1983 May 24

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, MALACHTOS, DEMETRIADES, LORIS, STYLIANIDES, PIKIS, JJ.]

POLICE,

v.

STEPHANOS ATHIENITIS,

Accused.

(*Question of Law Reserved* No. 191).

Criminal Procedure—Criminal case—Discontinuance—Attorney-General can, in the exercise of his powers under Article 113.2 *of the Constitution, discontinue a case without affording any reasons and without filing a nolle prosequi under section* 154(1) *of the Criminal Procedure Law, Cap.* 155—*He can exercise this power in person or by officers subordinate to him.*

On 20th December 1982 the District Court of Larnaca, while dealing with criminal case No. 6143/82, reserved for the opinion of the Supreme Court, under section 148 of the Criminal Procedure Law, Cap.155, the following two questions of law:

"1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of s.154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney-General discontinue a case without affording any reasons as to the due exercise of such a power?

Held, Hadjianastassiou and Pikis, JJ. dissenting:

(1) That the Attorney-General can, in the exercise of his powers under Article 113.2 of the Constitution, discontinue a criminal case without filing a nolle prosequi, in accordance with the provisions of section 154(1) of the Criminal Procedure Law, Cap.155.

(2) That the Attorney-General can discontinue a case without affording any reasons for doing so; and he can exercise this power in person or by officers subordinate to him.

Order accordingly.

Cases referred to:

R. v. The Comptroller-General of Patents, Designs and Trade Marks [1899] 1 Q.B.909 at p.914;

Police v. Ekdotiki Eteria (1982) 2 C.L.R.63;

Georghiou v. The Attorney-General (1982) 2 C.L.R.938;

Police v. Georghiades (1982) 2 C.L.R.33 at p.48;

Gouriet v. Union of Post Office Workers [1977] 3 All E.R.70 at p.88; [1978] A.C.435;

Georghadji and Another v. Republic, (1971) 2 C.L.R.229;

Rodosthenous and *Another v. The Police*, 1961 C.L.R.48;

Attorney-General v. Pouris and Others (1979) 2C.L.R.15;

Raymond v. Attorney-General [1982] 2 All E.R.487 at p.491;

Xenophontos v. Republic, 2 R.S.C.C.89;

R. v. Gateshead Justices [1981] 1 All E.R.1027 at p.1033;

R. v. Rowlands, 17 Q.B.671;

Republic v. Zacharia, 2 R.S.C.C.1;

Police v. Hondrou, 3 R.S.C.C.82;

Papaphilipou v. Republic, 1 R.S.C.C.62;

Hinds v. Queen [1976] 1 All E.R.353;

R. v. Meruyn Broad [1979] 68 Cr. App. R.281;

R. v. Bedwellty Justices ex P. Munday [1970] Crim. L.R. 601;

Soanes [1948] 32 Cr. App. R. 136;

R. v. Philips [1953] 1 All E.R.968;

R. v. Nishbet [1971] 3 All E.R.307 at pp. 312, 313;

Police v. Tterla (1973) 1 J.S.C. 109 (a judgment of the District Court of Famagusta);

Isaias v. Police [1966] 2 C.L.R.43;

R. v. Sang [1979] 2 All E.R. 46 (C.A.); [1979] 2 All E.R.1222 (H.L.).

Questions of Law Reserved.

Questions of law reserved by the District Court of Larnaca (Eliades, D.J.) for the opinion of the Supreme Court under section 148 of the Criminal Procedure Law, Cap. 155 relative to a ruling of the said District Court made in the course of the hearing of Criminal Case No. 6143/82 preferred by the Police against Stefanos Athienitis who was charged for theft.

A. M. Angelides, Senior Counsel of the Republic with *M. Photiou*, for the Attorney-General of the Republic.

Gl. Xenos, for the accused.

Cur. adv. vult.

TRIANTAFYLLIDES P.: This Court is, by majority, of the opinion that the answer to both the questions of law which were reserved, under section 148 of the Criminal Procedure Law, Cap. 155, should be in the affirmative; and in the light of this opinion this case is remitted to the District Court of Larnaca for any further proceedings.

Each one of us will give his reasons for agreeing or disagreeing with the opinion of the Court.

TRIANTAFYLLIDES P.: On 20th December 1982 the District Court of Larnaca, while dealing with criminal case No. 6143/82, reserved for the opinion of the Supreme Court, under section 148 of the Criminal Procedure Law, Cap. 155, the following two questions of law:

"1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of s.154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney-General discontinue a case without affording any reasons as to the due exercise of such a power?"

The circumstances in which the above two questions were reserved for the opinion of the Supreme Court are stated as follows by the District Court of Larnaca:

"On the 10th September 1982, when this case was fixed for plea, the prosecution asked for an adjournment as the matter was reconsidered by the Attorney-General. The Court accepted the application and the case was adjourned to 9th October 1982, for plea. As on that date the Prosecution stated that they were not ready to proceed (due to the fact that the file was still at the office of the Attorney-General), the Court adjourned the case for a second time to the 18th of October 1982, for plea.

On the 18th October 1982, the Prosecuting Officer stated to the Court that he had instructions from the Attorney-General *to withdraw the case on the basis of Art.*113.2 *of the Constitution.* After a short break, the Court delivered its ruling, by which the application was dismissed. The accused was thereupon charged and pleaded not guilty to the charge preferred against him and the case was accordingly fixed for hearing on the 4th December 1982.

On that date the Prosecution submitted that they did not wish to offer any evidence and the Court asked the Prosecuting Officer to respect the previous ruling of the Court on the matter. An adjournment was later asked by the Prosecuting Officer in order to get further instructions and on the 18th December 1982, when the case was fixed for hearing, the Prosecution informed the Court that the Attorney-General, acting on the strength of Art. 113 of the Constitution, '*discontinues the conduct of the present proceedings*' ".

Paragraph 2 of Article 113 of the Constitution reads as follows:

"2. The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest, to in-

stitute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions."

Subsection (1) of section 154 of Cap. 155, as modified by virtue of Article 188.3 (a) of the Constitution, reads as follows:

"154.(1) In any criminal proceedings and at any stage thereof before judgment the Attorney-General may enter a nolle prosequi, either by stating in Court or informing the Court in writing that the Republic intends that the proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the nolle prosequi is entered."

Before proceeding I should observe that in my view the Supreme Court when exercising its jurisdiction under section 148 of Cap. 155 is only empowered to answer, with due reasoning, the questions of law reserved under such section for its opinion and cannot proceed to lay down in a binding manner what the law is in any other respect.

The first question which has been reserved, as above, by the District Court of Larnaca clearly raises the issue whether the power given to the Attorney-General under Article 113.2 of the Constitution to "discontinue any proceedings for an offence against any person in the Republic" can only be exercised in accordance with the provisions of section 154(1) of Cap. 155; in other words, whether the said constitutional power of the Attorney-General is limited, as regards the manner of its exercise, by the provisions of a statute, such as Cap. 155, which existed before the coming into operation of the Constitution on 16th August 1960.

It is, in my opinion, beyond dispute that a constitutional provision cannot be applied or construed on the strength of a statutory provision, whether such provision has existed before the coming into operation of the Constitution or has been enacted afterwards, because the Constitution is the supreme law of the country and it prevails over any statutory provision; and, as a result, statutory provisions have to be construed and applied in a manner consistent with the Constitution.

In applying nowadays section 154(1) of Cap. 155, in the light of Article 113.2 of the Constitution, it is pertinent to quote paragraphs 1, 4 and 5 of Article 188 of the Constitution, which read as follows:-

"1. Subject to the provisions of this Constitution and to the following provisions of this Article, all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be, made under this Constitution, continue in force on or after that date, and shall, as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution.

. . . . . .

4. Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of this Constitution including the Transitional Provisions thereof.

5. In this Article -

'law' includes any public instrument made before the date of the coming into operation of this Constitution by virtue of such law; 'modification' includes amendment, adaptation and repeal."

It is, also, clear from the wording of section 154(1) of Cap. 155 that entering a nolle prosequi is a mode of informing a Court which is dealing with a criminal case that "the Republic intends that the proceedings shall not continue."

In the light of the foregoing I am of the opinion that the answer to the first question which has been reserved, as aforesaid, under section 148 of Cap. 155, is that the Attorney-General can, in the exercise of his powers under Article 113.2 of the Constitution, discontinue a criminal case in any manner sufficient, for purposes of Court record, to inform the Court concerned of his decision to discontinue such case; and this can be done, also, by any person or officer subordinate to him "acting under and in accordance with his instructions". Accordingly, it was

sufficient in the present instance to inform, through the police officer conducting the prosecution, the District Court of Larnaca "that the Attorney-General, acting on the strength of Article 113 of the Constitution, 'discontinues the conduct of the present proceedings'".

As regards the answer to the second question, which has been reserved under section 148 of Cap. 155, as above, my opinion is that the power of the Attorney-General to enter a nolle prosequi is not subject to the control of the Courts (see, inter alia, in this respect, Halsbury's Laws of England, 4th ed., vol.11, p.137, para. 222, and *R. v. The Comptroller-General of Patents, Designs and Trade Marks,* [1899] 1 Q.B. 909, 914). Thus, the power of the Attorney-General under Article 113.2 of the Constitution to discontinue a criminal proceeding is, likewise, not subject to the control of the Courts and, therefore, he need not give any reasons, in this respect, to the District Court of Larnaca.

In the light of the above the answer to both questions which have been reserved for our opinion should be in the affirmative.

HADJIANASTASSIOU J.: On the 20th December, 1982, the District Court of Larnaca reserved for the opinion of the Supreme Court, under section 148 of the Criminal Procedure Law, Cap. 155, the following questions of law:

1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of section 154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney-General discontinue a case without affording any reasons as to the due exercise of such a power?

The circumstances under which the two questions were reserved for the opinion of the Supreme Court appear in the relevant ruling of the said Judge which was delivered on 20th December, 1982, in Case No. 6143/82, and reads as follows:

> "On the 10th September, 1982, when this case was fixed for plea, the prosecution asked for an adjournment as the matter was reconsidered by the Attorney-General. The

Court accepted the application and the case was adjourned to 9th October, 1982, for plea. As on that date the Prosecution stated that they were not ready to proceed (due to the fact that the file was still at the office of the Attorney-General), the Court adjourned the case for a second time to the 18th of October 1982, for plea.

