1961
Feb. 2,
March 24, 29,
April 19,
May 18

NICOLAS PANTOPIOU LOFTIS
v.
THE REPUBLIC

[O' BRIAIN, P., ZEKIA, J., JOSEPHIDES, J. and TRIANTAFYLLIDES, ACTING J.]

NICOLAS PANTOPIOU LOFTIS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2293).

Criminal Law—Murder—Common Design—Criminal Code, Cap. 154, *section* 21—*Offence committed not relating to common design—Murder by strangulation does not relate to the common design "to frighten G. (the deceased), give him a good beating and let him go".*

Criminal Procedure—Appeal—Conviction of murder quashed—Conviction of unlawful wounding with intent to do grievous bodily harm substituted—Criminal Procedure Law, Cap. 155, *section* 145(1) (c).

Murder—Criminal Code, Cap. 154, *sections* 204, 205 *and* 207 *of the Criminal Code as they stood before their repeal by the Criminal Code (Amendment) Law,* 1962 (*Law of the Republic No.* 3 *of* 1962)—*Section* 205—*Partly unconstitutional in view of paragraph* 2 *of Article* 7 *of the Constitution excluding death sentence with the exception of cases, inter alia, of "premeditated murder"—Lacuna created by that article in the Criminal Code as it stood prior to its amendment by Law No.* 3 *of* 1962—*Necessity to fill the lacuna by legislation.*

Reference to the Supreme Constitutional Court—Article 144 *of the Constitution—Or under Article* 149(*b*) *thereof—How far decisions of the Supreme Constitutional Court on reference under either of those articles are binding.*

Laws in force at the time of the coming into force of the Constitution and contrary to the Constitution—Amendment thereof by any court—Article 188. 4 *of the Constitution—The question to what extent the courts established by the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960) *have power to make such amendments—Left open.*

The appellant together with a certain Varellas were charged before the Assize Court of Nicosia of the murder of a certain Gavrias. The material facts, as found by the Assize Court

were as follows: Varellas asked the appellant to help him "to frighten Gavrias, the deceased, give him a good beating and let him go". The deceased received several blows on the head with a piece of iron and, eventually, was strangled with a rope. The deceased died of asphyxia due to strangulation. The blows on the head although serious were not fatal. Apart from the victim the only persons present at the scene of the crime at the time of the murder were Varellas, a certain Hambis and the appellant. But the trial court was unable to come to a positive finding as to who of the three accomplices actually used the rope to strangle the victim. The Assize Court applying the provisions of section 21 of the Criminal Code convicted the accused (appellant) of the murder of the deceased and sentenced him to death under section 205 of the Criminal Code. Section 21 reads as follows: "When two or more persons form a common intention to prosecute an unlawful purpose in connection with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence".

In the course of the hearing of this appeal appellant's counsel raised the question of the unconstitutionality of section 205 of the Criminal Code, and the matter was referred under Article 144 of the Constitution to the Supreme Constitutional Court which on the 6th March, 1961, ruled that the section to the extent to which it provides for the death penalty for murder other than "premeditated murder" is inconsistent with Article 7, paragraph 2, of the Constitution (see: *The Republic* and *Nicolas Pantopiou Loftis*, 1 R.S.C.C. 30). Paragraph 2 of Article 7 of the Constitution reads as follows:

"No person shall be deprived of his life except in the execution of a sentence of a competent court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law".

Held: (1) The act done must relate to the common design and not totally or substantially vary from it.

Regina v. Macklin (1838) 2 Lewin 225; 168 E.R. 1136, and *Aziz Dervish and another v. Rex* (1942) 18 C.L.R. 25, *followed.*

(2) (O' BRIAIN, P. *dissenting*): (a) In the present case the trial court was unable to come to a positive finding as to who of the three accomplices actually used the rope to strangle the victim. On the other hand the victim died not as a result of the blows he received on the head but of asphyxia by strangulation with a rope. Taking into account all the circumstances of this case we are not prepared to hold that the strangulation relates to the common design "to frighten the deceased and give him a good beating and let him go". We are of the opinion that the act of strangulation totally or substantially varies from the common design, and in those circumstances the appellant cannot be deemed to have committed the offence of murder. We, therefore, set aside his conviction of murder.

