[O' BRIAIN, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

IOANNIS MICHAEL PEFKOS AND OTHERS

Appellants,

v.

THE REPUBLIC

Respondent.

(*Criminal Appeals Nos.* 2396, 2397 *and* 2398).

Criminal law—Attempted murder—The Criminal Code, Cap. 154, *section* 214(a)*—Actual intent to kill is a necessary ingredient of the offence—Intention merely to use violence or to inflict grievous bodily harm, not sufficient—Notwithstanding that if death were to result, the perpetrator could have been found guilty of murder—Intent to kill as distinct from "malice aforethought"—Sections* 204 *and* 207 *of the Criminal Code, Cap.* 154, *prior to the amending Law No.* 3 *of* 1962*—"Malice aforethought" comprises many instances outside actual intent to kill.*

Intent to kill—Must be proved—Usually inferred as a fact from surrounding circumstances of each particular case—Burden of proof being throughout on the prosecution—Intent to kill must be the only reasonable inference—The presumption of law "a man must be taken or presumed to intend the natural consequences of his acts"—Meaning and scope—"Overall intention", "actual intent" or "desire or purpose".

Parties to crime — Common design — Criminal Code, Cap. 154, *sections* 20 *and* 21.

Sentence—Several offences charged—Where accused is found guilty of several offences and the component parts of the heavier offence form part and parcel of the other offences of less gravity, the correct course is to record convictions on the lesser or subsidiary ones but not to pass sentence on them—Sentence on the heavier offence sufficient—Otherwise the principle that a person should not be punished twice for the same act or omission would be offended—Which is against Article 12, *paragraph* 2, *of the Constitution, section* 19 *of the Criminal Code, Cap.* 154 *and section* 40(3) *of the Criminal Procedure Law, Cap.* 155.

The appellants waylaid the car of a company in order to rob its cashier who was travelling in that car and carrying with him a considerable amount of money. On seeing the car approaching the place where the appellants were hiding themselves, two of them emerged therefrom and signalled

to the car to stop. The car did not and went on past them. Thereupon, one of the appellants (not identified) fired twice at the car from a close distance. A bullet smashed the window pane, penetrated the car and hit the back of the head of the cashier who, although injured, was able to pick up the bullet which had hit him. The first appellant and one of the other two were found in possession of a pistol and a revolver, respectively, and of live rounds of ammunition. All three appellants were charged before the Assize Court sitting at Limassol on an information containing eight counts as follows: On count 1 with the attempted murder of the cashier; on count 2 with the attempted murder of a Police Officer who took part in the chase; on count 3 with attempted armed robbery and on counts 4 to 8 with possessing and using a pistol, with possessing and using a revolver and with possessing rounds of ammunition. All three appellants, who pleaded not guilty, were acquitted of the charge on count 2, but were convicted on all the remaining seven counts as charged and were sentenced to the following sentences:

The first appellant to twenty years' imprisonment on count 1 (attempted murder of the cashier), the other two appellants to eighteen years' imprisonment on the same count; all three appellants to fourteen years' imprisonment on count 3 (attempted armed robbery), and to four, five, four, five and two years imprisonment on each of the remaining counts 4 to 8, respectively, all sentences to run concurrently.

The first appellant appealed against all his convictions as well as against all the sentences imposed on him. The second and third appellants appealed only against their sentences. It was argued on behalf of the first appellant that he was wrongly convicted of the attempted murder on the ground, *inter alia*, that intent to kill had not been established. Section 204 of the Criminal Code, Cap. 154 (as it stood before the amending Law No 3 of 1962) provided: "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder". "Malice aforethought" was defined by section 207 of the Criminal Code prior to the amending Law No. 3 of 1962 (*supra*) as follows:

"Malice aforethought shall be deemed to be established by evidence proving whether expressly or by implication any one or more of the following circumstances:-

(a) An intention to cause the death of or to do grievous

harm to any person, whether such person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although, such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony when in the circumstances the commission of such felony is dangerous to life and likely in itself to cause death

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony".

Held:- As to the conviction of appellant No. 1 of attempted murder.

