

1989 February 15

(BOYADJIS, J.)

IN THE MATTER OF AN APPLICATION BY OR ON BEHALF  
OF YIANNAKIS P. ELLINAS, FOR LEAVE TO APPLY  
FOR AN ORDER OF CERTIORARI AND/OR PROHIBITION

AND

IN THE MATTER OF CRIMINAL CASE NO. 32/89 PENDING  
BEFORE THE DISTRICT COURT OF LIMASSOL.

(Application No. 12/89).

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*Prerogative Orders — Certiorari/Prohibition — Leave to apply for —  
Principles applicable — The concept of a «prima facie case» and of  
«sufficiently arguable case».*

*Constitutional Law — Criminal cases — Right to a hearing within  
reasonable time — Constitution Art. 30.2 — Applicant arrested in 5  
1984 in connection with an investigation of alleged thefts charged for  
the first time in 1989 and was committed for trial by Assizes — Filing  
of information followed — Leave to apply for certiorari and  
prohibition granted.*

*European Convention for the Protection of Human Rights — Criminal 10  
cases — Right to hearing within reasonable time — In the  
circumstances of the case, accused, who complained of  
unreasonable delay in prosecuting him, was granted leave to apply  
for certiorari and prohibition.*

The facts of this case need not be summarized, as they sufficiently 15  
appear in the hereinabove headnotes.

*Leave to apply for certiorari  
and prohibition granted.*

*Cases referred to:*

*Bell v. Director of Public Prosecutions of Jamaica and Another 20  
[1985] 2 All E.R. 585;*

*In re Marouletti (1970) 1 C.L.R. 75;*

*In re Kakos (1985) 1 C.L.R. 250;*

*In the Argyrides* (1987) 1 C.L.R. 23;

*Ellinas v. Republic* (1989) 1 C.L.R. 17;

### **Application.**

Application for leave to apply for an order of certiorari to  
5 remove into the Supreme Court for the purpose of quashing the  
committal of the applicant by the District Court of Limassol for trial  
before the Assize Court in Criminal Case No. 32/89.

G. Cacoyannis, for the applicant.

BOYADJIS J. gave the following judgment. This is an  
10 application filed on behalf of Yiannakis P. Ellinas, of Limassol, for  
leave to issue and serve a motion for orders of certiorari and  
prohibition. The object of the order of certiorari is to remove into  
the Supreme Court for the purpose of its being quashed the  
15 committal of the applicant by the District Court of Limassol for trial  
before the Assize Court of Limassol for the offences charged in the  
charge sheet dated 3rd January, 1984, made by the said District  
Court on 13th January, 1989 in Criminal Case No. 32/89. The  
object of the order of prohibition is to prohibit the Assize Court of  
Limassol from proceeding to arraign and/or to try the applicant in  
20 Criminal Case No. 32/89 on the basis of the said committal made  
by the District Court of Limassol on 13th January, 1989, and/or on  
the information dated 19th January, 1989, filed by the Attorney-  
General on the basis and/or in consequence of the said committal.

The applicant further prays that all proceedings in the said  
25 Criminal Case No. 32/89 before the Assize Court of Limassol be  
stayed until after the hearing of the motion or further order and  
that all necessary and consequential directions be given.

The main ground upon which the said reliefs are sought is the  
contention of applicant's learned counsel that there has been such  
30 an inordinate delay in prosecuting the applicant for the offences  
set out in the information filed by the Attorney-General in Criminal  
Case No. 32/89 following the committal of the applicant on 13th  
January, 1989, that the constitutional and legal rights of the  
applicant under Article 30.2, 33 and 35 of the Constitution and  
35 Art. 6.1 of the European Convention on Human Rights ratified by  
Law 39 of 1962 have been infringed. Therefore, counsel alleged,  
the committal of the applicant for trial before the Assize Court of  
Limassol in Criminal Case No. 32/89 is null and void and of no  
effect whatsoever, its invalidity being an error of law apparent on

the face of the record and/or such committal was made in excess of the Court's jurisdiction or power. Counsel added that the prosecution of the applicant through Criminal Case No. 32/89 amounts, in the circumstances, to an abuse of the process of the Court.

