CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

IN ITS ORIGINAL JURISDICTION AND ON APPEAL FROM THE ASSIZE COURTS, DIVISIONAL COURTS AND DISTRICT COURTS

[STRONGE, C.J., AND FUAD, J.]

1935. Jan. 11, 12 & 19.

REX

v.

HUSSEIN SADIK KOUNNI.

(*Criminal Application No.* 90/34).

REX v. HUSSEIN SADIK KOUNNI.

Criminal Law — Conviction at Assizes — Appeal — Application more than ten days after conviction to extend time for lodging notice of appeal — Order XXXIII, Rule 3 *— Validity.*

The applicant was convicted at Famagusta Assizes and after the expiration of the ten days allowed by Order XXXIII, rule 3, for giving notice of application for leave to appeal he applied to the Court to extend the time for giving such notice.

Held, such application was necessary inasmuch as rule 3 of Order XXXIII was not repugnant to section 3 of the English Criminal Appeal Act as applied to Cyprus by clause 56 of the Cyprus Courts of Justice Order, 1927, and the rule making body had power under clause 217 of that Order to make such a rule.

Applicant in person.

S. Pavlides (Crown Counsel) for Crown:

To hold rule 3 *ultra vires* would give a right of appeal to everybody convicted since 1927 and *argumentum ab inconvenienti multum valet*—Halsbury's Laws of England (1st Ed.), Vol. 18, p. 211. *Joachim* v. *Christofi*—5 C.L.R., at p. 76, rule 3 does not restrict the right but merely regulates it: *Mahmoud* v. *Irikzadé*, 11 C.L.R., 29, is strongly in my favour. *Reg.* v. *Pawlett*, L.R. 8 Q.B., 491. The rule is *intra vires* the rule-making power conferred by clause 217 of the C.C.J.O., 1927, and is to be read as part of the Order in Council itself. Submit the Court has no power in the circumstances to question its validity: *Institute of Patent Agents* v. *Lockwood*, 1894, A.C., 347; *Yaffe's case*, 1931, A.C., 494.

Cur. adv. vult.

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The following judgment was read by the Chief Justice:—

STRONGE, C.J.: In this case the applicant Hussein Sadik Kounni, who was convicted by the Famagusta Assize Court on the 8th October, 1934, applied to this Court on the 11th December, 1934, to extend the ten days fixed by Order XXXIII, rule 3, as the time within which he is bound to file his notice of appeal. The question before us is

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whether it was competent by rule to so delimit the period for appealing. If it was, then clearly an application to extend the time is necessary, while if it was not, an application to the Court for enlargement is superfluous.

The enactments material to the point under consideration are clauses 56, 217 and 219 of the C.C.J.O., 1927, together with the four sections (3 to 6 inclusive) of the Imperial Criminal Appeal Act of 1907, enumerated in the first-mentioned of these clauses. In the light of these statutory enactments we have further to consider the effect of rules 3 and 4 of Order XXXIII of the Rules of Court, 1927.

Clause 56 of the 1927 Order in Council gives the Supreme Court jurisdiction to hear appeals from Assizes, subject however, to, and in accordance with the provisions of sections 3, 4, 5 and 6 of the Imperial Criminal Appeal Act, 1907. Section 3 of that Act prescribes the instances in which appeals may be taken, while sections 4 to 6 deal with the powers of the Court of Criminal Appeal at the hearing of such appeals. Section 3 does not, however, prescribe any time limit within which the convicted person is bound to bring his appeal or make application for leave to appeal. So far as this section is concerned he is free to do either at any time—at all events within a reasonable period.

Clause 217 of the 1927 Order in Council empowers the making of Rules of Court " for the better execution of the provisions of this Order and in particular for regulating the pleading, practice and procedure " of (*inter alia*) the Supreme Court; Clause 219 enacts that all such rules are to be published in the *Cyprus Gazette* and when so published " shall have the same force and effect for all purposes as if incorporated in the Order in Council."

Coming next to the rules in Order XXXIII for regulating appeals from the Assize Courts: rules 3 and 4 of that Order provide, in effect, that notice of appeal or application for leave to appeal must be given within ten days from the date of conviction which period the Supreme Court may, on application made to it, extend.