(1) In cases of murder, the "malice aforethought" required by the Criminal Code, Cap. 154, sections 204 and 207 (*supra*) may be established irrespective of, and quite apart from, any intent to kill. On the contrary, the offence of attempted murder always involves an actual intent to kill and that intent is the principal ingredient of the crime. An intention merely to use violence or to do grievous harm, does not suffice, notwithstanding that if death were to result therefrom the person so using violence or inflicting harm could be found guilty of murder. This principle was laid down in the case of *R. v. Whybrow*, 35 Cr. App. R. 141, at p. 146, *per* Lord Goddard, C.J., and was followed and applied by this Court in the case of *Nicolas Georghiou Kkolis v. The Republic*, Criminal Appeal No. 2291, decided on March 29, 1961; (Note: now reported in this volume at p. 53, *ante*)

(2) *Per ZEKIA, J.:* Had this attack caused the death of any of the occupants of the car, the man who fired the shot, whether he intended to kill or not, would have committed murder and his companions involved in the felonious adventure would have also been guilty of murder. Intent to kill is not a necessary ingredient in all cases of murder. "Malice aforethought" however is the necessary ingredient but this phrase as defined in section 207 of the Criminal Code comprises many instances which have nothing to do with an actual intent to kill.

(3) The intent to kill must be proved to the Court's satisfaction, the burden in that regard being throughout on the prosecution.

(4) Although intent to kill can be inferred as a fact from the surrounding circumstances of a particular case, it is not sufficient that such an inference is a reasonable one; it should be the only reasonable inference that can be drawn from the facts. If on a review of the whole evidence, the Court either think the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.

Statement of the law in *Reg. v. Nicos Sampson Georghiades* (No. 2) (1957) 22 C.L.R., 128, at p. 133 and in *R. v. Steane* (1947) K.B. 997, at p. 1004, *per* Lord Goddard, C.J., *adopted.*

(5) (VASSILIADES, J., *dissenting*): (A) In the instant case the trial court did not direct their mind to the question of intent to kill. In fact there is no finding of the Court in their judgment on this point. On the totality of the evidence in the case there is room for three or four views as to the intent in firing at the complainant. As on a review of the whole evidence, the Court would be left in doubt as to the actual intent, the conviction on the charge of attempted murder should be set aside.

Principles laid down in *Sampson's* case (*ubi supra*) and in *Steane's* case (*ubi supra*), *applied.*

(B) For the reasons stated above, and having regard to the convictions of the first appellant on the other counts which must be affirmed, his conviction on count 1 of the attempted murder must be set aside without ordering a retrial or considering whether he should be convicted of any lesser offence.

(6) *Per JOSEPHIDES, J.:* (A) It was argued on behalf of the prosecution that on the authority of the recent case *Reg. v. Smith* (1960) 3 W.L.R. 92, intention can usually be determined inferentially from the surrounding circumstances, including the presumption of law that a man intends the natural and probable consequences of his acts. But it should be borne in mind that the Court of Criminal Appeal in that case were considering the summing up of the trial Judge in a case of murder. The House of Lords subsequently restated that proposition in the following terms (*D.P.P. v. Smith* (1960) 3 W.L.R. 546, at p. 547:

"It is immaterial what the accused in fact contemplated as the probable result of his actions, provided he is in law responsible for them in that he is capable of forming an intent, is not insane within the M' Naghten Rules and cannot establish diminished responsibility. On that assumption, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result and the only test of this is what the ordinary responsible man would. in all the circumstances of the case, have contemplated as the natural and probable result.

Once the accused's knowledge of the circumstances and nature of his acts has been ascertained, the only thing that can rebut the presumption that he intends the natural and probable consequences of those acts is proof of incapacity to form an intent, insanity or diminished responsibility. The test of the reasonable man, properly understood, is a simpler criterion than that of the "presumption of law" and contains all the necessary ingredients of malice aforethought".

Unless the House of Lords has by inference overruled the existing authorities, a man cannot be convicted of wounding with intent to murder, unless his attitude of mind was such that he intended to kill. *Smith's* case does not overrule *Steane's* case (*supra*) but distinguishes it on the basis that the principle restated in that authority (*R. v. Steane*) is confined to cases in which an actual or overall intent or desire has to be proved (*D.P.P. v. Smith*, (*supra*) at page 558). Such cases do not include cases of murder, but they are confined to cases like *R. v. Steane*, and cases of attempted murder, or wounding with intent to murder, such as *R. v. Whybrow* (*supra*) where the intent is the principal ingredient of the crime.

