1989 June 9

[MALACHTOS, J.]

IN THE MATTER OF AN APPLICATION BY 1. KYRIACOS KAMMOUYIAROS AND 2. OMIROS VASILIOU FOR AN ORDER OF CERTIORARI/MANDAMUS/PROHIBITION,

AND

IN THE MATTER OF THE JUDGMENT OF THE DISTRICT COURT OF NICOSIA DATED 14.5.88 IN CRIMINAL CASE NO. 15620/87.

(Application No. 91/88).

Criminal Procedure — Reserving a question of law for the opinion of the Supreme Court — The Criminal Procedure Law, Cap. 155, section 148(1) — Meaning of «question of law» in that section — Review of authorities.

Prerogative orders — 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 — It does not lie as a cloak of an appeal.

Prerogative Order — Certiorari — Failure to attach to the application copy of the decision complained of — Obiter dictum that such a failure is fatal to the application for certiorari.

The legal principles emanating from this case sufficiently appear in the headnotes hereinabove. This was a case of an application for certiorari to quash a ruling of a court exercising criminal summary Jurisdiction, whereby an application by the accused to reserve certain «points of law» for the opinion of the Supreme Court was dismissed. The Court dismissed the application for certorari on the ground that the questions sought to be reserved were not questions of law.

Application dismissed.

Cases referred to:

The Republic v. Kalli (No. 1), 1961 C.L.R. 266;

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

Stephenson, Blake & Co. v. Grant Legros & Co., 86 L.J. Ch. 439;

Williams v. O' Keefe [1910] A.C. 186;

Glasgow Navigation Co v. Iron Ore Co. [1910] A. C. 293;

Australian Commonwealth Shipping Board v. Federated Seamen's Union of Australia, 36 C.L.R. 450.

The Republic v. President District Court Famagusta ex Parte Loukia K. Marouletti (1971) 1 C.L.R. 226.

Application.

Application for an order of Certiorari/mandamus/prohibition in respect of the judgment of the District Court of Nicosia dated 14.5.88 in Criminal Case No. 15620/87.

E. Efstathiou with M. Tsangarides, for the applicants.

Gl. HadjiPetrou, for the Attorney-General of the Republic.

Cur. adv. vult.

MALACHTOS J. read the following judgment. The present proceedings arose out of and in the course of the hearing of Criminal Case No. 15620/87 before a Judge of the District Court of Nicosia, where the two applicants were charged under 17 counts for stealing by agent sums of money on various dates, during the period between 1983 and 1985, which they collected on behalf of the Cyprus Tourism Organization (C.T.O.), contrary to sections 255 and 270 of the Criminal Code, Cap. 154.

It was the case for the Prosecution before the trial court that the two applicants, who at the material time were managing the Trokadero Cabaret in Nicosia, that although they were collecting on the various bills of their customers the amount of 3% for the C.T.O., they appropriated it.

The case was reported to the Police by Georghios Pericleous, an Inspector of the C.T.O., who also took part in the investigations together with P.C. 286 A. Neofytou, the Police investigator.

On 19.9.85 various premises of Accused 1, namely, Kyriakos Kammouyiaros, were searched on the strength of a judicial warrant and a number of documents were received, the contents of which could support a criminal charge against the two accused. In the meantime, a number of statements were received from various persons and one of those statements, that of George Kammouyiaros, referred to Accused No. 2, namely, Omiros Vassiliou, as the person who indicated to the employees of accused 1 who were the cashiers operating the till machines of the cabaret of accused 1, how to prepare two tapes of account, each one with different amount collected.

It should be noted here that according to the prosecution the above charges concerned the stealing of various sums of money

consisting of the 3% which the accused were collecting for the account of C.T.O. from the customers of the cabaret of accused 1.

On the basis of the collections shown by the till machines the relevant declarations were submitted to C.T.O. and the case for the prosecution is that the two accused declared the amount of the tape with the lesser amount collected. On 21.9.85 P.W.1, Inspector Pericleous, together with the Police investigator, met accused 2 who, according to the prosecution, had a conversation with them. When P.W.1 was about to give evidence at the trial as to what was exchanged between them, counsel for the defence objected and alleged that the witness could not state as to what was said or done by accused 2 at that meeting as the investigator did not observe the Judge's Rules. According to counsel for the accused at that time the investigator was in possession of evidence, which raised reasonable suspicion that the accused committed the offence with which he was charged and so the investigator had to caution him. In view of the objection raised by counsel for the accused a trial within trial took place where it was revealed that what accused 2 said and did was that he found the tapes of the till machines and delivered then to them.

