1987 FEBRUARY 14

[STYLIANIDES J.]

IN THE MATTER OF AN APPLICATION BY OR ON BEHALF OF MR CHARALAMBOS THEOPHANOUS ARGYRIDES AGAINST WHOM A RULING AND/OR AN ORDER COMMITTING HIM FOR TRIAL WERE MADE BY THE DISTRICT COURT OF NICOSIA (BY H H E PAPADOPOULOU, AG D J.) ON THE 10.1.87 FOR AN ORDER OF CERTIORARI

(Application No. 16/87)

Prerogative orders—Certiorari—Error of law apparent on the face of the record—The error need not go to the jurisdiction—What constitutes the «record»—Nature of remedy—Discretionary—Affidavit evidence—In general record cannot be supplemented thereby

Prerogative orders—Certiorari—Order committing an accused for trial before an Assize Court—The jurisdiction to quash is now established

Prerogative orders—Constitution, Article 155.4—Principles applicable—Not different to those applicable by English Courts—The power, however, does not extent to matters within the jurisdiction of Article 146 of the Constitution

Construction of Statutes—Long title—An aid to construction

Criminal Procedure—Preliminary inquiry—The Criminal Procedure (Temporary Provisions) Law 42/74—Section 3 as amended by section 2 of Law 44/83—Purpose and effect of said Law—The necessary prerequisites for its application—Nature of Judge's discretion thereunder—The discretion is not to hold or not a preliminary inquiry—a matter that is entrusted to the Attorney-General—but whether to commit an accused for trial before the Assize Court without holding such an inquiry or not to commit him—The discretion should be exercised judicially—Committing Judge not bound to go through all the statements of witnesses—It suffices, if he goes through some of them and is satisfied that there is sufficient evidence to commit

Criminal Procedure—Preliminary inquiry—Object of—The Criminal Procedure (Temporary Provisions) Law 42/74—It facilitates and shortens committal proceedings, but it does not take away their basic function, namely to serve as a safeguard of the liberty of the subject and of the ordeal of trial before an Assize Court unnecessarily

Having obtained the necessary leave*, the applicant filed the present

*See (1987) 1 C.L.R. 23

application for an order of certioran quashing the order of the District Court of Nicosia in Criminal Case 568/87, whereby he was committed to trial before the Assize Court of Nicosia

The contention of the applicant is that the committing Judge took her decision to commit him as aforesaid with no evidence on which to base it as a «short break» was not sufficient to read the statements of the witnesses, which had been filed in accordance with Law 42/74 Counsel for the applicant argued that as a result the Judge misapplied the law in that she failed to exercise her judicial power and discretion given to her by the said law

Held, *dismissing the application* (1) Certioran would issue to quash a decision of a statutory tribunal for an error of law apparent on the face of the record, although the error does not go to the jurisdiction of the tribunal The jurisdiction to quash the committal of a person for trial by an Assize Court is now established, notwithstanding the statement in Halsbury's Laws of England, 4th Ed , Vol II, p 860, para 1569 *(In re Economides and Others* (1983) 1 C L R 933 at pp 938-939) What constitutes the «record» has been analysed by Lord Denning in *R v Northumberland Compensation Appeal Tribunal - Ex-parte Shaw* [1952] 1 All E R 122 at p 130

(2) The long title of a statute is an aid to its construction The object of Law 42/74 is obvious from the title and its contents Its only substantive provisions are set out in section 3* as amended by s 2 of Law 44/83 The English Law is not of any guidance in the interpretation or application of the said Law Law 42/74 renders inoperative, if certain prerequisites are fulfilled, s 92 of the Criminal Procedure Law, Cap 155 for all offences, except those punishable by death Thus, all provisions relating to the holding of a preliminary inquiry (sections 93-105 inclusive) are also rendered inoperative The controlling words of section 3 of Law 42/74 are «The Court has power to commit for trial without a preliminary inquiry any accused person» These words do not empower the Court to hold or not a preliminary inquiry the power is to commit without a preliminary inquiry or not to commit The discretion whether such an inquiry is necessary or not was entrusted by the legislator to the Attorney-General who, under the Constitution, exercises very wide powers of quasi-judicial nature