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The facts upon which the application is based are set out in the affidavit sworn by the applicant's wife, filed in support of the application, verifying, inter alia, the brief historical factual background set out in the application. The story therein set out is briefly this:

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Michael brothers filed their complaint with the Police on 8th December, 1984 and the applicant was arrested on 19th December, 1984, on the strength of a judicial warrant. On the same day a large volume of books, files, accounts and documents belonging to Lightning Transport and/or the applicant were seized by the Police and are kept by them till to-day.

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The Police did nothing to start an accounts investigation into the affairs of Lightning Transport and/or the applicant.

By a letter dated 30th March, 1985, eleven bus owners, including the Michael brothers, instructed Petrides and Modinos, a firm of accountants, to carry out a general investigation into the affairs of Lightning Transport purportedly pursuant to section 30 of the Partnership Law, Cap. 116. These accountants carried out their investigation in the Police Station where the books, files, accounts and documents which the Police had seized on 19th December, 1984, were kept. The investigation covered the period between June 1973 and June 1983. The investigation commenced in May 1985 and ended on 2nd July, 1986, without the Police ever urging a speeding up thereof.

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On 4th July, 1986, the applicant was formally charged that between 1.3.1974 and 18.6.1983 he stole the sum of £52,343.-

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Four criminal cases were filed against the accused subsequently to the aforesaid formal charge as follows: Case No. 22444/87 on 18.8.1987; Cases No. 22445/87 and No. 22446/87 on 19.8.1987; and Case No. 23802/87 on 11.9.1987. The applicant was thereby charge with 115 counts of theft which he allegedly committed during the period 1981 - 1983. On 5.2.1988 the District Court of Limassol committed the applicant for trial before the Assize Court next sitting in Limassol in each one of the said four

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criminal cases. Informations were filed only in Cases No. 22446/87 and No. 23802/87.

5 On 26.8.1988 the Assize Court of Limassol found the applicant guilty in Case No. 22446/87 and sentenced him to 18 months' imprisonment. Applicant's appeal against his conviction is still pending before the Supreme Court.

Case No. 23802/87 stands fixed for hearing before the Limassol Assize Court on 20.2.1989.

10 On 3.1.1989 a fifth criminal case was filed against the applicant with the District Court of Limassol. It is Case No. 32/89 and contains 38 counts all charging the applicant with thefts of various amounts belonging to Lightning Transport company, allegedly committed between March 1980 and January 1984. On 13.1.1989 the applicant was committed for trial by the Limassol 15 Winter Assizes.

Pursuant to the aforesaid committal, the Attorney-General filed on 19.1.1989 an Information in the said Criminal Case No. 32/89 charging the applicant with stealing various amounts alleged to be the property of Lightning Transport, during the period between 20 8.3.1980 and 7.9.1983. The case now stands fixed before the Limassol Assizes on 20.2.1989 and the Court shall proceed to hear the case unless it is prohibited by the Supreme Court from doing so through the issue of an order of prohibition.

25 Learned counsel for the applicant submitted that in the determination of any criminal charge against him, the applicant has the right safeguarded by Art 30.2 of the Constitution and also by Art. 6.1 of the European Convention on Human Rights, to a fair and public hearing within a reasonable time; that, in the circumstances of this case, the period to be taken into 30 consideration for verifying whether this provision has been observed begins on 19th December, 1984, when the applicant was arrested by the Police; that, having regard to the criteria for judging the reasonableness of the length of proceedings coming within the scope of Art. 6.1 of the Convention, laid down in a 35 number of decisions reported in the Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights, Volume 2, there has been an unreasonable delay in the prosecution of the applicant for the offences set out in the information in Criminal Case No. 32/89; and that the applicant's 40 constitutional and legal rights having been infringed by the filing of

the Criminal Case No. 32/89 against him, by his subsequent committal for trial before the Limassol Assizes and by the consequent filing by the Attorney-General of the Information in the aforesaid criminal case, the Court has a duty under Art. 35 of *the Constitution to ensure that the applicant's aforesaid rights* 5  
are protected from violation by issuing the prerogative orders applied for.

