1988 October 27

(MALACHTOS, PIKIS, PAPADOPOULOS, JJ.)

SALEM ALI AL-HAMAD AND ANOTHER,

Appellants,

v.

THE POLICE,

Respondent.

(Criminal Appeals Nos. 4974-4975).

Appeal — Criminal appeal — Composition of the Court hearing such an appeal — The three Judge bench constituted under section 11(3) of the Administration of Justice Law, 1964 (Law 33/64) — Numerical strengthening of — Ultimately a matter of discretion — Principles governing its exercise.

Counsel for the appellants applied that the Constitution of the Court, which would try the appeal, be numerically strengthened or that the appeal be heard by the Full Bench of this Court.

In making his aforesaid application, he relied on the fact that one of the issues raised on appeal is the competence of the Assize Court to review the legality and validity of warrants of arrest and search in the context of the determination of the admissibility of evidence recovered or that emerged as a result of the execution of the warrant.

Held, *dismissing the application:* (1) A three Judge bench constituted under section 11(3) of the Administration of Justice Law, 1964 (Law 33/64) is the natural forum for hearing of criminal appeals. However, *Hadjisavvas v. The Republic* (1986) 2 C.L.R. 154 recognised that such a bench has competence to direct the enlargement of the constitution of the appellate bench charged to try the case.

(2)Whether an enlarged bench will be directed is ultimately a matter of discretion for the Court. Without laying down a hard and fast rule, a strengthened bench may be ordered if the legal issue is highly complex and the pooling of judicial resources is likely to contribute to its elicitation, or if the issues are of extraordinary importance either because of their repercussions upon the litigants or

because of wider repercussions on the administration of justice To this list one may contemplate the constitution of a strengthened bench when legal propositions at issue are the subject of directly conflicting decisions of the Supreme Court

(3) The competence of the Assize Court to inquire into the validity of warrants of arrest and search is, no doubt, a very important question requiring careful consideration. On the other hand, the issue is not one of great complexity Furthermore, some aspects of it are illuminated by the decision in *Ellinas v Republic (Not reported yet)*

(4) In the end this Court has not been persuaded that it is necessary to direct the enlargement of the constitution of the Court

Cases referred to *Application dismissed*

Hadjisavvas v Republic (1986) 2 C L R 154,

Ellinas v Republic (Not reported yet),

R v Taylor [1950] 2 All E R 170,

R v Nesome [1970] 3 All E R 455

Poole v Regina, 1960 East Africa Reports 62,

Wandsworth London B C v Winder [1984] 3 All E R 83

R v Spencer [1985] 1 All E R 673

R v Howe [1968] 1 All E R 833,

Demetriades v The Republic (1977) 3 C L R 213,

R v Gould [1968] 1 All E R 849,

Orphanides v Michaelides (1968) 1 C L R 295,

Politis v The Republic (1987) 2 C L R 116

Application.

Application by Counsel for the appellants for an order that the appeal be taken by the Full Bench of the Court

Chr Pourgourides, for the appellants

R Gavrielides, Senior Counsel of the Republic, for the respondents.

MALACHTOS, J The decision of the Court will be delivered by Pikis, J

PIKIS, J The appellants were convicted by the Assize Court of

Limassol for conspiracy to kill, attempted murder and carrying an automatic rifle. They were sentenced to concurrent terms of 9 and 7 years' imprisonment. They appealed against conviction and sentence.

Before opening his appeal, counsel for the appellants invited the Court to direct the numerical strengthening of the appellate bench charged to try the case, or direct that it be tried by the Full Bench. In the submission of counsel the enlargement of the constitution of the Court is warranted by the importance of one of the issues raised on appeal, namely, the competence of the Assize Court to review the legality and validity of warrants of arrest and search in the context of the dermination of the admissibility of evidence recovered or that emerged as a result of the execution of the warrant.

The opening statement of counsel for the appellants accurately depicts the reasons justifying, in his opinion, the numerical enlargement of the bench:

> «*Mr. Pourgourides:* I would like to be put on record that my trust to the Bench of this Court is full and without any reservation whatsoever. But I believe that the matter raised in this appeal as far as the question whether the validity of a search warrant or a warrant of arrest can be challenged exclusively by reference to the evidential material placed before the Court is a very serious point and one which occurs in almost every single criminal case. This is the only reason for I believe that on this issue the inferior courts need guidelines and I believe that guidelines of this nature are preferable if they are given by the Full Bench of this Court. ....»

