

1982 October 30

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF MANFRED MUTKE,
AND
IN THE MATTER OF AN APPLICATION BY HIM FOR
AN ORDER OF HABEAS CORPUS.

(Application No. 13/82).

Fugitive offenders—Extradition—Committal to custody awaiting extradition—No evidence before Committing Judge in the sense of section 9(5) and 13 of the Fugitive Offenders Law, 1970 (Law 97/70)—And no finding by the Judge that there was placed before him such evidence—Such finding an essential part of the decision —Order of committal not made with due compliance with provision of said section 9(5)—Order for habeas corpus made—Section 10 of the above Law and Article 155.4 of the Constitution. 5

This was an application for an order of habeas corpus after a Judge of the District Court of Limassol committed applicant to custody awaiting his extradition to the Federal Republic of Germany. The Committal was based on section 9 of the Extradition of Fugitive Offenders Law, 1970 (Law 97/70) and the application for an order of habeas corpus was made under section 10* of the same Law. 10 15

Regarding the evidence to be heard by the Court of Committal under section 9(5)** of the Law the provisions of section 13*** of the Law show that such evidence need not be always oral and on oath.

Counsel for the applicant contended that the Court of Committal had no evidence before it on the basis of which there could have been made the committal order challenged by means of an application for an order of habeas corpus. Counsel for the respondent referred the Court to documents forwarded 20

* Section 10 is quoted at pp. 924-926 post.
** Section 9(5) is quoted at pp. 926-928 post.
*** Section 13 is quoted at pp. 928-930 post.

to the Government of Cyprus when the Government of the Federal Republic of Germany requested the extradition of the applicant, namely an "International warrant for arrest" issued by the Local Court at Osterode am Harz on 19th July 1982 and setting out, in detail, the offences in respect of which the extradition of the applicant is being requested, and, also, a certificate issued by the aforesaid Local Court on 19th July 1982 regarding the relevant provisions of the German Criminal Code.

Held, that there is nothing in the documents which were placed before the Court of committal and before this Court which could be regarded as "evidence", in the sense of sections 9(5) and 13 of Law 97/70, which was adduced in support of the request for the extradition of the applicant and which could be treated as evidence "sufficient to warrant" the applicant's "trial" for the offences concerned 'if they "had been committed within the jurisdiction" of the Court of committal; that, further, the Court of committal itself, in its relevant ruling, does not appear to have made a finding that there was placed before it evidence of the aforementioned nature and no such finding has been pointed to this Court in the said ruling by counsel for the respondent; that that finding was an essential part of the decision to commit the applicant to custody to await his extradition and it should have been made clearly and expressly, because this is a matter affecting the liberty of a person; and that, therefore, the order made, as aforesaid, by the District Court of Limassol, was not made with due compliance with the provisions of subsection (5) of section 9 of Law 97/70 and, consequently, an order for habeas corpus, in the exercise of the powers of the Court under section 10 of Law 97/70, as well as under Article 155.4 of the Constitution, has to be made, with the result that the applicant should be discharged from custody.

Application granted.

Application.

Application for an order of habeas corpus by Manfred Mutke following his committal to custody awaiting extradition, by a Judge of the District Court of Limassol.

S. Patsalides with *N. Athanatos*, for the applicant.

S. Georgiades, Senior Counsel of the Republic with
E. Loizidou (Mrs.), for the respondent.

Cur. adv. vult.

TRIANΤΑFYLLIDES P. read the following judgment. In the present case the applicant has applied for an order of habeas corpus after a Judge of the District Court of Limassol, on 21st August 1982, committed him to custody to await his extradition to the Federal Republic of Germany.