(b) But in this case the appellant admits that he went to the forest with Varellas after the latter had told him that he wanted to frighten the victim and give him a good beating; that he knew that Varellas might have to use violence and that he agreed to go to the forest. On the other hand, according to the medical evidence, five serious wounds were inflicted on the head of the deceased with a piece of iron before he was strangled to death. Therefore, in the exercise of our powers under the Criminal Procedure Law, Cap. 155, section 145 (1) (c) and applying the provisions of section 21 of the Criminal Code we convict the appellant of the offence of unlawfully wounding Gavrias (the victim) with intent to do him grievous bodily harm, contrary to section 228 (a) of the Criminal Code, and we sentence him to twenty years' imprisonment.

Appeal allowed. Conviction of murder quashed. Appellant convicted of unlawful wounding with intent to do grievous bodily harm and sentenced to twenty years' imprisonment.

Cases referred to :

Regina v. Macklin (1838) 2 Lewin 225; 168 E.R. 1136.

Aziz Dervish and another v. Rex (1942) 18 C.L.R. 25.

Regina v. Sfongaras (1957) 22 C.L.R. 113.

Rex v. Sykes 8 Cr. App. R. 233.

The Republic and *Nicolas Pantopiou Loftis* (case No. 8/61 of the Supreme Constitutional Court) now reported in 1 R.S.C.C. 30.

Per curiam: Had the deceased died of the blows he received on the head, the killing could be held to be a natural consequence of that common design to assault, and therefore the act of the appellant would come within the provisions of section 21 of the Criminal Code and render him liable for murder.

Quaere, whether a murder in those circumstances would amount to a capital murder, in view of paragraph 2 of Article 7 of the Constitution.(1)

Per O' BRIAIN, P.: (TRIANTAFYLLIDES, Acting J., concurring): (1) Two questions in particular raised important issues. First, whether the Criminal Code, in so far as it does not contravene the Constitution, may be interpreted and applied by any tribunal other than the courts established by the Courts of Justice Law 1960 and the High Court of Justice established by Part X of the Constitution. Secondly, whether in applying a law which was in force on the 16th August last, any court may make a modification therein for the purpose of filling a *lacuna* in the law, as distinct from doing what is strictly necessary to provide that the law shall conform with the Constitution. I refrain from expressing an opinion on these questions in the present case but I desire to hold myself free to consider them if and when they arise for decision in the future.

(2) If the Legislature were to see fit to enact, in the near future, a short measure dealing with the *lacuna* created in the Criminal Code by the enactment of Article 7, paragraph 2, of the Constitution not merely would it thereby remove much uncertainty amongst practitioners and others concerned with trials on charges of murder but the likelihood of a conflict between the Courts with far reaching consequences, would be obviated.

Per TRIANTAFYLLIDES, Acting J.: I desire to associate myself fully with the course followed by the President in stressing the necessity for early legislative action to remedy

(1) *Quaere*, also, whether the dictum just quoted would be still good law now in view of the repeal of sections 203 to 207 of the Criminal Code by the Criminal Code (Amendment) Law, 1962, (Law No. 3 of 1962), and the new provisions substituted therefor by that law.

the situation resulting from the unconstitutionality in part of section 205 of the Criminal Code, Cap. 154. As a matter of fact in view of paragraph 3 of Article 144 of the Constitution the decision of the Supreme Constitutional Court in its case No. 8/61 (*supra*), which was given on a reference made by this Court in this appeal under the said Article 144, is not binding on a criminal court in another case of this nature. It is only binding on such a criminal court to the extent of being a decision under Article 149(b) of the Constitution, so as to enable the Court in question to comply in a proper case, with the provisions of paragraph 4 of Article 188 of the Constitution. This roundabout way of giving effect to a basic principle of the Constitution in a matter of such grave importance should not be allowed to continue any longer than it is absolutely necessary for the legislative authorities of the Republic to re-enact this part of the law in a manner conforming to the Constitution.

