1976 July 2

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

CHRISTODOULOS P. ZISIMIDES,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3645).

Criminal Law—Stealing—Mental element—"Fraudulently" and "without a claim of right"—Section 255(1) *of the Criminal Code, Cap.* 154—*Whether exposition of law in R. v. Feely* [1973] 1 All E.R. 341, *excluded by* Platritis *v.* The Police (1967) 2 *C.L.R.* 174.

Evidence—Statements on other occasions—Previous statements by witness to same effect as his evidence given at trial—Admissibility—Rule applicable—Witness subjected to narcoanalytic treatment by administration of sodium pentothal known as the "truth drug"—Line of his cross-examination challenging his account as being a recent invention—Trial Court wrongly excluded statements made by witness to his doctor while under the said treatment.

Criminal Law—Stealing—Mental element—Conviction for stealing by a servant—Sections 255 *and* 268 *of the Criminal Code, Cap.* 154—*Bank cashier appropriating money deposited by clients of the Bank—Conviction mainly based on uncorroborated evidence of witness with a purpose of his own to serve—Though, from a strictly legal point of view, open to trial Court to treat said witness as a witness of truth, this was a very unsafe course in the particular circumstances of this case—Wrong exclusion of evidence relating to what appellant had said while under narcoanalysis—Finding that there existed the necessary mental element not safe and certain beyond reasonable doubt—Proviso to section* 145 (1) (*b*) *of Cap.* 155 *cannot be applied—Not a proper case for retrial—Conviction set aside—Substituted by conviction for forgery—Section* 145 (1) (*c*) *of Cap.* 155.

Criminal Law—Stealing—Bank cashier—Cash in his possession

deposited by him and his Manager in strong-room—Manager signing "specification of cash"—Money missing from strong-room—Trial Court believing Manager's evidence that he signed said specification without checking the cash—And disbelieving appellant's evidence to the contrary—Said "specification of cash" a solemn banking document which cannot be ignored in deciding the appeal—Wrong exclusion of evidence regarding what appellant had said while under narcoanalysis—"Lurking doubt" left in the mind of the Court of Appeal—Conviction an unsafe one—Quashed.

Criminal Law—Conviction—Verdict "unsafe" or "unsatisfactory"—Lurking doubt—Concept of—HjiSavvas *v.* The Republic (1976) 2 J.S.C. 302.

Evidence—Corroboration—Witness with purpose of his own to serve—Warning should be given of danger of acting upon his uncorroborated evidence.

Criminal Law—Sentence—Forgery—Bank employee—Seriousness of offence—Deterrent aspect—Individualization of sentence—Mitigating factors—Proper measure of sentence.

The appellant was at all material times employed by the Chartered Bank, at its Makarios III Avenue Branch, in Limassol as a cashier.

He was found guilty by an Assize Court on 16 counts of the offences of stealing on divers dates various amounts of money which were the property of the Chartered Bank in Limassol; and as he was employed by such bank as a cashier, he was found guilty, on the basis of the said counts, of the offence of stealing by a servant, contrary to sections 255 and 268 of the Criminal Code, Cap. 154.

As a result of his aforesaid convictions for stealing he was, also, found guilty on corresponding counts of having committed the offence of fraudulent false accounting, contrary to section 313 (c) of Cap. 154, in relation, respectively, to the various amounts which he was found guilty of having stolen. The false accounting consisted of his omission on each occasion to make the relevant entry in the cash-book of his employers to the effect that he had received the amount concerned.

According to the prosecution the offences involved in the stealing counts were committed when on three occasions the appellant received sums of money, in his capacity as the cashier of the said bank which were paid into the bank to the credit of Charalambides Dairies Ltd; when on three other occasions he received money in his above said capacity which were paid into the bank to the personal account of a certain Philippos Georghiades an employee of Charalambides Dairies Ltd.,; when he stole various amounts deposited with the bank, on divers dates in June, July and August, 1974 to the credit of the Cyprus Broadcasting Corporation, by persons who were paying their radio and television licences' fees; and when he stole an amount of C£1,579.955 which was found missing from the cash in the strong-room of the bank.

The sums deposited in the name of Charalambides Dairies were, on two occasions, deposited by their said employee Philippos Georghiades and on another occasion by another of their employees; the sums deposited in the name of Philippos Georghiades were deposited personally by him; and when the appellant received from these depositors the sums in question, he filled in deposit vouchers in his own hand-writing and handed over copies of such vouchers to the depositors. These deposit vouchers were stamped by the appellant with the stamp of the bank and were initialled by him. It was, later, revealed that the appellant omitted to make the relevant entries for all the six deposits in question in the cash book of the bank, on the dates when the deposits were, respectively, made, or on any other date prior to the date when his omissions to do so were discovered.

Regarding the amount missing from the strong-room the prosecution evidence, which came from the Manager of the above Branch of the Bank, Yiokaris, was to the effect that at about noon of August 13, 1974 the cash in the possession of the appellant was deposited in the strong-room by him and the appellant but without first being checked by Yiokaris who later signed the "specification of cash", prepared by the appellant. The cash was not checked by the Manager, as it ought, normally, to have been done, as the appellant was in a hurry to leave the bank because he was, at the time, also, serving in the National Guard. The strong-room could only be opened by the simultaneous use of the keys possessed by Yiokaris and

the appellant, which were separately possessed by each one of them. When appellant left on August 13, he delivered his own keys of the strong-room to a senior official of the Bank.

The strong-room was for the first time opened on August 19, 1974, in the absence of the appellant by gaining access to it through an emergency door. One of the keys of this door was kept by the appellant and was discovered in one of the drawers of his desk at the bank, which was unlocked by a duplicate key in the possession of Yiokaris.

The version of the appellant regarding the aforesaid deposits was that in fact no money was deposited with him, as a cashier of the bank, as shown by the deposit vouchers concerned, and that, therefore, all these vouchers did not relate to actual deposits of money with the bank, but that they were fictitious deposit vouchers issued by him for use by the said Philippos Georghiades in order to cover him for various amounts of money which he had advanced earlier to the appellant, in the appellant's personal capacity, for the purpose of lending them to others, for short periods, on a 5% commission basis, such commission being shared equally between the appellant and Georghiades. As a rule these loans were made by the appellant to, or through, a certain Pourgourides.

Regarding the stealing of the money belonging to the Cyprus Broadcasting Corporation appellant has not disputed that he received the amount involved but that he failed, because of pressure of work, to make the proper entries in the cash book of the bank. He alleged, however, that he was not aware of any bank regulation providing that he should have made the relevant entry on the same day when a payment was made; and that he kept the money in an envelope pending the accumulation of a sufficient number of payments to be entered in the cash book. After his mobilization he used to carry with him the accumulated money which remained in his possession after he had been for the last time to the bank on August 13, 1974; and he has contended that he never intended to steal it, but that he was intending, always, to return it to the bank.

Finally his version regarding the stealing of the money found to be missing from the strong-room, was that the cash in his possession was actually checked by Yiokaris, before the latter had signed the specification of cash and before such cash was

placed by him and Yiokaris in the strong-room; and that after he had delivered his own keys of the strong-room, he was at all times serving in the National Guard, had no opportunity of entering the strong-room and he had no keys in his possession to use for the purpose.

The trial Court disbelieved, in respect of all counts, the evidence of the appellant, and relying on evidence for the prosecution, which it found credible, proceeded to convict the appellant as already stated. In dealing with the evidence of Georghiades, one of the main witnesses, the trial Court pointed in their judgment that he was a person who could be described as someone who had a purpose of his own to serve, but they ended up by saying that after "repeatedly cautioning" themselves they had decided to act upon his evidence without corroboration; and in this connection they referred to *R.* v. *Prater*, 44 Cr. App. R 83 And in dealing with the mental element required for the commission of the offence of stealing, as found in s. 255 (1) of Cap. 154, the trial Court relied on the case of *Platritis* v. *Police* (1967) 2 C.L.R 174

Whilst the appellant was serving on a full time basis in the National Guard, having been away from his work since August 13, 1974, he fell ill on August 20, 1974 and was eventually found suffering from hysterical amnesia For the treatment of this illness the appellant was on two occasions subjected to narcoanalytic treatment by Dr Messis, during which there was administered intravenously to the appellant an anaesthetic known as sodium pentothal, which in common parlance is known as the "truth drug" As a result of this treatment the appellant was completely cured of the hysterical amnesia and on December 2, 1974 he g ve a statement to the police putting his version of the facts concerned which he later adopted at his trial

During the trial counsel for the appellant called Dr. Messis as a witness for the defence and he sought to put in evidence what the appellant had told him during the two sessions of narcoanalytic treatment; it could be surmised that counsel for the appellant did have instructions that what the appellant told Dr. Messis was consistent with his statement to the Police and his evidence on oath at the trial.

The trial Court excluded the evidence, in this respect, of Dr. Messis as inadmissible on various grounds, one of them being

that such evidence was not admissible as not coming within the exception to the hearsay rule* regarding previous statements admitted to rebut the suggestion that the testimony of a witness was an afterthought or a recent fabrication because the line of cross-examination of the appellant by counsel for the prosecution was to attack his whole testimony and was not challenging his account as being a recent invention.

During the trial Dr. Messis could not exclude, with absolute certainty, the possibility that the appellant could have lied to him while talking to him, or answering his questions, during the two sessions of narcoanalytic treatment; but he stated positively on oath that since the mechanism of recovery involved in the narcoanalytic treatment is to get at the real traumatic event which has caused the hysterical amnesia, if the patient — in this case the appellant — recovers, this means that the doctor has got at that event and so what has come out is, indeed, a true fact; and Dr. Messis went on to say that the traumatic event in this case, as it came out during the narcoanalytic treatment, was the death of the friend of the appellant, Pourgourides, who, apparently, was the only person who knew where the money that the appellant had lent to him had gone. Dr. Messis stated, further, that it had come out, during the treatment, that this amount was about C£10,000 and that the appellant believed that he could no longer get it back.

On appeal against conviction:

Held, (*I*) *with regard to the conviction concerning the deposits* (*counts* 1–12):

(*After dealing with the construction of the terms "fraudulently" and "without a claim of right" in s.* 255(1) *of Cap.* 154 *and holding that the trial Court was not prevented by* Platritis *v.* Police (1967) 2 *C.L.R.* 174 *from following* R. *v.* Feely [1973] 1 *All E.R.* 341— vide pp. 400–13 *post*).

(1) That this Court does not share the view of the trial Court that the line of cross-examination of the appellant, by counsel for the respondent, was to attack only the testimony of

* The general rule is that when a witness had previously made statements to the same effect as the evidence that he is giving the previous statements are not admissible in confirmation of such evidence, but there is an exception to this rule where in cross-examination a witness's account of certain facts is challenged as being a recent fabrication or an afterthought.

the appellant as a whole; that it is clearly implied in such line, and it was expressly put to him on more than one occasion, that the most vital and material parts of his version were recent fabrications; and that, accordingly, the trial Court exercised wrongly its discretion in excluding the statements made by the appellant to Dr. Messis while under narcoanalytic treatment, and that it should have, in the exercise of such discretion treated such statements as admissible, coming under the exception to the hearsay rule regarding evidence of a witness's previous statements. (See *Fox* v. *General Medical Council* [1960] 3 All E.R. 225 at pp. 230-231). pp. 418-23 *post*.

(2) That the statements of the appellant to Dr. Messis, while he was under narcoanalytic treatment, were made in circumstances which practically excluded the possibility of such statements having been made consciously by the appellant, as self-serving statements in order to show consistency with a false version which he was going to put forward later in his statement to the police and, subsequently, on oath at his trial and that on the contrary, it is, to say the least, most probable that at the time when the appellant was talking to Dr. Messis he was speaking to him the truth.