(B) Where on a true construction of a statute "intent" equals "desire" or "purpose" as in the case of attempted murder, or wounding with intent to do grievous bodily harm, then the rule laid down by Lord Goddard in *R. v. Steane* would be applicable, (1947) K.B. at p. 1004) *i.e.* "if, on a review of the whole evidence (the jury) either think the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted". As Lord Denning (a member of the House of Lords in the *Smith's* case) said recently, there is nothing illogical or inconvenient about interpreting "intent" in some statutory offences to mean *desire* or *purpose*, whereas

in murder cases it means not only desire or purpose but includes an intentional act done with *knowledge* of the probable consequences. ("Responsibility before the Law" by Lord Denning (1961), page 28).

(7) *Per VASSILIADES, J.* in his partly dissenting judgment: (A) Now coming to the count for attempted murder (count 1), the Court had similarly to find from the conduct of the gunman who fired the wounding shot, the *mens rea* and the *actus reus* required to establish the attempt charged. The Court had to find the *mens rea*, i.e. the intent to cause the death of another, required by section 214; and, furthermore, to find the *actus reus* necessary to establish sufficiently in law, the crime of attempted murder charged.

The carrying of the revolver in those circumstances might be an act indicating an intent to cause death; but it would not, in itself be an *actus reus* sufficient to establish an attempt to kill. Similarly the loading of the revolver might be a step further in carrying out the intent to cause death; but it might again fall short of constituting the *actus reus* required to establish the crime under s. 214.

But the gunman in this case did not stop at the carrying of a loaded revolver. He showed what was his "intent" in so carrying it, when, seeing that the car did not obey the signal to stop, the gunman raised his hand, aimed at the car as it was passing within a few paces from him, and pulled the trigger well knowing that that would cause a bullet to hit the car more or less at the part aimed at, that is to say at the glass of the side-door, behind which the cashier (or another person of his party) was sitting. There was no suggestion at the trial that the person sitting near the glass window could not be seen. That same person (the cashier, P.W.4) was asked by counsel for the appellant, in cross-examination, to describe the gunman's moustache.

In fact a bullet did go out of the gunman's weapon, as intended, and piercing the glass-window, wounded the cashier on the head. Surely, if the cashier died in consequence of that wound, the killing would amount to murder; causing the death of another with intent.

The trial court found from the series of the gunman's acts ending with the pulling of the trigger, in the circumstances, both, the *mens rea* required by s. 214, and the *actus reus* sufficient to establish the attempt, as required by law.

The conviction on the count for attempted murder - a unanimous conviction by a court of three legally qualified and experienced judges - to me clearly indicates that the evidence satisfied the court, beyond reasonable doubt, on both elements of the crime.

(B) In my opinion, this Court can only set aside that conviction, if the Court is prepared to hold that the firing of the weapon, in the circumstances, cannot reasonably lead to the conclusion reached by the trial court. That is to say, that the trial court could not reasonably find an intention to cause death, in the act of an armed robber, firing his weapon at his intended victim from a close position, in the circumstances shown by the evidence in this case, and actually wounding the victim on the head.

I find myself completely unable to share such view of the facts. I may add that I cannot see how the trial court could reasonably reach any other conclusion, as to the crime committed by the gunman who fired the wounding shot.

Held:- As to the conviction of appellant No. 1 on the other counts:

There was ample evidence supporting those convictions.

Held as to the sentences: (1) Sentence of first appellant on count 3 (armed robbery), fourteen years' imprisonment, affirmed.

(2) Sentence of second and third appellants on count 1 (attempted murder) and count 3 (armed robbery), eighteen and fourteen years' imprisonment, respectively, being manifestly excessive, in view of the lesser role they played in the commission of the crime, reduced to ten years' imprisonment on each count, to run concurrently.

(3) The sentences passed on all three appellants on counts 4 to 8 should be set aside on the following ground: Although the charges on those counts (carrying and using a pistol and a revolver, and possessing rounds of ammunition) have been proved and the appellants are technically guilty on those charges, nevertheless, as the same facts and circumstances formed part and parcel of the attempted robbery charged and of which the appellants have been convicted and sentenced, no sentence should have been passed upon those counts,

otherwise the Court might be taken to have punished twice a person for the same act or omission which is expressly forbidden by the Criminal Code, Cap. 154, section 19 *, Article 12, paragraph 2, of the Constitution ** and the Criminal Procedure Law, Cap. 155, section 40(3).***

Appeal of first appellant against his conviction on count 1 allowed. His appeal against the other convictions dismissed. His appeal against sentence on count 3 (attempted armed robbery) dismissed: against sentences on the remaining counts allowed. Appeals against sentence of the second and third appellants on counts 1 and 3 allowed. Their sentences on those counts reduced to ten years' imprisonment on each count, to run concurrently. Sentences on the remaining counts set aside.

