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

IN THE MATTER OF ARTICLE 155.4 OF THE CONSTITUTION

and

IN THE MATTER OF AN APPLICATION BY

(a) CHARALAMBOS N. CHARALAMBOUS, AND

(b) PARTHENON PUBLISHING CO. LTD., FOR AN ORDER OF CERTIORARI.

(*Civil Application No.* 8/74).

Criminal Procedure—"Question of law arising during the trial" in section 148 (1) *of the Criminal Procedure Law, Cap.* 155—*Meaning—Criminal trial for offences under section* 46 (*A*) *of the Criminal Code Cap.* 154—*Submission that defence under section* 198 *of Cap.* 154 (supra) *available—Raised and decided together with submission of "no prima facie case"—Issue of availability of such defence not relevant at that stage of the trial—Dealt with prematurely for the purposes of the trial—Said issue was not, at that stage, "a question of law arising during the trial" in the sense of the said section* 148 (1).

Statutes—Construction—"Question of law arising during the trial" in section 148 (1) *of the Criminal Procedure Law, Cap.* 155—*Meaning.*

In the course of the hearing of a criminal case in which the Applicants were facing charges, under section 46 (A) of the Criminal Code, Cap. 154, of insulting the Head of the State, the trial Judge in deciding as to whether or not to call upon the accused to make their defence, held, *inter alia*, that the defence provided for by section 198 of the Criminal Code, Cap. 154 was not available in a case such as the present one. Thereupon counsel for the accused applied that a question of law be reserved under section 148 of the Criminal Procedure Law, Cap. 155, for the opinion of the Supreme Court, as to the availability of the defence in question.

The trial Judge, relying on the Authority of *The Republic* v. *Kalli* (*No.* 1), 1961 C.L.R. 266 refused to reserve "a question

of law". Hence an application for an order of certiorari to remove into this Court and quash the said refusal.

Counsel for the Applicants (accused) conceded that even if he had succeeded in obtaining a ruling that the said defence was available, this would not, in view of the circumstances of this case, have prevented his clients from being called upon to defend themselves; he explained, however, that he wanted a ruling on that issue, at that stage, so that he could know how to present the case for the defence in case there were rejected his arguments in support of his submission that his clients should not be called upon to make their defence.

Held, (1). Subsection (1) of section 148 does not enable either side to a criminal proceeding to raise before the trial Court a question of law at a stage of its own choosing and to apply that such question should be reserved at such stage for our opinion.

(2) In our view " a question of law arising during the trial" means only a question of law arising during the trial at a stage at which it *has* to be decided in order to enable the trial to proceed further in accordance with the law and rules of practice relating to criminal procedure.

(3) Within the ambit of such expression it is not included a question of law which was prematurely raised at a stage of the trial at which it does not have to be decided for the purposes of the trial at that particular stage; because, in our opinion, section 148 does not provide a procedural machinery by means of which a party to a criminal case can seek a ruling on a point of law, from the Supreme Court, in anticipation of the stage of the trial at which the state of the law in relation to such point may or will become actually material and of immediate importance for the further progress of the case; what is envisaged under the said subsection (1) is a situation where a question of Law is, so to speak, obtruding itself upon the trial Court and demanding an answer straightway. (See, *inter alia, Stephenson, Blake & Co.* v. *Grant Legros & Co.*, 86 L.J. Ch. 439).

(4) As at the stage in question of the trial the issue of the availability of the defence under section 198 was not relevant it follows that such issue was dealt with prematurely for the purposes of the trial. We, are, therefore, of the opinion, that the issue concerned, though raised and decided, was not, at that

stage, "a question of law arising during the trial" in the sense of section 148 (1) of Cap. 155.

(5) It follows that the trial Judge had no power, at that particular stage of the trial, to reserve, as a question of law under section 148 (1) of Cap. 155, the issue of the availability in a case of this nature of the defence under section 198 of Cap. 154, and, therefore, he could not have exercised any discretion in this respect.

Application dismissed.

Per curiam: The case of *The Republic* v. *Kalli* (*No.* 1), 1961 C.L.R. 266, should not be taken as laying down that in an application by the defence under section 148 (1) a trial Judge should refuse to reserve a question of law for the opinion of this Court merely for the sake of avoiding an interruption of the trial even though he thinks that it is a proper case in which to do so.

