1988 May 25

(PIKIS J)

IN THE MATTER OF ARTICLE 155.4 OF THE CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION BY (a) CHARALAMBOS A.AEROPOROS (b) ANDREAS A AEROPOROS AND (c) ANTONIS AEROPOROS, FOR AN ORDER OF CERTIORARI AND/OR PROHIBITION,

AND

IN THE MATTER OF THE HEARING OF CRIMINAL CASE 23069/87 WHICH IS PENDING FOR HEARING BEFORE THE ASSIZE COURT OF LIMASSOL.

(Application No. 9/88).

Prerogative Orders—Certiorari—A discretionary remedy—Delay in applying—Consequences.

Prerogative Orders—Certiorari—Procedure to be followed—Governed by old English Rules in force prior to Independence—Justification of adoption of this rule—Failure to comply with such English Rules—Effect.

Prerogative Orders—Certiorari—Procedure to be followed—No affidavits in addition to those filed in support of the application for leave may be filed without the leave of the Court.

Prerogative Orders—Certiorari—It cannot be made for purposes of dictating to a Court how to decide a matter within its jurisdiction—Admissibility of evidence—A matter within the province of a trial Court.

Criminal procedure—Search Warrants/Warrants of Arrest—Presumption of regularity.

Prerogative Orders—Certiorari—Warrants of arrest/Search Warrants—Insufficiency of evidence justifying their issue—Whether review by certiorari possible—Doubtful.

Having obtained the necessary leave, the applicants applied for an order of prohibition, restraining the Assize Court from proceeding with a criminal case against the applicants, and for an order of certiorari to quash two warrants of arrest issued on 11 7 87 and four warrants of search issued between the 15th and 24th of July, 1987

The applications were prompted by a ruling of the Assize Court in another case issued in December, 1987 that such Court was not empowered to examine the validity of such warrants The ultimate purpose of the applications was to prevent the Assize Court from admitting in evidence material recovered by reason of such warrants

It must be noted that (a) In the course of the hearing, the application for prohibition was abandoned, and (b) The applications were not accompanied by the warrants in question duly certified by the Registrar of the District Court, as provided by O 59, r 8 of the Old English Rules

The ground upon which the applicants relied was absence of evidential material justifying the issue of the warrants in question

Held *dismissing the application* (1) Following the abandonment of the motion for the issue of an order of prohibition, the substratum of the application has disappeared with it The essence of the application was to restrain the holding of future proceedings and incidentally thereto to quash the warrants of arrest and search

An order of certiorari is a discretionary remedy Delay to apply is a valid reason for refusing review of the legality of the order challenged

In the absence of any wish on the part of the applicants to challenge the warrants prior to the said ruling of the Assize Court in another case in December, 1987 and the reasons for their wish to challenge them thereafter, the delay is inexcusable

(2) The application for leave to apply for certiorari must be accompanied by an affidavit setting forth the facts relied upon The self same application and affidavit or affidavits must, following leave, be served on the respondents together with the summons

In this case, two further affidavits accompanied the summons without prior leave of the Court.

In any event the allegation as to absence of evidence justifying the issue of the warrant remained unsubstantiated by evidence

(3) The admissibility of evidence is a matter exclusively within the province of a trial Court The quashing of the orders is merely sought for the purposes of forestalling a ruling contrary to the position of the

accused on the admissibility of evidence in pending criminal proceedings This is wholly impermissible and not a valid cause for seeking judicial review by way of certiorari

(4) The argument of counsel that no presumption of regularity operates in favour of a search warrant and warrants of arrest cannot be accepted The burden to establish the existence of error or irregularity liable to render a judicial order invalid lies on the party who propounds the irregularity error or omission

(5) No Rules of Court were ever enacted in Cyprus for the review of judicial action by way of certiorari Before Independence the procedural gap was filled by the provisions of s 51 of the Courts of Justice Law 19/40 making applicable the practice and procedure observed in England No similar provision is to be found in the Courts of Justice Law (14/60)

The Supreme Court has consistently adhered to the rules applicable in England at the time of the introduction of the Constitution