(3) The committing Judge does not make automatically or as a matter of course a committal order Committal proceedings serve as a safeguard of the liberty of the subject and of the ordeal of standing trial before the Assize Court unnecessarily This function of the committal proceedings was not taken away by Law 42/74 It facilitates and shortens committal proceedings, but it does not take away its basic function

*Quoted at p 39

(4) The power of the committing Judge under Law 42/74 should be exercised judicially, but it is not necessary for him to go through all the statements It is sufficient if he goes through some of them and is satisfied that there is sufficient evidence to commit

(5) In this case it cannot be said and it was not argued - that the Judge could not have read some or material statements, which would enable her to find sufficient grounds for committing the applicant Nor has it been suggested that the statements disclose no such grounds For this reason the Court is not satisfied that she misapplied Law 42/74 or exercised her discretion in such a wrong way as to justify intervention by this Court No apparent error of law appears or can be deduced from the record

Application dismissed

Cases referred to

Lambnanides v Michaelides, 23 C L R 49,

Attorney-General v Christou, 1962 C L R 129,

Kynakides v Hilimindn (1963) 2 C L R 171,

In re Droushiotis (1981) 1 C L R 708

Christofi and Another v Iacovidou (1986) 1 C L R 236,

R v Northumberland Compensation Appeal Tnbunal - Ex parte Shaw [1952] 1 All E R 122,

In re Economides and Others (1983) 1 C L R 933

R v Patents Appeal Tnbunal, ex parte Baldwin and Francis Ltd [1959] Q B D 105,

Baldwin and Francis Ltd v Patents Appeal Tnbunal [1959] 2 All E R 433,

R v Nat Bell Liquors Ltd [1922] 2 A C 128,

Zenios v Disciplinary Board (1978) 1 C L R 382

In re Economides and Another (1983) 1 C L R 925,

Vacher and Sons Ltd v London Society of Compositors [1913] A C 107,

Constantinides v The Republic (1978) 2 C L R 337,

Xenophontos v The Republic, 2 R S C C 89,

Police v Athienitis (1983) 2 C L R 194,

R. v. Carden [1879] 5 Q.B.D. 1;

Atkinson v. U.S.A. Government [1971] A.C. 197;

R. v. Epping and Harlow Justices [1973] 1 Q.B.D. 433;

R. v. Justices of Surrey [1870] L.R. Q.B.D.466;

R. v. Stratford [1940] 2 K.B.33.

Application.

Application for an order of certiorari to bring up and quash the committal order in Criminal Case No.568/87 whereby the applicant was committed for trial before the Nicosia Assize Court.

A. Markides with Chr. Triantafyllides, for the applicant.

M. Kyprianou, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following decision. On 26th January, 1987, leave was granted to the applicant to move the Court for certiorari to bring up and quash the committal order in Criminal Case No.568/87 whereby he was committed for trial before the Nicosia Assize Court. On the basis of this, the applicant moves the Court «for an order of certiorari to remove into the Supreme Court for the purpose of their being quashed the ruling and/or order of the District Court of Nicosia relating to the committal of the applicant for trial before the Assize Court of Nicosia for the offences as shown in the charge-sheet.»

The power of this Court to issue prerogative orders is set out in paragraph 4 of Article 155 of the Constitution, and the principles applicable in the exercise of such jurisdiction are not different to those applied by the English courts. It does not extend, however, to matters which are within the jurisdiction of Article 146 - (*Lambrianides v. Michaelides*, 23 C.L.R. 49; *Attorney-General v. Christou*, 1962 C.L.R. 129; *Kyriakides v. Hilimindri*, (1963) 2 C.L.R. 171; *In re Droushiotis*, (1981) 1 C.L.R. 708; *Christofi and Another v. Iacovidou*, (1986) 1 C.L.R. 236).