Cases referred to:

Nicolas Georghiou Kkolis v. The Republic, Criminal Appeal No. 2291, reported in this Volume at p. 53, *ante;*

Reg. v. Nicos Sampson Georghiades (No 2) 22 C.L.R. 128;

R. v. Steane (1947) K.B. 997;

Reg. v. Smith (1960) 3 W.L.R. 92;

D.P.P. v. Smith (1960) 3 W.L.R. 546;

R. v. Whybrow 35 Cr. App. R. 141;

R. v. Appleby 28 Cr. App. R. 1.

---

* Section 19 of Cap. 154 "A person cannot be twice criminally responsible either under the provisions of this Law or under the provisions of any other Law for the same act or omission, except....."

** Paragraph 2 of Article 12 of the Constitution reads as follows: "A person who has been acquitted or convicted of an offence shall not be tried again for the same offence. No person shall be punished twice for the same act or omission except where death ensues from such act or omission".

*** Section 40(3) of Cap. 155: "If the Court convicts the accused generally on the whole charge, the legal effect of such conviction shall be to convict him on each of the counts contained therein and the Court may, thereupon, pass upon him the same sentence as if he had been separately convicted on every such count:

Provided that not more than one sentence shall, in any case, be passed upon any person upon the same facts."

1961
Sept. 29,
Oct. 19, 20,
Dec. 8

IOANNIS MICHAEL PEFKOS & OTHERS
v.
THE REPUBLIC

Appeal No. 2396 against conviction and sentence.

Appeals Nos. 2397 and 2398 against sentence.

The appellants were convicted on the 10th July, 1961 at the Assize Court of Limassol (Criminal Case No. 3402/61) on seven counts of attempted murder, attempted armed robbery, possessing and using a pistol and a revolver, and possessing explosive substances, and were sentenced by Michaelides, P.D.C., and Limnatitis and Demetriou, D.JJ. to the following sentences : First appellant to 20 years' imprisonment on the count for attempted murder, 14 years' imprisonment on the count for attempted armed robbery and to 4, 5, 4, 5 and 2 years' imprisonment, respectively, on the remaining counts, sentences to run concurrently.

The second and third appellants were sentenced each to 18 years' imprisonment on the counts for attempted murder, to 14 years' on the count for attepted armed robbery and to the same terms of imprisonment as the first appellant on the remaining counts, all sentences to run concurrently.

Lefkos Clerides for the appellants.

Ach. Frangos, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of VASSILIADES, J.

O' BRIAIN, P.: I have read the judgment which Mr. Justice Vassiliades is about to deliver and I am in agreement with same, except as regards the conviction of the appellant Ioannis Pefkos on count 1, attempted murder of the cashier Xenis, contrary to section 214(a) and 20 of the Criminal Code. The facts are fully set out in that judgment and I need not here state them. The offence of attempted murder involves an intent to kill and that intent is the principal ingredient of the crime. An intention merely to use violence or to inflict harm, does not suffice notwithstanding that if death were to result therefrom the person so using violence or inflicting harm could be found guilty of murder.

This matter was considered by this Court in the case of *Nicolas Georghiou "Kkolis"* (*Criminal Appeal* 2291) *v. The Repubic*. In that case, this court laid it down that where

the charge is one of attempted murder, the trial Court must specifically consider the issue whether or not the accused had formed the intention to kill. In England, the matter has been considered by the Court of Criminal Appeal in *Whybrow's* case, 35 Cr.App.R. 141 at page 148. In that case one of attempted murder by administering an electric shock the trial Judge had charged the jury as follows:

> "You will notice there, members of the jury, that I said if you are satisfied that, first of all, he made those connections with the wires and, secondly, that he intended to kill *or do grievous bodily harm*"
>
> "If you are satisfied beyond all reasonable doubt that on that evening of the 30th April he did connect up this wire in such a way that it would pass the domestic supply in the skirting of the bedroom along the wire to the socket in the cupboard, which in turn was connected with the soap dish, and if you are further satisfied that in doing that he intended to kill his wife or to do her grievous bodily harm, then he would be guilty of attempted murder".

