[BOURKE, C.J., ZEKIA AND ZANNETIDES, JJ.]

REGINA,
v.
NICOS SAMPSON GEORGHIADES (No. 1).

(Question of Law Reserved No. 112).

Evidence in criminal cases—Statement by person in custody—Voluntary statement—Taking of statement—Admissibility of oral evidence of statement—Judges' Rules—Criminal Procedure Law, Cap. 14, sections 4, 5 and 8.

Question of law reserved—Application by Attorney-General—Stage of proceedings at which question may be reserved—Criminal Procedure Law, Cap. 14, section 145.

Police Sergeant L. of the Special Branch took part in the arrest of the accused who was taken in custody to the Nicosia Police Station. At the Special Branch office, while the accused was in custody, but was not formally charged with an offence, he wished to volunteer a statement to Sergeant L. who cautioned him and the accused then made a statement. Sergeant L. took what he called " notes " of what the accused said, putting down the exact words spoken by the accused. At the time Sergeant L. knew that an Assistant Superintendent of Police had been sent for to take a statement, and the record which he made was described by L. as being notes which he made of a conversation which the accused had with him pending the arrival of the Assistant Superintendent of Police. Sergeant L. stated that the instructions of the Chief Constable were that all statements were to be taken by a member of the C.I.D. and not by a member of the Special Branch. He did not read over to the accused the record which he made, nor did he ask the accused to sign the record of his statement.

Upon these facts the trial Judge held that the evidence of Sergeant L. as to the contents of the statement was not admissible.

Upon application by the Attorney-General the Court reserved the question as to the admissibility of the statement for determination by the Supreme Court in pursuance of the provisions of section 145 of the Criminal Procedure Law, Cap. 14. Counsel for the accused on the hearing of this question of law raised the preliminary point that it was not open to the trial Judge to reserve the question because he had already given his ruling and decided it.

Held : (1) that the words in section 145 (1) of the Criminal Procedure Law, Cap. 14, " at any stage of the proceedings " could not be limited to mean at any stage of the proceedings *before* the Court of trial decides or rules upon the question of law arising ;

(2) that on the facts found by the trial Judge there was material to permit the inference that Sergeant L. was acting as an investigating officer for the purposes of section 8 of the Criminal Procedure Law, Cap. 14;

(3) that, when an investigating officer cautioned a person in custody who wished to volunteer a statement, under section 8 (2) of the Criminal Procedure Law, such officer was bound to reduce the statement into writing, to read it over to the accused, and invite him to sign it, in compliance with the provisions of section 5 (2) of the same Law (as set out in section 3 of Law 6 of 1953); and that he was precluded from giving oral evidence of the statement;

R. v. *Phaedonos & others* (*ante*, p. 21) considered;

May (1952) 36 Cr. App. R. 91, and *Straffen* (1952) 36 Cr. App. R. 132 distinguished.

(4) that, consequently, the evidence of Sergeant L. as to the statement was not admissible.

Judges' Rules in England distinguished.

Ruling of trial Court affirmed.

Cases referred to:

(1) *A.-G.* v. *Kounnides* (unreported) (Question of Law Reserved No. 109/56 decided on Dec. 6, 1956).

(2) *R.* v. *Phaedonos & others*, at page 21 of this volume.

(3) *R.* v. *Koutalianos & others* (unreported) (Paphos Assizes, May 2, 1955).

(4) *May* (1952) 36 Cr. App. R. 91.

(5) *Straffen* (1952) 36 Cr. App. R. 132.

(6) *R.* v. *Erdheim* (1896) 18 Cox C.C. 355.

(7) *R.* v. *Swatkins* (1831) 4 Car. & P. 548; 172 E.R. 819.

Question of law reserved.

At the Special Court composed of Shaw J. the accused was charged with murder (Case No. 922/57). In the course of the trial a question arose as to the admissibility of a statement made by the accused, and the trial Judge after hearing argument, ruled in favour of the defence and held that the statement was not admissible.

Sir James Henry, Q.C., Attorney-General (*H. Gosling* with him) for the Crown.

Stelios Pavlides, Q.C. (*L. Clerides* and *T. Papadopoullos* with him) for the respondent.

