

1985 October 23

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 155.4
OF THE CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION
BY CHARALAMBOS PSARAS, FOR LEAVE TO APPLY
FOR AN ORDER OF PROHIBITION AND/OR
CERTIORARI,

AND

IN THE MATTER OF THE HEARING
OF CRIMINAL CASE No. 3455/85 BEFORE THE ASSIZE
COURT OF FAMAGUSTA.

(Application No. 83/85).

*Prerogative Orders—Prohibition—Is an order issued out
of the Supreme Court and directed to an inferior Court,
which forbids that Court to continue proceedings therein
in excess of its jurisdiction or in contravention of the
5 laws of the land or in contravention of the rules of
natural justice—An Assize Court is an inferior Court
and, therefore, amenable to such an order.*

*Prohibition—Application for leave to apply for an order
of prohibition—Leave will be granted, if applicant makes
10 out a “prima facie case.”*

Natural Justice—Bias—Test of bias.

The applicant was prosecuted in Criminal Case
No. 3455/85 before the Assize Court of Famagusta
sitting at Larnaca for offences involving narcotic drugs.
15 Seventeen other persons were charged on the same
Information. All but five pleaded guilty. The hearing
commenced on 30.9.1985.

In the course of the trial the Prosecution sought to
put in evidence certain items seized by the Police during

a search of the premises of Psaras Shipping Agencies Ltd. The Defence objected on the ground that the search was illegal as it was carried out on the authority of an invalid search warrant. It was disclosed during the trial within trial that followed that the search warrant in question was issued by Constantinides S.D.J., a member of the Assize Court. The Assize Court found that the search in question was not carried out on the basis of the warrant but with the consent of a person whom they found to have had authority to give such consent. But the issue of the review of the validity of the warrant of arrest has not as yet been dealt with by the Assize Court. Its validity is of crucial importance to the defence as, if the arrest of the applicant is illegal, then in the circumstances the admissibility of three statements given by him to the Police will be successfully challenged.

Held, (1) Prohibition lies not only in cases of excess or absence of Jurisdiction but also in cases of departure from the rules of natural justice.

(2) It is of fundamental importance that Justice should not only be done, but should manifestly and undoubtedly be seen to be done. The test of bias is: Would a reasonable and fair minded person, sitting in Court and knowing all the relevant facts, have a reasonable suspicion that a fair trial for the applicant was not possible?

(3) A prima facie case should be made out sufficiently to justify the granting of leave to the applicant to move this Court to issue an order of prohibition. The expressions "arguable case" and "prima facie case" are used in the sense of a case made out without the need to go into any rebutting evidence put forward at this preliminary stage.

(4) As the applicant succeeded to make out a prima facie case, leave is granted to him to file an application for prohibition but in view of the circumstances of this case, including the fact that the trial commenced on 30.9.1985 and that besides a number of other persons undergo a trial on the same Information, proceedings are not hereby stayed.

Application granted. 40

Cases referred to:

- R. v. North, ex parte Oakey* [1927] 1 K.B. 491;
- R. v. Kemp Police Authority, ex parte Godden* [1971]
3 All E.R. 20;
- 5 *The King v. Sussex Justices, ex parte McCarthy* [1924]
1 K.B. 256;
- In re Kakos* (1984) 1 C.L.R. 876;
- In re Kakos* (1985) 1 C.L.R. 250;
- Sidnell v. Wilson and Others* [1966] 1 All E.R. 681;
- 10 *Land Securities plc v. Receiver for the Metropolitan
Police District* [1983] 2 All E.R. 254;
- Police v. Georghiades* (1983) 2 C.L.R. 23;
- R. v. Electricity Commissioners* [1924] 1 K.B.D. 204;
- R. v. St. Edmundsbury and Ipswich Diocese (Chancellor)
and Another, Ex parte White and Another* [1947]
15 2 All E.R. 170;
- Economides and Another v. The Police* (1983) 2
C.L.R. 301;
- R. v. Liverpool City Justices, ex parte Topping* [1983]
20 1 All E.R. 490;
- Kritiotis v. Municipality of Paphos* (1983) 3 C.L.R. 1460.

