1984 February 16

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, A. LOIZOU, DEMETRIADES, SAVVIDES, STYLIANIDES, JJ.]

POLICE,

v.

NICOS CHR. CHRISTOPHIDES AND ANOTHER,
Accused.

(*Questions of Law Reserved Nos.* 193 *and* 194).

Criminal Procedure—Trial in criminal cases—Statements made by persons whom the prosecution does not call as prosecution witnesses and statements made to the Police by persons called as prosecution witnesses—Whether to be made available to the defence.

The following questions of law were reserved for the opinion of the Supreme Court under section 148 of the Criminal Procedure Law, Cap. 155, by the District Court of Limassol in the exercise of its criminal jurisdiction.

Whether the prosecution should make available to the defence.

(a) Statements made by persons whom the prosecution does not call as prosecution witnesses;

(b) Statements made to the Police by persons called as prosecution witnesses.

Held, (1) that there is no duty on the prosecution to make available to the defence statements given to the Police by persons whom the prosecution does not call as witnesses but that as a matter of natural justice and with the object of a fair trial where the prosecution have taken a statement from any person whom they have decided not to call as a witness and whose statement contains material evidence in the case it is the duty of the prosecution to make known to the accused or his advocate, if so requested, the name and address of such person.

(2) That subject to the provisions of section 3(b) of Law 42/74 as amended by section 2 of Law 44/83, and also in so far as any statement given by an accused person is concerned (see *Georghiou* v. *Police* (1966) 2 C.L.R. 18) there is no duty on the prosecution to make available to the defence statements given to the police by persons who are called as witnesses, but that it is the duty of the prosecution particularly in summary trials, where a witness called or tendered by the prosecution gives evidence which is materially inconsistent with an earlier statement which the witness has made to the police to bring this matter to the notice of the Court and of the defence.

Order accordingly.

Cases referred to:

R. v. *Bryant and Dickson* [1946] 31 Cr. App. R. 146 at pp. 151-152;

R. v. *Hall* [1958] 43 Cr. App. R. 29;

R. v. *Xinaris* [1955] 43 Cr. App. R. 30;

Dallison v. *Caffery* [1964] 2 All E.R. 610;

Regina v. *Layland Justices, Ex parte Howthorn* [1979] R.T.R. 109;

Georghiou v. *Police* (1966) 2 C.L.R. 18;

Isaias v. *Republic* (1966) 2 C.L.R. 43.

Questions of Law Reserved.

Questions of Law Reserved on 17.6.83 and 9.6.83 by the District Court of Limassol (Fr. Nicolaides Ag. S.D.J. and Hadjihambis, D.J. respectively) for the opinion of the Supreme Court under section 148(1) of the Criminal Procedure Law, Cap. 155 during the hearing of Criminal Case Nos. 19845/82 and 18751/82 on the questions whether (a) the prosecution has a duty to supply the defence with copy of a statement given to the Police by a person who can give material evidence and whom the prosecution decided not to call as a witness and (b) the statements taken by the Police both of persons intended to be called as witnesses and of those not so intended should be made available to the defence.

R. Gavrielides, Senior Counsel of the Republic, of the Police.

E. Serghides, for accused in Q.L.R. 193

C. Tsirides, for accused in Q.L.R. 194

Cur. adv. vult.

TRIANTAFYLLIDES, P.: The decision of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES, J.: These two cases in which questions of law were reserved for the opinion of this Court under section 148 of the Criminal Procedure Law, Cap. 155, by the District Court of Limassol in the exercise of its criminal jurisdiction, were heard together as presenting common questions of law. They both turn round the question as to whether statements of witnesses taken by the Police should be made available to the defence.

In Case No. 193, the question of law was reserved by the trial Judge in the course of the hearing of Criminal Case No. 19845/82 of the District Court of Limassol and after the Prosecution closed its case. Counsel for accused applied at that stage for directions by the Court to the Prosecution to make available to him a statement given to the Police by a witness alleged, by the defence, to be a material eye-witness who was not called by the Police to give evidence. The Prosecution objected to such application and after hearing the parties, the Court ruled that the Prosecution should make available to counsel for the accused such statement, unless the Prosecution could show that there was a good reason for not doing so.

