1988 July, 30

(MALACHTOS, J.)

IN THE MATTER OF ARTICLE 155.4 OF THE CONSTITUTION AND SECTIONS 3 AND 9 OF THE ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) LAW, 1964,

and

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY-GENERAL OF THE REPUBLIC,

and

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY-GENERAL OF THE REPUBLIC ON BEHALF OF THE PROSECUTION IN CRIMINAL CASE NO. 23069/87 FOR THE ISSUE OF ORDERS OF CERTIORARI AND MANDAMUS,

and

IN THE MATTER OF THE JUDGMENTS OF THE ASSIZE COURT OF NICOSIA DATED 20.6.88 AND 13.6.88, RESPECTIVELY, IN CRIMINAL CASE NO. 23069/87.

(Applications Nos. 110/88 and 115/88).

Constitutional Law — Courts of Justice — Constitution, Art. 152.1 — Assize Courts established under section 3(1) of the Courts of Justice Law, 1960 (Law 14/60) — They are inferior Courts — Therefore, prerogative orders can be addressed to them.

Prerogative Orders — Certiorari — When it lies.

Criminal Procedure — The Criminal Procedure Law, Cap. 155, s.148(1) — Question of Law Reserved — It is a question of law arising during the trial at a stage at which it has to be decided to enable the trial to proceed.

Criminal Procedure — The Criminal Procedure Law, Cap. 155, sections 41 and 110 — Joint trial — Separation of — Principles governing the exercise of the discretion.

The three accused before the Assize Court were jointly charged under 9 counts as follows:

Count 1: Conspiracy to kill Panikkos Michael of Limassol, contrary to section 217 of the Criminal Code, Cap. 154.

Counts 2,3, and 4: Premeditated murder contrary to sections 203(1)(2), 20 and 21 of the Criminal Code, Cap. 154, as amended by Law 3/62 and 86/83, of Panikkos Michael, Christakis Panikkou Michael and Michalakis Panikkou Michael, all late of Limassol.

Counts 5,6,7,8 and 9: For possessing on various dates explosive substances without a licence contrary to sections 4(4)(d), 5(a)(b) of the Explosive Substances Law, Cap. 54.

On counts 5 and 6 accussed 3 is charged alone, on count 9 accused 2 and 3 are charged together and on counts 7 and 8 all the accused are charged together.

All three accused pleaded not guilty. Soon after such plea the prosecution applied to the Assize Court to order separate trials of accused 1 on counts 1, 2, 3, 4, 7 and 8 and accused 2 and 3 on all counts.

The Assize Court dismissed the application. This decision is the subject-matter of application 115/88 for an Order of certiorari quashing it.

The Attorney-General applied to the Assize Court under s. 148(1) of Cap. 155 for eight questions* of law to be reserved for the opinion of the Supreme Court. The Assize Court dismissed the application on the ground that none of the 8 questions fall within the ambit of section 148(1) as a ground of law. As against this decision, application 110/88 was filed for an order of certiorari and mandamus.

The first of the questions, which the Attorney-General asked to be reserved for the opinion of the Supreme Court, reads as follows:

Whether the decision of the Assize Court is contrary to the Constitution and the Law because in the way it was drafted, has as result, an indirect judicial interference with the powers of the Attorney-General by virtue of Article 113.2 of the Constitution and section 154 of the Criminal Procedure Law, Cap. 155.

Counsel for the accused raised before this Court the issue whether orders in the nature of certiorari and mandamus can be addressed to

* *The questions are quoted at pp. 463-464 post.*

Assize Courts, which, in their submission, are not inferior, but superior Courts

Held, *dismissing both applications* (1) It is clear from the wording of Article 152 1 of the Constitution that an Assize Court, which is established under section 3(1) of Law 14/60 is an inferior Court

(2) This Court is of the opinion that the Assize Court rightly exercised its discretionary power and did not order separate trials of the accused The number of factors militating against such a view was given in their decision, the strongest one being the very nature of the charges, as they are framed in the charge sheet

