1983 June 21

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF AN APPLICATION BY PHAEDON G. ECONOMIDES FOR AN ORDER OF CERTIORARI.

(*Application No.* 16/83).

IN THE MATTER OF AN APPLICATION BY PHANOS CHRISTOU AND PAVLOS SAMARAS FOR AN ORDER OF CERTIORARI.

(*Application No.* 17/83).

Certiorari—Committal for trial by an Assize Court—Jurisdiction to issue orders of certiorari quashing the committal—Article 155.4 *of the Constitution.*

Criminal Procedure—Preliminary inquiry—Section 92 *of the Criminal Procedure Law, Cap.* 155—*Committal for trial without a preliminary inquiry—Section* 3 *of the Criminal Procedure (Temporary Provisions) Law,* 1974 (*Law* 42/74)—*It vests in the District Court concerned discretionary power to decide whether or not a particular case is one in which it is proper to commit the accused for trial by an Assize Court without holding a preliminary inquiry —Once District Court decided not to hold a preliminary inquiry under section* 92 *of Cap.* 155 *it could not apply at all sections* 93(*h*) *and* 94 *of Cap.* 155—*Because such sections only applicable if there was held a preliminary inquiry under section* 92—*Error of Law in the face of the relevant decision of the District Court, as to the mode of application of Law* 42/74, *as a result of which it acted in excess of the powers vested in it by means of Law* 42/74—*Committal for trial quashed.*

The applicants sought to quash by means of orders of certiorari their committal for trial by an Assize Court in Larnaca which was ordered by the District Court of Larnaca in criminal case No. 3982/83. They were three out of the six accused in the said criminal case and they were committed for trial together with two of their co-accused whereas the sixth co-accused was discharged. The committal was made without having been held a preliminary inquiry, as envisaged by section 92 of the Criminal Procedure Law, Cap. 155, but it was ordered under the provisions

of section 3* of the Criminal Procedure (Temporary Provisions) Law, 1974 (Law 42/74). The District Court held that Law 42/74 left unaffected its discretionary powers under sections 93(h) and 94 of Cap. 155 and proceeded to examine the evidence before it for the purpose of applying, and it actually did apply, the said two sections on the basis of the written summaries of evidence which were placed before it pursuant to the provisions of Law 42/74.

Held, (I) *on the issue of jurisdiction:*

That this Court possesses, under Article 155.4 of the Constitution, jurisdiction to quash by means of orders of certiorari the committal of the applicants for trial by an Assize Court.

Held, (II) *on the merits of the applications:*

(1) That Law 42/74 (as well as the Criminal Justice Act, 1967) enables the committal of an accused person for trial on indictment without the holding of a preliminary inquiry and, therefore, without considering, at the stage of committal, whether or not there exists sufficient evidence justifying the committal; and that is the reason for which, as it is stated in note No. 4 to para. 158 in Halsbury's Laws of England, 4th ed. there is no power, when a preliminary inquiry has not taken place, to discharge the accused.

(2) That the function of a District Court under Law 42/74 is not a merely automatic function, because the said Law by its section 3 clearly provides that the Court "has power to commit for trial" and this provision does vest in the District Court concerned discretionary power to decide whether or not a particular case is one in which it is proper to commit the accused for trial by an Assize Court without holding a preliminary inquiry; that such power is to be exercised judicially in the light of all relevant considerations, one of which could be the sufficiency of the evidence, in the sense that if either the District Court is prima facie of the view that there does not exist sufficient in law evidence justifying the committal for trial of the accused, or if counsel appearing for the accused puts forward such an argument and the District Court is of the

* Section 3 is quoted at p. 937 post.

opinion that this argument is prima facie well-founded, the District Court may decide not to commit the accused for trial without a preliminary inquiry, but instead to hold a preliminary inquiry, so as to avoid putting a person on trial before an Assize Court without sufficient evidence justifying such a course. (see section 3 of Law 42/74 and section 1 of the Criminal Justice Act, 1967).