Upon such ruling the Prosecution applied to the Court for reserving such question of law for the opinion of the Supreme Court and the Judge submitted such question as follows:

"On the 17th June, 1983, after the Prosecution closed its case, learned counsel for the accused applied to the Court to give directions to the Prosecution to supply him with a copy of the statement ot the Police of a person whom the Prosecution had decided not to call as a witness, though he was in a position to give material evidence. The Prosecution objected and contended that the Court cannot force the Prosecution to deliver to the defence the statement of any person.

The Court by its interim ruling decided that the Prosecution should allow the defence to see the said statement, unless there is a good reason to the contrary.

At this stage the Prosecution applied that the question of law raised be reserved for the opinion of the Supreme Court.

Copies of the relevant arguments and the ruling of the Court, are attached.

As the reservation of a question of law on the application of the Attorney-General is according to section 148(1) of the Criminal Procedure Law, Cap. 155, mandatory, and as according to the provisions of section 148(2) of the same Law the Judge who is trying the case is bound to formulate the questions raised, I submit to the Chief Registrar, for the opinion of the Supreme Court, the following point of law:

Whether the Prosecution has a duty to supply the defence with a copy of a statement given to the Police by a person who can give material evidence and whom, the Prosecution decided not to call as a witness at the hearing of the case."

In Case No. 194 the question of law was reserved by the trial Judge in Criminal Case No. 18751/82 of the District Court of Limassol in which respondent was charged for driving a motor vehicle without due care and attention, contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law 86/72, and after the Judge had ruled that both the statements of persons whom the Prosecution intended to call as witnesses and of those not so intended, should be made available to the defence. As a result of such ruling, the Prosecution applied to the Court for reserving the question of law for the opinion of the Supreme Court, and the Judge submitted such question as follows:

"On the 9th of June 1983 the Court, upon an application made by the Defence, gave a ruling that the statements taken by the police both of persons intended to be called as witnesses and of those not so intended be made available by the Prosecution to the Defence. This application had been opposed by the Prosecution. On the 25th of June 1983 an application of the Attorney-General was submitted to the Court by Chief Inspector Papageorghiou appearing for the Prosecution for the question of law raised in the said application to be reserved for the opinion of the Supreme Court under section 148 of the Criminal Procedure Law, Cap. 155. The Court adjourned the application to 8.7.1983 upon an application by learned counsel for the accused

on the ground that he had not been prepared for this development. On the 8th of July 1983 Chief Inspector Papageorghiou for the Prosecution addressed the Court on the application and learned counsel for the accused also addressed the Court stating that he had no objection to the application, whereupon the Court, considering the application and the arguments in respect thereof, ruled that the question of law raised by its ruling be reserved for the opinion of the Supreme Court.

Whereas section 148(2) provides that the trial Judge '..... shall make a record of the question reserved with the circumstances upon which the same has arisen..... '.

I do hereby submit for the opinion of the Supreme Court the following question of law:

Whether the statements taken by the police both of persons intended to be called as witnesses and of those not so intended should be made available by the Prosecution to the Defence".

The questions of law involved in both cases and which we have to consider are whether the prosecution should make available to the defence:

(a) statements made by persons whom the prosecution does not call as prosecution witnesses.

(b) statements made to the Police by persons called as prosecution witnesses.

In Archbold Criminal Pleadings and Practice 41st Edition under the heading, "Information the Prosecution should make available to the Defence" this question is considered from both its aspects that is in respect of statements of persons who are not called as witnesses and in respect of statements of persons called as prosecution witnesses. In relation to the first aspect, we read the following at p. 294 under paragraph 4-178:

"Where the prosecution have taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence and should supply the defence with the witness' name and

address. The prosecution are not under the further duty of supplying the defence with a copy of the statement which they have taken: *R.* v. *Bryant and Dickson* [1946] 31 Cr. App. R. 146)".

In *R.* v. *Bryant and Dickson* (supra) to which reference is made in Archbold in support of the above proposition, Goddard, L.C.J. in considering what is the duty of the prosecution in such cases, had this to say at pp. 151–152.

