

Litigation - Cyprus

Appeals on the rise following changes to evidential rules on hearsay

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Introduction

The evidential rules in Cyprus regarding hearsay and corroborative evidence have undergone a series of changes over the past decade. This has led to appeals against a number of criminal convictions, particularly in sexual assault cases.

In 2004 the Evidence Law (Cap 9) was amended along similar lines to the UK Criminal Justice Act 2003, allowing hearsay evidence to be taken into account under certain conditions and circumstances, such as the unavailability of a witness. A further amendment to the Evidence Law was made in 2009 allowing defendants to be convicted on the sole testimony of minor complainants, without the need for corroborative evidence.

Case studies

Kleitou v The Republic of Cyprus,⁽¹⁾ which was decided in March 2011, was noteworthy for two reasons. First, the sole testimony was that of a 15 year old, who was considered to be a vulnerable witness who needed help in order to testify and was therefore allowed to testify through closed circuit television in the presence of a specialist psychologist, based on Law 95(I)/2001. Second, the judge in the case followed the new Article 9 of the Evidence Law, which did not require corroborative evidence to support the minor's sworn (or unsworn in certain instances) testimony and did not require the court to warn itself of the dangers of convicting based on such sole testimony.⁽²⁾

The new Article 9 became effective before the completion of the hearing, but after the case had been filed on March 6 2009. The appellant argued that the new provision should not have been applied retroactively to his case. Following English case law in *Director of Public Prosecutions v Lamb*,⁽³⁾ *Buckman v Button*⁽⁴⁾ and *R v Oliver*,⁽⁵⁾ the Supreme Court determined that the new provision should be applied to cases where the hearings, and therefore the possible convictions, had not been concluded; the new provision therefore applied to the present case.

The appellant also argued that this provision should not be followed in offences of a sexual nature and that the court should seek corroborative evidence or give itself the necessary self-warning. The Supreme Court also rejected this argument, stating that Article 9 applied to sexual offences as to others. The conviction was upheld.

In the case of *Kleovoulou v The Police*,⁽⁶⁾ the defendant and three other persons were charged with:

- sexual exploitation of adults (Articles 2 and 9(a) of the Prevention of Exploitation of Persons and the Protection of Victims Law 2007 (as amended) and Article 20 of the Penal Code (Cap 154, as amended));
- exploitation at work via threats (Articles 2 and 8(a) of the law and Article 20 of the code);
- living off the profits of prostitution; (Articles 164(1)(a), 35 and 20 of the code); and
- running a brothel (Articles 156(1)(α) and 35 of the code).

The appellant was convicted of the third charge and sentenced to three years in prison. He was acquitted of the other charges. He appealed his conviction, for a plethora of reasons, such as the validity of the prosecution's evidence and testimony. However, as in the aforementioned case, the main reason of appeal was the court's decision to not seek corroborative evidence.

The Supreme Court upheld the finding of the court of first instance that corroborative evidence is not required by law, or indeed a necessity, if the court finds the complainant's testimony reliable.

ECHR perspective

The changes in Cyprus seem to be in line with a general trend to reduce the evidence required to secure a conviction, illustrated by the recent acceptance by the European Court of Human Rights (ECHR) of the

approach adopted by the UK Supreme Court when hearsay evidence is the sole or main evidence, where no other evidence is available.

In its decision delivered on December 15 2011 the ECHR upheld the conviction of Imad al-Khawaja and said that his right to a fair trial had not been breached, overturning its initial 2009 ruling in *Al-Khawaja v The United Kingdom*⁽⁷⁾ that if hearsay evidence was the "sole and decisive evidence" then there was a breach of Article 6.

Comment

The changes to ECHR and Cyprus jurisprudence have made it easier to convict defendants, even where the evidence is the sole testimony of a complainant or a minor, or hearsay evidence. However, that is only half the story. The court always has an important role to play in counterbalancing the evidence with other factors.

For instance, when the Cyprus courts are called on to admit hearsay evidence, under Article 27 of the Evidence Law they must take various factors into consideration when deciding what weight to give to the evidence, including:

- the possibility of calling the person who made the statement as a witness;
- the degree of hearsay evidence; and
- the time that has elapsed from the event the statement is referring to and the statement itself.

In criminal cases the court has a discretionary power under Article 24 of the Evidence Law to disregard hearsay evidence if it considers that accepting it would not be in the interests of justice. This is a broad provision and gives the courts a wide discretionary power.

These counterbalances are essential to ensure that justice is not only done, but is seen to be done. This was evident at the ECHR in the above-mentioned case, where the conviction of the second appellant (Ali Tahery) was overturned - there were not enough counterbalancing factors to uphold his conviction and the United Kingdom was ordered to pay him €18,000 in costs and damages.

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Endnotes

⁽¹⁾ Criminal Appeal 173/2009.

⁽²⁾ The court warning itself is a measure that was adopted for jury trial, whereby the judge would warn the jurors of the possible dangers of conviction. Since Cyprus does not have jurors, the judge somewhat paradoxically warns himself or herself.

⁽³⁾ (1941) 2 All ER 499.

⁽⁴⁾ (1943) 2 All ER 82.

⁽⁵⁾ (1943) 2 All ER 800.

⁽⁶⁾ Criminal Appeal 27/2010.

⁽⁷⁾ Applications 26766/05 and 22228/06.

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