(3) That once the District Court decided not to hold a preliminary inquiry under section 92 of Cap. 155, it could not apply at all sections 93(h) and 94 of Cap. 155, because such sections were only applicable if there was held a preliminary inquiry under section 92 of Cap. 155; that, what, in effect, has happened is that, in actual fact, a preliminary inquiry was held, not on the basis of oral evidence, but on the basis only of the written summaries of evidence which were produced as envisaged by section 3(b) of Law 42/74; that such a course was not lawfully open, under Law 42/74, to the District Court; that, therefore, on the face of the relevant decision of the District Court, as well as on the face of the proceedings before such Court as a whole, there appear errors of law as to the mode of application of Law 42/74, because though sections 93(h) and 94 of Cap. 155 were not at all applicable they were nevertheless applied by the District Court, and as a result of such errors of law the District Court acted in excess of the powers vested in it by means of Law 42/74; accordingly the orders of certiorari applied for by the applicants will be issued and their sub judice committal for trial by the Assize Court will be quashed.

Applications granted.

Cases referred to:

In re Ktimatias (1977) 2 C.L.R. 296;

R. v. *Gee* [1936] 2 All E.R. 89 at p. 91;

R. v. *Northumberland Compensation Appeal Tribunal, Ex Parte Shaw* [1952] 1 All E.R. 122 at pp. 125, 128;

R. v. *Southampton Justices, Ex Parte Green* [1975] 2 All E.R. 1073 at pp. 1079, 1080;

R. v. *Horseferry Road Magistrates' Court, Ex parte Pearson* [1976] 2 All E.R. 264 at p. 266;

R. v. *Crown Court at Knightsbridge* [1981] 3 All E.R. 417 at pp. 421, 422;

R. v. *Wells Street Magistrates' Court, Ex Parte Albanese* [1981] 3 All E.R. 769;

R. v. *Surrey Coroner, Ex parte Campbell* [1982] 2 All E.R. 545 at pp. 552, 554;

O' Reilly v. *Mackman* [1982] 3 All E.R. 1124 at p. 1128;

R. v. *Uxbridge Justices, Ex Parte Heward-Mills* [1983] 1 All E.R. 530;

R. v. *Roscommon Justices* [1894] 2 I.R. 158;

R. v. *Irwin*, 80 Can. C.C. 314;

R. v. *Matheson*, 123 Can. C.C. 60;

Constantinides v. *Republic* (1978) 2 C.L.R. 337 at pp. 352–353, 354–355.

Applications.

Applications for an order of certiorari to remove into the Supreme Court of Cyprus and quash the order made by the District Court of Larnaca on the 12th May, 1983 in Criminal Case No. 3982/83 whereby the applicants were committed for trial by an Assize Court.

G. Cacoyiannis with *Chr. Triantafyllides*, for the applicant in Appl. No. 16/83.

E. Efstathiou, for the applicant in Appl. No. 17/83.

A.M. Angelides, Counsel of the Republic, for the Republic.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By means of these two applications, for the filing of which leave was granted on the 27th May, 1983 (in Applications Nos. 11/83 and 12/83, respectively) and which have been heard together in view of their related nature, the applicants seek to quash by means of orders of certiorari their committal for trial by an Assize Court in Larnaca which was ordered by the District Court of Larnaca on 12th May 1983 in criminal case No. 3982/83.

It is common ground that the applicants were three out of the six accused in the said criminal case and that they were committed for trial together with two of their co-accused whereas the sixth co-accused was discharged.

The applicants were committed for trial without there having

been held a preliminary inquiry, as envisaged by section 92 of the Criminal Procedure Law, Cap. 155; their committal was ordered under the provisions of the Criminal Procedure (Temporary Provisions) Law, 1974 (Law 42/74), section 3 of which reads as follows:-

"3. Διαρκούσης τῆς ἰσχύος τοῦ περὶ Δικαστηρίων (Προσωριναὶ Διατάξεις) Νόμου τοῦ 1974 καὶ παρὰ τὰς διατάξεις τοῦ ἄρθρου 92 τοῦ περὶ Ποινικῆς Δικονομίας Νόμου εἰς περιπτώσεις ἀδικημάτων προβλεπομένων ὑπὸ τοῦ Ποινικοῦ Κώδικος ἢ οἱουδήποτε ἑτέρου ἐν ἰσχύι Νόμου, ἐξαιρουμένων ἀδικημάτων τιμωρουμένων διὰ τῆς ποινῆς τοῦ θανάτου, ἐὰν—

