1980 January 28

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

NICOS KARANTOKIS (HOLDINGS) LIMITED,

Applicant,

v.

THE DISTRICT OFFICER OF LIMASSOL AND ANOTHER,

Respondents

(*Criminal Application No* 2/79)

Building—Building permit—Duration—One year—Section 5 *of the Streets and Buildings Regulation Law Cap* 96—*Section* 28 *of the Town and Country Planning Law*, 1972 (*Law* 90/72) *providing for three years' duration not yet in force*

Town and Country Planning Law 1972 (*Law* 90/72)—*Town planning licence under section* 28 *of the Law—Whether the same as a building permit under section* 3 *of the Streets and Buildings Regulation Law Cap* 96

Criminal Procedure—Motion in arrest of judgment—Section 79 *of the Criminal Procedure Law, Cap* 155—*Allegation that charge uncertain and not disclosing an offence in law—Whether it could be raised by the above motion*

The appellant company was, on June 2, 1979, found guilty of the offence of having erected a fence without a building permit from the appropriate authority, and the case was fixed on June 6, 1979, so that counsel for the appellant could address the Court in mitigation. On that date Counsel filed a motion(*) in arrest of judgment based on the ground that the charge did not state any offence and on the ground that the charge was uncertain. The trial Judge dismissed the motion and Counsel for the appellant applied to him, under section 149 of the Criminal Procedure Law, Cap. 155, to state a case under the said section so that there could be raised before the Supreme Court certain points(**) regarding the applicability of section

* See particulars of the motion at p. 212 *post*

** See details of these points at pp. 212–13 *post*

85 of the Town and Country Planning Law, 1972 to the provisions of sections 3(1)(b) and 5 of the Streets and Buildings Regulation Law, Cap. 96. The trial Judge refused to state a case under the said section 149 and issued a certificate to that effect.

On September 14, 1979 the Supreme Court issued a rule nisi under s. 149(3) of Cap. 155 and rule 13 of the Criminal Procedure Rules. In proceedings for showing cause why the rule nisi should not be made absolute the main submission of counsel for the appellant company was that the appellant could not be convicted of the offence in question because the building permit, which was issued to it in relation to the fence concerned on March 12, 1976, did not have a duration of only one year, as provided under section 5 of the Streets and Buildings Regulation Law, Cap. 96, but a duration of three years in view of the provisions of the Town and Country Planning Law, 1972 (Law 90/72), and, in particular, of section 28(1) of such Law.

Held, that the said Law 90/72 is not yet in force as a whole because by a Notice published under section 88 of this Law, on June 8, 1973 (see No. 125 in the Third Supplement, Part I, to the Official Gazette of the Republic of June 8, 1973), there have come into force only, as from June 15, 1973, sections 1–19, 35, 60–66, 80, 81 and 83–88 of the Law; that, therefore, even to-day section 28 of Law 90/72 is not yet in force; that, consequently, even assuming that the issues of law which the appellant seeks to raise before this Court, by way of a Case Stated, are matters which could have been raised by means of a motion in arrest of judgment under section 79 of Cap. 155—and this is something that it is left open—and even assuming that the town planning licence referred to in section 28 of Law 90/72 is the same as a building permit envisaged under section 3 of Cap. 96, there is no valid reason for holding that the building permit of the appellant had a duration of three years, instead of one year, by virtue of section 28 of Law 90/72 which has not yet come into force; and that, accordingly, there is no merit in the contentions of the appellant justifying this Court to make the rule nisi absolute and the application for a Case Stated must be dismissed.

Application dismissed.

Cases referred to:

Khadar and Another v. *The Republic* (1978) 2 C.L.R. 132 at pp. 221–224.

Application.

Application to make absolute a rule nisi which had been issued under section 149(3) of the Criminal Procedure Law, Cap. 155 and rule 13 of the Criminal Procedure Rules.