(3) That it is scarcely possible to overestimate the impression which the statements made, as aforesaid, by the appellant to Dr. Messis might have created at the trial in relation to the issue of the credibility of the appellant, had they been admitted in evidence by the trial Court; and that their impact would have been all the more decisive in view of the fact that the trial Court had already before it evidence given by Philippos Georghiades who had admitted the existence of a joint private venture of his with the appellant to lend out money on commission.

(4) That though, from a strictly legal point of view, (see *R.* v. *Prater*, 44 Cr. App. R. 83 at pp. 85-86) it was open to the trial Court to treat Georghiades as a witness of truth in respect of those parts of his evidence relating to counts 1 to 12, this was a very unsafe course in the particular circumstances, especially since, as was stressed by the trial Court, it cautioned itself repeatedly before doing so; that this consideration, coupled with the fact that it was wrong for the trial Court to exclude the evidence concerning what the appellant told to Dr. Messis during the two sessions of narcoanalytic treatment, leads this

Court to examine, whether the conviction of the appellant on the said counts should be upheld on appeal, especially as regards the safety, and certainty beyond reasonable doubt, of the finding that there existed the necessary mental element for the commission of the offences in question; and that in this connection it has to consider whether it is proper to apply, in relation to the conviction of the appellant on the counts concerned, the proviso to s. 145 (1) (b) of Cap. 155.

(5) That having regard to the general principles governing the application of the said proviso (see *Vouniotis* v. *The Republic* (1975) 2 C.L.R. 34 and *R.* v. *Oyesiku*, 56 Cr. App. R. 240 at pp. 247–248) and to all relevant considerations, this Court had decided that the better course is not to apply the said proviso, but to set aside the conviction of the appellant on counts 1 to 12.

(6) That this is not a proper case in which to order a new trial under s. 145 (1) (d) of Cap. 155; that as the appellant admitted, in no uncertain terms, that he made deposit vouchers purported to be genuine, though they were, in fact, according to his own version, fictitious, this Court, exercising its powers under section 145 (1) (c) of Cap. 155, has no hesitation in finding him guilty of the offence of forgery in respect of each one of the six deposit vouchers which are involved in counts 1 to 12, and that, accordingly, he is convicted on six counts charging him, respectively, with the offence of forgery (see sections 331, 333(a), 334 and 335 of Cap. 154).

Held, (II) with regard to the conviction concerning the stealing from the strong-room (count 17):

(1) That as in respect of the cash which was placed by the appellant and prosecution witness Yiokaris in the strong-room of the bank, there was signed by Yiokaris a specification of cash, on August 13, 1974, prior to the placing of the cash in the strong-room; that as in such specification of cash, which should have stated correctly the amount of cash that was placed in the strong-room on that date, there was included the amount of C£1,500 which was, later, found to be missing; that as the said specification of cash could only have been signed, in the course of normal banking practice, after Yiokaris had checked the cash which was to be placed in the strong-room by him and

the appellant; that as, and notwithstanding that the trial Court believed Yiokaris' version that he has not checked the cash, the specification of cash in question is a solemn banking document and it is very difficult for this Court to ignore it in deciding as regards the outcome of this appeal because it amounts to documentary evidence of the utmost cogency militating in favour of the version of the appellant, who insisted, all along, that he had nothing to do with the loss of the C£1,500; that as it was possible for the strong-room to have been opened between August 13 and August 19, 1974, by using the keys of the emergency door; that as the trial Court has deprived itself of the opportunity of hearing what the appellant has told Dr. Messis during narcoanalysis; that as, moreover, even if what the appellant told Dr. Messis might not have been directly connected with the issue of the missing C£1,500 from the strong-room, nevertheless, the appellant's statements to Dr. Messis could have proved the consistency of his story in many other material respects in this case, and, therefore, were directly relevant to, and inextricably connected with, the wider issue of his credibility as a whole; and that as this Court is not prepared to speculate what the finding of the trial Court could have been in respect of such issue had it not wrongly excluded the evidence concerning the statements of the appellant to Dr. Messis during narcoanalysis there has been left with a lurking doubt which makes it wonder whether an injustice has not been done in convicting the appellant on count 17 and that, accordingly, it regards his conviction on such count as an unsafe one. (Regarding the concept of "lurking doubt" in relation to the determination of an appeal see *HjiSavva* v. *The Republic* (1976) 2 J.S.C. 302 at pp. 315-323 and 348-357; and regarding setting aside of convictions on appeal as being "unsafe or unsatisfactory" see *Meitanis* v. *The Republic* (1967) 2 C.L.R. 31 and *Christodoulides* v. *The Police* (1968) 2 C.L.R. 226).

Held, (III) with regard to the conviction concerning the C.B.C. money:

That in the light of what this Court has stated in relation to the stealing of the strong-room money concerning the close nexus between the issue of the credibility of the appellant and the exclusion of the evidence of Dr. Messis regarding statements made to him by the appellant under narcoanalysis, this Court feels that it is, also, unsafe to uphold the conviction of the

appellant on these counts and that it has, accordingly, to be set aside, too.

Per curiam: (1) That, moreover, in relation to these counts the appellant has put forward an explanation, which if it had been accepted by the trial Court it would have negatived completely the existence of the mental element which was necessary for the commission of the offences in question, and which was, also, consistent with his innocence.

(2) That, irrespective of the wrongful exclusion of the evidence of Dr. Messis, this Court would be inclined to regard the verdict of guilty on the counts concerned as being unreasonable in the light of the evidence as a whole; in this connection, it must not be lost sight of that this Court is reviewing the verdict of Judges sitting without a jury and it, therefore, has a duty to look at the evidence as a whole and decide for itself whether or not their verdict can be said to be reasonable or not (see *R.* v. *Tucker* [1952] 2 All E.R. 1074 at p. 1077).

(3) That, furthermore, even if an appellate Court is sitting on appeal from a verdict reached by a jury it can still interfere with it if an alternative theory put forward by the defence, which is consistent with the evidence as to the innocence of the appellant, has been ignored (see *R.* v. *Turkington*, 22 Cr. App. R. 91 at pp. 92–93).

Held, (IV) with regard to the sentence imposed on the forgery counts:

That though the offences concerned are serious this Court, while paying due regard to the deterrent aspect of sentencing, must, as far as possible, individualize the sentence; that taking into account the fact that the appellant is a first offender, he has lost his career with the bank, has suffered a serious affliction which may possibly recur, and has tried to make amends by repaying some of the money involved in the offences concerned, this Court has decided to impose on him a concurrent sentence of eighteen months' imprisonment regarding each one of the six counts on which it has convicted him.

Appeal allowed; convictions on all counts set aside. Appellant convicted on six counts of forgery.

Cases referred to:

Platritis v. *Police* (1967) 2 C.L.R. 174 at pp. 185–186;

R. v. *Williams and Another* [1953] 1 All E.R. 1068 at p. 1070; [1953] 2 W.L.R. 937 at p. 942; [1953] 1 Q.B. 660 at p. 667; 37 Cr. App. R. 71 at p. 80;

R. v. *Cockburn* [1968] 1 All E.R. 466 at p. 468;

Halstead v. *Patel* [1972] 2 All E.R. 147 at pp. 151, 152;

Scott v. *Commissioner of Police for the Metropolis* [1974] 3 All E.R. 1032 at p. 1036;

R. v. *Waterfall*, 53 Cr. App. R. 596 at pp. 596–597, 598–599;

R. v. *Feely* [1973] 1 All E.R. 341 at pp. 346–347;

R. v. *Roberts* [1942] 1 All E.R. 187 at p. 191;

Fox v. *General Medical Council* [1960] 3 All E.R. 225 at pp. 230–231;

The Nominal Defendant v. *Clements* (decided by the High Court of Australia) 104 C.L.R. 476 at pp. 479–480;

Transport and General Insurance Co. Ltd., v. *Edmondson* (decided by the High Court of Australia) 106 C.L.R. 23 at p. 28;

R. v. *Oyesiku*, 56 Cr. App. R. 240 at pp. 246, 247 and 248;

R. v. *Prater*, 44 Cr. App. R. 83;

R. v. *Stannard and Others*, 48 Cr. App. R. 81 at pp. 91–92;

R. v. *Russell*, 52 Cr. App. R. 147 at p. 150;

Vouniotis v. *The Republic* (1975) 2 C.L.R. 34;

HjiSavva v. *The Republic* (1976) 2 J.S.C. 302 at pp. 315–323 and 348–357 (to be reported in (1976) 2 C.L.R.);

R. v. *Cooper* [1969] 1 All E.R. 32 at p. 34;

Stafford v. *D.P.P.* [1973] 3 All E.R. 762;

R. v. *Pattinson and Laws*, 58 Cr. App. R. 417 at p. 426;

Meitanis v. *The Republic* (1967) 2 C.L.R. 31 at pp. 41–42;

Christodoulides v. *The Police* (1968) 2 C.L.R. 226;

Vrahimis v. *The Police* (1970) 2 C.L.R. 120 at p. 124;

Varnava v. *The Police* (1973) 2 C.L.R. 317, at p. 320;

R. v. *Tucker* [1952] 2 All E.R. 1074 at p. 1077;

R. v. *Turkington*, 22 Cr. App. R. 91 at pp. 92–93;

Appeal against conviction and sentence.

Appeal against conviction and sentence by Christodoulos P.

Zisimides who was convicted on the 21st August, 1975 at the Assize Court of Limassol (Criminal Case No. 8386/75) on sixteen counts of the offence of stealing by a servant, contrary to sections 255 and 268 of the Criminal Code Cap. 154, on fifteen counts of the offence of fraudulent false accounting contrary to section 313 (c) of Cap. 154 and was sentenced by Loris, P.D.C., Hadjitsangaris, S.D.J. and Chrystostomis, D.J. to various terms of imprisonment ranging from six months to three years, the sentences to run concurrently.

G. Cacoyiannis, for the appellant.

R. Gavrielides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: The appellant was tried by an Assize Court in Limassol on an information containing in all thirty-seven counts. At the close of the case for the prosecution he was not called upon to defend himself on counts 14, 15 and 16, and at the end of his tria' he was acquitted and discharged on counts 13, 20 and 21, and he was convicted on the remaining counts, namely counts 1 to 12, counts 17, 18 and 19 and counts 22 to 37.

The appellant was sentenced to concurrent terms of imprisonment as follows:-

To two years' imprisonment in respect of each one of counts 1 to 6, to three years' imprisonment in respect of each one of counts 7 to 12, to three years' imprisonment on count 17 and to six months' imprisonment in respect of each one of counts 18, 19 and 22 to 37.

By means of his conviction on counts 1, 3, 5, 7, 9, 11, 17, 18, 22, 24, 26, 28, 30, 32, 34 and 36 the appellant was found guilty of stealing, on divers dates during the period from June to August 1974, various amounts of money which were the property of the Chartered Bank in Limassol. As, at the time, he was employed by such bank as a cashier, he was found guilty, on the basis of the said counts, of the offence of stealing by a servant, contrary to sections 255 and 268 of the Criminal Code, Cap. 154.

As a result of his conviction on counts 2, 4, 6, 8, 10, 12, 19,

23, 25, 27, 29, 31, 33, 35 and 37 he was found guilty of having committed the offence of fraudulent false accounting, contrary to section 313(c) of Cap. 154, on divers dates during the aforementioned period, and in relation, respectively, to the various amounts which he was found guilty of having stolen as aforesaid. The false accounting consisted, on each occasion, of his omission to make the relevant entry in the cash-book of his employers to the effect that he had received the amount concerned.

Counts 1 to 6 relate to three occasions on which he, allegedly, received sums of money, as a cashier of the bank in question, which were paid into the bank to the credit of Charalambides Dairies Ltd. The first occasion was on July 15, 1974, and the sum involved was C£2,000. The second occasion was between July 17 and 19, 1974, and the sum involved was C£2,080, and the third one was on July 31, 1974, and the sum involved was C£2,400.