In any event and as it has been held in *Re* Maroulletti (1971) 1 C L R 226 at 243, 244 «certiorari lies 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 The control is exercised by removing an order or decision and then quashing it Certiorari will not issue as the cloak of an appeal in disguise, and it does not lie to bring up an order of decision of rehearing of the issue raised in the proceedings»

In the case under consideration it cannot be said that there is a legal error on the face of the proceedings and so Application No 115/88, cannot succeed

(3) All the questions asked to be reserved, except the first, are not questions of law

The first one may be considered as a question of law but it does not fall within the ambit of section 148(1) as it did not arise during the trial at a stage at which it has to be decided in order to enable the trial to proceed

Applications dismissed

Cases referred to

R v Patents Appeal Tribunal Ex Parte Champions Paper and Fibre Co [1957] 1 All E R 227,

R v Patents Appeal Tribunal Ex Parte Baldwin and Francis Ltd [1959] 1 Q B 105,

Cheshire Justices, Ex Parte Henver [1912] 108 L T 374,

R v Minister of Health Ex Parte Committee of Visitors of Glamorgan County Mental Hospital [1938] 4 All E R 32,

The Republic v. The Assize Court of Kyrenia Ex Parte The Attorney-General of the Republic (1971) 2 C.L.R. 222;

Re Psaras (1985) 1 C.L.R. 561;

Oueiss v. The Republic (1987) 2 C.L.R. 49;

R. v. Barnes, R. v. Richards [1940] 2 All E.R. 229;

R. v. Gray and Others [1969] 3 All E.R. 941;

D.P.P. v. Merriman [1972] 3 All E.R. 42;

The Republic v. Pierides (1971) 2 C.L.R. 181;

Shaw v. Reckitt [1893] 2 Q.B. 59;

R. v. Shannon [1974] 2 All E.R. 1009;

Ex Parte Loukia K. Maroulletti (1971) 1 C.L.R. 226;

Charalambous and Another v. Republic (1974) 2 C.L.R. 37.

Applications.

Applications by the Attorney-General of the Republic for an order of certiorari to remove into the Supreme Court and quash the judgment of the Assize Court of Nicosia in Criminal Case No. 23069/87 dated 20.6.88 and for an order of mandamus ordering the Assize Court of Nicosia to reserve in the above Criminal case eight legal questions for the opinion of the Supreme Court.

M. Triantafyllides, Attorney-General of the Republic with Gl. HjiPetrou and A. Vassiliades.

Chr. Pourgourides with R. Erotokritou for the accused.

Cur. adv. vult.

MALACHTOS J. read the following judgment. These two related Applications for prerogative Orders of Certiorari and Mandamus, were filed by the Attorney-General of the Republic after obtaining the relevant leave of the Court.

In Application No. 110/87 we are concerned:-

(a) With the issue of an Order in the nature of Certiorari to remove the judgment of the Assize Court of Nicosia dated 20.6.88 before the Supreme Court for the purpose of being quashed; and

(b) an Order in the nature of Mandamus ordering the Assize

Court of Nicosia, which consists of Chr. Artemides, P.D.C., Y. Constantinides, S.D.J. and St. Nathanael, D.J., to reserve in Criminal Case No. 23069/87, eight legal questions for the Opinion of the Supreme Court.

The said legal questions are the following:

1. Whether the decision of the Assize Court is contrary to the Constitution and the Law because in the way it was drafted, has as a result, indirect judicial interference with the powers of the Attorney-General by virtue of Article 113.2 of the Constitution and section 154 of the Criminal Procedure Law, Cap. 155.

2. Whether the decision of the Assize Court is contrary to law because, as it appears from its reasoning, was based wrongly on the assumption that the two separate trials of the accused would take place before the same Assize Court and not before two different Assize Courts.

3. Whether the decision of the Assize Court is contrary to the Constitution and the law because it wrongly adopted the view that the retaining by the accused of common advocates did not permit the separation of their trials.

4. Whether the decision of the Assize Court is contrary to Law because for the reasons given wrongly results to the conclusion that the two separate trials will be against the right and just administration of justice and the public interest.

