

1988 June 15

(A LOIZOU, P.)

IN THE MATTER OF AN APPLICATION BY YIANNAKIS P. ELLINAS
FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI ETC.

and

IN THE MATTER OF A RULING OF THE ASSIZE COURT OF
LIMASSOL DATED 1.6.88 IN CRIMINAL CASE NO. 22446/87.

(Application No. 99/88).

*Criminal Procedure—Committal for trial before an Assize Court—
Preliminary objections raised before plea relating to alleged
invalidity of the committal order—Whether Assize Court has power
to look at the statements of witnesses placed before the committing
Judge in order to decide whether they disclose the charges faced by
the accused—Questions determined in the negative.* 5

*Criminal Procedure—Committal for trial before an Assize Court—
Preliminary objections raised before plea relating to alleged
invalidity of the committal order—Whether the Assize Court has
power to examine whether the committing Judge exercised
wrongly his discretion on the ground that the offences were not
disclosed in the statements of the witnesses—This is a matter within
the exclusive jurisdiction of the Supreme Court under Article 155 of
the Constitution.* 10

*Criminal Procedure—The Criminal Procedure Law, Cap.155, section
148—Question of law reserved for the opinion of the Supreme
Court—Application made by accused—Principles governing the
exercise of the discretion of trial Court.* 15

The applicant was committed to trial before the Assize Court of
Limassol for various offences. After the filing of the Information, but
before plea, the applicant raised before the Assize Court various
preliminary objections. All objections were, in effect, based on an
alleged invalidity of the committal order. 20

The Assize Court concluded that the case law shows that even in
England it is not permissible, and the trial Court had no right to refer
to the evidence and/or depositions which were placed before the
committing Judge in order to decide if and whether the charges faced 25

by the accused are disclosed, that is only permissible in the other instances which do not cover the objections.

5 The Assize Court further concluded that if the objection was considered as referring to a mistake of the committing Judge in the sense of wrong exercise of his discretionary power to commit the accused for trial before the Assize Court on the basis of the statements from which none of the offences for which the accused is charged are disclosed, the Assize Court again was deprived of the right to examine that position in view of the provisions of Article 155 of the Constitution as the only competent Court to decide such a subject is the Supreme Court and not the Assize Court.

10 As a result the preliminary objections were dismissed. The applicant applied under section 148 of Cap.155 for 4 questions of law to be reserved for the opinion of the Supreme Court. The Assize Court dismissed the application.

15 This is an application for leave to apply for orders of certiorari, mandamus and prohibition both against the ruling dismissing the preliminary objection and against the ruling dismissing the application for reserving the 4 questions of law for the opinion of the Supreme Court.

20 Held, *dismissing the application*: (1) This Court is in full agreement with the approach adopted by the Assize Court as regards the preliminary objections.

25 (2) In any event the statements of the witnesses filed during the committal proceedings disclosed sufficient evidence justifying committal .

30 (3) In refusing to reserve the four questions of law for the opinion of the Supreme Court the Assize Court exercised their discretion properly and in a manner consistent with the approach of this Court in a number of cases regarding the desirability that the trial of a Criminal case and especially an Assize case should not be interrupted unduly.

Application dismissed.

Cases referred to:

- 35 *HadjiGeorghiou v. Republic*, 1964 C.L.R. 156;
Mouyios v. Police (1974) 2 C.L.R. 23;
R. v. Hall [1968] 2 All E.R. 1009;

R v. Gee [1936] 2 All E.R. 89;

R. v. Chairman of London County Session Ex Part Downes (37)
Crim. App. R. 148;

John McKinsie Jones and Others [1974] 59 Crim. App. R. 120;

R v. McDonnell [1966] 1 All E.R. 193; 5

R. v. Mustafa Halil and Another, 13 C.L.R. 65;

Republic v. Kalli, 1961 C.L.R. 266;

Re Charalambous and Another (1974) 2 C.L.R. 37;

Police v. Sampson (1977) 2 C.L.R. 1.