Counts 7 to 12 relate to three occasions on which he, allegedly, received in his capacity as the cashier sums of money which were paid into the bank by a certain Philippos Georghiades, of Limassol, who was, at the time, an employee of Charalambides Dairies Ltd. The said sums were, on each occasion, paid by Georghiades in his personal capacity and into his own personal account. The first two occasions were on August 2, 1974, and the sums involved were C£600 and C£2,240, respectively, and the third one was on August 6, 1974, and the sum involved was C£1,800.

Count 17 relates to the alleged stealing by the appellant, between August 8 and 19, 1974, of the sum of C£1,579.955 mils, being the property of his employers.

Counts 18, 19 and 22 to 37 relate to the alleged stealing by the appellant of various amounts deposited with the bank on divers dates in June, July and August, 1974, to the credit of the Cyprus Broadcasting Corporation, by persons who were paying their radio and television licences' fees. The total of these amounts added up to the sum of C£79.500 mils. The false accounting involved in these transactions was that the appellant, allegedly, omitted to prepare the necessary vouchers for crediting the amounts paid in, as aforesaid, to the account of the Cyprus Broadcasting Corporation.

The appellant was employed, at all material times, by the Chartered Bank at its Makarios III Avenue branch, in Limassol; he was a cashier since the end of 1971 and he continued acting in that capacity up to and including August 13, 1974; he had, first, entered the employment of the bank in January 1970.

The version of the prosecution regarding the deposits made to the credit of Charalambides Dairies Ltd. was to the effect that on the three aforementioned occasions the amounts concerned were deposited at the said branch of the Chartered Bank, in Limassol–while the appellant was acting as a cashier—in relation to the Charalambides Dairies Ltd. "transit account", that is that they were deposited there in transit for the Nicosia account of the said company with the Chartered Bank in Nicosia. The accused, upon receipt of the sums in question, filled in deposit vouchers in his own hand–writing and handed over copies of such vouchers to the depositors. These deposit vouchers were stamped by the appellant with the stamp of the bank and were initialled by him. The depositor on the first two occasions was Philippos Georghiades, and on the third occasion another employee of the company who has not been identified, as his signature on the relevant deposit voucher is illegible.

It was, later, revealed that the appellant omitted to make the relevant entries for all the three deposits in question in the cash–book of the bank, on the dates when the deposits were, respectively, made, or on any other date prior to August 7, 1974, when his omissions to do so were discovered.

The version of the appellant concerning these deposits to the credit of Charalambides Dairies Ltd. is that, in fact, no money was deposited with him, as a cashier of the bank, as shown by the deposit vouchers concerned, and that, therefore, all these vouchers did not relate to actual deposits of money with the bank, but that they were fictitious deposit vouchers issued by him for use by Philippos Georghiades in order to cover him for various amounts of money which he had advanced earlier to the appellant, in the appellant's personal capacity, for the purpose of lending them to others, for short periods, on a 5% commission basis, such commission being shared equally between the appellant and Georghiades.

Regarding the amounts deposited in the personal account of Georghiades, the evidence for the prosecution was to the effect that the amount of C£600, which was deposited on August 2, 1974, and that of C£1,800, which was deposited on August 6, 1974, were deposited by Georghiades himself, and that the appellant filled in the relevant deposit vouchers, stamped them with the stamp of the bank, initialled them and handed copies of such vouchers to Georghiades. The other amount of C£2,240, which was deposited, also, on August 2, 1974, was paid in by an employee of Charalambides Dairies Ltd., in Limassol, Eleni Papadopoulou, who testified that she had instructions to deposit it in the account of her employers; the appellant, however, filled in the deposit voucher in the name of Georghiades and when Eleni remarked that she had asked him to make the deposit to the credit of the company, and not of Georghiades, the appellant replied that he was in a hurry to leave and suggested that the matter could be arranged by Georghiades issuing a cheque in favour of his employers. Eleni Papadopoulou then received a copy of the deposit voucher which was stamped and initialled in the usual course by the appellant, and handed it over to Georghiades, explaining how it came that the money had been deposited in his personal account instead of in that of the company.

As regards these three deposits, too, the version of the appellant has been the same as that which he has put forward in relation to the deposits which appear to have been made to the credit of Charalambides Dairies Ltd.

The conviction of the appellant on count 17 was mainly based on the evidence of Panayiotis Yiokaris, the Manager of the particular branch of the Chartered Bank where the appellant was working at the time. According to this evidence the appellant was in a hurry to leave the premises of the bank at about noon on August 13, 1974, because, at the time, he was serving, also, in the National Guard while working at the bank, as he had been called up as a result of the Turkish invasion of Cyprus. Yiokaris testified that, after some argument with the appellant, he agreed that the cash should be placed in the strong-room of the bank, in accordance with the existing practice, but without having, first, been checked by Yiokaris, and, as a result, the appellant, accompanied by Yiokaris, went into the strong-room and deposited the cash there. Yiokaris stated in his

evidence that, consequently, he had to sign the "specification of cash"—which was prepared by the appellant for that date—without actually having, first, checked the cash as it ought, normally, to have been done.

August 13, 1974, was the last day when the appellant worked at the bank. On the next day the second phase of the Turkish invasion started and the appellant did not go to work, though Yiokaris was present at the premises of the bank. On August 15 and 16 the bank was closed. On August 17 the bank re-opened, but the strong-room was not opened as business was very limited. August 18 was a Sunday and the bank re-opened for business on August 19. On that day the appellant did not report for duty and, eventually, when Yiokaris, in the presence of other employees of the bank, gained access to the strong-room, it was found that there was missing from the cash deposited there the amount of C£1,579.955 mils.

It is to be noted that the main door of the strong-room could not be opened unless Yiokaris and the appellant used keys simultaneously, which were possessed separately by each one of them. There were, also, on the main door of the strong-room, two "combination locks," one of which was operated by the appellant and the other by Yiokaris. It is in evidence that after August 13, 1974, the appellant delivered his own keys of the main door of the strong-room, and the combination for the combination lock operated by him, to Kypros Neophytou, who was the Manager supervising all the Limassol branches of the Chartered Bank.

On August 19, 1974, though Yiokaris used his own keys and operated himself the combination lock which was, normally, operated by him and another employee of the bank, Charalambos Charalambides used the keys of the appellant, which had been handed, as stated above, to Neophytou, and, also, tried the combination lock which was, normally, operated by the appellant; it did not, however, become possible to enter the strong-room through the main door and access was gained through an emergency door which could be opened, again, only be separate keys, possessed by Yiokaris and the appellant, respectively. The appellant had not left the key for the emergency door to Neophytou, but it was discovered in one of the drawers of his desk at the bank, which was unlocked by a

duplicate key in the possession of Yiokaris; it, thus, became possible to use the key for the emergency door, which was in the possession, usually, of the appellant, in order to unlock such door and enter into the strong-room.

The version of the appellant regarding the amount of money found missing on August 19, 1974, and in respect of which he was convicted under count 17, was that at noon of August 13, 1974, the cash in his possession was actually checked by Yiokaris, before the latter had signed the specification of cash and before such cash was placed by him and Yiokaris in the strong-room; he testified that after he had delivered his own keys of the strong-room door to Neophytou, and as from then onwards he was at all times serving in the National Guard, he had no opportunity whatsoever of entering the strong-room, or of having access to the cash there; he had no keys in his possession to use for this purpose, and he did not go back to the premises of the bank at any material time up to the discovery of the fact that the aforementioned amount, which was the subject matter of count 17, was found to be missing.

Lastly, in connection with the total amount of C£79.500 mils, which the appellant received on divers dates from various persons by way of payments of Cyprus Broadcasting Corporation licences' fees, it has not been disputed by the appellant that he did, actually, receive this amount; and, moreover, there were found in the drawers of his desk at the bank those parts of the relevant C.B.C. bills which he had retained after each person concerned had paid his fees and was issued with that part of the relevant bill which constituted a receipt for the payment. Nor is it disputed that the appellant did not make, on the date when each such payment was made, the proper entry in the cash-book of the bank, or that he did not prepare the necessary voucher for the purpose of crediting, accordingly, the C.B.C. account. His version has been that he was not aware of any bank regulation providing that he should have made the relevant entry on the same day when a payment was made, and he alleged that he used to make entries in the cash-book, after filling in one voucher for a number of payments, whenever there were sufficient payments to be entered and when he was not pressed for time, as he did not consider the making of such entries to be a matter of urgency. He explained that he used

to stamp the receipts given to the licensees, who paid their fees, with the dates of payments, but he did not, likewise, stamp the stubs of the bills which remained in his possession. He alleged that the money which he was collecting, in connection with the C.B.C. licences, he was keeping in an envelope pending the accumulation of a sufficient number of stubs for entries on a relevant voucher, and he said that after his mobilization he used to carry with him the accumulated money in respect of which entries had not yet been made; thus, the said amount of C£79.500 mils remained in his possession after he had been for the last time to the bank on August 13, 1974; and he has contended that he never intended to steal it, but that he was intending, always, to return it to the bank.

The trial Court disbelieved, in respect of all counts, the evidence of the appellant, and relying on evidence for the prosecution, which it found credible, proceeded to convict the appellant as already stated in this judgment.

As regards all counts, except count 17, the paramount issue was whether there had existed in the mind of the appellant, at the material time, the necessary mental element for the commission of the offences of which he was convicted; and, we think, it is quite clear that had the evidence of the appellant been believed, in relation to the events concerning all these counts, instead of that of the prosecution, it cannot be said, without doubt, that the trial Court would inevitably have convicted the appellant on such counts.

In relation to the mental element required for the commission of the offences concerned it is necessary to refer, first, to the relevant provisions of Cap. 154, which are section 255(1) and section 313 (c):

The material part of section 255(1) reads as follows:-

"255.(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

Section 313 (c) reads as follows:-

"313. Any person who, being a clerk or servant, or

being employed or acting in the capacity of a clerk or servant does any of the acts following with intent to defraud, that is to say –

(a) .....

(b) .....

(c) omits or is privy to omitting any material particular from any such book, document or account, is guilty of a felony, and is liable to imprisonment for seven years."

It is useful to compare section 255(1), above, with section 1(I) of the Larceny Act, 1916, in England (see Halsbury's Statutes of England, 2nd ed., vol. 5, p. 1012); the relevant part of the said English provision reads as follows:–

"1. Definition. — For the purposes of this Act –

(I) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof;"

In relation to the construction of the terms "fraudulently" and "without a claim of right" the trial Court referred, in its judgment, to *Platritis* v. *The Police*, (1967) 2 C.L.R. 174, and, in particular, to the judgment delivered in that case by Hadjianastassiou J., who said, *inter alia*, (at pp. 185–186) the following:–

"I am of the opinion that the word 'fraudulently' does add, and is intended to add, something to the words 'without a claim of right', and it means that the taking must be intentional and deliberate, that is to say, without mistake. In the present case, as it has been found by the trial Court, the appellant knew at the time of the taking of the money from the safe that it was the property of the widow of the late Sergeant and that he took the money deliberately; he converted the money to his own use and with an intent to deprive the owner of the money. As I said the Court took this view which was reasonably open to the trial Court and I see no reason to interfere. With regard to the

argument of the counsel for the appellant that he intended to repay it and had reasonable grounds for repayment, does it make any difference that he intended to repay the money which can only mean from the facts in this case that he only hoped he would be able to repay the money? I consider it constructive to quote from the judgment of Lord Goddard, C.J., in the case of *Rex* v. *Williams and Another* [1953] 1 All E.R. 1068 at p. 1070; as I am in agreement with the reasoning behind this case I would adopt and apply it in the case before us.