(α) ὁ Γενικὸς Εἰσαγγελεὺς τῆς Δημοκρατίας παράσχῃ γραπτὴν συγκατάθεσιν περὶ τῆς μὴ ἀναγκαιότητος διεξαγωγῆς τοιαύτης προανακρίσεως· καὶ

(β) ἡ οὐσία τῆς καταθέσεως ἑκάστου μάρτυρος κατηγορίας τὸν ὁποῖον προτίθεται νὰ καλέσῃ ἡ κατηγοροῦσα Ἀρχή, ἐπιδοθῇ προηγουμένως εἰς τὸν κατηγορούμενον ἢ τὸν δικηγόρον αὐτοῦ,

τὸ Δικαστήριον κέκτηται ἐξουσίαν νὰ παραπέμψῃ εἰς δίκην ἄνευ προανακρίσεως οἱονδήποτε κατηγορούμενον".

("3. During the continuance in force of the Courts of Justice (Temporary Provisions) Law, 1974, and notwithstanding the provisions of section 92 of the Criminal Procedure Law, in cases of offences created by the Criminal Code or any other Law in force, with the exception of offences punishable with the death penalty, if—

(a) the Attorney-General of the Republic gives his written consent to the effect that it is not necessary to hold a preliminary inquiry; and

(b) the substance of the statement of each prosecution witness, whom the prosecution intends to call, is served in advance on the accused or his advocate,

the Court has power to commit for trial, without a preliminary inquiry, any accused person").

Before proceeding further I find it appropriate to state now my final decision on the issue of whether I possess, under Article

155.4 of the Constitution, jurisdiction to quash by means of orders of certiorari the committal of the applicants for trial by an Assize Court, if I find that it is proper to make such orders in the present instance.

In a Decision which I gave during the hearing of the aforementioned Applications Nos 11/83 and 12/83, on the 24th May 1983,* I had found, as then advised, that I possess such jurisdiction and now, after having given the matter further consideration, I am still of the opinion that my said Decision is correct; and I shall not repeat once again all that I have said in such Decision because its contents should be deemed to be incorporated herein.

I would like, however, to add that in the case of *In re Ktimatias*, (1977) 2 C.L.R. 296, I had to examine whether or not to issue an order of certiorari for the purpose of quashing a committal for trial by an Assize Court which was ordered under the provisions of Law 42/74; and, eventually, in the *Ktimatias* case, supra, the application for an order of certiorari was dismissed on grounds unrelated to my jurisdiction to make such an order on that occasion, which, actually, was never contested.

Also, it is, I think, useful to draw attention to the case of *R.* v. *Gee*, [1936] 2 All E.R. 89, 91, where there appears from the judgment of Goddard J, as he then was, that it was taken for granted at that time by the Court of Criminal Appeal in England that certiorari could be applied for in order to quash a committal for trial on indictment.

Moreover, the possession of jurisdiction by this Court to make an order of certiorari in a case of this nature is, in my view, put really beyond any doubt (notwithstanding certain passages to the contrary in Halsbury's Laws of England, 4th ed., vols. 1 and 11, to which I have referred to in my Decision of 24th May, 1983) when such matter is examined in the light of the modern scope of certiorari, as it has been expounded authoritatively in relevant case-law in England, including decisions of the House of Lords (see, in this respect, *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 All E.R. 122, 125, 128, *R.* v. *Southampton Justices, ex parte Green*, [1975] 2 All E.R. 1073, 1079, 1080, *R.* v. *Horseferry Road Magistrates' Court, ex parte Pearson*, [1976] 2 All

* Reported in (1983) 3 C.L.R. 925.