Application. 10

Application for leave to apply for an order of certiorari and/or mandamus and/or prohibition against the ruling of the Assize Court of Limassol delivered on 1.6.1988 rejecting the preliminary objections raised on behalf of the applicant prior to his arraignment and also against the refusal of the Assize Court to reserve a question of law for the opinion of the Supreme Court. 15

G. Cacoyiannis with P. Mouaimis and M. Koukkidou (Miss), for the applicant.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. I have just refused, 20
in the judgment delivered in Application No. 100/88, leave to the applicant to apply for an Order of Certiorari to remove into the Supreme Court for the purpose of its being quashed his committal by the District Court of Limassol (Stavrinides D.J.), for trial before the Assize Court of Limassol, and for an Order of Prohibition 25
prohibiting the Assize Court of Limassol from proceeding to arraign and/or try the applicant in the said case on the basis of the said committal and/or on the information filed by the Attorney-General in consequence thereof.

I shall proceed now to examine the present application by 30
which the applicant applies for leave to apply for an Order of Certiorari, and/or Mandamus and/or Prohibition, against the Ruling of the Assize Court of Limassol, delivered on the 1st June 1988, rejecting the preliminary objections raised on behalf of the applicant prior to his arraignment, and also respecting the refusal 35
of the Assize Court of Limassol by its Decision delivered on the 7th

June, 1988, to reserve a Question of Law for the opinion of the Supreme Court under Section 148 of the Criminal Procedure Law, Cap. 155 for leave to apply for an Order of Mandamus and/or Prohibition and/or Certiorari.

5 The applicant was on the 5th February, 1988, committed by the District Court of Limassol for trial by the Limassol Assize Court, for twenty offences relating to stealing allegedly committed on various dates during the period of February 1982 and July 1983 as per the charge-sheet on which he was so committed.

10 The Attorney-General of the Republic filed in the Assize Court of Limassol an information charging the applicant with thirty-one offences committed between the 12th February 1982 and the 28th July, 1983.

On the 25th May, 1988, when the applicant was about to be
15 arraigned before the Limassol Assize Court, but prior to his such arraignment he raised certain preliminary objections on which the Assize Court gave its ruling on the 1st June, 1988. Following the said Ruling learned counsel for the applicant applied on the 3rd June, 1988, to the Assize Court for four
20 Questions of Law arising out of the said Ruling of the Court to be reserved for the opinion of the Supreme Court pursuant to Section 148 of the Criminal Procedure Law, Cap. 155. The Assize Court on the 7th June, 1988, rejected the applicant's said application and refused to reserve any Question of Law for the
25 opinion of the Supreme Court.

On the 9th June, 1988, the applicant filed this application whereby he sought the reliefs set out in this application and which I need not reproduce here verbatim.

30 The grounds upon which the said reliefs or any of them are sought are the following:

(1) The committal of the Applicant for trial before the Limassol Assize Court for the offences charged in the Charge Sheet in Criminal Case No. 22446/87 (Exhibit 1) made by the District Court of Limassol was invalid in law and of no effect
35 the said invalidity being an error of law apparent on the face of the record and/or was made in excess of the Court's jurisdiction or power in that the offences charged in the said Charge Sheet were not disclosed in the statements produced to and/or examined by the Court (Exhibit 6).

(2) The said committal was invalid and of no legal effect the said invalidity being an error of law apparent on the face of the record in that there was no evidence and/or sufficient evidence in law (as disclosed in the said statements produced to the Committing Judge - Exhibit 6) to justify the committal of the Applicant for trial before the Assize Court of Limassol and/or in that the said statements did not disclose the offences for which the Applicant was so committed. 5

(3) The Assize Court of Limassol acted in excess of jurisdiction and/or refused to assume jurisdiction where it was dutybound to do so and/or erred in law such error being an error of law apparent on the face of the record in ruling that it had no jurisdiction and/or competence to entertain the preliminary objections raised by the Defence before the arraignment of the Applicant. 10 15

(4) The Assize Court of Limassol acted in excess of jurisdiction and/or refused to assume jurisdiction where it was dutybound to do so and/or erred in law its said error being an error of law apparent on the face of the record in ruling that it had no jurisdiction or competence to entertain the preliminary objections raised by the Defence before the arraignment of the Applicant to the effect that the committal of the Applicant for trial before it was invalid thereby nullifying the whole proceedings before it and/or that the Information before it (Exhibit 2) was defective because the offences charged therein were not disclosed in the statements produced to the Committing Judge. (Exhibit 6). 20 25