5. Whether the decision of the Assize Court is contrary to law because wrongly relied on the view that the power of the Prosecution to apply for separate trials of the accused is confined to the existing practice on the basis of which at the joint trial of accused one of them pleads guilty to the charge and later gives evidence against his co-accused.

6. Whether the decision of the Assize Court is contrary to Law because, as it appears, wrongly takes the view that with the formation of the charge sheet the prosecution has already made its choice for a joint trial of all the accused.

7. Whether the decision of the Assize Court is contrary to Law because it wrongly decides that the way the charges were framed in the charge sheet, is a serious reason for the claim of the prosecution for separate trials of the accused, to be rejected, and

8. Whether the decision of the Assize Court is contrary to Law because it wrongly decides that the scales tipped against the claim of the prosecution for separate trials of the accused.

In Application No. 115/88 we are only concerned with an Order in the nature of Certiorari to remove the judgment of the Assize Court of Nicosia dated 13.6.88, before the Supreme Court for the purpose of its being quashed.

The legal grounds on which this Application is based, are the same as those enumerated hereinabove in Application No. 110/88.

The relevant facts that gave rise to the present Applications, shortly put, are the following:

The Assize Court, with which we are concerned, was specially constituted to try Criminal Case No. 23069/87, where the three accused, namely, 1. Panayiotis Agapiou Panayi, alias Kafkaris, 2. Charalambos Antoniou Michael, alias Aeroporos, and 3. Andreas Antoniou Michael, alias Aeroporos, were jointly charged under 9 counts as follows:

Count 1: Conspiracy to kill Panikkos Michael of Limassol, contrary to section 217 of the Criminal Code, Cap. 154.

Counts 2, 3 and 4: Premeditated murder contrary to sections 203(1)(2), 20 and 21 of the Criminal Code, Cap. 154, as amended by Law 3/62 and 86/83, of Panikkos Michael, Christakis Panikkou Michael and Michalakis Panikou Michael, all late of Limassol.

Counts 5, 6, 7, 8 and 9: For possessing on various dates explosive substances without a licence contrary to sections 4(4)(d), 5(a)(b) of the Explosive Substances Law, Cap. 54.

On counts 5 and 6 accused 3 is charged alone and on count 9 accused 2 and 3 are charged together and on counts 7 and 8 all the accused are charged together.

On the 9th June, 1988, the three accused were charged before the Assize Court and pleaded not guilty on all counts. Soon after their plea the prosecution applied to the Assize Court to order separate trials of accused 1 on counts 1, 2, 3, 4, 7 and 8 and accused 2 and 3 on all counts.

The interim decision of the court dismissing this application for separate trials was delivered on 13th June, 1988. This decision, as

already stated, is the subject matter of Application No. 115/88. Immediately after this decision the Attorney-General of the Republic applied to the Assize Court to reserve the eight questions of law referred to earlier in this judgment, for the opinion of the Supreme Court under section 148(1) of the Criminal Procedure Law, Cap. 155. This section reads as follows:

> «148 (1): 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.»

The Assize Court, by its judgment of 20.6.88, dismissed the application of the Attorney-General on the ground that none of the 8 questions fall within the ambit of section 148(1) as a ground of law.

As against this decision Application No. 110/88 was filed.

Service of both Applications was effected on counsel for the three accused who, on 29.6.88, filed his opposition.

In the affidavit in support of the opposition, besides the allegations that the Assize Court acted within its jurisdiction and exercised its discretionary powers properly, it is also stated that the Orders of Certiorari and Mandamus applied for, cannot be issued as they are directed against the decisions of an Assize Court, which is a superior court, whereas such orders can only be issued as regards decisions of inferior courts.

At this stage, for obvious reasons, I consider it proper to dispose of this issue because if it is decided in accordance with the view taken by counsel for the three accused, then this will mean the end of the present proceedings.

