7η Αὐγούστου 1973

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ΑΔΩΝΙΣ ΝΙΚΟΛΕΤΤΙΔΗΣ ΚΑΙ ΑΛΛΟΣ

ν.

ΑΣΤΥΝΟΜΙΑΣ

[ΔΙΚΑΣΤΑΙ: ΤΡΙΑΝΤΑΦΥΛΛΙΔΗΣ, Πρόεδρος, ΣΤΑΥΡΙΝΙΔΗΣ, ΧΑΤΖΗΑΝΑΣΤΑΣΙΟΥ, Α. ΛΟΙΖΟΥ, ΜΑΛΑΧΤΟΣ, Δικασταί].

ΑΔΩΝΙΣ ΝΙΚΟΛΕΤΤΙΔΗΣ ΚΑΙ ΑΛΛΟΣ,

Ἐφεσείοντες,

κατὰ

ΑΣΤΥΝΟΜΙΑΣ

Ἐφεσιβλήτου.

(*Ποινικαὶ Ἐφέσεις ὑπ' ἀρ.* 3476–3477).

Δικαστικὸν Διάταγμα Κρατήσεως (ἢ Προφυλακίσεως) ἀξιωματικῶν ὑπηρετούντων εἰς τὴν Ἐθνικὴν Φρουρὰν – Δικαιοδοσία – Δικαιοδοσία τοῦ Ἐπαρχιακοῦ Δικαστηρίου πρὸς ἔκδοσιν τοιούτων διαταγμάτων – Ἁρμοδίως ὅθεν ἐξεδόθησαν ὑπὸ Δικαστοῦ τοῦ Ἐπαρχιακοῦ Δικαστηρίου Λευκωσίας τὰ ὑπὸ κρίσιν διατάγματα κρατήσεως ἀξιωματικῶν – Ἄρθρον 24 *τοῦ περὶ Ποινικῆς Δικονομίας Νόμου, Κεφάλαιον* 155 *– Ἄρθρα* 119(1), 120, 121(1) *καὶ* 138 *τοῦ περὶ Στρατιωτικοῦ Ποινικοῦ Κώδικος καὶ Δικονομίας Νόμου,* 1964 (*Νόμος* 40/1964) *– Καὶ ἄρθρον* 11, *παράγραφοι* 5, 6 *καὶ* 7 *τοῦ Συντάγματος – Βλ. καὶ παραγράφους* 1 *καὶ* 2(*γ*) *τοῦ ἐν λόγῳ ἄρθρου* 11.

Προφυλάκισις – Δικαστικὸν Διάταγμα Προφυλακίσεως (ἢ Κρατήσεως διὰ σκοποὺς ἀνακρίσεως) – Βλ. ἀνωτέρω καὶ κατωτέρω, Passim.

Δικαστικὸν Διάταγμα Κρατήσεως – Ἔφεσις – Τοιαῦτα διατάγματα ὑπόκεινται εἰς ἔφεσιν εἰς τὸ Ἀνώτατον Δικαστήριον καὶ δὴ ἀνεξαρτήτως τοῦ ἐὰν ταῦτα ἐξεδόθησαν ὑπὸ Ἐπαρχιακοῦ Δικαστηρίου ἢ ὑπὸ Στρατοδικείου – Ἄρθρον 11, *παράγραφος* 6, *τοῦ Συντάγματος.*

Ἐθνικὴ Φρουρὰ – Ἀξιωματικοὶ ὑπηρετοῦντες εἰς τὴν Ἐθνικὴν Φρουρὰν – Ὑπόκεινται εἰς δικαστικὰ διατάγματα κρατήσεως ἐκδιδόμενα ὑπὸ Ἐπαρχιακοῦ Δικαστηρίου (ἢ Δικαστοῦ τοιούτου Δικαστηρίου) – Βλ. ἀνωτέρω.

Δικαστικὸν Διάταγμα Κρατήσεως – Ἰσχυρισμοὶ περὶ κακοποιήσεως κρατουμένου, προσαγομένου πρὸ τοῦ Δικαστοῦ ἐπὶ τῷ τέλει ἐκδόσεως διατάγματος κρατήσεως ὡς διαλαμβάνει τὸ ἄρθρον 11, *παράγραφος* 6, *τοῦ Συντάγματος – Τίνι τρόπῳ τοιοῦτοι ἰσχυρισμοὶ δύνανται νὰ τεθῶσι πρὸ τοῦ Δικαστοῦ – Διὰ δηλώσεως*

ἁπλῶς ἡ μαρτυρίας κατὰ τὴν κρίσιν τοῦ Δικαστοῦ – 'Ο Δικαστὴς δὲν κρίνει ὁριστικῶς τὴν οὐσίαν τοῦ ἰσχυρισμοῦ ἀλλ' ἁπλῶς λαμβάνει γνῶσιν καὶ τῆς ἐν λόγῳ πτυχῆς τῆς σχετικῆς αἰτήσεως ἐνώπιόν του διὰ νὰ δυνηθῇ νὰ ἐνασκήσῃ δεόντως τὴν διακριτικὴν αὐτοῦ ἐξουσίαν, καὶ δὴ ἐν γνώσει πάντων τῶν κρισίμων στοιχείων.

Δικαστικὸν Διάταγμα Κρατήσεως – Διαδικασία ἐκδόσεως τοιούτου διατάγματος μὴ συμπληρωθεῖσα αὐθημερὸν – Κατὰ πόσον δύναται νὰ συνεχισθῇ τὴν ἑπομένην ἐνώπιον ἄλλου Δικαστοῦ καὶ διὰ τῆς καταθέσεως ἢ ὑποβολῆς νέας αὐτοτελοῦς αἰτήσεως – 'Υπὸ ὡρισμένους ὅρους τοιαύτη μέθοδος εἶναι ἐπιτρεπτή.