(5) The Assize Court of Limassol ought to have considered the preliminary objection raised by the Defence before arraignment to the effect that the Information was defective in that the offences contained therein were not disclosed in the statements produced to the Committing Judge (Exhibit 6) and/or that the trial Court had no jurisdiction or power to try the said Criminal Cases as there had been no proper or valid committal of the Applicant for trial by the Assize Court and/or because the committal proceedings were defective in that the accused was committed for trial for offences not disclosed in the statements (Exhibit 6) produced to the Committing Judge. 30 35

(6) The Assize Court of Limassol erred in law and such error was an error of law apparent on the face of the record in 40

holding that it had jurisdiction or power to proceed with the trial on the basis of the Information before it (Exhibit 2) even though such Information may have been defective for the reasons stated above.

5 (7) The Assize Court of Limassol ought to have looked at the statements (Exhibit 6) produced to the Committing Judge during the committal proceedings to examine whether they disclosed the offences contained in the Information (Exhibit 2) and its failure to do so amounted to a refusal to exercise
10 jurisdiction where it was dutybound to do so and/or to an error of law apparent on the face of the record..

(8) The Assize Court of Limassol ought to have made the distinction between a mere irregularity and an irregularity going to the root of the proceedings rendering the
15 proceedings a nullity and its failure to do so amounted to an error of law apparent on the face of the record..

(9) The said Ruling and/or Order of the District Court of Limassol dated 5.2.1988 was in excess of the jurisdiction or powers of the Court in that the offences contained in the
20 Charge Sheet (Exhibit 1) were not disclosed by the evidence contained in the statements produced to the Committing Judge.

(10) The said Ruling and/or Order of the District Court of Limassol dated 5.2.1988 was in excess of the jurisdiction or powers of that Court in that there was no evidence and/or
25 sufficient evidence in law to justify the committal of the Applicant to trial before the Assize Court of Limassol.

(11) All steps and/or proceedings flowing from and/or consequent upon the said committal are null and void and of
30 no legal effect since they flow from and/or are dependent on the said invalid committal and are vitiated by the invalidity thereof; and/or

(12) The Assize Court of Limassol will proceed to try the Applicant on the basis of the said committal and the said
35 subsequent steps and/or proceedings (filing of Information, rejection of preliminary objections etc.) unless prohibited from doing so by an Order of Prohibition.

(13) After correctly ruling that the stage at which the application by the Applicant (through his counsel) was made to the Assize Court of Limassol for the reservation for the opinion of the Supreme Court of the four questions of law that arose from the Assize Court's Ruling dated 1.6.1988 (Exhibit 4) was a proper one, the Court was unjustified and/or failed to exercise judicially or properly or at all its discretion in rejecting the said application of the Applicant and refusing to reserve such questions of law or any of them for the opinion of the Supreme Court. In so acting the Court erred in law and its error was apparent on the face of the record.

(14) Viewing, inter alia, the principle of equality of arms safeguarded by the Constitution, the Assize Court of Limassol was in the circumstances dutybound to reserve the questions of law raised by the Applicant for the opinion of the Supreme Court and its failure to do so amounted to a refusal to assume jurisdiction where it was dutybound to do so and/or to an error of law apparent on the face of the record.

(15) The decision of the Assize Court of Limassol not to reserve for the opinion of the Supreme Court the said questions of law did in the circumstances and/or having regard to the grounds given amount to a refusal to assume jurisdiction where the Court ought to have done so and/or to excess or abuse of jurisdiction or powers and/or an error of law apparent on the face of the record.»