Cases referred to:

Stephenson, Blake & Co. v. *Grant Legros & Co.*, 86 L.J. Ch. 439;

Williams v. *O'Keefe* [1910] A.C. 186;

Glasgow Navigation Co. v. *Iron Ore Co.* [1910] A.C. 293;

Australian Commonwealth Shipping Board v. *Federated Seamen's Union of Australasia*, 36 C.L.R. 442, at p. 450;

Republic v. *Kalli* (*No.* 1), 1961 C.L.R. 266;

Luna Park Ltd. v. *Commonwealth of Australia*, 32 C.L.R. 596 at p. 600.

Application.

Application for an order of certiorari to remove into the Supreme Court and quash an order made by a District Judge of the District Court of Nicosia on the 26th April, 1974 whereby he refused to reserve "a question of law" for the opinion of the Supreme Court under s. 148 (1) of the Criminal Procedure Law, Cap. 155.

St. Terrel, Q. C. with *K. Saveriades*, for the Applicants.

A. Frangos, Senior Counsel of the Republic, with *C. Kypridemos*, Counsel of the Republic, for the Attorney-General as Respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was delivered by:

TRIANTAFYLLIDES, P.: The Applicants seek an order of certiorari* to remove into this Court and quash a Ruling made by the trial Judge, on April 26, 1974, in the course of the hearing of Criminal Case 3449/74, before the District Court of Nicosia, in which the Applicants are facing charges, under section 46 (A) of the Criminal Code, Cap. 154, of insulting the Head of the State.

The said Ruling reads as follows:-

> " Mr. Stephen applied that the Court should state a case for the opinion of the Supreme Court and decide"—(sic)—"whether he had the defence available under section 198 of the Criminal Code or not. He relied on section 148 and cited in support of his argument the case of the *Republic* against *Fivos Pierides*, reported in (1971) 2 C.L.R. 263. He stressed that the Court should exercise its discretion and state the case.
>
> Mr. Frangos appearing for the Prosecution opposed the application for a case to be stated and relied on the case of *Georghios Theocli Kalli* against *The Republic*, 1961 C.L.R., p. 266.
>
> I agree with the judgment delivered in the case of *Kalli*, that a criminal case should not be disrupted and tried piecemeal and in exercising my discretion I refuse to state a case".

The occasion for making the Ruling in question arose when counsel appearing for the accused in that case—the Applicants in these proceedings before us—applied that a question of law

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* *Editor's note*: No application for mandamus was filed in conjunction with the application for certiorari on this occasion.

be reserved for the opinion of this Court under section 148 of the Criminal Procedure Law, Cap. 155. The said section reads as follows:-

" 148.(1) 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.

(2) In every such case the President of the Assize Court or the trial Judge, as the case may be, shall make a record of the question reserved with the circumstances upon which the same has arisen and shall transmit a copy thereof to the Chief Registrar.

(3) The Supreme Court shall consider and determine the question reserved and may -

(a) if the Court has convicted the accused -

(i) confirm the conviction;

(ii) quash the conviction, in which case the accused shall be acquitted;

(iii) direct that the judgment of the Court shall be set aside and that, instead thereof, judgment shall be given by the Court as ought to have been given at the trial;

(b) if the Court has not delivered its judgment, remit the case to it with the opinion of the Supreme Court upon the question reserved".

It is common ground that the trial Court had, just before making the said Ruling, held, *inter alia*, in deciding as to whether or not to call upon the accused to make their defence, that the defence provided for by section 198 of the Criminal Code, Cap. 154, was not available in a case such as the present one. By the Ruling in question the trial Judge refused to reserve a question of law for the opinion of this Court as to the availability of the defence in question and, as a result, the present application for an order of certiorari has been filed.

In the course of considering the fate of this application, we felt that we had to examine the meaning of the expression "a

question of law arising during the trial" as used in subsection (1) of section 148. As this point was not argued, initially, by either side, we invited counsel to address us in relation thereto and we are, indeed, grateful to them for the assistance they have given us. We have come to the conclusion that subsection (1) of section 148 does not enable either side to a criminal proceeding to raise before the trial Court a question of law at a stage of its own choosing and to apply that such question should be reserved at such stage for our opinion; in our view "a question of law arising during the trial" means only a question of law arising during the trial at a stage at which it *has* to be decided in order to enable the trial to proceed further in accordance with the law and rules of practice relating to criminal procedure; and within the ambit of such expression it is not included a question of law which was prematurely raised at a stage of the trial at which it does not have to be decided for the purposes of the trial at that particular stage; because, in our opinion, section 148 does not provide a procedural machinery by means of which a party to a criminal case can seek a ruling on a point of law, from the Supreme Court, in anticipation of the stage of the trial at which the state of the law in relation to such point may or will become actually material and of immediate importance for the further progress of the case; what is envisaged under the said subsection (1) is a situation where a question of law is, so to speak, obtruding itself upon the trial Court and demanding an answer straightway.

