1986 November 6

[TRIANTAFYLLIDES, P., LORIS, KOURRIS, JJ.]

GEORGHIOS DEMETRIS CHRISTOFOROU
ALIAS KKELES,

Appellant,

v.

THE POLICE.

Respondents.

(Criminal Appeal No. 4779).

Criminal Procedure —Appeal—Fresh evidence —Principles applicable—The Criminal Procedure Law, Cap. 155—Section 146(b)—The Courts of Justice Law 14/60—Section 25(3)—Witnesses for the defence, who had not been summoned, left the Court, which refused adjournment on that ground—As their evidence was well within appellant's knowledge at the time of his trial and their attendance could be secured by summoning them, the application to adduce their evidence before this Court has to be dismissed.

The trial of the criminal charge against the appellant for possessing a small quantity of narcotics began on the morning of 17.4.86 and continued in the afternoon of that day, when the appellant, having been called upon to defend himself, elected to give evidence on oath. Upon conclusion of his evidence, counsel appearing for him at the trial—not the one appearing for him before this Court—applied for an adjournment on the ground that two witnessees for the defence had left. To a question by the Court whether such witnesses had been summoned, counsel replied in the negative. The trial Court refused the adjournment, as it had made it clear that the hearing would have continued in the afternoon and as, had the witnesses been summoned, it would have been ready to issue a warrant for their arrest.

Eventually the appellant was convicted. He filed, as a result, this appeal. He, also, filed the present application for leave to adduce fresh evidence, namely the evidence of the said witnesses. The application was based on sections 146(b) and 153 of Cap. 155.

Held, dismissing the application: (1) In the circumstances this Court decided to treat the application as an application not only under s. 146(b)* of Cap. 155, but also as an application under s. 25(3)** of Law 14/60, which confers increased powers in this Court.

(2) The principles upon which this Court will act in allowing applications of this nature have been laid down as early as 1961 and have been reiterated in a great number of cases thereafter. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Section 25(3) was never intended to relieve a plaintiff at trial from the duty of placing all available evidence before the trial Court *(Pourikkos (No. 2)* v. *Fevzi*, 1962 C.L.R. 283).

(3) In this case the failure to summon the witnesses has caused the appellant difficulties, but the fact remains that the evidence of the two persons in question was within appellant's knowledge at the time and steps could and ought to have been taken for safeguarding their presence at the trial.

Application dismissed.

Cases referred to:

Pourikkos (No. 1) v. *Fevzi* 1962 C.L.R. 30;

Charalambous v. *Demetriou*, 1961 C.L.R. 14;

Pourikkos (No. 2) v. *Fevzi*, 1962 C.L.R. 283;

Simadhiakos v. *The Police*, 1961 C.L.R. 64;

Kolias v. *The Police* (1963) 1 C.L.R. 52;

Hjisavva and Others v. *Panayiotou* (1966) 1 C.L.R. 6;

* Quoted at p. 182 post.
** Quoted at p. 182 post.

Ashiotis v. *Weiner* (1966) 1 C.L.R. 274;

Felekkis v *Police* (1968) 2 C.L.R. 15;

Athanassiou v. *A-G* (1969) 1 C.L.R. 160;

Papadopoulos v *Kouppis* (1969) 1 C.L.R. 584;

Paraskevas v. *Mouzoura* (1973) 1 C.L.R. 88;

Moumdjis v. *Michaelidou and Others* (1974) 1 C.L.R 226;

Evdokimou v. *Roushias* (1975) 1 C.L.R 304;

Kyriacou v. *C. D. Hay and Sons* (1978) 1 C.L.R 100;

Pavlidou and Another v *Yerolemou and Others* (1982) 1 C.L.R 912.

Application.

Application by appellant for leave to adduce further evidence.

P. Angelides, for the appellant.

A. M. Angelides, Senior Counsel of the Republic, for the respondents.

TRIANTAFYLLIDES P.: The ruling of this Court on the application of the appellant to adduce further evidence will be delivered by Loris J.

LORIS, J.: On the 2nd October 1986 when the present appeal came up for hearing before us learned counsel appearing for the appellant applied for an adjournment in order to be enabled to file an application for leave to adduce during the hearing of this appeal, evidence which was allegedly erroneously excluded at the trial in the first instance.

Learned counsel appearing for the respondent did not object to the adjournment being granted.

This Court being prepared to give the appellant the op-

portunity to take the proper procedure to apply to this Court for leave to adduce the evidence in question adjourned the appeal for hearing to-day giving at the same time directions in connection with the filing of the intended application and the opposition, if any, thereto *(Pourikkos (No. 1)* v. *Fevzi, 1962 C.L.R. 50).* The hearing of the application was also fixed for to-day.

The appellant filed his application on 11.10.86 accompanied by two affidavits of even date, sworn by Panos Georghiou and Christos Stephanides, the two witnesses for whom leave was sought to be heard before us. This application together with the affidavits aforesaid were served on the respondents who filed their opposition on 16.10.86.

It is significant to note at this stage that the appellant confined his application for leave to adduce fresh evidence only; this is apparent from the prayer in his application and the oral address of learned counsel appearing for him before us.