Δικαιοδοσία – 'Επαρχιακοῦ Δικαστηρίου—Διάταγμα Κρατήσεως – 'Αξιωματικοὶ ὑπηρετοῦντες εἰς τὴν 'Εθνικὴν Φρουράν – Βλ. ἀνωτέρω.

"Εφεσις – Διάταγμα Κρατήσεως – "Αρθρον 11.6 τοῦ Συντάγματος – Βλ. ἀνωτέρω.

Κακοποίησις – 'Ισχυρισμὸς κακοποιήσεως κρατουμένου – Τίνι τρόπῳ ὁ τοιοῦτος ἰσχυρισμὸς δύναται νὰ ἀχθῇ πρὸ τοῦ Δικαστοῦ ὅστις ἐπιλαμβάνεται αἰτήσεως πρὸς ἔκδοσιν διατάγματος κρατήσεως – 'Εξουσίαι τοῦ Δικαστοῦ – Βλ. ἀνωτέρω.

Ποινικὴ Δικονομία – Διάταγμα κρατήσεως κ.τ.λ. – Βλ. ἀνωτέρω.

Συνταγματικὸν Δίκαιον – Διάταγμα (δικαστικὸν) κρατήσεως – "Εφεσις κ.τ.λ. – "Αρθρον 11.6 καὶ 7 τοῦ Συντάγματος – Βλ. ἀνωτέρω.

Σημείωσις : Τὸ πλῆρες κείμενον τῶν παραγράφων 5, 6 καὶ 7 τοῦ ἄρθρου 11 τοῦ Συντάγματος ὡς ἐπίσης καὶ τὰ ἄλλα σχετικὰ ἀποσπάσματα ἐκ τοῦ Συντάγματος καὶ τῶν Νόμων περὶ ὧν προείρηται, ἐκτίθενται εἰς τὴν ἀπόφασιν τοῦ Δικαστηρίου (βλ. κατωτέρω).

Εἰς τὰς προκειμένας συνηνωμένας ποινικὰς ἐφέσεις τὸ 'Ανώτατον Δικαστήριον ἔκρινεν ὅτι, ἤτοι:-

(1) Δικαστικὰ Διατάγματα Κρατήσεως (ἢ ἄλλως Δικαστικὰ Διατάγματα προφυλακίσεως) ὑπόκεινται εἰς ἔφεσιν ἐνώπιον τοῦ 'Ανωτάτου Δικαστηρίου, καὶ δὴ ἀνεξαρτήτως τοῦ ἐὰν ταῦτα ἐξεδόθησαν ὑπὸ 'Επαρχιακοῦ Δικαστηρίου ἢ ὑπὸ τοῦ Στρατοδικείου, τῶν γενικῶν διατάξεων τῆς παραγράφου 7 τοῦ "Αρθρου 11 τοῦ Συντάγματος μὴ περιοριζουσῶν τὸ παράπαν τὴν εἰδικὴν διάταξιν τῆς παραγράφου 6 τοῦ ἐν λόγῳ "Αρθρου 11 ἥτις

ρητῶς προβλέπει δικαίωμα ἐφέσεως ἐναντίον τοιούτων διαταγμάτων.

(2) Τὰ Ἐπαρχιακὰ Δικαστήρια κέκτηνται δικαιοδοσίαν πρὸς ἔκδοσιν τοιούτων διαταγμάτων κρατήσεως (προφυλακίσεως) ἀξιωματικῶν ὑπηρετούντων εἰς τὴν Ἐθνικὴν Φρουράν.

(3) (α) Ἰσχυρισμοὶ περὶ κακοποιήσεως κρατουμένου καὶ προσαχθέντος πρὸ τοῦ Δικαστοῦ ἐπὶ τῷ τέλει ἐκδόσεως διατάγματος κρατήσεως δύνανται νὰ τεθῶσι πρὸ τοῦ Δικαστοῦ ὡς οὗτος ἤθελε κρίνει πρόσφορον εἴτε δι' ἁπλῆς δηλώσεως εἴτε δι' ἐνόρκου μαρτυρίας.

(β) Ὁ Δικαστὴς δὲν κρίνει—οὔτε ἔχει τοιοῦτον δικαίωμα—ὁριστικῶς περὶ τῆς οὐσίας τοῦ ἰσχυρισμοῦ περὶ κακοποιήσεως ἀλλ' ἁπλῶς λαμβάνει γνῶσιν καὶ τῆς πτυχῆς ταύτης τῆς ἐνώπιον αὐτοῦ σχετικῆς αἰτήσεως ἵνα δυνηθῇ τοιουτοτρόπως νὰ ἐνασκήσῃ δεόντως τὴν διακριτικὴν αὐτοῦ ἐξουσίαν ἐπὶ τοῦ θέματος καὶ δὴ πλήρως ἐνημερωμένος ἐπὶ πάντων τῶν κρισίμων στοιχείων.

(4) Διαδικασία πρὸς ἔκδοσιν δικαστικοῦ διατάγματος κρατήσεως μὴ συμπληρωθεῖσα αὐθημερόν, δύναται νὰ συνεχισθῇ ἢ ἐπαναληφθῇ τὴν ἐπομένην ἐνώπιον ἄλλου Δικαστοῦ ὑπὸ ὡρισμένους ὅρους καὶ διὰ τῆς ὑποβολῆς νέας αὐτοτελοῦς αἰτήσεως πρὸς τοῦτο.

Τὰ πραγματικὰ περιστατικὰ τῶν ὑποθέσεων τούτων ἐκτίθενται ἀρκούντως εἰς τὴν ἀπόφασιν τοῦ Ἀνωτάτου Δικαστηρίου διὰ τῆς ὁποίας ἀπερρίφθησαν ἀμφότεραι αἱ προκείμεναι ποινικαὶ ἐφέσεις.