Counsel for the three accused in support of his submission that an Assize Court is a superior court, referred to the following cases decided by the Courts in England, where it is shown that an assize court is a superior court. These cases are: *R. v. Patents Appeal Tribunal Ex Parte Champions Paper and Fibre Co.*, [1957] 1 All E.R. 227,*R. v. Patents Appeal Tribunal Ex Parte Baldwin and Francis Ltd.*, [1959] 1 Q.B. 105,*Cheshire Justices Ex Parte Henver* [1912] 108 L.T. 374 and *R. v. Minister of Health Ex Parte Committee of Visitors of Glamorgan County Mental Hospital* [1938] 4 All E.R. 32.

Counsel for the accused also submitted that it is also clear from the above authorities that the decisive factor as to whether a court is a superior or inferior one is not the rank of the judge or judges constituting it but the extent of its jurisdiction and an assize court in Cyprus has unlimited jurisdiction to try any offences committed anywhere in the territory of the Republic. He further submitted that the question whether the assize court is a superior or inferior court, was never decided by our courts and referred to the case of *The Republic v. The Assize Court of Kyrenia Ex Parte The Attorney-General of the Republic* (1971) 2 C.L.R. 222 where the Full Bench of this Court assumed jurisdiction in two applications on behalf of the Attorney-General under Article 155.4 of the Constitution for Orders of Certiorari and Mandamus in relation to the ruling of the Assize Court in Kyrenia dated 7th July, 1971, refusing an application made by counsel for the prosecution asking the Assize Court to reserve for the Opinion of the Supreme Court three questions of Law under section 148(1) of the Criminal Procedure Law, Cap. 155. He also referred to the case of *Psaras* (1985) 1 C.L.R. 561, a case concerning an application for leave to apply for an Order of Prohibition and Certiorari where, at page 564, the following is stated by Stylianides, J.:

«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.»

Counsel for the accused pointed out that in the first case it was taken for granted that the Assize Court was an inferior court and in the case of *Psaras*, supra, it is obiter as this point was not in issue before the trial judge.

On the other hand, the Attorney-General submitted that the argument of counsel for the accused is a correct one, as far as the

English Courts are concerned, but it has no application in Cyprus because of Article 152.1 of our Constitution and section 3(1)(a) and (b) of the Courts of Justice Law, 1960 (Law 14/60).

Article 152.1 of the Constitution and section 3(1)(a) and (b) of Law 14/60, read as follows:

«152.1: The judicial power, other than that exercised under Part IX by the Supreme Constitutional Court and under paragraph 2 of this Article by the Courts provided by a communal law, shall be exercised by a High Court of Justice and such inferior courts as may, subject to the provisions of this Constitution, be provided by a law made thereunder».

«Section 3(1): There shall be established under this law the following courts to exercise such jurisdiction and powers as are conferred upon them by this law or any other law in force for the time being:-

(a)District Courts;

(b) Assize Courts.»

It is clear from the wording of Article 152.1 of the Constitution that an Assize Court, which is established under section 3(1) of Law 14/60 is an inferior court and I must say that I am in full agreement with the submission of the Attorney-General on this issue.

The next issue to consider is the judgment of the Assize Court of 13.6.88, the subject matter of Application No. 115/88.

The reason why the Attorney-General applied for separate trials is because the evidence of accused 1 is substantial for the case of the prosecution against accused 2 and 3, in order to be called as a witness for the prosecution against the other two accused, the trial of whom will follow.

In its judgment the Assize Court repeats the basic principles of the law, that the joint trial of co-accused persons is very desirable in cases where the sequence of events is based on common ground. The advantages of a joint trial are referred to in the recent case of *Oueiss v. The Republic* (1987) 2 C.L.R. 49. The same principles apply in England and indicatively the Assize Court referred to the case of *R.v. Barnes, R. v. Richards* [1940] 2 All E.R. 229, *R.v. Gray and Others* [1969] 3 All E.R. 941, where it is also stated that the power to order separate trials is in the discretion of

the court and should be exercised judicially in the general interest of the administration of justice.

The Assize Court then referred to sections 20 and 21 of the Criminal Code, Cap. 154, as to principal offenders and offences committed by joint offenders in prosecution of common purpose, and the objection of counsel for the accused to the application of the prosecution and enumerated the following five grounds on which the opposition is based:-

(a) injustice will result to the accused.