P. Cacoyiannis, for the appellants.

E. Kranos, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant company, which was the accused in a criminal case before the District Court of Limassol, was, on June 2, 1979, found guilty of the offence of having erected a fence without a building permit from the appropriate authority. The case was fixed on June 6, 1979, so that counsel appearing for the appellant could address the Court in mitigation. On that date there was filed a motion in arrest of judgment based on the following grounds:-

"1. The charge does not state and cannot by any alteration authorized by the Criminal Procedure Law be made to state any offence which in the opinion of the Court was within the reasonable contemplation of the accused.

2. Want of certainty in the charge or omission or insufficient statement of some material allegation where the defect is more than formal and has not been amended or cured by the judgment.

No offence in Law is disclosed in the charge."

The said motion was dismissed by the trial Judge on June 9, 1979, and then, on June 14, 1979, counsel for the appellant applied to him, under section 149 of the Criminal Procedure Law, Cap. 155, asking him to state a case under the said section, so that there could be raised before the Supreme Court the following points:-

"1. The decision of the trial Judge, His Honour P. Eleftheriou, Judge of the District Court of Limassol, that the provisions of section 85 of the Town and Country Planning Law, No. 90 of 1972, which came into operation on the 15th June, 1973, do not apply to the provisions of sections 3(1)(b) and 5 of the Streets and Buildings Regulation Law Cap. 96 and the duration of the building permit issued on the 12th March 1976, *exhibit* 1, the subject-

matter of the present criminal proceedings is wrong or erroneous in Law.

Section 85 of Law 90 of 1972 reads as follows:

'85.(1) Τηρουμένων τῶν διατάξεων τῶν ἐδαφίων (2) καὶ (3), ὁ περὶ Ρυθμίσεως Ὁδῶν καὶ Οἰκοδομῶν Νόμος καὶ οἱοιδήποτε δυνάμει αὐτοῦ ἐκδοθέντες Κανονισμοὶ ἀναγινώσκονται, ἑρμηνεύονται καὶ ἐφαρμόζονται ὡς ὑποκείμενοι εἰς τὰς διατάξεις τοῦ παρόντος Νόμου ἐν σχέσει πρὸς ἅπαντα τὰ θέματα ἐπὶ τῶν ὁποίων ἐφαρμόζονται αἱ διατάξεις τοῦ παρόντος Νόμου, ἐν περιπτώσει δὲ οἱασδήποτε συγκρούσεως μεταξὺ τῶν διατάξεων τοῦ περὶ Ρυθμίσεως Ὁδῶν καὶ Οἰκοδομῶν Νόμου ἢ οἱωνδήποτε δυνάμει αὐτοῦ ἐκδοθέντων Κανονισμῶν ἢ Διοικητικῶν Πράξεων καὶ τῶν διατάξεων τοῦ παρόντος Νόμου ἢ οἱωνδήποτε δυνάμει αὐτοῦ ἐκδοθέντων Κανονισμῶν ἢ Διοικητικῶν Πράξεων ἐν σχέσει πρὸς οἱονδήποτε τοιοῦτο θέμα ὡς τὰ προαναφερθέντα, ἐπικρατοῦσιν αἱ τελευταῖαι αὗται διατάξεις.'

"2. The decision of the trial Judge His Honour Mr. P. Eleftheriou, Judge of the District Court of Limassol, to the effect that Law 90 of 1972 was not put into operation, is erroneous in Law. If the learned Judge had taken notes of the address of the advocate of the applicant which lasted about one hour, in explaining the meaning and effect of sections 85 and 28 of Law 90 of 1972, he should have noticed that section 85 of Law 1972 was put into operation on the 15th June, 1973".

Section 85(1) of Law 90/72, which was relied on, as above, by counsel for the appellant, reads in English translation as follows:–

"85.–(1) Subject to the provisions of sub–sections (2) and (3), the Streets and Buildings (Regulation) Law and any Regulations made thereunder shall be read, construed and applied subject to the provisions of this Law in respect of all matters to which the provisions of this Law are applicable, and in case of any conflict between the provisions of the Streets and Buildings (Regulation) Law or of any Regulations or Public Instruments made thereunder and the provisions of this Law or of any Regulations or

Public Instruments made thereunder in respect of any such matter as aforesaid the latter provisions shall prevail."