The Court of Criminal Appeal held that that was clearly a misdirection and that the jury should have been told that the essence of the offence was the intent to murder.

It seems to me that, from the evidence on record in this case, at least three different intentions might be attributed to the assailant when firing the pistol. (1) The intention to halt the passing car; (2) the intention to wound or maim the occupants in the car ; (3) an intention to kill them. It was the duty and function of the trial Court to consider the matter in the light of all the evidence given before them and to state expressly on the record what inference, if any, they were prepared to draw with respect to that assailant's intent, the principal ingredient and the very essence of the crime. The record does not show that the trial Court addressed its mind at all to the question. There is no express finding as to what was the specific intent of the assailant at the time he fired the pistol. By reason of this omission on the part of the trial Court, the conviction for attempted murder cannot stand in my opinion. It would be open to this Court to order a new trial of the appellant upon that ground. But, having regard to the convictions of the accused on the other counts which must be affirmed for the reasons to be given by Vassiliades J., and to the views of all the members of this Court regard-

ing the sentence to be imposed, I consider that the proper course to adopt in this case is for this Court to set aside the conviction upon count 1, and to affirm the convictions of the appellant on all other counts, the sentences to be reduced as set out in the judgment of Mr. Justice Vassiliades.

ZEKIA, J.: All three appellants in this case were convicted of attempted murder and of attempted armed robbery and of other offences connected with the above but relatively minor in character. Appellant No. 1 was sentenced to 20 and the other appellants to 18 years of imprisonment on the attempt to murder and all appellants to 14 years' imprisonment on the count of attempted armed robbery. Appellant No. 1 appealed against conviction and sentence on all counts whereas appellants No. 2 and No.3 appealed only against sentence on the ground that it was manifestly excessive.

I had the advantage of reading the judgment of my brother Judge Vassiliades in this case and with a view to shorten my judgment I adopt his statement of facts and also his reasons for finding that there was adequate evidence in the case to implicate appellant No. 1 in the felonious adventure the subject matter of appeal.

I am of the opinion, however, that appellant 1 was not rightly convicted of attempted murder either as a principal in the first degree or as a party to the offence. The three appellants waylaid the car of the Cyprus Palestine Plantations Company in order to rob the cashier of the company who was travelling in the car and carrying with him considerable amount of money in a metal box. On seeing the said car approaching the place they were apparently hiding themselves two of the prisoners emerged from under the trees signalled to the car to stop. The car did not and went past them. One of the prisoners thereupon fired twice at the car from a close distance. A bullet smashed the window pane penetrated the car and hit the back of the head of the cashier who though injured was able to pick up the bullet which had hit him.

The car at the time was travelling at a speed of 30 - 35 miles per hour and heavy rain was falling. The screen wipers being out of order it was not easy to discern objects or persons through the panes of the car.

Had this attack caused the death of any of the occupants

of the car, whether the man who fired at the car intended to kill or not, would have committed murder and his companions involved in the felonious adventure would have also been guilty of murder. Intent to kill is not a necessary ingredient in all cases of murder. Malice aforethought is a necessary ingredient however in all cases but this phrase as defined in section 207 of the Criminal Code comprises instances which have nothing to do with an actual intent to kill.

In an attempt to murder, however, actual intent to cause death as distinct from presumed intent is an ingredient of the offence and this has to be established. To my mind it will only cause confusion if one compares the presumed intent involved in a murder case with the actual intent required in an attempted murder. In the former there are statutory presumptions for establishing malice aforethought whereas in the latter there is no such presumption and the intent cannot be established by any presumption but must be inferred as a fact from the surrounding circumstances of a particular case.

The trial court does not seem to have directed their mind as to this distinction. Bearing in mind that the prisoners, as far as the evidence goes, were engaged in stopping the car with a view to snatch the money transported therein coupled with the fact that shortly before they had signalled to the car to stop and that the two shots were fired at the car after it failed to stop ; under such circumstances the inference to be drawn as to the intent of the man firing at the car might well be to threaten the driver, halt the car in order to enable the gang to execute the common purpose of robbery. Such an inference in my view can be drawn at least with equal force with the inference that the gunman who fired at the car from close distance intended to kill one or more of the passengers.