Ἐφέσεις.

Ἐφέσεις ὑπὸ τοῦ Ἄδωνι Νικολεττίδη καὶ ἄλλου κατὰ δικαστικῶν διαταγμάτων κρατήσεώς των, ἐκδοθέντων ὑπὸ τοῦ Ἐπαρχιακοῦ Δικαστηρίου Λευκωσίας (Α. Ἰωαννίδης, Προσ. Ε.Δ.) κατὰ τὴν 29ην Ἰουνίου, 1973.

Π. Δημητρίου, Μ. Ἡλιάδης καὶ Λ. Γεωργιάδου (Κα), διὰ τοὺς ἐφεσείοντας.

Κλ. Ἀντωνιάδης, Δικηγόρος τῆς Δημοκρατίας, διὰ τὴν ἐφεσίβλητον.

ΑΠΟΦΑΣΙΣ*

ΤΡΙΑΝΤΑΦΥΛΛΙΔΗΣ, Πρ.: Αἱ παροῦσαι ἐφέσεις κατεχωρήθησαν κατὰ διαταγμάτων ὀκταημέρου κρατήσεως τῶν ἐφεσειόντων

* An English translation of this judgment appears at pp. 229-235, *post*.

δι' ἀνάκρισιν ἀφορῶσαν εἰς ἀδικήματα ἐν σχέσει πρὸς τὰ ὁποῖα συνελήφθησαν ὡς ὑποπτοι. Τὰ διατάγματα ἐξεδόθησαν ὑπὸ τοῦ Ἐπαρχιακοῦ Δικαστηρίου Λευκωσίας.

Ἐν σχέσει πρὸς κράτησιν δι' ἀνάκρισιν τὸ ἄρθρον 11 τοῦ Συντάγματος προνοεῖ ὅτι:–

«1. Ἕκαστος ἔχει τὸ δικαίωμα ἐλευθερίας καὶ προσωπικῆς ἀσφαλείας.

2. Οὐδεὶς στερεῖται τῆς ἐλευθερίας αὐτοῦ, εἰμὴ ὅτε καὶ ὅπως ὁ νόμος ὁρίζῃ εἰς τὰς περιπτώσεις:

(γ) συλλήψεως ἢ κρατήσεως ἀτόμου ἐνεργουμένης πρὸς τὸν σκοπὸν προσαγωγῆς αὐτοῦ ἐνώπιον τῆς ἁρμοδίας κατὰ νόμον ἀρχῆς ἐπὶ τῇ εὐλόγῳ ὑπονοίᾳ ὅτι διέπραξεν ἀδίκημα ἢ ὅσάκις ἡ σύλληψις ἢ κράτησις θεωρηθῇ εὐλόγως ἀναγκαία πρὸς παρεμπόδισιν διαπράξεως ἀδικήματος ἢ ἀποδράσεως μετὰ τὴν διάπραξιν αὐτοῦ,

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5. Ὁ συλληφθεὶς προσάγεται ἐνώπιον τοῦ Δικαστοῦ ὡς οἷόν τε συντομώτερον εὐθὺς μετὰ τὴν σύλληψιν αὐτοῦ, πάντως δὲ τὸ βραδύτερον ἐντὸς εἴκοσι τεσσάρων ὡρῶν ἀπὸ τῆς συλλήψεως, ἐφ' ὅσον δὲν ἀφεθῇ πρότερον ἐλεύθερος.

6. Ὁ Δικαστής, ἐνώπιον τοῦ ὁποίου προσήχθη ὁ συλληφθείς, χωρεῖ ταχέως εἰς διερεύνησιν τῶν λόγων τῆς συλλήψεως εἰς καταληπτὴν ὑπὸ τοῦ συλληφθέντος γλῶσσαν καί, ὡς οἷόν τε συντομώτερον, πάντως δὲ τὸ βραδύτερον ἐντὸς τριῶν ἡμερῶν ἀπὸ τῆς τοιαύτης προσαγωγῆς, ἢ ἀπολύει τὸν συλληφθέντα ὑπὸ τοὺς κατὰ τὴν κρίσιν αὐτοῦ καταλλήλους ὅρους ἢ διατάσσει τὴν κράτησιν αὐτοῦ, ὁσάκις ἡ περὶ τῆς διαπράξεως τοῦ ἀδικήματος ἀνάκρισις, δι' ὃ συνελήφθη, δὲν συνεπληρώθη καὶ δύναται νὰ διατάσσῃ ἑκάστοτε τὴν κράτησιν αὐτοῦ ἐπὶ περίοδον χρόνου μὴ ὑπερβαίνουσαν τὰς ὀκτὼ ἡμέρας. Ὁ συνολικὸς χρόνος ὅμως τῆς τοιαύτης κρατήσεως δέον νὰ μὴ ὑπερβαίνῃ τοὺς τρεῖς μῆνας ἀπὸ τῆς ἡμερομηνίας τῆς συλλήψεως, μετὰ τὴν παρέλευσιν τῶν ὁποίων πᾶν ἄτομον ἡ ἀρχὴ ἔχουσα ὑπὸ κράτησιν τὸν συλληφθέντα ἀπολύει αὐτὸν παρευθύς. Πᾶσα κατὰ τὰ ἀνωτέρω ἀπόφασις τοῦ Δικαστοῦ ὑπόκειται εἰς ἔφεσιν.

7. Πᾶς στερηθεὶς τῆς ἐλευθερίας αὐτοῦ διὰ συλλήψεως ἢ κρατήσεως δικαιοῦται νὰ προσφύγῃ εἰς τὸ ἁρμόδιον δικαστήριον, ἵνα τοῦτο κρίνῃ ταχέως τὴν νομιμότητα τῆς κρατή-

σεως καὶ διατάξῃ τὴν ἀπόλυσιν αὐτοῦ, ἐὰν ἡ κράτησις δὲν εἶναι νόμιμος.

