1988 January 5

[PIKIS J.]

IN THE MATTER OF AN APPLICATION BY OR ON BEHALF OF YIANNAKIS P. ELLINAS AGAINST WHOM A RULING DATED 21.11.1987 WAS GIVEN BY SOTOS STAVRINIDES D.J. IN THE DISTRICT COURT OF LIMASSOL IN CRIMINAL CASE NO. 22444/87

(Application No. 194/87)

Criminal Procedure — Indictable offences — Committal for trial before the Assize Court — The Criminal Procedure (Temporary Provisions) Law 42/74, as amended by Law 44/83 section 3 — Once the two prerequisites, namely certification by the Attorney-General signifying his consent not to hold a preliminary inquiry and furnishing the accused with copies of the statements of the witnesses that the prosecution intends to call, are satisfied, the District Court has no discretion whether to hold or not a preliminary inquiry, but it has to decide whether it should commit the accused for trial or not

Attorney-General — Position of, in the Administration of Justice.

The District Court of Limassol committed the applicant to trial for indictable offences, taking the view that it has no discretion to direct the holding of a preliminary inquiry.

Having obtained leave, the applicant filed this application for an Order of Certioran to quash the committal to trial before the Assize Court.

The issue that calls for determination is the interpretation of section 3 of the Criminal Procedure (Temporary Provisions) Law 42/74, as amended by Law 44/83.

In *Re Economides and Others* (1983) 1 C.L.R. 933 decided before the amendment of the section by Law 44/83 Triantafyllides P. held that the District Court has discretion whether to hold or not a preliminary inquiry, whereas in *Re Argyrides* (1987) 1 C.L.R. 30 Stylianides J. decided that there is no such discretion.

Held, dismissing the application (1) In virtue of section 3 of Law 42/74, as amended, the District Court is vested with power to commit the accused for trial without holding a preliminary inquiry provided that the following prerequisites are satisfied, namely (a) written

certification by the Attorney-General of the Republic signifying his consent that the holding of a preliminary inquiry is not necessary and (b) furnishing the accused or his counsel with copies of the statements of every witness that the prosecution intends to call at the trial The question in this case is whether the Court had discretion to hold a preliminary inquiry, notwithstanding fulfilment of the requisites laid down in s 3

(2) In the light of the case law no exception can be taken on principle or authority to the vesting of power in the Attorney-General to dispense with the holding of a preliminary inquiry

(3) Section 3 does not in terms repeal or amend s 92 of the Criminal Procedure Law, providing for the holding of a preliminary inquiry It merely obviates the need for such a course whenever the prerequisites laid down thereunder are satisfied

The inevitable inference is that by s 3(a) the legislature intended to constitute the Attorney-General, the arbiter of the necessity of holding a preliminary inquiry, and by s 3(b) to establish a substitute for the depositions as a means of apprising the accused of the case he will face at the trial

The law does not in terms make the decision of the Attorney-General as to the non-desirability of holding a preliminary inquiry subject to judicial control Such a power cannot be implied by the concluding words of section 3 namely «to commit the accused to trial without holding a preliminary inquiry» But for the ending part of s 3, the Court would have had no power to commit to trial without a preliminary inquiry Therefore, it can be legitimately inferred that the discretion vested in the Court thereby is directly related to the committal of the accused to trial without a preliminary inquiry

(4) The discretion imported by the concluding part of s 3 is referable to the justification of committal The Court must decide whether the material made available under s 3(b) replacing the deposition, that is, the statements of witnesses stripped of any contradictions, raises a probable presumption of the guilt of the accused

Application dismissed
No order as to costs

Cases referred to

Re Ioannis Ktimatias (1977) 2 C L R 296,

Constantinides v The Republic (1978) 2 C L R 337,

Re Economides (1983) 1 C.L.R. 933;

Re Argyrides (1987) 1 C.L.R. 30;

Xenophontos v. Repubic, 2 R.S.C.C. 89;