Appeal against conviction.

The appellant was convicted on the 5th December, 1960, at the Assize Court of Nicosia (Criminal Case No. 7308/60) of the murder of a certain Gavrias and was sentenced by Vassiliades, J., Pierides and Hji Anastassiou, D.JJ. to death under section 205 of the Criminal Code.

George Ioannou Pelagias for the appellant.

K.C. Talarides for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of JOSEPHIDES, J. The following judgments were read:—

O' BRIAIN, P. : There is upon the record in this case, in my opinion, ample evidence, if it be accepted, to warrant the Assize Court in coming to the conclusion that the Appellant was guilty of the murder of Charalambos Nicola Kaizer, alias Gavrias.

It is manifest, however, that the sentence of death imposed cannot stand unless it be held that this murder was premeditated. On the assumption that it was so held, the question arises, could an accused person at any time since the Constitution came into force up to the present be convicted

of premeditated murder upon the information filed in this case. Counsel for the Republic has argued that the substantive offence of murder remains unchanged and that it follows from that view of the law that the question of premeditation only becomes germane when the question of sentence arises. Can it be that the Criminal Code of Cyprus, properly interpreted, leaves a citizen charged with murder uncertain as to whether or not his life is at stake until after he has been charged, returned for trial, tried and convicted? Even then, does the Court listen to plea of mitigation or not ? If, on a full consideration of the relevant provisions of the Criminal Code, it appears that that is what the law provides, it becomes the duty of the Judges exercising criminal jurisdiction to apply that law without question or qualification, however deplorable they may believe such a state of affairs to be. However, the decision of the majority of the Court makes it unnecessary to decide in this appeal this and several other matters referred to in the arguments during the courrse of the case.

Two questions in particular raised important issues. First, whether the Criminal Code, in so far as it does not contravene the Constitution, may be interpeted and applied by any tribunal other than the courts established by the Courts of Justice Law 1960 and the High Court of Justice established by Part X of the Constitution. Secondly, whether in applying a law, which was in force on the 16th August last, any court may make a modification therein for the purpose of filling a lacuna in the law, as distinct from doing what is strictly necessary to provide that the law shall conform with the Constitution. I refrain from expressing an opinion on these questions in the present case but I desire to hold myself free to consider them if and when they arise for decision in the future.

May I say that if the Legislature were to see fit to enact, in the near future, a short measure dealing with the lacuna created in the Criminal Code by the enactment of Article 7, paragraph 2, of the Constitution not merely would it thereby remove much uncertainty amongst practitioners and others concerned with trials on charges of murder but the likelihood of a conflict between the Courts with far reaching consequences, would be obviated.

Finally, I would say that I regard the sentence proposed by the other members of the Court not excessive having regard to the offence of which they consider the appellant should be convicted.

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ZEKIA, J. : I associate myself with the judgment which is about to be delivered by my brother, Mr. Justice Josephides.

JOSEPHIDES, J. : This appellant together with a man called Varellas was convicted at the Nicosia Assizes of murder under sections 204, 205 and 20 of the Criminal Code, Cap. 154, and was sentenced to death. He now appeals against conviction.

Varellas also filed a notice of appeal, but as he withdrew his appeal before the date of hearing we are not concerned with his case.

In the course of the hearing of this appeal appellant's counsel raised the question of the unconstitutionality of section 205 of the Criminal Code, and the matter was referred to the Supreme Constitutional Court which, on the 6th March, 1961, ruled that that section to the extent to which it provides for the death penalty for murder other than premeditated murder is inconsistent with paragraph 2 of Article 7 of the Constitution (Case No. 8/61).[1]

The main ground of appeal upon which this appeal has been argued before us is that the conviction is "against the weight of evidence", which, strictly speaking, should be taken to mean that the conviction was unreasonable having regard to the evidence adduced (see Section 145(1) (b) of the Criminal Procedure Law, Cap. 155).