In an earlier case I had the occasion to deal with intent as an ingredient in an attempt to commit a felony similar in nature to the present one.

In *Reg. v. Nicos Sampson Georghiades*, (No. 2), 22 C.L.R. at p. 132 in delivering the majority judgment I had quoted the following from Lord Goddard in *Steane's* case (1947) K. B. 997 at p. 1004:

> "No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on

a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction....."

In the following page I further stated:

"When the presence of intent in an attempt to commit a particular offence is sought to be established the nature of the evidence must be such as to rule out all other inferences inconsistent with the presence of such intent. It is not enough in ascertaining whether a particular intent is proved or not to say that this was a reasonable inference to be drawn from the facts but one must go further and be able to say that that was the only reasonable inference which could be drawn from the facts as found; if there be another reasonable view or probability consistent with innocence (as far as the particular charge is concerned) capable to be taken on the same facts then the onus of proving beyond reasonable doubt the existence of the particular intent has not been discharged".

I still hold that this was a correct statement of the law.

In the circumstances I am of the opinion that the appeal regarding conviction of attempted murder should be allowed and conviction and sentence set aside. Appeal against conviction and sentence on the count relating to armed robbery is dismissed.

Coming to the appeal of appellants No. 2 and No. 3 against sentence, in the circumstances of this case and bearing in mind that the appellant No. 1 was the leading figure in the adventure, I think that their term of imprisonment should be reduced to 10 years on both major counts, to run concurrently.

Regarding the convictions and sentences imposed by the Court on five other offences, I would like to say that when component parts of an offence constitute other offences of less gravity the correct way is to record convictions on such subsidiary offences but not to pass any sentence otherwise a Court might be taken to have punished twice a person for the same act or omission, a fact which is expressly prohibited by the Criminal Law and Constitution.

VASSILIADES, J.: This is an appeal against conviction and sentence by the Assize Court of Limassol, in a case where three men attempted to hold up and rob, nor far out of the town of Limassol, the cashier of a public company carrying a big sum of money, to the company's farm, for the payment of wages.

The cashier was travelling in the company's car, a Volkswagen Station Wagon, carrying £5,000 in a metal box. He was sitting in the front seat next to the driver, with four other passengers, sitting at the back. The crime was committed early in the afternoon of a rainy day, in April last.

As the car was proceeding on its way, at a speed of about 30 m.p.h. (P.W.5 p. 22; P.W. 10 p. 28) in a shower of rain, the driver and the cashier saw two men emerging from a hedge of cypress-trees on the side of the road, and signalling to the car to stop. The distance between the car and the two men was then about 20 metres. (P.W.4, p. 19). The driver pressed on, obviously intending to disregard the signal and avoid the men, when one of the assailants, taking aim at the car, fired a revolver as the car was going past him. According to the evidence he fired twice. (P.W.4 p. 19; P.W.5 p. 21). The car went off fast.

The glass-pane of the near side door of the vehicle, (the side on which the assailants were) was pierced by a bullet which wounded the cashier on the back of his head, fracturing a bone. (P.W.5 p. 22; P.W.4 p. 20; P.W.6 p. 23). The bullet was recovered and was exhibited at the trial.

Police Officers, acting on information, were following the company's vehicle in two other cars. One of these officers, an Assist. Superintendent, (P.W.10) saw the two men "dashing out" from the cypress-trees on the left hand side of the road, and signalling to the company's car to stop. (P.W.10 p. 28). He then saw a third man coming out from the same spot where the first two had emerged; and it was this third man who gave to this witness the impression of firing at the company's car as it was going past him (P.W.10. p. 28).

After the shooting, the three men rushed back through an opening in the trees on the side of the road where they had emerged earlier, and ran towards a wire-fence, climbing over which, they tried to make their escape through an orange grove (P.W.10, p. 29).

The Police gave chase, and after some more firing, mostly from police-weapons now, one of the three men surrendered. It was appellant Andreas Koloshiatis (the second man in the dock). After some further chase a second gun-man gave up, and was arrested with a pistol in his hand. It was appellant Antonis Mavros (the third person in the dock).

The remaining man, however, managed to get away. But before he was lost sight of, and while he looked back firing his revolver or pistol during the chase, one of the police who was chasing him, recognized this third man, and called out to him to stop, mentioning his name: "Στάθου ρὲ Πεῦκο κι' ἐκατάλαβά σε" (Stop, Pefkos, I have recognized you). The distance between the police officer and the gunman was then about 30 yards. (P.W.11 p. 36).