(b) the right of the accused to have an advocate of their choice,

(c) the application is against the public interest,

(d) there is parallel remedy for the prosecution more appropriate than the application which has been submitted to the court, and

(e) the separate trial of the accused is against the interests of justice.

Short reference was then made to the facts of the case and in particular to counts 2, 3 and 4, where the prosecution alleges that the death of the three persons was caused by the explosion of a bomb which was placed by one of the accused, whereas the rest of them aided and abetted its commission, which they planned together, and for this reason the three of them are also facing the conspiracy charge. The Assize Court, at page 6 of the record, concluded as follows:

> The most serious reason for which we consider that the claim of the prosecution must be rejected, is the very same nature of the charges as they were framed in the charge sheet. The three accused are charged that they conspired between themselves and with another or other persons unknown, in order to murder Panikkos Michael. After the charge of conspiracy there followed counts 2, 3 and 4, where the three accused are facing the charge of premeditated murder of Panikkos Michael, Christakis Michael and Michalakis Michael. In these charges reference is made, besides section 203(1)(2) of the Criminal Code, Cap. 154, to sections 20 and 21, which we have cited hereinabove. These two sections render possible the charge against the accomplices as if they were principals. It is, consequently, clear from the charge

sheet and it has been so left to be understood that one of the accused committed the act which caused the death to the three persons, that is to say, caused the explosion, whereas the others are accomplices since they took part in the offence in the way which is provided by sections 20 and 21 of the Criminal Code.

Therefore, separate trial for the first accused on the one hand and accussed 2 and 3 on the other, will be against the interests of justice as there is danger of contradictory judgments of the court in the two separate trials.

Furthermore, the prosecution will adduce in substance the same evidence for the proof of the conspiracy and the murder, besides the evidence which would be given by accused 1 against accused 2 and 3 twice in the separate trials.

It would be against the public interest at the trial of accused 1 where reference will be made to accused 2 and 3 while these accused will wait for their trial in other proceedings with the same evidence which was adduced against these accused.

We make reference to the above in order to show that although the court has jurisdiction to order separate trials the procedure which would follow if the claim of the prosecution was accepted, would be against the right and just administration of justice.»

And further down at page 8 to 9 of the judgment, is also stated the following:

«Another serious reason for which we could not exercise our discretion in favour of the application of the prosecution, is that which was put forward by the defence that if two separate trials are ordered, the accused must give instructions to other advocates to defend them. We consider it self evident that since the prosecution desires to call as a witness in the second trial the first acussed, against accused 2 and 3, this means that there will be an effort to incriminate them with his evidence. But the three accused have already engaged common advocates and they have common defence to the charges. Consequently, it would not be possible for their advocates, who have already accepted the relevant instructions for the common defence of the accused, to be able to appear for them, since in the second trial they must

cross-examine the first accused whereas in the first trial they would defend him. Serious is also the ground that the accused have already given instructions to their advocates which instructions cannot use in favour and against the accused in the two separate trials. So, the proposed separate trial of the charges precludes counsel from both trials. This is an element which does not concern only the interests of the defence but also the wider interest of the administration of justice.

We do not underestimate at all the reason why the Attorney-General submitted his claim for separate trials and, in particular, his honest position that the substantial element of proof of the prosecution against accused 2 and 3 is the evidence of accused 1 but as the position is today, he appears to be a hostile witness. We agree that the interest of justice is not confined to the side only of the defence but also to that of the prosecution in order to present all the evidence which is available so that justice should be done by the court.

The claim of the prosecution must be considered against all the other criteria which we have already analysed. The scales are tipped definitely against its claim, which we dismiss.

With reference to the power of the Attorney-General which is derived from Article 113.2 of the Constitution to discontinue any criminal proceedings before the issue of judgment, this is not subject to judicial control. He has a right to act in any way he considers proper.»

