1980 September 9

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF AN APPLICATION BY THEODOSSIS MALIKIDES AND OTHERS FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

(*Application No.* 28/80).

IN THE MATTER OF AN APPLICATION BY ANDREAS AZINAS FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

(*Application No.* 29/80).

Prerogative orders—Certiorari—Mandamus—Prohibition—Leave to apply for—Principles applicable—Criminal trial—Refusal of trial Judge to reserve for opinion of Supreme Court certain questions of law under section 148(1) *of Cap.* 155, *to adjourn the hearing of the trial after the institution of the proceedings for prerogative orders, rejection of submission regarding duplicity of charge, failure to decide whether or not to reserve a specific question of law to the Supreme Court and refusal to order the furnishing of particulars of the charges—Leave to apply for prerogative orders granted with regard to the last two matters—Articles* 12 *and* 30 *of the Constitution.*

Constitutional Law—Human Rights—Right of defence at the trial of a criminal case and right to a fair trial—Articles 12 *and* 30 *of the Constitution—Refusal to order furnishing of particulars of charges to accused—Leave to apply for an order of certiorari granted.*

Prerogative orders—Cannot be made for the purpose of dictating to a Court in what manner it is to decide on a certain matter within its jurisdiction.

Prerogative orders—Certiorari—Mandamus—Prohibition—Application for leave—Criminal trial—Stay of proceedings following filing of application—Within discretion of trial Judge.

Natural justice—Impartiality—Bias—Judge hearing case the godfather of applicant's daughter—Correct practice of dealing with this situation.

The applicants in these proceedings, who were accused in

criminal case No. 10346/80, in the District Court of Nicosia, sought leave to apply for orders of certiorari, mandamus and prohibition in relation to rulings of the trial Judge by means of which he rejected a submission regarding duplicity of a charge, refused to reserve certain questions of law for the opinion of the Supreme Court, under section 148(1) of Cap. 155, to order the furnishing of particulars of the charges and to adjourn the hearing of the aforesaid criminal case because of the filing of these proceedings.

Held, (1) that leave to apply for a prerogative order will be granted if the applicants have made out a prima facie case sufficient to justify granting them the applied for leave; that in relation to the ruling of the trial Judge dated July 17, 1980, by means of which the refused to reserve for the opinion of the Supreme Court, under section 148(1) of Cap. 155, certain questions of law it should be stressed that a prerogative order cannot be made for the purpose of dictating to a Court in what manner it is to decide on a certain matter within its jurisdiction; that in refusing by its said ruling to reserve for the opinion of the Supreme Court certain questions of law arising out of its ruling of July 16, 1980, the trial Court reached a decision within its jurisdiction which was open to it in the circumstances; that such ruling, however, does not appear to have dealt with the application of applicants in Application 28/80 that a question of law as to whether count 1 is bad for duplicity should be reserved for the opinion of the Supreme Court; that in the light of the foregoing this Court has not been satisfied that it should grant leave to apply for any prerogative order in respect of the ruling of July 17, 1980, except, only, leave to apply for an order of mandamus directing the trial Court to decide, in the exercise of its powers under section 148(1) of Cap. 155, whether or not to reserve for the opinion of the Supreme Court the question of law relating to the alleged duplicity of count 1.

(2) That as regards the refusal of the trial Court, by its ruling of July 16, 1980, to order that the aforementioned particulars should be furnished to counsel for the applicants, in this respect a prima facie case has been made out by the applicants entitling them to the leave applied for, especially as it is a matter related to their fundamental right, under Article 12 of the Constitution, to defend themselves at the trial of the criminal case in question,

and, also, to their other corresponding fundamental right, under Article 30 of the Constitution, to have a fair trial.

(3) That in respect, however, of that part of the ruling of July 16, 1980, which relates to the issue of duplicity of count 1 this Court has not, in view, *inter alia*, of the proviso to section 39 of Cap. 155, been persuaded that it should grant leave to apply for any prerogative order; and, that in any event, if count 1 is found to be bad for duplicity and it is, also, held that the applicants have in fact been misled thereby there does exist an adequate remedy by way of appeal, if the applicants are convicted.