The question in this case is whether non-compliance with particular provisions of English rules relevant to judicial review by way of certiorari can be excused The answer is that a lot will depend on the nature and procedural requirement infringed The production of the judicial warrants and their verification is a prerequisite for the valid exercise of the powers vested in the Court to review judicial acts by way of certiorari Their production and verification is a prerequisite for the valid exercise of the powers vested in the Court to review judicial acts by way of certiorari Their production and verification is essential for the definition of the subject-matter of the proceedings

(6) Although it is unnecessary in this case to answer the question definitively, this Court entertains reservations whether it is feasible in law to found certiorari proceedings for the review of a judicial warrant by reference to the sufficiency of the evidential material that led to the issue of the warrant Different considerations may apply when the warrant is defective on the face of it

Applications dismissed

Cases referred to

R v Newington Licensing Justices [1948] 1 K B 681,

Police v Georghiades (1982) 2 C L R 33,

Merthoja v Police (1987) 2 C L R 227,

Re Malikkides and Others (1980) 1 C L R 472,

R. v I R C ex parte Rossminster Ltd [1979] 3 All E.R 385

I.R.C. v. Rossminster Ltd. [1980] 1 All E.R. 80·

Frangos v Medical Disciplinary Board (1983) 1 C L.R. 256.

Ramadan v. Electricity Authority of Cyprus and Another, 1 R.S.C.C. 49.

Vassiliou and Another v. Disciplinary Committee (1979) 1 C L.R 46

Schmuel v. The Officer in Command Illegal Jewish Immigration Camp Karaolos. 18 C.L.R 158.

Regina v Peterborough Justices ex parte Hicks and Others [1977] 1 W.L.R. 1371;

Queen v. Tillett and Others: Ex Parte Newton and Others. 14 F L R 101.

Application.

Application for an order of prohibition to restrain the Assize Court of Limassol from taking cognizance and hearing Criminal Case No. 23069/87 until the determination of the validity of two warrants of arrest and four warrants of search

Chr. Pourgourides. for the applicants.

Gl Hadjipetrou. for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. In an application entitled «In the matter of the hearing of Criminal Case 23069/87, which is pending before the Assize Court of Limassol», made on 30.12.1987, Triantafyllides, P., as he then was, gave leave to apply for an order of prohibition to restrain the Assize Court of Limassol from taking cognizance of and hearing the aforementioned case until determination of the validity of two warrants of arrest issued on 11th July, 1987, and 4 warrants of search issued between 15th and 24th July, 1987.

Following the leave of the Court, a summons application was made for the issue of an order of prohibition and orders of certiorari respectively. On the directions of Triantafyllides, P., the application was served on the Chief of the Police and the Registrar of the District Court of Limassol. There is no indication in the file

signifying whether the application was brought to the notice of the members of the District Court of Limassol who had issued the impugned warrants.

The application was opposed by the Attorney-General on behalf of the Chief of the Police. The opposition is accompanied by the affidavits of three Police Sergeants who deposed to the facts preceding the issue of the search warrants. The application was listed for directions before Triantafyllides, P., on 21st March, 1988. In view of his impending retirement, on his appointment to the office of Attorney-General of the Republic, the case was mentioned before Malachtos, J. On his directions the hearing of the application was referred to the Supreme Court following an application of the parties that the case be taken by the Full Bench. On 26th March, 1988, directions were given by the Supreme Court that the case be tried by a single member of the Court in view of the express provisions of Art. 155 of the Constitution safeguarding a right of appeal from a decision of the Court in exercise of its original jurisdiction. Furthermore, the case was assigned to me for trial.

In the course of his address counsel for the applicants explicitly stated that the application for the issue of an order for prohibition is abandoned. At the end of the address in support of the application I inquired of counsel whether the application could be proceeded with without amendment of the title, more so in the absence of any certain indication that the application had been brought to the notice of those members of the District Court of Limassol who had issued the warrants; one of whom, it was pointed out served at the District Court of Nicosia at the time that the application was served on the Registrar of the District Court of Limassol. Both counsel agreed that the amendment of the title was necessary and an adjournment was granted in order to facilitate the submission of an application to amend. The application was opposed on the ground that it was not accompanied by the warrants duly verified by the Registrar of the District Court as required by Ord. 59, r.8, of the Rules of the Supreme Court applicable at the time when the Constitution of Cyprus came into effect. A similar requirement is incorporated, counsel pointed out, in the English Rules currently in force*. The