The Attorney-General submitted that his claim for separate trials was based on sections 41 and 110 of the Criminal Procedure Law, Cap. 155, which read as follows:

«41. The following persons may be joined in one charge and may be tried together, unless, the Court directs that they shall be tried separately, that is to say -

(a) persons accused of the same offence;

(b) persons accused of different offences committed in the course of the same transaction;

(c) persons accused of an offence and persons who, under the provisions of any enactment, are deemed to have taken part in the commission of such offence;

(d) persons accused of an offence and persons accused of attempting to commit such offence;

(e) persons accused of any offence relating to stealing, criminal breach of trust, fraudulent appropriation of property fraudulent falsification of accounts or fraudulent conversion and persons accused of receiving or taking upon themselves the control or disposition of the subject matter of such offence.»

«110. Sections 40, 41 and 42 of this Law (relating respectively to the joinder of counts, joinder of persons and the manner in which parties to offences may be charged) shall apply mutatis mutandis to informations as they apply to charges.»

It was further submitted by the Attorney-General that in the decision of 13.6.88 the Assize Court made a number of legal mistakes in not ordering separate trials. Their first mistake is that they decided that separate trials cannot be ordered where the application is made on behalf of the prosecution but only on the part of the defence and referred to a passage from the judgment at page 3 of the record, which is as follows:

«The novelty of the application of the Hon. Attorney-General consists of the fact that his claim for separate trials is filed by himself whereas on the basis of the existing practice. this is submitted by the defence. The reason is simple. The charge sheet is formed by the prosecution that elects as to whether it will contain many counts and more than one accused. It is a fact that in some law books reference is made that the court may order separate trials of accused persons so that the prosecution be facilitated to adduce in the second trial evidence which comes from an accused at the first trial. No decision has been cited to the court and we could trace none ourselves either in Cyprus or in England where it is stated that the prosecution can submit an application for separate trial at different time in order to be able to call as a witness at the second trial an accused in the first trial. Our impression is that the reference in the law books of this possibility, is connected with the known practice on the basis of which during the joint trial of accused, one of them desires to plead guilty to the charge and afterwards gives evidence against his co-accused. It is then when the court decides and imposes sentence on this

accused and concludes the trial of the case in order that the prosecution will be able to call him as a witness at the trial of the rest of the accused. So, the trial of this accused is separated from that of the rest but in the same proceedings.»

The Attorney-General referred to the Crown Court Practice 1978 edition, by Peter Fallon at page 43 in support of his view that the right of the Attorney-General to apply for separate trial is not confined only in the case where during the joint trial of accused persons one of them pleads guilty to the charge and later he gives evidence against his co-accused. At page 43 of the said book it is stated that «on the application of the prosecution separate trials may be granted where it is needed in order to allow the Crown to call an accomplice as a witness».

He also submitted that when one of the accused pleads guilty there can be no question for the court to order separate trials but separate trials are ordered as regards accused who plead not guilty. The Attorney-General also submitted that what is stated by the Assize Court at page 6 of the interim decision of 13.6.88, and to which reference has been made earlier in this judgment, is a clear misapprehension of the law as in its view whenever there are accomplices there can be no separate trial. He then made reference to various passages from the case of *D.P.P. v. Merriman* [1972] 3 All E.R. 42. Another misapprehension of the law is the view taken by the Assize Court that to order separate trials would be the danger of the issue of two contradictory judgments. They mistakenly took the view that the two separate trials would take place before the same Assize Court. Had they directed their minds to the fact that the separate trials would take place before two different assizes, this situation would have not arisen as it is not unusual on the same facts two different courts to give two different judgments. In the decision of 20.6.88 the Assize Court makes reference to this point and gives an explanation as to what was meant, something which was not permissible to do. If really this is not what they had in mind there can be no harm to the interest of justice and so their legal error is still greater.

The Attorney-General referred to pages 8 and 9 of the judgment of 13.6.88 and pointed out that the reason, given at page 9 of the judgment that the three accused have common advocates and so no separate trials can be ordered, is entirely wrong, as this means that whenever co-accused persons retain the same advocates,

then no separate trials may be ordered. The result will be to place the interest of the advocates over and above the interest of justice. It was also submitted by the Attorney-General that if the Assize Court did not make the mistake to consider that the prosecution made its choice to join the three accused in one indictment, if it did not make the mistake to say that the practice of separate trials is confined only in the case where the one accused pleads guilty, if it did not make the mistake to consider that the nature of the charges precludes separate trials, if it did not make the mistake to think, as it appears, that the same Assize Court would try both trials and if it did not make the mistake to consider that having common advocates is a reason not to order separate trials, surely the scale could not tip against the prosecution.