On the 18th October 1982, the Prosecuting Officer stated to the Court that he had instructions from the Attorney-General to withdraw the case on the basis of Art.113.2 of the Constitution. After a short break, the Court delivered its ruling, by which the application was dismissed. The accused was thereupon charged and pleaded not guilty to the charge preferred against him and the case was accordingly fixed for hearing on the 4th December, 1982.

On that date the Prosecution submitted that they did not wish to offer any evidence and the Court asked the Prosecuting Officer to respect the previous ruling of the Court on the matter. An adjournment was later asked by the Prosecuting Officer in order to get further instructions and on the 18th December, 1982, when the case was fixed for hearing, the Prosecution informed the Court that the Attorney-General, acting on the strength of Art. 113 of the Constitution, 'discontinued the conduct of the present proceedings' ".

Then the Court faced with that submission, viz., the discontinuance by the Attorney-General delivered its ruling indicating its reasons for the course taken by it and in doing so it relied on English and Cyprus precedents. In effect the cases quoted lend support to the proposition that the only way in which the Attorney-General may discontinue criminal proceedings without the leave of the Court is by filing a nolle prosequi.

As I said earlier when the ruling of the Court was delivered the Police Sergeant informed the Court that his instructions were not to offer any evidence. In the light of that statement a new date was given and the case was fixed once again for hearing on the 18th December, 1982. Once again the Prosecuting Officer informed the Court that he had instructions from the Attorney-General not to proceed with the case. Indeed, the Attorney-General's instructions were that he wished to dis-

continue the proceedings relying on Article 113 of the Constitution. Faced with that problem the learned Judge reserved the two questions and sought our guidance on the two distinct subjects. (a) The power if any of the Attorney-General to discontinue proceedings in a way other than that envisaged under section 154(1) of Cap. 155, and (b) the control that a Court of law may exercise over a decision of the Attorney-General to withdraw criminal proceedings.

The first question requires me to decide whether section 154(1) of Cap. 155 is in any way inconsistent to or incompatible with Article 113.2 of the Constitution so far as it defines the power of the Attorney-General to discontinue or withdraw criminal proceedings.

There is no doubt that laws enacted prior to independence were saved by Article 188.1 of the Constitution subject to the requirement that they may be applied with the necessary qualifications, if anyone, is needed in order to conform with the provisions of the Constitution. Article 188.1 of our Constitution is in these terms:

> "Subject to the provisions of this Constitution and to the following provisions of this Article, all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be, made under this Constitution, continue in force on or after that date, and shall, as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution."

With that in mind counsel on behalf of the Attorney-General argued with regard to question (1) and urged upon us to hold that (a) Article 113 of the Constitution confers on the Attorney-General unfettered power to discontinue the proceedings and to that extent this power is not limited by section 154(1) of Cap. 155 that must or should be disregarded. (b) The Attorney-General is entitled and can stop any prosecution by offering no evidence or indeed by withdrawing the charges without the leave of the Court, notwithstanding the provisions of section 91 of Cap. 155, or any other enactment.

Indeed counsel for the prosecution went even further and argued that the Attorney-General can bring proceedings to an end by offering no evidence after a plea, without the leave of the Court resulting in a verdict of not guilty, that is a verdict on the merits of the case. Having considered very carefully the argument for the prosecution I shall do my best to answer the question raised under No. 1 of the proceedings. Article 179 of the Constitution reads as follows:

"1. This Constitution shall be the supreme law of the Republic.

2. No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way repugnant to, or inconsistent with, any of the provisions of this Constitution."

With this in mind and subject to the doctrine of necessity as judicially defined its provisions must be given effect to without any qualifications whatever. Indeed the recent decisions of our Supreme Court emphasize that no law can abridge or modify constitutional rights. See *Police v. Ekdotiki Eteria* (1982) 2 C.L.R. 63; *Georghiou v. The Attorney-General* (1982) 2 C.L.R. 938, and *Police v. Georgiades* (1982) 2 C.L.R. 33, 48. The first question in the present case is whether section 154(1) of Cap. 155 abridges or in any way restricts the rights vested in the Attorney-General by Article 113.2 of the Constitution to discontinue proceedings. Section 154.1 is a procedural enactment designed to regulate comprehensively every facet of criminal proceedings. This section deals with the general powers of the Attorney-General in criminal proceedings and sub-section (1) reads as follows:

"In any criminal proceedings and at any stage thereof before judgment the Attorney-General may enter a nolle prosequi, either by stating in Court or informing the Court in writing that the Republic intends that the proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the nolle prosequi is entered".

There is no doubt that this section read earlier provides that if the Attorney-General appears in person before the Court he can discontinue proceedings by making a statement to that effect and, in every other case by informing the Court in writing that the State intends that proceedings shall not continue. In the words of Lord Dilhorne in *Gouriet v. U.P.W.* [1978] A.C. 435, all the Attorney-General has to do is to sign a piece of paper suspending the prosecution. What section 154(1) aims to achieve on a preview of its plain provisions, is to provide for the manner in which this right should be exercised prescribing the barest formality conceivable, to sign, I repeat, a piece of paper. The further question I pause for a moment is in the light of what has been said earlier can it be validly asserted that this formality can constitute a restriction of his rights under Article 113.2 of the Constitution and an inroad or interference into his powers? With respect in my judgment section 154(1) neither abridges nor restricts the rights of the Attorney-General under Article 113.2. It merely lays down that the powers should be exercised subject to a simple procedure designed if nothing else to ensure that no one other than the Attorney-General can assume his rights under Article 113.2 of the Constitution. Indeed, in my view far from restricting *his power under Article 113.2 and section 154(1) of Cap. 155,* it reinforces them in a manner perfectly compatible with the dictates of the Constitution. But there is a further question and there is no doubt that section 154(1) of Cap. 155 is to point out or indicate the repercussions arising from the entry of a nolle prosequi. According to these proceedings the accused is discharged but not acquitted. Once again, in my view, there is no derogation from Article 113.2 and the word "discontinue" confers no more power than to interrupt the proceedings and it brings the criminal process to a halt but not a conclusive end.

Having considered the submission of counsel for the prosecution that section 154(1) of Cap. 155 interferes with the rights of the Attorney-General under Article 113.2 of the Constitution unfortunately overlooks the object of a precedural enactment such as the Criminal Procedure Law which is to regulate and co-ordinate the exercise of legal rights. Furthermore, criminal procedure aims to gain the necessary certainty in the legal process, and procedural rules according to legal theory are consequential as to the rights the exercise of which they

regulate. I would repeat, once again, procedural safeguards provide the spring-board for the valid exercise of rights given by law. If authority is needed in *Fotini Polycarpou Georghadj and Another v. The Republic* (1971) 2 C.L.R. 229 the Court repeated that there is no inconsistency or conflict between the provisions of section 25(2) of the Courts of Justice Law 14/60 and those of Article 155.1 of the Constitution, vesting in the Supreme Court exclusive appellate jurisdiction. See *Lefkios Rodosthenous and Another v. The Police*, 1961 C.L.R. 48 and *Attorney-General v. Pouris and Others* (1979) 2 C.L.R. 15. In the light of the authorities and because section 154(1) of Cap. 155, in my view, all that section 154(1) of Cap. 155 purports to accomplish, is to establish the mode in which the right of the Attorney-General to discontinue proceedings may be exercised. Having given the matter my full consideration I have reached the conclusion that the provisions of section 154(1) of Cap. 155 are in no conflict with those of Article 113.2 of the Constitution. With respect to the Attorney-General he may at any time orally if personally present or by filing a nolle prosequi under his hand on any other occasion discontinue proceedings. Not only the criminal procedure leaves unfettered the right of the Attorney-General, and quite rightly so, to discontinue criminal proceedings at his discretion, but also establishes by section 156 of Cap. 155 the procedural framework for the deligation of his powers.

As regards to the second question which has been reserved I had had the advantage of reading in draft the judgment of Mr. Justice Pikis. I am in respectful agreement with it. Therefore I concur in holding that the two questions shall be answered as suggested in his judgment.

MALACHTOS J.: The present proceeding arose out of a summary trial before a District Judge of the District Court of Larnaca in Criminal Case No. 6142/82, where the accused was charged that on the 19th day of April, 1982, at Lefkara in the District of Larnaca, stole an old coffee mill valued at £10.- property of Costas Demetriou of Kato Lefkara, now of Nicosia.

According to the record of proceedings, on the 10th September, 1982, the accused appeared in person before the District Court of

Larnaca and before he was charged the Police Sergeant who was conducting the prosecution, applied for an adjournment as the case was under consideration by the Attorney-General. The trial Judge then adjourned the case to the 9th October, 1982, for plea and released the accused on bail in the sum of £100.- to appear before the Court on the above date.

On the 9th October, 1982, the accused appeared before the Court, this time represented by advocate, but the prosecuting officer applied for a further adjournment as the file of the case was still with the office of the Attorney-General. The case was then adjourned to the 18th October, 1982, and the accused was released on the same bail.

On the 18th October, 1982, the accused appeared before the Court but before he was called upon to plead the prosecuting officer stated to the Court that he had instructions from the Attorney-General to withdraw the case, basing his aplication on Article 113 of the Constitution. This Article is as follows:

> "1. The Attorney-General of the Republic assisted by the Deputy Attorney-General of the Republic shall be the legal adviser of the Republic and of the President and of the Vice-President of the Republic and of the Council of Ministers and of the Ministers and shall exercise all such other powers and shall perform all such other functions and duties as are conferred or imposed on him by this Constitution or by law.
>
> 2. The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions".

The trial Judge then, after a short break, made the following ruling:

> "Before accused was asked to plead to a charge of stealing an old coffee mill, of the value of £10.- the prosecution informed the Court that they had instructions from the office of the Attorney-General to withdraw the case in accordance with Article 113.2 of Constitution.

The right to withdraw or discontinue a criminal charge pending before a Court of Law, may arise in the following ways:

(a) Withdrawal -

Section 91 of the Criminal Procedure Law, Cap.155, provides that -

'If a prosecutor in any summary trial, at any time before a final order is passed, satisfies the Court that there are sufficient grounds for permitting him to withdraw the charge, the Court may permit him to withdraw the same and shall, thereupon, acquit the accused. Provided that, if the charge is so withdrawn before the accused had pleaded to it, the accused shall be discharged but such discharge shall not operate as an acquittal'.