* *See Halsbury's Laws of England, 4th Ed., Vol. 11, para. 1555.*

efficacy of the provisions of Ord 59, r 8, and need for unfailing adherence thereto was stressed in *R v Newington Licencing Justices** Counsel for the applicants did not doubt the applicability of the relevant provisions of the English rules but argued

(a) That the warrants need not be exhibited or verified in the application but at the trial and

(b) The respondents waived the objection that they might be entitled to raise to their omission by failing to raise the matter in their opposition

I invited counsel to wind up their arguments on the merits of the application upon the supposition that the examination of the legality of the warrants was properly at issue by the application that was filed following leave of the Court I adopted this course in order to save time considering that if the proceedings are otherwise viable, it would be difficult to refuse the application to formalize the proceedings in view of the directions given by Triantafyllides, P confining service upon the Registrar of the District Court of Limassol

I have given close consideration to every aspect of the application and the opposition and to the arguments raised in support and against the application The application is doomed to failure for a number of separate and independent reasons -

(1) Following the abandonment of the motion for the issue of an order of prohibition the subs[illegible]atum of the application has disappeared with it The essence of the application was to restrain the holding of fu[illegible]re proceedings and incidentall, thereto to quash the warrants of arrest and search warrants On account of this complexion of the case no attempt whatever was made to explain the delay in applying to quash orders that were made five or more months prior to the application [illegible]l leave to apply to set them aside by way of certiorari The delay is wholly unexplained except to the extent that counsel acknowledged that the application for judicial review was prompted by a ruling of the Assize Court of Limassol in another case in which Mr Pourgoundes appeared, notably, Criminal Case No 10592/87 given on 7th December, 1987 In fact the present proceedings were mounted for the sole purpose of preventing the Assize Court

* *[1948] 1 K B 681*

that will try the charge of premeditated murder upon which the applicants have been committed to trial from admitting in evidence supposedly incriminating material that surfaced in the execution of the warrants. An order of certiorari is a discretionary remedy. Delay to apply is a valid reason for refusing review of the legality of the order challenged. The time element is so essential as to have caused the English legislator to rule out judicial review for the issue of an order of certiorari after the lapse of six months from the communication of the impugned order*. In the absence of proper justification of the delay or more appropriately in the absence of any wish on the part of the applicants to challenge the legality of the orders prior to 7th December, 1987, and the reasons for so wishing to challenge it thereafter, I find the delay to apply inexcusable and on that account I would dismiss the application.

(2) The application for leave to apply for certiorari must be accompanied by an affidavit setting forth the facts relied upon. The self same application and affidavit or affidavits must, following leave, be served on the respondents together with the summons** For the adduction of further affidavit evidence the leave of the Court is required. In this case the summons application was accompanied by two affidavits additional to the one that supported the application for leave without the prior approval of the Court having first been obtained. Leaving this irregularity aside, the affidavits, none of them, disclosed evidence supporting the absence of evidential material justifying the issue of the warrants. The two affidavits to facts, one given by Michalis Aeroporos, a brother of the applicants, and the second by Niki Panteli, a clerk at the office of Mr. Pourgourides, merely contain suppositions suggesting absence of evidence justifying the issue of the warrants and the opinion of counsel as to the consequences that those assumptions would entail in law. There is a total vacuum of evidential material to justify the applications. Such material as we have before us relevant to the issue of the warrants coming from the deponents who made the affidavits accompanying the opposition, refute the suppositions made by the aforementioned witnesses respecting the circumstances under which the orders were made.

** R.S.C. Ord. 53, r.2(2).*

*** Ord. 59, r.6, of the Old Rules of the Supreme Court - Similar provisions appear in the new Rules set out in Order. 53.*

(3) The purpose for which the orders are sought, as counsel acknowledged, is to rule out the possibility of admission before the Assize Court of the evidential material that was recovered following the arrest of the applicants and the search of their premises. If the warrants are quashed, the production of such evidence would, counsel submitted, be admissible on the authority of *Police v. Georghiades**.