E.R. 264, 266, *R.* v. *Crown Court at Knightsbridge*, [1981] 3 All E.R. 417, 421, 422, *R.* v. *Wells Street Magistrates' Court, ex parte Albanese*, [1981] 3 All E.R. 769, *R.* v. *Surrey Coroner, ex parte Campbell*, [1982] 2 All E.R. 545, 552, 554, *O'Reilly* v. *Mackman*, [1982] 3 All E.R. 1124, 1128, and *R.* v. *Uxbridge Justices, ex parte Heward-Mills*, [1983] 1 All E.R. 530). The case of *R.* v. *Roscommon Justices*, (1894) 2 I.R. 158, on which the aforementioned passages in Halsbury's Laws of England appear to have been mainly based; as well as the to the same effect two Canadian cases of *R.* v. *Irwin*, 80 Can. C.C. 314, and *R.* v. *Matheson*, 123 Can. C.C. 60, seem to be out of tune with the modern scope of the remedy of certiorari and, therefore, cannot be regarded as establishing that I do not possess jurisdiction to entertain these applications. Moreover, they are in any event distinguishable from the present applications inasmuch as the applicants were committed for trial under Law 42/74, without having the benefit of the safeguard of a preliminary inquiry, whereas in the aforementioned Irish case of *Roscommon* and the Canadian cases of *Irwin* and *Matheson* it appears that the committal took place not only after a preliminary inquiry, but, also, after a hearing before a Grand Jury.

In *Constantinides* v. *The Republic*, (1978) 2 C.L.R. 337, it was held, inter alia (at pp. 352–353) that Law 42/74 is a procedural enactment which has not repealed section 92 of Cap. 155, but which has only made provision for an alternative thereto procedure in certain circumstances. It is useful to quote, also, the following passage from the judgment in the *Constantinides* case, supra (at pp. 354–355):

> "It has, also, been contended by counsel for the appellant that section 3 of Law 42/74 is so vague that it is not clear what a Judge, when applying it, is expected to do and, in particular, whether he has to exercise any discretion before he proceeds to commit somebody for trial without a preliminary inquiry.
>
> We agree that Law 42/74 could have been more elaborately drafted; it is, actually, a special measure, introduced for a certain period of time, and we trust that if it is decided to retain it as a feature of our legislation then it will be reformulated in a more elaborate manner (see,

for example, in England, the relevant provisions of the Criminal Justice Act, 1967). Irrespective, however, of the foregoing, and even assuming, without so deciding, that the District Judge who committed the appellant for trial under section 3 of the said Law had to exercise a discretion to some extent, we are of the opinion that all the prerequisites laid down in such section were duly satisfied and that it was a proper case in which to commit the appellant for trial by an Assize Court without holding a preliminary inquiry. It is to be borne in mind, further, in this respect, that at the stage when the appellant was committed for trial no application was made on his behalf that a preliminary inquiry should take place and no objection was taken that this was not a proper case in which he could be committed without such an inquiry".

The relevant provisions of the Criminal Justice Act, 1967, in England, which is referred to in the above passage, are to be found in Halsbury's Statutes of England, 3rd ed., vol. 21, pp. 365-367 (see, also, as regards the effect of the application of such provisions Archbold on Pleading, Evidence and Practice in Criminal Cases, 40th ed., para. 462, pp. 299-300, and Halsbury's Laws of England, 4th ed., vol. 11, pp. 107, 108, paras. 158, 159).

Though the provisions of Law 42/74 are not the same, and not as elaborate and as comprehensive, as the relevant provisions (particularly sections 1 and 2) of the Criminal Justice Act, 1967, I regard the said two enactments as being clearly statutes of the same nature and with the same object, that is to enable the committal of an accused person for trial on indictment without the holding of a preliminary inquiry and, therefore, without considering, at the stage of committal, whether or not there exists sufficient evidence justifying the committal; and that is the reason for which, as it is stated in note No. 4 to para. 158 in Halsbury's Laws of England, supra, there is no power, when a preliminary inquiry has not taken place, to discharge the accused.

On the other hand, I do not regard the function of a District Court under Law 42/74 as being a merely automatic function,

because the said Law by its section 3 clearly provides that the Court "has power to commit for trial" and this provision does vest, in my opinion, in the District Court concerned discretionary power to decide whether or not a particular case is one in which it is proper to commit the accused for trial by an Assize Court without holding a preliminary inquiry; and such power is to be exercised, of course, judicially in the light of all relevant considerations, one of which could be the sufficiency of the evidence, in the sense that if either the District Court is prima facie of the view that there does not exist sufficient in law evidence justifying the committal for trial of the accused, or if counsel appearing for the accused puts forwards such an argument and the District Court is of the opinion that this argument is prima facie well-founded, the District Court may decide not to commit the accused for trial without a preliminary inquiry, but instead to hold a preliminary inquiry, so as to avoid putting a person on trial before an Assize Court without sufficient evidence justifying such a course.