> 'It is one thing if a person with good credit and plenty of money uses somebody else's money which is in his possession—it having been entrusted to him or he having the opportunity of taking it—he merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to get. No jury will then say that there was any intent to defraud or any fraudulent taking, but it is quite another matter if the person who takes the money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future and, in considering whether this court is to give effect to the rider of the jury we must bear in mind the pronouncement which is the locus classicus in this matter—Channell, J.'s charge to the Jury in *Rex* v. *Carpenter* [1911], 76 J.P. 158 referred to by this Court in *R.* v. *Kritz* [1949] 2 All E.R. 406'.

In the present case the appellant intended to use the money and in fact has used it for purposes different from those for which he was holding it and for which the persons of the Police Force who paid the money intended it to be used, namely, for aiding financially the widow of the late Sergeant. Therefore, it seems to this Court that by taking the money and using it for his own purposes, the appellant intended to deprive of the money the widow and in so doing he acted fraudulently and without a claim of right, because he knew that he had no right to take the money which he knew was not his. The fact that he may have had a hope or expectation in the future of repaying that money, and in the present case it has been proved that he was not in a position to do so at the time, is a matter which

at most can go to mitigation. It does not amount to a defence."

As it appears from the above quoted part of the judgment of Hadjianastassiou J. in the *Platritis* case, reliance was placed on a passage from the judgment of Lord Goddard C.J. in *R.* v. *Williams and Another*, [1953] 1 All E.R. 1068, 1070; and the same passage appears in the report of the *Williams* case in the Weekly Law Reports [1953] 2 W.L.R. 937, 942). But a part of that passage, and perhaps a very vital one, namely that which commences with the words "It is one thing if a person with good credit" and continues up to the words "has a hope for expectation that he will be able to do so in the future and," has been omitted from the official final version of the judgment of Lord Goddard in the *Williams* case, *supra*, when it appeared in the Law Reports [1953] 1 Q.B. 660, 667); and the revised version of the judgment of Lord Goddard appears, also, in the Criminal Appeal Reports (37 Cr. App. R. 71, 80).

In *R.* v. *Cockburn*, [1968] 1 All E.R. 466, Winn L.J. referred (at p. 468) to the aforementioned part of the judgment of Lord Goddard in the *Williams* case, *supra*, which is not to be found in the final text of such judgment as it has been reproduced in the Law Reports and in the Criminal Appeal Reports, and said, in this respect, the following:-

> "..... and I venture to think that beyond peradventure LORD GODDARD himself must have checked those reports, the Law Reports and the Criminal Appeal Reports, and taken good care to see that the passage which I am about to read did not appear in those official reports.
>
> .....
>
> I venture to think that quite probably, LORD GODDARD, C.J., felt about that passage what I myself not only feel but now say: that it is an extremely dangerous and misleading statement. It does not appear in the other reports that I have mentioned.
>
> The fact of the matter, however, is this: that whereas larceny may vary very greatly indeed to the extent, one might say, of the whole heavens between grave theft and a taking which, whilst technically larcenous, reveals no moral obloquy and does no harm at all, it is nevertheless

quite essential always to remember what are the elements of larceny and what are the complete and total elements of larceny, that is to say, taking the property of another person against the will of that other person without any claim of right so to do,and with the intent at the time of taking it permanently to deprive the owner of it. If coins, half a crown, a 10s. note, a £5 note, whatever it may be, are taken in all the circumstances which I have already indicated with the intention of spending or putting away somewhere those particular coins or notes, albeit not only hoping but intending and expecting reasonably to be able to replace them with their equivalent, nevertheless larceny has been committed because with full appreciation of what is being done, the larcenous person, the person who commits the offence, has taken something which he was not entitled to take, had no claim of right to take, without the consent of the owner,and is in effect trying to force on the owner a substitution to which the owner has not consented."

Soon after the *Cockburn* case, above, there was enacted, in England, the Theft Act, 1968, and it is useful, for the purposes of this judgment, to quote subsections (1) and (2) of section 1, as well as sections 2 and 6 of such Act (see Halsbury's Statutes of England, 3rd ed., vol. 8, pp. 782, 783, 784, 786); subsections (1) and (2) of section 1 of this Act read as follows:-

" 1. Basic definition of theft

(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly.

(2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit."

Section 2 reads as follows:-

" 2. 'Dishonestly'

(1) A person's appropriation of property belonging to another is not to be regarded as dishonest -

(a) if he appropriates the property in the belief

that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

(c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property."

Section 6 reads as follows:-

6. 'With the intention of permanently depriving the other of it'

(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights."

In *Halstead* v. *Patel*, [1972] 2 All E.R. 147, Lord Widgery C.J. referred to the cases of *Williams* and *Cockburn*, *supra*, for the purpose of explaining the notion of "dishonesty" in relation to the provisions of the Theft Act, 1968; he said the following (at pp. 151, 152):-

> "So far as dishonesty is concerned, it is quite clearly established on authority that a man who passes a cheque in respect of an account in which there are no immediate funds to meet the cheque does not necessarily act dishonestly if he genuinely believes on reasonable grounds that when the cheque is presented to the paying bank there will be funds to meet it. For example the man who, overdrawn on Saturday, draws a cheque in favour of a third party in the honest and well-founded belief that funds will be put into his bank on a Monday, is a man who many juries would undoubtedly acquit of dishonesty, because there he has a genuine and honest belief that the cheque will be met in the ordinary course of events. But that is not this case; this case is the more common case in which there is no suggestion that the drawer of the cheque thought that funds would be available when the cheque in the ordinary course reached Bootle for payment. This is a case of a man who knows perfectly well that there are no funds and there will not be funds to meet the cheque on presentation, but who has the hope and, as the justices find, the honest intention of repaying the money another day when he acquires funds for the purpose.
>
> What is the situation in regard to that defence in the context of the requirement of s. 15 that the action shall be dishonest? For this I go to *R.* v. *Cockburn*[1], where the headnote says[2]:
>
> 'If money belonging to another person is dishonestly taken by the defendant against the will of the owner and without any claim of right and with intention at the time of taking permanently to deprive the owner of the property in the notes and coins concerned, the defendant is guilty of larceny. The fact that he intended soon to replace the money taken with its

1. [1968] 1 All E.R. 465.
2. 52 Cr. App. Rep. 134.

currency equivalent and reasonably expected to be able to do so may be a matter of strong mitigation, but it does not constitute a defence to the charge'.

That headnote is fully justified by the reference by Winn L.J.[1] to a dictum of Lord Goddard C.J. in the case of *R.* v. *Williams*[2] there referred to. What Lord Goddard C.J. had said was this[3]:

'..... it seems to the Court that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Postmaster-General of the property in those notes and coins, and in so doing they acted without a claim of right and fraudulently because they knew they had no right to take the money which they knew was not theirs. The fact that they may have had a hope or expectation in the future of repaying that money is a matter which at most can go to mitigation. It does not amount to a defence'.

To my mind those authorities make the whole situation in this case crystal clear."

It appears that it is generally accepted that the notion of "dishonestly" is used in the said Act as meaning the same thing as the notion of "fraudulently" in the earlier Larceny Act, 1916 (see, *inter alia* [1972] Crim. L.R. 625, 629); and, in this respect, it is useful to refer, too, to the judgment of Viscount Dilhorne, in the House of Lords in England, in the case of *Scott* v. *Commissioner of Police for the Metropolis*, [1974] 3 All E.R. 1032; the relevant passage (at p. 1036) reads as follows:-

" The definition of the common law offence of simple larceny had as one of its elements the fraudulent taking and carrying away (see Hawkins's Pleas of the Crown[4]; East's Pleas of the Crown[5]). 'Fraudulently' is used in the

1. [1968] 1 All E.R. at 469.
2. [1953] 1 All E.R. 1068.
3. [1953] 1 All E.R. at 1071.
4. 6th Edn. (1777), book I, p. 134.
5. (1803), vol. II, p. 553.

definition of larceny by a bailee in s. 3 of the Larceny Act 1861[1] and in the definition of larceny in s. 1 of the Larceny Act 1916. Theft always involves dishonesty. Deceit is not an ingredient of theft. These citations suffice to show that conduct to be fraudulent need not be deceitful.

The Criminal Law Revision Committee[2] in their eighth report on 'Theft and Related Offences' in para. 33 expressed the view that the important element of larceny, embezzlement and fraudulent conversion was 'undoubtedly the dishonest appropriation of another person's property'; in para. 35 that the words 'dishonestly appropriates' meant the same as 'fraudulently converts to his own use or benefit or the use or benefit of another person' and in para. 39 that 'dishonestly' seemed to them a better word than 'fraudulently'.

Parliament endorsed these views in the Theft Act 1968, which by s. 1(1) defined theft as the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it. Section 17 of that Act replaces ss. 82 and 83 of the Larceny Act 1861 and the Falsification of Accounts Act 1875. The offences created by those sections and by that Act made it necessary to prove that there had been an 'intent to defraud'. Section 17 of the Theft Act 1968 substitutes the words 'dishonestly with a view to gain for himself or another or with intent to cause loss to another' for the words 'intent to defraud'. If 'fraudulently' in relation to larceny meant 'dishonestly' an 'intent to defraud' in relation to falsification of accounts is equivalent to the words now contained in s. 17 of the Theft Act 1968 which I have quoted, it would indeed be odd if 'defraud' in the phrase, 'conspiracy to defraud' has a different meaning and means only a conspiracy which is to be carried out by deceit."

As it appears from the earlier case of *R.* v. *Waterfall*, 53 Cr. App. R. 596, the test as regards the existence of a dishonest intent is a subjective one; it is useful to quote the following passage from the headnote in that case, where its facts are set out (at pp. 596–597):–

1. 24 & 25 Vict. c. 96.
2. (1966) Cmnd 2977.

" In the early morning of January 31, 1969, the appellant telephoned for a taxi and asked the driver to take him to the station at Southampton to catch a train to London. The driver pointed out that at that hour of the morning—it was then 3.50 a.m.—there was no train to London, but after some discussion he offered to drive the appellant to London for £14. The appellant said he had an appointment at the B.B.C. early in the morning, and when they arrived there the driver asked for £10 in advance and the appellant replied: 'You'll get that when I get to Harley Street and see my accountant'. By this time the taxi driver felt that he was being deceived. They then drove off to Highgate to an address where the appellant said he once lodged and where he hoped to borrow money. He did not meet with any success there, nor from the accountant at Harley Street; indeed he said to the taxi driver that the accountant was not able to let him have any money. In the result they drove back to Southampton where the appellant tried to raise money at different addresses, and so it went on. The driver was never paid. The case for the prosecution was that from beginning to end the appellant had a dishonest intent and that he never intended to pay the taxi driver the money."

Lord Parker C.J. stated the following in his judgment in the *Waterfall* case (at pp. 598–599):–

" The sole question, as it seems to me, in this case revolves round the third ingredient, namely, whether that which was done was done dishonestly. In regard to that the Deputy-Recorder directed the jury in this way: 'If on reflection and deliberation you came to the conclusion that this defendant never did have any genuine belief that Mr. Tropp would pay the taxi fare, then you would be entitled to convict him. But if you felt on weighing up all of the evidence you have heard that there was some real doubt in your mind, not fantastic but some real doubt in your mind as to whether or not Mr. Tropp might have paid, then, of course, he would be entitled to be acquitted.' In other words, in that passage the Deputy-Recorder is telling the jury they had got to consider what was in this particular appellant's mind: had he a genuine belief that the accountant would provide the money? That, as it seems to this Court, is a

perfectly proper direction subject to this, that it would be right to tell the jury that they can use as a test, though not a conclusive test, whether there were any reasonable grounds for that belief. Unfortunately, however, just before the jury retired, the Deputy Recorder, as it seems to this Court, was saying: you cannot hold that this defendant had a genuine belief unless he had reasonable grounds for that belief. He said: 'It is entirely a matter for you to decide; you have to decide not merely whether this man genuinely believed he might get some money from Mr. Tropp, but whether he had any reasonable ground for thinking so.' And a little later: 'So what you have to decide in regard to that is not merely was it a genuine belief, but was there any reasonable ground for thinking that Mr. Tropp would lend him money.'