"Another point taken is that Compbell was not called at the trial. It is said that it was the duty of the prosecution to have supplied the defence with a statement which Campbell had admittedly made to the prosecution. The prosecution, for reasons which one can well understand, did not call Campbell. Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the Court there is no such duty, nor has there ever been. In the first place, if they had supplied a copy of the statement of Campbell, that would not have enabled the defence to put the statement in. The statement which Campbell made could have become evidence only if he had been called as a witness. But it is said that it was the duty of the prosecution to put that statement at the disposal of the defence. In the opinion of the Court, the duty of the prosecution in such a case is to make available to the defence a witness whom the prosecution know can, if he is called, give material evidence. That they did in this case, because when a letter was sent by the defence to the Director of Public Prosecutions, the reply of the Director of Public Prosecutions showed quite clearly that the prosecution did not intend to call him, but he added: There is no objection to your taking a statement from Campbell if you wish to do so. That was said well before the trial. It was said after the close of the police Court proceedings, when the defence knew that Campbell was not being called by the prosecution, and therefore could quite well themselves have gone to Campbell and taken a statement from him. Campbell was at the Court. Who brought him to the Court I do not know, nor is it material to inquire, but the defence could have called him if they

had liked. No doubt Mr. Scott Henderson would not have been so unwise as to call him without having a statement from him, but if the defence did not choose to take a statement and find out what he was prepared to say, that is not a matter with which the prosecution are concerned. In the opinion of the Court it is quite wrong to say that it was the duty of the prosecution in these circumstances, having made Campbell available to the defence as a witness if they wished to call him, to go further and produce the statement which he had made".

In relation to the second aspect the duty of the prosecution is described in Archbold (supra) under paragraph 4–179 at the same page, as follows:

"Where a witness whom the prosecution call or tender gives evidence in the box on a material issue, and the prosecution have in their possession an earlier statement from that witness which is materially inconsistent with such evidence, the prosecution should, at any rate, inform the defence of that fact if the defence have not already been provided with a copy of the statement (as will usually be the case these days): *R.* v. *Howes*, March 27, 1950, C.C.A. (unreported)".

Reference is also made to the case of *R.* v. *Hall* [1958] 43 Cr. App. R. 29 and *R.* v. *Xinaris* [1955] 43 Cr. App. R. 30 in the particular circumstances of which the defence was allowed to see statements made to the police by witnesses for the prosecution. In the case of *Xinaris* the statement sought for inspection was that of a witness, in the course of his cross–examination, on the allegation that his evidence before the Court was inconsistent with the previous statement given by the witness to the prosecution, and after a short argument between counsel appearing for the prosecution and the defence, prosecuting counsel handed over to the defence copies of the statement made to the police by all witnesses for the prosecution without any ruling by the Court to that effect.

In *Rex* v. *Hall*, counsel applied to inspect the statements given by certain prosecution witnesses to the Police, which was refused. On a renewed application after reference was made to *Xinaris* case, Judge Maude ruled that the prosecution should

allow counsel for the defence to inspect the statements of certain prosecution witnesses to the Police, but added that "he was laying down no general rule in this respect".

Counsel for the accused in the present cases sought to rely on what was said by Lord Denning, M.R. in *Dallison* v. *Caffery* [1964] 2 All E.R. p. 610 at p. 618, to the effect that—

> "The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the Court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should teld the defence about him so that they can call him if they wish".

What was said by Lord Denning, M.R. in that case, is a mere obiter and as Diplock, L.J. said in the same case at p. 622—

> "Next, counsel for the plaintiff contends that there was evidence fit to be left to the jury that the defendant did not honestly believe that the credible evidence known to him raised a case against the plaintiff fit to go to a jury. This contention seems to me to be based on the erroneous proposition that it is the duty of a prosecutor to place before the Court all the evidence known to him, whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or although not inconsistent with his guilt is helpful to the accused, the prosecutor should make such witness available to the defence (see *R.* v. *Bryant and Dixon*). It is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources: that is the function of the jury at the trial. The prosecutor's knowledge that there is such a conflict does not of itself constitute lack of reasonable and probable cause for the prosecution, nor is it inconsistent with the prosecutor's

honest belief that there is a case against the accused fit to go to a jury".

In a recent case, *Regina* v. *Layland Justices, ex parte Hawthorn* [1979] R.T.R. 109 on an application for certiorari to quash the conviction on the ground that the accused was deprived of the benefit of the Rules of Natural Justice by not being notified by the prosecution of witnesses known to the prosecution but whom the prosecution did not intend to call, it was held by the Q.B.D. granting the application that:

"the failure of the police to notify the defence of the existence of the witnesses prevented the tribunal from giving the applicant a fair trial and there was a clear denial of natural justice; and that, albeit the error was that of the police and not the tribunal, an application for an order of certiorari was justified, and the conviction would be quashed".

In that case the applicant was driving his car on a road when he was in collision with another car being driven in the opposite direction. Two witnesses gave statements to the police. The applicant did not know of the existence of those witnesses, and the police did not notify him about them. The applicant was charged with driving without due care and attention, the witnesses were not called to give evidence and the applicant was convicted. Subsequently he was informed about the witnesses by his insurers, who had received the police report on the accident.