The decision of the Supreme Court in *Hadjisavvas** decides, that an appellate bench of the Supreme Court set up under s.11(3) of the Administration of Justice (Miscellaneous Provisions) Law 1964 (Law 33/64) has competence to direct the enlargement of the constitution of the appellate bench charged to try the case, if of opinion that this is necessry in the interest of justice in view of the importance of one or more of the issues raised on appeal. Aside from acknowledging jurisdiction to the Court of Appeal to direct the enlargement of its constitution, no attempt was made to define

* *(Hadjisavvas v. Republic (1986) 2 C.L.R. 154 (majority judgment)).*

the circumstances in which the interests of justice are best served by the trial of an appeal by a numerically enlarged appellate bench The application for the numerical strengthening of the bench in the case of *Hadjisavvas* was, it must be noted, abandoned after the ruling of the Court recognising jurisdiction Therefore, the Court had no opportunity to examine whether the issues raised in that appeal justified its hearing by an appellate division comprising more Judges than three

Counsel for the Republic did not for his part contest the application leaving, in his words, the matter « ..to the discretion of the Court whether, in the circumstances of the present case, the expansion of the bench allowed by the majority judgment in *Hadjisavvas* case, is in the interests of justice in the present case » Like his counterpart, counsel for the Republic did not trace any decision of the Supreme Court directly addressing the question whether the Assize Court has competence to review the legality or validity of the judicial warrant of arrest or search The only decisions on the subject emanate from Assize Courts adopting the view that no jurisdiction lies with the Assize Court to examine the validity of judicial orders pertaining to the issue of warrants of arrest or search In the case here under appeal the Assize Court was, it appears of the same opinion. Our research, too, confirms that the issue here under consideration, has not been the subject of a direct judicial pronouncement in any previous decision of the Supreme Court However, a recent decision of the Full Bench of the Supreme Court has a bearing and throws light on aspects of the question under review Counsel could not have been aware of it as the decision has not been reported. It is the case of *Ellinas v Republic* * One of the issues raised in that appeal was whether the Assize Court had jurisdiction to review the validity of an order committing the accused for trial before the Assize Court The learned President ruled, in certiorari proceedings for the quashing of the order of the Assize Court declining jurisdiction, that the Assize Court had no jurisdiction On appeal the following was said·**

« A judicial order can only be reviewed in either of two ways -

(a) By way of appeal when a right of appeal is bestowed by it, or

* *(Not reported yet)*

** *(Judgment of Pikis, J , with which Malachtos and Kourris, JJ concurred)*

(b) by way of certiorari.

Both jurisdictions vest exclusively in the Supreme Court; appellate jurisdiction and jurisdiction to issue prerogative orders vests exclusively in the Supreme Court in virtue of para. 1 and para. 4 of article 155 of the Constitution, respectively.»

Mr. Pourgourides appropriately drew our attention to a number of English cases* illuminating the practice of the English Court of Appeal pertaining to the ad hoc enlargement of the constitution of an appellate bench. They indicate that this course may be adopted whenever one or more of the issues raised on appeal are of exceptional importance or complexity or for the purpose of clearing ground riddled with conflicting precedent.

We also considered it appropriate to direct our attention to developments affecting the practice of the English Court of Appeal in this field, following the enactment of the *Supreme Court Act 1981*,** and the *Court of Appeal (Civil Division) Order 1982*.*** These enactments make provision for the constitution of appellate divisions of the Court of Appeal comprising two instead of three Judges, which is the norm, for the hearing of certain categories of appeals (mainly appeals from interlocutory orders). The Court of Appeal has residual discretion to direct the enlargement of the constitution of the Court to include three members, on the application of the parties, or on the initiative of the Court - *Practice Note of the Court of Appeal.***** As explained in the *Practice Note,* one of the reasons for which the constitution of the Court may be numerically strengthened, is the likehood of the two Judges disagreeing. Evidently, no possibility of a stalemate exists in the case of a bench of three Judges. It must be appreciated that a two-Judge division of the Court of Appeal in England, is an exception to the general rule; whereas in Cyprus a bench set up under s.11(3) of Law 33/64 is the natural forum for the hearing and determination of appeals.