This section puts down in a statutory from the inherent powers of the Court to regulate the proceedings before it. It takes the form of a discretionary power which must be exercised judicially in the interests of justice and cannot be made the subject-matter of a bargain between the Prosecution and the Defence. When the Prosecution and the Defence had come to an agreement as to the withdrawal of one of the charges preferred against accused, the latter undertaking to plead guilty to the remaining charge, it was held that the Court was not bound by such an agreement without inquiring into the relevant facts. (See *R. v. Bedwellty Justices, Ex Parte Munday*, [1970], Crim. L.R. p. 601).

The withdrawal of the charge may be allowed where there is no evidence to support the charge as well as in the case where leave is applied to withdraw a charge so as to avoid any element of oppression that may result because of the large number of charges which have been simultaneously preferred against accused as for example in *Akritas v. Regina* (20 C.L.R. p. 110), where the Supreme Court observed that 20 different offences on two counts of falsification of accounts and embezzlement was an undesirable way of proceeding against appellant.

The Court will exercise favourably its discretion when the evidence as has been adduced in the course of trial , does not support one of two alternative counts in which case leave will be granted for the withdrawal of one of the alternative counts.

Where the hearing of the case has started and evidence has been heard, on an application for leave to withdraw, the main consideration upon which the Court will exercise its discretion will be whether the evidence already adduced is so unreliable that it cannot support the charge; otherwise, the Court will be turning a blind eye to illegality. The Court will not pause and evaluated the evidence for the prosecution before the case for the prosecution is closed but there are cases where the evidence is so unreliable or so discredited that the Court can say with certainty the evidence cannot possibly support the charge.

The discretion of the Court, as wide as may be, it is not unfettered and cannot be exercised at will, the paramount consideration being always the protection of the interests of justice. In deciding whether to prosecute or not a particular case, the Attorney-General may have to have regard to a variety of considerations, all of them leading to the final question:

Would a prosecution be in the public interest, including in that phrase of course, in the interests of justice? (see *Nina Ponomareva*, [1956] Crim. L.R. 725.

Discontinuance -

By virtue of s. 154(1) of the Criminal Procedure Law, Cap. 155 the Attorney-General of the Republic has the right in any criminal proceedings and at any stage thereof to enter a nolle prosequi whereupon the accused is discharged at once in respect of the charge or information for which the nolle prosequi is entered.

A nolle prosequi is usually entered in cases where the accused person cannot be produced in Court to plead or stand trial due to mental or physical incapacity which is of a permanent nature and it can be entered only on the directions of the Attorney-General. (see *R. v. Rowlands*, 17 Q.B. 671).

A nolle prosequi may be entered at any stage before judment *R. v. Dunn*, 1 C. and K. 70), but it cannot be entered during appeal proceedings (*Isaias v. Police* (1966), 2 C.L.R. 43.

This power of the Attorney-General is not subject to any control by the Courts (*R. v. Comptroller of Patents*, [1899] 1 Q.B. 909), but is open to criticism by the Legislature and in

England its abuse is prevented by the ordinary principle of Ministerial responsibility (*Queen v. Allen*, 1962, 1 B. and S. 850) The filing of a nolle prosequi puts an end to the Prosecution but does not operate as a bar, discharge or an acquittal on the merits, and the party remains liable to the recharged or re-indicted (see *Goddard v. Smith*, 3 SALK. 245).

In England, where by virtue of the provisions of s.4 of the Prosecution of Offences Act 1979, the Director of Public Prosecutions has the right to "undertake the conduct of a prosecution commenced privately", the question arose as to what were the limits of such a discretion and Mars - Justice had this to say in this respect:-

> 'Having regard to the wide powers conferred by the statutes and regulations to which I have referred, it is impossible to argue that it was unlawful or ultra vires for the Director of Public Prosecutions to interfere in this private prosecution only for the purpose of offering no evidence. As (counsel for the Director of Public Prosecutions) has pointed out there is nothing novel about such a procedure. The Attorney-General could always enter a nolle prosequi in criminal proceedings before Courts of record, and the Courts have never sought to interfere in the exercise of that power'. (*Turner v. D.P.P.* [1978] Cr. App. R. 70).

Concerning the powers of the Attorney-General, Viscount Dilhorne observed in *Gouriet v. Union of Post Office Workers* [1977], 3 All E.R. 70 at p. 88-

> 'The Attorney-General has many powers and duries. He may stop any prosecution or indictment by entering a *nolle prosequi* ..... he need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence'.

It was later decided that the word 'conduct' appears to be wider than the phrase 'carry on' and suggests that when the Director of Public Prosecutions intervenes in a privately instituted prosecution he may not limit himself to the right of pursuing it by carrying it on, but he may also abort it in the meaning that he may conduct the proceeding in whatever

manner it may appear expedient in the public interest. It follows that the Director of Public Prosecutions will intervene where the knowledge and the resources of his office should be brought into play to bear in order to ensure that proceedings are properly conducted from the prosecution point of view (see *Raymond v. Attorney-General* [1982], 2 All E.R. 487). In order to safeguard against the Director of Public Prosecutions exercising his power under s.4 of the 1979 Act to abort private prosecutions unnecessarily and gratuitously, by s.2 of the Act, his duties are exercised under the superintendence of the Attorney-General who, is his turn, is answerable to Parliament.

It may appear that the provisions of Article 113.2 of the Constitution are wide enough so as to confer power on the Attorney-General to withdraw a case in any manner he chooses either in writing or orally. Therefore it may be submitted that the provisions of s. 154 of the Criminal Procedure Law, Cap. 155 should be construed accordingly in the light of Article 188.1 of the Constitution requiring modification of pre-1960 laws to bring them into accord with the Constitution.

I am unable to uphold this submission. There is nothing inconsistent or repugnant with the Legislature regulating the manner in which the undisputed right of the Attorney-General may be exercised. In fact there are sound reasons for its exercise in the manner prescribed by s.154 of the Criminal Procedure Law, Cap.155. Most so as the right of the Attorney-General under Article 113.2 of the Constitution extends to both private and public prosecutions. Section 154 of the Criminal Procedure Law Cap. 155 in no way limits the right of the Attorney-General to terminate proceedings. It simply regulates the way in which it may be exercised.

In my judgment in the absence of a nolle prosequi in accordance with s.154 of the Criminal Procedure Law, Cap. 155, all prosecutors applying for leave to withdraw are in the same position and it matters not that an application for withdrawal under s.91 of the Criminal Procedure Law, Cap.155 has, in addition, the oral approval of the Attorney-General.

In this particular case no explanations were offered as to the reasons which prompted the prosecution to apply for the withdrawal of the case. Without going into merits of the case it may be said that if one Attorney-General after another follows

the same procedure, if each in his turn declines to prosecute, for no reason those who break the law, then the laws becomes a dead letter.

Of course the Attorney-General has the power to file a nolle prosequi, in which case the Courts will not dispute the exercise of such a right. But when the Attorney-General comes and says to the Court that he wishes to withdraw a criminal case, he must afford good reasons why this should be done, for he has no right to suspend or dispense with the laws of the land. If he withdraws a case without reasonable justification, in the interests of justice, then any member of the public at large may come and ask why the law is not properly enforced. The Courts are not prejudiced. They have only one prejudice and that is their duty to uphold indiscriminately the law.

Inasmuch as no reasons were afforded why the application should be withdrawn, I dimiss the application. The proceedings shall continue".

The accused was then charge and pleaded not guilty and the trial Judge fixed the case for hearing on the 4th December, 1982, ordering at the same time, the accused to appear on the same bail.

On the 4th December, 1982, the prosecuting officer, in the presence of the accused and his advocate, stated to the Court that he had placed before the Attorney-General of the Republic the ruling of the Court, who instructed him to offer no evidence in the case.

The trial judge then reminded the prosecuting officer that he had to comply with the ruling of the Court of the 18th October, 1982, to proceed with the hearing of the case. The prosecuting officer then applied for an adjournment of the case in order to obtain new instructions as he was facing a big dilemma to comply with the instructions of his superiors or the Order of the Court. Then the trial judge made his second ruling in the case, which reads as follows:

> "Before the commencent of the hearing of this case, Mr. Koulendis, who appears on behalf of the prosecuting authority, stated to the Court that he had instructions not to offer any evidence against accused. The Court asked Mr. Koulendis to honour the previous ruling of the Court, dated the 18.10.1982 by which an application to

withdraw the case was dismissed and he was further asked to proceed with the hearing of the case.

Mr. Koulendis asked for an adjournment to reconsider his position, in view of the very serious repercussions which would ensue following his decisions to comply with the order of the Court. He submitted that if he complies with the order of the Court he may be facing disciplinary measures by the police authorities and if he refuses to comply with the order he will be committing the offence of contempt of Court, in which case he may be facing a sentence of instant imprisonment.

No doubt the prosecuting officer is placed in a very difficult dilemma and his decision may have far reaching consequences, both in his personal capacity as well as in his capacity as a member of the police force and as a prosecuting officer.

Without interfering in any way with the manner the prosecuting officer approaches the whole issue, it may be useful to refer to the dicta of Lord Denning in the case of *R. v. Metropolitan Police Commissiomer ex Parte Black Burn,* [1968] 2 Q.B.118, where the Commissioner of the Metropolitan Police failed to take proceedings against clubs for breach of the gaming laws in accordance with instructions issued by his superiors:

'I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher v. Oldham Corpn* [1930] All E.R. Reprint 96, the Privy Council case of *A.-G.*

for New South Wales v. Perpetual Trustee Co. (Ltd) [1955] 1 All E.R. p. 846".

The Courts have a discretionary power to adjourn the hearing of a criminal case from time to time, as they may think fit (s. 48 of Cap. 155) . The principles which must be taken into account by the Court have been discussed in various cases (see *A.-G. v. Enimerotis* (1966), 2 C.L.R.25 and *Improvement Board of Kaimakli* v. *Sevastides* (1967) 2 C.L.R. 117). The tenor from the above decisions is that a piecemeal litigation must be avoided and an adjournment will only be granted if and when the interests of justice so require, e.g. where a key witness is unable to attend. (See *Kefalas v. Police* (1969) 2 C.L.R. 90).

"I have examined very carefully the application by the prosecution and considering the seriousness of the repercussions of the stand which will be taken by the prosecution and the novelty of the issue, I consider the application as justified. The case is adjourned to 18.12.1982, for hearing. Accused to appear on same bail."

