1983 August 27

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF AN APPLICATION BY IROULLA G. PANTELIDOU FOR ORDERS OF MANDAMUS AND OF CERTIORARI.

(*Application No.* 5/77).

Criminal Procedure—Question of law reserved for the opinion of the Supreme Court—Section 148 *of the Criminal Procedure Law, Cap.* 155*—Discretion of the trial Court—This is not a proper case in which to dictate to the trial Court, by means of prerogative orders of mandamus or certiorari, how to exercise its discretionary powers.*

Reasoned judgment—Sufficiency of reasoning depends largely on the circumstances of each particular case—Rulings that prima facie case made out against accused in a criminal trial—Section 74(1)(*b*) *and* (*c*) *of the Criminal Procedure Law, Cap.* 155*—Even if Article* 30.2 *of the Constitution is applicable to such rulings, having in mind their interlocutory nature, and reading them together they are "reasoned" in the sense of such Article.*

Criminal Procedure—Trial in criminal cases—Prima facie case—Section 74(1)(*b*) *and* (*c*) *of the Criminal Procedure Law, Cap.* 155*—Ruling calling upon accused to defend herself—Should not amount, in any way, to a final pronouncement as regards her guilt or innocence—Unless it is found that no prima facie case has been made out against the accused sufficiently to require her to make a defence.*

Certiorari—Mandamus—Discretion of the Court—Rulings calling upon accused to defend herself in a criminal trial—No excess of jurisdiction, or refusal to exercise jurisdiction—And no error of law which is apparent on the face of the record—Not a proper case in which to quash by means of an order of certiorari the said rulings or to make an order of mandamus—Moreover this is not an instance which comes within the category of cases in which certiorari issues as a matter of course "ex debito justitiae".

The applicant and another person were tried by the District Court of Limassol on a charge-sheet containing 36 counts. After the close of the case for the prosecution Counsel for both accused submitted that the Prosecution did not prove a prima facie case against their clients sufficiently to require them to make their defence.

Thereupon the Court ruled* that "both accused should be called upon to make their defence on all the counts they are charged except on counts Nos. 80, 196 and 242". Thereafter Counsel for the applicant complained that the above ruling was not duly reasoned and stated that if there is no expansion of the ruling he proposed to ask the Court to state a case for the opinion of the Supreme Court. The trial Judge gave a second ruling** whereby he dismissed the application for expansion of his first ruling and proceeded again to call upon the accused to defend themselves on the counts they were called upon in the first ruling.

Upon an application for

(a) An order of mandamus requiring the trial Judge to decide whether or not he accepts certain legal arguments which were put forward at the close of the case for the prosecution by counsel for the applicant regarding admissibility of evidence.

(b) An order of certiorari quashing the alleged failure of the trial Judge to give a reasoned decision, at the close of the case for the prosecution, as to whether or not he accepts the aforementioned arguments of counsel for the applicant.

(c) An order of mandamus requiring the trial Judge to reserve as a question of law for the opinion of the Supreme Court, under section 148 of the Criminal Procedure Law, Cap. 155, the correctness of his alleged failure to pronounce on the aforesaid legal arguments, and an order of certiorari quashing his refusal to reserve for the opinion of the Supreme Court such question of law.

* The ruling is quoted in full at p. 669 post.
** The second ruling is quoted at pp. 669-670 post.

Held, (1) that bearing in mind the principles that should guide the exercise of the discretionary powers of a trial Court in reserving a question of law under section 148 of Cap. 155 on the application of an accused person, this is not a proper case in which to dictate to the trial Court, by means of prerogative orders of mandamus or certiorari how to exercise such discretionary powers and, therefore, the said orders cannot be made as applied for by the applicant.

(2) That the sufficiency of reasoning depends largely on the circumstances of each particular case and, bearing in mind inter alia, the interlocutory nature of the two rulings, this Court is of the view that when they are read together they must be found to contain sufficient reasoning for the purpose for which they were given, and, thus, this Court is not prepared to hold that, even if Article 30.2 is applicable to them, they are not "reasoned" in the sense of such Article.