Having listened to Mr. Spokes, who has sought to support this verdict, the Court is quite satisfied that those directions cannot be justified. The test here is a subjective test, whether the particular defendant had an honest belief, and of course whereas the absence of reasonable ground may point strongly to the fact that that belief is not genuine, it is at the end of the day for the jury to say whether or not in the case of this particular defendant he did have that genuine belief."

As regards the burden of proving dishonesty, the following are stated in Phipson on Evidence, 11th ed., p. 44, para. 99:-

" For example, on charges of theft or handling, proof of recent possession of the stolen property by the accused, if unexplained or if though explained the explanation is disbelieved, raises a presumption of fact (not of law) that he is the thief or a handler (according to the circumstances) and the jury may (though not must), providing they are satisfied that the other elements of the particular offence are proved, convict[1]. It is not for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse[2]. Thus if the explanation given is

1. *R.* v. *Aves* [1950] 34 Cr. App. R. 159 (explaining *R.* v. *Schama & Abramovitch* [1914] 11 Cr. App. R. 45). See also *R.* v. *Norris* [1917] 86 L. J. K.B. 810; *R.* v. *Badash* [1918] 13 Cr. App. R. 17; *R.* v. *Aubrey* [1914] 11 Cr. App. R. 182; *R.* v. *Hagan* [1913] 9 Cr. App. 25.

2. *R.* v. *Aubrey supra.*

one which the jury think may be true, though they are not convinced that it is, they must acquit, for the burden of proof remains on the prosecution throughout and will not have been discharged[1]."

As regards the mental element that has to be established in relation to the offence of stealing, namely "fraudulently," or its equivalent "dishonestly" in the *Halstead* case, *supra*, reliance was being placed on the *Williams* and *Cockburn* cases, *supra*; in the later, however, case of *R.* v. *Feely*, [1973] 1 All E.R. 341, it appears that the Court of Appeal (Criminal Division) in England took a rather different view of the notion of "dishonestly"; and it, also, took a view different from that which had been expressed earlier in the *Cockburn* case as regards the part which, as already stated, was omitted from the final text of the judgment of Lord Goddard in the *Williams* case.

In relation to the latter point Lawton L.J. said the following in delivering the judgment in the *Feely* case (at pp. 346–347):–

"There is some evidence that Lord Goddard C.J. appreciated that his statement of principle in *R.* v. *Williams*[2] might not apply to every case. His judgment was not reserved and as delivered it is likely that it contained this passage[3]:

'It is one thing if a person with good credit and plenty of money uses somebody else's money which is in his possession—it having been entrusted to him or he having the opportunity of taking it—he merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to get.' No jury would then say that there was any intent to defraud or any fraudulent taking, but it is quite another matter if the person who takes the money is not in a position to replace it at the time but only has

1. See cases cited *supra*, at note 1. See aso *R.* v. *Brain* [1918] 13 Cr. App. R. 197; *R.* v. *Sanders* [1919] 14 Cr. App. R. 11. Note that on a receiving charge mere proof of a previous conviction for larceny, though admissible by s. 43 of the Larceny Act 1916 to show guilty knowledge, was not sufficient to shift the onus of disproving such knowledge on to the defendant: *R.* v. *Davis* [1870] L.R. 1 C.C.R. 272. The relevant section is now s. 27(3) of the Theft Act 1968.
2. [1953] 1 All E.R. 1068.
3. [1953] 1 All E.R. at 1070.

a hope or expectation that he will be able to do so in the future .....'

This passage is set out in the reports of *R.* v. *Williams* in the All England Law Reports and the Weekly Law Reports[1] but was omitted from the reports of that case in the Law Reports and the Criminal Appeal Reports[2]. The inference must be that when Lord Goddard C.J. came to revise his judgment for the Law Reports he had second thoughts, perhaps as Winn L.J. suggested in the later case of *R.* v. *Cockburn*[3], because he thought that it was 'an extremely dangerous and misleading statement'. We do not take this view; another explanation, and a more probable one, is that Lord Goddard C.J. thought it unwise to express opinions on facts which were not before the Court. But it matters little why Lord Goddard C.J. revised his judgment as he did. What does matter is that he seems to have envisaged when delivering his judgment the possibility of an unauthorised taking which might not be fraudulent. Once this possibility exists it must be for the jury to decide whether the facts proved are within it."

Concerning the notion of "dishonestly", Lawton L.J., after stating (at p. 347) that "if the law drifted off course in *R.* v. *Williams* because of the strong inference of fraud arising on the facts of that case, it got on to the wrong tack in *R.* v. *Cockburn*", proceeded to say the following (at p. 348):–

"We find it impossible to accept that a conviction for stealing, whether it be called larceny or theft, can reveal no moral obloquy. A man so convicted would have difficulty in persuading his friends and neighbours that his reputation had not been gravely damaged. He would be bound to be lowered in the estimation of right thinking people. Further, no reference was made by Winn L.J. to the factor of fraud which Lord Goddard C.J. in *R.* v. *Williams*[4] had said had to be considered. It is this factor whether it is labelled 'fraudulently' or 'dishonestly', which distinguishes a taking without consent from stealing.

1. [1953] 1 All E.R. 1068.
2. [1953] 1 Q.B. 660.
3. [1968] 1 All E.R. 466.
4. [1953] 1 All E.R. 1068.

If the principle enunciated in *R.* v. *Cockburn*[1] was right there would be a strange divergence between the position of a man who obtains cash by passing a cheque on an account which has no funds to meet it and one who takes money from a till. The man who passes the cheque is deemed in law not to act dishonestly if he genuinely believes on reasonable grounds that when it is presented to the paying bank there will be funds to meet it: see *Halstead* v. *Patel*[2] per Lord Widgery C.J. But, according to the decision in *R.* v. *Cockburn*[3], the man who takes money from a till intending to put it back and genuinely believing on reasonable grounds that he will be able to do so (see per Winn L.J.[4]) should be convicted of theft. Lawyers may be able to appreciate why one man should be adjudged to be criminal and the other not; but we doubt whether anyone else would. People who take money from tills and the like without permission are usually thieves; but if they do not admit that they are by pleading guilty, it is for the jury, not the Judge, to decide whether they have acted dishonestly."

At the trial of the present case counsel for the appellant invited the Assize Court to treat the *Feely* case, *supra*, as expounding the correct principle applicable to the matter before it; and in its judgment the Assize Court had this to say in this respect:-

"Now, the legal point which falls for determination is whether *R.* v. *Feely* is applicable in Cyprus, in view of the fact, a) that it was decided in connection with the Theft Act 1968, which is not part of our law, b) that the dicta in *R.* v. *Williams* which were adopted by our Supreme Court in the case of *Platritis*, were disapproved expressly in *R.* v. *Feely*.

As regards a) above, we have noted that in *R.* v. *Feely* a new element is introduced, namely Moral Obloquy. In this respect, the Court of Criminal Appeal (Lawson L.J. at p. 346 g.) say: 'In our judgment, a taking to which no

1. [1968] 1 All E.R. 466.
2. [1972] 2 All E.R. 147 at 152.
3. [1968] 1 All E.R. 466.
4. [1968] 1 All E.R. at 469.

moral obloquy can reasonably attach, is not within the concept of stealing either at Common Law or under the Theft Act 1968'. In view of the above, we might accept 'moral obloquy' as an extension of the Common Law principle.

As regards b), we hold the view that we are bound by the decision of our Supreme Court in the *Platritis* case (*supra*). We have decided though, for the purposes of the present judgment,—in case our Supreme Court holds otherwise— to consider the principle set out in *R.* v. *Feely* as part of our law."

We are not entirely sure what the trial Court meant when it said that it "might accept 'moral obloquy' as an extension of the Common Law principle," but we are, in any event, of the opinion, that when the notion of "moral obloquy" was introduced in no uncertain terms by the judgment in the *Feely* case it was not introduced only for the purposes of the application of the provisions of the Theft Act, 1968, but generally in relation to the crime of "larceny" or "theft", however it might be described (see, in this respect, the judgment of Lawton L.J. in the *Feely* case, at p. 348); furthermore, we cannot agree with the view that the trial Court was bound by the decision of this Court in the *Platritis* case, because that case was decided on the basis of the law as it had developed till then, and prior to the decision in the *Feely* case; in other words, in the judgments in the *Platritis* case are expounded the relevant principles of the Common Law as they were understood in England, and applicable in Cyprus, at that time and it would be wrong to say that the further development and elucidation of such principles, as it took place in the *Feely* case subsequently, is to be ignored in Cyprus by treating the *Platritis* case as case-law which has frozen for ever, for the purposes of the law of Cyprus, the relevant principles of the Common Law.

It is necessary, next, to refer to the relevant factual aspect of this case: As was already mentioned in this judgment, the last day on which the appellant went to his work, as a cashier of the particular branch of the Chartered Bank in Limassol, was August 13, 1974. Thereafter, he was away from his work as he was serving on a full time basis in the ranks of the National Guard. In the morning of August 20, 1974, he felt dizzy and

became unconscious and had to be taken to the Limassol hospital and, subsequently, to his home. There he was seen by various persons, some of whom were prosecution witnesses and some of whom were defence witnesses at his trial; he was unconscious or semiconscious and he did not talk. He was given sick-leave by his commanding officer in the National Guard up to September 4, 1974, when he was discharged from the army by virtue of a decision of the Council of Ministers.

He was treated, at first, by Dr. Doritis, and, later on, as from September 2, 1974, by Dr. Messis; both of these doctors are specialists in psychiatry. Dr. Messis testified that he had diagnosed that the appellant was suffering from hysterical amnesia, and the correctness of the diagnosis of Dr. Messis was never disputed either at the trial or before us, and it has been taken to be an established fact by the trial Court.

Dr. Messis explained in his evidence that the appellant was suffering from hysterical amnesia which started from August 20, 1974, and was stretching back retrogradely covering the entire life of the appellant prior to the said date; the appellant was able, however, to remember events that had occurred subsequently to the setting in of the amnesia. Dr. Messis said that he had treated the appellant, at first, with drugs and gave him, also, supportive psychotherapy; such treatment had had good effects in so far as the headaches and the insomnia, from which the appellant was suffering, were concerned, and had improved, also, his socialization, but there had been no change regarding his amnesia; therefore, Dr. Messis had to resort to what he described as "narcoanalytic treatment," during which there was administered intravenously to the appellant an anaesthetic known as sodium pentothal, which is known in common parlance as the "truth drug".

As has been testified by Dr. Koliandri, who is a qualified specialist anaesthetist in the Government Medical Service and who administered the drug to the appellant at a clinic in Limassol on two occasions, when he was subjected to narcoanalytic treatment by Dr. Messis, the appellant was kept, during such treatment, in a situation between sleep and awakeness so that he would be able to talk and answer questions, without being able, however, to control his thoughts; in other words, the treatment consisted of subjecting the appellant to psychoanalysis

while he was, to a certain extent, under narcosis, induced by the administration of the aforesaid drug.

Dr. Messis explained in his evidence that during the two narcoanalytic treatment sessions the appellant was not completely unconscious, but he was in a stage in which the resistance of the censorship of his consciousness had been overcome so that he was brought to a point where subconscious material was coming to the surface, and he began to talk about things and events about which he was not able to talk before because of the defence mechanism of repression that is involved in hysterical amnesia.

As a result of the narcoanalytic treatment the appellant was completely cured of the hysterical amnesia. The last session of such treatment took place about the end of November 1974, and the first session about a week earlier.