"

Οἱ συνήγοροι τῶν ἐφεσειόντων ἰσχυρίσθησαν ὅτι τὸ Ἐπαρχιακὸν Δικαστήριον Λευκωσίας δὲν ἐκέκτητο ἁρμοδιότητα νὰ ἐκδώσῃ τὰ ἐν λόγῳ διατάγματα διότι μόνον ἁρμόδιον ἐν προκειμένῳ ἦτο τὸ Στρατιωτικὸν Δικαστήριον ὡς ἐκ τοῦ γεγονότος ὅτι κατὰ τὸν χρόνον τῆς ἐκδόσεως τῶν διαταγμάτων οἱ ἐφεσείοντες ἦσαν ἀξιωματικοὶ ὑπηρετοῦντες εἰς τὴν Ἐθνικὴν Φρουράν.

Δεδομένου ὅτι βάσει τοῦ ἄρθρου 11(6) δύναται νὰ ἀσκηθῇ ἔφεσις ἐνώπιον τοῦ Ἀνωτάτου Δικαστηρίου κατὰ διατάγματος κρατήσεως δι' ἀνάκρισιν, εἴτε τὸ διάταγμα ἐξεδόθη ὑπὸ τοῦ Ἐπαρχιακοῦ Δικαστηρίου εἴτε τοῦτο ἐξεδόθη ὑπὸ τοῦ Στρατιωτικοῦ Δικαστηρίου, καὶ εἰς ἑκατέραν περίπτωσιν τὸ Ἀνώτατον Δικαστήριον, ἔχει, ὡς δευτεροβάθμιον δικαστήριον, τὰς ἰδίας ἀκριβῶς ἐξουσίας, τὸ ἐγερθὲν θέμα ἀναρμοδιότητος δὲν ἐνέχει οὐσιώδη σημασίαν. Ἐν τούτοις ἐφ' ὅσον ἠγέρθη δέον νὰ ἐξετασθῇ καὶ ἀποφασισθῇ ὑφ' ἡμῶν.

Ἐν πρώτοις δέον νὰ ἀναφερθῇ ὅτι τὸ θέμα τῆς ἁρμοδιότητος τοῦ Ἐπαρχιακοῦ Δικαστηρίου δύναται νὰ ἀποφασισθῇ κατὰ τὴν παροῦσαν κατ' ἔφεσιν διαδικασίαν βάσει τῆς ὡς ἄνω παραγράφου (6) τοῦ ἄρθρου 11, διότι ἡ πρόνοια εἰς τὴν παράγραφον (7) τοῦ ἰδίου ἄρθρου περὶ δικαιώματος προσφυγῆς εἰς δικαστήριον δι' ἔλεγχον τῆς νομιμότητος τῆς κρατήσεως δὲν δύναται νὰ ἑρμηνευθῇ ὡς περιοριστικὴ τῆς ἐκτάσεως τῆς κατ' ἔφεσιν δικαιοδοσίας δυνάμει τῆς παραγράφου (6).

Αἱ νομοθετικαὶ διατάξεις ἐπὶ τῶν ὁποίων ἐβασίσθη ἡ περὶ ἀναρμοδιότητος τοῦ Ἐπαρχιακοῦ Δικαστηρίου ἐπιχειρηματολογία τῶν συνηγόρων τῶν ἐφεσειόντων περιέχονται, κυρίως, εἰς τὸν περὶ Στρατιωτικοῦ Ποινικοῦ Κώδικος καὶ Δικονομίας Νόμον τοῦ 1964 (Νόμος 40/64).

Εἶναι ἐμφανὲς ὅτι κατὰ τὴν σύνταξιν τοῦ Νόμου 40/64 ἐλήφθησαν ὑπ' ὄψιν, εἰς μέγα βαθμόν, αἱ ἀνάλογοι πρόνοιαι τοῦ ἐν Ἑλλάδι ἰσχύοντος Στρατιωτικοῦ Ποινικοῦ Κώδικος, ἀλλὰ εἶναι ἐπίσης προφανὲς ὅτι αἱ πρόνοιαι αἱ ληφθεῖσαι ἐκ τοῦ ἐν λόγῳ Στρατιωτικοῦ Ποινικοῦ Κώδικος διεμορφώθησαν κατὰ τοιοῦτον τρόπον ὥστε νὰ συνάδουν πρὸς τὴν ἐν Κύπρῳ ἰσχύουσαν Ποινικὴν Δικονομίαν καὶ διαδικασίαν, καὶ ὡς ἐκ τούτου ἡ ἐφαρμογὴ των δυνατὸν νὰ μὴν ἔχῃ πάντοτε τὰ ἴδια ἀποτελέσματα ὡς ἡ ἐφαρμογὴ τῶν ἀντιστοίχων προνοιῶν ἐν Ἑλλάδι.

Δέον νὰ σημειωθῇ ὅτι ὁ Νόμος 40/64 (καὶ ὡς ἐτροποποιήθη μεταγενεστέρως) δὲν ἀποτελεῖ αὐτοτελὲς νομοθέτημα, ἐν ὄψει τοῦ γεγονότος ὅτι τὸ ἄρθρον 138 τοῦ Νόμου προνοεῖ ὅτι:-

> «Περὶ τῶν ἀντικειμένων περὶ ὧν δὲν προβλέπει εἰδικῶς ὁ παρὼν Νόμος ἐφαρμόζονται αἱ διατάξεις τοῦ περὶ Ποινικῆς Δικονομίας Νόμου καὶ παντὸς ἑτέρου εἰδικοῦ ἐπὶ ἑκάστης περιπτώσεως νόμου καὶ κανονισμοῦ».