The trial Judge refused to state a case under section 149 of Cap. 155 and issued a certificate to that effect, under subsection (2) of the said section, on June 15, 1979.

On June 18, 1979, counsel for the appellant applied for a rule nisi, under subsection (3) of section 149 of Cap. 155, and rule 13 of the Criminal Procedure Rules. We issued such a rule on September 14, 1979, calling upon the trial Judge and the respondents—who were the complainants in the criminal case in question—to show today cause why a case should not be stated under the said section 149.

The trial Judge has shown cause by swearing an affidavit dated November 30, 1979, and the respondents have shown cause by appearing, through counsel, and presenting arguments why the rule nisi should not be made absolute.

Provision for motion in arrest of judgment is made in section 79 of the Criminal Procedure Law, Cap. 155, which reads as follows:-

"79.(1) The accused may, at any time before sentence, whether on his plea of guilty or otherwise, move in arrest of judgment on the ground that the charge or information does not, after any alteration which the Court is willing to and has power to make, state any offence which the Court has power to try.

(2) The Court may, in its discretion, either hear and determine the matter during the same sitting, or adjourn the hearing thereof to a future time to be fixed for that purpose.

(3) If the Court decides in favour of the accused, he shall be discharged from that charge or information."

This is a procedural step which is similar to the motion in arrest of judgment in criminal cases in England (see Archbold on Pleading, Evidence and Practice in Criminal Cases, 40th ed., p. 460, para. 630).

As regards such a procedural step useful reference may be made to the judgment of L. Loizou J. in *Khadar and another* v. *The Republic*, (1978) 2 C.L.R. 132, 221-224.

In essence the case for the appellant is that it could not be convicted of the offence in question because the building permit, which was issued to it in relation to the fence concerned on March 12, 1976, did not have a duration of only one year, as provided under section 5 of the Streets and Buildings Regulation Law, Cap. 96, but a duration of three years in view of the provisions of the Town and Country Planning Law, 1972 (Law 90/72), and, in particular, of section 28(1) of such Law.

The said Law 90/72 is not yet in force as a whole because by a Notice published under section 88 of this Law, on June 8, 1973 (see No. 125 in the Third Supplement, Part I, to the Official Gazette of the Republic of June 8, 1973), there have come into force only, as from June 15, 1973, sections 1–19, 35, 60–66, 80, 81 and 83–88 of the Law.

So, even today section 28 of Law 90/72 is not yet in force.

Consequently, even assuming that the issues of law which the appellant seeks to raise before this Court, by way of a Case Stated, are matters which could have been raised by means of a motion in arrest of judgment under section 79 of Cap. 155—and this is something that we leave open—and even assuming that the town planning licence referred to in section 28 of Law 90/72 is the same as a building permit envisaged under section 3 of Cap. 96, we cannot find any valid reason for holding that the building permit of the appellant had a duration of three years, instead of one year, by virtue of section 28 of Law 90/72 which has not yet come into force.

It is correct that section 85 of Law 90/72 states that wherever there is any conflict between the provisions of Cap. 96 and the provisions of Law 90/72 the latter shall prevail; but, of course, that section must be understood and applied as referring to the provisions of Law 90/72 which are in force at any particular time; and no such conflict existed in the present case between section 28 of Law 90/72 and section 3 of Cap. 96, to which section 85 of Law 90/72 could be held to be applicable, because the said section 28 was not in force at any material time.

In the light of all the foregoing we find that there is no merit in the contentions of the appellant justifying us to make the

rule nisi absolute and its application for a Case Stated is accordingly dismissed.

This case will have now to go before the trial Court so that it may proceed to pass sentence, after hearing, of course, counsel for the appellant in mitigation.

Application dismissed.