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The committal was, apparently, based on section 9 of the Extradition of Fugitive Offenders Law, 1970 (Law 97/70), and the present application for an order of habeas corpus has been made under section 10 of that Law, which reads as follows:

“10.—(1) Τὸ Δικαστήριον, ἐν πάσῃ περιπτώσει, καθ’ ἣν ἤθελε διατάξει τὴν κράτησιν τοῦ ὑπὸ ἔκδοσιν προσώπου δυνάμει τοῦ ἄρθρου 9, θέλει πληροφορήσει ἅμα τὸν ἐνδιαφερόμενον, εἰς κοινὴν γλῶσσαν, περὶ τοῦ δικαιώματος αὐτοῦ ὅπως ὑποβάλλῃ αἴτησιν δια habeas corpus πρὸς τοῦτοις δὲ ἀμελλητὶ κοινοποίησιν τὴν τοιαύτην ἀπόφασιν τῷ Ὑπουργῷ.

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(2) Πρόσωπον, οὕτινος διετάχθη ἡ κράτησις δυνάμει τοῦ ὡς εἴρηται ἄρθρου 9 δὲν δύναται δυνάμει τοῦ παρόντος Νόμου νὰ ἀποδοθῇ εἰς τὸ Κράτος ἢ τὴν χώραν, ἣτις ἠτήσατο τὴν ἔκδοσιν αὐτοῦ—

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(α) ἐν πάσῃ περιπτώσει, μέχρις οὗ παρέλθῃ διάστημα δεκαπέντε ἡμερῶν ἀπὸ τῆς ἡμέρας, καθ’ ἣν ἐξεδόθη τὸ περὶ ἐκδόσεως διάταγμα·

(β) ἐν ἣ περιπτώσει ἤθελεν ὑποβληθῆ αἴτησις. διὰ habeas corpus ἐφ’ ὅσον ἐκκρεμῆ ἢ ἐξέτασις τῆς ὑποβληθείσης αἰτήσεως.

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(3) Τὸ Ἀνώτατον Δικαστήριον, ἐπιλαμβανόμενον τῆς τοιαύτης αἰτήσεως, δύναται, μὴ ἐπηρεαζομένης οἰασδήποτε ἐτέρας δικαιοδοσίας αὐτοῦ, νὰ διατάξῃ τὴν ἀποφυλάκισιν τοῦ ὑπὸ ἔκδοσιν προσώπου, ἐφ’ ὅσον ἤθελε κρίνει ὅτι—

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(α) λόγῳ τῆς ἀσημάντου φύσεως τοῦ ἀδικήματος, δι’ ὃ διώκεται ἢ κατεδικάσθη· ἢ

(β) λόγῳ τῆς παρόδου μακροῦ χρόνου, ἀφ’ οὗ ἐγένετο ἡ διάπραξις τοῦ ἀδικήματος, ἢ ἀναλόγως τῆς περιπτώσεως, ἀφ’ οὗ καταζητεῖται πρὸς ἔκτισιν ποινῆς μετὰ καταδίκην αὐτοῦ· ἢ

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(γ) λόγῳ τοῦ ὅτι ἡ κατ’ αὐτοῦ κατηγορία δὲν ἐγένετο καλῆ τῇ πίστει ἢ ἐν τῷ συμφέροντι τῆς δικαιοσύνης,

ή απόδοσις αὐτοῦ θὰ ἀπετέλει, λαμβανομένων ὑπ' ὄψιν ἀπασῶν τῶν περιστάσεων, ἄδικον ἢ καταπιεστικὸν μέτρον.

5 (4) Τὸ Ἀνώτατον Δικαστήριον, ἐπιλαμβανόμενον οἰασδή-
ποτε τοιαύτης αἰτήσεως, δύναται νὰ δεχθῆ συμπληρωματικὰ
ἀποδεικτικὰ στοιχεῖα, σχετικὰ πρὸς τὴν ἀσκησιν τῆς δικαιο-
δοσίας αὐτοῦ δυνάμει τοῦ ἄρθρου 4 ἢ δυνάμει τοῦ ἐδαφίου
(3) τοῦ παρόντος ἄρθρου.