The facts sufficiently appear in the judgment of the Court which was delivered by:

BOURKE, C.J.: In the course of the trial of a charge of murder before the Special Court composed of a Judge, a question arose as to the admissibility in evidence of a statement made by the accused. After hearing argument the learned trial Judge ruled in favour of the defence and held that the statement was not admissible in view of the provisions of section 8 of the Criminal Procedure Law, Cap. 14. Upon application by the Attorney-General the Court reserved the question for determination by this Court in pursuance of the peculiar provisions of section 145 of the Criminal Procedure Law, Cap. 14, which reads as follows:

> "145. (1) Any Court exercising criminal jurisdiction may, and upon application by the Attorney-General shall, at any stage of the proceedings, reserve a question of law arising during the trial of any person for the opinion of the Supreme Court.
>
> (2) In every such case the President of the Assize Court or the trial Judge, as the case may be, shall make a record of the question reserved with the circumstances upon which the same has arisen and shall transmit a copy thereof to the Chief Registrar.
>
> (3) The Supreme Court shall consider and determine the question reserved and may—
>
> (*a*) if the Court has convicted the accused—
>
> (i) confirm the conviction;
>
> (ii) quash the conviction, in which case the accused shall be acquitted;
>
> (iii) direct that the judgment of the Court shall be set aside and that, instead thereof, judgment shall be given by the Court as ought to have been given at the trial;
>
> (*b*) if the Court has not delivered its judgment, remit the case to it with the opinion of the Supreme Court upon the question reserved."

In accordance with the requirements of sub-section (2) of that section, the trial Judge has made a record of the question reserved with the circumstances upon which the same has arisen and has also furnished his reasoned decision upon the point for the perusal of this Court.

It appears that before the lower Court there was agreement to the course required of referring the question for the opinion of this Court; but Mr. Pavlides for the accused has now raised the objection that it was not open to the trial Judge to reserve the question because he had already given his ruling and decided it. We do not think that there is substance in the submission. Under section 145 the Court may in its discretion at any stage of the proceed-

ings reserve a question of law arising during the trial. It is apparent from sub-section (3) that this procedure may be resorted to even after conviction, which involves decision in the case. Upon application by the Attorney-General the Court is bound at any stage of the proceedings to reserve a question of law arising during the trial and clearly, in our opinion, this can also be done after conviction. It is evident that in whatever manner the machinery of section 145 is set in motion, there can be a question reserved and determined after judgment and conviction which would involve decision by the trial Court not only upon the general issue but upon the particular question arising during the trial and which is reserved for determination by this Court. Equally when the trial Court has decided the particular question prior to delivery of its judgment in the case, this constitutes no bar to the question being reserved and considered by this Court at such stage of the proceedings. It would fall to the trial Court, as is not disputed, to be guided by and act on the opinion of this Court upon the question reserved. In *Attorney-General* v. *Kounnides* (Reserved Case No. 109/56)*, a question was reserved under section 145 upon application by the Attorney-General after a ruling upon the point of law by the Court of trial and it was determined by this Court. We can discern no sufficient reason for limiting the words in section 145 (1)— " at any stage of the proceedings " to mean at any stage of the proceedings *before* the Court of trial decides or rules upon the question of law arising.

The circumstances as recited are that a police officer of the Special Branch named Leach took part in the arrest of the accused, who was taken in custody to the Nicosia Police Station. It appears that he was suspected in connection with the present case (see Judge's ruling). At the Special Branch office the accused said to Sergeant Leach—" You know who I am, and now I am going to tell you everything ". Sergeant Leach then cautioned the accused saying—" Look here, Nicos, you are not obliged to say anything unless you wish to do so. But whatever you say will be taken down in writing and may be given in evidence ". The accused, who was admittedly in custody, then made a statement and Leach took what he called " notes " of what the accused said, putting down the exact words spoken by the accused. After the first few lines Leach interrupted the accused and put the following question to him—" Who were the other members of your group "? At the time Leach knew that A.S.P. Mr. Green had been sent for to take a statement and the record which he made was described by Leach, apparently in evidence, as being notes which he made of a conversation which the accused had with him pending the arrival of Mr. Green.

* Unreported (decided on Dec. 6, 1956).

Sergeant Leach was heard to state that the instructions of the Chief Constable were that all statements are to be taken by a member of the C.I.D. and not by a member of the Special Branch. He did not read over to the accused the record which he had made of what the accused said and did not ask the accused to sign the written record of his statement.