The facts as found by the Assize Court are that in the afternoon of the 12th May, 1960, one Haralambos Nicola Kaiser alias Gavrias of Eylendja was found murdered in his van parked near the Elementary School of Neapolis. The cause of death was asphyxia by strangulation caused by a tight rope found round the neck of the deceased. The deceased had also five wounds on the head inflicted by a piece of iron before he was strangled with the rope. According to the medical evidence those wounds could not cause death directly, and in any event, they were not the cause of the victim's death. They were serious but not fatal. The man might have died of haemorrhage if left without assistance, but none of the wounds would cause immediate death.

The deceased was killed on the 11th May, 1960, at locality Laoudia of Athalassa forest, near Eylendja, and he was subsequently put in his van by Varellas and the appellant

(1) Now reported in 1 R.S.C.C. 30.

who drove the van as far as the Elementary School of Neapolis, where the dead body was found on the following day. The court further found that Varellas prompted by his feelings towards the deceased in connection with the latter's behaviour towards his (Varellas's) son, conceived a plan to frighten and punish deceased so as to put an end to the moral dangers to which, in his opinion, his son was exposed. With this plan in mind Varellas met the appellant, with whom he was on friendly terms, and asked him to help him. Varellas's plan was to entice the victim to Athalassa forest by arranging for a boy, named Hambis Kyriacou, aged 17, to go with them to the forest. It was stated that deceased was very keen on the boy and that he would go anywhere to meet him in order to satisfy his immoral desires.

Varellas denied going to the forest, but both the appellant and the boy Hambis admit going there. There are two versions as to what actually took place in the forest : the version of the appellant and that of Hambis. The trial court treated both of them as accomplices, each one trying to shift the blame to the other and Varellas. According to the evidence adduced, apart from the victim, the only persons present at the scene of the crime at the time of the murder were Varellas, Hambis and the appellant. The trial court found that the attack was led by Varellas and that after repeated blows on the head with a piece of iron the victim was finally killed by strangulation with a rope.

Appellant was arrested two days after the finding of the dead body, *i.e.* on the 14th May, and he was kept in custody in the police station where after being identified by Hambis three days later (on the 17th May) he made a voluntary statement which he retracted at the trial. The trial court after hearing evidence on the issue of voluntariness held that it was a voluntary one and admitted it in evidence. In that statement appellant admitted that Varellas in the presence of Hambis disclosed to him the details of the plan which he (Varellas) conceived to strangle the victim in the forest ; and that he (appellant) went to the forest as arranged, that he saw Varellas striking the victim on the head with a piece of iron three to four times, that the deceased fell down and Varellas then passed a rope round his neck and strangled him, that, on being threatened by Varellas, appellant helped him put the victim in the van and that he then drove it to a place outside the Neapolis Elementary School.

In his evidence before the Assize Court the appellant admitted that he was present, but he contended that his presence was not intended to help the commission of the murder, nor did he take any part in the crime. Appellant stated that he went to the scene of the crime at the request of Varellas who wanted to teach the victim a lesson to respect his friends' children. Varellas wanted to "frighten" the victim because the latter attempted to interfere with his son Demetrakis. On being asked what sort of frightening did Varellas mean, appellant stated that Varellas told him that he intended giving the deceased "a good beating" and let him go ; and he (Varellas) added "I would like you to be there. Your presence will frighten him more" ; and that the appellant replied "very well, if this is going to help you I will go as far as there". In cross-examination appellant admitted that Varellas "might have to use violence".

Appellant further stated in evidence that after waiting in the forest, where he had gone first at about 6 p.m. he saw the victim's van arrive there with headlights on. The victim, Varellas and Hambis then alighted and before appellant had time to approach he heard Varellas accusing the deceased of indecent behaviour with his (Varellas's) boy, and at the same time he heard blows ; and that on going nearer he saw that the victim was on the ground near the van, and Varellas with Hambis were bending over the victim's head. Varellas then angrily ordered him (appellant) to get near and give a hand if he did not want to have the victim's fate ; and frightened as he was he helped, he says, in carrying and placing the dead victim into the van and he then drove the van to the place where it was found on the following day. Appellant finally stated that before leaving the place of the crime, again obeying Varellas's orders, he drew out a bundle of papers from the victim's pocket which he later delivered, as they were, to Varellas. He also helped, together with Hambis, cover with earth the blood on the ground.