Certiorari exists to correct an error of law where revealed on the face of an order or decision or irregularity or absence of or excess

of jurisdiction where shown - *(R. v. Northumberland Compensation Appeal Tribunal - Exparte Shaw.* [1952] 1 All E.R. 122).

By the *Northumberland* case it was held that certiorari would issue to quash a decision of a statutory tribunal for error of law on the face of the record although the error did not go to the jurisdiction of the tribunal. The ressuscitation and readaptation of certiorari in the *Northumberland* case means that the supervisory jurisdiction extends to the sphere from which it was for considerable time thought to have been excluded. The error for which certiorari lies has to be apparent on the face of the written determination of the Court.

The jurisdiction of this Court to make an order to quash by means of certiorari the committal of a person for trial by an Assize Court is now established notwithstanding the statement in *Halsbury's Laws of England,* 4th Ed., Vol. 11, p.860, para.1569 - *(In re Economides and Others.* (1983) 1 C.L.R. 933, at pp. 938-939).

The error of law on which this motion is based, as set out in the application, is that the learned District Judge committed the applicant for trial in excess and/or abuse of her powers and/or without exercising her discretion and/or judicial power, as provided by Law No.42/74, as amended.

Certiorari is only available to quash a decision for error of law if the error appears on the face of the record. What, then, is the record?

Lord Denning in the *Northumberland* case (supra) said at p.130.-

> «It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see *Blackstone's Commentaries,* vol. III, p.24. But it must be noted that, whenever there was any question as to what should, or should not, be included in the record of any tribunal, the Court of King's Bench used to determine it. It did it in this way. When the tribunal sent their record to the King's Bench in answer to the writ of certiorari, this return was examined, and, if it was defective or incomplete, it was quashed. It appears that the Court of King's

Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction and also the document which contained their adjudication. Thus in the old days the record sent up by the justices had, in the case of a conviction, to recite the information in its precise terms, and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from. The record had also to set out the adjudication, but it was never necessary to set out the reasons. Following these cases, I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision.»

(See, also, *R. v. Patents Appeal Tribunal, ex-parte Baldwin & Francis Ltd.*, [1959] 1 Q.B.D. 105, and *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] 2 All E.R. 433).

There is no quarrel what constitutes the record in the present case.

The record in this case consists of the charge-sheet in Criminal Case No.568/87 filed in the District Court of Nicosia, the record of the District Judge and two exhibits, i.e. the consent of the Attorney-General and a copy of the statements of witnesses.

Counsel for the applicant submitted that the learned District Judge had, in application of Law No.42/74, to exercise a double discretion: (a) whether to proceed with or without a preliminary inquiry; and (b) if she decided to dispense with a preliminary inquiry, then to exercise her discretion whether to commit or not, and this discretion should be exercised if the statements disclosed sufficient grounds for such committal for trial.

It is the contention of counsel for the applicant that the learned District Judge misapplied the Law in that she failed to exercise her judicial power and discretion given to her by Law No.42/74 in deciding whether to commit the applicant with or without holding a full preliminary inquiry. She has taken the decision to commit the applicant for trial with no evidence on which to base it as a short

break was not sufficient to read the statements. It was not argued that the statements do not reveal sufficient grounds for committal.

The record of the Judge of 10th January, 1987, reads as follows:-

«*Δικαστήριο:* Απαγγέλλονται οι κατηγορίες που αντιμετωπίζουν οι κατηγορούμενοι σύμφωνα με το παρόν κατηγορητήριο, σε απλή και καταληπτή από αυτούς γλώσσα. Οι ίδιοι δηλώνουν ότι αντελήφθησαν και κατενόησαν τις κατηγορίες που αντιμετωπίζουν.

Κατηγορούσα Αρχή: Παρουσιάζω έγγραφο συγκατάθεση της Εντίμου Γενικού Εισαγγελέως της Δημοκρατίας, περί μη αναγκαιότητας διεξαγωγής προανακρίσεως στην παρούσα υπόθεση.