It is this statement of the accused which the prosecution unsuccessfully endeavoured to prove as evidence, and the question reserved, which is a composite one, goes to its admissibility ; it is distinct from the further question as to whether the statement is admissible as being of a voluntary character, as to which, of course, we express no view. The argument turns upon the proper construction to be given to section 8 of the Criminal Procedure Law and in particular to sub-section (2) of that section, for it is made evident from the record provided by the trial Judge that the accused at the material time was in custody, wished to volunteer a statement, and was not formally charged with an offence. It is convenient at this stage to set out section 8 as amended :—

> " 8. (1) No person in custody shall be questioned *unless the investigating officer cautions him as follows* or to the like effect—
>
> > " You are not obliged to say anything but anything you say may be given in evidence."
>
> (2) If any person in custody wishes to volunteer a statement, an investigating officer shall, after administering the caution as in sub-section (1) of this section provided, take the statement of such person without, however, *putting any question to him in connection therewith* except for the purpose of removing an ambiguity in what such person has actually said.
>
> (3) When an investigating officer has made up his mind to charge a person with an offence, he shall not put to him any questions or any further questions, as the case may be, unless he first cautions him in the manner in sub-section (1) of this section provided.
>
> (4) Before a person is formally charged with an offence by an investigating officer, the investigating officer shall read out to him the statement of the offence and shall immediately proceed to caution him as follows—
>
> > " Do you wish to say anything in answer to the charge ? You are not obliged to say anything, unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."
>
> The investigating officer shall then take down any statement which such person may make in answer to the charge.

(5) The provisions of sub-section (2) of section 5 of this Law shall apply to the taking of any statement under this section.

(6) Where a statement or any part thereof is made under this section in answer to a question and such statement is reduced to writing, the question as well as the answer shall be recorded.

(7) No statement made under this section shall be received in evidence against the person making the same, unless the provisions of this section have been complied with :

Provided that no statement made by a person before there was time to caution him shall be rendered inadmissible in evidence merely because it was made before caution had been administered if the Court is satisfied that caution was administered as soon as possible thereafter."

Section 5 (2) as amended, which is made applicable by section 8 (5), reads as follows :—

"5. (2) The investigating officer may reduce into writing any statement made by the person examined and such statement shall then be read over to such person who shall thereupon sign the same or, if he is illiterate, affix his mark thereto and, if such person refuses to do so, the investigating officer shall make at the foot of the statement a note of the refusal stating also the reason thereof, if ascertained, and the statement shall then be signed by the investigating officer."

It is as well also to quote section 4, as amended, of the same Law :—

"4.—(1) Any police officer may investigate into the commission of any offence.

(2) The Governor may authorize any person, by name or by his office, who appears to him to be competent for the purpose, to investigate into the commission of any offence.

(3) Any police officer or any person authorized under sub-section (2) investigating into the commission of any offence is hereafter in this Law referred to as 'investigating officer'."

The first question raised concerns the conclusion reached by the learned trial Judge that Sergeant Leach was an "investigating officer" within the meaning of sections 4 and 8. If he was not such then of course section 8 would not be applicable. Whether there was no material to justify the inference of fact that he was fulfilling the role of investigating officer constitutes no doubt a question of law. In the opinion of this Court, and having regard to the circumstances as given, there was material to permit

the inference that Sergeant Leach was acting as an investigating officer for the purposes of section 8.

Now it is not disputed that the statement of the accused cannot be proved by production of the written record of what he said because it was not read over to him nor was he asked to sign it. Whether Sergeant Leach chooses in evidence to describe his record as "notes" or anything else, it is plain from what is before us that what he did was to reduce the accused's statement to writing—taking down the exact words he spoke after the caution was administered, though failing to read over the recorded statement to the accused or to ask him to sign it. The view formed by the learned trial Judge may be observed from the following passages from his ruling upon the point of admissibility :—

> "But if the investigating officer writes down the statement then he must read it over and ask the person examined to sign it .... I am unable to agree that where a statement is taken under section 8 (2) it does not mean that it is to be written down in the words used by the person in custody. I am unable to agree that "take the statement" can mean take notes which are not read over and signed, and, in my judgment, the words "the taking of any statement" in section 8 (5) mean the taking of a statement *in extenso* in the manner in which the investigating officer has to take it when he decides to reduce it into writing under the provisions of section 5 (2) .... I think that the object of section 8 (2) is to have a full and accurate record made of what the person in custody has said, which the person making the statement can be satisfied is a true record of what he has said .... Having decided to hear what the accused had to say he (Leach) should, in my judgment, have recorded accused's statement in full, and should have read it over and asked the accused to sign it. As the requirements of section 8 (2) and 8 (5) have not been complied with, the statement cannot be received in evidence—See section 8 (7)".