(3) That at the stage of a criminal trial to which paragraphs (b) and (c) of subsection 1 of section 74 of Cap. 155 relate the decision to be given by the trial Court should not amount in any way to a final pronouncement as regards the guilt or innocence of the accused unless, of course, it is found that no prima facie case has been made out against the accused sufficiently to require him to make a defence, that it is obvious from his complained of rulings that the trial Judge went through the arguments advanced by counsel for the applicant, as well as by the prosecuting officer, and examined the relevant parts of the evidence that had been commented on by them and without making any finding as to the credibility of any witness—as he indeed, ought not to have made—he reached the view that the applicant should be called upon to make her defence, that, consequently, the trial Judge, in acting as he has done at that particular stage of the trial, has not acted in excess of his jurisdiction, nor has he refused to exercise his jurisdiction, nor has he acted in a manner resulting in an error of law which is apparent on the face of the record, and that, therefore, this is not a proper case in which to quash by means of an order of certiorari either or both of his two rulings concerned.

(4) That, in any event, this is not an instance which comes within the category of cases in which certiorari issues as a matter

of course "ex debito justitiae" (see, in this respect, Halsbury's Laws of England, 4th ed., vol. 1, paras. 160 to 162, pp. 156, 157); and that, as, therefore, the making of an order of certiorari would be discretionary this Court would not, in the exercise of its discretion, after having taken into account all relevant factors, have been inclined to grant an order of certiorari in the present case even if there existed—(and in fact there does not exist)—a ground entitling it in law to do so.

(5) That also, on the basis of what has already been stated, there is no proper reason for making an order of mandamus; that in any case the granting of the remedy of mandamus is discretionary (see Halsbury's Laws of England, 4th ed., vol. 1, para. 91, p. 112) and this Court would not be prepared to grant such an order directing, in effect, the trial Judge to make, at the stage of calling upon the applicant to make her defence, specific findings as regards admissibility of evidence or as regards any other matter on which the trial Judge did not have to pronounce for the purpose of the proper application of the provisions of section 74(1)(c) of Cap. 155; accordingly the application must fail.

Application dismissed.

Cases referred to:

Police v. *Georghiades* (1983) 2 C.L.R. 33 at pp. 38, 50;

Neumeister Case (European Court of Human Rights, decided on 29.6.1968);

Wemhoff Case (European Court of Human Rights, decided on 29.6.1968);

Ringeisen Case (European Court of Human Rights, decided on 16.7.1971);

Huber v. *Austria* (Decisions and Reports of European Commission of Human Rights, Vol. 2, p. 11);

Hatti v. *Federal Republic of Germany* (Decisions and Reports of the European Commission of Human Rights, Vol. 6, p. 22);

Haase v. *Federal Republic of Germany* (Decision and Reports of the European Commission of Human Rights, Vol. 11, p. 78);

In Re Constantinou (1983) 1 C.L.R. 410;

Attorney-General of the Republic v. *Enimerotis Publishing Co. Ltd.* (1966) 2 C.L.R. 25 at p. 30;

Katsaronas v. *Police* (1973) 2 C.L.R. 17 at p. 35;

Petsas v. *Republic* (1973) 2 C.L.R. 84 at p. 86;

Fournaris v. *Republic* (1978) 2 C.L.R. 28 at p. 37;

Neophytou v. *Police* (1981) 2 C.L.R. 195 at p. 198;

Pioneer Candy Ltd. v. *Stelios Tryfon & Sons Ltd.* (1981) 1 C.L.R. 540 at p. 541;

Papageorghiou v. *HjiPieras* (1981) 1 C.L.R. 560 at p. 563;

Hambou v. *Michael* (1981) 1 C.L.R. 618 at p. 619;

Azinas v. *The Police* (1981) 2 C.L.R. 9 at pp. 52–57;

Attorney-General of the Republic v. *Morphitis* (1975) 1 C.L.R. 138.