Police v. Athienitis (1983) 2 C.L.R. 194;

Constantinides v. Ekdotiki Eteria (1983) 1 C.L.R. 348;

Papaphilippou v. the Republic 1 R.S.C.C. 62;

Republic v. Zacharia, 2 R.S.C.C. 1;

Police v. Hondrou, 3 R.S.C.C. 82;

Rodosthenous and Another v. The Police, 1961 C.L.R. 48;

Georghadji and Another v. Republic (1971) 2 C.L.R. 229;

Attorney - General v. Pouris and Others (1979) 2 C.L.R. 15;

Hinis v. The Police (1963) 1 C.L.R. 14.

Application.

Application for an order of certiorari for the purpose of quashing the ruling of a Judge of the District Court of Limassol (Stavrinides, D.J.) dated 21st November, 1987 (Criminal Case No. 22444/87) whereby the holding of a preliminary inquiry was found to be inexistent.

G. Cacoyannis with M. Malachtou (Mrs.), for the applicant.

Cl. Antoniades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. At issue is the interpretation and effect of s. 3 of the Criminal Procedure (Temporary Provisions) Law 42/74*, particularly the discretion of the Court, if any, to order the holding of a preliminary inquiry, notwithstanding fulfilment of the conditions stipulated for in paras. (a) and (b) of s. 3. On an application to the District Court of Limassol for the committal of Yiannakis P. Ellinas to trial on a number of indictable offences, the Court ruled it had no discretion to direct the holding of a preliminary inquiry taking the view that the discretion vested in the Court by virtue of s. 3 of the law is

* *Amended by Law 44/83.*

confined to an assessment of the effect of the statements of witnesses with a view to deciding whether they contain sufficient material to commit the accused to trial before the Assize Court.

Following the leave of the Court, the application here under review was filed challenging the validity of the decision of the Court whereby jurisdiction to examine an application for the holding of a preliminary inquiry was found to be inexistent. And an order is sought to quash that decision by means of a writ of certiorari in exercise of the powers vested in the Supreme Court by para. 4 of Art. 155.

Section 3 of Law 42/74 provides that notwithstanding the provisions of s. 92 of the Criminal Procedure Law, the District Court is vested with power to commit the accused to trial provided the conditions envisaged by paras. (a) and (b) of the law are satisfied. They are (a) written certification by the Attorney-General of the Republic signifying his consent that the holding of a preliminary inquiry is not necessary, and (b) furnishing the accused or his counsel with copies of the statements of every witness that the prosecution intends to call at the trial. Provided the above requisites are satisfied «the Court is possessed of power to commit the accused to trial without holding a preliminary inquiry». Evidently, the foremost object of the law is to provide an alternative procedure to a preliminary inquiry as a necessary prelude for the committal of the accused, in the interest of speed in the transaction of judicial business.

The crucial question, as earlier indicated, is whether the Court has discretion to hold a preliminary inquiry notwithstanding fulfilment of the requisites laid down in s. 3. Learned counsel for both sides drew attention to conflicting authority bearing on the subject under examination and made reference to other cases tending to throw light on the question under review.

We may begin by noting that s. 3 of Law 42/74 has passed the test of constitutionality posed in the cases of *Re Ioannis Th. Ktimatias** and *Constantinides v. Republic***. The Supreme Court decided that s. 3 does not breach the provisions of either Art. 12 or 30 in that neither safeguards a right to a judicial inquiry into the justification of the charge as a condition precedent to committal to

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* *(1977) 2 C.L.R. 296.*

** *(1978) 2 C.L.R. 337.*

trial. The preliminary inquiry is the offspring of statute and as such may be modified or be done away with or suspended by the legislature, as was done by the enactment of Law 42/74. The conflicting judicial pronouncements on the ambit and effect of s.3, with particular reference to the discretion vested in the Court thereby, stem from the decisions of the Supreme Court in the exercise of its original jurisdiction in the cases of *In Re Economides and Others** and *In Re Arghyrides***. In the former case Triantafyllides, P., adopted the view that the discretion of the Court to commit is not solely dependent on the sufficiency of the evidence and for that reason committal is not «an automatic function»***. Elsewhere in his judgment the learned Judge espouses the view that discretion vests in the Court to hold a preliminary inquiry «so as to avoid putting a person to trial before the Assize Court without sufficient evidence justifying such course».