Δικαστήριο: Η έγγραφος συγκατάθεση της Γενικού Εισαγγελέως σημειούται ως Τεκμ. Α.

Κατηγορούσα Αρχή: Παρουσιάζω επίσης αντίγραφο *του συνόλου της μαρτυρίας, αντίγραφο της οποίας* παρέδωσα σήμερα στους κατηγορούμενους/στο δικηγόρο των κατηγορούμενων.

Δικαστήριο: Το σύνολο της μαρτυρίας σημειούται ως Τεκμ. Β.

Συνηγ.: Βεβαιώνομεν ότι ελάβαμεν σήμερα αντίγραφο του συνόλου της μαρτυρίας, ως το Τεκμ. Β.

Συνηγ.: Δεν επιθυμούμεν σε αυτό το στάδιο να αναφέρομεν οτιδήποτε. Επιφυλάσσομε την υπεράσπισή μας.

(Μετά από σύντομη διακοπή, επαναρχίζει η διαδικασία - Εμφανίσεις είναι όπως και προηγουμένως).

Δικαστήριο: Είμαι ικανοποιημένη ότι έχουν τηρηθεί οι Πρόνοιες του Άρθρου 3 του Νόμου 42/74. Είμαι επίσης ικανοποιημένη ότι στο Τεκμήριο Β περιέχεται *επαρκής μαρτυρία η οποία* δικαιολογεί την παραπομπή των κατηγορουμένων σε δίκη ενώπιον του Κακουργιοδικείου, χωρίς να είναι ανάγκη να διεξαχθεί προηγουμένως προανάκριση.

Οι κατηγορούμενοι παραπέμπονται σε δίκη ενώπιον του Κακουργιοδικείου Λευκωσίας, το οποίο συνέρχεται σε Συνεδρία την 12η Ιανουαρίου, 1987».

(«*Court:* The charges faced by the accused are read in simple language, which they can understand. The accused state that they understood the charges which they face.

Officer for the prosecution: I produce the written consent of the Honourable Attorney-General of the Republic to the effect that in this case it is not necessary to carry out a preliminary inquiry.

Court: The written consent of the Attorney-General is marked Exhibit A.

Officer for the prosecution: I also produce copy of all the evidence. I have given copy thereof to the accused/their advocates.

Court: The evidence is marked Exhibit B.

Counsel for the accused: We confirm that we have received to-day copy of the whole evidence as per Exhibit B.

Counsel for the accused: At this stage we do not wish to say anything. We reserve our defence.

(After a short break the proceedings are resumed - Appearances as before).

Court: I am satisfied that the provisions of section 3 of Law 42/74 have been complied with. I am also satisfied that Exhibit B contains sufficient evidence, justifying the committal of the accused to trial before the Assize Court, without being necessary to carry out beforehand a preliminary inquiry.

The accused are committed to trial before the Assize Court of Nicosia, sitting on the 12.1.87»).

In the affidavit in support of the application for leave, which is adopted in the affidavit in support of the present motion and is actually made an exhibit thereto, it is stated that the honourable Judge interrupted the proceedings for a short period of time that was not more than 15 to 20 minutes. This part of the affidavit is not admissible for the simple reason that the error must appear on the record and the record cannot be in general supplemented by

affidavit evidence - *(R. v. Nat Bell Liquors Ltd.,* [1922] 2 A.C. 128, per Lord Sumner, at p.159; *Baldwin & Francis Ltd. v. Patents Appeal Tribunal and Others,* [1959] 2 All E.R. 433, per Lord Tucker, at p.443). This affidavit was not put by consent and this part of the affidavit will be disregarded for the purposes of these proceedings.

Learned counsel for the respondents submitted that the District Court under Law No.42/74 has no power to decide whether to hold a preliminary inquiry or not; if the requirements prescribed by the said Law are satisfied, it has power to commit the accused for trial unless there is no sufficient evidence.