Application.

- Application for leave to apply for orders of prohibition
and certiorari for the purpose of prohibiting the Assize
25 Court of Famagusta from further proceeding with the
hearing of criminal case No. 3455/85.

M. Tapa (Miss) for *Chr. Pourgourides*, for the
applicant.

Cur. adv. vult.

- 30 STYLIANIDES J. read the following decision. The applicant
was prosecuted in Criminal Case No. 3455/85 before the

Assize Court of Famagusta sitting at Larnaca for offences involving narcotic drugs. Seventeen other persons were charged on the same Information. All but 5 pleaded guilty. The hearing commenced on 30th September, 1985.

The present application is intituled "In the matter of an application by Charalambos Psaras... for leave to apply for an order of prohibition and/or certiorari." In the body of the application, however, the relief sought is "an Order of the Honourable Court prohibiting the Assize Court of Famagusta from further proceeding with the hearing of the criminal case 3455/85. In the alternative an order prohibiting His Honour Constantinides, S.D.J., from further proceeding with the hearing of the said case." 5 10

The grounds upon which the said relief is sought are:-

There are circumstances pointing to a real likelihood that the Assize Court of Famagusta with its present coram and/or composition would have bias against the applicant and/or that there are circumstances pointing to a real likelihood that the maxim "justice should not only be done but should manifestly and undoubtedly be seen to be done" would be violated. 15 20

Certiorari and prohibition are prerogative orders addressed to inferior Courts or to a body of persons exercising judicial power.

In Cyprus before Independence the Assize Courts were presided either by the Chief Justice or by one of the Puisne Judges of the Supreme Court and, therefore, they were not inferior Courts. The Assize Courts established by the Courts of Justice Law, 1960 (Law 14 of 1960), enacted pursuant to the provisions of Article 152.1 of the Constitution that provides that the judicial power shall be exercised by the High Court of Justice (now the Supreme Court) and such inferior Courts as may, subject to the provisions of this Constitution, be provided by a Law made thereunder, are inferior Courts and, therefore, they are amenable to orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. The Supreme Court has exclusive jurisdiction to issue such orders. 25 30 35

A certiorari requires the record of the order of the Court to be sent up to the Supreme Court, to have its legality inquired into and, if necessary, to have the orders quashed. I need not, however, say anything more about certiorari as the applicant does not seek such a relief by this application. The application is for leave to apply for an order of prohibition.

Prohibition is an order issued out of this Court and directed to an inferior Court which forbids that Court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. Prohibition lies not only in excess or absence of jurisdiction but also in a departure from the rules of natural justice—(*R. v. North, ex-parte Oakey* [1927] 1 K.B. 491; *R. v. Kemp Police Authority, ex-parte Godden* [1971] 3 All E.R. 20).

It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a reasonable suspicion—(*The King v. Sussex Justices, ex-parte McCarthy* [1924] 1 K.B. 256).

At this stage the Court must be satisfied that there is material before it on which, if it were accepted as accurate, an arguable case could be put forward. A prima facie case should be made out sufficiently to justify the granting of leave to the applicant to move this Court to issue an order of prohibition. The expressions “arguable case” and “prima facie case” are used in the sense of a case made out without the need to go into any rebutting evidence put forward at this preliminary stage—(*In Re Kakos*, (1984) 1 C.L.R. 876; *In Re Kakos*, (1985) 1 C.L.R. 250; *Sidnell v. Wilson & Others* [1966] 1 All E.R. 681, at p. 686; *Land Securities plc v. Receiver for the Metropolitan Police District*, [1983] 2 All E.R. 254, at p. 258).