Stated shortly, the question which arises for determination is whether the statement of the accused can be proved as an oral statement through the testimony of Sergeant Leach speaking to the best of his recollection as to what the accused said to him and, if need be, refreshing his memory from the written record he made at the time. The learned Attorney-General has very strongly urged that such mode of proof is not in all the circumstances precluded by the provisions of section 8 ; he argues that oral evidence of the statement may properly be received, the reliability of the evidence and weight and value of the statement as so proved being a matter for the Court of trial.

A close examination of section 8 is necessary and as a preliminary to that task we advert to what was said by

this Court in *R.* v. *Phaedonos & others* (Cr. App. No. 2074)*; the point at issue appears from the following excerpt from the judgment (Hallinan, C.J. and Zekia, J.):

"The first ground of appeal argued was a point of law. Section 8 (4) of the Criminal Procedure Law, Cap. 14, provides that before a person is formally charged the following caution shall be administered: "Do you wish to say anything, in answer to the charge? You are not obliged to say anything, unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence." The Police Officer administering the caution to the appellants omitted the words "will be taken down in writing" and it is submitted that since sub-section (7) of section 8 provides that no statement made under this section shall be received in evidence unless the provisions of the section have been complied with, then the answers of the appellants to the formal charge were inadmissible. It was urged on behalf of the appellants that any departure from the wording of the caution contained in sub-section (4) was fatal because the provisions of the statute are imperative and not directive.

We are unable to accept this argument. A similar point was argued in a '*habeas corpus*' application to the Supreme Court (Application Nos. 4, 5, 6 and 7/1956). One of the questions arising on that application was whether certain provisions in Regulation 6 of the Emergency Powers (Public Safety and Order) Regulations, 1955, were imperative or directive. In holding they were directive only, both at first instance and on appeal, the Supreme Court cited with approval the passage from Maxwell, 10th Edition, at p. 176, which states that the fundamental rule in determining whether an enactment is imperative or directive is to consider the scope and object of the enactment. Now, the scope and object of section 8 is to enact as a matter of law what in England has long been a matter of practice under the Judges' Rules which are set out in Archbold, 33rd Edition, at p. 414. The caution set out in section 8 (4) reproduces verbatim that contained in Rule 5 of the Judges' Rules. The legislative authority clearly intended to make a matter of law what in England is a matter of practice; we cannot agree that the contents of the Judges' Rules were intended to be reduced to a narrow and rigid verbal formula. In the present case, although the words "will be taken down in writing" were omitted, the statements of the appellants in answer to the formal charge were in fact taken down in writing, read over to them and signed by them as correct. It would not be in the interest even of accused persons, that the provisions of section

* Reported at page 21 of this volume.

8 should be considered as a complete and rigid code to control the practice of the Courts in admitting statements by accused persons ".

The important consideration remains that, though in practice the Judges' Rules may be said virtually to have acquired the force of law, they are not in fact law, whereas we are faced here with provisions contained in a statutory enactment which, though they reflect much to be found in the Judges' Rules, contain material differences and in particular the provision contained in sub-section (7) that—" No statement made under this section shall be received in evidence against the person making the same, unless the provisions of this section have been complied with ". In the Assize Court case of *R.* v. *Koutalianos and others* (1955)* a similar question was raised but was not decided because it was held that the police officer was not an " investigating officer " within the meaning of section 8. In the course of the ruling, given by Hallinan, C.J., the following occurs :—

> " Section 5 of the Criminal Procedure Ordinance, as amended, does provide that an investigating officer must reduce a statement to writing and it contains provisions as to his reading over the statement to the accused and regarding the signing of the statement by the accused.
>
> Section 8 of the same Law provides, *inter alia*, that when a person in custody wishes to make a voluntary statement, an investigating officer must take that statement and must comply with the provisions of Section 5 with regard to the reading over and signing ".

