1986 September 25

[A. LOIZOU, DEMETRIADES, PIKIS, JJ.]

DEMETRAKIS HADJISAVVAS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(Application in Criminal Appeal No. 4670).

Jurisdiction—Appellate Jurisdiction—Criminal Appeal—Application that such appeal be heard and determined by the Full Bench—Whether the Bench nominated under s. 11(3) of the Administration of Justice (Miscellaneous Provisions) Law 33/64 has competence to deal with the substance of the application—Question answered in the affirmative.

The applicant, who filed an appeal against his conviction and sentence for premedidated murder, filed the present application, whereby he applied that his appeal be heard and determined by the Full Bench of the Supreme Court.

The Supreme Court at its regular administrative meeting of the 1.11.86 decided to refer the said application to the above bench, consisting of A. Loizou, Demetriades and Pikis, JJ. for consideration.

In the course of the hearing the following preliminary point was raised, namely whether the above Bench has competence to deal with the said application or whether the application should have been entertained in the first place by the Full Bench of this Court.

Held, on the preliminary point Pikis, J. dissenting* (1) The preliminary point can briefly be disposed of by

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* Pikis, J. held that there is no jurisdiction to refer the appeal to the Full Bench and consequently dismissed the application.

referring to section 11(3) of Law 33/64 by virtue of which the Supreme Court nominated this Bench to exercise the appellate jurisdiction vested in it. The said nomination was made in respect of a four month period and in fact for three consecutive such periods. The Supreme Court has considered the present application and referred it to this Bench under s. 11(3) as a matter relating to the appellate jurisdiction of this Court. Consequently, this Bench has competence to deal with the substance of the application.

(2) A *nomination under* s. 11(3) does *not* take away the power of the Court or of the Bench engaged in a case to take over or be enlarged for the purpose of hearing an appeal, if need arises or it is proper so to do. Needless to add that the Supreme Court does not divest itself of its overall jurisdiction and this is how s. 11(3) has been implemented in practice.

Order accordingly.

Cases referred to:

Republic v. *Vassiliades* (1967) 3 C.L.R. 83;

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

Anastassiades v. *The Republic* (1977) 2 C.L.R. 97;

Kouppis v. *The Republic* (1977) 2 C.L.R. 361;

Orphanides v. *Michaelides* (1968) 1 C.L.R. 295;

R. v. *Camberwell Green Justices* [1978] 2 All E.R. 377;

A-G. v. *Leveller Magazine Ltd.* [1978] 3 All E.R. 731;

Attorney-General v. *Ibrahim*, 1964 C.L.R. 195;

Pantelides v. *The Republic* (1984) 3 C.L.R. 1271;

Wandsworth London B.C. v. *Winder* [1984] 3 All E.R. 83;

R. v. *Spencer* [1985] 1 All E.R. 673;

Williams v. *Fawcett* [1985] 1 All E.R. 787.

Application.

Application by the appellant that the appeal be heard and determined by the Full Bench of the Supreme Court.

G. Cacoyannis, for the applicant-appellant.

L. Loucaides, Deputy Attorney-General of the Republic, for the respondent.

Cur. adv. vult.

The following judgments were read:

A. Loizou J.: Upon the filing by the applicant/appellant of his appeal from the conviction and sentence by the Assize Court of Nicosia for the offence of premeditated murder, his counsel addressed a letter, —application,— dated 6th August 1985, to the Chief Registrar of this Court that the said appeal be heard and determined by the Full Bench of the Supreme Court for a number of reasons set out in six long paragraphs some of them divided further into subparagraphs. Subsequently an application by summons was filed by the applicant/appellant seeking the same remedy. This is the application, dated 16th September 1985 with which we are seized, as same was considered by the Supreme Court at its regular administrative meeting and referred it to us for determination.