10 (5) Διὰ τοὺς σκοποὺς τοῦ παρόντος ἄρθρου, ἡ διαδικασία
διὰ τὴν ἐξέτασιν αἰτήσεως ὑποβληθείσης διὰ τὴν ἐκδοσιν
habeas corpus λογίζεται ἐκκρεμοῦσα μέχρι οὗ ἐκδικασθῆ
ἢ κατ' αὐτῆς τυχὸν ἀσκηθεῖσα ἐφεσις, ἢ παρέλθῃ ἀπρακτος
ἢ προθεσμία, ἐν ᾗ δύναται νὰ ἀσκηθῆ τοιαύτη ἐφεσις, ἢ,
15 ἐφ' ὅσον ἀπαιτεῖται ἄδεια διὰ τὴν ἀσκησιν ἐφέσεως, ἢ προ-
θεσμία ἐν ᾗ δύναται νὰ αἰτηθῆ ἢ παροχὴ τῆς τοιαύτης ἀ-
δείας”.

20 (“10.-(1) Where a person is committed to custody under
section 9, the Court shall inform him in ordinary language
of his right to make an application for habeas corpus and
shall forthwith give notice of the committal to the Minister.

(2) A person committed to custody under the said section
9 shall not be returned under this Law -

- 25 (a) in any case, until the expiration of the period of fifteen
days beginning with the day on which the order for
his committal is made;
- (b) if an application for habeas corpus is made in his
case, so long as proceedings on that application are
pending.

30 (3) On any such application the Supreme Court may,
without prejudice to any other jurisdiction of the Court,
order the person committed to be discharged from custody
if it appears to the Court that -

- (a) by reason of the trivial nature of the offence of which
he is accused or was convicted; or
- 35 (b) by reason of the passage of time since he is alleged to
have committed it or to have become unlawfully at
large, as the case may be; or

(c) because the accusation against him is not made in good faith in the interests of justice,

it would, having regard to all the circumstances, be unjust or oppressive to return him.

(4) On any such application the Supreme Court may receive additional evidence relevant to the exercise of their jurisdiction under section 4 or under subsection (3) of this section. 5

(5) For the purposes of this section proceedings on an application for habeas corpus shall be treated as pending until any appeal in those proceedings is disposed of; and an appeal shall be treated as disposed of at the expiration of the time within which the appeal may be brought or, where leave to appeal is required, within which the application for leave may be made, if the appeal is not brought or the application made within that time.” 10 15

Counsel for the respondent has pointed out that in subsection (4) of section 10, above, the reference to “section 4” should have been a reference to “section 6” of Law 97/70.

Law 97/70 has been preceded by the European Convention on Extradition (Ratification) Law, 1970 (Law 95/70), but I do not think that there arises, at any rate for the purposes of this case, the issue of whether Law 95/70 and the Convention which was ratified by means of it, are, in any way, in conflict with the relevant provisions of Law 97/70, because in the said Convention it is expressly provided, by means of its Article 22, that “Except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party.” 20 25

In deciding on the fate of this application for an order of habeas corpus I have to examine, inter alia, whether the procedure prescribed by Law 97/70 has been duly complied with. 30

It is provided, by means of subsection (5) of section 9 of Law 97/70, as follows:

“(5) ‘Εφ’ ὅσον ἡ ἐξουσιοδότησις διὰ τὴν ἔναρξιν τῆς διαδικασίας τῆς ἐκδόσεως ἤθελε παρασχεθῆ τὸ δὲ ἐπιληφθὲν 35