Application.

Application for an order of mandamus requiring the trial judge who is hearing a criminal case in which the applicant is an accused to decide whether or not he accepts certain legal arguments which were put forward at the close of the case for the prosecution by Counsel for the applicant regarding admissibility of evidence.

G. Cacoyiannis, for the applicant.

A. Frangos, Senior Counsel of the Republic, with *G. Constantinou*, Counsel of the Republic, for the Republic.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By means of this application, of which the scope was somewhat limited during its hearing, the applicant seeks, in effect, an order of mandamus requiring the trial Judge, who is hearing a criminal case in the District Court of Limassol, in which the applicant is one of the accused, to decide whether or not he accepts certain legal arguments which were put forward at the close of the

case for the prosecution by counsel for the applicant regarding admissibility of evidence.

Also, the applicant seeks an order of certiorari quashing the alleged failure of the trial Judge to give a reasoned decision, at the close of the case for the prosecution, as to whether or not he accepts the aforementioned arguments of counsel for the applicant.

Furthermore, the applicant seeks an order of mandamus requiring the trial Judge to reserve as a question of law for the opinion of the Supreme Court, under section 148 of the Criminal Procedure Law, Cap. 155, the correctness of his alleged failure to pronounce on the aforesaid legal arguments, and an order of certiorari quashing his refusal to reserve for the opinion of the Supreme Court such question of law.

When the applicant was granted leave to file the present application the relevant criminal proceedings were stayed by the order granting such leave, but it was made clear that counsel for the prosecution, as well as counsel for the other accused—Andreas Agathocleous—were at liberty to apply to this Court for any order that they might deem necessary in relation to the stay of proceedings.

At the time when the criminal proceedings were stayed by this Court there had been reached the stage at which the trial Judge had decided, under section 74(1)(c) of Cap. 155, to call upon both accused to make their defence and the co-accused of the applicant (who is accused 1 in the case) elected to make, and did make, an unsworn statement from the dock, whereas the applicant (who is accused 2 in the case) did not elect what course to adopt but obtained leave to file her present application and, thus, secured a stay of the criminal proceedings against her.

Naturally, in view of the nature of this application, its hearing, which eventually turned out to be quite lengthy, was concluded as expeditiously as it was feasible in the circumstances; and relatively soon after judgment had been reserved I had prepared a draft of my judgment, but it was not delivered then because a most unfortunate misunderstanding occurred due to which I was erroneously given the impression that it was not necessary

to deliver my judgment as the criminal proceedings concerned were to be discontinued for other reasons.

Nothing happened, as the years went by, to free me from such misunderstanding, especially as none of the other parties to the criminal case in question took any procedural step to expedite the delivery of my reserved judgment or to set aside the order staying the criminal proceedings, as they were perfectly entitled to do, particularly in view of the terms on which, as already stated, such proceedings had been stayed. Nor was an application filed by them, after the judgment had remained reserved for more than six months, for any order that the Supreme Court might have deemed fit to make under the Civil Procedure (Amendment) Rules of Court, 1965.

Then, recently, during a check by the Registry of this Court of all pending applications for prerogative orders it was discovered that there was nothing in the file of this case indicating that it was no longer necessary to deliver the reserved judgment because the criminal proceedings in question were discontinued and the case was fixed for mention on the 18th June 1983 in order, as was expected, to record formally the discontinuation of such proceedings. It was thus discovered that the information about the discontinuance of the criminal proceedings was erroneous and that it is still necessary to deliver the reserved judgment in this case.

As regards the regrettable delay that has been thus caused to the determination of the criminal charges against the applicant and her co-accused I feel duty bound to mention that it might, depending on the further course and outcome of the criminal proceedings concerned, give rise to the issue of whether or not there has occurred a violation of Article 30.2 of the Constitution.