This man, Pefkos, who managed to avoid arrest in that chase, was a well known person to the police-officer who recognized him and called out to him to stop, by his name. He was also a policeman, Ioannis Pefkos, the first appellant in the dock (P.W.11 p. 36, 37 & 40). He was arrested shortly afterwards at some distance from the place, by other police, to whom he (the first appellant) gave a false alibi - (P.W.17, p.48).

The three appellants were charged before the Assizes on an information containing 8 counts:-

The first count charged all three appellants jointly, for attempted murder; attempt unlawfully to cause the death of the company-cashier.

The second count charged, again all three appellants, for the attempted murder of one of the police-sergeants who took part in the chase.

The third count, similarly charged them with attempted robbery ; the fourth for carrying a pistol without the required permit, contrary to the Firearms Law (Cap.57); the fifth, under the same statute, for using a pistol ; the sixth and seventh for carrying and using, respectively, "a revolver or pistol"; and the eighth for the unlawful possession of explosives, 5 rounds of ammunition, contrary to the provisions of the Explosive Substances Law, Cap. 54.

All three appellants pleaded not guilty to all counts, and the case went to trial on that plea. They were all defended by counsel.

The Court heard 21 witnesses for the prosecution ; two witnesses called for the first appellant; and also heard the first appellant from the witness-box, wherefrom he elected to give evidence on oath. The other two appellants made statements from the dock, adopting the contents of their earlier detail-statements to the Police.

At the conclusion of the trial, the Assize Court gave, in a careful and well considered judgment, the reasons for which they found all three appellants guilty on all counts excepting count 2, for the attempted murder of the sergeant; and convicted them accordingly. The Court then proceeded to pass heavy sentences on the appellants, on each of the counts where there was a conviction.

The first appellant, appeals against all his convictions; and he also appeals against all the sentences imposed upon him.

The other two appellants, appeal against sentence only. Their convictions, therefore, stand.

The convictions of the first appellant are challenged mainly on the contention that he has not been sufficiently identified as one of the three assailants. But apart of this defence of identification, it was contended on his behalf that the evidence cannot support the conviction for attempted murder, as the intent to kill was not proved.

As regards count 3, the count for attempted armed robbery, I do not think that anyone can seriously say that the Court's finding cannot be supported ; the finding that the three men who tried to stop the cashier's car, in the circumstances of this case, attempted to commit armed robbery. There was ample evidence upon which the Court could make that finding; and I do not propose dealing further with this point.

As regards the other counts (counts 4-8 inclusive) the matter becomes almost purely academic. If the first appellant (to whom I shall hereinafter refer as the appellant) succeeds on the issue of identification, none of his convictions can stand. If he fails on that issue, the other convictions lose their practical effect, as they are obviously of less importance than that for attempted armed robbery, (ct.3); and the sentences passed for them, far smaller in extent, are made concurrent to that passed on count 3.

I would, however, venture the view that although technically, the same set of facts may constitute more than one offences, as a matter of practice, a conviction on the most serious of such offences, renders conviction on the rest, academic; and sentence thereon unnecessary, as no person can be punished twice for the same act or omission. (Art. 12. 2 of the Const.). Such convictions and sentences are sometimes put on the record, merely in order that they be found there, in case the conviction on the more serious counts becomes inoperative.

Returning now to the substance in the appeal, this can be divided in two parts:

(a) the identification of the appellant as one of the three assailants; and

(b) whether the facts as proved can support a conviction on the count for the attempted murder of the cashier (ct.1).

Appellant, who was a member of the Police Force, at the time of the crime, admitted in the witness box that he was then stationed in Larnaca District, and that he was living there with his wife. On the 4th April he obtained leave to absent himself from 1 p.m. of the 4th April, 1961, to 20 hrs. of the 5th April, 1961 - (exh.13 - p.64 of the notes). Appellant admits that he altered the figure 5 on his leave-pass (exh.13) so as to make it appear as expiring at 20 hrs. of the 6th April, instead of the 5th.