The relevant paragraph 6 of its Minutes No. 796 dated 1st November 1986 reads:-

> "6. *Application dated 6th August 1985 from Advocate G. Cacoyannis for fixing Criminal Appeal No. 4670.*
>
> The Supreme Court decided that the application filed on the 16th September 1985, in Criminal Appeal No. 4670 is to be taken by the Appellate Bench composed of Judges Loizou, Demetriades and Pikis."

The application is based on the inherent jurisdiction and powers of the Supreme Court.

In the course of hearing this application it was thought necessary that it should be decided by way of a preliminary point whether this Bench has competence to deal with this application for the trial of the case by the Full Bench or whether the application should have been entertained in the first place by the Full Bench.

This Court was established, for the reasons set out in its Preamble by the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33 of 1964). Section 3(1) provides that: "For the purpose of having the jurisdiction hitherto exercised by the Supreme Constitutional Court and the High Court continued to be exercised, there shall be established in the Republic a Supreme Court to exercise, subject to the provisions of this law, such jurisdiction." By its section 9 the jurisdiction and powers of the two Courts were vested in this Court.

Section 11 of the said law provides:-

«11.- (1) Η δικαιοδοσία, αι αρμοδιότητες ή εξουσίαι άτινας το Δικαστήριον κέκτηται δυνάμει του άρθρου 9, ασκούνται, υπό την επιφύλαξιν των διατάξεων των εδαφίων (2) και (3) και παντός διαδικαστικού κανονισμού, υπό της ολομέλειας του Δικαστηρίου.

(2) Η πρωτοβάθμιος δικαιοδοσία δι' ής περιβέβληται το Δικαστήριον δυνάμει του ισχύοντος δικαίου και οιαδήποτε αναθεωρητική δικαιοδοσία, περιλαμβανομένης και της δικαιοδοσίας επί εκδικάσεως προσφυγής, γενομένης κατά πράξεως, ή παραλείψεως οιουδήποτε οργάνου, αρχής, ή προσώπου ασκούντος εκτελεστικήν ή διοικητικήν λειτουργίαν επί τω λόγω ότι αύτη αντίκειται προς τας διατάξεις του ισχύοντος δικαίου, ή ότι εγένετο καθ' υπέρβασιν ή κατάχρησιν εξουσίας, δύναται να ασκηθή, τηρουμένου παντός διαδικαστικού κανονισμού, υπό τινος Δικαστού ή Δικαστών ως ήθελε το Δικαστήριον αποφασίσει.

Νοείται ότι τηρουμένου παντός διαδικαστικού κανονισμού χωρεί έφεσις ενώπιον του Δικαστηρίου κατά

των ούτω υπό Δικαστού ή Δικαστών εκδιδομένων αποφάσεων.

(3) Η δευτεροβάθμιος δικαιοδοσία δι' ης περιβέβληται το Δικαστήριον ασκείται, τηρουμένου παντός διαδικαστικού κανονισμού, υπό τριών τουλάχιστον Δικαστών οριζομένων υπό του Δικαστηρίου.

Ούτοι ορίζονται υπό του Δικαστηρίου δια περίοδον τεσσάρων μηνών και εις την αρχήν εκάστης τοιαύτης περιόδου.

And in English it reads:-

"11.- (1) Any jurisdiction, competence or powers vested in the Court under section 9 shall, subject to subsections (2) and (3) and to any Rules of Court, be exercised by the full Court.

(2) Any original jurisdiction vested in the Court under any law in force and any revisional jurisdiction, including jurisdiction on the adjudication of a recourse made against an act or omission of any organ, authority or person exercising executive or administrative authority as being contrary to the law in force or in excess or abuse of power, may be exercised, subject to any Rules of Court, by such Judge or Judges as the Court shall determine:

Provided that, subject to any Rules of Court, there shall be an appeal to the Court from his or their decision.

(3) Any appellate jurisdiction vested in the Court shall, subject to any Rules of Court, be exercised by at least three Judges nominated by the Court.

Each such nomination shall be made in respect of a period of four months at the beginning of such period."