5 τῆς ἐκδόσεως Δικαστήριον ἤθελεν ἰκανοποιηθῆ, δυνάμει τῶν προσαχθέντων πρὸς ὑποστήριξιν τῆς αἰτήσεως ἐκδόσεως ἀποδεικτικῶν στοιχείων, ἢ τῶν κατ' αὐτῆς προσαχθέντων τοιούτων, ὅτι τὸ ἀδίκημα εἰς ὃ ἀφορᾷ ἡ τοιαύτη ἐξουσιοδότησις εἶναι ἀδίκημα δι' ὃ δύναται κατὰ νόμον νὰ χωρήσῃ ἐκδοσις, πρὸς τούτοις δὲ ἰκανοποιηθῆ—

10 (α) ἐν μὲν τῇ περιπτώσει προσώπου διωκομένου διὰ τὴν διάπραξιν τοῦ ἐν λόγῳ ἀδικήματος, ὅτι τὰ προσαχθέντα ἐνώπιον αὐτοῦ ἀποδεικτικὰ στοιχεῖα εἶναι ἐπαρκῆ ὥστε νὰ δικαιολογῶσι τὴν παραπομπὴν αὐτοῦ εἰς δίκην διὰ τὸ ἐν λόγῳ ἀδίκημα, ἐφ' ὅσον τοῦτο διεπράττετο ἐντὸς τῆς δικαιοδοσίας τοῦ Δικαστηρίου·

15 (β) ἐν δὲ τῇ περιπτώσει προσώπου καταζητουμένου διὰ τὴν ἔκτισιν ποινῆς ἐπιβληθείσης αὐτῷ διὰ τὴν διάπραξιν τοῦ τοιούτου ἀδικήματος, ὅτι τῷ ὄντι κατεδικάσθη καὶ ὅτι παρανόμως παραμένει ἐλεύθερον,

20 τὸ Δικαστήριον θέλει διατάξῃ τὴν προφυλάκισιν αὐτοῦ μέχρις οὗ χωρήσῃ ἡ ἐκδοσις, ἐκτὸς ἐὰν ἡ ἐκδοσις ἀπαγορεύεται δυνάμει ἐτέρας τινὸς προνοίας τοῦ παρόντος Νόμου· ἐν ἐναντίᾳ περιπτώσει θέλει διατάξῃ ὅπως τὸ εἰς ὃ ἀφορᾷ ἡ αἴτησις ἐκδόσεως πρόσωπον ἀφεθῆ ἐλεύθερον”.

25 (“(5) Where an authority to proceed has been issued in respect of the person arrested and the Court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied—

30 (a) where that person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the Court;

(b) where that person is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large,

35 the Court shall, unless his committal is prohibited by any other provision of this Law, commit him to custody to await his extradition thereunder; but if the Court is not

so satisfied or if the committal of that person is so prohibited, the Court shall discharge him from custody.”).

As regards the “evidence”, to which reference is made in the aforementioned subsection (5), there should be borne in mind the provisions of section 13 of Law 97/70, which show, in my opinion, that the evidence to be adduced before the “Court of committal” - in this case the District Court of Limassol - need not be always oral and on oath. 5

The said section 13 reads as follows:

“(13.—(1) Εἰς πᾶσαν διαδικασίαν διεξαγομένην δυνάμει τοῦ παρόντος Νόμου, περιλαμβανομένης καὶ τῆς διαδικασίας τῆς ἀφορώσης εἰς τὴν αἴτησιν ἐκδόσεως habeas corpus, ἀναφορικῶς πρὸς κρατούμενον, δυνάμει τοῦ παρόντος Νόμου, πρόσωπον— 10

(α) πᾶν, δεόντως κεκρωμένον, ἔγγραφον, φερόμενον ὡς περιέχον ἔνορκον μαρτυρικὴν κατάθεσιν παρασχεθεῖσαν εἰς Κράτος συνάψαν συνθήκην ἐκδόσεως μετὰ τῆς Δημοκρατίας ἢ εἰς καθωρισμένην Χώραν τῆς Κοινοπολιτείας, γίνεται ἀποδεκτὸν ὡς ἀποδεικτικὸν στοιχεῖον τῶν ἐν αὐτῷ ἐκτιθεμένων γεγονότων· 15 20