The investigating officer in this case, Police Sergeant Costas Michaelides, visited the appellant at his home on September 3, 1974, for interrogation purposes, but he could not interrogate him as the appellant was lying in bed mute and indifferent because of the hysterical amnesia from which he was suffering. On December 2, 1974, Dr. Messis informed P. S. Michaelides that the appellant was, then, in a position to be interrogated and, as a result, the appellant gave a statement to P. S. Michaelides in the afternoon of the same day. At his own request Dr. Messis was present during most of the time when the statement was being taken.

In his said statement to the police the appellant denied any responsibility for the loss of cash which was discovered when the strong-room of the bank was opened in his absence, on August 19, 1974, and he insisted that when he had placed the cash in hand in the strong-room, together with Yiokaris, on August 13, 1974, that is on the last previous occasion when the strong-room had been opened, such cash had already been checked by Yiokaris and found to be in accordance with the specification of cash which the appellant had prepared for the purpose on August 13, 1974.

Regarding the deposit vouchers relating to counts 1 to 12 in the information, the appellant stated that Philippos Georghiades, the employee of Charalambides Dairies Ltd., used to give

him, from time to time, money of his employers, which the appellant, without the knowledge of his superiors at the bank, used to lend for short periods of time to others, usually for about five days, at a commission of 5% which he used to share with Georghiades. The appellant explained that he was issuing to Georghiades deposit vouchers (such as those involved in counts 1 to 12) which were in fact false, in order to enable Georghiades to answer queries of his employers about any deficiency in the cash which he was supposed to have in hand or to have deposited at the bank. The appellant said that, as a rule, the loans, for a short period and on a 5% commission, were made by him to, or through, a certain Panikos Pourghourides. Shortly before the coup d'etat of July 1974, Pourghourides had become a person wanted by the police and, therefore, he could not be found. At the time Pourghourides had on him quite a few thousand pounds which had been lent to him by the appellant in accordance with the aforesaid scheme and he sent word to the appellant that he would return this amount of money through a third person. A few days before the coup d'etat an unknown person had telephoned to the appellant that he was coming to return the money owed to him by Pourghourides but this meeting between them did not materialize in view of the fact that the coup d'etat intervened in the meantime. The appellant went on to say, in his statement to the police, that after the coup d'etat, on July 17, 1974, he met, one evening, Pourghourides, who again promised to return the money which was in his possession and which was approximately C£9,500, but that this was not done and a few days later Pourghourides was killed while fighting against Turkish forces in the area of Limassol.

Lastly, regarding the remaining counts, on which the appellant was convicted, which for convenience's sake we shall call the C.B.C. counts, the appellant denied any intent to steal the money involved. He said that he had had it always in his possession and that he had not proceeded to make the necessary entries in his books at the bank because he had too much work, and he intended to do so in due course.

At his trial the appellant adopted more or less, but with more details, and he gave a lot of explanations under cross-examination in relation thereto, the statement which he had made to the police as aforesaid. As has been already mentioned in this

judgment, the trial Court rejected as untrue the version of the appellant.

During the trial counsel for the appellant called Dr. Messis as a witness for the defence and he sought to put in evidence what the appellant had told Dr. Messis during the two sessions of narcoanalytic treatment; it may be surmised that counsel for the appellant did have instructions that what the appellant told Dr. Messis was consistent with his statement to the police and his evidence on oath at the trial.

The trial Court, after hearing lengthy arguments, excluded the evidence, in this respect, of Dr. Messis as inadmissible on various grounds, one of them being that such evidence was not admissible as not coming within the exception to the hearsay rule regarding previous statements admitted to rebut the suggestion that the testimony of a witness was an afterthought or a recent fabrication.

It was hotly contested, during the trial, whether or not the appellant could have lied to Dr. Messis while talking to him, or answering his questions, during the two sessions of narcoanalytic treatment; it is true that Dr. Messis could not exclude, with absolute certainty, this possibility; but he stated positively on oath that since the mechanism of recovery involved in the narcoanalytic treatment is to get at the real traumatic event which has caused the hysterical amnesia, if the patient—in this case the appellant—recovers, this means that the doctor has got at that event and so what has come out is, indeed, a true fact; and Dr. Messis went on to say that the traumatic event in this case, as it came out during the narcoanalytic treatment, was the death of the friend of the appellant, Pourghourides, who, apparently, was the only person who knew where the money that the appellant had lent to him had gone. Dr. Messis stated, further, that it had come out, during the treatment, that this amount was about C£10,000 and that the appellant believed that he could no longer get it back.

We shall examine, next, whether or not the evidence of Dr. Messis, regarding what the appellant had told him while under narcoanalytic treatment, was rightly excluded by the trial Court on the aforesaid ground:

In *R.* v. *Roberts*, [1942] 1 All E.R. 187, Humphreys J. stated the following (at p. 191):-

" The second of the grounds of appeal is put in this way:

That the learned Judge was wrong in law in refusing to admit the evidence of the appellant's father as to the statement made to him by the appellant after his arrest. That relates to a statement alleged to have been made by the accused to his father after his arrest and while he was in custody. The father, naturally, was allowed to see his son. In our view the Judge was perfectly right in refusing to admit that evidence, because it was in law inadmissible. It might have been, and, perhaps, by some Judges would have been, allowed to be given on the ground that it was the evidence which the defence desired to have given, was harmless, and there was no strenuous opposition on the part of the prosecution. Such evidence might have been allowed to be given, but the Judge was perfectly entitled to take the view which he did, that in law that evidence was inadmissible. The law upon the matter is well-settled. The rule relating to this is sometimes put in this way, that a party is not permitted to make evidence for himself. That law applies to civil cases as well as to criminal cases. For instance, if A and B enter into an oral contract, and some time afterwards there is a difference of opinion as to what were the actual terms agreed upon and there is litigation about it, one of those persons would not be permitted to call his partner to say: 'My partner a day or two after told me what his view of the contract was and that he had agreed to do' so and so. So, in a criminal case, an accused person is not permitted to call evidence to show that, after he was charged with a criminal offence, he told a number of persons what his defence was going to be, and the reason for the rule appears to us to be that such testimony has no evidential value. It is because it does not assist in the elucidation of the matters in dispute that the evidence is said to be inadmissible on the ground that it is irrelevant. It would not help the jury in this case in the least to be told that the appellant said to a number of persons, whom he saw while he was waiting his trial, or on bail if he was on bail; that his defence was this, that or the other. The evidence asked to be admitted

was that the father had been told by his son that it was an accident. We think the evidence was properly refused. Of course, if the statement had been made to the father just at the time of the shooting, that would have been a totally different matter, because it has always been regarded as admissible that a person should be allowed to give in evidence any statement accompanying an act so that it may explain the act. It was put by counsel for the appellant that the statement might be admissible on the ground that the accused had been asked in cross-examination, and it had been suggested to him in cross-examination that this story of accident was one which he had recently concocted. If any such question had been put, undeniably the evidence would have been admissible as showing it was not recently concocted, because the accused had said so on the very day the incident occurred. The answer is that no such question had been put, and no suggestion made, to the accused."

The *Roberts* case, *supra*, was referred to, with approval, in the subsequent case of *Fox* v. *General Medical Council*, [1960] 3 All E.R. 225, which was decided by the Privy Council, in England; in that case Lord Radcliffe, in giving judgment, stated the following (at pp. 230-231):-

"The purpose of such evidence of a witness's previous statements is and can only be to support his credit, when his veracity has been impugned, by showing a consistency in his account which adds some probative value to his evidence in the box. Generally speaking, as is well known, such confirmatory evidence is not admissible, the reason presumably being that all trials, civil and criminal, must be conducted with an effort to concentrate evidence on what is capable of being cogent and, as was remarked by HUMPHREYS, J., in *R.* v. *Roberts* (1), it does not help to support the evidence of a witness who is the accused person to know that he has frequently told other persons before the trial what his defence was. Evidence to that effect is, therefore, in a proper sense immaterial.

There are, however, certain special exceptions, or at any

(1) [1942] 1 All E.R. at p. 191.

rate one head of exception, from this general rule. If, in cross-examination, a witness's account of some incident or set of facts is challenged as being a recent invention, thus presenting a clear issue whether, at some previous time, he said or thought what he has been saying at the trial, he may support himself by evidence of earlier statements by him to the same effect. Plainly the rule that sets up the exception cannot be formulated with any great precision, since its application will depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it. Its application must be, within limits, a matter of discretion and its range can only be measured by the reported instances, not in themselves many, in which it has been successfully invoked. Thus, in *R.* v. *Coll* (1), a police witness who identified an accused in his trial evidence as being present at and party to the crime charged, being cross-examined on an earlier information sworn by him that did not mention the name of that accused, was allowed to give evidence to the effect that he had mentioned the name in an information of still earlier date. The admission of his evidence seems to have been treated by the Court as coming within the 'recent invention' exception. That apart, it seems to have been little more than a permissible exercise of the right of re-examination to ask him, in effect, whether or not the second of the two informations may not have been due to inadvertence and thus to displace the inference which the cross-examination had sought to draw from its contents. *R.* v. *Benjamin* (2) is often referred to in this connexion. A police witness, whose account of what he saw in certain premises was challenged in cross-examination, was allowed to refer to a contemporary entry in his official note-book showing that he had immediately made a report to the same effect to his superior in the police force. Perhaps the best example of the way in which the exception can be properly invoked and applied is offered by *Flanagan* v. *Fahy* (3). There a witness who had testified to the forging of a will was cross-examined to

(1) [1889], 24 L.R. Ir. 522.
(2) [1913], 8 Cr. App. Rep. 146
(3) [1918] 2 I.R. 361.

the effect that he had invented his story because of enmity between him and the accused, the beneficiaries under the propounded will. He was allowed to call confirmatory evidence to show that, before the cause of this enmity had arisen, he had told a third party the story he was now telling. In that situation, the issue raised by the cross-examination was clearly defined; a recent invention due to a specified cause, and, if the witness could show that his account had been the same before the cause existed, he was certainly adding a relevant fact in support of his credibility."

As it is pointed out in the above quoted passage, the admission, by way of exception to the hearsay rule, of evidence of a previously made statement in order to show consistency with an account put forward later by the same person, is a matter of judicial discretion. In this respect, Dixon C.J. said the following in the case of *The Nominal Defendant* v. *Clements*, which was decided by the High Court of Australia (104 C.L.R. 476, at pp. 479–480):-

" The rule of evidence under which it was let in is well recognized and of long standing. If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, inasmuch as the rule forms a definite exception to the general principle excluding statements made out of Court and admits a possibly self-serving statement made by the witness, great care is called for in applying it. The Judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate Court. It is evidence however that the Judge at the trial must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked

on the ground of recent invention or reconstruction or that a foundation for such an attack has been laid by the party but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack."

The above dictum was quoted, with approval, by the High Court of Australia in the case of *Transport and General Insurance Co. Ltd.* v. *Edmondson*, 106 C.L.R. 23, 28, and it is, also, commented upon very favourably in Cross on Evidence, 4th ed., p. 217.

In *R.* v. *Oyesiku*, 56 Cr. App. R. 240, Karminski L.J., in delivering the judgment of the Court of Appeal (Criminal Division) in England, adopted the above dictum of Dixon C.J. (at p. 246) and went on to say the following (at p. 247):-

That judgment of the Chief Justice of Australia, although technically not binding upon us, is a decision of the greatest persuasive power, and one which this Court gratefully accepts as a correct statement of the law applicable to the present appeal.

That is the position in law, and in our view the learned trial Judge was wrong to refuse to allow that evidence to be given. The value of it, of course, was a matter for the jury to assess. We appreciate also that the learned trial Judge has a duty to exercise his discretion in a matter of this kind. He dealt with the matter very shortly, saying that he could not allow inadmissible evidence to go before the jury, and he ruled that such evidence was inadmissible.