On the 18th December, 1982, the prosecuting officer again, in the presence of the accused and his advocate, made the following statement:

"Your Honour, I wish to inform you on behalf of the Honourable Attorney-General of the Republic, that the Honourable Attorney-General of the Republic, exercising his powers, in accordance with Article 113.2 of the Constitution, discontinues any further proceedings in this case. I was also instructed to inform you that neither section 154 of the Criminal Procedure Law, Cap. 155, is applicable. We are concerned with a case for which the Criminal Procedure Law could not provide as it was enacted many years before the Constitution."

The trial judge then adjourned to case for the 20th December, 1982, when again, in the presence of the accused and his advocate, made his third ruling, where after summarising the facts of his two previous rulings, continues:

"No doubt, *a case may be withdrawn* if the Court is satisfied that there are sufficient grounds for allowing such withdrawal (see s.94 of the Criminal Procedure Law, Cap.155). Such a power is a discretionary one being exercised judicial-

ly in the interests of justice and cannot form the subject matter of a bargain between the prosecution and the defence. (*R. v. Bedwellty Justices Ex Parte Munday*, 1970, Cr. Law Review, p. 601). The discretion of the Court cannot be exercised at will, the paramount consideration being always the protection of the interests of justice. In deciding whether to prosecute or not a particular case, the Attorney-General may have regard to a variety of considerations, all of them leading to the final question: Would a prosecution be in the public interest including, in that phrase of course, 'in the interests of justice'? (*Nina Ponomareva*, [1956] Crim. L.R., 725).

By virtue of s.154(1) of the Criminal Procedure Law, Cap.155, the Attorney-General of the Republic has the right in any criminal proceedings and at any stage thereof *to enter a nolle prosequi* whereupon the accused is discharged at once in respect of the charge or information for which the nolle prosequi is filed.

A nolle prosequi is usually entered in cases where the accused person cannot be produced to Court to plead or stand trial due to mental or physical incapacity, which is of a permanent nature, and which can be entered only on the directions of the Attorney-General. (See *R. v. Rowlands*, 17 Q.B. 671).

A nolle prosequi may be entered at any stage before judgment (*R. v. Dunn*, 1 C.N.K.730), but it cannot be entered during appeal proceedings. (*Isaias v. Police* (1966), 2 C.R.L. 43).

This power of the Attorney-General is not subject to any control by the Courts (*R. v. Comptroller of Patents* [1899] 1 Q.B. 909), *Turner v. D.P.P.* [1978], 68 Cr. App.R., 70 and *Gouriet* v. *Union of Post Office Workers* [1977], 3 All E.R. p.70, but is open to criticism by the legislature and in England its abuse is prevented by the ordinary principle of Ministerial responsibility (*Queen* v. *Allen* (1962) 1 B. & S. 850). The filing of a nolle prosequi puts an end to the prosecution but does not operate as a bar, discharge or an acquittal on the merits and the party remains liable to be re-charged or re-indicted (*Goddard v. Smith*, 3 Salk. p.245).

In this particular case the Attorney-General, by relying on Article 113.2 of the Constitution and by informing the Court that he discontinues the present proceedings, he submits, in reality, that he has the right to bring criminal proceedings at an end without the necessity of filing a nolle prosequi.

Inasmuch as the question was more or less disposed by this Court in its ruling of the 18th October 1982, on an application for the withdrawal of the case based on Article 113.2 of the Constitution, I consider it pertinent to examine whether I can have the question reserved for the opinion of the Supreme Court, under s.148(1) of Cap.155.

By virtue of s.148(1) of Cap.155, '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'.

Concerning the construction of the above section it was said by Triantafyllides Justice in *Re Charalambous* (1974) 2 C.L.R. p.37 that 'In our view a question of law arising during trial means only a question of law arising during the trial at a stage at which it has to be decided in order to enable the trial to proceed further in accordance with the law and rules of practice relating to criminal procedure'.

The words 'criminal proceedings' include proceedings instituted before any Court against any person to obtain punishment of such person for any offence against any enactment. (See s.2 of the Criminal Procedure Law, Cap.155).

The trial Court may reserve a question of law under s.148(1) without stating its own opinion on the matter. (See *Queen* v. *Herodotou,* 19 C.L.R. p.144 and *Republic v. Liasis* (1973), 2 C.L.R. p.283.) However, it was indicated in *Re Charalambous* (supra) that it is desirable for the trial Court to express its own opinion on the matter before exercising its discretionary powers as the parties may re-consider their position in view of the reasoning contained in such decision.

As it was said by A. Loizou, in *Republic v. Sampson* (1977), 2 C.L.R. p.1 -

'If anything, it would only be proper that such a question should be reserved after the ruling of a trial Court is given, so that its reasoning, if persuasive enough, may render unnecessary an application for such a reservation or reveal their thinking in case they eventually refuse to reserve'.

Considering the legal principles involved and that similar applications were dismissed by the Court on several occasions in the recent past and no appeals were filed against such rulings, the tenor from the recent decision in *Raymond v. Attorney-General* [1982] 2 All E.R. p.487), that the Attorney-General must see that proceedings are properly conducted from the prosecution point of view, and taking into account the detrimental consequences which a ruling against the accused may have as well as the undesirable embarrassment which will ensue between two main agencies of the Law, I find that I can and I hereby have the following questions reserved for the opinion of the Supreme Court:

1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of s.154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney-General discontinue a case without affording any reasons as to the due exercise of such a power?"

Before I express my opinion on the above questions I consider it pertinent to examine the powers of the Attorney-General under sections 91 and 154(1) of the Criminal Procedure Law, Cap.155 and Article 113.2 of the Constitution. Section 91 reads as follows:

"91. Subject to the provisions of section 154 of this Law, if a prosecutor in any summary trial, at any time before a final order is passed, satisfies the Court that there are sufficient grounds for permitting him to withdraw the charge, the Court may permit him to withdraw the same and shall thereupon acquit the accused:

Provided that, if the charge is so withdrawn before the accused had pleaded to it, the accused shall be discharged but such discharge shall not operate as an acquittal."

It follows from the above section that the Attorney-General himself and any officer subordinate to him, like any other prosecutor, in any summary trial may withdraw a charge with the permission of the Court if he satisfies the Court that there are sufficient grounds to do so.

This section, as stated therein, is subject to the provisions of section 154 of Cap.155, which is as follows:

"154(1) In any criminal proceedings and at any stage thereof before judgment the Attorney-General may enter a nolle prosequi, either by stating in Court or informing the Court in writing that the Crown (now the Republic) intends that the proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the nolle prosequi is entered.

(2) When a nolle prosequi is entered, if the accused has been committed to prison, he shall be released, or if on bail the bail bond shall be discharged, and, where the accused is not before the Court when such nolle prosequi is entered, the Registrar or other proper officer of the Court shall, if the accused is in custody, cause notice in writing of the entry of such nolle prosequi to be given forthwith to the person having custody of the accused and such notice shall be sufficient authority to discharge the accused in respect of the charge or information for which the nolle prosequi is entered or, if the accused is not in custody, shall cause such notice in writing to be given forthwith to the accused and his sureties, if any, and shall, in every case, cause a similar notice in writing to be given to any witnesses bound over to appear.

(3) Where a nolle prosequi is entered in accordance with the provisions of this section, the discharge of an accused person shall not operate as a bar to any subsequent proceedings against him for the same offence or on account of the same facts."

It is clear from the above legislative provision that a nolle prosequi may be entered by the Attorney-General both in a summary trial and a trial by information instituted on his behalf or by any other person, either orally by appearing in Court or if he does not so appear he may inform the Court in writing that the Republic intends that the proceedings shall not continue. Thereupon the Court shall discharge the accused but this discharge however, does not operate as a bar to any subsequent proceedings. This power of the Attorney-General cannot be exercised by any other officer, except the Deputy Attorney-General, or a Counsel of the Republic in accordance with the provisions of section 156 of Cap. 155 which reads as follows:

> "With the exception of the power to appeal from any judgment of acquittal by any District Court under the provisions of section 137 of this Law, the Attorney-General may by writing under his hand or by notice in the Gazette, delegate all or any of the powers vested in him under this Law to the Solicitor-General (now the Deputy Attorney-General) or a Crown Counsel (now Counsel of the Republic) and the exercise of any such powers by the Solicitor-General or a Crown Counsel shall then operate as if such powers have been exercised by the Attorney-Genral."

Under Article 113.2 of the Constitution, quoted earlier in this judgment, the Attorney-General has power exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. It is immaterial whether the proceedings have been instituted by him or anybody else. These powers may be exercised by him by appearing in Court in person or by officers subordinate to him acting under and in accordance with his instructions.

It is clear from a mere glance at this Article and at section 154(1) of the Criminal Procedure Law, that the power of the Attorney-General of the Republic to discontinue criminal proceedings is wider after the coming into operation of our Constitution.

I entirely disagree with the view taken by the trial Judge that section 154 of the Criminal Procedure Law regulates the way in which the right to discontinue a case by the Attorney-General is exercised. The power given to the Attorney-General to discontinue criminal proceedings by virtue of Article 113.2 of the Constitution, is quite independent from the power given to him under section 154(1) of the Criminal Procedure Law.

In the case in hand, the trial Judge, quite unnecessarily in my view, went into so many pains and made reference, to a considerable number of judgments of the English Courts and converted a simple case into a very complicated one. To my mind, the duty of the trial judge was to apply a constitutional provision i.e. Article 113.2, which is clear and unambiguous. There are no conditions or restrictions imposed by this Article on the Attorney-General as to how he will discontinue criminal proceedings.

In the present case, as soon as the prosecuting officer had informed the trial Court that he had instructions from the Attorney-General to discontinue the proceedings by virtue of Article 113.2 of the Constitution, all the trial Judge had to do was to record down this statement, dismiss the case and discharge the accused.

I am, therefore, of the view that:-

1. The Attorney-General can discontinue a criminal case under the provisions of Article 113.2 of the Constitution, without filing a nolle prosequi in accordance with the provisions of section 154(1) of the Criminal Procedure Law, Cap.155; and

2. He can also discontinue a case without affording any reasons as to the due exercise of such power.

Before concluding my judgment, I must state that I leave entirely open to be decided when it arises, the question as to whether the dismissal of a criminal case and the discharge of the accused under Article 113.2 of the Constitution, operates as an acquittal or not.

