1987 November 18

[A LOIZOU, LORIS, STYLIANIDES, JJ]

THEODOULOS CHARALAMBIDES,

Appellant,

v

THE POLICE,

Respondents

(Criminal Appeal No 4716)

Constitutional Law — Constitution, Articles 30 2, 12 5(b) and (c) and 30 3(b) and (d) — Court continuing the hearing of a criminal case in the presence of accused, but in the absence of his counsel, who failed to appear in time — When counsel appeared later on he had the evidence taken in his absence read out to him, whereupon he continued the conduct of the case to the end — Counsel did not ask for the recalling of the witness, who gave evidence in his absence — No violation of any of the said constitutional provisions

The appellant was convicted of driving without due care and attention In arguing the present appeal against conviction counsel for the appellant contended, inter alia, that the trial Court did not give to the appellant the benefits of a fair trial contrary to Article 30(2) of the Constitution and that it failed to give to the appellant his minimum constitutional rights safeguarded by Article 12(5)(b) and (c) and Article 30(3)(b) and (d), of the Constitution, namely to have adequate time for the preparation of his defence and to defend himself in person or through a lawyer of his own choice

The facts are briefly as follows On 26 4 85 the appellant appeared before the trial Court and entered a plea of not guilty The case was adjourned for hearing on 10 7 85 The case was further adjourned to 8 10 85 On that day the hearing began and appellant s counsel cross examined the first prosecution witness The hearing was then adjourned for continuation on 14 10 85

On that day the appellant was present, but not his counsel The trial Judge decided to continue with the hearing After the testimony of the second witness for the prosecution, the prosecution closed its case and the trial Judge, having found that there had been made out a prima facie case, called upon the accused to make his defence

At that moment appellant's counsel appeared before the trial Judge and protested for what had happened, stating at the same time, that he had been engaged before another Court He applied for an adjournment in order to have time to file a certioran The trial Judge turned down the application Counsel for the appellant to whom the evidence given in his absence was read, conducted the case to its end.

Held, *dismissing the appeal*: (1) The appellant had the services of an advocate of his choice, practically throughout the hearing of his case The fact that his advocate because of other engagements was not available to defend him for part of the case, is not the fault of the Court but the fault of the advocate who failed to make proper arrangements and arrange his diary accordingly Moreover the defence was given ample time for its preparation

(2) Both the said grounds of appeal should fail because counsel for the appellant had the brief evidence of the second prosecution witness, who had testified in his absence, but in appellant's presence, read out to him and he could, if he wanted, apply to have the witness recalled for further cross examination, which he did not elect to do

Appeal dismissed

Cases referred to

Adamis and Another v Eracleous (1982) 1 C L R 746.

Vakanas v Thomas and Another (1982) 1 C L R 530

Appeal against conviction.

Appeal against conviction by Theodoulos Charalambides who was convicted on the 14th October, 1985 at the District Court of Nicosia (Criminal Case No. 6788/85) on one count of the offence of driving without due care and attention contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972 (Law No 86 of 1972) and was sentenced by Soupashis, D.J. to pay £13.= fine and £7 = costs.

C. Hadjioannou, for the appellant.

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

Cur. adv. vult.

A. LOIZOU J. read the following judgment of the Court. The appellant was found guilty and convicted of a charge of driving on

the 6th day of December 1984, at Nicosia, motor-car under Reg. No. JX 814 on Grivas Dhigenis Avenue without due care and attention, contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law 1972, (Law No. 86 of 1972), and he was sentenced to thirteen pounds fine and seven pounds costs.

The facts of the case as found by the learned trial Judge are briefly these. On the day in question the appellant was driving his said vehicle on Stassinos street which is a side-road to Grivas Dhigenis Avenue controlled by a halt sign. He was following at the time another car that stopped at the halt sign. When that car moved on as the road at the time was clear for it, the appellant also followed it and collided with motor-vehicle under Reg. No. JW 855, driven by ex-accused 2, along Grivas Dhigenis Avenue from the direction of the Airport towards the town.

Both drivers were prosecuted. The present appellant as accused No. 1, was charged with one count of driving without due care and attention to which he pleaded not guilty and ex-accused 2 with three counts. The one for driving without due care and attention the other for driving without having in force a policy against third party risks and the last one for driving without the consent of the owner. Ultimately he pleaded guilty to all three of them.

When the appellant tried to cross the whole length of the Avenue, go to the left hand side and proceed on his way towards Nicosia town, ex-accused 2 who was proceeding on the Avenue, applied his brakes leaving with the left wheels of his car 134 ft. and with the right wheels 124 ft. brakemarks, but the collision was not avoided. The point of impact was 12 ft. and 6 inches from the left hand side of the Avenue to the direction the cars were proceeding. Dhigenis Avenue is 40 ft. wide divided into four lanes, two to each direction.