In the *Practice Note* it is explained that a strengthened division

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* *(R v Taylor [1950] 2 All E R 170, R v Nesome [1970] 3 All E R 455, Poole v Regina, 1960 East Africa Reports, p 62)*

** *(s 54(4))*

*** *(S I 1982/543)*

**** *[1982] 3 All E R 376*

of three Judges may be directed (where the law permits a constitution of the Court of Appeal by two Judges) if the appeal raises issues « of such complexity or general importance that a three-Judge Court is desirable » Addressing himself to the circumstances under which a three-Judge Court may be directed, *Ackner, L J*, in *Wandsworth London B C v Winder,** stressed the general importance of the case as a consequential factor, as well as the complexities of the issues raised for determination

The importance of a case, its complexity and factors relevant to the desirability of directing an enlarged constitution of the Court are, as it emerges from the above, very much matters for evaluation by the Court. Whether an enlarged bench will be directed is ultimately a matter of discretion for the Court

Although there is no decision of the Court bearing directly on the relevant issue raised on appeal, the decision in *Ellinas*, supra, is indicative of the framework of the powers of the Assize Court to review orders made by Judges of the District Court. Certainly, we shall not pause at this stage to consider the impact or implications of the above decision on the sub judice issues in this appeal Nor do we overlook a long line of English precedent acknowledging greater freedom to the Court of Appeal to depart from previous decisions whenever they are considered wrong and the departure is one favouring the accused The decision in *R v Gould*** highlights the extent of this freedom -

> «In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of stare decisis with the same rigidity as in its civil jurisdiction If on due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this Court, or its predecessor the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v Bristol Airplane Co Ltd.* .»***

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* *[1984] 3 All E R 83 106*

** *[1968] 1 All E R 849 851*

*** *(See also, R v Spencer [1985] 1 All E R 673, R v Howe [1986] 1 All E R 833 The implications of the doctrine of binding precedent in Cyprus were reviewed in Demetriades v Republic (1977) 3 C L R 213)*

We are disinclined to lay down any hard and fast rules or, indeed, attempt to define comprehensively the circumstances under which an appellate bench may be numerically enlarged. The practice of the Supreme Court, in capital cases,* was that they should as a rule, be heard by the Full Bench or an enlarged appellate bench, no doubt because of the irreversible consequences that the outcome of the appeal might have on the life of the appellant. A strengthened bench may be ordered if the legal issue is highly complex and the pooling of judicial resources is likely to contribute to its elicitation.** To this list one may contemplate the constitution of a strengthened bench when legal propositions at issue are the object of directly conflicting decisions of the Supreme Court.

In exercising our discretion whether to order the enlargement of the constitution of the Court, it must be appreciated that every issue affecting the rights of the subject is important, as, indeed, is every issue concerning the administration of justice. The enlargement of the constitution of the Court may be ordered only when the issues raised are of extraordinary importance, either because of their repercussions upon the litigants or wider repercussions on the administration of justice. Again the importance of the issue in the above sense may not be decisive if the issue is of a legal nature and has been the subject of authoritative judicial pronouncements. We reiterate that the three-Judge bench constituted under Law 33/64, is the natural forum for adjudication on appeal. Any departure from this norm must be strictly justified, so much so, that in the end, it must appear to the Court that a numerically strengthened bench is necessary in the interests of justice.

The competence of the Assize Court to inquire into the validity of warrants of arrest and search is, no doubt, a very important question requiring careful consideration. On the other hand, the issue is not one of great complexity. Furthermore, some aspects of it are illuminated by the decision in *Ellinas* though, we repeat, we have purposely refrained at this stage from assessing its impact on the issues raised in this appeal. In the end we are not persuaded

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* *(The death sentence for premeditated murder was abolished by Law 86/83 also, see, Politis v Republic, (1987) 2 C L R. 116.*

** *(See, Orphanides v Michaelides (1968) 1 C L R 295)*

that it is necessary to direct the enlargement of the constitution of the Court

The appeal is, therefore, fixed before us for hearing on 6th and 7th December, 1988

Application refused