The objections raised on behalf of the applicant before the Assize Court, the arguments advanced, the authorities cited in support thereof as well as the reply of the Deputy Attorney General, are set out in its Ruling of the 1st June, 1988. For the sake of brevity I do not intend to reproduce here verbatim the analysis made by the Assize Court of the various arguments. It is sufficient to refer to the authorities quoted in the said Ruling. The case of *Philippos HadjiGeorghiou v. The Republic*, 1964 C.L.R. 156; and *Vassilios Lazarou Mouyios v. The Police* (1974) 2 C.L.R. 23 were cited as regards the issue as to the jurisdiction of an Assize Court, which had been raised at the trial after a plea of not guilty and which should, according to the approach of this Court in those cases not have been treated as triable concurrently with the question of guilt but that such issue should have been raised before plea and should have been tried before the trial. Also

reference is made to the textbook of Criminal Procedure in Cyprus by Loizou and Pikiis at p. 91 regarding the lack of substantive jurisdiction to take cognizance of the offence, and the Assize Court concluded on this issue, that it was the proper stage at which the objection as to the jurisdiction should have been raised.

They then dealt with the position of the Law in England as to the circumstances in which it is proper for the Judge to order an amendment of the indictment. In that respect reference was made to Archbold Criminal Pleading Evidence and Practice 42nd Edition pp. 48-49.

Learned counsel for the applicant relied on the case of *R. v. Hall* [1968] 2 All E.R. 1009 in order to prove that an information is defective if an indictment charges offences which are not disclosed in the depositions and fails to charge an offence which is and so such indictment lacks the most essential quality of an indictment. Also reference was made to the case of *R. v. Gee* [1936] 2 All E.R. 89 which construed the meaning of the term «committed for trial» as meaning lawfully committed and legally committed for trial and once the provisions of the Act were not complied with, no bill of indictment could be preferred against the accused and so the document before the Court was not an indictment and the accused could not be tried.

As regards the quashing of an indictment reference was made to *Archbold* (supra), paragraph 1-110 where separate analysis is made of the position of the Common Law and that of the Statutes in England. Reference was made also to the cases of *R. v. Chairman of London County Session Ex Parte Downes* (37) Cr. App. R. 148; *John McKinsie Jones and Others* (1974) 59 Cr. App. R. 120; *R. v. MacDonnell* [1966] 1 All E.R. 193 and it concluded that «with the Case Law referred to earlier it is clear that in the case referred to by Mr. Cacoyannis, even in England it is not permissible, and the trial Court has no right to refer to the evidence and/or depositions which were placed before the committing Judge in order to decide if and whether the charges faced by the accused are disclosed, that is only permissible in the other instances which do not cover the objection of Mr. Cacoyannis.»

The Assize Court then relied on the case of *R. v. Mustafa Halil and Another*, 13 C.L.R. 65, and concluded that if the objection was considered as referring to a mistake of the committing Judge in the sense of wrong exercise of his discretionary power to commit the

accused for trial before the Assize Court on the basis of the statements from which none of the offences for which the accused is charged are disclosed, the Assize Court again was deprived of the right to examine that position in view of the provisions of Article 155 of the Constitution as the only competent Court to decide such a subject is the Supreme Court and not the Assize Court. 5

I am on the whole in agreement with the approach of the Assize Court on these issues and I need not proceed any further. Needless, however, to say that the aforesaid situation does not arise in the present proceedings before me as I have already refused leave to apply for an Order of Certiorari and/or Prohibition on the ground that there was sufficient evidence to commit the accused for trial and these legal points need not be resolved. 10 15

This application therefore fails as regards this leg.

Coming now to the second leg of these proceedings which relates to the refusal of the Assize Court to reserve four Questions of Law for the opinion of the Supreme Court I have examined the Ruling of the Assize Court which had been appended to the application as Exhibit 5 and I am in full agreement with their approach. They have exercised their discretion properly and in a manner consistent with the approach of this Court in a number of cases including, inter alia, *The Republic v. Georghios Theokli Kalli*, 1961 C.L.R. 266; *In Re Charalambous and Another* (1974) 20 25 2 C.L.R. 37; *The Police v. Nicolaos Sampson* (1977) 2 C.L.R. 1, regarding the desirability that the trial of a Criminal case and especially an Assize case should not be interrupted unduly. The application fails also as regards this leg too.

For all the above reasons the leave applied for is therefore refused and the present application is dismissed. 30

Application dismissed.