We have come to the conclusion that in all the circumstances of this case he was wrong in coming to that conclusion; and if he did exercise his discretion,he exercised it wrongly. It is only fair to the learned trial Judge to say that he did not have the very detailed argument that we had from counsel in this Court as to the general principles to be applied in matters of this kind, but we have come to the conclusion that this evidence was in our view wrongly excluded."

It is clear from the judgment in the *Oyesiku* case that the exercise of the discretion of a Judge, as to whether or not to

exclude a previously made statement which tends to show consistency with a later given account, is reviewable, in a proper case, on appeal. In excluding, in the present case, the statements made by the appellant to Dr. Messis, while under narcoanalytic treatment, the trial Court said the following:-

" Reverting to the facts of the present issue we have considered the cross-examination of the accused. Despite the fact that the word 'fabrication' was used at least once in attacking the credibility of the accused yet we hold the view, in exercising our discretion, that the line of cross-examination of the accused was to attack the whole testimony of the witness. It is therefore clear in the issue under consideration that the evidence sought to be put in, does not come within the exception to the general Rule laid down in the *Fox* case *supra*."

We do not share the above view of the trial Court. We have perused carefully the lengthy cross-examination, by counsel for the respondent, of the appellant at the trial and we do not agree that the line of such cross-examination was to attack only the testimony of the appellant as a whole; it was, also, clearly implied in such line, and it was expressly put to him on more than one occasion, that the most vital and material parts of his version were recent fabrications. We have, therefore, reached the conclusion that the trial Court exercised wrongly its discretion in excluding the statements made by the appellant to Dr. Messis while under narcoanalytic treatment, and that it should have, in the exercise of such discretion, treated such statements as admissible, coming under the exception to the hearsay rule with which we have just been dealing in this judgment.

We would like to stress that, in our opinion, the statements of the appellant to Dr. Messis, while he was under narcoanalytic treatment, were made in circumstances which practically excluded the possibility of such statements having been made consciously by the appellant, as self-serving statements in order to show consistency with a false version which he was going to put forward later in his statement to the police and, subsequently, on oath at his trial; on the contrary, it is, to say the least, most probable that at the time when the appellant was talking to Dr. Messis, while he was undergoing narcoanalytic treatment, he was speaking to him the truth; this is clearly to be derived

from the whole of the evidence of Dr. Messis and, particularly, from that part of it to which we have referred earlier on in this judgment, namely the part where Dr. Messis states that the real traumatic experience, which caused the hysterical amnesia, came out during the treatment and as a result the appellant was cured of such amnesia.

It is scarcely possible to overestimate the impression which the statements made, as aforesaid, by the appellant to Dr. Messis might have created at the trial in relation to the issue of the credibility of the appellant, had they been admitted in evidence by the trial Court, and we do think that their impact would have been all the more decisive in view of the fact that the trial Court had already before it evidence given by Philippos Georghiades, one of the main prosecution witnesses and the person with whom the appellant had alleged that he was lending money on on short-term basis, to the effect that, in fact, on certain occasions, the said Georghiades had been using his personal funds as well as funds of his employers, Charalambides Dairies Ltd., for the purpose of giving money to the appellant in order to lend it on commission, by way of a secret joint venture of theirs.

Georghiades has, indeed, insisted that the instances to which counts 1 to 12 refer were not instances in which he had given money for that purpose to the appellant, but were occasions on which there had been made genuine deposits to the bank, through the appellant as a cashier; and the trial Court believed Georghiades in this respect and decided, furthermore, to act on his evidence even though it was uncorroborated.

The trial Judges did point out, in their judgment, that Georghiades was a person who could be described as someone who had a purpose of his own to serve, but they ended up by saying that after "repeatedly cautioning" themselves they had decided to act upon his evidence without corroboration.

In this connection the trial Court referred to *R.* v. *Prater*, 44 Cr. App. R. 83; in that case the appellant was convicted on evidence which included that of a co-accused, Welham, who testified on his own behalf and not as a witness for the prosecution; Edmund Davies J. stated the following in delivering the judgment of the Court of Criminal Appeal (at pp. 85-86):-

"In relation to the first matter, that Welham was called

on his own behalf and was an accomplice and that a warning should have been given of the danger of acting upon his uncorroborated evidence, the authorities by no means point in the same direction. We have been referred to a number of cases where judgments have been delivered by learned Judges of high authority, by Channell J. in *SCOTT* [1909] 2 Cr. App. R. 215, by Lord Alverstone C.J. in *MARTIN* [1910] 5 Cr. App. R. 4, and by this Court in 1940 in *BARNES AND RICHARDS* 27 Cr. App. R. 154 on the one hand; on the other hand, by Avory J. in *BARROW* [1934] 24 Cr. App. R. 141, by Humphreys J. in *GARLAND* [1943] 29 Cr. App. R. 46n. and again by the last-named Judge in *RUDD* [1948] 32 Cr. App. R. 138.

For the purposes of this present appeal, this Court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve. It is to be observed that in *Davies* v. *Director of Public Prosecutions*, 38 Cr. App. R. 11; [1954] A.C. 378, which went to the House of Lords, Lord Simonds, in enunciating what was described as the third proposition, deals with the matter in these terms (38 Cr. App. R. at p. 32; [1954] A.C. at p. 399): 'Where the Judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate Court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The rule, it will be observed, applies only to witnesses for the prosecution.'

This Court, in the circumstances of the present appeal, is content to express the view that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts and in *Garland* (supra) Humphreys J., delivering the judgment of the Court, used words which this Court finds completely apposite to the

circumstances of the present case, namely, that if there be clear and convincing evidence to such an extent that this Court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction to the jury, this Court will not interfere."

In *R.* v. *Stannard and Others*, 48 Cr. App. R. 81, Win J. said the following (at pp. 91–92):–

"The rule, if it be a rule, enunciated in *Prater* (*supra*) is no more than a rule of practice. I say deliberately 'if it be a rule' because, reading the passage of the judgment as I have just read it, it really seems to amount to no more than an expression of what is desirable and what, it is to be hoped, will more usually than not in cases, at any rate where it seems to be appropriate to the learned Judge, be adopted. It certainly is not a rule of law, and this Court does not think that it can be said here that there was any departure in this respect from proper procedure of trial; still less, does it seem that any injustice can possibly have flowed from the undoubted fact that no such warning was given in the present trial."

The above view of the law was confirmed by Diplock L.J. in *R.* v. *Russell*, 52 Cr. App. R. 147, 150.

In the light of the above principles it was open, from a strictly legal point of view, to the trial Court to treat Georghiades as a witness of truth in respect of those parts of his evidence which related to counts 1 to 12; but, we do think that this was a very unsafe course in the particular circumstances, especially since, as was stressed by the trial Court, it cautioned itself repeatedly before doing so.

The above consideration, coupled with the fact that, as already held in this judgment, it was wrong for the trial Court to exclude the evidence concerning what the appellant told to Dr. Messis during the two sessions of narcoanalytic treatment, leads us to examine, next, whether the conviction of the appellant on the said counts should be upheld on appeal, especially as regards the safety, and certainty beyond reasonable doubt, of the finding that there existed the necessary mental element

for the commission of the offences in question. In this connection, we have to consider whether it is proper to apply, in relation to the conviction of the appellant on the counts concerned, the proviso to section 145 (1) (b) of the Criminal Procedure Law, Cap. 155.

Since the general principles governing the application of the said proviso were referred to in, *inter alia*, *Vouniotis* v. *The Republic*, (1975) 2 C.L.R. 34, we need not repeat, in this judgment, such principles; it is useful, however, to quote a relevant passage from the judgment of Karminski L.J. in the *Oyesiku* case, *supra* (at pp. 247–248):–

" We have to consider whether, as invited by the prosecution, this is a kind of case where it would be right to apply the proviso and to say that, notwithstanding the misdirection and the wrongful exclusion of this evidence, this conviction can stand. To come back to the evidence itself, it depended largely, as I have already said, on the conflict between the appellant and his wife on the one hand and the police officer on the other. The other evidence did not in the main take the matter much further, and we have got to decide whether, if the jury had been correctly directed and this statement by the wife, written by her, had gone before the jury, they would necessarily have come to the same conclusion.

The principle of the application of the proviso has been dealt with in *Willis* [1959] 44 Cr. App. R. 33. The decision of that Court, as set out in the headnote, is this: 'The evidence was admissible if relevant to the appellant's state of mind at any time, and in the present case it was relevant to his state of mind when he later made a statement to the police and therefore should have been admitted; but that, inasmuch as even if the evidence had been admitted, any properly directed jury would, in the opinion of the Court, have been bound to return the same verdict, the Court would apply the proviso to section 4(1) of the Criminal Appeal Act 1907, and confirm the conviction.'

Before we can apply the proviso in a case of this kind,

it is necessary for us to come to the conclusion that if the jury had been properly directed (in our view in this case they were not), they would have been bound to return the same verdict. It may be that if the jury had been properly directed and allowed to see the wife's statement, they would nevertheless have come to the same conclusion and convicted this appellant. We are quite unable to say on the facts before us that a jury would have been bound to come to that conclusion. For that reason we have decided that this appeal must succeed, since it is not a case for the application of the proviso."

Having weighed carefully all relevant considerations, we have decided that the better course is not to apply the proviso to section 145 (1) (b) of Cap. 155 but to set aside the conviction of the appellant on counts 1 to 12; and having done so, we must consider, next, whether to order a new trial on the said counts, under paragraph (d) of subsection (1) of section 145 of Cap. 155, or, in the alternative, whether to convict the appellant, of any offence or offences of which he might have been convicted by the trial Court on the evidence which has been adduced, in the exercise of our powers under paragraph (c) of the said subsection (1) of section 145; of course, we are not bound to adopt either of the said two courses, and having set aside the conviction of the appellant on counts 1 to 12, we may acquit him altogether.

We have reached the conclusion that we should not order a new trial, but that this is a proper case in which to exercise our powers under paragraph (c) of subsection (1) of section 145. We have no hesitation in finding that the appellant is guilty of the offence of forgery in respect of each one of the six deposit vouchers which are involved in counts 1 to 12, and which were produced as *exhibits* in relation thereto at the trial, and are now before us. The relevant provisions of our Criminal Code, Cap: 154, are sections 331, 333 (a), 334 and 335, which read as follows:

"331. Forgery is the making of a false document with intent to defraud.

333. Any person makes a false document who —

(a) makes a document purporting to be what in fact it is not;

.....

334. An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact; nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

335. Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless, owing to the circumstances of the forgery or the nature of the thing forged, some other punishment is provided, to imprisonment for three years."

The appellant has admitted, in no uncertain terms, that he made deposit vouchers purporting to be genuine, though they were, in fact, according to his own version, fictitious. He intended them to appear to be genuine deposit vouchers, officially issued by the branch of the Chartered Bank in Limassol where he was working as a cashier, and he had stamped them, for this purpose, with the official stamp of the bank, and he initialled them in his capacity as a cashier of the bank. In fact, however, they were not genuine deposit vouchers, beca se he said that he issued them only in order to enable witness Georghiades to be covered as regards his employers, Charalambides Dairies Ltd., so that they would not discover that Georghiades, together with the appellant, were using their money for loans through Pourghourides, on a short-term basis, for a commission of 5% which they pocketed; thus, the six deposit vouchers concerned were "false documents" made by the appellant, in the sense that they were documents purporting to be what, in fact, they were not, and they were made with intent to defraud, that is to defraud the employers of the said Georghiades, by leading them to think that their money was being actually deposited with the bank, whereas, in fact, it was not, but it was being lent, as aforesaid.