Clauses empowering the making of rules " which shall have effect as if enacted in this Act " are to be found in English statutes of the year 1850 and even earlier. The effect of such a provision or formula was considered by the House of Lords in the *Institute of Patent Agents* v. *Lockwood*, 1894, A.C., 347, and the view of Lord Watson, as expressed in the concluding sentence of his speech at p. 365, was: " Such rules are to be as effectual as if they were part of the Statute itself." Lord Herschell in the same case, after pointing out that where no such incorporating formula was employed, a statutory rule, if made within the limits of the rule making powers conferred by the enabling statute, was

as effective as the statute itself, went on to say at p. 360: "But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering," (*i.e.* the incorporating formula) "you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. There is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority but (there is) that very substantial difference if it is open to consideration whether it be so or not." He went on to point out that although the effect of the incorporating formula was that the rules must be treated exactly as if they were in the Act yet if their provisions conflicted with any provision in the Act they must give way to the act.

This decision marked the high water mark of inviolability of orders and rules where the formula was contained in the enabling statute, and it was long regarded as a conclusive decision that such orders and rules were immune from judicial challenge on any ground except that of repugnancy to some section or other of the enabling Act. Now, whether, as seems probable, the effect of the later decision of the House of Lords in Yaffe's case 1931, A.C., 494, is (to use the words of the Lord Morris's dissenting judgment in Lockwood's case) "that a Court of Justice, if of opinion that certain of the rules are not within the rule making powers delegated by the Legislature to the rule making body, can hold such rules inoperative as being *ultra vires*," is a question we are not now called upon to determine, inasmuch as the powers conferred by clause 217 of the 1927 Order in Council to "make rules for the better execution of the provisions of this Order" are, in my judgment, sufficiently wide to empower the making of rules prescribing the time within which applications and appeals are to be made to the Supreme Court. The sole question, consequently, for determination in the present case is whether Order XXXIII, rules 3 & 4, conflict with section 3 of the English Criminal Appeal Act of 1907.

To answer this question we must, in accordance with the House of Lords' decisions referred to, first read section 3 of the 1907 Act, and then read rules 3 and 4 as if they were, in fact, subsequent sections of that Act. Reading them thus, we have one section (section 3) conferring a right of appeal—as of right on a point of law, but in other cases only by leave of the Court. This section is followed by two other sections—in the shape of rules 3 and 4—providing that notice of appeal is to be given within a specified period or such extension thereof as the Court may allow. A comparison of these two rules, masquerading as sections, with section 7 (1) of the Act—which is omitted from

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clause 56 of the 1927 Order—shows that their provisions are identical with those of that section both in regard to the ten days' limit for giving notice of appeal and the extension of that time by leave of the Court. In one respect, indeed, the rules are more lenient, for whereas section 7 does not permit of any extension in the case of a conviction for murder rules 3 and 4 contain no such restriction.

It cannot, with any force or show of reason, we conceive, be said that section 7 (1) of the 1907 Act providing as it does for extension by the Court at any time of the ten days' limit for giving notice of appeal is in any way in conflict with or repugnant to section 3 of that Act. It follows, therefore, that rules 3 and 4 which in Cyprus by force of clause 219 of the 1927 Order takes the place of section 7 cannot, any more than section 7 itself with which they are identical in content, be said to be in conflict with or irreconcilable with section 3. The cases of *Saffet Mahmoud Effendi et al* v. *Ratib Effendi Irikzade*, 11 C.L.R., 29 and *The Queen* v. *Pawlett*, 1872, L.R., 8 Q.B., 491, to which Mr. Pavlides referred us were both cases in which the question for decision was whether rules were *ultra vires* the rule making authority. Being, however, satisfied as has been stated, that rules 3 and 4 in the case now under consideration were within the rule making powers conferred by clause 217 of the Order, consideration of these cases become, in our view, unnecessary and would only, in any event, have been relevant on the assumption that the effect of the decision in Yaffe's case is that notwithstanding a provision that rules are to "have the same force and effect for all purposes as if incorporated in the order" such rules, can, nevertheless be declared by the Courts to be inoperative, if they are adjudged not to be within the rule making power conferred by the legislature.

In the view which we entertain, for the reasons stated, of the effect of rules 3 and 4, the present application for extension of the period for giving notice of appeal is not one which is necessary in consequence of those rules being nugatory.

We have, consequently, felt it is incumbent on us to consider the application on its merits, and having done so, have come to the conclusion that it is unmeritorious and should be refused since the sole ground for requesting the extension is that the applicant mistakenly thought he had given notice of appeal within the ten days whereas in truth and in fact he had done nothing of the kind.

FUAD, J.: I have had the opportunity of reading and considering the judgment of the learned Chief Justice and I agree with the conclusions arrived at by him.

Application refused.