The facts on which this application is relied upon are set out in two affidavits dated 17.10.85 and 22.10.85, respectively, sworn by A. Theofilou, an advocate of Limassol. The substance of the contents of these affidavits is as follows:-

In the course of the trial before the Assizes on 15.10.85

the prosecution sought to put in evidence certain items seized by the Police during a search of the premises of Psaras Shipping Agencies Ltd. The defence objected to their production, inter alia, on the ground that the search was illegal as it was carried out on the authority of an invalid search warrant. A trial within trial was directed by the Assizes on this issue. 5

It was disclosed during this side-trial that the search warrant in question was issued by H.H. Y. Constantinides, S.D.J., a member of the Assize Court, the other two members being the P.D.C. of Larnaca and a District Judge. As evidence illegally obtained is excluded on the authority of *Police v. Georghiades*, (1983) 2 C.L.R. 23, the validity of the search warrant, as deposed in the first affidavit, is of crucial importance. The validity of the search warrant, having been made an issue, the judicial officer, who issued it, is in effect sitting on appeal from his own decision, and furthermore his ability to keep an open mind until the very end of the trial may be affected, and there is a likelihood of bias. 10 15 20

On 19.10.85 they ruled that the search was not carried out on the basis of the search warrant in question but with the consent of a person whom they found to have had authority to give such consent, and that the objected evidence was admissible. 25

The validity of the warrant of arrest is going to be challenged by the defence. Its validity is of crucial importance for the defence case as, if the arrest of the applicant was illegal, then in the circumstances the admissibility of the three statements given by him to the Police will be successfully challenged. The likelihood of bias cannot be excluded. 30

Atkin, L.J., in *R. v. Electricity Commissioners*, [1924] 1 K.B.D. 204, said:-

“Both writs of prohibition and certiorari are of great antiquity, forming part of the process by which the King’s Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in 35

excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and if necessary, to have the order quashed. It is to be noted that both writs deal with question of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In *R. v. St. Edmundsbury and Ipswich Diocese (Chancellor) and Another, Ex-parte White and Another*, [1947] 2 All E.R. 170, Wrottesley L.J., had this to say at p. 177:-

"As to the statement by Atkin, L.J., in *R. v. Electricity Commissioners*, [1924] 1 K.B.D. 204; it is sufficient to say that the Lord Justice treated the matter as one in which the court was at liberty to grant either writ, as indeed was the case, and merely indicated the difference in operation between the two writs, viz., that while the one prevented, the other cured. None the less, it is the fact that the effect of a writ of prohibition is not merely to prevent the making of an order should it arrive in time, but is also to prevent the enforcement of it should it arrive after it has been made."

The test for bias is: Would a reasonable and fair-minded person, sitting in Court and knowing all the relevant facts, have a reasonable suspicion that a fair trial for the applicant was not possible?—(*Economides & Another v. The Police*, (1983) 2 C.L.R. 301; *R. v. Liverpool City Justices, Ex-parte Topping*, [1983] 1 All E.R. 490; *Kritiotis v. Municipality of Paphos*, (1983) 3 C.L.R. 1460).

The issue of the search has already been dealt with by

the Assize Court of Famagusta and they ruled that it was carried out not on the basis of the warrant. No preventive action can be taken at this stage either for the making of an order or for the enforcement of it on the issue of the search in the circumstances as disclosed in the affidavits and the exhibits thereto. The issue of the review of the validity of the warrant of arrest has not as yet been dealt with by the Assize Court. 5

As at this stage I have to be satisfied only that an arguable case was raised or that a prima facie case sufficiently to justify the grant of leave is made out, on the material before me I decided to make the following order:- 10

The applicant is granted leave to file an application for prohibition. Such application to be filed within 3 days from today. In view of all circumstances of the case, including the fact that the trial of Criminal Case No. 3455/85 commenced on 30.9.85 and that besides the applicant a number of other persons undergo a trial on the same Information, proceedings are not hereby stayed. I shall revert to this matter when the respondents, the Assize Court of Famagusta, file their opposition to such application. 20

The order is addressed to the inferior Court and not to a Judge thereof.

Copy of this order granting leave to be delivered to the Assize Court of Famagusta sitting at Larnaca. 25

Application granted.