The trial Judge, after making reference to the cases of *Fournides v. The Republic* (1986) 2 C.L.R. 73, *R.v. May,* 36 Cr. App. R. 91, *R. Prager,* 56 Cr. App. R. 51, and *Azinas v. The Police* (1981) 2 C.L.R. 9, on 3.5.88 decided that what was said by the accused does not amount to a confession and also the delivery of the tapes was free and voluntary. So, he overruled the objection.

After the issue of the ruling of the court, counsel for the two accused applied for an adjournment in order to be able to apply in writing to the court to state the case for the Opinion of the Supreme Court under section 149(1) of the Criminal Procedure Law, Cap. 155. This section reads as follows:

> «149(1): The Attorney-General and any party dissatisfied with the decision of a judge exercising summary criminal jurisdiction as being errouneous on a point of law or as being in excess of the jurisdiction or of powers of the judge, may, within the time set out in subsection 7 of this section, apply in writing to the judge who gave the decision to state a case setting forth the facts and grounds of such for the Opinion of the Supreme Court.»

The trial judge then adjourned the case to 14.5.88.

On 13.5.88 counsel for the two accused filed an application to the trial court under section 149(1) to state the case for the Opinion of the Supreme Court on the following grounds:

Α. Δεδομένου ότι ο μάρτυρας κατηγορίας αρ. 1 Γεώργιος Περικλέους κατά την 7.8.1985, υπέβαλεν παράπονον εις την Αστυνομίαν εκ μέρους του Κ.Ο.Τ. του οποίου τυγχάνει υπάλληλος διά γραπτής καταθέσεως εις την οποίαν ανέφερεν γεγονότα και εις την οποίαν διατύπωσεν την θέσιν ότι ο κατηγορουμενος αρ. 1 ήτο ο δράστης κλοπής ποσοστού 3% επί εισπράξεων πελατών του εις βάρος του Κ.Ο.Τ., και δεδομένου ότι αυτός στην συνέχεια προέβη εις πλήρη ανάκρισιν και διερεύνησιν της ίδιας υπόθεσης σε συνεργασίαν με τον μάρτυρα κατηγορίας αρ. 6 ανακρίνοντας άλλα πρόσωπα και περισυλλέγοντας όλα τα άλλα αποδεικτικά στοιχεία, κατάστασις η οποία συγκεντρώνει την ιδιότητα παραπονουμένου και ανακριτή εις το ίδιον πρόσωπον, ζητείται ευσεβάστως από το Ανώτατον Δικαστήριον να γνωμοδοτήσει εάν η περισυλλεγείσα μαρτυρία που λήφθηκε κατά τον αναφερόμενον τρόπον θα μπορούσεν να αποτελέσει το υπόβαθρον διά την νομικά έγκυρη θεμελίωσιν, σύνταξιν και καταχώρησιν του Κατηγορητηρίου εναντίον των κατηγορουμένων.

Β. Δεδομένων όλων των ανωτέρω γεγονότων, ζητείται ευσεβάστως από το Ανώτατον Δικαστήριον να γνωμοδοτήσει εάν οι κατηγορούμενοι έχουν πληγεί εις τα συνταγματικά των δικαιώματα ίσης και αμερόληπτης μεταχείρισης, ή εάν παραβιάσθησαν οι κανόνες της Φυσικής Δικαιοσύνης, της προστασίας των οποίων δικαιούνται οι κατηγορούμενοι, και περί του κατά πόσον το Κατηγορητήριον και/ή η επί τη βάσει αυτού επακολουθείσασα διαδικασία είναι έγκυρη και/ή μαρτυρία η οποία περισυνελέγη κατά τον αναφερόμενον τρόπον και κατόπιν των αναφερθεισών παραβιάσεων, μπορούσεν να παρουσιασθεί ενώπιον του Δικαστηρίου που εκδικάζει την υπόθεσιν και/ή εάν το αναφερόμενον Κατηγορητήριον πάσχει ή όχι από ακυρότητα.