To my mind the matter can briefly be disposed of by

referring to the provisions of subsection 3 of section 11 by virtue of which the Supreme Court has nominated this Bench to exercise the appellate jurisdiction vested in it. The said nomination, in compliance with the aforesaid sub-section, was made in respect of a period of four months and in fact for three consecutive such periods. The Supreme Court, as already seen, considered the present application and assigned it to this Bench to deal with same under Section 11(3) as a matter relating to the appellate jurisdiction of this Court and in particular to Criminal Appeal No. 4670 in respect of the hearing of which and by which Bench it should be heard.

This assignment in my view constitutes, a sufficient in Law authority to deal with it without of course meaning that a nomination under subsection 3 of section 11 of the Law confines the appellate jurisdiction to the Bench of three so nominated for a period of four months. To my mind a nomination under the said section does not take away the power of the Court or of the Bench engaged in a case to take over or be enlarged for the purpose of hearing an appeal if need arises or if it is a proper case to do so in the interests of justice.

Needless to say that the Supreme Court does not divest itself of its overall jurisdiction and competence and this is how the provisions of section 11(3) of the law have been implemented so far in practice.

I have considered the judgments delivered by the Full Bench in the *Republic* v. *Christakis Vassiliades* (1967) 3 C.L.R. 83 and I find nothing incompatible with what was said in that case, in which the issue was the construction of section 11 subsection 2, the reference to subsection 3, being only an ancillary one.

My decision therefore on the preliminary point is that this Court has competence to entertain the present application.

DEMETRIADES J.: I had the advantage of reading the judgment just delivered by my brother Judge A. Loizou. As I am in full agreement with it I have nothing to add.

PIKIS J.: In exercise of the powers vested in it by s. 11(3) of the Administration of Justice (Miscellaneous Provisions) Law 1964 (33/64), the Supreme Court nominated Justices A. Loizou, Demetriades and myself, as the Bench charged with the exercise of the appellate jurisdiction of the Supreme Court under subsection 3 of section 11. The nomination was for three fourmonth successive terms commencing September 1985. By a subsequent decision of the Supreme Court the nomination was extended for another term of four months ending in January 1987.

The composition of the Bench was subject to two qualifications, the following:-

(a) Members of the Full Bench exercising jurisdiction under s. 11(2), incapacitated from sitting in anyone case, would be replaced by members of the appellate bench according to a predetermined order who, in turn, would substitute for the replaced member of the appellate bench and vice-versa.

(b) Members of the Appellate Bench, incapacitated by illness, would be replaced by members of the Supreme Court according to the exigencies of their programme. Appropriate arrangements would be made for their replacement during the period of their temporary incapacitation.

Demetrakis Hadjisavvas was convicted of premeditated murder and sentenced to life imprisonment. He appealed against conviction. In the notice of appeal numerous issues of criminal and constitutional law are raised, no doubt serious, as questions affecting the liberty of the subject invariably are. By a motion in writing, addressed to the Supreme Court, he applied for the case to be listed for hearing before the Full Bench in view of the gravity of the issues raised, especially their constitutional importance.

Seized of the application the Supreme Court referred it

for consideration to this Bench, directing that it be ".... taken by the Appellate Bench composed of Justices A. Loizou, Demetriades and Pikis". Counsel for the applicant-appellant submitted it is in our power to direct that the appeal be tried by the Full Bench of this Bench with a numerically enlarged composition. In support of his submission he referred to the practice of the Supreme Court, followed over the years, whereby the Full Bench, or an enlarged appellate bench, took cognizance of appeals in serious criminal cases, particularly cases of premeditated murder[1]. A similar practice has been followed in cases involving issues of constitutional importance. Further, the practice of the Court was not limited to cases of the above nature but extended on occasion to appeals raising novel issues, as in the case of *Orphanides* v. *Michaelides*[2].