DEMETRIADES J.: On the 20th December, 1982, the District Court of Larnaca, having been informed by the Police Prose-

cuting Officer that the Attorney-General of the Republic, acting on the strength of Article 113 of the Constitution, had instructed him to discontinue the conduct of Criminal Case No. 6143/82, in which the accused was prosecuted for stealing, reserved for the opinion of this Court the following questions of law:

"1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of s.154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney-General discontinue a case without affording any reasons as to the due exercise of such a power?"

I feel that I need not go into the facts and history of the proceedings before the District Court of Larnaca, because they appear in detail in the judgments just delivered by my brother Judges and which I have had the advantage of reading before.

Having read these judgments, I must say that I fully agree with the reasoning and the result reached by my brother Judge Triantafyllides, P. However, I would like to add the following:

Before the establishment of the Republic, the Attorney-General, by virtue of section 154 of the Criminal Procedure Law, Cap. 155, had the absolute right to discontinue proceedings by appearing before the Court and stating the intention of the "Crown" to do so, or by informing the Court in writing, i.e. by filing what is known as a nolle prosequi, that the "proceedings shall not continue". With the establishment of the Republic and the coming into force of the Constitution, the position has, in my view, radically changed in that by para. 2 of Article 113, the Attorney-General of the Republic was vested with a much wider power to discontinue proceedings "in the public interest" for offences committed in the Republic by informing the Court of the intention of the Republic to do so.

By this Article of the Constitution the Attorney-General of the Republic is placed in a different position than that of the Attorney-Generals in other countries where this post exists, in

that whilst in Cyprus the office of the Attorney-General is an independent office of the Republic, in other countries it is a Ministerial post and the decisions of the Attorney-Generals may be made the subject of Parliamentary control.

In the light of the clear and unambiguous words of para.2 of Article 113 of the Constitution, it is my view that the Attorney-General of the Republic can discontinue any proceedings for offences committed in the Republic without having to file a nolle prosequi.

However, it is my opinion that the prosecuting officer appearing in a criminal case should inform the Court of the intention of the Republic, conveyed to him through the written instructions of the Attorney-General, to discontinue the proceedings and such information given to the Court or statement made by the prosecuting officer should be recorded in the minutes of the case kept by the trial judge in clear and unambiguous words.

In the light of the above, the case should be remitted to the District Court of Larnaca and be dealt with accordingly.

LORIS J.: On the 20th December 1982 the District Court of Larnaca reserved for the opinion of the Supreme Court, under s.148(1) of the Criminal Procedure Law, Cap. 155, the following questions of law:

"1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of s.154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney-General discontinue a case without affording any reasons as to the due exercise of such power?"

The above two questions of law were reserved for the opinion of the Supreme Court under the circumstances which appear in the relevant ruling of the District Court of Larnaca in the criminal proceedings in case 6143/82; the relevant part reads as follows:

"On the 10th September 1982, when this case was fixed for plea, the prosecution asked for an adjournment as the matter was reconsidered by the Attorney-General. The Court accepted the application and the case was adjourned to 9th October 1982, for plea. As on that date the Prosecution stated that they were not ready to proceed (due to the fact that the file was still at the office of the Attorney-General) the Court adjourned the case for a second time to the 18th of October 1982, for plea.

On the 18th October 1982, the Prosecuting Officer stated to the Court that he had instructions from the Attorney-General *to withdraw the case on the basis of Art.* 113.2 *of the Constitution.* After a short break, the Court delivered its ruling, by which the application was dismissed. The accused was thereupon charged and pleaded not guilty to the charge preferred against him and the case was accordingly fixed for hearing on the 4th December 1982.

On that date the Prosecution submitted that they did not wish to offer any evidence and the Court asked the Prosecuting Officer to respect the previous ruling of the Court on the matter. An adjournment was later asked by the Prosecuting Officer in order to get further instructions and on the 18th December 1982, when the case was fixed for hearing, the Prosecution informed the Court that the Attorney-General, acting on the strength of Art. 113 of the Constitution, '*discontinues the conduct of the present proceedings*'".

Article 113.2 of the Constitution reads as follows:-

"2. The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions."

Thus, from the wording of Article 113.2 of our Constitution, it is clear that the Attorney-General of the Republic is

(a) vested with power to institute, conduct, take over and continue or discontinue criminal proceedings;

(b) he can exercise such power at his discretion in the public interest.

In relation to the said powers of the Attorney-General, it is the exclusive right of the Attorney-General to represent the public interest. As stated by Lord Wilberforce in the case of *Gouriet* v. *Union of Post Office Workers*, [1977] 3 All E.R. 70, (H.L.) at p. 83, letters B-C "that it is the exclusive right of the Attorney-General to represent the public interest, even where individuals might be interested in a larger view of the matter, is not technical, not procedural, nor fictional. It is constitutional. I agree with Lord Westbury L.C. that it is also wise".

And the decisions to be made as to the public interest are entirely within the province of the Attorney-General, an independent officer of the Republic according to our Constitution, and the Courts cannot interfere with such decisions.

As Lord Wilberforce stated in the case of *Gouriet*, supra, at p. 84, letters D-E "the decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas."

In this respect, we have to examine, whether any procedure exists for the implementation of the aforesaid powers of the Attorney-General. As it is natural such procedure is not envisaged by the Constitution itself; therefore, we have to resort to the relevant legislation with a view to tracing such a procedure and from what I am aware of the only law which provides for such a procedure is our Criminal Procedure Law, Cap.155, an enactment in force on the day of the coming into operation of our Constitution, which, according to Article 188 thereof, must be construed and applied with such modifications as may be

necessary to bring the law in question into conformity with the Constitution.

The relevant sections of the Criminal Procedure Law, Cap. 155, which speak directly or indirectly for the discontinuance of criminal proceedings are the following:

(A) Section 154(1) under the sub-heading "General Powers of Attorney-General in criminal proceedings" which reads as follows:

> "In any criminal proceedings and at any stage thereof before judgment the Attorney-General may enter a nolle prosequi, either by stating in Court or informing the Court in writing that the Republic intends that proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the nolle prosequi is entered."

(B) Section 91 which refers to withdrawal of a charge by a "prosecutor in any summary trial"; it reads:

> "Subject to the provisions of section 154 of this Law, if a prosecutor in any summary trial, at any time before a final order is passed, satisfies the Court that there are sufficient grounds for permitting him to withdraw the charge, the Court may permit him to withdraw the same and shall thereupon acquit the accused:
>
> Provided that, if the charge is so withdrawn before the accused had pleaded to it, the accused shall be discharged but such discharge shall not operate as an acquittal."

(C) Section 3 which provides that "matters of criminal procedure for which there is no special provision in this Law (Cap. 155) or in any other enactment in force for the time being, every Court shall, in criminal proceedings, apply the law and rules of practice relating to criminal procedure for the time being in force in England."

Under this latter section cases are covered, inter alia, where

rules of practice in England under the common law (and it must be borne in mind that the common law forms part and parcel of our law) were made applicable to Cyprus in cases of discontinuance of criminal proceedings by any prosecutor in the long established formula of "offering no evidence".

I do not intend making reference to authorities in order to cover the historical origin or the extent of use of this mode of withdrawing and or discontinuing a criminal proceeding; suffice it to say that such a mode was employed in England prior to 1960 and is still so employed, as indicated by the dicta of Viscount Dilhorne in *Gouriet* case (supra) at p. 88 where it is expressly stated that "he (the A/G) may tell him (the D.P.P.) to offer no evidence" i.e. the Attorney-General may direct orally the Director of Public Prosecutions, an officer subordinate to him, to offer no evidence. As the relevant passage from the opinion of Viscount Dilhorne makes reference to nolle prosequi as well, I consider it very useful to transplant here the whole paragraph:

> "The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper showing that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosectuion and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to the control and supervision of the Courts....."
>
> (per Viscount Dilhorne in *Gouriet* case (supra) at p.88 letters g-j).

The dictum of Viscount Dilhorne was recently followed in the case of *Raymond v. Attorney-General,* [1982] 2 All E.R. 487, where at p. 491, Sir Sebag Shaw delivering the judgment of the Court of Appeal, quoted verbatim the above referred passage from the opinion of Viscount Dilhorne.

The next topic which has to be examined is whether the above

referred three modes of withdrawing and/or discontinuing a criminal proceeding, envisaged by our Criminal Procedure Law, Cap. 155, are applicable in the case of intended withdrawal or discontinuance by the Attorney-General of the Republic of a criminal proceeding.

I must say straightway that the procedure envisaged under s.91 of Cap. 155 (B-above) although applicable in the case of any other prosecutor is positively inapplicable in the case of the Attorney-General of the Republic for the following reasons:

a) It is exclusively within the powers of the Attorney-General to decide whether it is in the public interest to discontinue or withdraw a criminal proceeding;

b) The decisions to be made as to the public interest "are not such as Courts are fitted or equipped to make"; they are definitely outside the province of the Court.

In other words neither the Attorney-General of the Republic has a duty to place "sufficient grounds for permitting him to withdraw the charge" before the Court, as he is the sole arbiter of public interest nor the Court can deal with decisions of public interest which in this connection are entirely outside his province.

Construing the remaining two modes of discontinuance of criminal proceedings, under (A) and (C) above, in the light of the relevant provisions of the Constitution, I am of the opinion that they are both compatible with the power vested in the Attorney-General of the Republic by virtue of the provisions of Article 113.2; and of course such a power may be exercised by the Attorney-General in person or by officers subordinate to him acting under and in accordance with his instructions.

Needless to repeat that when exercising such a power the Attorney-General of the Republic need not give any reasons, as he is the sole arbiter of public interest, nor is he under the supervision and control of the Court.

On both these occasions if the Attorney-General is appearing

personally he can either discontinue under s.154(1) of Cap. 155 or "offer no evidence" by making an oral statement to that effect before the Court; in cases though where he chooses to discontinue under s.154(1) of Cap. 155, and he is not present in Court, he has to inform the Court accordingly in writing as section 154(1) of Cap. 155 now stands on the Statute Book; we were not asked and, therefore, I do not intend to pronounce, whether the writing required under s.154(1) is in any way restrictive of the powers conferred on the Attorney-General under Article 113.2 of the Constitution, although, as at present advised, I cannot see how the power of the Attorney-General can be eliminated by the mere signing of a piece of paper informing the Court of his intention to discontinue a criminal proceeding, without giving any reasons (as he is perfectly entitled not to give) for such discontinuance.