Δυνάμει τῶν προνοιῶν τοῦ ἄρθρου 119 τοῦ Νόμου 40/64 ἡ ἀνάκρισις ἐνεργεῖται, ὑπὸ τὴν ἐποπτείαν καὶ συμφώνως πρὸς τὰς ὁδηγίας τοῦ Γενικοῦ Εἰσαγγελέως τῆς Δημοκρατίας, εἴτε κατόπιν διαταγῆς τοῦ ὀργάνου τοῦ ἔχοντος δικαίωμα πρὸς τοῦτο εἴτε αὐτεπαγγέλτως. Εἰς τὴν παροῦσαν περίπτωσιν ἡ ἀνάκρισις δὲν διεξάγεται αὐτεπαγγέλτως, βάσει τοῦ ἐδαφίου (2) τοῦ ἄρθρου 119, ἀλλά, συμφώνως πρὸς ὑφισταμένας ὁδηγίας, ὑπὸ ἀστυνομικῶν ὀργάνων ἐχόντων, δυνάμει τῆς σχετικῆς νομοθεσίας, τὸ δικαίωμα νὰ προβαίνουν εἰς ἀνακρίσεις.

Ἡ μόνη πρόνοια τοῦ Νόμου 40/64 ἡ ὁποία ἀφορᾷ εἰς προφυλάκισιν (ἄλλαις λέξεσιν, κράτησιν δι' ἀνάκρισιν) εἶναι τὸ ἄρθρον 120, βάσει τοῦ ὁποίου ἡ ἔκδοσις διατάγματος προφυλακίσεως ὑπὸ Στρατιωτικοῦ Δικαστηρίου ἐπιτρέπεται ἐν περιπτώσει ἀνακρίσεως ἐνεργουμένης αὐτεπαγγέλτως, δυνάμει τῶν προνοιῶν τοῦ ἄρθρου 119(2). Ὡς δὲ ἔχει ἤδη ἀναφερθῇ ἡ ἀνάκρισις εἰς τὴν παροῦσαν *περίπτωσιν δὲν ἐνεργεῖται αὐτεπαγγέλτως.*

Ἐξ ἄλλου, ἐν ὄψει τοῦ ἄρθρου 121(1) τοῦ Νόμου 40/64, τὸ ὁποῖον προνοεῖ ὅτι:-

> «Οἱ ἐπὶ τῆς ἀνακρίσεως ὑπάλληλοι ἐνεργοῦντες κατὰ παραγγελίαν ἢ αὐτεπαγγέλτως, ἐπιχειροῦσιν ἕκαστος, ἐντὸς τῆς ἁρμοδιότητός του καὶ ἄνευ ἀναβολῆς, πάσας τὰς ἀναγκαίας πρὸς βεβαίωσιν τοῦ ἀδικήματος καὶ τῶν ὑπαιτίων ἀνακριτικὰς πράξεις κατὰ τὰς σχετικὰς διατάξεις τοῦ περὶ Ποινικῆς Δικονομίας Νόμου»,

ὡς καὶ τοῦ προαναφερθέντος ἄρθρου 138 τοῦ ἰδίου Νόμου, διὰ τοῦ ὁποίου αἱ πρόνοιαι τοῦ περὶ Ποινικῆς Δικονομίας Νόμου (Κεφ. 155) καθίστανται ἐφαρμοστέαι πρὸς συμπλήρωσιν τῶν προνοιῶν τοῦ Νόμου 40/64, ἦτο δυνατὸν διὰ τὰς ἁρμοδίας ἀστυνομικὰς ἀρχάς, τὰς ἐνεργούσας τὴν ἀνάκρισιν εἰς τὴν παροῦσαν ὑπόθεσιν, νὰ ζητήσουν τὴν ἔκδοσιν, ὑπὸ τοῦ Ἐπαρχιακοῦ Δικαστηρίου Λευκωσίας, δυνάμει τοῦ ἄρθρου 24 τοῦ Κεφ 155, διαταγμάτων κρατήσεως τῶν ἐφεσειόντων διὰ τοὺς σκοποὺς τῆς ἀνακρίσεως, τοσούτῳ μᾶλλον καθότι ἡ ἀνάκρισις ἀφορᾷ εἰς ἀδικήματα διαπραχ-

θέντα ἐν συνεργασίᾳ μετὰ πολιτῶν καὶ ὡς ἐκ τούτου οἱ ἐφεσείοντες δυνατὸν νὰ προσαχθῶσι πρὸς δίκην, συμφώνως πρὸς τὸ ἄρθρον 114(1) τοῦ Νόμου 40/64, ἐνώπιον τακτικοῦ ποινικοῦ δικαστηρίου, καὶ οὐχὶ τοῦ Στρατιωτικοῦ Δικαστηρίου.

Διὰ τοῦτο εἴμεθα τῆς γνώμης ὅτι τὸ Ἐπαρχιακὸν Δικαστήριον ἐκέκτητο ἁρμοδιότητα νὰ ἐκδώσῃ τὰ ὑπὸ κρίσιν ἡμῶν τεθέντα διατάγματα κρατήσεως.

