1971
July 13
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THE REPUBLIC
. . v.
THE ASSIZE
COURT AT
KYRENIA,
EX-PARTE
THE ATTORNEY-
GENERAL OF
THE REPUBLIC

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, JJ.]

THE REPUBLIC,

v.

THE ASSIZE COURT AT KYRENIA, EX PARTE THE ATTORNEY-GENERAL OF THE REPUBLIC.

(*Applications No.* 7/71 *and* 8/71).

Criminal Procedure—Questions of law reserved for the opinion of the Supreme Court by trial Courts—Section 148(1) *of the Criminal Procedure Law, Cap.* 155—*Trial Court has no duty or power to reserve for the opinion of the Supreme Court questions which actually are not questions of law; nor questions of law not arising out during the trial—See further* infra.

Prerogative Writs or Orders—Certiorari—Mandamus—Article 155.4 *of the Constitution—Applications on behalf of the Attorney-General for such orders in relation to the ruling of the Assize Court in Kyrenia, dated July* 7, 1971, *refusing an application made by counsel for the prosecution asking the Assize Court to reserve for the opinion of the Supreme Court "three questions of law", under section* 148(1) *of the Criminal Procedure Law, Cap.* 155—*The last two of those three questions held not to be actually questions of law but merely questions of fact—Therefore they could not be reserved under the section—As regards the remaining first question, even assuming that it is a question of law at all, again it could not be so reserved either, because such question has not actually arisen "during the trial" as provided in the said section—Cf.* supra.

Question of law reserved for the opinion of the Supreme Court—Section 148(1) *of the Criminal Procedure Law, Cap.* 155—*See* supra.

Certiorari—See supra.

Mandamus—See supra.

These are two related applications filed, after leave, on

behalf of the Attorney-General: The first for an order of Certiorari and the other for an Order of Mandamus. Both these applications are made, under Article 155.4 of the Constitution, in relation to a Ruling given by the Assize Court in Kyrenia on July 7, 1971, in the course of the trial of Criminal case No. 434/71, in which two accused persons are facing a charge of premeditated murder.

By virtue of the said Ruling the Assize Court, rejecting the application made by counsel for the prosecution (appearing on behalf of the Attorney-General), refused to reserve, under section 148(1) of the Criminal Procedure Law, Cap. 155, for the opinion of this Court three questions which according to counsel for the prosecution were "questions of law" which had arisen "during the trial". The aforesaid three questions are set out in full in the judgment of the Court (*post*). Section 148(1) of the Criminal Procedure Law, Cap. 155 reads as follows:

> "Any Court exercising Criminal jurisdiction may, and upon application by the Attorney-General shall, at any stage of the proceedings, reserve a question of law arising during the trial of any person for the opinion of the Supreme Court".

The Assize Court refused the application of counsel for the prosecution on the ground that the aforesaid three questions sought to be reserved for the opinion of the Supreme Court "do not present any question of law to be reserved for the opinion of the Supreme Court".

Dismissing these two applications for Certiorari and Mandamus made on behalf of the Attorney-General, the Supreme Court:-

Held, (1). Before considering whether or not it is otherwise proper or possible to issue an order of Certiorari or an order for Mandamus we have to be satisfied that the said three questions, which prosecuting counsel applied to have reserved by the Assize Court for our opinion, are questions of law within the ambit of section 148(1) of Cap. 155 (*supra*); because if that is not so then the Assize Court was not bound to reserve such questions for our opinion and the present applications for Certiorari and Mandamus cannot succeed. (*Note:* The full text of the said three questions is set out *post* in the judgment of the Court).

(2) Having examined these three questions we have no difficulty in reaching the conclusion that questions 2 and 3 (see them *post* in the judgment) are not, as framed, questions of law in the sense of section 148(1).