The said Article is closely similar, in this respect, to Article 6(1) of the European Convention on Human Rights 1950, which, after its ratification by means of the European Convention on Human Rights (Ratification) Law, 1962 (Law 39/62), is applicable in our Republic (see, inter alia, *Police* v. *Georghiades*, (1983) 2 C.L.R. 33, 38, 50).

It is useful, therefore, to bear in mind, too, relevant case-law of the European Court of Human Rights (such as the *Neumeister*

and *Wemhoff* cases, decided on 29th June 1968, and the *Ringeisen* case, decided on 16th July 1971) and of the European Commission of Human Rights (such as the cases of *Huber* v. *Austria*, Decisions and Reports, vol. 2, p. 11, *Hatti* v. *Federal Republic of Germany*, Decisions and Reports, vol. 6, p. 22, and *Haase* v. *Federal Republic of Germany*, Decisions and Reports, vol. 11, p. 78).

What I have just stated hereinabove should not, in the least, be taken as prejudging, in any way, whether or not there might be found that in this case there exists a violation of Article 30.2 of the Constitution and Article 6(1) of the European Convention on Human Rights.

I shall proceed, now, to deliver my reserved judgment in the present case:

I shall deal, first, with the part of this application by means of which there are sought orders of mandamus and certiorari regarding the refusal of the trial Judge to reserve a question of law, under section 148 of Cap. 155, for the opinion of the Supreme Court: Bearing in mind the principles that should guide the exercise of the discretionary powers of a trial Court in reserving a question of law under the said section 148, on the application of an accused person, I am of the opinion that this is not a proper case in which to dictate to the trial Court, by means of prerogative orders of mandamus or certiorari, how to exercise such discretionary powers and, therefore, the said orders cannot be made as applied for by the applicant (see, inter alia, in this respect, *In re Constantinou*, to be reported in the (1983) 1 C.L.R.).*

As regards the orders of mandamus and certiorari which are being sought in relation to the alleged failure of the trial Judge to give a reasoned decision on legal arguments of counsel for the applicant, at the close of the case for the the prosecution, it is useful to quote, first, the two complained of rulings of the trial Judge, as a result of which the present application has been filed.

In rejecting the submissions of counsel for both accused that no prima facie case had been made out against them the trial Judge said the following:

* Now reported in (1983) 1 C.L.R. 410.

"After the case for the Prosecution closed, advocates for both Accused submitted to the Court that the Prosecution did not prove a prima facie case against their clients and so they should be acquitted. Both advocates for the Accused and the Prosecuting Officer, addressed the Court in lengthy arguments.

I had the opportunity to go through these arguments as well as the relevant parts of the evidence they commented upon, and without making any findings as to the credibility of any witness, I am of the opinion that both Accused should be called upon to make their defence on all the counts that they are charged except on counts Nos. 80, 195, and 242. Full reasons for the above will be given in the judgment".

Then, after counsel for the applicant had complained that the above ruling was not duly reasoned the trial Judge went on to give a further ruling which reads as follows:

"After a Ruling was given calling upon both Accused to make their defence on 33 out of 36 counts, Counsel appearing for Accused 2 submitted that the Ruling was not in compliance with Article 30 of the Constitution in that it was not reasoned and he went on to say that if there is no expansion on the Ruling, he proposes to ask the Court to state the case to the Supreme Court.

Having listened to what Defending Counsel argued, I understand that his complaint is that to some of his submissions, i.e. (i) that evidence against Accused No. 1 should not be evidence against Accused No. 2, (ii) Accused 2 should not be called upon to make her defence for cheques issued to the order of Kyprianides and signed by the complainant, or when she was abroad, and (iii) that some counts were bad for duplicity, no explanation or reasoning, as he described it, was given. The ruling itself is very clear and the message conveyed is that the advocates' submissions were not sustained by the Court and that is why the Accused were called upon to make their defence.