Ἕτερος ἰσχυρισμὸς ὅστις προεβλήθη ὑπὸ τῶν συνηγόρων τῶν ἐφεσειόντων εἶναι ὅτι ὁ Ἐπαρχιακὸς Δικαστὴς ὁ ἐκδώσας τὰ ἐν λόγῳ διατάγματα δὲν ἐνήργησε νομίμως διότι ἡ σχετικὴ διαδικασία εἶχεν ἤδη ἀρχίσει τὴν προτεραίαν ἐνώπιον ἄλλου Ἐπαρχιακοῦ Δικαστοῦ. Ὀφείλομεν νὰ τονίσωμεν, ἐν προκειμένῳ, ὅτι ὄντως δὲν ἦτο ἐπιθυμητὸν νὰ ἐπαναρχίσῃ τὴν ἐπομένην ἡμέραν, διὰ ταυτοσήμου αἰτήσεως, ἐνώπιον ἑτέρου Ἐπαρχιακοῦ Δικαστοῦ, ἡ διαδικασία αἰτήσεως δι' ἔκδοσιν διαταγμάτων κρατήσεως ἥτις ἤρξατο τὴν προτεραίαν ἐνώπιον ἄλλου Δικαστοῦ. Ἐν τούτοις οὐδεμία ἀμφιβολία ὑπάρχει ὅτι τοῦτο ἐγένετο ἄνευ οἱουδήποτε ἀλλοτρίου σκοποῦ, ἀλλὰ μόνον διότι ὁ Ἐπαρχιακὸς Δικαστὴς ὅστις ἀρχικῶς ἐπελήφθη τῆς αἰτήσεως διὰ τὴν κράτησιν τῶν ἐφεσειόντων ὑπέδειξεν ὁ ἴδιος εἰς τὰς ἀστυνομικὰς ἀρχάς, ἅμα τῇ μὴ συμπληρώσει αὐθημερὸν τῆς ἐνώπιόν του διαδικασίας, ὅτι ἠδύναντο νὰ ἀνανεώσωσι τὴν αἴτησίν των τὴν ἐπαύριον, αἱ δὲ ἐν λόγῳ ἀρχαὶ ἔκριναν ὀρθότερον νὰ ὑποβάλουν, τὴν ἐπομένην ἡμέραν, νέαν αὐτοτελῆ αἴτησιν. Ὁ δὲ Ἐπαρχιακὸς Δικαστὴς ὅστις ἐπελήφθη τῆς νέας αἰτήσεως ἐνημερώθη πλήρως περὶ τῶν διατρεξάντων προηγουμένως καὶ ἀκολούθως ἐξήτασεν ἐξ ἀρχῆς τὸ ὅλον θέμα, κατὰ τρόπον ὥστε, ἐν τῇ οὐσίᾳ, ἡ ὅλη διαδικασία διὰ τὴν ἔκδοσιν τῶν διαταγμάτων κρατήσεως τῶν ἐφεσειόντων ἐπανήρχησε καὶ συνεπληρώθη ἐνώπιον ἑνὸς καὶ τοῦ αὐτοῦ Ἐπαρχιακοῦ Δικαστοῦ. Οὕτω δὲν δύναται νὰ λεχθῇ ὅτι τὰ ἐφεσιβληθέντα διατάγματα δὲν ἐξεδόθησαν κατόπιν νομίμου διαδικασίας.

Οἱ ἐφεσείοντες παρεπονέθησαν, περαιτέρω, ὅτι δὲν ἐπετράπη εἰς αὐτοὺς ὑπὸ τοῦ Ἐπαρχιακοῦ Δικαστοῦ νὰ καταθέσουν ἐνόρκως ἐνώπιόν του πρὸς ἀπόδειξιν ἰσχυρισμῶν των περὶ κακοποιήσεώς των ἐνῶ ἐτέλουν ὑπὸ κράτησιν.

Ἡ κακοποίησις συλλαμβανομένου ἢ κρατουμένου εἶναι ὄχι μόνον ἀντίθετος πρὸς τὸ Σύνταγμα καὶ τοὺς νόμους, ἀλλὰ καὶ ἀπὸ πάσης ἄλλης ἀπόψεως καταδικαστέα. Ἡ δὲ τοιαύτη κακοποίησις ἀποτελεῖ οὐσιώδη παράγοντα τὸν ὁποῖον τὸ Ἐπαρχιακὸν Δικαστήριον σταθμίζει ὅταν ἀποφασίζῃ, ἐν τῇ ἐνασκήσει τῆς διακριτικῆς του εὐχερείας, ἐάν, καὶ ὑπὸ ποίους ὅρους, θὰ ἐκδώσῃ ἢ θὰ ἀνανεώσῃ, διάταγμα κρατήσεως δι' ἀνάκρισιν.

Εἰς συνοπτικῆς μορφῆς διαδικασίαν, ὡς εἶναι ἡ τῆς αἰτήσεως διὰ κράτησιν, τὸ θέμα τυχὸν κακοποιήσεως δύναται, κατὰ τὴν κρίσιν τοῦ Δικαστοῦ, νὰ τεθῇ ἐνώπιόν του εἴτε διὰ δηλώσεως εἴτε διὰ μαρτυρίας. Ὁ Δικαστὴς δὲν ἀποφαίνεται ἐπὶ τοῦ θέματος τῆς κακοποιήσεως ἀλλὰ ἁπλῶς ἀκούει καὶ περὶ αὐτῆς τῆς πτυχῆς τῆς ἐνώπιόν του αἰτήσεως διὰ νὰ δυνηθῇ νὰ ἐνασκήσῃ δεόντως τὴν διακριτικήν του εὐχέρειαν.

Εἰς τὴν παροῦσαν περίπτωσιν προκύπτει σαφῶς ἐκ τῆς ἐνώπιόν μας δικογραφίας ὅτι ἐτέθη ἐνώπιον τοῦ Ἐπαρχιακοῦ Δικαστοῦ ὁ ἰσχυρισμὸς τῶν δύο ἐφεσειόντων περὶ κακοποιήσεώς των καὶ ὅτι οὗτος ἐλήφθη δεόντως ὑπ' ὄψιν ὑπ' αὐτοῦ. Δὲν δύναται ὅθεν νὰ λεχθῇ ὅτι πρόκειται περὶ περιπτώσεως ὅπου ὁ Δικαστὴς παρέλειψε νὰ σταθμίσῃ οὐσιώδη παράγοντα. Διὰ τοῦτο δὲν δυνάμεθα νὰ ἀποδεχθῶμεν ὅτι, ὑπὸ τὸ φῶς τῶν συνθηκῶν τῆς ἐνώπιόν μας ὑποθέσεως, ἡ ἄρνησις τοῦ Δικαστοῦ νὰ ἀκούσῃ μαρτυρίαν ἐν σχέσει πρὸς τὸν ἰσχυρισμὸν περὶ κακοποιήσεως δέον νὰ συνεπάγηται τὴν ἀκύρωσιν τῶν ἐφεσιβληθέντων διαταγμάτων.