This is the first case where the reasonableness of the length of criminal proceedings coming within the scope of Art. 30.2 of the Constitution and Art. 6.1 of the European Convention falls to be 10  
considered by this Court. The matter has been considered by the Privy Council in the context of section 20(1) of the Constitution of Jamaica, safeguarding the right to a «fair hearing within a reasonable time», in the case of *Bell v. Director of Public Prosecutions of Jamaica and Another*, [1985] 2 All E.R. 585, 15  
where it was held that:

«(1) Regardless of the position at common law, the express words of s.20(1) of the Constitution of Jamaica plainly sufficed to confer on an accused the right to a fair hearing 'within a reasonable time'. Furthermore, the accused did not have to 20  
show any specific prejudice before being entitled to have charges against him dismissed because of unreasonable delay in bringing him to trial. In determining whether the accused had been deprived of a fair trial by reason of unreasonable delay factors which were relevant were the length of the 25  
delay, the reasons given by the prosecution to justify the delay, the efforts made by the accused to assert his rights and the prejudice to the accused. The assessment of those factors would necessarily vary from jurisdiction to jurisdiction and case to case. In particular, the prevailing system of legal 30  
administration and economic, social and cultural conditions in Jamaica had to be taken into account; *Barker v. Wingo* (1972) 407 US adopted.

(2) On the facts, the operative period of delay began on 7th March, 1979, when the Court of Appeal ordered a retrial. 35  
Although the delay thereafter of 32 months in the Gun Court would not have amounted to an unreasonable delay in a normal trial, given the conditions prevailing in Jamaica, it was unreasonable in the case of the appellant's retrial and it 40  
infringed his right to a fair hearing within a reasonable time. It

followed that the appellant was entitled to a declaration to that effect and that his appeal would be allowed».

At the present stage of the proceedings, that of obtaining leave on an ex parte application for the issue of an order of certiorari and prohibition, the Court need not go into the matter thoroughly because this is not the stage where the applicant's complaint and contentions are examined and determined conclusively.

The remedy is discretionary and the principles applicable to the exercise of the Court's jurisdiction are the same with those applied in England. The question which falls for determination at present is whether the applicant has succeeded in making out a prima facie case sufficiently to justify the granting of leave to him to move this Court in due time to issue the prerogative orders applied for: *In re Loucia Maroulleti* (1970) 1 C.L.R. 75. If an arguable issue arises out of the applicant's submissions which merits an answer, leave should be granted. There are numerous authorities dealing with the concepts of «a prima facie case» and «a sufficiently arguable case». It seems that the two concepts are identical, both demanding the existence on first view of a convincing enough case. See for example *In re Kakos* (1985) 1 C.L.R. 250, *In re Argyrides* (1987) 1 C.L.R. 23, and in *Ellinas v. Republic* (1989) 1 C.L.R. 17.

Having considered the submission of counsel, without at this stage deciding the validity thereof or whether the infringement of the applicant's constitutional or legal rights complained of has taken place or not, I am of opinion that the applicant has succeeded in making out an arguable case deserving an answer and a more thorough consideration after leave is granted as applied for.

Leave is, therefore, granted to apply for certiorari and prohibition. The applicant to file his application within 8 days from to-day. In the meantime the proceedings before the Assize Court of Limassol in Criminal Case No. 32/89 against the applicant shall stay. The stay shall continue to operate until further order if, pursuant to the present leave, the applicant files his application within the time prescribed hereinabove.

*Leave granted.*