Γ. Δεδομένων όλων των ανωτέρω γεγονότων που έχουν εκτεθεί εις την παράγραφον Α, ευσεβάστως ζητείται από το Ανώτατο Δικαστήριον, να γνωμοδοτήσει περί του πως μπορεί

να προστατευθεί ένα κατηγορούμενον πρόσωπον όταν η διεξαχθείσα ανακριτική διαδικασία εναντίον του η οποία οδήγησεν εις την σύνταξιν του κατηγορητηρίου έγινεν κατά παράβασιν των κανόνων της ίσης μεταχείρισης, της αμεροληψίας, και κατά παράβασιν των αρχών της Φυσικής Δικαιοσύνης, οι οποίες εφαρμόζονται εις όλους ανεξαιρέτως τους ανθρώπους.

Δ. Δεδομένου όλων των γεγονότων που εκτίθενται εις την παράγραφον Α, ζητείται ευσεβάστως από το Ανώτατον Δικαστήριον να γνωμοδοτήσει εάν είναι επιτρεπτόν να τυγχάνουν άνισης και/ή άδικης (UNFAIR) και/ή καταπιεστικής και/ή δυσμενούς μεταχείρησης, μερικοί πολίτες της Δημοκρατίας, όταν ευρίσκονται εις την δισμενή και ολέθριαν θέσιν υπόπτου διαπράξεως ποινικού αδικήματος και εν συνεχεία ως κατηγορούμενοι εις ποινικές υποθέσεις εν όψει των Συνταγματικών διατάξεων που ισχύουν επί του προκειμένου, της Νομολογίας και της Ευρωπαϊκής Συμβάσεως Ανθρωπίνων Δικαιωμάτων, η οποία κατέστη εσωτερικόν δίκαιον της Κυπριακής Δημοκρατίας.

Ε. Δεδομένου του περιεχομένου της αποφάσεως η οποία εξεδόθη στις 3.5.1988, εάν είναι νομικώς ορθές οι θέσεις που διατυπώνονται εις την αναφερομένην απόφασιν αναφορικώς προς το περιεχόμενον της ενστάσεως των κατηγορουμένων της οποίας η ουσία είναι διατυπωμένη εις τας παραγράφους Α, Β, Γ και Δ ανωτέρω και η οποία αφορά ένστασιν επί της εγκυρότητας του κατηγορητηρίου. Η ένστασις επί της εγκυρότητας ενός κατηγορητηρίου, είναι δυνατόν να εγερθεί εις οιονδήποτε στάδιον της διαδικασίας, ευθύς ως περιέλθουν εις γνώσιν των κατηγορουμένων τα στοιχεία επί των οποίων μπορεί να εδραιωθεί μία τοιαύτη ένστασις.

ΣΤ. Εάν η ένστασις επί της εγκυρότητας ενός κατηγορητηρίου είναι ένστασις αρμοδιότητας ή όχι και περί του εάν η αρμοδιότης ενός Δικαστηρίου ταυτίζεται με την κατά τόπο αρμοδιότητα.»

At the commencement of the hearing of the application on 14.5.88 the trial judge drew the attention of counsel for the two accused to the case of *Kaouras v. The Police* (1973) 2 C.L.R. 112, which is a case directly on the point as to whether a party dissatisfied with a decision of a judge exercising summary jurisdiction in a criminal case, which is not final, applies to him to

state the case for the Opinion of the Supreme Court as being errouneous on a point of law or in excess of jurisdiction.

Counsel for the two accused then stated that in view of the above case, had to withdraw his application under section 149(1) but, at the same time, applied orally to the court to reserve the questions of law that arose in his said application for the Opinion of the Supreme Court basing his said application on section 148(1) of the Criminal Procedure Law, Cap. 155, which 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».

Counsel for the two accused submitted to the trial court that the aforementioned questions of law will affect, if decided upon at the stage of the proceedings, the final result of the case as they touch important matters and, consequently, had to be reserved for the Opinion of the Supreme Court.

