

1985 November 11

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 155.4  
OF THE CONSTITUTION,

AND

IN THE MATTER OF THE APPLICATION OF CHARA-  
LAMBOS PSARAS, NOW IN CUSTODY AND UNDER-  
GOING TRIAL BY THE ASSIZE COURT OF FAMAGUSTA  
FOR THE ISSUANCE OF WRIT OF PROHIBITION,

AND

IN THE MATTER OF THE HEARING OF CRIMINAL  
CASE No. 3455/85 BEFORE THE ASSIZE COURT OF  
FAMAGUSTA.

(Application No. 86/85).

*Criminal Procedure—Accused’s intention to challenge during  
his trial before the Assize Court the validity of the warrant  
of his arrest issued in the course of the investigation into  
the commission of the offence by a Judge who is sitting  
as a member of the Assize Court—The consideration of* 5  
*the validity of the warrant is not an appeal from a deci-  
sion of the Judge who issued it.*

*Bias, likelihood of—The test is this: Would a reasonable and  
fair minded person, sitting in Court and knowing all the  
relevant facts, have a reasonable suspicion that a fair trial* 10  
*for the applicant was not possible?*

*Constitutional Law—Constitution Arts. 35, 30.2 and 11.*

*The European Convention of Human Rights, Arts. 1 and 6.2.*

*The Criminal Procedure Law, Cap. 155 s. 18(1).*

By this application the applicant applies for - 15

- (a) An order of prohibition prohibiting the Assize Court of Famagusta from further proceeding with the hearing of Criminal Case No. 3455/85 against the applicant; and,

(b) In the alternative, a writ of prohibition prohibiting H. H. Y. Constantinides, S.D.J., from further proceeding and/or participating in the hearing of the said criminal case against the applicant.

5 The applicant is one of the accused undergoing trial before the Assize Court of Famagusta sitting at Larnaca for offences involving narcotic drugs. In the course of the investigation into the commission of the offences the applicant was arrested pursuant to a warrant issued by H. H. Y.  
10 Constantinides S.D.J. After his arrest he made a statement to the Police. He thereafter gave other statements as well.

Counsel for the applicant argued that the validity of the warrant of arrest is of crucial importance to the defence in the sense that if the applicant's arrest was illegal  
15 the statements given by him to the Police would not be admissible evidence.

It was submitted that the determination of the validity of the warrant is an appeal from the Judge who issued it and that a likelihood of bias cannot be excluded, though  
20 counsel did not in the slightest dispute the personal integrity of the Judge who issued the warrant

*Held*, dismissing the application (1) The purpose of the exclusionary rule, which excludes evidence obtained in violation of the human rights safeguarded by the Constitution from being admitted in a criminal trial is to deter—  
25 to compel respect for the constitutional guarantees in the only effectively available way—by removing the incentive to disregard it.

(2) It is well settled that a Judge who took part in the hearing which resulted in any order or decision under  
30 appeal is excluded from sitting as a Court at Appeal. In view of the Cyprus jurisprudence on the matter the decision in *R. v. Lovegrove* [1951] 1 All E.R. 804 is not applicable in Cyprus.

35 In the present case the consideration of the validity of the warrant of arrest is not, on any view, an appeal from a decision of the Judge who issued it. It is an incidental issue to the admissibility of evidence which by itself is

in the circumstances of this case as presented before the Court a legal issue.

(3) The test for bias is this: Would a reasonable and fair minded person, sitting in Court and knowing all the relevant facts, have a reasonable suspicion that a fair trial for the applicant was not possible? The test is not subjective but objective. 5

The notion of impartiality of the Courts which determine the civil rights and obligations and the criminal charges against a person is enshrined and safeguarded by Article 30.2 of the Constitution which corresponds to Article 6.1 of the European Convention on Human Rights. This embodies the maxim that "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the Courts must inspire in the public in a democratic society. It is no doubt desirable that all Judges like Caesar's wife should be above suspicion. 10 15

On the whole Judges in this country do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. 20

The issue of warrants of arrest by Judges of the District Courts, who have limited territorial jurisdiction, is almost of daily occurrence and nonetheless due to the aforesaid qualifications of our Judges, our system worked satisfactorily though the same Judge on occasions has to consider the legal validity of the warrant he had issued in the course of the trial that ensues. 25