(β) πᾶν, δεόντως κεκρωμένον ἔγγραφον, φερόμενον ὡς ἔγγραφον ἀποδεικτικὸν στοιχεῖον ἢ ὡς ἀντίγραφον τοιοῦτου ἔγγραφου κατατεθέντος εἰς οἰανδήποτε δικαστικὴν διαδικασίαν διεξαχθεῖσαν εἰς τὸ τοιοῦτον Κράτος ἢ χώραν, γίνεται ἀποδεκτὸν ὡς ἀποδεικτικὸν στοιχεῖον· 25

(γ) πᾶν, δεόντως κεκρωμένον ἔγγραφον, πιστοποιοῦν ὅτι πρόσωπόν τι κατεδικάσθη κατὰ τὴν καθωρισμένην ἐν τῷ ἔγγραφῷ ἡμερομηνίαν, δι’ ἀδίκημα κατὰ τὸ δίκαιον οἰουδήποτε τοιοῦτου Κράτους ἢ χώρας ἢ τμήματος αὐτῶν, γίνεται δεκτὸν ὡς ἀποδεικτικὸν στοιχεῖον τοῦ γεγονότος καὶ τῆς ἡμερομηνίας τῆς τοιαύτης καταδίκης. 30

(2) Διὰ τοὺς σκοποὺς τοῦ παρόντος ἄρθρου ἔγγραφόν τι λογίζεται ὡς δεόντως κεκρωμένον τοιοῦτο—

(α) ἐν τῇ περιπτώσει ἔγγραφου περιέχοντος μαρτυρικὴν κατάθεσιν παρασχεθεῖσαν ὡς ἐν τοῖς ἀνωτέρω, ἐφ’ ὅσον ἤθελε πιστοποιηθῆ ὑπὸ δικαστοῦ ἢ λειτουργοῦ τοῦ ὡς εἴρηται Κράτους ἢ χώρας ὅτι τοῦτο εἶναι τὸ 35

πρωτότυπον έγγραφον, τὸ περιέχον ἢ ἀναγράφον τὴν τοιαύτην μαρτυρικήν κατάθεσιν ἢ πιστὸν ἀντίγραφον αὐτοῦ·

5 (β) ἐν τῇ περιπτώσει ἐγγράφου ἀποδεικτικοῦ στοιχείου, ἐφ' ὅσον ἤθελε πιστοποιηθῆ ὡς ἐν τοῖς ἀνωτέρω ὅτι εἶναι τὸ πρωτότυπον τοῦ οὕτω κατατεθέντος ἐγγράφου ἢ πιστὸν ἀντίγραφον αὐτοῦ·

10 (γ) ἐν τῇ περιπτώσει ἐγγράφου βεβαιούντος τὴν καταδίκην προσώπου, ἐφ' ὅσον τοῦτο ἤθελε πιστοποιηθῆ ὡς ἐν τοῖς ἀνωτέρω,

καὶ ἐν πάσῃ τοιαύτῃ περιπτώσει τὸ ἐγγράφον κυροῦται εἴτε δι' ἐνόρκου τινὸς μαρτυρίας εἴτε διὰ τῆς ἐπίσημου σφραγίδος Ὑπουργοῦ τοῦ Κράτους μεθ' οὗ συνήφθη συνθήκη ἐκδόσεως μετὰ τῆς Δημοκρατίας, ἢ, ἀναλόγως τῆς περιπτώσεως, καθωρισμένης χώρας τῆς Κοινοπολιτείας.