"Informing the Court in writing" under the circumstances envisaged by s.154(1) of Cap. 155, does not arise when the Attorney-General chooses to withdraw or discontinue a criminal proceeding by means of mode (C) above i.e. when he chooses to "offer no evidence". In such a case he can tell his subordinate acting under his instructions to "offer no evidence" (per Viscount Dilhorne in *Gouriet* case - supra - at p.88).

Pausing here for a moment, I feel that I should state that all provisions concerning the withdrawal and/or discontinuance of criminal proceedings should be enacted afresh, in which case the use of language consonant with the provisions of the Constitution would have dissolved any confusion likely to arise and would have rendered proceedings like the present one unnecessary, thus saving the money of the taxpayer.

In the light of the above the position may be thus summarized:

1. The Attorney-General of the Republic is vested with power by virtue of the provisions of Article 113.2 of the Constitution to discontinue criminal proceedings at his discretion, in the public interest.

   In exercising such a power the Attorney-General need not give any reasons as he is the sole arbiter of public interest, nor is he under the supervision and control of the Court.

Such a power may be exercised by the Attorney-General in person or by officers subordinate to him acting under and in accordance with his instructions.

2. The only procedural modes envisaged by our legislation enabling the Attorney-General to exercise his aforesaid power are those described in (A) and (C) above.

On both these occasions if he is appearing in person he can either discontinue under s.154(1) of Cap.155 or "offer no evidence" by making an oral statement to that effect before the Court.

When he is not appearing in person

a) if he chooses to inform the Court of his intention to discontinue under s. 154(1), he has to do so in writing,

b) if he chooses to "offer no evidence" he may direct his subordinate orally to offer no evidence.

In the light of the above the answer to both questions which have been reserved for our opinion should be in the affirmative.

STYLIANIDES J.: A District Judge, exercising criminal jurisdiction at the District Court of Larnaca, reserved under s.148 (1) of the Criminal Procedure Law, Cap. 155, two questions of law of constitutional importance. The questions, as formulated, are:-

"1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of s.154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney-General discontinue a case without affording any reasons as to the due exercise of such power?"

The formulation of these questions was the culmination of a tug of war between the Judge and the prosecuting officer in a summary trial of a minor criminal offence in which the pro-

secuting officer, acting on the authority and on the instructions of the Attorney-General of the Republic, tried unsuccessfully to bring to an end the criminal proceedings, as the Judge issued three consecutive rulings, denying to the Attorney-General the right to withdraw a criminal case, to offer no evidence and to discontinue, under Article 113.2 of the Constitution, a criminal case.

On 18.10.82 the prosecuting officer, before the accused was called upon to plead, stated: "I have the instructions of the Attorney-General to ask for the withdrawal of this case. I base my application on Article 113 of the Constitution". The Judge ruled that the right to withdraw or discontinue a criminal charge pending before a Court of law may be exercised with the leave of the Court upon good ground shown. The Attorney-General may enter a nolle prosequi in virtue of the provisions of s.154(1) of the Criminal Procedure Law, Cap. 155, that simply regulates the manner in which the Attorney-General may exercise his power to discontinue proceedings for an offence.

On 4.12.82 the prosecuting officer stated before the same Judge that on instructions from the Attorney-General he is not offering evidence in the case. The Judge requested the prosecutor to proceed with the case as no withdrawal is possible except by the leave of the Court.

On 18.12.82 the prosecuting officer signified in unequivocal language that "the Attorney-General, in exercise of his powers under Article 113.2 of the Constitution, discontinues the present proceedings".

On 20.12.82 the Judge reiterated his previous ruling that the proceedings can only be discontinued by entering a nolle prosequi by virtue of s.154(1) of the Criminal Procedure. At the end of the day the learned trial Judge reserved the aforementioned two questions for our opinion.

We have a written Constitution which came into operation on the day of the establishment of this Republic of ours. It is the supreme Law of the Republic, and no law made thereafter, repugnant to, or inconsistent with, any of the provisions of the Constitution, is valid - (Article 179).

All laws in force on the date of the Constitution, until amended, whether by way of variation, addition or repeal, by any law made under the Constitution, continue in force on or after that date, and shall, as from that date, be construed and applied with such modification as may be necessary to bring them into conformity with the Constitution - (Article 188.1).

The Constitution differs from ordinary legislation. It must be construed to give effect to the intentions of those who made and agreed to it and those intentions are expressed in or to be deduced from the terms of the Constitution itself and not from any preconceived ideas as to what such a Constitution should or should not contain. It must not be construed as if it was partly written and partly not - (*Hinds v. The Queen*, [1976] 1 All E.R. 353).

Our Constitution deals under separate headings with the legislature, the executive and the judicature.

The office of the Attorney-General was known to this country from the days of the colonial administration. The Attorney-General of the Republic, unlike England, is an independent officer. He is appointed by the Head of the State. The qualifications for his appointment and the terms and conditions of his office are the same as those of a Judge of this Court; he is not removable from office except on the like grounds and in like manner as a Judge of this Court. The exercice of the authority by the Attorney-General of the Republic is only closely related to judicial proceedings in criminal cases, is not within the ambit of paragraph 1 of Art. 146 and, therefore, this Court has no jurisdiction over it; it is executive in character - (*Xenophontos v. The Republic*, 2 R.S.C.C. p.89).

Paragraph 2 of Article 113 of the Constitution reads as follows:-

> "The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions".

No doubt among the drafters of the Constitution there were persons nurtured in the Common Law. Criminal procedure in Cyprus is governed by the relevant law, Cap. 155, that pre-existed the Constitution, having been enacted in 1948. The due process is to consider and interpret the Constitution and then consider if the statutory provisions are consistent with the Constitution. The powers vested by the Constitution in any organ thereof cannot in any way be abridged or modified- (See *Police v. Edkotiki Eteria*, (1982) 2 C.L.R. 63; *Police v. Georghiades*, (1983) 2 C.L.R. 33). The powers of the Attorney-General are in no way fettered; he is paris patriam.

The exercise of such a power is a matter of his own discretion. The Attorney-General's discretion is absolute and not reviewable. It is upon him to institute any proceedings for an offence against any person. In our legal system the function of the Courts is to stand idly by until their aid is invoked by someone recognized by law as entitled to claim the remedy in justice that he seeks. Courts of justice cannot compel anyone to invoke their aid who does not choose to do so; nor can they demand of him an explanation for his abstention. The ordinary way of enforcing criminal law is by punishing the offender after he has acted in breach of it. Commission of the crime precedes the invocation of the aid of a Court of criminal jurisdiction by a prosecutor.

Criminal proceedings are instituted by a charge preferred before a Court. The charge is presented to a Judge of the Court who, after perusal, directs that the same shall be filed - (Sections 37 and 43 of the Criminal Procedure Law, Cap. 155). The direction of the Judge for filing or his refusal to give such direction no doubt is a judicial function and not administrative. He has to examine the charge in order to ascertain: (i) that an offence known to law is alleged, (ii) that it is not out of time, (iii) that the Court has jurisdiction, and (iv) that the informant has any necessary authority to prosecute - (See *R. v. Gateshead Justices*, [1981] 1 All E.R. 1027, per Donaldson, L.J., at p.1033).

The functions of the Court whose aid is then invoked are restricted to (i) determine whether the accused is guilty of the offence that he is charged with having committed, and, (ii), if he is found guilty, decreeing what punishment may be inflicted on

him by the executive authority - (*Gouriet v. Union of Post Office Workers*, [1977] 3 All E.R. 70, per Lord Diplock at p.97).

A private prosecution is always subject to the control of the Attorney-General through his power to take over, continue or discontinue. He has the power to conduct a case both instituted by or on his behalf and a case taken over by him. He has the power to "conduct" proceedings.

The word "conduct" appears to us to be wider than the phrase "carry on" and suggests to our minds that when the director intervenes in a prosecution which has been privately instituted he may do so not exclusively for the purpose of pursuing it by carrying it on, but also with the object of aborting it, that is to say, he may "conduct" the proceedings in whatever manner may appear expedient in the public interest - (*Raymond v. Attorney - General*, [1982] 2 All E.R. 487).

He may discontinue any proceedings. His power to discontinue is also unfettered. Section 154(1) of Cap. 155, with the necessary modification, reads:-

> "154. - (1) In any criminal proceedings and at any stage thereof before judgment the Attorney-General may enter a nolle prosequi, either by stating in Court or informing the Court in writing that the Republic intends that the proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the nolle prosequi is entered".

By entering a nolle prosequi, in accordance with the provisions of s. 154(1), the proceedings are discontinued. Is, however, this provision exhaustive of the power to discontinue? Though the provision of this section in not inconsistent with the Constitution, it is not exhaustive.

Section 91, which refers to withdrawal of proceedings with the permission of the Court by a prosecutor, in the light of the above should be considered as not applicable in the case of the Attorney-General. The Attorney-General is not bound to procecute in every case where there is sufficient evidence. When a question of public policy or public interest may be involved, the Attorney-General has the duty of deciding whether

prosectution would be in the public interest Enforcement of the criminal law is, of course, a very important public interest, but it is not the only one and may not always be the predominant one There may be even more important reasons of public policy why such procedure should not be taken at a particular moment and must be proper for the Attorney-General to have regard to them. The above equally apply to his power to bring criminal proceedings to an end.

The Attorney-General may discountinue proceedings also by offering no evidence or by informing the Court of his intention to discontinue either orally or in writing and either in person or by officers subordinate to him acting under and in accordance with his instructions.

The learned trial Judge, without disclosing the paternity used the following expression of Lord Denning in the *Gouriet* case: "If one Attorney-General after another follows the same procedure, if each in his turn declines to prosecute for no reason those who break the law, then the law becomes a dead letter". This expression of the ex-Master of Rolls was strongly criticized by the House of Lords.