(4) That with regard to the refusal of the trial Court to adjourn the hearing of the aforesaid criminal case because the present proceedings for prerogative orders were being instituted in the Supreme Court, since no stay of proceedings had, at that time, been ordered by the Supreme Court, it was up to the trial Court to decide, in the exercise of its discretionary powers, whether or not to adjourn the hearing of the criminal case and that it was open to it to decide not to do so; and that, consequently, there is no adequate reason for granting leave for an application for any prerogative order in this respect.

Held, further, that there is no merit in the contention of the applicant in Application 29/80 that the conduct by the trial judge of the criminal trial is such that justice does not appear to be done; and, so, to the extent to which leave is sought to apply for a prerogative order in this connection such leave has to be refused.

Applications partly granted.

Per curiam: Before concluding this decision I wish to put on record that because of the fact that I am the godfather of a daughter of the applicant in Application 29/80 I have had to consider whether I should entertain myself the present proceedings. In so far as I was concerned I felt no difficulty in doing so, but in accordance with what was indicated as the correct practice in *R.* v. *Altrincham Justices, ex parte Pennington*, [1975] 2 All E.R. 78, 83, I brought the above fact to the attention of the parties before the start of the hearing of the present applications and as there was no objection on the part of anyone of them to my dealing with them I proceeded to hear and determine them.

Cases referred to:

Vassiliou and Another v. *Police Disciplinary Committees* (1979) 1 C.L.R. 46 at p. 49;

Rex v. *Marshland Smeeth and Fen District Commissioners* [1920] 1 K.B. 155 at p. 165;

In re Charalambous (1974) 2 C.L.R. 37;

Republic v. *Sampson* (1977) 2 C.L.R. 1;

R. v. *Altrincham Justices, ex parte Pennington*, [1975] 2 All E.R. 78 at p. 83.

Applications.

Applications for leave to apply for orders of certiorari, mandamus and prohibition in connection with proceedings in relation to applicants before the District Court of Nicosia in respect of charges preferred against them in criminal case No. 10346/80.

E. Efstathiou with *S. Mamantopoullos*, for the applicants in application No. 28/80.

L. N. Clerides with *St. Charalambous* and *C. Clerides*, for the applicant in application No. 29/80.

S. Nicolaides, Senior Counsel of the Republic, for the Attorney-General of the Republic.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following decision. These two applications for leave to apply for orders of certiorari, mandamus and prohibition in relation to the proceedings in criminal case No. 10346/80, in the District Court of Nicosia, are so interrelated that they have been heard together.

By means of Application 28/80 the applicants, who are accused 2-6 in the said criminal case, seek leave to apply for (i) an order of certiorari quashing that part of a ruling given on July 16, 1980, in the criminal proceedings in question, by means of which there were refused particulars of counts 1 to 10 of the charge, (ii) an order of certiorari against that part of the said ruling by means of which there was rejected a submission that count 1 in the charge is bad for duplicity, (iii) an order of mandamus directing the trial Court to order that the applicants should be given particulars of counts 1 to 10 and that count 1 should be so amended as to cease to be bad for duplicity, (iv) an order of certiorari quashing that part of a ruling given by the trial Court

on July 17, 1980, by means of which it refused to reserve for the opinion of the Supreme Court, under section 148(1) of the Criminal Procedure Law, Cap. 155, certain questions of law arising out of the complained of parts of its aforementioned ruling of July 16, 1980 (v) an order of mandamus directing the trial Court to reserve the said questions of law for the opinion of the Supreme Court under section 148(1) of Cap. 155, and (vi) an order of this Court staying the proceedings in the aforesaid criminal case until the particulars of counts 1 to 10 are furnished, count 1 is amended and the said questions of law are reserved for the opinion of, and are determined by, the Supreme Court.

By means of an application filed subsequently it is sought to amend the Statement in Application 28/80 so as to include in it a claim for an order of mandamus directing the trial Court to decide on the application of counsel for the applicants that certain questions of law should be reserved for the opinion of the Supreme Court under section 148(1) of Cap. 155.

From the material at present before me it appears that in so far as the issue of the alleged duplicity of count 1 is concerned the trial Court has not decided yet on the application of counsel for the applicants that such issue should be reserved as a question of law for the opinion of the Supreme Court. I have, therefore, decided to allow, in this respect, the applied for amendment of the Statement in Application 28/80.