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(3) Ἐν τῷ παρόντι ἄρθρῳ ὁ ὅρος ἐνορκος περιλαμβάνει καὶ ἐπίσημον βεβαίωσιν ἢ δήλωσιν· οὐδὲν τῶν ἐν τῷ παρόντι ἄρθρῳ διαλαμβανόμενων ἀποκλείει τὴν παραδοχὴν οἴουδήποτε ἐγγράφου ὡς ἀποδεικτικοῦ στοιχείου, ἐφ' ὅσον τὸ τοιοῦτον ἐγγράφον εἶναι παραδεκτὸν ὡς ἀποδεικτικὸν στοιχεῖον ἀνεξαρτήτως τῶν προνοιῶν τοῦ παρόντος ἄρθρου.”

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“(13)-(1) In any proceedings under this Law, including proceedings on an application for habeas corpus in respect of a person in custody thereunder -

25 (a) a document, duly authenticated, which purports to set out evidence given on oath in a treaty State or designated commonwealth country shall be admissible as evidence of the matters stated therein;

30 (b) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received, in any proceedings in any such State or country shall be admissible in evidence;

35 (c) a document, duly authenticated, which certifies that a person was convicted on a date specified in the document of an offence against the law of, or of a part of, any such State or country shall be admissible as evidence of the fact and date of the conviction.

(2) A document shall be deemed to be duly authenticated for the purposes of this section -

- (a) in the case of a document purporting to set out evidence given as aforesaid, if the document purports to be certified by a judge, or magistrate or officer in or of the State or country in question to be the original document containing or recording that evidence or a true copy of such a document; 5
- (b) in the case of a document which purports to have been received in evidence as aforesaid or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of a document which has been, so received; 10
- (c) in the case of a document which certifies that a person was convicted as aforesaid, if the document purports to be certified as aforesaid, 15

and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister of the treaty State or the designated commonwealth country, as the case may be. 20

(3) In this section 'oath' includes affirmation or declaration; and nothing in this section shall prejudice the admission in evidence of any document which is admissible in evidence apart from this section." 25

Sections 9, 10 and 13, above, of our Law 97/70 appear to have been modelled on, respectively, sections 7, 8 and 11 of the Fugitive Offenders Act, 1967, in England (see Halsbury's Statutes of England, 3rd ed., vol. 13, p. 286). 25

It has been submitted by counsel for the applicant that the Court of committal had no evidence before it on the basis of which there could have been made the committal order which is now challenged by means of an application for an order of habeas corpus. On the other hand, I have been referred by counsel for the respondent to documents forwarded to the Government of Cyprus when the Government of the Federal Republic of Germany requested the extradition of the applicant, namely an "International warrant for arrest" issued by the 30 35

Local Court at Osterode am Harz on 19th July 1982 and setting out, in detail, the offences in respect of which the extradition of the applicant is being requested, and, also, a certificate issued by the aforesaid Local Court on 19th July 1982 regarding the relevant provisions of the German Criminal Code.

As far as I can see there is nothing in the documents which were placed before the Court of committal and before me which could be regarded as "evidence", in the sense of sections 9(5) and 13 of Law 97/70, which was adduced in support of the request for the extradition of the applicant and which could be treated as evidence "sufficient to warrant" the applicant's "trial" for the offences concerned if they "had been committed within the jurisdiction" of the Court of committal.

It has to be noted, further, that the Court of committal itself, in its relevant ruling, does not appear to have made a finding that there was placed before it evidence of the aforementioned nature and no such finding has been pointed to me in the said ruling by counsel for the respondent. That finding was an essential part of the decision to commit the applicant to custody to await his extradition and it should have been made clearly and expressly, because this is a matter affecting the liberty of a person.

For these reasons I find that the order made, as aforesaid, by the District Court of Limassol, was not made with due compliance with the provisions of subsection (5) of section 9 of Law 97/70 and, consequently, an order for habeas corpus, in the exercise of the powers of the Court under section 10 of Law 97/70, as well as under Article 155.4 of the Constitution, has to be made, with the result that the applicant should be discharged from custody.

As no costs have been claimed by counsel for the applicant I do not propose to make any order regarding the costs of the present proceedings.

Application granted. No order as to costs.