

1985 December 21

[TRIANTAFYLIDIS. P.]

IN THE MATTER OF ARTICLE 155.4 OF THE CONSTITUTION.

IN THE MATTER OF AN APPLICATION BY ONISIFOROS CHARALAMBOUS, ALIAS FORIS, AND KETI ONISIFOROU CHARALAMBOUS, BOTH OF KOLOSSI, FOR ORDERS OF CERTIORARI AND PROHIBITION.

(Application No. 94/85).

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*Constitutional Law—Right of accused to defend himself through a lawyer of his own choosing—Constitution, Article 12 (5) (c)—European Convention of Human Rights, Article 6 (3) (c)—Constitution, Article 30 (3) (d).*

- 5 *Criminal Procedure—Adjournment of hearing—Application for, on ground that the advocate chosen by accused was engaged in another criminal case—Adjournment refused—In the circumstances insistence of accused in the services of the particular advocate justified—Proceedings following*  
10 *the refusal tainted with unconstitutionality (Article 12 (5) (c) of the Constitution) and resulted in contravention of the rules of Natural Justice.*

*Natural Justice—See Criminal Procedure—Adjournment ....., ante.*

- 15 *European Convention on Human Rights—Article 6(3) (c).*

As a result of an appeal filed by the applicants against their conviction by the Assize Court in Limassol, the Supreme Court ordered a retrial of their case, which was fixed before an Assize Court in Limassol on the 14.10.85.

- 20 On that date the applicants applied for an adjournment of the hearing on the ground that their advocate Chr. Pourgourides, who appeared for them at their first trial and on appeal, was engaged in another criminal case before the Assize Court in Larnaca.

The Assize Court adjourned the case on the 29.10.85, stressing that, if the said advocate would still be engaged before the Assize Court in Larnaca, the accused had to make arrangements to be defended by other counsel.

On the 29.10.85 the applicants once again applied for an adjournment on the same ground as before, stressing that they do not wish to be defended by any other advocate as Mr. Pourgourides had appeared for them during the first trial and on appeal. 5

The Assize Court decided by majority to refuse a further adjournment. The applicants were charged and as they remained silent pleas of not guilty were entered. The hearing commenced on 30.10.85, when five prosecution witnesses were heard, who were not cross-examined at all by the applicants. If the trial was to continue there would be called only four more prosecution witnesses of a formal nature. 10 15

The applicants, having obtained leave, filed this application for an order of prohibition, preventing the Assize Court from further proceeding with the hearing and an order of certiorari, quashing the proceedings commenced on 29.10.85 in the said case. 20

*Held, issuing orders of prohibition and certiorari:* (1) Article 12(5)(c)\* of the Constitution corresponds to Article 6(3)(c)\*\* of the European Convention of Human Rights. As it was held in *Fourri v. The Republic* (1980) 2 C.L.R. 152 the right granted by Article 6(3)(c) of the Convention and, consequently, the right granted by Article 12(5)(c) of the Constitution guarantees to an accused person legal assistance of his own choosing in cases only where the fees of defending counsel are to be paid by the accused himself. As the present applicants will be paying the fees of defending counsel, their right to choose him is protected under both the above provisions. 25 30

\* Quoted at p 324

\*\* Quoted at p 325

(2) The case of *Christou v. The Police* (1972) 2 C.L.R. 38, where the appellant, as the accused at the trial, chose, when counsel retained by him failed to appear, to defend himself, is clearly distinguishable from the present case.

(3) There is no need to examine whether the matter in question falls within the ambit of Article 30(3)(d) of the Constitution because such provision applies also to proceedings other than criminal cases, whereas Article 12(5) applies specifically to criminal cases and in case of conflict between the two provisions Article 12(5) prevails in relation to criminal cases.

(4) There is also no need to examine to what extent the right safeguarded under Article 12(5)(c) of the Constitution and Article 6(3)(c) of the said Convention enables an accused to insist that only a particular advocate will defend him, notwithstanding that he is prevented from being available, because this is a very exceptional situation as the advocate in question had appeared for the applicants during their first trial and on appeal. Applicants' insistence as regards his services were thoroughly justified.

(5) In the light of the above the proceedings following the refusal on the 29.10.85 to adjourn the case are tainted by unconstitutionality, apparent on the face of the record and, moreover, have resulted in contravention of the rules of natural justice.

*Orders of Certiorari and Prohibition granted.*

30 Cases referred to:

*Fourri v. The Republic* (1980) 2 C.L.R. 152;

*Christou v. The Police* (1972) 2 C.L.R. 38.

#### **Application.**

35 Application for an order of prohibition preventing the Assize Court of Limassol from further proceeding with the hearing of Criminal Case No. 27736/84 and for an

order of certiorari quashing the proceedings in such criminal case.

*Chr. Pourgourides*, for the applicants.

*R. Gavrielides*, Senior Counsel of the Republic with  
*E. Papadopoullou (Mrs.)*, for the Attorney-  
General of the Republic.