Accepting it on the authority of *Phaedonos'* case that the provisions of section 8 are directive rather than imperative, is there a substantial compliance with the section where a statement given under sub-section (2) is not taken down in writing at all, and is it admissible as an oral statement through the testimony of an investigating officer ? The learned Attorney-General contends that the intention is not disclosed by the wording of the section to render statements inadmissible unless they are reduced to written form. But we have the words in sub-section (2) " shall *take* the statement " and then sub-section (5) making applicable the provisions of section 5 (2) " to the *taking* of any statement under this section ". It is true that section 5 (2) commences with the words—" The investigating officer may reduce into writing any statement . . . " and one can visualize circumstances, as the learned trial Judge has done, where the exercise of a discretion for the purposes of section 5 may be necessary. But to import this discretionary or permissive feature into section 8 makes nonsense of the words just quoted from sub-sections (2) and (5) as to the taking of a statement. In the context

* Unreported (Paphos Assizes, May 2, 1955).

of section 8 we think that the words "shall take" and "the taking of" a statement can only mean and refer to a reducing into writing and the intention is that those provisions of section 5 (2) shall apply where a statement is reduced into writing, that is to say, the statement as recorded shall be read over to the person making it who shall sign the same and so on. Where a statement under sub-section (2) of section 8 has not been taken down in writing or where, as in the instant case, it has been taken down but there has been an entire failure to comply with the provisions of sub-section (5), how can it validly be said that there has been even a substantial compliance with the section so as to render the statement of the person in custody admissible in evidence in view of what is contained in sub-section (7)? It has been submitted that to make a statement reduced to writing admissible in evidence the provisions to be complied with are the giving of the caution plus the reading over and signing; but that where the statement has not been reduced to writing the only requirement is the caution to permit oral evidence of the statement. In the opinion of this Court this second proposition loses sight of the provisions as to the taking of a statement in sub-sections (2) and (5); and it is further to be remembered that sub-section (7) is directed towards prohibiting the reception in evidence of what has been actually said by the person in custody when the provisions of the section have not been complied with. Some reliance has been placed upon sub-section (6) as revealing by implication that a statement volunteered under sub-section (2) may be proved by oral evidence and has not to be taken in writing. But we find difficulty in appreciating how the provision under reference can refer to sub-section (2) in which it is provided that no question shall be put except for the purpose of removing an ambiguity; it may be that it is devised for the purposes of sub-section (1). But however that may be, the argument fails to convince us that there is ground for giving other than the ordinary meaning in the context to the words which we have quoted and repeatedly stressed from sub-sections (2) and (5). The learned Attorney-General has referred to the cases of *May*, 36 Cr. App. R. 91 and *Straffen*, 36 Cr. App. R. 135, to emphasise that the Judges' Rules are not rules of law and to show that if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, (*May* p. 93). The Rules have no force in law in the sense that answers given by an accused person to any enquiries made in breach of the Rules are inadmissible; it is a matter for the discretion of the learned Judge in each case whether, when inquiries are made in contravention of the Rules, the answers should be admitted or not (*Straffen*, p. 135). All that is perfectly true where the

Judges' Rules are concerned, but here we are dealing with provisions of law, though based on the Judges' Rules, and that constitutes the vital difference. Section 8 for that reason cannot be approached or applied in the same way as the Judges' Rules which are not rules of law and which, even if they were, do not include an express provision governing the reception of a statement in evidence such as sub-section (7) of section 8 of our Criminal Procedure Law. Again, reference has been made to such cases as *R.* v. *Erdheim* 18 Cox Cases 355, and *R.* v. *Swatkins* 172 E.R. 819, 821 note (*b*), as instances of oral proof being held to be acceptable where there has been fault in complying with the method provided by an enactment for the recording and formal authentication of statements : proof by oral evidence would be open to objection going to the weight and reliability of the evidence but not to its admissibility. But the legislation considered in such cases contained no provision equivalent to section 8 (7) of the Criminal Procedure Law ; if it had, the results must, in our view, have been different.

We believe that the foregoing sufficiently indicates the opinion of this Court on the various divisions of the question reserved. We consider that the learned trial Judge was correct in holding that the statement of the accused cannot be received in evidence. It is accordingly not necessary to consider the further question reserved as to the effect upon admissibility of the question put by the witness Leach to the accused in the course of the making of the statement.

The case is remitted to the Court below in accordance with section 145 (3) (*b*) of the Criminal Procedure Law.

Ruling of trial Court affirmed.
Case remitted to trial Court.