In the latter case (*In Re Arghyrides*) Stylianides, J., took a contrary view of the effect of s. 3. The learned Judge decided that discretion to dispense with a preliminary inquiry vests with the Attorney-General, a function compatible with the quasi judicial nature of his duties under the Constitution acknowledged in *Xenophontos v. Republic*****. Therefore, the discretion of the Court is limited to deciding whether the material disclosed in the statements warrants the committal of the accused to trial.

In *Criminal Procedure in Cyprus****** an analysis is made of the provisions of s. 3, albeit without authoritative caselaw guidance and such assistance as may be gained from the ponderation of the implications deriving from the application of the law in practice. The authors, myself being one, took the view that residual discretion vests in the Court to hold a preliminary inquiry notwithstanding the consent of the Attorney-General to dispense with it.

I have given serious consideration to every aspect of the question under examination aided, I must acknowledge, by the illumination of the issue by the elaborate arguments of counsel.

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* *(1983) 1 C.L.R. 933.*

** *(1987) 1 C.L.R. 30.*

*** *Page 940.*

**** *2 R.S.C.C. 89.*

***** *By Loizou and Pikis (1975), pages 177, 178.*

Mr. Cacoyannis submitted, as I comprehended his argument, that the Court should not suffer an encroachment on the exercise of judicial power, drawing attention to my dissenting judgment in *Police v. Athienitis** and the judgment of the Court in *Constantinides v. Ekdotiki Eteria***. Consequently, only in the face of compelling language should the Court construe the law as depriving the Court of discretion to direct the taking of the judicial course of holding a preliminary inquiry. Far from putting the matter beyond controversy, counsel argued that s. 3 supports the vesting of residual discretion in the Court to hold a preliminary inquiry, if this course is found to be in the interest of justice; especially if the view is taken that the elicitation of the case for the prosecution prior to trial is conducive to the achievement of that end.

For his part counsel for the Republic adopted the exposition of the law made by Stylianides, J., in *Re Arghyrides* (supra) as a conclusive answer to the submissions raised on behalf of the applicant. The legislature could appropriately vest, he argued, power in the Attorney-General to determine the necessity of steps preliminary to the trial, a function well within the nature of the duties entrusted to him by the Constitution (Art. 113).

From the early days of the Republic it was recognized that decisions of the Attorney-General pertaining to the prosecution of offenders constitute acts interwoven with the administration of justice and as such are subject only to judicial control; such decisions being procedurally binding on the Court***. It emerges from the caselaw that the determination of the forum of trial and matters relevant thereto are not judicial acts stricto senso, though subject to judicial control by the Courts, the vestees of the judicial power and overseers of the judicial process****. The Criminal Procedure Law confers on the Attorney-General a variety of powers relevant to the determination of the forum and framework

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* *(1983) 2 C L R 194, 234*

** *(1983) 1 C L R 348, 355, 356*

*** *Republic v. Charalambos Zachana, 2 R S C.C 1*

**** *Papaphilippou v Republic 1 R S C C 62, Police v Hondrou 1 R S C C 82, Lefkios Rodosthenous & Another v The Police (1961) C.L R. 48 Photini Polycarpou Georghadji & Another v Republic (1971) 2 C L R 229, Attorney-General v Pouns and Others (1979) 2 C.L.R 15*

of the trial. Of especial relevance is s. 155(b) (Cap. 155) putting it in the power of the Attorney-General to remit for summary trial a case committed to the Assize Court for trial. Similarly s. 24(2) of the Courts of Justice Law (14/60), makes provision for the summary trial of offences with the consent of the Attorney-General otherwise triable on information.

