[BELCHER, C.J., LUCIE-SMITH, J., SERTSIOS, J.]

BELCHER, C.J., LUCIE-SMITH, J., SERTSIOS, J. 1927.

Nov. 2.

REX

v.

MUSTAFA HALIL AND ANOTHER.

CRIMINAL PROCEDURE—CASE STATED BY THE ASSIZE COURT, NICOSIA. NO CONDITIONAL INTENTION TO COMMIT—DEPOSITIONS NOT READ TO ACCUSED, EFFECT OF—CYPRUS COURTS OF JUSTICE ORDER, 1927, CLAUSES 105, 106, 118 AND 151, CYPRUS COURTS OF JUSTICE ORDER, 1882, CLAUSES 85, 86 AND 98 COMPARED.

Indictable Offences Act, 1848, compared.

Cyprus Courts of Justice Order, 1927, Clause 105:

"As soon as the Magisterial Court considers that evidence of the guilt of the accused is sufficient to justify his committal has been given, the Court shall declare its intention to commit him for trial, unless he shows cause why he should not be committed."

Idem Clause 106:

"When the Magisterial Court has expressed such conditional intention to commit the accused as aforesaid, the depositions of the witnesses shall be read over the accused, witnesses being present, or not, as may be convenient."

The Crown admitted that these provisions had not been complied with.

HELD: That as the Cyprus Courts of Justice Order, 1927, Clause 151, which gives an accused person certain rights to move *in arrest of judgment does not give him the right to do so* when an irregularity has taken place in proceedings before he was committed for trial, there is no remedy for such an irregularity and the word "shall" in the 3rd line of Clause 105 and in the 3rd line of Clause 106 is advisory and not mandatory.

Question of law reserved by Assize Court of Nicosia.

Solicitor-General for Crown.

Accused in person.

CHIEF JUSTICE: The question reserved for us is whether the Assize Court may properly convict on an indictment which is based on a subsisting order of committal, which order of committal was made without certain of the requirements of the Order in Council of 1882 (Clauses 85 and 86), relative to expression of conditional intention to commit, and reading over of evidence to the accused, being complied with.

I have no doubt that the Court may properly convict in such a case. We cannot go outside the Order in Council, which contains what is virtually a code of Criminal Procedure for Cyprus, and there is no provision in it for an

BELCHER, C.J., LUCIE-SMITH, J., SERTSIOS, J.

REX v. MUSTAFA HALIL AND ANOTHER.

objection of this kind, though it sets out several of what may be called technical defences as being open to the accused. Some hardship may theoretically be involved, but the law seems clear.

The Assize Court of Nicosia-Kyrenia, trying a person accused of an offence not punishable summarily, which came before it on an information based on a committal from a Magisterial Court, has, under Clause 158 of the Cyprus Courts of Justice Order, 1927, reserved for this Court a question of law, namely, whether, it being admitted that the requirements of Clauses 85 and 86 of the Cyprus Courts of Justice Order in Council, 1882 were not fulfilled by the committing Magistrate (inasmuch as neither was any conditional intention to commit expressed nor were the depositions of the witnesses read over to the accused at the stage in the clause indicated, namely after the Magisterial Court, considering that evidence to justify committal has been given, has so declared its conditional intention to commit), the committal order is bad so as to deprive the Assize Court of jurisdiction to try the case.

It appears that it had been for some time the practice to disregard what is laid down in Clauses 85 and 86 of the old Order (Clauses 105 and 106 of the new) so far as relates to an expression of intention and the reading over of the depositions to the accused: the first no doubt because the intention is sufficiently indicated in the question and information immediately given to the accused, and the second perhaps because the reading over to the witnesses under Clause 98 (now Clause 118) was looked upon as rendering a subsequent reading unnecessary.