Moreover, I am of the opinion that such complaints can properly be raised by way of appeal if the Accused are convicted and should not be dealt with at this stage

either by an explanation or interpretation of the Ruling, or by way of question of law reserved for the opinion of the Supreme Court.

In the case of *The Republic* v. *Georghios Theocli Kalli* (No. 1), reported in (1961) C.L.R. p. 266, at p. 286 it was decided that interruptions in criminal cases are highly undesirable and such proceedings during the trial should be discouraged as tending to cause inconvenience, delay and embarrassment is the administration of criminal justice.

As regards the three counts on which the Accused were not called upon to make their defence, that creates no problem to the Accused as they have no obligation to make their defence on those counts, and so no further explanation is required.

For all the above reasons, the application is hereby refused and both Accused are called upon to defend themselves on the counts they were called upon in the Ruling".

It is pertinent to quote, next, paragraphs (b) and (c) of subsection (1) of section 74 of Cap. 155, which read as follows:

"(b) at the close of the case for the prosecution, the accused or his advocate may submit that a prima facie case has not been made out against the accused sufficiently to require him to make a defence and, if the Court sustains the submission, it shall acquit the accused;

(c) at the close of the case of the prosecution, if it appears to the Court that a prima facie case is made out against the accused sufficiently to require him to make a defence, the Court shall call upon him for his defence and shall inform him that he may make a statement, without being sworn, from the place where he then is, in which case he will not be liable to cross-examination or give evidence in the witness box, after being sworn as a witness, in which case he will be liable to cross-examination as a witness;"

It has been contended by counsel for the applicant that it was the duty of the trial Judge to give—at the close of the case for the prosecution and in dealing with the submission that no

prima facie case had been made out against the applicant—a reasoned decision regarding the admissible evidence on which he relied in deciding to call on the applicant to make her defence; and counsel for the applicant went on to argue that because of the failure of the trial Judge to give such a decision as regards the admissible, at that stage, evidence the trial Judge has acted without jurisdiction in calling upon the applicant to make her defence; and it was contended further that, consequently, there has occurred an error of law which is apparent on the face of the record. Also, counsel for the applicant has submitted that the ruling, by means of which the applicant was called upon to make her defence, was not "reasoned" as required by Article 30.2 of the Constitution.

In deciding whether or not the said ruling is "reasoned" it is proper to look at it together with the subsequent ruling which was given by the trial Judge when it was complained by counsel for the applicant that the Judge's first ruling was not duly reasoned.

I would like to point out, at this stage, that I have some doubts as to whether the term "judgment" in the context of Article 30.2 of the Constitution can be construed as meaning anything else but a final judgment about the outcome of a particular case; and if only a final judgment is covered by the provisions of Article 30.2 it then follows that the aforementioned two interim rulings need not have been reasoned. On the other hand, in the case of *The Attorney-General of the Republic* v. *Enimerotis Publishing Co. Ltd.*, (1966) 2 C.L.R. 25, 30, there is to be found a dictum of Vassiliades J., as he then was, to the effect that a decision of a trial Court concerning the adjournment of the hearing of a criminal case, which obviously is not a final judgment, "must be duly reasoned, as required of all judicial decisions by Article 30.2 of the Constitution". I shall, therefore, proceed to examine, in the light of the above dictum, whether the two rulings in question are "reasoned" as required by Article 30.2.

All our case-law as regards what constitutes sufficient reasoning appears to relate to final judgments; and it is useful to refer, in this respect, to the cases of *Katsaronas* v. *The Police*, (1973) 2 C.L.R. 17, 35, *Petsas* v. *The Republic*, (1973) 2 C.L.R. 84, 86, *Fournaris* v. *The Republic*, (1978) 2 C.L.R. 28, 37, *Neophytou*

v. *The Police*, (1981) 2 C.L.R. 195, 198, *Pioneer Candy Ltd.* v. *Stelios Tryfon & Sons Ltd.*, (1981) 1 C.L.R. 540, 541, *Papageorghiou* v. *HjiPieras*, (1981) 1 C.L.R. 560, 563 and *Hambou* v. *Michael*, (1981) 1 C.L.R. 618, 619.