The existence of the practice to which counsel referred cannot be factually doubted. On the other hand, the jurisdic basis upon which this practice was founded is not explained in any decided cases and so far as we were able to ascertain its compatibility with statutory provisions had never been judicially tested. The validity of the practice falls to be tested in this case. Judicial practice is not a source of substantive law. The practice of the Court is a species of adjective law regulating procedural matters pertinent to the conduct of litigation. It reflects judicial opinion on the way litigation should be conducted on a basis best conducive to the interests of justice. Procedural rules should be kept flexible, consonant with the inherent power of the Court to change and adjust them to serve the ends of justice[3]; whereas the jurisdiction and composition of an appellate Court is a matter of substantive law inamenable to regulation by rules of practice.

Although the practice of the Court here under consider-

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[1] See, Pantelis Vrakas and Another v The Republic (1973) 2 C.L.R 139. Anastassiades v. The Republic (1977) 2 C L.R. 97. Kyriacos Nicola Kouppis v The Republic (1977) 2 C L R. 361

[2] (1968) 1 C.L.R. 295.

[3] (See, inter alia, R. v Camberwell Green Justices [1978] 2 All E.R. 377 (D.C.); and A-G v Leveller Magazine Ltd. [1978] 3 All E.R 731 (DC)).

ation has not been directly in issue in any decided cases, weighty dicta in at least three decided cases suggest it is untenable. The leading case on the framework of the appellate jurisdiction of the Supreme Court in exercise of the powers vested in it by Law 33/64 is that of *Attorney-General* v. *Ibrahim*[1]. The principles evolved in the above case relevant to the issues here under consideration, are the following:-

(i) The events of 1963 and 1964 threatened constitutional order with collapse. In face of that danger it was legitimate to invoke the doctrine of necessity and underpin by appropriate statutory measures constitutional order in the interest of the unimpeded functioning of the State.

(ii) Law 33/64 was such a legislative measure justified by the necessity created by the events of 1963-64, judicially noticed by the Court.

(iii) The exercise of the jurisdiction of the Supreme Court that formerly vested in the Supreme Constitutional Court and the High Court, was regulated by the provisions of Law 33/64. No longer was it necessary for the plenum of the Supreme Court to exercise the jurisdiction of the Supreme Constitutional Court or the appellate jurisdiction of the High Court. The exercise of the appellate jurisdiction of the Supreme Court was regulated by the provisions of subsections 2 and 3 of section 11. It was pointed out that the exercise of the aforementioned jurisdiction by the plenum of the two Courts was peculiarly associated with the constitutional voting rights of the neutral presidents of the two courts. In their absence it was legitimate to assign the exercise of this jurisdiction to divisions of the Supreme Court.

(iv) Constitutional questions need no longer be resolved by the plenum of the Supreme Court. Article 144

[1] 1964 C.L.R. 195.

was to that extent rendered superfluous. Questions of constitutional law became amenable to the jurisdiction of any court of law, determinable as questions of law. That such questions need no longer be determined by the plenum of the Supreme Court is illustrated by the assumption of jurisdiction in the very case of *Ibrahim* by an appellate bench of three, exercising jurisdiction under s. 11(3) to resolve the questions of supreme constitutional importance posed in that case.

The decision in *Republic (Council of Ministers)* v. *Christakis Vassiliades*[1] reinforces the view that the exercise of the appellate jurisdiction of the Supreme Court is solely regulated by the provisions of subsections 2 and 3 of section 11 of Law 33/64. All six members of the Court were agreed about this. Where they differed and opinion was divided was with regard to the meaning of "court" in subsection 2 of section 11. The majority were of opinion, and so it was decided, that the "court" in subsection 2 was not the same as the "court" in subsection 3 and that it comprised all members of the Supreme Court other than those incapacitated from sitting in the particular case; that is, the Full Bench of the Supreme Court. On the other hand, appeals from subordinate courts were solely amenable to the jurisdiction of the appellate bench nominated by the Supreme Court in accordance with the provisions of subsection 3 of section 11.