When the trial court came to examine the confession of the appellant to the police, and the surrounding circumstances, with a view to ascertaining its weight and value, and whether it could be relied upon as a statement of truth, they were of opinion that it contained "a great deal of truth", but that it was not at all certain that it was not made for the purpose of securing for the appellant "the favour and help of the officer to whom it was made", and for that reason it

appeared to the court "to contain many inaccuracies, and probably lies". The Court taking the view that it could not rely on that statement "as a statement containing the truth and nothing but the truth, advanced without any ulterior motive", considered that it could not safely be acted upon as being true (see *Regina v. Sfongaras* (1957) 22 C.L.R. 113 at p. 120 ; *Rex v. Sykes*, 8 Cr. App. R. 233, 236). The trial court finally held that in substance the evidence of the appellant in court was true.

Counsel for the Republic submitted that the trial court ought to have relied on the appellant's confession and invited this Court to act on it. The appellant gave evidence on oath and was cross-examined for two days before the trial court which, after weighing his evidence as against that of Hambis, accepted that in substance his (appellant's) evidence was true and chose not to act on his confession to the police. As regards the eye-witness Hambis Kyriacou, the Court held that he was an accomplice in the commission of the offence and they stated in their judgment that on his evidence alone they would not be prepared to act.

As there is no ground whatever for suggesting that the trial court failed to use or has misused the advantage of seeing and hearing the witnesses, and of weighing their testimony, we feel unable to accept the submission of counsel for the Republic that we should act on the appellant's confession in preference to his evidence before the trial court.

On the evidence which they accepted, the Assize Court held that when appellant went to the forest —

> "he knew that force might be used there against the victim, which might cause grievous bodily harm. Though the Court is unable to come to a positive finding as to who of the three accomplices actually used the rope for the strangulation of the victim, nevertheless, the Court holds that the conduct of the accused (appellant) during the commission of the murder and soon after as described above, amounts to complicity in the commission of the crime".

And the unanimous verdict of the Court was that both appellant and Varellas were guilty of murder.

After giving very careful consideration to the evidence in this case and the very exhaustive judgment of the trial

court we have, with considerable hesitation, come to the conclusion that we cannot support the finding of the court.

As the trial court was unable to come to a positive finding as to who of the three accomplices actually used the rope to strangle the victim, in order that the appellant may be found guilty of murder it must be proved or inferred from the evidence that he and Varellas formed a common intention to prosecute an unlawful purpose and in carrying it out the deceased was killed, and that the killing was a probable consequence of the prosecution of such purpose, within the provisions of section 21 of the Criminal Code. It is a well-settled principle of law that if persons have agreed to waylay a man and rob him, and they come together for the purpose armed with deadly weapons, and one of them happens to kill him, every member of the gang is held guilty of the murder. But if their agreement had merely been to frighten the man, and then one of them went to the unexpected length of shooting him, such a murder would affect only the particular person by whom the shot was actually fired. The act done must relate to the common design and not totally or substantially vary from it : See *Regina v. Macklin* (1838) 2 Lewin 225; 168 E.R. 1136, where there was a common intent to frighten, but no common intent to attack.

In Aziz Dervish and another v. Rex (1942) 18 C.L.R. 25, it was held that if there is a common design to assault the deceased with walking sticks, the killing with a knife is not a natural consequence of that common design to assault, and therefore the act of the one assailant of striking the deceased with a walking stick did not come within section 22 (now section 21) of the Criminal Code and render him liable for murder.

It will be seen that the act done must relate to the common design and not totally or substantially vary from it.

In the present case the trial court accepted in substance the evidence of the appellant. His evidence was to the effect that Varellas told him that he wanted to "frighten" the deceased and that he intended to give him "a good beating and let him go". In cross-examination, on being asked by counsel for the Republic "You knew that he might use violence for that purpose?" Appellant replied : "I knew he might have to use violence".