The power assigned to the Attorney-General might be abused, just as there is a possibility of any power being abused. As a general proposition that is true but it has nothing to do with this questions. A law, either preexisting the Constitution or enacted thereafter, cannot validly alter or abridge the powers of the Attorney-General conferred on him by the Constitution

To sum up, the Attorney-General is a direct, independent organ of the State. His power to discontinue proceedings, either by entering a nolle prosequi, as provided in s.154(1) of Cap. 155, or by offering no evidence or by signifying his such intention to discontinue a case orally either in person or by any person or officer subordinate to him acting under and in accordance with his instructions, is unfettered and s. 154(1) is not exhaustive of his such power. It is outside the jurisdiction or power of Court to ask or hear the grounds on which such power was exercised. According to the Constitution, such power is exercisable at the discretion of the Attorney-General and neither a District Judge trying summary cases nor any other Court may inquire or

consider the reason which lead the Attorney-General to follow such a course. He is not subject to judicial control.

In the light of the foregoing my answer to the questions reserved is as follows:-

Question No. 1:

The Attorney-General in person or by officers subordinate to him acting under and in accordance with his instructions can, without filing a nolle prosequi, in accordance with the provisions of s. 154(1) of Cap. 155, in exercice of his powers under Article 113.2 of the Constitution, discontinue a criminal case in any manner. It is sufficient to inform the Court either in writing or orally of his such decision.

Question No. 2 :

The Attorney-General can discontinue a case without affording any reasons as to the due exercice of his powers.

PIKIS J.: Questions of law of considerable importance to the administration of justice must be answered in response to a questionnare of District Court of Larnaca, formulated for our opinion under s. 148(1) of the Criminal Procedure Law, Cap. 155. The first question is whether the Attorney-General can discontinue a case, in exercise of the powers vested in him under Article 113.2 of the Constitution, without filing a nolle prosequi, as proveded by s. 154(1) of Cap. 155.-

"I hereby have the following questions reserved for the opinion of the Supreme Court :

1. Can the Attorney-General discontinue a criminal case under the provisions of Article 113.2 of the Constitution without filing a nolle prosequi in accordance with the provisions of s.154(1) of Cap. 155?

2. If the answer is in the affirmative, can the Attorney -General discontinue a case without affording any reasons as to the due exercise of such a power ? "

What preceded the reservation of the aformentioned questions of law, is worth noting; it illustrates the importance of the issues

raised and their implications upon the day-to-day administration of justice.

Stefanos Athienitis was charged on a count of theft before the Larnaca District Court. The charge was approved in accordance with the provisions of s.43 - Cap.155, by a Judge of the Court on 9/8/82. When the case came up for plea, the police sergeant who conducted the prosecution on behalf of the prosecutor, the Larnaca Divisional Police Commander, requested an adjournment for the reason that the file of the case was with the Office of the Attorney-General "for consideration". On the next appearance before the Court, the prosecuting sergeant made an application in these terms :

> "I have the instructions of the Attorney-General to ask for the withdrawal of this case. I base my application on Article 113 of the Constitution".

The Judge refused leave, taking the view he had a discretion in a matter of a judicial character. And in the absence of advancement of any reasons for the proposed course, his discretion could only be exercised in one direction, the one followed. If he had a discretion in the matter, leave was refused for a perfectly legitimate cause - lack of supporting reasons.

In a lengthy ruling, the learned Judge indicated his reasons for the course taken, deriving support from English and Cyprus precedent. A number of cases cited therein, lend support to the proposition that the only way in which the Attorney-General may discontinue criminal proceedings without the leave of the Court, is by filing a nolle prosequi, i.e. a notice under his hand signifying his intention to discontinue proceedings. When the ruling of the Court was delivered, the police sergeant informed the Court he did not wish to offer any evidence. Instructions to this purpose were issued, as he stated to the Court, by the Attorney -General, conveyed to the prosecuting officer through the Chief of the Police. In brief, he communicated to the Court, he had instructions from the Attorney-General not to proceed with the charge against the accused. Thereupon, the Judge requested the prosecutor to proceed with the case, a stand consistent with his understanding of the law that no withdrawal is possible in whatever terms it may be couched, except by the leave of the Court. Offering no evidence, is but a species of an application

to withdraw pending proceedings. Thereupon, a new date of trial was given and the case was fixed for hearing on 18/12/82. On that occasion the prosecuting officer signified once again his unwillingness to proceed with the case, on instructions from the Attorney-General. The instuctions of the Attorney-General, passed on to the Court by the prosecuting officer, were that he wished to discontinue the proceedings in exercise of his power under Article 113.2 of the Constitution. In view of the importance of the issues raised and the desirability of avoiding further friction with the office of the Attorney-General, the learned trial Judge sought the guidance of the Supreme Court, reserving the aforementioned two questions for our opinion.

The first question sets out, to my comprehesion, two questions of law and not one. This must have been within the contemplation of the trial Judge as well, having regard to the history of the proceedings elicited above. "Discontinue" is defined in the Concise Oxford Dictionary as primarily connoting "cease from, give up (doing habit etc.) and cease taking . . . ". In my considered opinion on an appreciation of the first question posed, we are required to give an opinion on two distinct subjects:-

(a) The power, if any, of the Attorney-General to discontinue proceedings in a manner other than that envisaged in s.154(1) - Cap.155 and,

(b) The control that a Court of law may exercise over a decision of the Attorney-General to withdraw criminal proceedings.

The first question requires us to decide whether s.154(1) is in any way inconsistent to or incompatible with Article 113.2, so far as it defines the power of the Attorney-General to discontinue (διακόψει) criminal proceedings. Laws enacted prior to independence were saved by Article 188.1 of the Constitution, subject to the requirement that they be applied with the necessary modifications if anyone needed, to conform with the provisions of the Constitution.

Counsel for the Attorney-General subscribed to the above analysis upon Question 1 and invited us to hold that-

(A) Article 113.2 confers on the Attorney-General

unfettered power to discontinue proceedings. To the extent this power is limited by s.154(1) - Cap. 155, it must be disregarded.

(B) The Attorney-General can stop any prosecution by offering no evidence or by withdrawing the charges without the leave of the Court, notwithstanding the provisions of s.91 - Cap.155, or any other enactment

In his submission, the Attorney-General can bring proceedings to an end, by offering no evidence after plea, without the leave of the Court, resulting in a verdict of not guilty, i.e. a verdict on the merits of the case. I shall attempt to answer the questions raised in the order above earmarked.

(A) *Can the Attorney-General discontinue Proceedings except in the Manner specified in Section* 154(1) -Cap. 155?

The Constitution is the supreme law of the land - Article 179.1 of the Constitution. Subject to the doctrine of necessity, as judically defined its provisions must be given effect to without any qualification whatever. Recent decisions of the Supreme Court emphasize that no law can abridge or modify constitutional rights. (See, *Police v. Ekdotiki Eteria* (1982) 2 C.L.R. 63; *Georghiou* v. *The Attorney-General* (1982) 2 C.L.R. 938 and, *Police v. Georghiades* (1983) 2 C.L.R. 33, 48). The crucial question in this case is whether s.154(1) - Cap.155. abridges or, in any way restricts the rights vested in the Attorney -General by Article 113.2 of the Constitution to discontinue proceedings. Section 154(1) is a procedural anactment forming part of a code designed to regulate comprehensively every facet of criminal proceedings. It is modelled on the way the Attorney -General in England exercises his right to discontinue proceedings. Parenthetically, it may be notedt hat in England a nolle prosequi is in practice entered only when the accused cannot proceed to Court to plead or attend trial due to mental or physical incapacity of a permanent nature, making attendance before the Court unlikely in the foreseeable future. (See, *R. v. Rowlands,* 17 Q.B. 671).

Section 154(1) provides that, if the Attorney-General appears in person before the Court, he can discontinue proceedings by making a statement to that effect and, in every other case, by

informing the Court in writing that the State intends that proceedings shall not continue. In the words of *Lord Dilhorne*, in *Gouriet v. U.P.W.* [1978] A.C. 435, all the Attorney-General has to do is to sign a piece of paper suspending the prosecution. What section 154(1) aims to achieve on a preview of its plain provisions, is to provide for the manner in which the right should be exercised prescribing the barest formality conceivable, to sign a piece of paper. Can it then be validly asserted that this formality, if at all a formality, constitutes a restriction of his rights under Article 113.2 and an inroad into his powers? In my judgment the question requires only to be asked for the answer to be suggested. Section 154(1) neither abridges nor restricts the rights of the Attorney-General under Article 113.2. It merely lays down how it should be exercised, providing a simple procedure designed if nothing else to ensure that no one other than the Attorney-General assumes his rights under Article 113.2 of the Constitution. Far from restricting his powers under Article 113.2, s.154(1) - Cap.155, reinforces them in a manner perfectly compatible with the dictates of the Constitution.

The second accomplishment of s.154(1) - Cap.155, is to indicate the repercussions flowing from the entry of a nolle prosequi. The proceedings are suspended, the accused is discharged but not acquitted. Here, again, there is no derogation from Article 113.2. To discontinue (διακόπτω) confers no more power than to interrupt the proceedings; it brings the criminal process to a halt but not a conclusive end.

The third object of s.154(1), again compatible with Article 113.2, is to establish the stage at which proceedings may be suspended before judgment. This is consistent with the notion of discontinuance in Article 113.2 for, after judgment there is nothing to discontinue. The legal process has come to an end.

The submission that s.154(1) - Cap.155, is limitative of the rights of the Attorney-General under Article 113.2, overlooks the object of a procedural enactment, such as the Criminal Procedure Law, which is to regulate and co-ordinate the exercise of legal rights. Procedural rules provide the foundation for the exercise of legal rights. Without them the edifice of the law would be at risk of collapse. The exercise of every right known to the law, starting from the most fundamental, the right to liberty down to the most trivial ones, is subject to procedural

regulation in the interests of order and coherence in the legal system. Criminal procedure aims to inject the necessary certainty in the legal process. Procedural rules are, as legal history teaches, as consequential as the rights the exercise of which they regulate. Procedural safeguards provide the spring-board for the valid exercise of rights given by law.

It has been authoritatively decided by the Supreme Court, in *Photini Polycarpou Georghadji and Another v. The Republic* (1971) 2 C.L.R. 229 that, there is no inconsistency or conflict between the provisions of s.25(2) of the Courts of Justice Law - 14/60 and those of Article 155.1 of the Constitution, vesting in the Supreme Court exclusive appellate jurisdiction. The ratio emerging is that every right or jurisdiction, even if it emanates from the Constitution, is subject to reasonable procedural regulation. (See, also, *Lefkios Rodosthenous and Another v. The Police*, 1961 C.L.R. 48 and, *Attorney-General v. Pouris and Others* (1979) 2 C.L.R. 15). All that s.154(1) - Cap.155 purports to accomplish, is to establish the mode in which the right of the Attorney-General to discontinue proceedings may be exercised. In my judgment it is both reasonable and necessary.