By means of Application 29/80 the applicant, who is accused 1 in the criminal case in question, seeks leave to apply for (i) an order of certiorari quashing that part of the ruling of the trial Court dated July 16, 1980, by means of which there were refused the particulars which were requested by a letter addressed to the Attorney-General of the Republic by counsel for the applicant on July 10, 1980, (ii) an order of certiorari quashing that part of the ruling of the trial Court dated July 17, 1980, by means of which it refused to reserve for the opinion of the Supreme Court, under section 148(1) of Cap. 155, certain questions of law arising out of the complained of part of the ruling of the trial Court dated July 16, 1980, (iii) an order of certiorari quashing the decision of the trial Court to continue the trial of the said criminal case after it had been informed that the present proceedings for leave to apply for orders of certiorari, mandamus and prohibition were being instituted in the Supreme Court, and

(iv) an order of prohibition preventing the trial Court from continuing with the trial of the aforesaid criminal case.

Subsequently, an application for the amendment of the statement in Application 29/80 was filed. By means of it there is being sought to amend the Statement so as to include therein, as grounds for granting leave to apply for an order of certiorari, the contention that because Mrs. Anna Artemides, who is the wife of the trial Judge, published on May 19, 1980, in the newspaper "Kypros" a letter hostile to the applicant the trial of the criminal case concerned by her husband violates the principle that justice must not only be done but it should, also, manifestly be seen to be done, and, also, the contention that the simultaneous sittings of the Commission of Inquiry, which was appointed by the Council of Ministers under the Commissions of Inquiry Law, Cap. 44, in relation to certain matters concerning Co-operative Societies in Cyprus, will affect the fair trial of the applicant.

It is correct that in relation to the two above matters, in respect of which the amendment of the Statement in Application 29/80 is being sought, arguments were already advanced before me prior to the filing of the application for amendment. After, however, such application had been filed the aforesaid matters were raised, for the first time, before the trial Judge, when the hearing of the criminal case in question was resumed; and, indeed, in an Interim Decision dated August 5, 1980, I had indicated that I did not regard such a course as being incompatible with the present proceedings before me, since the aforesaid matters were not as yet within the ambit of the Statement in Application 29/80. A ruling regarding such matters was given by the trial Court on August 12, 1980, and Application 30/80 for leave to apply for orders of certiorari and prohibition in respect of it was filed on August 26, 1980; and leave has been granted today.

In the circumstances, I do not think that it is proper or necessary to allow, in the exercise of my relevant discretionary powers, the amendment of the Statement in Application 29/80, in order to include therein the two matters in respect of which leave has been granted, as aforesaid, in Application 30/80; especially as the relevant ruling of the trial Court dated August 12, 1980, was not yet in existence when these matters were raised in the course of the proceedings before me in Application 29/80, or

when the application for amendment of the Statement in such Application was filed.

In considering whether or not to grant the leave sought by means of the present Applications, 28/80 and 29/80, I have borne in mind that the applicants must satisfy me that they have made out a prima facie case sufficient to justify granting them the applied for leave (see *Vassiliou and another* v. *Police Disciplinary Committees*, (1979) 1 C.L.R. 46, 49, and the case-law referred to in the judgment in that case).

In relation to the ruling of the trial Judge dated July 17, 1980, by means of which he refused to reserve for the opinion of the Supreme Court, under section 148(1) of Cap. 155, certain questions of law, it should be stressed that a prerogative order cannot be made for the purpose of dictating to a Court in what manner it is to decide on a certain matter within its jurisdiction.

In *Rex* v. *Marshland Smeeth and Fen District Commissioners*, [1920] 1 K.B. 155, McCardie J. stated the following (at p. 165):

> "If, for example, a jurisdiction be given to an inferior Court all that that Court can be called upon by the High Court to do, save in special circumstances, is to hear and determine the matters brought before it in a regular and proper manner. Hence a mandamus is granted, if jurisdiction has been declined by the inferior Court, to hear and determine only. If the inferior Court has a discretion as to the decision it may give, then if that discretion be exercised bona fide and not arbitrarily or illegally and without reference to extraneous considerations the Court will not control that exercise of that discretion. See the cases cited in Short and Mellor on Crown Office Practice, 2nd ed., pp. 200 and 201".