(3) (a) Regarding question 1 (see *post* in the judgment), even if it could be held to be, in part at least, a question of law, it must, also be found to be "a question of law arising during the trial" before the Assize Court in Kyrenia; otherwise it cannot be treated as coming within the ambit of section 148(1) (*supra*).

(b) Question 1 appears to us to have been framed on the basis of an incorrect construction of the decision of the Assize Court regarding the admissibility of the confession of the second accused; it is stated in the text of this question that the Assize Court "made an indirect finding that no promises, encouragement or other inducement was held out by the Chief Superintendent HjiLoizou".

But this statement is, in our opinion, inaccurate because no such indirect finding can be derived from the relevant decision of the Assize Court. It follows that question 1 is is not actually a question of law arising during the trial before the Assize Court, inasmuch as it does not arise out of the course of the proceedings at such trial and, therefore, it is not a question of law within the ambit of the said section 148(1) of Cap. 155; assuming, of course, that it is a question of law at all.

(4) As, in the light of the foregoing, there has not been, in effect, a refusal by means of the Ruling of the Assize Court, dated July 7, 1971, to reserve, under section 148(1) of the Criminal Procedure Law, Cap. 155, a question of law, in the sense of that section, the present applications for Orders of Certiorari and Mandamus, in relation to such ruling, have to be dismissed on this ground, without further consideration on their merits.

Applications dismissed.

Applications.

Applications for an order of Certiorari and for an order of Mandamus, made under Article 155.4 of the Constitution, in relation to a ruling given by an Assize Court in Kyrenia

on the 7th July, 1971, in the course of the trial of Criminal Case No. 434/71, in which two accused persons were facing a charge of premeditated murder.

A. Frangos, Senior Counsel of the Republic, with *M. Kyprianou*, Counsel of the Republic, for the Attorney-General of the Republic.

G. Cacoyiannis with *D. Papachrysostomou* and *C. Erotocritou*, for N. Theofilou, accused 1.

K. Saveriades, for A. Drakos, accused 2.

Cur. adv. vult.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: We have before us today two related applications which, on leave having been granted for the purpose, were filed on behalf of the Attorney-General of the Republic: The first for an Order of Certiorari and the other for an Order of Mandamus. Both these applications have been made, under Article 155.4 of the Constitution, in relation to a Ruling given by an Assize Court in Kyrenia, on the 7th July, 1971, in the course of the trial of Criminal Case No. 434/71, in which two accused persons, N. Theofilou and A. Drakos, are facing a charge of premeditated murder.

By virtue of the said Ruling the Assize Court refused to reserve, under section 148(1) of the Criminal Procedure Law, Cap. 155, for the opinion of this Court, three questions which, according to counsel for the prosecution (appearing on behalf of the Attorney-General), who applied on the 7th July, 1971, for them to be so reserved, were questions of law which had arisen during the trial. Prosecuting counsel made his application after the Assize Court had, on the previous day, refused to admit in evidence a statement made to the police of the 15th March, 1971, by the second accused, Drakos.

The said questions were:-

"1.- In view of the fact that the trial Court made an indirect finding that no promises, encouragement or other inducement was held out by Chief Superintendent HjiLoizou to the accused to make the statement, the inference drawn by the Court that" (sic) "the possibility that the Police exploited the desperate state of mind in

which the accused was at the time, thus taking an unfair advantage of the situation, is wrong in law and the conclusion reached in the exercise of the Court's discretion was based on wrong legal principles, misapplication of the law and misinterpretation of the judicial pronouncements bearing on the issue.

2. The finding of the Court that the possibility that the Police exploited the desperate state of mind in which the accused was at the time, thus taking an unfair advantage of the situation, could not be excluded, is based on an inference from facts neither put forward by the defence nor appearing on the record, thus making the course followed by the trial Court to amount to a misapplication of the law.

3. Whether or not in the light of the circumstances appearing on the record the statement of accused No. 2 is admissible in evidence."