I found it hard to comprehend how a provision, requiring the Attorney- General to signify his decision to discontinue proceedings, whenever not present in person, in the simplest conceivable manner restricts his rights under Article 113.2. If we were to accede to the submission made on behalf of the Attorney-General, we would have to hold by the same reasoning inapplicable, in the case of the Attorney-General, every provision of the criminal procedure law regulating the institution and conceivably the conduct of criminal proceedings. A series of provisions of Cap.155 deals with the prerequisites for a valid institution of criminal proceedings applicable to the Attorney-General as well, in accordance with s.109 of the same code (see, sections 39, 40, 41 and 42). Another corollary from the above submission would be that requirements of Cap.155 for a preliminary inquiry in the case of serious offences would be unconstitutional on grounds of restrictiveness of the right of the Attorney-General to institute proceedings. Here contemplation of the implications of the submission made, persuades one of its unsoundness. Also it is contrary to authority.

In my judgment, the submission of counsel runs counter to the decision of the Supreme Constitutional Court in the *Republic v. Charalambos Zacharia*, 2 R.S.C.C. 1, establishing that the decision of the Attorney-General to prosecute is of an executory character, only procedurally binding upon the Court. It is not a decision of a judicial character in the strict sense. Judicial power vests in the Supreme Court and Courts subordinate thereto in virtue of the express provisions of Article 152.1 of the Constitution. This is the reason why the initiation, conduct and trial of judicial proceedings is subject to judicial control as a matter of constitutional order. (See, *Police v. Hondrou*, 3 R.S.C.C. 82; *Papaphilippou v. The Republic*, 1 R.S.C.C. 62). The power of the Attorney-General to discontinue proceedings is of a similar nature with his power to initiate proceedings by the same reasoning of executive character, only procedurally binding upon the Court. Therefore, by entering a nolle prosequi, the proceedings are suspended because the decision of the Attorney-General is procedurally binding upon the Court. It results in the discharge of the accused. On the other hand, a verdict on the merits is a purely judicial act that cannot emanate from anyone other than the judiciary.

In my judgment, the provisions of section 154(1) - Cap.155, are in no conflict with those of Article 113.2 of the Constitution. The Attorney-General may, at any time, orally, if personally present, or by filing a nolle prosequi under his hand on any other occasion, discontinue proceedings. Not only the criminal procedure leaves unfettered the right of the Attorney-General to discontinue criminal proceedings at his discretion, but also establishes by s.156 - Cap.155 the procedural framework for the delegation of his powers signified by an appropriate notice in the Gazette.

(B) *Can the Attorney-General withdraw Proceedings by offering no Evidence, or otherwise, without the Leave of the Court?*

Counsel for the Attorney-General argued that power vests, in virtue of Article 113.2 of the Constitution, in the Attorney-General to bring proceedings to an end by offering no evidence or by an act of withdrawal and that such decision is binding upon the Court and should result in a verdict on the merits, i.e. a verdict of not guilty. As already noted, the acknowledgment of such power to the Attorney-General would in effect

entail overriding the provisions of the Constitution, vesting judicial power exclusively in the hands of the judiciary.

The Courts retain control over every aspect of judicial proceedings and, within the sphere of their powers they are sovereign. The exercise of their power to control proceedings is procedurally regulated by the provisions of s.91 - Cap.155. making the withdrawal of criminal proceedings subject to the leave of the Court. A similar jurisdiction vests in the Courts in trials on information. In Cyprus this is a corollary of the principle of separation of powers, as well as a fundamental rule of the common law, made applicable in Cyprus by virtue of the provisions of s.29(1)(c) of the Courts of Justice Law - 14/60.

In a legal system of separation of powers the exercise of every aspect of judicial power is necessarily the exclusive domain of the Judiciary - *Hinds v. Queen* [1976] 1 All E.R. 353 (P.C.).

In R. v. Meruyn Broad [1979] 68 Cr. App. R. 281; it was affirmed as a principle admitting no controversy that a Court exercising criminal jurisdiction is not bound by any decision of the prosecuting authority to drop the case or abandon it. In the epigrammatic words of *Roskill L.J.*, as he then was,

> "The Judge in such circumstances is not a rubber stamp to approve a decision by counsel without further investigation, a decision which may or may not be right and which, in the present case, in the view of each member of this Court, with respect to the experienced counsel concerned, was not one with which this Court agrees."

The learned Judge earlier pointed out that the approval of the Court for any course proposed to be taken by the prosecution is no idle formality. The history of the proceedings in the above case demonstrates the wisdom of this rule. The prosecution took the view that the evidence against the accused was insufficient to support a charge of handling stolen goods and, informed the Court that they intended to offer no evidence against him. Leave was sought to withdraw the case. On perusal of the material before the trial Court outlining the evidence against the accused, the Judge took a contrary view of the effect of the

evidence whereupon he refused leave and requested the prosecutor to proceed with the case, a request properly heeded by the prosecution. At the end of the day, the accused was convicted and sentenced to two years' imprisonment. On appeal the Court took the view, unanimously, that the course followed by the trial Judge was impeccable, beyond any criticism.

Subject to the entry of a nolle prosequi in the manner envisaged in s.154(1) - Cap.155, the prosecution cannot bring criminal proceedings to a conclusion in any manner whatever, except by the leave of the Court. (See, also, *R. v. Bedwellty Justices ex P. Munday Crim. L.R.*, [1970] p. 601).

The breadth of the discretion of the Court to control proceedings before it, is illustrated by the case of *Soanes* [1948 32 Cr. App. R., 136, where it was held that the Court retains power not only to refuse leave to withdraw, but also power to reject a course agreed upon between prosecution and defence upon a plea of guilty to the remaining counts. (The cases of *R. v. Philips* [1953] 1 All E.R. 968 and, *R. v. Nishbet* [1971] 3 All E.R. 307, 312, 313, also furnish a good illustration of the inherent power of the Court to control proceedings before it).

In *Police v. Tterla* (1973) 1 J.S.C. 109 - a decision of the District Court of Famagusta - I had occasion to review the provisions of s.91 - Cap.155 and, examine their origin and compass. It was observed that s.91 reproduces the powers traditionally exercised by criminal Courts under the common law system to control proceedings before them, inevitably requiring the leave of the Court for their withdrawal. (See, also, *Criminal Procedure in Cyprus,* by Loizou and Pikis, p.69).

The Supreme Court in *Isaias v. The Police* (1966) 2 C.L.R. 43, rigorously proclaimed that the progress and outcome of judicial proceedings is always subject to judicial control. A Court of law, it was observed, is not bound by the view of the prosecution as to the implications of evidence adduced before the Court, being the sole arbiter of the outcome of a case on the merits. The above decision lends indirectly support, in my view, to the proposition that s.154(1) is not inconsistent with the provisions of Article 113.2 of the Constitution. A nolle prosequi,

they noted, can only be entered before judgment, affirming the validity of the provisions of s.154 in this area.

From the moment a charge is approved, the fate of judicial proceedings is subject to judicial control in exercise of the powers vested in the Judiciary by the Constitution. The very approval of a charge is a matter of judicial discretion. No one can institute proceedings without the approval of the Court, whoever the prosecutor may be (see, s.43(1) - Cap.155). The approval of a charge is a judicial and not an administrative matter - *R. v. Gateshead Justices* [1981] 1 All E.R. 1027.

The power of the Courts to control criminal proceedings must not be confused with the role of the Judge in the judicial process. These are two separate and distinct questions. Under our system of law, the Judge remains aloof of the legal battle that is waged before him and retains throughout the proceedings his distance from the adversaries. He remains throughout the impartial arbiter of the strength of the case of the adversaries. He is not expected to interfere with the presentation and conduct of the case for the prosecution, nor is it his function to exercise control over the manner in which evidence is presented.* (See, *R. v. Sang* [1979] 2 All E.R. 46 (C.A.) and on appeal to the *House of Lords*, 2 All E.R. 1222). In the exercise of his powers to prosecute, the Attorney-General is not subject, either to Ministerial control or control and supervision by the Courts. (See, *Gouriet v. P.P.W.* [1978] A.C. 435). The distance that a Judge must maintain from the position of the adversaries is in no way inconsistent with the powers vested in the Court to control judicial proceedings. The power to control proceedings is necessary in order to safeguard the independence of the Judiciary, as well as sustain the faith of the public in the judicial process. Every decision on the merits colours the quality of justice in the country and is of direct concern to the Judiciary. Abdication from the exercise of control over judicial proceedings would involve abandonment of the constitutional responsibility of the Court as the custodians of the judicial power of the State. It would also undermine their independence.

* However, unlike the position adopted in *Sang* supra, we have it on authority in Cyprus, that a judge should scrutinize the way evidence is collected, its provenance, in order to ensure, at the least, that constitutional provisions are observed in collecting evidence-*Police v. Georghiades* (1983) 2 C.L.R. 33,48.

In my judgment, the Attorney–General cannot withdraw the proceedings, except by leave of the Court. But he can discontinue proceedings in the manner envisaged by s.154(1) - Cap.155, without giving any reasons for the discontinuance, unless he chooses to do so. Supplying the reasons for such a decision, is entirely a matter for the Attorney-General. To my comprehension, making public reasons for the entry of a nolle prosequi, is subject to the existence of compelling reasons justifying a different course, invariably in the public interest. Furnishing reasons for a decision to enter a nolle prosequi, serves best the principle of equality before the law enshrined in Article 28.1 of the Constitution.

In the light of the above, my answer to the questions raised is as follows:

Answer to Question 1: The Attorney-General can only discontinue a criminal proceeding by filing a nolle prosequi. Discontinuance of a case in any other circumstances, whether by the Attorney-General or any prosecutor, is only possible by the leave of the Court.

Answer to Question 2: The Attorney-General need not give reasons for the suspension of a case by the entry of a nolle prosequi. Discontinuance of a case in any other circumstances is subject to the discretion of the Court exercised judicially upon explanation of the reasons justifying discontinuance.

Order accordingly.