It may be useful to consider what is the object of Clause 86. It is plainly to give accused an opportunity of showing, after a case has been made against him, why he should not be committed: either by making a statement, or by calling evidence, or it may be by both. It may be that in one or other of these ways the *primâ facie* case established in the Magistrate's opinion by the prosecution will be shaken to such an extent that he decides not to commit at all; and it is indisputable that inasmuch as no one would wish to be tried for an offence if he could avoid it, accused is put to hardship if committed unnecessarily. And he may conceivably also be prejudiced at his trial if, for example, he has not called evidence in the Court below because he did not understand or properly follow the Crown evidence as it was delivered and because it was never read directly to him at all as Clause 86 prescribes. It may be that had he fully understood the case, he could

have met it there and then by the evidence of his most important witness who has died since committal and before trial.

Now the hardship in being committed at all when he need not have been may be disposed of at once by saying that it is not hardship causing him prejudice at the trial. The trial will cure that. As to whether the more serious potential hardship of the second class I have mentioned is to be met by the remedy of annulling the proceedings, here I think the English cases which are cited in the books are of some assistance, though there is none directly on the point that I can discover. But in the many cases where there was failure to take the depositions as they are ordered to be taken by the Indictable Offences Act, 1848, while it has been held that the omission rendered the intended depositions unavailable as such, it seems never to have been suggested that the order of committal was bad although the provisions as to depositions are no less, if no more, mandatory than those corresponding ones contained in our Order in Council. It may be said that the cases are inconclusive, for counsel for the defence would not raise the point, seeing that it would obviously be better policy to shut out prejudicial evidence and go to the jury so, than to take an objection whose only conceivable effect if successful would be to have the case sent back in circumstances which would ensure that no further mistakes were made of which accused could take advantage. But the point, if there was anything in it, would certainly, going as it does, in the form in which it is put to us, directly to jurisdiction, have been taken in England by a Superior Criminal Court itself: one cannot imagine indeed, that the Crown would not bring it forward even if the accused did not.

Now there is no essential difference between the mode in which a committed case gets to trial in England and Cyprus. In Cyprus there is no Grand Jury, and an information filed by the Attorney-General replaces the indictment presented by the Grand Jury: but in essence the procedure is the same; there is a committal order made by a Court which does not try but only enquires, and then there is a formal document bringing the case before the actual trial tribunal.

If it had been intended to leave it open to the accused to object, or to the Court to find, that the committal order was bad and that that fact deprived the Assize Court of jurisdiction, the Order in Council would have said so. For, it must come to this, was the Assize Court acting within its jurisdiction or was it not? But the only defences of

BELCHER, C.J., LUCIE-SMITH, J., SERTSIOS, J.

REX v. MUSTAFA HALIL AND ANOTHER.

what may be called a technical nature, as this is, are the right to raise in arrest of judgment (clause 151) the ground, and the ground alone, that the information discloses no offence, and the special pleas set out in clause 171, of which this is not one. That clause does indeed give a right to object to the jurisdiction, but only on one ground: that the Court has not, and that some other Court has, jurisdiction. But it could never be contended that the Assize Court had no jurisdiction in that sense in this case, in the face of article 55 which gives it jurisdiction to try all charges of offences committed in the Colony: and indeed, it could only have applied it at all, under the former system, when a case was brought in a Court of limited jurisdiction.

Some hardship may sometimes be involved by a committal which comes at the close of irregular proceedings—whether any has occurred here, there is not sufficient material before me to say—but I have come to the conclusion, for the reasons given above, that if a Magisterial Court having jurisdiction to make a committal order has done so, then there is jurisdiction in the Assize Court to try the accused on an information laid on the foundation of that committal even though antecedent to the committal there may have been a failure to comply with the provisions of clauses 105 and 106 such as occurred in this case.

There are or there may be definite legal results of a lower Court's omissions. Statements may in certain cases thereby be rendered inadmissible at the trial: it may be that the Magistrate could be compelled by mandamus to hear evidence or take other procedural steps laid down for him which he was proposing to decline to take; but those cases are not before us and I must limit myself to answering the question asked, as I have done.

LUCIE-SMITH and SERTSIOS, *JJ.*, concurred.

Question answered in affirmative.