*Application dismissed.* 30  
*No order as to costs.*

**Cases referred to:**

- The Police v. Georghiades* (1983) 2 C.L.R. 33;  
*Vassiliades v. Vassiliades*, 18 C.L.R. 10;  
*Rodosthenous v. The Republic*, 1 R.S.C.C. 127; 35  
*The Republic of Cyprus through the Council of Ministers v. Vassiliades*, (1967) 3 C.L.R. 82;

*R. v. Lovegrove* [1951] 1 All E.R. 804;

*Economides and Another v. The Police* (1983) 2 C.L.R. 301;

5 *Kritiotis v. The Municipality of Paphos* (1983) 3 C.L.R. 1460;

*Regina v. Barnsley Licensing Justices* [1960] 2 Q.B. 167;

*HjiCosta v. Anastasiades* (1982) 1 C.L.R. 296;

*Vrakas v. The Republic* (1973) 2 C.L.R. 139;

*Razis and Another v. The Republic* (1983) 3 C.L.R. 309.

10 **Application.**

Application by Charalambos Psaras for an order of prohibition prohibiting the Assize Court of Famagusta from further proceeding with the hearing of Criminal Case No. 3455/85 against the applicant.

15 *Chr. Pourgourides*, for the applicants.

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

*Cur. adv. vult.*

20 STYLIANIDES J. read the following decision. By this application the applicant applies for -

- (a) An order of prohibition prohibiting the Assize Court of Famagusta from further proceeding with the hearing of Criminal Case No. 3455/85 against the applicant; and,
- 25 (b) In the alternative, a writ of prohibition prohibiting H. H. Y. Constantinides, S.D.J., from further proceeding and/or participating in the hearing of the said criminal case against the applicant.

30 The applicant is one of a number of accused undergoing trial before the Assize Court of Famagusta sitting at Larnaca for offences involving narcotic drugs. Their trial on information commenced on 30.9.85.

In the course of the investigation into the commission of the offences a warrant of arrest of the applicant was issued by H. H. Y. Constantinides, S.D.J. Pursuant to the said warrant the applicant was arrested. After his such arrest he made a statement to the Police. He thereafter gave other statements as well. 5

It was argued on his behalf before me that the validity of the warrant of arrest would be challenged before the Assize Court as its validity is of crucial importance for the defence in the sense that if the arrest of the applicant were illegal, then in the circumstances of the case the statements given by him to the Police would not be admissible evidence. The validity of the warrant will be considered and decided upon by the Assize Court composed of a President, the judicial officer who issued the warrant and a District Judge. 10 15

It was submitted that the determination of the validity of the warrant is an appeal from the Judge who issued it and that no one can be a Judge of his own cause. Furthermore a likelihood of bias cannot be excluded though counsel for the applicant did not in the slightest dispute the personal integrity of the Judge who issued the warrant. 20

In *The Police v. Georghiades*, (1983) 2 C.L.R. 33, it was held that evidence obtained in violation of the human rights safeguarded by the Constitution is evidence illegally obtained and not admissible. There is no room for exercising any discretion by any Court in admitting it. 25

Article 35 of the Constitution provides that the legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of Part II of the Constitution providing for the fundamental rights and liberties. 30

The Republic of Cyprus by ratifying the European Convention on Human Rights has undertaken by means of Article 1 of the said Convention to secure to everyone within its jurisdiction the rights and freedoms defined in section 1 of the Convention. 35

The exclusionary rule, which excludes evidence which

is wrongfully obtained from being admitted in a criminal trial, is calculated to prevent, not to repair; its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing  
5 the incentive to disregard it.

The material part of Article 11 of the Constitution provides that every person has the right to liberty and security of person and no person shall be deprived of his liberty save in the cases therein enumerated and as provided by  
10 law.

Under s. 18(1) of the Criminal Procedure Law, Cap. 155, any Judge may issue a warrant for the arrest of any person in all cases in which he considers that such warrant is necessary or desirable, provided that no warrant of arrest  
15 shall be issued unless the grounds on which it is applied for are supported by oath.