Διὰ τοὺς ὡς ἄνω λόγους αἱ ἐφέσεις αὗται ἀπορρίπτονται.

This is an English translation of the judgment in Greek appearing at pp. 222-229, *ante*.

Remand order concerning officers serving in the National Guard—Jurisdiction—Such remand order can be made by a District Court (or a Judge thereof)—Section 24 *of the Criminal Procedure Law, Cap.* 155*—Sections* 119(2), 120, 121(1) *and* 138 *of the Military Criminal Code and Procedure Law,* 1964 (*Law* 40 *of* 1964)*—Article* 11, *paragraphs* 5, 6 *and* 7 *of the Constitution—Cf. also paragraphs* 1 *and* 2(γ) *of said Article* 11.

Remand order—Appeal—An appeal lies against a remand order made by a Judge under Article 11, *paragraph* 6, *of the Constitution—See said paragraph* 6 *of Article* 11*—Such appeal lies irrespective of whether the remand has been ordered by the District Court or by the Military Court.*

National Guard—Officers serving in the National Guard may be the subject of orders of remand in custody issued by District Courts (or Judges thereof)—See supra.

Remand order—Allegations of ill-treatment of the person brought before the Judge for the purpose of remand under Article 11,

paragraph 6, of the Constitution—How such allegations may be placed before the Judge—The Judge does not make a definite finding about the alleged ill-treatment, but only takes notice of this aspect of the case, too, in order to be able to exercise duly his relevant discretionary power.

Remand order—Process for the making of remand order not completed on the same day—Whether it can continue on the following day by means of a new application before another Judge—It can be so done on certain conditions.

Jurisdiction—District Court—Remand order—Officers serving in the National Guard—See supra.

Appeal—Remand order—Article 11.6 *of the Constitution—See* supra.

Ill-treatment—Allegation of ill-treatment of persons brought before the Court for the purpose of remand—How it may be placed before the Court—Powers of the Court—See supra.

Criminal Procedure—Remand order etc.—See supra.

Constitutional Law—Remand order—Appeal—Article 11.6 *of the Constitution—See* supra.

Note: The full text of paragraphs 5, 6 and 7 of Article 11 of the Constitution as well as the material parts of the other constitutional and statutory provisions referred to above are set out in the judgment of the Court.

In these consolidated criminal appeals the Supreme Court held that:

(1) An appeal lies from orders of remand, irrespective of whether such orders were made by District Courts or the Military Court, the general provisions of paragraph 7 of Article 11 of the Constitution not affecting in the least the special provision of paragraph 6 of the said Article 11 expressly providing for a right of appeal against such orders.

(2) District Courts have jurisdiction to issue orders for remand in custody (or otherwise) concerning officers serving in the National Guard.

(3) (a) Allegations of ill-treatment of the person brought before the Judge for the purpose of remand may be placed before such Judge either by way of a mere statement or sworn evidence, as the Judge may think fit and proper.

(b) The Judge does not and should not make a definite finding about the alleged ill-treatment, but he only takes notice of this particular aspect of the case, too, in order to be able to exercise duly his relevant discretionary powers in the matter.

(4) A process for the making of a remand order not completed on the same day, can be pursued on the following day by means of a new application *ab initio* before another Judge, provided certain conditions are fulfilled.

The facts of these cases sufficiently appear in the judgment of the Court, dismissing both these criminal appeals.

Appeals.

Appeals by Adonis Nicolettides and Another against an order of remand made by the District Court of Nicosia (A. Ioannides, Ag. D.J.) on the 29th June, 1973, whereby they were remanded in custody for eight days.

P. Demetriou, M. Eliades and *L. Georghiadou (Mrs.)*, for the Appellants.

Cl. Antoniades, Counsel of the Republic, for the Respondents.

Cur. adv. vult.

The following judgment was delivered by:-

TRIANTAFYLLIDES, P.: The present appeals were filed against orders remanding in custody, for eight days, the Appellants, for purposes of the investigation into the commission of offences in relation to which they were arrested as suspects. The remand orders were issued by the District Court of Nicosia.

In relation to detention for purposes of investigation Article 11 of the Constitution provides that:

" 1. Every person has the right to liberty and security of person.

2. No person shall be deprived of his liberty save in the following cases when and as provided by law:-

.....

(c) the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

.....

5. The person arrested shall, as soon as practicable after his arrest, and in any event not later than twenty-four hours after the arrest, be brought before a Judge, if not earlier released.

6. The Judge before whom the person arrested is brought shall promptly proceed to inquire into the grounds of the arrest in a language understandable by the person arrested and shall, as soon as possible and in any event not later than three days from such appearance, either release the person arrested on such terms as he may deem fit or where the investigation into the commission of the offence for which he has been arrested has not been completed remand him in custody and may remand him in custody from time to time for a period not exceeding eight days at any one time;

Provided that the total period of such remand in custody shall not exceed three months of the date of the arrest on the expiration of which every person or authority having the custody of the person arrested shall forthwith set him free. Any decision of the Judge under this paragraph shall be subject to appeal.

7. Every person who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a Court and his release ordered if the detention is not lawful.

....."

Counsel for the Appellants have contended that the District Court of Nicosia did not possess jurisdiction to make the said remand orders, because the only competent Court, in this connection, was the Military Court, in view of the fact that at the time of the issuing of such orders the Appellants were officers serving in the National Guard.