The interpretation of the aforementioned statutory provisions and their effect within the framework of the exercise of judicial power came up for consideration in *Ioannis Georghiou Hinis v. The Police**. The Court was immediately concerned to decide whether s. 155(b) of the Criminal Procedure Law was impliedly repealed by the provisions of s. 24(2) of the Courts of Justice Law. In the process the Court debated the nature of the power conferred on the Attorney-General by s. 155(b) of Cap. 155 and its place in the administration of justice. The Court decided that s. 24(2) of Law 14/60 left unaffected the application of s. 155(b). Of immediate relevance are the observations of the Court that s. 155(b) far from being a provision obnoxious to the liberty of the subject, is an enactment intended to help in the proper and speedy administration of justice. The dicta in *Hinis* support the proposition that the determination of the forum of the trial within the context of the judicial power as laid down in the Constitution (Articles 30.1 and 152.1), is a procedural matter and as such its determination may be assigned to the Attorney-General. Consequently, no exception can be taken on principle or authority to the vesting of power in the Attorney-General to dispense with the holding of a preliminary inquiry. We must, therefore, turn to s. 3 in order to discern as a matter of a judicial interpretation, the ambit of the discretion entrusted to the Court.

Section 3 does not in terms repeal or amend s. 92 of the Criminal Procedure Law providing for the holding of a preliminary inquiry. It merely obviates the need for such a course whenever the prerequisites laid down thereunder are satisfied, namely (a) certification by the Attorney-General of the non-necessity of holding a preliminary inquiry, and (b) supplying the accused or his counsel with the statements of prosecution witnesses. The inevitable inference is that by s.3 (a) the legislature intended to constitute the Attorney-General, the arbiter of the necessity of

* *(1963) 1 C.L.R. 14.*

holding a preliminary inquiry, and by s. 3(b) to establish a substitute for the depositions as a means of apprising the accused of the case he will face at the trial. For the reasons earlier indicated, no objection can be raised to the conferment of power upon the Attorney-General to determine the necessity for a preliminary inquiry. Similarly, it was in the power of the legislature to prescribe an alternative process of informing the accused of the case he will be required to meet at his trial. The law does not in terms make the decision of the Attorney-General as to the non-desirability of holding a preliminary inquiry subject to judicial control.

What we must determine is whether this power should be implied by the concluding words of s. 3 bestowing power upon the Court to commit the accused to trial without a preliminary inquiry. But for the ending part of s. 3, the Court would have had no power to commit to trial without a preliminary inquiry. Therefore, we can legitimately infer that the discretion vested in the Court thereby is directly related to the committal of the accused to trial without a preliminary inquiry. The power vested in the Court cannot be extricated or be read separately from the introductory part of s. 3 defining the circumstances under which a preliminary inquiry may be dispensed with. Read in this light, the meaning and effect of s. 3 is to empower the Court to commit the accused to trial despite *the absence of a preliminary inquiry; provided the conditions set* down in s. 3(a) and (b) are satisfied. The power given to the Court by the concluding part of s. 3 is intended to save the power to commit notwithstanding the non-holding of a preliminary inquiry. While the discretion imported thereby is referrable to the justification of committal, the law does not repeal s. 94 of the Criminal Procedure Law, Cap. 155, and does not abrogate the standard governing committal, namely, probable presumption of the guilt of the accused. The Court must decide whether the material made available under s. 3(b) replacing the depositions, that is, the statements of witnesses, stripped of any contradictions, raises a probable presumption of the guilt of the accused.

I conclude that the Judge inquiring into the case has no discretion to order the holding of a preliminary inquiry when the requisites of s. 3(a) and (b) of Law 42/74 are satisfied. The function of the Court is confined to ascertaining whether the material disclosed in the statements warrants the committal of the accused to trial. The application is dismissed. No order as to costs.

Application dismissed.
No order as to costs.