The Attorney-General then concluded his submission on the last paragraph of the decision of 13.6.88 where the Assize Court referred to his powers by virtue of Article 113.2 of the Constitution to discontinue proceedings in the public interest, a power which is not under judicial control, after making a finding earlier on in its judgment that to order separate trials is against the public interest. This, he submitted, is an interference by the court with the power of the Attorney-General and amounts to judicial control of his right.

As the two Applications are related, I propose next to deal with Application No. 110/88 before I pronounce on Application No. 115/88.

The Assize Court in its decision of 20.6.88 after making a short reference to the facts and after stating the eight questions, with which we are concerned, and after referring to the provisions of Section 148(1) of the Criminal Procedure Law, Cap. 155, stated at page 5 of this decision, the following:

«It is clear that in the case where the application to reserve a question of law is made by the Attorney-General, the court has no discretionary power on the subject. It has a duty to reserve the question of law for the opinion of the Supreme Court. As it has been accepted by the Hon. Attorney-General, in all cases the question of law in order to be reserved, should be a legal one and arises during the trial according to the provisions of section 148(1). See in this respect *The Republic v. Phivos Petrou Pierides* (1971) 2 C.L.R. 181, and *The*

Republic v The Assize Court of Kyrenia ex Parte the Attorney-General of the Republic (1971) 2 C L R 222

It is the submission of counsel for the accused that none of the eight questions is a question of law and that the Hon. Attorney-General in substance is pursuing an appeal against the interim decision of the Assize Court alleging that the court did exercise properly its discretionary power and cited the case of *Shaw v. Reckitt* [1893] 2 Q.B. 59. The only subject on which we are called to decide is as to whether the questions quoted earlier are legal or not within the provisions of section 148(1)»

Then at page 9 to 10 of its decision the Assize Court states

«We have carefully considered the application of the Hon Attorney-General and we must approach the subject without any reference to anything which could be considered as reexamination or explanation of the subjects which were the object of our interim decision of 13 6 88 We have also a duty to make reference to the contents of that interim decision to the degree that it is necessary to decide if the questions arose during the trial»

The Assize Court then proceeded and examined the questions in the light of the judicial interpretation given to section 148(1) in the case of *The Republic v The Assize Court of Kyrenia ex Parte the Attorney-General*, supra, and at page 10 of the interim decision, said the following,

«The first question takes it for granted that our interim decision had, as a result, the indirect judicial interference with the powers of the Attorney-General The Hon Attorney-General explained that whereas the last paragraph of our interim decision, which we have already quoted, makes clear the intention of the court not to interfere with his powers, definitely in any case without such intention as a whole, this decision results to constitute interference We think that we can, for the purposes of the present procedure, note that it cannot be considered that such a subject is the result of our interim decision Whatever has been referred to our interim decision was connected with the factors which should have been taken into account in the execution of our discretionary powers that guidelines the judical criteria

The second question takes it for granted that the court relied on the assumption that two separate trials of the accused would be before the same Assize Court and not before two different Assize Courts. We think that we have a duty to note that something like this does not result from our interim decision.

The third question takes it for granted that the court adopted the view that the retaining of common advocates by the accused, does not permit the separate trials of the accused. If with this question it is meant that the court wrongly took into consideration the arrangements for common advocates, which was made by the accused, there is no subject of misinterpretation. But if it is meant that the court adopted the view that it is not allowed as a matter of principle, the separation of trials for the reason of these arrangements, then there is a matter of misinterpretation.

The fifth question takes it for granted that the court took the view that the possibility for the prosecution to apply for the separate trials of the accused is confined to the existing practice on the basis of which during the joint trial of accused persons one of them pleads guilty to the charge and then gives evidence against his co-accused.