Now, had the deceased died of the blows he received on the head, the killing could be held to be a natural consequence of that common design to assault, and therefore the act of the appellant would come within the provisions of section 21 of the Criminal Code and render him liable for murder. But in this case the cause of death was asphyxia by strangulation with a rope. Having considered all the circumstances of this case, we are not prepared to hold that the strangulation relates to the common design to frighten the deceased and give him a good beating and let him go. We are of opinion that the act of strangulation totally or substantially varies from the common design, and in those circumstances the appellant cannot be deemed to have committed the offence. We, therefore, set aside his conviction of murder.

It now remains for us to consider whether, in exercise of our powers under s.145(1)(c) of the Criminal Procedure Law, Cap.155, we may convict the appellant of any offence of which he might have been convicted by the trial court on the evidence adduced.

As already stated, the appellant admits that he went to the forest after Varellas had told him that he wanted to frighten the deceased and give him a good beating, that the appellant knew that Varellas might have to use violence and that he agreed to go to the forest. According to the medical evidence, five serious wounds were inflicted on the head of the deceased with a piece of iron before he was strangled to death. Although those wounds were serious, none of them would cause immediate death, but the victim might die of haemorrhage if left without assistance.

Having regard to the evidence adduced and considering the nature of the wounds on the victim's head, and the instrument used, we have no hesitation in finding the appellant guilty of unlawfully wounding the said Gavrias with intent to do him grievous bodily harm, contrary to section 228(a) of the Criminal Code, and we convict him accordingly.

The maximum punishment provided by law for the felony of which the appellant has been found guilty is imprisonment for life. In passing sentence we have taken into account the nature of the cowardly attack and the number of injuries inflicted on the victim, as well as the appellant's role in the disposal of the body. In the circumstances of this case, we

consider that the appropriate punishment would be twenty (20) years imprisonment, and we sentence the appellant accordingly. Sentence to run from the date of conviction, i.e. 5th December, 1960.

TRIANTAFYLLIDES, Acting J. : I have had the advantage of perusing in advance the jugments of the President of the Court and of Mr. Justice Josephides.

I fully concur with the course followed by the President of the Court in expressly drawing attention to the questions of law which he has left open. The sooner such questions are determined by the proper Court in an appropriate case the easier it will be to apply the provisions of the Constitution involved therein.

I further desire to associate myself fully with the course followed by him in stressing the necessity for early legislative action to remedy the situation resulting from the unconstitutionality in part of section 205 of the Criminal Code, Cap. 154. As a matter of fact in view of paragraph 3 of Article 144 of the Constitution the decision of the Supreme Constitutional Court in its Case No. 8/61 (*supra*) which was given on a reference made by this Court in this appeal under the said Article 144, is not binding on a criminal court in another case of this nature. It is only binding on such a criminal court to the extent of being a decision under Article 149(b) of the Constitution, so as to enable the court in question to comply, in a proper case, with the provisions of paragraph 4 of Article 188 of the Constitution. This roundabout way of giving effect to a basic principle of the Constitution in a matter of such grave importance should not be allowed to continue any longer than it is absolutely necessary for the legislative authorities of the Republic to re-enact this part of the law in a manner conforming to the Constitution.

On the other hand I am glad to say that I somehow do not share the anxiety of the President of the Court when he speaks about "the likelihood of a conflict between the Courts, with far reaching consequences". I feel confident that no such conflict, which would certainly be most undesirable, is likely at all to arise so long as all members of the judicial service of the Republic continue to carry out in accordance with the Constitution their respective and, in their own way, equally important duties, having primarily at heart the wider

interests of the administration of justice and the maintenance of the Rule of Law in the Republic.

Should, however, such a conflict or rather a bona fide contest of competence or power ever arise it is a consolation to remember that ample provision exists in the Constitution, under Article 139, for resolving such a situation without necessarily incurring the risk of any far reaching consequences whatsoever.

In concluding I wish to state that I agree in substance with the judgment delivered by Mr. Justice Josephides.

Appeal allowed. Conviction of murder quashed. Appellant convicted of unlawful wounding with intent to do grievous bodily harm and sentenced to twenty years' imprisonment.