In construing, as above, section 148 (1) we have borne in mind, *inter alia*, the general principle that questions of law are not to be decided on a hypothetical basis (see, for instance, *Stephenson, Blake & Co.* v. *Grant Legros & Co.*, 86 L.J. Ch. 439, *Williams* v. *O'Keefe* [1910] A.C. 186 and *Glasgow Navigation Co.* v. *Iron Ore Co.* [1910] A.C. 293, as well as the Australian case *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia*, 36 C.L.R. 442, 450).

What has happened in the present case is that when counsel for the Applicants (the accused at the trial) made a submission under section 74 (1) (b) of Cap. 155 that a *prima facie* had not been made out against his clients sufficiently to require them to make a defence, he raised, in addition to the arguments tending to support his said submission, the issue of whether or not the defence under section 198 of Cap. 154 was available in a case of this nature.

As was very rightly conceded by counsel for the Applicants, even if he had succeeded in obtaining a ruling that the said defence was available, this would not, in view of the circumstances of this case, have prevented his clients from being called upon to defend themselves; he explained, however, that he wanted a ruling on that issue, at that stage, so that he could know how to present the case for the defence in case there were rejected his arguments in support of his submission that his clients should not be called upon to make their defence.

It is true that counsel for the Respondent (who was appearing for the prosecution at the trial) did not object to the issue of the availability of the defence under section 198 of Cap. 154 being raised at that stage and he advanced arguments against the relevant contention of counsel for the Applicants; and, eventually, the trial Judge ruled, as already stated, that such defence was not available.

As at the stage in question of the trial the issue of the availability of the defence under section 198 was not relevant it follows that such issue was dealt with prematurely for the purposes of the trial. That was an issue which might only arise later in relation to the admissibility of evidence to be adduced by the Applicants in order to establish the existence of the defence under section 198, or, even later, at the stage of the final addresses of counsel at the trial. We are, therefore, of the opinion, in the light of all the foregoing, that the issue concerned, though raised and decided, was not, at that stage, "a question of law arising during the trial" in the sense of section 148 (1) of Cap. 155.

It follows that the trial Judge had no power, at that particular stage of the trial, to reserve, as a question of law under section 148 (1) of Cap. 155, the issue of the availability in a case of this nature of the defence under section 198 of Cap. 154, and, therefore, he could not have exercised any discretion in this respect. Consequently, proceedings before the trial Judge will have to go on and even though he refused to reserve a question of law for the opinion of this Court, in a purported exercise of discretion under section 148 (1), no useful purpose could be served by quashing, by means of an order of certiorari, his refusal, because, as expounded hereinbefore, he could not, in any event, have lawfully reserved, under section 148 (1), the question of law concerned, at that stage of the trial. Before, however, leaving the matter of the Ruling of the trial Judge,

which led to the making of the present application, we feel that we should clarify that the case of *The Republic* v. *Kalli* (*No.* 1), 1961 C.L.R. 266, to which the Judge has referred in his said Ruling, should not be taken as laying down that on an application by the defence under section 148 (1) a trial Judge should refuse to reserve a question of law for the opinion of this Court merely for the sake of avoiding an interruption of the trial even though he thinks that it is a proper case in which to do so.

The proceedings before the trial Judge will have to go on and we are sure that if and when the question of the availability of the defence under section 198 arises at the appropriate stage of the trial, the trial Judge will approach this issue afresh, in the light of any further arguments to be advanced by either side, and without feeling at all that his hands are in any way tied by his earlier ruling on this point which, due to the fact that it was premature, has no binding effect, in the true sense, at all (see, *inter alia*, the Australian case of *Luna Park Ltd.* v. *Commonwealth of Australia*, 32 C.L.R. 596, 600); and if the Judge decides then, once again, that the said defence under section 198 is not available in a case of this nature, counsel for the Applicants will have to consider whether to apply again under section 148 (1) for a question of law to be reserved for the opinion of this Court, or whether to await until the later stage of an eventual appeal, in order to raise this matter before us.

In the light of all the foregoing the present application for an order of certiorari is dismissed, without any order as to its costs.

Application dismissed. No order as to costs.