In the course of rejecting as inadmissible the statement concerned of the second accused the Assize Court stated the following, *inter alia*:-

> " The only disputed point that has bearing on this issue is the conversation exchanged between the accused and Chief Superintendent HjiLoizou immediately before the statement in question started being reduced in writing.
>
> On this point the accused gave evidence which is to the effect that he was encouraged to make the statement by promises given to him by Chief Superintendent HjiLoizou, the promises being to the effect that he would be released and be turned into a prosecution witness. On the other hand, Chief Superintendent HjiLoizou in giving evidence said that the accused was neither encouraged by him nor in any way induced in giving the statement in question but the statement was made freely and voluntarily.....
>
> We have come to the conclusion that the prosecution failed to discharge the burden of proof which is cast upon them. We are in doubt that the statement of this accused was freely and voluntarily made as we cannot exclude the possibility that the police exploited the desperate state of mind in which the accused No. 2 was at the time, thus taking an unfair advantage of the situation."

Then there followed, as aforementioned, the application for questions to be reserved, under section 148(1) of Cap. 155, for the opinion of this Court, and the Assize Court in refusing that application gave the following Ruling, in relation to which there are being sought now Orders of Certiorari and Mandamus:-

> "We have considered the application of counsel for the Republic in the light of the authorities cited by him as well as those authorities cited by both counsel for the two accused.
>
> We have examined carefully the three grounds put forward by counsel for the Republic and we must say that, in our view, they do not present any question of law to be reserved for the opinion of the Supreme Court. We must repeat here that the power of the Court to admit or reject a confession is a discretionary power.
>
> In our ruling on the admissibility of the statement of accused No. 2 we said clearly that on careful consideration of the evidence adduced, we came to the conclusion that the prosecution failed to discharge the burden of proof cast upon them and that we were in doubt that the statement of the accused was freely and voluntarily made.
>
> For the reasons stated above, the application of Counsel for the Republic is dismissed."

Section 148(1) of Cap. 155 reads as follows:-

> "Any Court exercising criminal jurisdiction may, and upon application by the Attorney-General shall, at any stage of the proceedings, reserve a question of law arising during the trial of any person for the opinion of the Supreme Court."

Thus, before considering whether or not it is otherwise proper or possible to issue an Order of Certiorari or an Order of Mandamus we have to be satisfied that the afore-quoted questions, which prosecuting counsel applied to have reserved for our opinion, are questions of law within the ambit of section 148(1); because if that is not so then the Assize Court was not bound to reserve such questions for our opinion and the present applications for Certiorari and Mandamus cannot succeed.

Having examined these three questions we have had no difficulty in reaching the conclusion that questions 2 and 3 are not, as framed, questions of law in the sense of section 148(1).

Regarding question 1, even if it could be held to be, in part at least, a question of law, it must, also, be found to be "a question of law arising during the trial" before the Assize Court in Kyrenia; otherwise it cannot be treated as coming within the ambit of section 148(1).

Question 1 appears to us to have been framed on the basis of an incorrect construction of the decision of the Assize Court regarding the inadmissibility of the statement of the second accused: It is stated in the text of this question 1 that the Assize Court "made an indirect finding that no promises, encouragement or other inducement was held out by Chief Superintendent HjiLoizou"; this statement is, in our opinion, inaccurate because no such indirect finding can be derived from the relevant decision of the Assize Court.

It follows that question 1 is not actually a question of law arising during the trial before the Kyrenia Assize Court, inasmuch as it does not arise out of the course of the proceedings at such trial and, therefore, it is not a question of law within the ambit of section 148(1) of Cap. 155; assuming, of course, that it is a question of law at all.

As, in the light of the foregoing, there has not been, in effect, a refusal by means of the Ruling of the Assize Court, dated the 7th July, 1971, to reserve, under section 148(1) of Cap. 155, a question of law, in the sense of that section, the applications for Orders of Certiorari and Mandamus, in relation to such ruling, have to be dismissed on this ground, without further consideration on their merits.

Applications dismissed.