Another case that illuminates the basis upon which jurisdiction is exercised by the Supreme Court under s. 11 of Law 33/64 is that of *Pantelides* v. *Republic*[2]. In that case I was required to decide whether a Judge of the Supreme Court exercising revisional jurisdiction under subsection 2 of section 11 had power to relinquish jurisdiction and adjourn the case for consideration by the Full Bench of the Supreme Court. I refused the application, holding I had no discretion to relinquish jurisdiction. The exercise of revisional jurisdiction was, it was observed, regulated

[1] (1967) 3 C.L.R. 82.
[2] (1984) 3 C.L.R. 1271.

by the provisions of s. 11(2). The law left the determination of the numerical strength of the Court that should try at first instance cases amenable to its revisional jurisdiction, to the Supreme Court. The Supreme Court having directed that such jurisdiction should be exercised by a single member of the Supreme Court, the composition of the Court to try cases under Article 146 at first instance, had been established as ordained by the law and no power vested in any member of the court to modify or alter such composition. The apriori determination of the composition of the court was not only mandatory under the Statute—I observed—but desirable too, in the interest of the impersonal administration of justice, vital for the independence and impartiality of the judiciary. The impersonal composition of judicial bodies is nowadays regarded as a fundamental attribute of the independence, autonomy and impartiality of the judiciary (see Article 28 of the Italian Constitution)[1]. Our statutory provisions regulating the exercise of appellate jurisdiction are not modelled on the statutory provisions of any other country. Consequently, reference to the English statutory provisions and rules made thereunder, concerning the exercise of appellate jurisdiction made, I hasten to add, at the request of the Court, can be of limited assistance. Appellate jurisdiction under English law is the creature of Statute[2] that solely governs the assumption and exercise of it. Equally unnecessary for the same reasons, I consider reference to the rules bearing on the exercise of appellate jurisdiction of the Supreme Court of the U.S.A. characterised by the division between certiorari and "appellate jurisdiction".

The importance attached by the legislature to the apriori determination of the constitution of the Court exercising appellate jurisdiction, is evident from the requirement that the bench should be nominated for a period of no less

[1] (see, the Italian Legal System by L. G. Certoma, p. 162)

[2] See, Supreme Court Acts (1981), Practice Note of the Court of Appeal, Civil Division (1982) 3 All E.R. 376, R.S.C. Ord. 59, Wandsworth London B.C. v. Winder [1984] 3 All E.R. 83, 106 R. v. Spencer (1985) 1 All E.R. 673, Williams v. Fawcett [1985] 1 All E.R. 787)

than four months. As in the case of the exercise of first instance jurisdiction under s. 11(2), the numerical strength of the Court exercising appellate jurisdiction is left to the Supreme Court subject to the statutory qualification that it should comprise no fewer than three members of it. Once nominated and for the currency of the statutory period, only that bench is competent subject to the qualifications earlier mentioned to exercise appellate jurisdiction; subject always to the rule inherent in the exercise of judicial power that hearing of an appeal must be concluded before the same bench.

The constitution of the appellate bench was in no way qualified by reference to the nature of the issues raised on appeal for determination. Whether such qualification could be attached is a matter that does not arise from determination in the present case and for that reason I refrain from expressing any concluded view. Only this bench has jurisdiction to try and determine the appeal under consideration and that includes every matter referable to the appeal or arising thereunder. The constitution of this Court is, as above explained, regulated by statute. Its jurisdiction includes every aspect of the appellate jurisdiction of this Court formerly vested in the High Court of Justice. Certainly, such jurisdiction does not include power to alter or modify the constitution of the Court exercising appellate jurisdiction. Consequently, the Supreme Court rightly referred the determination of the present application to the appellate bench vested with power to determine every aspect of this appeal.

Therefore, the application is dismissed.

A. Loizou J.: In the result the Ruling by majority is that this Court has competence to entertain the present application.

The hearing of the application is fixed on the 29th October 1986 at 9:30 a.m.

Order accordingly.