I have formed the above opinion on the basis, inter alia, of what seems to me to be the proper construction of section 3 of Law 42/74 and in the light of the provisions of section 1 of the Criminal Justice Act, 1967, in England, which, though they are not to be found in our Law 42/74 and are not, therefore, to be treated as being applicable in Cyprus, do indicate by way of useful example what are the elements which might lead a District Court in Cyprus to refuse, under section 3 of Law 42/74, to commit for trial without holding a preliminary inquiry; and this view of mine as regards the manner of the proper application of legislation such as Law 42/74 is strengthened by what is stated in relation to the Criminal Justice Act, 1967, in England, in Halsbury's Statutes and Halsbury's Laws, supra.

Counsel who appeared before me in the present proceedings on behalf of the Republic has, indeed, agreed that the District Court in a case such as the present one had a discretion to decide, under Law 42/74, whether or not a preliminary inquiry was to be held.

Before, however, the District Court there did not appear counsel on behalf of the Republic but a police prosecuting

officer who invited the District Court to find that there was sufficient evidence justifying the committal of the applicants for trial; and, in the end, as it appears from the relevant decision of the District Court, dated 12th May 1983, the District Court held that Law 42/74 left unaffected its discretionary powers under section 93(h) and 94 of Cap. 155 and proceeded to examine the evidence before it for the purpose of applying, and it actually did apply, the said two sections on the basis of the written summaries of evidence which were placed before it pursuant to the provisions of Law 42/74.

But, in my opinion, once the District Court decided not to hold a preliminary inquiry under section 92 of Cap. 155, it could not apply at all sections 93(h) and 94 of Cap. 155, because such sections are only applicable if there is held a preliminary inquiry under section 92 of Cap. 155.

I agree with counsel for the applicants that what, in effect, has happened in the present case is that, in actual fact, a preliminary inquiry was held, not on the basis of oral evidence, but on the basis only of the written summaries of evidence which were produced as envisaged by section 3(b) of Law 42/74; and, in my view, such a course was not lawfully open, under Law 42/74, to the District Court.

Also, it might be observed at this stage, that once sections 93(h) and 94 of Cap. 155 were not applicable the provisions of Article 30 of the Constitution, which were relied on by counsel for the applicants, were not applicable, either.

It follows from the foregoing that on the face of the relevant decision of the District Court, as well as on the face of the proceedings before such Court as a whole, there appear errors of law as to the mode of application of Law 42/74, because though sections 93(h) and 94 of Cap. 155 were not at all applicable they were nevertheless applied by the District Court; and as a result of such errors of law the District Court acted in excess of the powers vested in it by means of Law 42/74.

Consequently, I have to issue the orders of certiorari applied for by the applicants and to quash their sub judice committal for trial by the Assize Court.

The effect of issuing, as aforesaid, orders of certiorari is not, of course, the acquittal of the applicants as accused persons in the particular criminal proceedings; and they, therefore, are still liable to be prosecuted afresh, in respect of the offences in relation to which they were charged before the District Court, either by means of a preliminary inquiry or by virtue of the procedure under Law 42/74; and if the latter course is adopted then the District Court will have to decide whether or not to commit them for trial without holding a preliminary inquiry.

I should, further, make it clear, before concluding, that the orders of certiorari which I have issued in this case, entail only the quashing of the committal for trial of the applicants and not of any of their co-accused, too, who have not applied, also, for orders of certiorari; nor have I quashed by the just issued orders of certiorari the discharge of the co-accused of the applicants who was not committed for trial by the District Court, since counsel for the Republic did not apply for an order of certiorari quashing his discharge.

In the light of all the relevant considerations I have decided not to make any order as to the costs of these applications.

Applications granted with no order as to costs.