I granted leave without at that stage being necessary to decide on the validity of the contentions of counsel, the functions of the committing Court under Section 3 of Law No. 42/74 and whether the alleged miscompliance occurred, and this in accordance with previous authority - *(Zenios v. Disciplinary Board,* (1978) 1 C.L.R. 382,387; *In re Economides and Another,* (1983) 1 C.L.R.925, at p.928).

The first question that arises for determination is the functions of the committing Court. The Criminal Procedure Law, Cap.155, s.92, provides that a preliminary inquiry shall be held by a Judge in accordance with the provisions in Sections 93 to 105 (inclusive) whenever any charge has been brought against any person of an offence not triable summarily or as to which the Court is of opinion that it is not suitable to be disposed of by summary trial.

In 1974 The Criminal Procedure (Temporary Provisions) Law, 1974 (No.42 of 1974) was enacted. The long title of a Statute is an aid to construction (*Vacher & Sons, Limited v. London Society of Compositors,* [1913] A.C, 107, at pp. 128-129).

The long title of Law No.42 of 1974 reads:-

> «Law providing for certain measures for «διευκόλυνσιν και ταχυτέραν απονομήν της δικαιοσύνης» (facility and speedier administration of justice) in criminal cases during the emergency created in consequence of the Turkish invasion.»

The object of the Law is obvious from the title and its contents. Its only substantive provisions are set out in s.3, as amended by s.2 of Law No.44/83, which reads as follows:-

«3. Διαρκούσης της ισχύος του περί Δικαστηρίων (Προσωριναί Διατάξεις) Νόμου του 1974 και παρα τας διατάξεις του άρθρου 92 του περί Ποινικής Δικονομίας Νόμου εις περιπτώσεις αδικημάτων προβλεπομένων υπό του Ποινικού Κώδικος ή οιουδήποτε ετέρου εν ισχύϊ Νόμου, εξαιρουμένων αδικημάτων *τιμωρουμένων δια της ποινής του θανάτου, εάν-*

(α) ο Γενικός Εισαγγελεύς της Δημοκρατίας παράσχη γραπτήν συγκατάθεσιν περί της μη αναγκαιότητος διεξαγωγής τοιαύτης προανακρίσεως· και

(β) αντίγραφον της καταθέσεως εκάστου μάρτυρος *κατηγορίας τον οποίον προτίθεται να καλέση* η κατηγορούσα Αρχή, επιδοθή προηγουμένως εις τον κατηγορούμενον ή τον δικηγόρον αυτού,

το Δικαστήριον κέκτηται εξουσίαν να παραπέμψη εις δίκην άνευ προανακρίσεως οιονδήποτε κατηγορούμενον.»

(«3. During the continuance in force of the Courts of Justice (Temporary Provisions) Law, 1974, and notwithstanding the provisions of section 92 of the Criminal Procedure Law, in cases of offences created by the Criminal Code or any other Law in force, with the exception of offences punishable with the death penalty, if-

(a) the Attorney-General of the Republic gives his written consent to the effect that it is not necessary to hold a preliminary inquiry; and

(b) copy of the statement of each prosecution witness, whom the prosecution intends to call, is served in advance on the accused or his advocate,

the Court has power to commit for trial without a preliminary inquiry any accused person»).

The provisions of this Law were to some extent judicially considered in *Constantinides v. The Republic*, (1978) 2 C.L.R. 337, and *In re Economides and Others*, (1983) 1 C.L.R.933).

Though the notion of committing without preliminary inquiry was embodied as early as 1967 in the Criminal Justice Act in

England, after comparison of the provisions of the two Laws, I am of the view that the Cypriot legislator did not follow in any respect the English Law. The English Law is not of any guidance in the interpretation or application of our Law, neither is the Magistrates' Act, 1980.

The opening paragraph of Section 3 lays down that the operation of this Law and the exercise of the power given to a Court to commit without preliminary inquiry exists only during the continuance in force of The Courts of Justice (Temporary Provisions) Law, 1974 (No.43 of 1974). It renders inoperative, if certain prerequisites are fulfilled, the provisions of s.92 of the Criminal Procedure Law, Cap.155, for all offences except those punishable by death. Thus, it renders also inoperative all the provisions regarding the holding of a preliminary inquiry which are set out in Sections 93-105, inclusive.