The learned trial Judge in the light of his findings based on the credibility of the witnesses as accepted by him and the real evidence adduced, concluded that the appellant was driving without due care and attention, as charged, as he omitted to give way to the traffic on the Avenue to pass and then come out of the halt sign and cross the Avenue as he had a duty to do and this he did when the danger of collision with the other car which was proceeding thereon was evident. More so in view of the fact that he had to cross the whole width of the Avenue, before reaching his side of the road. In other words he entered into the main road

when it was not safe for him to do so And that he had a duty to act diligently as a driver who enters into a main road would act on the supposition that the driver on the main road would act diligently (See *Adamis and Another v Eracleous* (1982) 1 C L R 746, and *Vacanas v Thomas and Another* (1982) 1 C L R 530)

The appellant by his present appeal challenged the aforesaid conclusions of the learned trial Judge and contended that the verdict was based on insufficient facts

We have considered the totality of the evidence and looked at the brake-marks and measurements marked on a plan not to scale prepared by the Police Traffic Investigator, who visited the scene after the accident and took up the examination of the case and we have come to the conclusion that there is no room whatsoever to interfere with the findings of fact and the conclusions drawn therefrom and in any way with the verdict of the learned trial Judge who directed himself correctly on the Law

This, however, is not the end of the case as counsel for the appellant has argued two more grounds of Law, namely that the trial Court did not give to the appellant the benefits of a fair trial contrary to Article 30(2) of the Constitution and that it failed to give to the appellant his minimum constitutional rights safeguarded by Article 12(5)(b) and (c) and Article 30(3)(b) and (d), of the Constitution, namely to have adequate time for the preparation of his defence and to defend himself in person or through a lawyer of his own choice.

The facts relevant to these issues are these The case came up for plea on the 26th April 1985 The appellant was represented by his present counsel and ex-accused 2 by Mr Mamantopoulos The appellant, entered a plea of not guilty to count 1 and ex-accused 2 a plea of not guilty to Counts 2 and 3, and guilty to Count 4 The case was adjourned for hearing on the 10th July 1985, and both accused were released on bail On that day the appellant was again represented by his counsel, and ex-accused 2, through his own counsel applied to the Court for leave to change his plea to one of guilty on Counts 2 and 3 as well Mr Mamantopoullos then prayed for an adjournment of the case to another date for facts and sentence because on accout of an urgent commitment he had, as he said, to leave Nicosia The case was adjourned to the 8th October 1985, for hearing when both accused were present and the appellant was again represented by his counsel who cross-examined the first prosecution witness, the Police Traffic Investigator The further hearing of the case was then adjourned to

the 14th October, when according to the record of the Court the appellant was present but not his counsel. The record reads as follows:

«Counsel Mr. Hadjioannou was called repeatedly since 10.10 hours whilst now the time is 11.00 o' clock and so I shall proceed to hear the case in the absence of Mr. Hadjioannou.»

The second witness then was called who was the passenger in the car of ex-accused 2. He was cross-examined by the appellant and the prosecution closed its case. The learned trial Judge found that there was prima facie case and called upon the appellant to make his defence, after his rights were explained to him. It was 11.05 a.m. when at that stage Mr. Hadjioannou appeared. Mr. Hadjioannou stated that until that moment he was engaged before His Honour Judge Artemides as he had mentioned to the trial Judge on the previous hearing that he would be so engaged and the record of the Court goes on as follows:

«*Hadjioannou:* I appeared and I was before you in order to ask for an adjournment of the case. I do not know how the hearing continued in my absence and I am not in a position to defend my client suitably.

Court: Mr. Hadjioannou was called repeatedly since 10.00 to appear before the Court; until 10.35 he did not appear and as a result I had no other choice but to continue the hearing as the Court has a very heavy list and for that reason it had to complete the case. I must observe that the conduct of the advocates not to appear before the Courts when they have hearings is a conduct which is strange to me.

Hadjioannou: With all due respect I am here since 10:45, Mr. Artemides called me and I informed my client that I shall go and adjourn the other case and also informed my colleagues. I have said what I had to say, I cannot defend my client since there has been heard part of the evidence. I request that an adjournment be given so that I shall proceed with certiorari.

Court: The application for adjournment is dismissed. I see no reason why I should adjourn the case.

Hadjioannou: I cannot defend my client. He has rights for this matter.

Court: As regards the certiorari the prosecution also has the right of appeal after the end of the case.

Hadjioannou: In view of your interim decision I shall cross-examine the witness with reservation and also I would like the evidence given so far be read out to me. (Evidence read.) (The appellant elects to give evidence on oath).»

It is unnecessary to say anything more than that the appellant had the services of an advocate of his choice practically throughout the hearing of his case. The fact that his advocate because of other engagements was not available to defend him for part of the case, is not the fault of the Court but the fault of the advocate who failed to make proper arrangements and arrange his diary accordingly. Moreover the defence was given ample time for its preparation.

We are sure it was not the intention of learned counsel to dictate to the Court the hours of sitting and the order in which cases were to be taken and that is not what is safeguarded by the relevant Articles of the Constitution. An advocate according to Rule 5(3) of the Advocates Etiquette Regulations 1966, has to be punctual when appearing in a case the rest being a matter of co-operation between Bench and Bar, and we leave matters at that, as we need not lay down any hard and fast rule on this matter.

In any event both grounds of appeal should fail because Mr. Hadjioannou had the brief testimony of the witness who gave evidence in his absence, but in the presence of his client who cross-examined him, read out to him and he could, if he wanted apply to have the witness recalled for further cross-examination, which he did not elect to do.

We need not therefore elaborate further on the rights safeguarded by the said paragraphs of the Constitution which correspond to Article 6(3)(b) and (c) of the European Convention on Human Rights - Ratified by the Republic under Law No. 39 of 1962 - which has been the subject of judicial interpretation by the European Commission and the European Court of Human Rights, organs entrusted with the supervision of its application. (See Digest of Strasbourg Case-Law relating to the European Convention on Human Rights.)

For all the above reasons the appeal is dismissed.

Appeal dismissed.