The salient facts connected with the present application as they transpire partly from the record of the main appeal, to which we were referred by learned counsel for the appellant, and partly from the affidavits in support of the present application, as well as from statement at the bar made by counsel for appellant, may be thus summarised:

The appellant was on trial on 17.4.86 on a charge of possession of a small quantity of narcotic drugs before the District Court of Famagusta sitting at Paralimni; he was represented at the said trial by another advocate—not the one now appearing before us. As it transpires from the record of the appeal the hearing before the Court of first instance continued in the afternoon of that day as well; the appellant was called upon to defend himself and elected to give evidence on oath; upon the conclusion of his evidence counsel appearing for him at the trial informed the trial Court that he would be calling two witnesses for the defence but, as he stated, these witnesses had left and applied for an adjournment. To a question of the Court whether the said two witnesses were summoned counsel replied in the negative. The trial Court refused the ad-

journment giving his reasons which appear at p. 39 of the record. He pointed out, inter alia, that he had made it abundantly clear before break at noon, that the hearing would have been continued in the afternoon and indicated that the Court would have been ready to issue a warrant for the arrest of the said two witnesses had they been properly summoned.

After his application for adjournment was turned down, counsel appearing at the trial, stated that he had no other witnesses and closed the case for the defence. He also made a final address.

Both witnesses, whose evidence is sought to be adduced before us, in the last paragraph of their respective affidavits depose that on the day of the trial they were present in Court but around 1.00 p.m. they left because as they put it "the time for the closing down of the Court had arrived and no one has called us to give evidence."

As stated earlier on in the present ruling the written application under consideration was confined only to an application for leave to hear fresh evidence i.e. the evidence of the two witnesses named therein. It is stated in the application that same is relying on sections 146 and 153 of the Criminal Procedure Law, Cap. 155. Counsel appearing for the appellant clarified that the application was relying in substance on s. 146(b) of Cap. 155 and when the provisions of section 25(3) of Law 14/60 were pointed out to him by Court. he replied that he would be relying on the provisions of s. 146(b) of Cap. 155 and s. 25(3) of Law 14/60, as well.

Then counsel for appellant addressed us on the substance of the present application. He referred us to the affidavits of both witnesses for whom audience was sought by this Court and invited us to to allow the application.

We have decided to treat the present application as an application not only under s. 146(b) of Cap. 155 but as an application under s. 25(3) of the Courts of Justice Law (Law 14/60) which confers increased powers to this Court *(Philippos Charalambous* v. *Sotiris Demetriou,* 1961 C.L.R. 14 at p. 18).

Section 146(b) of Cap. 155 reads as follows:

"146. During the hearing of an appeal and at any stage thereof, before final judgment, the Supreme Court, subject to the provisions of section 153 of this Law may:-

(a)

(b) hear further evidence and reserve judgment until such further evidence has been heard; and

(c) "

Section 25(3) of the Courts of Justice Law (Law 14/60) provides:

"Notwithstanding anything contained in the Criminal Procedure Law or any other Law or in any Rules of Court and in addition to any powers conferred thereby the High Court on hearing and determining any appeal either in a civil or criminal case shall not be bound by any determinations on questions of fact made by the trial Court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, rehear any witnesses already heard by the trial Court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of retrial by the trial Court, or any other Court having jurisdiction, as the High Court may direct".

The principles upon which a Court of appeal will act in allowing applications of this nature have been laid down as early as 1961 and have been reiterated in a great number of cases thereafter.

In the case of *Pourikkos (No. 2) v. Fevzi, 1962 C.L.R. 283*, the then President of the then High Court summed up the position as follows at p. 288:

"It must be shown that the evidence could not

have been obtained with reasonable diligence for use at the trial..."

And further down in respect of s. 25(3) of the Courts of Justice Law 1960 (Law 14/60) he stated the following:

"This statutory provision was never intended to relieve a plaintiff at trial from the duty of placing before the Court all available relevant evidence."

(Vide also *Simadhiakos* v. *Police*, 1961 C.L.R. 64; *Kolias* v. *Police* (1963) 1 C.L.R. 52 at p. 56; *Hjisavva and Others* v. *Panayiotou* (1966) 1 C.L.R. 6 at p. 7; *Ashiotis* v. *Weiner* (1966) 1 C.L.R. 274; *Felekkis* v. *Police* (1968) 2 C.L.R. 15; *Athanassiou* v. *A/G* (1969) 1 C.L.R. 160; *Papadopoulos* v. *Kouppis* (1969) 1 C.L.R. 584; *Paraskevas* v. *Mouzoura* (1973) 1 C.L.R. 88; *Moumdjis* v. *Michaelidou and Others* (1974) 1 C.L.R. 226; *Evdokimou* v. *Roushias* (1975) 1 C.L.R. 304; *Kyriacou* v. *C. D. Hay & Sons* (1978) 1 C.L.R. 100; *Pavlidou and Another* v. *Yerolemou and Others* (1982) 1 C.L.R. 912).

Reverting now to the facts of the present application: The appellant was standing a trial on a serious charge. He was represented by counsel—not the one appearing before us in the present appeal—"It was the responsibility of his advocate to ascertain the facts that were relevant to the case and to see that they are put before the trial Judge". *(Kolias v. The Police (1963) 1 C.L.R. 52 at p. 56).* It seems that certain facts which might be helpful to the case of the accused were known to the affiants; and this was in the knowledge of counsel. In the circumstances he should take all necessary steps to summon the witnesses in question and make them available at the trial, so that they might have been called in case the accused was called upon to defend himself and their evidence was required. Failure to summon the witnesses has caused the appellant's difficulty.

The fact remains that such evidence was well within the knowledge of the appellant at the time of the trial and steps could and ought to have been taken for safeguarding the presence of such witnesses at the trial.

"As has been said in other cases, this is an appellate Court and all the proper evidence must be put before the trial Judge. That is the intention of our system" (per Wilson P. in *Kolias* v. *The Police* (supra) at p. 55).

In the circumstances we did not call upon learned counsel for the respondent to address us on this application which is doomed to failure and is hereby dismissed.

Application dismissed.