The appellant is, therefore, convicted by us on six counts charging him, respectively, with the offence of forgery; the particulars of each such count correspond, as regards date, place and amount of money, to the particulars appearing on the face of each one of the aforementioned deposit vouchers. We shall consider later what sentence is to be passed on the appellant in respect of these new convictions.

We shall, next, deal with the conviction of the appellant on count 17:

We need not reiterate the facts relevant to the said count, as they are, already, set out in an earlier part of this judgment. We would like, however, to stress one factor which we regard as of great significance, namely that in respect of the cash which was placed by the appellant and prosecution witness Yiokaris in the strong-room of the bank, on August 13, 1974, and was found to be deficient to the extent of approximately C£1,500 when the strong-room was opened in the absence of the appellant, on August 19, 1974, there was signed by Yiokaris a specification of cash, on August 13, 1974, prior to the placing of the cash in the strong-room. In such specification of cash, which should have stated correctly the amount of cash that was placed in the strong-room on that date, there was included the amount of C£1,500 which was, later, found to be missing; the said specification of cash could only have been signed, in the course of banking practice, after Yiokaris had checked the cash which was to be placed in the strong-room by him and the appellant. Of course, Yiokaris has denied having checked the cash; he stated that he had to sign the specification of cash without checking the cash because the appellant was in a hurry to leave, and evidence was adduced to support his version, which the trial Court has accepted. On the other hand, the specification of cash in question is a solemn banking document and it is very difficult for us to ignore it in deciding as regards the outcome of this appeal; it amounts to documentary evidence of the utmost cogency militating in favour of the version of the appellant, who insisted, all along, that he had nothing to do with the loss of the C£1,500.

Another factor which has influenced us is that it was possible for the strong-room to have been opened between August 13

and August 19, 1974, by using the keys of the emergency door which were in the custody of the appellant, but which had been left by him in a drawer of his desk at the bank which could have been opened by a duplicate key which was to be found at the premises of the bank, too; and it is common ground that during the whole of that period, between August 13 and August 19, 1974, the appellant did not visit the bank at all.

Counsel for the respondent has submitted that we can only set aside the conviction of the appellant on count 17 if we are prepared to find that Yiokaris was the culprit concerning the theft of the amount which was found to be missing when the strong-room was opened. We do not agree, at all, with this proposition. We are, only, concerned with the guilt of the appellant on count 17 and we are not concerned, at all, with by whom else, or how, the money could have been stolen from the strong-room in those troubled days for Limassol and for Cyprus in general; the possibility of this happening in the absence of the appellant existed and we are concerned as to how it may have materialized.

We do not overlook the fact that the appellant's story that he had nothing to do with the stealing of the amount concerned was disbelieved by the trial Court; but the trial Court, at the same time, has deprived itself of the opportunity of hearing what the appellant had told Dr. Messis, during narcoanalysis, and, moreover, even if what the appellant told Dr. Messis might not have been directly connected with the issue of the missing C£1,500 from the strong-room, nevertheless, the appellant's statements to Dr. Messis could have proved the consistency of his story in many other material respects in this case, and, therefore, were directly relevant to, and inextricably connected with, the wider issue of his credibility as a whole; and we are not prepared to speculate what the finding of the trial Court could have been in respect of such issue had it not wrongly excluded the evidence concerning the statements of the appellant to Dr. Messis during the narcoanalytic treatment.

In view of all the foregoing, we have been left with a lurking doubt in our minds which makes us wonder whether an injustice has not been done in convicting the appellant on count 17; we, therefore, regard his conviction on such count as an unsafe one.

The concept of "lurking doubt" in relation to the determination of an appeal in a criminal case has already been referred to by our Supreme Court in *HjiSavva* v. *The Republic*, (1976)* 2 J.S.C. 302, where it was, in effect, held that there is room for it in the course of applying together section 145 of the Criminal Procedure Law, Cap. 155, and section 25 (3) of the Courts of Justice Law, 1960 (Law 14/60); useful reference, in this respect, may be made to the judgments in the *HjiSavva* case of L. Loizou J. (at pp. 315–323) and of Hadjianastassiou J. (at pp. 348–357), where there were referred to, also, the English cases of *R.* v. *Cooper*, [1969] 1 All E.R. 32, *Stafford* v. *D.P.P.*, [1973] 3 All E.R. 762 and *R.* v. *Pattinson and Laws*, 58 Cr. App. R. 417.

Of course, all these English cases were decided on the basis of the exercise of the rights conferred on an appellate Court in a criminal appeal by means of section 2 of the Criminal Appeal Act, 1968, but, as it has been correctly pointed out in the *HjiSavva* case, it is clear that the provisions of the said section 2 are not really wider than those of our own section 25 (3) of Law 14/60 (see the judgment of L. Loizou J. at p. 318).

In the *Cooper* case, *supra* (at p. 34), it was pointed out by Widgery L.J. that under section 2 of the Criminal Appeal Act, 1968, it is possible to allow an appeal against conviction if it is thought that it should be set aside, on the ground that, in all the circumstances of the case, it is unsafe or unsatisfactory; and the concept of "lurking doubt" is brought in as a test for ascertaining whether the conviction is unsafe or unsatisfactory. It is to be noted, further, that the same approach has been adopted in the *Pattinson* case, *supra*, (see the judgment of Lawton L.J., at p. 426).

An examination of our own case-law discloses that convictions in criminal cases have been examined on appeal with a view to deciding whether they were unsafe or unsatisfactory and had, therefore, to be set aside, even though the terms "unsafe" or "unsatisfactory" are not to be found, as such, in either section 145 of Cap. 155 or section 25 (3) of Law 14/60; this is so because it stands to reason that an unsafe or unsatisfactory conviction

* To be reported in (1976) 2 C.L.R.

has to be treated either as being unreasonable having regard to the evidence adduced, or as entailing a substantial miscarriage of justice in the sense of section 145 (1) (b) of Cap. 155, or as calling for the exercise of the wide powers conferred on this Court, on appeal, by means of section 25 (3) of Law 14/60. Thus, for example, in *Meitanis* v. *The Republic*, (1967) 2 C.L.R. 31, a basic finding of the trial Court was not upheld on the ground that it was unsafe and unsatisfactory and the conviction of the appellant was set aside as being unreasonable, in the sense of the provisions of section 145 (1) of Cap. 155 (see pp. 41–42 of the report of that case); in *Christodoulides* v. *The Police*, (1968) 2 C.L.R. 226, it was pointed out (at p. 228) that for the appellant to succeed in his appeal he had to satisfy the Supreme Court that the findings of the trial Judge and his assessment of the credibility of the main witnesses were erroneous or in any way unsatisfactory (and see, further, in this respect, *inter alia*, *Vrahimis* v. *The Police*, (1970) 2 C.L.R. 120, 124, *Varnava* v. *The Police*, (1973) 2 C.L.R. 317, 320).

In the light of all the foregoing considerations of fact and of law, we have reached, as already indicated, the conclusion that the conviction of the appellant, on count 17, should be set aside.

We come, next, to the remaining counts on which the appellant was convicted, namely those involving receipts of fees for C.B.C. licences: In the light of what we have already stated in relation to count 17, concerning the close nexus between the issue of the credibility of the appellant and the exclusion of the evidence of Dr. Messis regarding statements made to him by the appellant under narcoanalysis, we feel that it is, also, unsafe to uphold the conviction of the appellant on these counts and that it has, therefore, to be set aside, too. Moreover, in relation to these counts the appellant has put forward an explanation which, if it had been accepted by the trial Court it would have negatived completely the existence of the mental element which was necessary for the commission of the offences in question, and which was, also, consistent with his innocence, namely that his failure to make the necessary entries in the cash-book and other book-keeping transactions was due to pressure of work and that the money involved was kept by him separately without any intention on his part to steal it.

We could go even further and say that, irrespective of the wrongful exclusion of the evidence of Dr. Messis as regards what was said to him by the appellant during the narcoanalytic treatment, we would be inclined to regard the verdict of guilty on the counts concerned as being unreasonable in the light of the evidence as a whole; in this connection, it must not be lost sight of that we are reviewing the verdict of Judges sitting without a jury and we, therefore, have a duty to look at the evidence as a whole and decide for ourselves whether or not their verdict can be said to be reasonable or not; it is useful, in this respect, to refer, by analogy, to the following passage from the judgment of Hilbery J. in *R.* v. *Tucker*, [1952] 2 All E.R. 1074 (at p. 1077):-

> " The Courts-Martial (Appeals) Act, 1951, s. 5 (1), provides as follows:
>
> "'Subject to the provisions of the next following section, on an appeal under this Part of this Act the Court shall allow the appeal if they think that the finding of the Court-martial is unreasonable or cannot be supported having regard to the evidence or involves a wrong decision of a question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal.'
>
> It is right for us to emphasise that an appeal to this Court is not a re-hearing. We do not try the case over again, but when, as here, it is the ground—perhaps the principal ground—of the appeal that the finding in question involved a wrong decision, a decision which was unreasonable and cannot be supported having regard to the evidence, it becomes essential for this Court to investigate the whole of the evidence that was before the Court-martial in order that the Court may ascertain whether the evidence can be regarded as supporting the finding of the Court-martial or whether that finding was not supported, that is to say, established by the evidence, or was unreasonable."

Furthermore, even if an appellate Court is sitting on appeal from a verdict reached by a jury it can still interfere with it if an alternative theory put forward by the defence, which is consistent with the evidence as to the innocence of the appellant,

has been ignored. In *R.* v. *Turkington*, 22 Cr. App. R. 91, Avory J. said the following (at pp. 92-93):-

> " The theory of the prosecution in this case, which must be taken as having been accepted by the jury, was that the woman was evicted from the flat after a quarrel, and that, as she was attempting to get back into the flat through the window, she was violently struck by the appellant, and that the blow caused her to fall into the area.
>
> This Court never interferes with the verdict of a jury on a question of fact, if the jury has been properly directed and if there was evidence on which they could reasonably arrive at their verdict. The defendant was not bound to put forward any theory of death, but we are bound to consider, not only the theory of the Crown, but also the alternative theory that was strongly urged on behalf of the defendant, that the woman slipped on the window sill and so met her death. If that alternative theory was possible and consistent with the evidence, the appellant was entitled to be acquitted. The medical evidence was that the woman's fall might have been brought about by a blow on her chin; but it was qualified by the evidence of another doctor, who admitted that all the symptoms displayed were consistent with a mere fall from the window. There was evidence by the appellant, and nothing to contradict it, that the blow on the woman's chin was given when she was endeavouring to force an entry through the door of the flat and before she climbed on to the window.
>
> On the other point raised on behalf of the appellant—that the appellant was justified in striking the blow in defence of his flat—it is not necessary to express an opinion. The Court is of opinion that the verdict is unreasonable and cannot be supported having regard to the evidence; and in the circumstances the appeal will be allowed and the conviction quashed."

In the result, this appeal is allowed, so that the convictions of the appellant on all counts on which he was found guilty are set aside, but he is convicted, instead, on six counts of forgery, as aforementioned in this judgment.

Court (to counsel for the appellant): Do you want to address us in mitigation of sentence?

Counsel for the appellant addresses the Court.

TRIANTAFYLLIDES P.: It is rather difficult to assess the proper sentence in this case; on the one hand, the offences concerned are serious; on the other hand, while paying due regard to the deterrent aspect of sentencing, we must, as far as possible, individualize the sentence.

In doing so we have to take into account the fact that the appellant is a first offender, he has lost his career with the bank in question due to the events which have led to his conviction, and, also, he has suffered a serious affliction which may possibly recur.

He has tried to make amends by repaying some of the money involved in the offences concerned.

Having taken everything into account, we have decided to impose on him a sentence of eighteen months' imprisonment regarding each one of the six counts on which we have convicted him; the sentences are to run concurrently as from the date when he went to prison in relation to the present case.

Appeal allowed.