It is well settled that a Judge who took part in the hearing which resulted in any order or decision under appeal is excluded from sitting as a Court of Appeal. No  
20 Judge shall sit upon the hearing of an appeal in an action tried before him or upon an appeal from a judgment or order made by him or to which he was a party whether concurring or dissenting—(*Vassiliades v. Vassiliades*, 18 C.L.R. 10, 21; *L. Rodosthenous v. The Republic*, 1 R.S. C.C. 127; *The Republic of Cyprus through the Council of Ministers v. Christakis Vassiliades*, (1967) 3 C.L.R. 82).  
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The decision of the English Court of Criminal Appeal in *R. v. Lovegrove*, [1951] 1 All E.R. 804, that on an application or appeal to the Court of Criminal Appeal  
30 there is, as a general rule, no objection to the trial Judge sitting as a member of the Court to hear the application or appeal, in view of the aforesaid Cyprus jurisprudence is not applicable.

The second ground on which the application is based is  
35 that there is a likelihood of bias on the part of the Judge who issued the warrant.

By now the test for bias is settled—(See *Economides and Another v. The Police*, (1983) 2 C.L.R. 301; *Kritiotis*

v. *The Municipality of Paphos*, (1983) 3 C.L.R. 1460). It is this: Would a reasonable and fair minded person, sitting in Court and knowing all the relevant facts, have a reasonable suspicion that a fair trial for the applicant was not possible?

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It is not actual or real bias but a likelihood of bias. The test is not subjective but objective. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the Judge sits—(*Regina v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167, 187).

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The notion of impartiality of the courts which determine the civil rights and obligations and the criminal charges against a person is enshrined and safeguarded by Article 30.2 of the Constitution which corresponds to Article 6.1 of the European Convention on Human Rights. This embodies the maxim that “justice must not only be done, it must also be seen to be done”. What is at stake is the confidence which the courts must inspire in the public in a democratic society. It is no doubt desirable that all Judges like Caesar’s wife should be above suspicion.

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A Judge in a given case must be excluded where there is a legitimate reason to doubt whether he offered the guarantees of impartiality to which every accused person is entitled. Any matter which a reasonable man would consider as tending to make it difficult for a Judge to bring to the consideration of a case a mind entirely unaffected by personal interest in the result, or relationship to any party thereto or by having expressed a concluded view upon the case, constitutes incapacity in respect of that Judge. Though sensitive to the views of the parties on the delicate subject under consideration, it would be injudicial and wrong in principle to make the composition of the Court dependent on the whims of the parties—(*Hji-Costa v. Anastassiades*, (1982) 1 C.L.R. 296).

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In *Pantelis Vrakas v. The Republic*, (1973) 2 C.L.R. 139, the Supreme Court held that a Judge who held the P.I. and committed the accused for trial was not disqualified from sitting on the Bench as a member of the Assize Court trying the case.

In *Razis and Another v. The Republic*, (1983) 3 C.L.R. 309, it was held that the pronouncement on a legal issue should not disqualify a Judge from entertaining the same legal question or questions in a subsequent case whether that be between the same parties or other parties. If a different view was taken, there would be hardly Judges available to try cases as time and again the same legal issues come up for determination by the Courts, and there is the further safeguard of the right of appeal.

In the present case the consideration of the validity of the warrant of arrest is not, on any view, an appeal from a decision of the Judge who issued it. It is an incidental issue to the admissibility of evidence which by itself is in the circumstances of this case, as presented before this Court, a legal issue. The Assize Court is not sitting as an Appeal Court from a decision of one of its members. On the whole Judges in this country do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. By this I should not be taken that I accept the idea that a man by merely taking the oath of office as a Judge, he ceases to be human and strips himself of all predilections and becomes a passionless thinking machine.

The issue of warrants of arrest by Judges of the District Courts, who have limited territorial jurisdiction, is almost of daily occurrence and nonetheless due to the aforesaid qualifications of our Judges, our system worked satisfactorily though the same Judge on occasions has to consider the legal validity of the warrant he had issued in the course of the trial that ensues.

By not acceding to the application for an order of



prohibition the applicant is not left without a remedy. The way to the Appeal Court is always open to him.

In view of the aforesaid I would dismiss this application for the issue of an order of prohibition.

Application dismissed with no order as to costs.

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*Application dismissed.  
No order as to costs.*