Inasmuch as under Article 11.6, above, an appeal can be made to the Supreme Court against an order of remand in custody for investigation, irrespective of whether the remand has been ordered by the District Court or by the Military Court, and, in either case, the Supreme Court has, as an appellate tribunal, exactly the same powers, the issue of jurisdiction which has been raised as aforesaid is not, really, of much significance;

but since it has been brought up it must be examined and determined by us:

It must be stated at the outset that the issue of the jurisdiction of the District Court can be decided in the course of the present proceedings in these appeals, under the said paragraph (6) of Article 11, because the provision in paragraph (7) of the same Article, as regards the right to take proceedings for the determination by a Court of the lawfulness of a person's detention, cannot be construed as restricting the extent of the jurisdiction on appeal under paragraph (6).

The legislative provisions, on the basis of which were advanced the arguments of counsel for the Appellants on the issue of the lack of competence of the District Court, are, mainly, those comprised in the Military Criminal Code and Procedure Law, 1964 (Law 40/64).

It is evident that in drafting Law 40/64 there were taken into consideration, to a great extent, the corresponding provisions of the Military Criminal Code in force in Greece, but it is, also, obvious that any provisions which were obtained from the said Code were adapted in such a manner as to be brought into accord with the criminal procedure and practice in Cyprus, and, for this reason, the application of such provisions may not bring about always the same results as the application of corresponding provisions in Greece.

It is to be noted that Law 40/64 (as, also, subsequently amended) does not constitute a self-contained Law, especially as its section 138 provides that:-

> " In relation to those matters for which no special provision is made in this Law there shall be applied the provisions of the Criminal Procedure Law and of any other Law or Regulation, as the case may be".

By virtue of the provisions of section 119 of Law 40/64 an investigation is carried out under the supervision, and in accordance with the instructions, of the Attorney-General of the Republic, either on orders of a competent organ or *ex proprio motu*. In the present case the investigation is not carried out *ex proprio motu*, on the strength of sub-section (2) of section 119, but in accordance with existing orders, given by police organs who have, under relevant legislation, the right to conduct investigations.

The only provision of Law 40/64 which refers to remanding in custody for purposes of investigation is section 120, under which the issuing of a remand order by a Military Court is enabled in case of an investigation conducted *ex proprio motu*, in accordance with the provisions of section 119(2); and as has already been mentioned the investigation in the present case is not conducted *ex proprio motu*.

On the other hand, in view of section 121(1) of Law 40/64, which provides that:- " Each investigating officer, acting on orders or *ex proprio motu*, carries out, within his competence and without delay, all necessary investigations in relation to the ascertainment of the commission of offences and of the offenders, in accordance with the relevant provisions of the Criminal Procedure Law", as well as in view of the above-mentioned section 138 of the same Law, by virtue of which the provisions of the Criminal Procedure Law (Cap. 155) became applicable in order to supplement the provisions of Law 40/64, it was possible for the competent police authorities, which carry out the investigation in the present case, to apply for the making, by the District Court of Nicosia, under the provisions of section 24 of Cap. 155, of orders remanding the Appellants in custody for the purposes of such investigation, and, especially so, as the investigation concerns offences allegedly committed together with civilians and, therefore, the Appellants may be brought to trial, in accordance with section 114(1) of Law 40/64, before an ordinary criminal Court, and not before the Military Court.

We are, consequently, of the view that the District Court did possess jurisdiction to issue the *sub judice* remand orders.

Another argument which has been put forward by counsel for the Appellants is that the District Judge who issued the said orders acted contrary to law, because the relevant proceedings had commenced, on the previous day, before another District Judge. We ought to stress, in this respect, that, indeed, it was not desirable to set in motion once again, on the following day, by means of an identical application before another District Judge, the process for the issuing of the remand orders, once such process had already commenced on the previous day before another District Judge. Nevertheless, there is no doubt that this was done without any ulterior motive, but only because the District Judge who had originally taken the application for the remands pointed out, himself, to the police, when the pro-

ceedings before him had not been completed on one and the same day, that they could renew their application on the following day, and the police authorities thought that it was better to make, on the following day, a new application for the purpose.

The District Judge who dealt with the new application was fully apprised of everything that had happened previously and, consequently, he examined the whole matter *ab initio*, in such a way that, in substance, the whole process for the making of the remand orders concerning the Appellants began afresh and was completed before one and the same District Judge. So, it cannot be said that the *sub judice* remand orders were not the products of a lawful process.

The Appellants have complained, further, that they were not permitted by the District Judge to testify on oath before him in order to substantiate allegations that they had been ill-treated while being in custody:

The ill-treatment of an arrested or detained person is not only contrary to the Constitution and the law but it is, also, condemnable, in every other respect. Such ill-treatment is a material factor which a District Court takes into consideration when deciding, in the exercise of its discretion, whether, and on what terms, it will issue or renew, a remand order for purposes of investigation.

In a summary proceeding, such as an application for a remand order, an allegation of ill-treatment may be placed before the Judge either by means of a statement made in Court or by evidence, as the Judge may deem fit. The Judge, at that stage, does not make a definite finding about the ill-treatment, but he only takes notice of this aspect of the case, too, in order to be able to exercise duly his relevant discretionary power.

In the present instance it emerges clearly, from the record before us, that the allegations of the Appellants, about their having been ill-treated, were placed before the District Judge and that they were duly taken into account by him. So it cannot be said that this is a case in which a Judge has refused to consider a material factor. For this reason we cannot, in the light of the circumstances of the case before us, accept that the refusal of the Judge to hear evidence in relation to the allegations of ill-treatment should result in the annulment of the *sub judice* remand orders.

For the above reasons these appeals are dismissed.

Appeals dismissed.