The two prerequisites that have to be satisfied are:-

(a) Written consent of the Attorney-General to the effect that it is not necessary to hold a preliminary inquiry; and,

(b) The service in advance on the accused or his advocate of copy of the statement of each witness for the prosecution whom the prosecution intends to call.

The controlling words of the section are: «The Court has power to commit for trial without a preliminary inquiry any accused person.» These words do not empower the Court to exercise discretion whether to hold or not a preliminary inquiry; the power is to commit without a preliminary inquiry or not to commit. The discretion whether a preliminary inquiry is necessary or not, whether the provisions of s.92 of Cap.155 should be followed or the provisions of this Law should be applied, were entrusted by the legislator to the Attorney-General of the Republic whose written consent that the holding of a preliminary inquiry is not necessary, was made a prerequisite for the exercise of the power given to the Court by this section. The Attorney-General under the Constitution exercises very wide powers of quasi-judicial nature - (Article 113 of the Constitution - *Xenophontos v. The Republic,* 2 R.S.C.C. 89; *Police v. Athienitis,* (1983) 2 C.L.R. 194).

The committing Judge does not make automatically or as a matter of course a committal order. The object of the necessity of

a case going through committal proceedings before trial by the Assize Court is a safeguard for a citizen to ensure that he cannot be made to stand his trial without sufficient grounds. It served as a safeguard of the liberty of the subject and of the ordeal of standing a trial before the Assize Court unnecessarily - *(R. v. Carden,* [1879] 5 Q.B.D. 1; *Atkinson v. U.S.A. Government,* [1971] A.C. 197; *R. v. Epping & Harlow Justices,* [1973] 1 Q.B.D. 433).

This function of the committal proceedings was not taken away by Law No. 42/74. It facilitated and shortened committal proceedings but it did not take away its basic function.

In the English Act in certain cases the committing magistrate «shall commit»; under our Law he is vested with power to commit without preliminary inquiry. Such power should be exercised judicially. He has to satisfy himself that there are sufficient grounds for a person to stand his trial. The object of the provision to deliver copies of the statements of the witnesses whom the prosecution intends to call at the trial is twofold: (a) to enable the commiting Judge to exercise his discretion; and (b) to inform the accused of the case that he is due to face.

This being said, I do not find that it is necessary for a District Judge to go through all the statements in order to exercise such power. It suffices if he goes through some of the statements and is satisfied that there is sufficient evidence to commit.

It is upon an applicant who moves the Court for certiorari to satisfy the Court that there is an error of law manifest on the face of the record.

Before concluding, I would like to observe that certiorari is a discretionary remedy. It is not given in futile. As was said in the case of *Christofi v. Iacovidou* (supra), «certiorari is not a writ of course, yet where the application is by the party aggrieved, it ought to be treated as ex debito justitiae» - *(Regina v. Justices of Surrey,* [1870] L.R. Q.B.D. 466; *R. v. Stratford,* [1940] 2 K.B. 33).

It was argued that the learned District Judge could not have read all the statements within the short period that she withdrew to her chambers. It cannot be said, however, validly - and it was not argued - that she could not have read some or material statements which would enable her to find that there are sufficient grounds for committing the accused. Nor has it been suggested that the

statements disclose no such grounds.

For this reason I am not satisfied that the committing Judge misapplied Law No.42/74 or exercised her discretion in such a wrong way as to justify my intervention. No apparent error of law appears or can be deduced from the record.

I would like to place on record that committing Judges must adhere strictly to the Law. They have to keep a «speaking» record; and it would be advisable, though they are not bound to do so, to go through the statements of the witnesses in their entirety before they exercise their power under s.3 of Law No.42/74, a fact that should be reflected on the record.

For the aforesaid reasons I would refuse the application.

Application dismissed. Let there be no order as to costs.

Application dismissed with no order as to costs.