The trial judge in his interim decision as regards the interpretation and application of section 148(1) of the Criminal Procedure Law, made reference to a number of cases decided by the Supreme Court, particularly to the case of *The Republic v. Georghios Theori Kalli* (No.1) (1961) C.L.R. 266 and *In Re Charalambous and Another* (1974) 2 C.L.R. 37.

The following passage from the case of *Kallis*, supra, at page 286 to 287 was cited:

«Such proceedings during a trial should, in my opinion, be discouraged as tending to cause inconvenience, delay and embarrassment in the administration of criminal justice.

Interruptions in criminal trials are highly undesirable for a number of obvious reasons. I venture the view that so long as this, extraordinary provision, is still allowed to remain on the Statute Book, trial courts faced with an application by or on behalf of the Attorney-General under this section, should comply with the peremptory provision in the statute, without, wherever possible, interrupting the trial; especially if the application is made after the Court has ruled on the point, as it happened in this case.

A trial for murder or other serious crime, should not, in my opinion, be interrupted under this section, unless the Court

think that in the interests of justice and for the Court's own benefit, a question of law arising during the trial, should be reserved for the opinion of the High Court.»

The trial judge also cited the following passage from page 42 of the *Charalambous* case, supra:

«In our view '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 straightway.

In construing, as above, section 148(1) we have bome in mind, inter alia, the general principle that questions of law are not to be decided on a hypothetical basis (see, for instance, *Stephenson, Blake & Co. v. Grant Legros Co.*, 86 L.J. Ch. 439, *Williams v. O'Keefe* [1910] A.C. 186 and *Glasgow Navigation Co. v. Iron Ore Co.* [1910] A.C. 293, as well as the Australian case *Australian Commonwealth Shipping Board v. Federated Seamen's Union of Australia*, 36 C.L.R. 442, 450).»

The trial judge after examining the questions raised by counsel for the two accused in the light of the above citations came to the conclusion that no one of them falls within the ambit of section 148(1) of the Criminal Procedure Law, Cap. 155 and so dismissed the application and fixed the case for continuation of hearing on 18.5.88 to be continued on 20.5.88

On 18.5.88 the applicants obtained leave to apply for Orders of

Certiorari and/or Mandamus and/or Prohibition and the proceedings in Criminal Case No. 15620/87 were stayed.

Counsel for applicants in arguing his case before me put forward the same allegations as those put forward before the Court below and submitted that since the questions raised are novel legal points this court had to pronounce on them because if they are answered in his favour that would be the end of the case.

On the other hand, counsel for the Republic in supporting the decision of the lower court repeated that the questions raised are exclusively connected with matters of admissibility of evidence, credibility and weight of evidence and they are prematurely raised and, in any case, do not fall within the ambit of section 148(1) of the Criminal Procedure Law, Cap. 155.

In view of the fact that a copy of the decision of the lower court complained of, was not attached to the application at the time it was filed, counsel for the Republic submitted that this is fatal and so the application for this reason alone had to be dismissed.

Although I am inclined to agree with this last submission of counsel for the Republic, I shall not proceed to pronounce on it since during his reply counsel for applicants filed a copy of this decision without any objection on the part of counsel for the Republic.

After the filling of the present application I had the opportunity to deal with a similar case namely, Applications Nos. 110/88 and 115/88,* as regards the interpretation and application of section 148(1) of the Criminal Procedure Law, Cap. 155. In that case, among the line of authorities I referred to is the case of *The Republic v. President District Court Famagusta ex Parte Loukia K. Marouletti* (1971) 1 C.L.R. 226, where at pp. 243 to 244, the following is stated:

> «Certiorari lies to correct 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,

* *See In re Attorney - General (1988) 1 C.L.R. 459.*

and it does not lie to bring up an order or decision for rehearing of the issue raised in the proceeding (see also *Rex v. Northumberland Compensation Appeal Tribunal ex parte Shaw* [1952] 1 K.B. 338 (C.A.) at pages 347, 348 and 357).»

Having considered the arguments of counsel in the light of the above authorities, I must say that I fully agree with the approach of the Court below which, in exercising its discretion, dismissed the application as the questions raised were not questions of law within the ambit of section 148(1) of the Criminal Procedure Law, Cap. 155.

In the result, the application is dismissed and the Order issued for the stay of proceedings in Criminal Case No.15620/87 is hereby cancelled.

Application dismissed.