In Cyprus under the provisions of the Criminal Procedure (Temporary Provisions) Law, 1974 (Law 42/74) as amended by Law 44/83, in cases of prosecution on information before an Assize Court, the Court has power instead of holding a preliminary inquiry into the case to summarily commit an accussed person for trial subject to the satisfaction of the conditions set out therein. One of such conditions under paragraph (b) of section 3 of Law 42/74 as amended by section 2 of Law 44/83, is that:

"Copy of the statement of each prosecution witness whom the prosecution intends to call is delivered in advance to the accused or his advocate".

It should be noted that the above provision does not apply

(a) in cases of summary trial

(b) in cases of statements taken by the police from persons other than those whom the prosecution intends to call as witnesses.

In *Georghiou* v. *The Police* (1966) 2 C.L.R. 18 in which the prosecution refused to make available to the defence during the trial a statement made by the accused to the Police, the Supreme Court held that it was incumbent upon the prosecution to make such statement available to the defence. Vassiliades, J. (as he then was) said at p. 20:

> "This Court has repeatedly made the position of Police prosecutors in such circumstances quite clear. It is the duty of the prosecutor, particularly in summary trials, to place all the facts before the Court; including the facts which may help the accused. And this applies a fortiori to accused's own statement.
>
> We take the view that unless there are special reasons to the contrary, to the satisfaction of the Court, the prosecution must make available to counsel for the defence any statement in their hands taken from the accused. The prosecution may withhold such a statement if, for instance, they intend to use it at a later stage of the trial; and they have reasons to keep it until such later stage. But in this particular case, apparently the prosecution never intended making any use of accused's statement as part of their case, or otherwise. In such circumstances it was, we think, incumbent upon the prosecuting officer to make the statement available to counsel".

The position therefore as to the duty of the prosecution to make available to the defence previous statements of an accused person, unless there are special reasons to the contrary, has been, authoritatively, settled by this Court.

It is also settled that the prosecution is bound to disclose to the Court material defects in the evidence of prosecution witnesses, which are within the knowledge of the prosecution. In *Isaias* v. *The Republic* (1966) 2 C.L.R. p. 43, counsel appearing

for the Police, conscious of his duty to the Court, felt bound to say that material defects in the evidence of some prosecution witnesses were not disclosed, or were even, apparently, concealed from the trial Court and offered to put before the Court of Appeal the statements made by such witnesses which obviated the defects. The conviction of the accused was quashed and Vassiliades, Ag. P. (as he then was) had this to say at p. 47:

> "Considering the matter before us at this stage of the present appeal, in the light of the able argument of counsel for the appellant, we reached the conclusion that the conviction cannot stand. The main reasons which led us to this conclusion were material irregularities going to the root of the trial, which, to our mind, amounted to a substantial miscarriage of justice within the provisions of Section 145(1)(b) of the Criminal Procedure Law, Cap. 155".

Bearing in mind the above, we conclude that:

(a) There is no duty on the prosecution to supply the defence with copies of statements which they have taken from person whom they do not intend to call as prosecution witnesses in the case. As a matter of natural justice and with the object of a fair trial where the prosecution have taken a statement from any person whom they have decided not to call as a witness and whose statement contains material evidence in the case it is the duty of the prosecution to make known to the accused or his advocate, if so requested, the name and address of such person.

(b) It is the duty of the prosecution particularly in summary trials, where a witness called or tendered by the prosecution gives evidence which is materially inconsistent with an earlier statement which the witness has made to the police to bring this matter to the notice of the Court and of the defence.

In both cases we wish to reiterate what was said in the *Gcorghiou* case (supra) that it is the duty of the prosecution to place before the Court all the facts including the facts which may help the accused.

In the light of our conclusions and subject to what we have stated, we are of the following opinion:

(a) There is no duty on the prosecution to make available to the defence statements given to the police by persons whom the prosecution does not call as witnesses.

(b) Subject to the provisions of section 3(b) of Law 42/74 as amended by section 2 of Law 44/83, and also in so far as any statement given by an accused person is concerned (*Georghiou* case (supra)), there is no duty on the prosecution to make available to the defence statements given to the police by persons who are called as witnesses.

The cases are remitted back to the trial Courts for further proceedings in the light of the above opinion.

Order accordingly.