In refusing by its ruling of July 17, 1980, to reserve for the opinion of the Supreme Court certain questions of law arising out of its ruling of July 16, 1980, the trial Court, after referring to the relevant principles in accordance with which its discretion ought to be exercised, as they have been expounded in, *inter alia*, *In re Charalambous*, (1974) 2 C.L.R. 37, and *The Republic* v. *Sampson*, (1977) 2 C.L.R. 1, reached a decision within its jurisdiction which was open to it in the circumstances; and the ruling of July 17, 1980, is so framed that it must be taken to deal with the applications to the trial Court of all the applicants, in both the present Applications, that the issue of the particulars

which were requested by counsel for the applicants—as counsel for the accused in the criminal case concerned—should be reserved for the opinion of the Supreme Court as a question of law.

Such ruling, however, does not appear to have dealt with the application of applicants in Application 28/80 that a question of law as to whether count 1 is bad for duplicity should be reserved for the opinion of the Supreme Court.

In the light of the foregoing I have not been satisfied that I should grant leave to apply for any prerogative order in respect of the ruling of July 17, 1980, except, only, leave to apply for an order of mandamus directing the trial Court to decide, in the exercise of its powers under section 148(1) of Cap. 155, whether or not to reserve for the opinion of the Supreme Court the question of law relating to the alleged duplicity of count 1.

As regards the question of granting leave to apply for prerogative orders in relation to the refusal of the trial Court, by its ruling of July 16, 1980, to order that the aforementioned particulars should be furnished to counsel for the applicants, I have reached the conclusion that in this respect a prima facie case has been made out by the applicants entitling them to the leave applied for, especially as it is a matter related to their fundamental right, under Article 12 of the Constitution, to defend themselves at the trial of the criminal case in question, and, also, to their other corresponding fundamental right, under Article 30 of the Constitution, to have a fair trial.

In respect, however, of that part of the ruling of July 16, 1980, which relates to the issue of duplicity of count 1 I have not, in view, *inter alia*, of the proviso to section 39 of Cap. 155, been persuaded that I should grant leave to apply for any prerogative order; and, in any event, if count 1 is found to be bad for duplicity and it is, also, held that the applicants have in fact been misled thereby there does exist an adequate remedy by way of appeal, if the applicants are convicted.

Regarding, next, the refusal of the trial Court to adjourn the hearing of the aforesaid criminal case because the present proceedings for prerogative orders were being instituted in the Supreme Court, I am of the view that since no stay of proceedings had, at that time, been ordered by the Supreme Court, it was up to the trial Court to decide, in the exercise of its discretionary powers, whether or not to adjourn the hearing of the

criminal case and that it was open to it to decide not to do so; consequently, I find no adequate reason for granting leave for an application for any prerogative order in this respect.

Lastly, I have found no merit in the contention of the applicant in Application 29/80 that the conduct by the trial Judge of the criminal trial is such that justice does not appear to be done; and, so, to the extent to which leave is sought to apply for a prerogative order in this connection such leave has to be refused.

In the light of all the above leave is granted to the applicants in Application 28/80 to apply for an order of certiorari as per paragraph A of the Statement and for an order of mandamus in accordance with the amendment, as aforesaid, of the Statement, and to the applicant in Application 29/80 to apply for orders of certiorari and prohibition as per paragraphs A1 and B of the Statement. The relevant applications to be filed within ten days from today.

Regarding the question whether, in the exercise of my discretionary powers, I should make an order that the leave which I have just granted should operate as a stay of the proceedings in the criminal case concerned I have decided that for the time being no such order is required in view of the fact that the proceedings in the criminal case have already been stated by means of an order to that effect which I have made today in related Application 30/80*; should the need arise to stay such proceedings independently of the stay ordered in Application 30/80 this Court may be moved accordingly at the appropriate time.

Before concluding this decision I wish to put on record that because of the fact that I am the godfather of a daughter of the applicant in Application 29/80 I have had to consider whether I should entertain myself the present proceedings. In so far as I was concerned I felt no difficulty in doing so, but in accordance with what was indicated as the correct practice in *R.* v. *Altrincham Justices, ex parte Pennington*, [1975] 2 All E.R. 78, 83, I brought the above fact to the attention of the parties before the start of the hearing of the present applications and as there was no objection on the part of anyone of them to my dealing with them I proceeded to hear and determine them.

Applications partly granted.

* Reported at p. 466 *ante*.