The admissibility of evidence is a matter exclusively within the province of a trial Court for reasons that need no further elaboration. The quashing of the orders is merely sought for the purposes of forestalling a ruling contrary to the position of the accused on the admissibility of evidence in pending criminal proceedings. This is wholly impermissible and not a valid cause for seeking judicial review by way of certiorari. As Triantafyllides, P. pointed out in *Re Malikides & Others*** «. . . a prerogative order cannot be made for purposes of dictating to a Court in what manner is to decide on a matter within its jurisdiction». The true purpose of this application is to achieve just that objective, that is, prejudge directly or indirectly an issue of admissibility of evidence in pending criminal proceedings

The principal object of the present proceedings is not to impugn the legality of the orders as such but to indirectly dictate to the Assize Court due to try a case of premeditated murder against the applicants to reject evidence seemingly considered relevant by the prosecution. This is yet another ground for dismissing the application.

(4) The essence of the argument of counsel was that no presumption of regularity operates in favour of a search warrant and warrants of arrest and that in every case in which they are called into question it is for those supporting their validity to justify their issuance by reference to the material that was adduced to support them. The submission is untenable and to my comprehension wrong in law.

It was founded (the above submission) primarily on the decision of the Court of Appeal in *R. v. I.R.C. ex parte Rossminster Ltd****. In the course of argument I did draw the attention of counsel to the fact, that the above decision was reversed on appeal as indeed it

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* *(1982) 2 C.L.R. 33 - See also the recent decision of Merthodja v Police, (1987) 2 C L.R. 227.*
** *(1980) 1 C L.R. 472, at 478*
*** *[1979] 3 All E R 385.*

was - *I.R.C. v. Rossminster Ltd**. Contrary to the position put forward by counsel, it was held that a presumption operates in favour of the lawfulness of a search warrant and the valid exercise of judicial duties. The following passage from the judgment of Lord Diplock accurately depicts the position in law on the subject (p.91, letters D - E):

> «It is not, in my view, open to Your Lordships to approach the instant case on the assumption that the Common Serjeant did not satisfy himself on both these matters, or to imagine circumstances which might have led him to commit so grave a dereliction of his judicial duties. The presumption is that he acted lawfully and properly; and it is only fair to him to say that, in my view, there is nothing in the evidence before Your Lordships to suggest the contrary; nor, indeed, have the respondents themselves so contended».

The burden, therefore, to establish the existence of error or irregularity liable to render a judicial order invalid lies on the party who propounds the irregularity, error or omission. As earlier explained not an iota of evidence was adduced to substantiate allegations of irregularity.

Whereas such affidavit evidence as has been adduced in support of the opposition tends to negative the existence of an irregularity.

The warrants themselves, if at all permissible to consult photostatic copies of them, in the absence of the verification envisaged by Ord. 59, r.8 (Old English Rules), do not reveal any error apparent on the face of them; the foremost ground upon which a Court of law may interfere by way of certiorari with judicial acts.

(5) Failure to comply with the necessary prerequisites for the review of judicial warrants by way of certiorari is fatal to the justiciability of the complaint. The jurisdiction conferred on the Supreme Court by virtue of the provisions of para. 4 of Art. 155 is the jurisdiction vested in the Judges of the High Court of England to issue prerogative writs, a fact duly acknowledged by the Full Bench of the Supreme Court in *Frangos v. Medical Disciplinary Board***. The jurisdiction must, of course, be invoked and applied

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* *(1980) 1 All E.R. 80.*

** *(1983) 1 C.L.R. 256.*

subject to the legal framework established by the Constitution, notably, the exclusive jurisdiction of the Supreme Constitutional Court to review administrative action*.

As far as I am aware no Rules of Court were ever enacted in Cyprus for the review of judicial action by way of certiorari. Before Independence in *Rudolf Schmuel v. The Officer in Command Illegal Jewish Immigration Camp Karaolos*** , it was held that the procedural gap was filled by the provisions of s 51 of the Courts of Justice Law 19/40 making applicable the practice and procedure observed in England. No similar provision is to be found in the Courts of Justice Law (14/60). The above case is instructive in one other respect by underlining that the writ of habeas corpus has more to do with the machinery of justice and less with the substantive law. The same can no doubt be said about the writ of certiorari intended to ensure that justice is administered according to law.

