

1963
March 11,
1964
Oct. 13

[ZEKIA, P., VASSILIADES, TRIANTAFYLLIDES, MUNIR AND
JOSEPHIDES, JJ.]

—
THE DIRECTOR
OF DEPARTMENT
OF CUSTOMS
AND EXCISE
v.
ANDREAS
MATHEOU
KARIOLOU
AND 2 OTHERS

IN THE MATTER OF ARTICLE 144 OF THE CONSTITUTION

and

IN THE MATTER OF A REFERENCE BY THE DISTRICT
COURT OF FAMAGUSTA IN CRIMINAL CASE No.
4950A/62, ENTITLED :

Between :

THE DIRECTOR OF DEPARTMENT OF CUSTOMS
AND EXCISE,

and

1. ANDREAS MATHEOU KARIOLOU,
2. COSTAKIS KYRIAKOU,
3. ANDREAS MANOLI

(Case No. 308/62)

*Criminal Law—Sponge Fishery Law, Cap. 146—“ Forfeiture ”
of vessel and equipment on conviction—Section 10—“ For-
feiture ” no longer mandatory—In view of paragraph 3 of
Article 12 of the Constitution.*

*Constitutional Law—Article 12.3 of the Constitution—“ Forfei-
ture ” (supra) is part of the punishment and, therefore, is co-
vered by paragraph 3 of Article 12 of the Constitution—Con-
sequently it is no longer mandatory.*

Article 12.3 of the Constitution reads :

“ No law shall provide for a punishment which is dis-
proportionate to the gravity of the offence.”

This is a reference under Article 144 of the Constitution,
made by the District Court of Famagusta, in criminal case
No. 4950A/62, instituted by the Director of Customs and
Excise, against the master of a ship and two members of the
crew, for fishing sponges without a permit, contrary to sec-
tions 7 (a), 10 and 11 of the Sponge Fishery Law, Cap. 146 ;
and for possessing sponges knowing that they were taken
in contravention of the said Sponge Fishery Law.

The difficulty arose when, facing this charge, the respon-
dents were in difficulty as to their plea, not arising from the

facts of the case, but from the provision in section 10 of the Sponge Fishery Law, (*supra*) for the mandatory forfeiture of the vessel and her equipment, in case of conviction.

The question reserved by the District Court is as follows :

“ Whether, having regard to Article 12.3 of the Constitution, section 10 of the Sponge Fishery Law, Cap. 146, is unconstitutional.”

Held, (1) as to the question reserved :

The answer to the question reserved by the District Court, should be in the affirmative, to the extent that it provides “ for a punishment which is disproportionate to the gravity of the offence ”. And such provision should be read and applied in such a manner as to bring it in line with Article 12.3 of the Constitution.

(2) As to the application of the decision in (1) above to the present case : This decision would mean that the provision regarding forfeiture in section 10 should be considered as part of the punishment and, therefore, as coming within the discretion of the trial Judge in considering sentence, who would then make or abstain from making an order for forfeiture as the merits of the case might require for purposes of punishment.

(3) The case now goes back to the District Court under the rules in force.

Order in terms. Case sent back to the District Court under the rules in force.

Reference.

Reference under Article 144 of the Constitution, of the question whether having regard to Article 12 (3) of the Constitution, section 10 of the Sponge Fishery Law Cap. 146, is unconstitutional, made by the District Court of Famagusta, in Criminal Case No. 4950A/62, instituted by the Director of Customs and Excise against the master of a ship and two members of a crew, for fishing sponges without a permit, contrary to sections 7 (a), 10 and 11 of the aforesaid Law and for possessing sponges knowing that they were taken in contravention of the said Sponges Fishery Law.

L. N. Clerides, for the accused.

M. Spanos, Counsel of the Republic, for the Republic.

Cur. adv. vult.

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The Judgment of the Court was delivered by :

VASSILIADES, J. : The case before the Court is reference under Article 144 of the Constitution, made by the District Court of Famagusta, in criminal case No. 4950A/62, instituted by the Director of Customs and Excise against the master of a ship and two members of the crew, for fishing sponges without a permit, contrary to sections 7 (a), 10 and 11 of the Sponge Fishery Law, Cap. 146 ; and for possessing sponges knowing that they were taken in contravention of the said Sponge Fishery Law.

The difficulty, according to counsel for the Respondents arose when, facing this charge, the respondents were in difficulty as to their plea ; a difficulty not arising from the facts of the case, but from the provision in section 10 of the Sponge Fishery Law, for the forfeiture of the vessel and her equipment, in case of conviction.

I need not cite here the whole section. It is sufficient to say that it provides that, in addition to the fine therein prescribed—a fine not exceeding £25, the vessel and equipment thereof, shall be forfeited. The accused had good grounds to fear, counsel added, not unjustifiably perhaps, that had they not raised the question of unconstitutionality, the trial Judge would make an order for the forfeiture of the ship and her equipment in addition to any fine he might think fit to impose, notwithstanding the provisions of Article 12.3 of the Constitution, and regardless of the merits of the case.

Provisions in Cyprus statutes regarding forfeiture or confiscation of articles connected with offences have been considered in numerous cases, both by the Supreme Constitutional Court and the High Court of Justice, prior to the enactment of the present Administration of Justice (Miscellaneous Provisions) Law, 1964. In all such cases, the view taken was that statutory provisions regarding confiscation following upon conviction, were, as a rule, provisions in the nature of punishment and should be interpreted and applied accordingly, subject to the provisions regarding punishment in Article 12.3 of the Constitution.

It is also well settled by now, that in such cases, the trial-court complying with the requirements of Article 188 of the Constitution, should make, in interpreting and applying laws preserved in force under that Article, such modification or adaptation of the law as may be necessary to bring the law in line with the Constitution ; and should read and apply the law subject to the Constitution.

In this case, it would appear that if the Judge proceeded in that manner, no difficulty would arise at all. There is no dispute regarding the factual part of the case ; and no question as to what law is applicable to its facts.

In the circumstances, the answer to the question reserved by the District Court, *i.e.* : “ whether, having regard to article 12.3 of the Constitution, section 10 of the Sponge Fishery Law, Cap. 146, is unconstitutional ”, should be in the affirmative, to the extent that it provides “ for a punishment which is disproportionate to the gravity of the offence ”. And such provision should be read and applied in such a manner as to bring it in line with article 12.3 of the Constitution. This is the unanimous decision of this Court in the question reserved by the District Court.

This decision, applied in the present case, in the light of the line of decisions in cases of similar nature, would mean that the provision regarding forfeiture in section 10 should be considered as part of the punishment, and, therefore, as coming within the discretion of the trial Judge, in considering sentence, who would then make or abstain from making an order for forfeiture as the merits of the case might require for purposes of punishment. The case now goes back to the District Court under the rules in force.

Order in terms.

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