We do not think that our interim decision results that the mention of the above practice was done with such a meaning. The above apply also as regards the sixth question which presents the Assize Court having in mind that with the formation of the charge sheet the prosecution has already selected for a joint trial for all the accused. Having in mind all the above there can be no doubt that the questions to the degree that they are raised from our interim decision, refer to factors which the court took into consideration during the execution of its discretionary power.»

The Hon. Attorney-General both before the Assize Court and before this court, accepted that the questions would not be questions of law if the matter was simply that the court exercised wrongly its discretion but he submitted that the nature of the questions become legal from the time their object is as to whether the way of execution of the discretionary power of the court was contrary to law and the Constitution or whether the discretionary

power of the court was exercised with the wrong understanding of the law.

I have carefully considered the able and extensive arguments of counsel appearing on both sides and I came to the conclusion that as regards Application No. 115/88, the Assize Court rightly exercised its discretionary power and did not order separate trials of the accused. The number of factors militating against this view was given in their decision, the strongest one being the very nature of the charges, as they are framed in the charge sheet. To support this view the Assize Court referred to the case of *R. v. Shannon* [1974] 2 All E.R. 1009 at page 1034, where Lord Morris said the following: «As I have earlier indicated I think it is very desirable where there is a charge of conspirancy against A and B that they should be tried together.»

In Application No. 115/88 we are concerned with the issue of an order in the nature of certiorari only. In the case of *R. v. President of the District Court of Famagusta ex Parte Loukia K. Maroulletti* (1971) 1 C.L.R. 226 at pages 243, 244, it is stated that «certiorari lies 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. The control is exercised by removing an order or decision and then quash it. Certiorari will not issue as the cloak of an appeal in disguise, and it does not lie to bring up an order or decision for rehearing of the issue raised in the proceedings.»

In the case under consideration it cannot be said that there is a legal error on the face of the proceedings and so Application No. 115/88, cannot succeed.

Coming now to the Application No. 110/88, which is an application for certiorari and mandamus, it is useful to refer to the case of *Ex Parte Attorney-General*, supra, at page 227 where we read:

> «Thus, before considering whether or not it is otherwise proper or possible to issue an Order of Certiorari or an Order of Mandamus we have to be satisfied that the aforequoted questions, which prosecuting counsel applied to have reserved for our opinion, are questions of law within the ambit of section 148(1); because if that is not so then the Assize Court was not bound to reserve such questions for our

opinion and the present applications for Certiorari and Mandamus cannot succeed.»

Having examined the eight questions in the light of the above citation, I have come to the conclusion that no one of them falls within the ambit of section 148(1) of the Criminal Procedure Law, Cap. 155. All of the said questions, except the first one, cannot even be considered as questions of law.

The first one may be considered as a question of law but it does not fall within the ambit of section 148(1) as it did not arise during the trial at a stage at which it has to be decided in order to enable the trial to proceed.

In the case of *Charalambous and Another* (1974) 2 C.L.R. 37 at page 42, we read:

«'A question of law arising during the 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; and within the ambit of such expression it is not included a question of law which was prematurely raised at a stage of the trial at which it does not have to be decided for the purposes of the trial at that particular stage; because, in our opinion, section 148 does not provide a procedural machinery by means of which a party to a criminal case can seek a ruling on a point of law; from the Supreme Court, in anticipation of the stage of the trial at which the state of the law in relation to such point may or will become actually material and of immediate importance for the further progress of the case; what is envisaged under the said subsection (1) is a situation where a question of law is, so to speak, obtruding itself upon the trial Court and demanding an answer straight-away».

Before concluding my judgment I must remark that these Applications present only an academic interest from the time accused 1 pleaded not guilty to the information. At his trial he will certainly attack his voluntary statement as being involuntary and his evidence, if he consents to be called as a witness against the other two accused, will be either hostile or if it is against them will be of no value.

For the reasons stated above, both Applications are dismissed.

The Order of the 22nd June, 1988, staying the proceedings before the Assize Court of Nicosia, is hereby cancelled.

Applications dismissed.