.The absence of rules of the Supreme Court regulating proceedings for the issue of prerogative writs has not prevented the Supreme Court from exercising the jurisdiction specifically assigned to the Supreme Court by virtue of the provisions of Art. 155.4. The Supreme Court has consistently adhered to the rules applicable in England at the time of the introduction of the Constitution. The rationale of this approach may lie in the fact that pregogative writs are legal remedies peculiar to English law, inextricably tied to procedural requirements and safeguards essential for the definition and ventilation of matters at issue; or in the adoption of English rules by the Supreme Court as a matter of proper practice for the effective exercise of the jurisdiction vested by para. 4 of Art. 155. Counsel for the applicants in no way suggested that English Procedural Rules applicable to certiorari proceedings are inapplicable. In fact, the application is fashioned on those rules. What is at issue is whether non-compliance with particular provisions of English rules relevant to judicial review by way of certiorari can be excused. The answer is that a lot will depend on the nature and procedural requirement infringed. Where observance of the rule is fundamental to the exercise of the Court' s jurisdiction, as in this case, the Court will not readily suffer a relaxation. The production of the judicial warrants and their

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* *Hussein Ramadan v. Electricity Authority of Cyprus and Another, 1 R.S.C.C. 49 - Vassiliou & Another v. Disciplinary Committee (1979) 1 C.L.R. 46.*

** *18 C.L.R. 158*

verification is a prerequisite for the valid exercise of the powers vested in the Court to review judicial acts by way of certiorari. Their production and verification is essential for the definition of the subject-matter of the proceedings. For the Court to exercise its jurisdiction in the absence of the above requisites, the failure must be duly accounted for as provided in Ord. 59, r.8. In this case the justification offered by the affidavit of Mr. Agamemnonos, Registrar, District Court of Limassol, is confined to the non-production of the sworn statements that were made in support of the application for the issue of the warrants. Consequently, the failure to produce the relevant warrants duly verified remains unexplained. Nor can I regard the gap as filled by counsel making in the course of the hearing available to the Court photostatic copies of the warrants.

(6) Lastly, I must record my reservations whether it is feasible in law to challenge a judicial warrant of arrest or search exclusively by reference to the evidential material placed before the Court. Such recourse appears to me to smack of an attempt to question the correctness of the order as opposed to its legality, the basis of the jurisdiction upon which judicial orders may be reviewed by way of prerogative writs.

The decision in *Regina v. Peterborough Justices ex Parte Hicks and Others** cited by counsel in support of the proposition that there is amenity to question warrants by reference to evidential material, does not establish any universal rule; nor can the decision be extricated from the special facts that warranted review in that case. A crucial issue in those proceedings was whether the seizure of documents in the hands of solicitors by way of a search warrant was possible in law and whether privilege precluded seizure. It is appropriate to remind of the observations of Lord Scarman in *Rossminster* (supra - p.105, h-j) that:

> «The value of judicial review which is high, should not be allowed to obscure the fundamental limits of the judicial function».

I must acknowledge that in Canada it is common practice to review search warrants by reference to collateral issues**.

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* *[1977] 1 W.L.R. 1371.*

** *See «Civil Actions Against the Police» by Richard Clayton and Hugh Tomlinson.*

It must be noted, however, that in Canada there are specific provisions requiring that a warrant should contain detailed information concerning the material upon which it is based and the circumstances in which it was given. Australian cases too suggest that review by way of certiorari is possible by reference to the evidential material upon which the warrant is founded*

Although it is unnecessary in this case to answer the question here debated definitively, for my part I entertain reservations whether it is feasible in law to found certiorari proceedings for the review of a judicial warrant by reference to the sufficiency of the evidential material that led to the issue of the warrant. Different considerations may apply when the warrant is defective on the face of it.

For all the above reasons the application is dismissed.

Application dismissed.

* *See, inter alia, Queen v Tillett & Others Ex Parte Newton & Others, 14 F L R 101*