As it is to be derived from the above case-law the sufficiency of reasoning depends largely on the circumstances of each particular case and, bearing in mind, inter alia, the interlocutory nature of the aforesaid two rulings, I am of the view that when they are read together they must be found to contain sufficient reasoning for the purpose for which they were given; and, thus, I am not prepared to hold that, even if Article 30.2 is applicable to them, they are not "reasoned" in the sense of such Article.

In relation to the aspect of the adequacy of the reasoning set out in the two rulings in question, as well as in connection with the remaining complaints of the applicant—with which I am going to deal next in this judgment—it is, I think, essential to bear in mind what is the exact nature of the stage of a criminal trial to which paragraphs (b) and (c) of subsection (1) of section 74 of Cap. 155 relate; and, in this respect, very useful guidance is to be derived from the judgment in *Azinas* v. *The Police*, (1981) 2 C.L.R. 9, 52-57 (and see, too, Archbold on Pleading, Evidence and Practice in Criminal Cases, 41st ed., paras. 4-385 to 4-387, pp. 416-419, and Halsbury's Laws of England, 4th ed., vol. 11, para. 290, p. 167).

At this stage of a criminal trial the decision to be given by the trial Court should not amount in any way to a final pronouncement as regards the guilt or innocence of the accused (see, inter alia, *The Attorney-General of the Republic* v. *Morphitis*, (1975) 2 C.L.R. 138); unless, of course, it is found that no prima facie case has been made out against the accused sufficiently to require him to make a defence.

It is obvious from his complained of rulings that the trial Judge went through the arguments advanced by counsel for the applicant, as well as, by the prosecuting officer, and examined the relevant parts of the evidence that had been commented on by them; and then, without making any finding as to the credibility of any witness—as he, indeed, ought not to have made—he reached the view that the applicant should be called

upon to make her defence; and the fact that he did not call upon the applicant and her co-accused to defend themselves on three counts indicates that he examined the evidence against the two accused in relation to each one of the many counts that were preferred against them.

Consequently, I am of the opinion that the trial Judge, in acting as he has done at that particular stage of the trial, has not acted in excess of his jurisdiction, nor has he refused to exercise his jurisdiction, nor has he acted in a manner resulting in an error of law which is apparent on the face of the record, and, therefore, I am not satisfied that this is a proper case in which to quash by means of an order of certiorari either or both of his two rulings concerned.

In any event, this is not an instance which comes within the category of cases in which certiorari issues as a matter of course "ex debito justitiae" (see, in this respect, Halsbury's Laws of England, 4th ed., vol. 1, paras. 160 to 162, pp. 156, 157), and as, therefore, the making of an order of certiorari would be discretionary I would not, in the exercise of my discretion, after having taken into account all relevant factors, have been inclined to grant an order of certiorari in the present case even if there existed—(and in fact there does not exist)—a ground entitling me in law to do so.

Also, on the basis of what I have already stated, I cannot see any proper reason for making an order of mandamus. In any case the granting of the remedy of mandamus is discretionary (see Halsbury's Laws of England, 4th ed., vol. 1, para. 91, p. 112) and I would not be prepared to grant such an order directing, in effect, the trial Judge to make, at the stage of calling upon the applicant to make her defence, specific findings as regards admissibility of evidence or as regards any other matter on which the trial Judge did not have to pronounce for the purposes of the proper application of the provisions of section 74(1)(c) of Cap. 155.

For all the foregoing reasons the present application is dismissed, but without any order as to its costs.

Application dismissed with no order as to costs.