*Cur. adv. vult.*

TRIANTAFYLIDIS P. read the following judgment. In these proceedings the applicants, who are the accused in criminal case 27736/84 before an Assize Court in Limassol, are seeking an order of prohibition preventing the Assize Court from further proceeding with the hearing of the said case against them, and an order of certiorari quashing the proceedings in such criminal case, which commenced on the 29th October 1985.

Both applicants—who are husband and wife—are facing before the Assize Court charges of unlawful possession of a pistol.

They have filed the present application after they were granted leave for this purpose on the 30th October 1985; and it was ordered then that in the meantime the proceedings in the aforementioned criminal case before the Assize Court should be stayed until further order of this Court. As a result such proceedings were suspended by the Assize Court and the two applicants were let out on bail in the meantime.

Applicant 1 had been, earlier, convicted of the offence in question by another Assize Court in Limassol and he was sentenced to fifteen months' imprisonment and applicant 2, on having also been found guilty of such offence, was sentenced to a suspended sentence of imprisonment for fifteen months.

On the 3rd July 1985 the Supreme Court, in determining appeals by the applicants against their convictions, ordered a retrial of their case which was fixed before an Assize Court in Limassol on the 14th October 1985.

On that date the applicants appeared before the Assize Court and counsel appearing on their behalf applied for an adjournment of the trial on the ground that advocate Christos Pourgourides, who had appeared on behalf of the applicants at their first trial and on appeal, was engaged at the trial of a criminal case before an Assize Court in Larnaca and could not appear then for the applicants at their new trial.

The Assize Court in Limassol granted an adjournment of the trial from the 14th October 1985 to the 29th October 1985, but it stressed that if Mr. Pourgourides would still be engaged before the Assize Court in Larnaca, and could not appear on the 29th October 1985 to defend the applicants, they had to make arrangements to be defended by other counsel.

On the 29th October 1985 the applicants appeared before the Assize Court without counsel and applied for another adjournment until Mr. Pourgourides would be available to defend them; they stressed that they did not wish to be defended by any other advocate as Mr. Pourgourides had appeared for them both at their first trial and at their appeal.

Counsel appearing for the prosecution stated that he would not object to an adjournment in order to afford a last opportunity to the applicants to arrange for counsel to appear for them, either Mr. Pourgourides or someone else; and he said that he had communicated with counsel who was conducting the prosecution before the Assize Court of Larnaca in the other case in which Mr. Pourgourides was appearing for the defence and had been informed that it was envisaged that there were needed another fifteen to twenty days in order to complete the trial of that case; he added that he would not object to an adjournment of the case of the applicants until the completion of that other case before the Assize Court of Larnaca.

The Assize Court decided, by majority of two to one, to refuse a further adjournment. Chrysostom's P.D.C. and Nicolaides S.D.J. took the view that an adjournment would not be justified, whereas the other member of the Assize Court, Hadjihambis D.J., stated that he would be prepared

to grant the adjournment in view of the need to safeguard the constitutional right of the applicants to be defended by counsel of their own choice

Then the applicants were charged and as they remained silent pleas of not guilty were entered on their behalf; and the further hearing of the case was adjourned to the 30th October 1985. On that date, while leave was being sought from the Supreme Court to file the present application for orders of prohibition and certiorari, the hearing of the case commenced before the Assize Court of Limassol and five prosecution witnesses were heard who were not cross-examined at all by the applicants; and I have been told, by counsel who are appearing for the Republic, that if the trial was to continue there would be called only four more prosecution witnesses of a formal nature.

When this application was heard before me it was argued that the rights of the applicants under Articles 12 (5) (c) and 30 (3) (d) of the Constitution have been infringed by the refusal of the adjournment of the hearing of their case on the 29th October 1985, and, furthermore, that the rules of natural justice have been contravened.

Article 12 (5) (c) of the Constitution reads as follows:

“ARTICLE 12

5. Every person charged with an offence has the following minimum rights:-

(c) to defend himself in person or through a lawyer of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require;

Article 30 (3) (d) of the Constitution reads as follows:

“ARTICLE 30

3. Every person has the right -

.....

5 (d) to have a lawyer of his own choice and to have free legal assistance where the interests of justice so require and as provided by law;”

10 Article 12 (5) (c), above, corresponds to Article 6(3) (c) of the European Convention on Human Rights which reads as follows:

“ARTICLE 6

.....

3. Everyone charged with a criminal offence has the following minimum rights:

15 .....

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

20 ”

Our Supreme Court had occasion in the case of *Fourri v. The Republic*, (1980) 2 C.L.R. 152, to consider the meaning and effect of Article 12(5)(c) of our Constitution and of Article 6(3)(c) of the European Convention on Human Rights which since its ratification by the European Convention on Human Rights (Ratification) Law, 1962 (Law 39/62) forms part of the Law of Cyprus. It was held in the *Fourri* case, supra, that the right granted by Article 6 (3) (c) of the European Convention on Human Rights and, consequently, by the corresponding Article 12(5)(c)

of our Constitution, guarantees to an accused person legal assistance of his own choosing in cases only where the fees of defending counsel are to be paid by the accused himself; and that when counsel is assigned by the Court— 5  
under Article 12 (5) (c) of the Constitution and section 64 of the Criminal Procedure Law, Cap. 155—to defend an accused person by way of free legal aid the accused does not have a right to choose the counsel who is to be assigned to him.

In the present case it appears that the applicants will 10  
be paying the fees of Mr. Pourgourides and, therefore, their right to choose him as their defending counsel is protected under both Article 12 (5) (c) of our Constitution and Article 6 (3) (c) of the European Convention on 15  
Human Rights.

In *Christou v. The Police*, (1972) 2 C.L.R. 38. the Supreme Court was faced on appeal with the situation that the appellant as the accused at the trial had retained and paid an advocate to appear for him but his advocate failed to turn up at the trial and the appellant chose to 20  
defend himself in person and he did not apply for an adjournment in order to be enabled to instruct other counsel. It was held by the Supreme Court that in the circumstances the appellant was not the victim of a violation of his right to be defended by a lawyer of his own 25  
choosing which is safeguarded by Article 12 (5) (c) of the Constitution. In my view the *Christou* case is clearly distinguishable, on the basis of its own special facts, from the present case.

I need not deal with the aspect of whether the matter 30  
before me comes within the ambit of Article 30 (3) (d) of the Constitution, and not only within the ambit of Article 12 (5) (c) of the Constitution and of Article 6 (3) (c) of the European Convention on Human Rights, because 35  
from a comparison of the provisions of Article 12 (5) and of Article 30(3) it appears that Article 12(5) applies specifically to criminal cases whereas Article 30 (3) applies,



also, to proceedings other than criminal cases and in case of conflict between the provisions of Article 12 (5) and of Article 30 (3) the provisions of Article 12 (5) are those which have to prevail in relation to criminal cases.

5 Nor do I have to examine in the present case whether, and to what extent, the right safeguarded under Article 12 (5) (c) of the Constitution and Article 6 (3) (c) of the European Convention on Human Rights enables an accused  
10 person to insist that only a particular advocate will defend him at his trial even if he is prevented from being available and can only become available later on another date if an adjournment of the hearing of the case is granted, because in the present instance I  
15 am faced with a very exceptional situation in which the advocate whom the applicants had chosen to defend them at their new trial, and who was not available and could only become available on a later date if an adjournment of their trial was granted, was the advocate who had defended them at their first trial and on appeal; and I do  
20 find thoroughly justified the insistence of the applicants that they should not be deprived of the services of the advocate who had, in the circumstances, such prior knowledge of their case as to render him uniquely qualified to defend them at their new trial.

25 I have, therefore, no difficulty in arriving at the conclusion that the refusal of the Assize Court in Limassol to grant an adjournment in order to enable counsel of the choice of the applicants to appear and defend them resulted in a violation of both Article 12 (5) (c) of the  
30 Constitution and of Article 6(3) (c) of the European Convention on Human Rights.

At this stage it is useful to refer to the following passage from "Judicial Review of Administrative Action", by S. A. de Smith, 4<sup>th</sup> ed., at p. 397:

35 "What is the position where a tribunal wrongfully refuses an application for the adjournment of its pro-

ceedings and then goes on to make an order that is adverse to the applicant? There is Irish, Canadian, Australian and New Zealand authority for the proposition that by continuing its proceedings in such a case the tribunal exceeds its jurisdiction, if the grounds for making the application were to produce material evidence or to assert a statutory right to legal representation. There is some English authority going the other way; such an improper exercise of judicial discretion is an error of Law and a ground for appeal, but it is not necessarily an error going to jurisdiction. But certiorari will lie if the error is apparent on the face of the record or is such as to involve a denial of natural justice: and in any event a Court need not be embarrassed by a dearth of authority if it wishes to hold that a significant abuse of discretion goes to jurisdiction.”

In the light of the foregoing I am of the opinion that the proceedings before the Assize Court in Limassol which ensued after the refusal, by majority, of such Assize Court, on the 29th October 1985, to adjourn the new trial of the applicants in order to enable advocate Christos Pourgourides to appear for them, are proceedings tainted by unconstitutionality which is apparent in the face of the record of the Assize Court, in the sense that, due to the said refusal, there has occurred a breach of the rights of the applicants under Article 12 (5) (c) of the Constitution. Moreover such proceedings have resulted in contravention of the rules of natural justice.

I have, consequently, reached the conclusion that this is a proper case in which to make an order of certiorari quashing the majority decision of the Limassol Assize Court, by means of which there was refused an adjournment of the case on the 29th October 1985, and, also, quashing all proceedings thereafter at the new trial of the applicants before such Assize Court. Furthermore, I have decided to make an order of prohibition preventing the Assize Court in Limassol from proceeding further with

the hearing of the case in question pursuant to the aforesaid majority decision of the 29th October 1985.

The Assize Court will have now to resume the new trial from the stage prior to the refusal, by majority, of  
5 an adjournment on the 29th October 1985

*Order accordingly.*