He went to Limassol on the 4th April to see his brothers and friends, he said ; and he returned to Larnaca at 3 p.m. of the 5th (p. 63 letter H.). But at about 7.30 p.m. of the same day, he went back to Limassol again (p. 64. B.) He stayed there for the night, and the following morning he was in his brother's grocery until about 11, he said (p. 65 A.) Appellant was not re-examined on all these points. He was not re-examined at all. (p. 70).

I do not propose going further into appellant's evidence as to his movements at Limassol on that day, until he was arrested soon after the commission of the offence, as his story was disbelieved by the trial court. It is sufficient for me to say that appellant entirely denied any knowledge of the crime. He put up a completely false alibi, which he failed to support in the least. All that I may, perhaps, add is that in my

opinion, the trial court were fully justified in disbelieving the appellant, and entirely rejecting his story. (Judgment p.6 blue 82).

On the other hand, again without going into detail, I may say that the trial court, accepting, as they did, the evidence of the prosecution-witnesses who took part in the chase of the three culprits, and in the arrest of the three appellants, were, in my opinion, equally justified in reaching the conclusion that the first appellant was one of the three men who attempted to stop the cashier's car. (Judgment p.6 bl. 82. E). Indeed, that seems to me, the only reasonable finding, in the circumstances.

The case for the prosecution was that the gunman who fired the shot which wounded the cashier, was the appellant. But the trial court did not make that finding; and it must, therefore, be assumed that the appellant was not identified with that gunman.

On the other hand the Court's acceptance of the evidence of wit.3, the taxi driver engaged to take the appellants to the place where the crime was committed, establishes that the appellant sat next to him, and was directing, at least that part of the operation, while the other two appellants sat at the back (P.W.3. 14F; p. 15 A-C).

Moreover, the evidence of the police witnesses who took part in the chase, especially that of Sgt. Emilios Spyrou, (P.W.11 p. 36 H; p. 37 A; p. 40 D and E) which was also accepted by the trial court, establishes that the appellant was one of the three assailants, two of whom (including the appellant) held guns ; and that he fired his weapon in making his escape.

The material facts, therefore, upon which the appeal against the conviction for attempted murder (ct. 1) must be decided are these:—

Three men, including the appellant, attempted to stop the cashier's car with intent to rob him of a big sum of money. Appellant and one of the other two, were armed for the purpose. When the car did not stop, in disobedience to their signal, either one or both the armed men, fired their weapons. One of the shots was fired at the side of the car as it was passing the gun-man within a short distance; and the bullet, piercing the glass-pane next to the cashier, wounded him on

the head, fracturing a bone. The cashier was sitting in the front seat, near the driver, on the side where the gun-man was, when he fired the wounding shot.

On these facts the question which falls for decision is:-

Assuming that the appellant *was not* the gun-man who fired the wounding shot, was he rightly convicted of attempted murder?

For the purpose of answering this question, one must first answer the question whether, on the evidence before them, the trial court could find attempted murder. In other words, whether they could find that the gunman who fired the wounding shot, committed in the circumstances, the crime of attempted murder.

In our Criminal Code (Cap. 154) this crime comes under sect. 214 which as far as material to the case in hand, provides that any person who attempts unlawfully to cause the death of another, or with intent to so cause the death of another, does something which is likely to endanger human life, is guilty of the felony of attempted murder, and is liable to imprisonment for life.

So the intention to cause the death of another is a necessary ingredient of the offence ; and must be established by the prosecution to the satisfaction of the Court, beyond reasonable doubt.

But intention, in most cases, is a matter of inference. It is a fact which the Court has to find from a person's conduct at the material time, in the surrounding circumstances.

In *Reg. v. Smith* (1960 3 W.L.R., p. 92) where the Court of Criminal Appeal in England, had to consider the trial Judge's direction to the jury in a murder case where the appellant's intent at the material time, was one of the main issues, the legal maxim that "a man must be taken (or be presumed) to intend the natural consequences of his acts", was discussed.

The trial Judge referred to this maxim in the following terms:-

> "The intention with which a man did something, can usually be determined by a jury, only by inference from the surrounding circumstances, including the presumption of law that a man intends the natural and probable consequences of his acts".

The Court of Appeal took the view that addressing a jury of laymen, the trial judge should explain to them the meaning and effect of this legal presumption. And then the Court proceeded to state the law as follows:-

> "The law on this point as it stands to-day, is that this presumption of intention, means this : that as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But while that is an inference which may be drawn, and on the facts in certain cases must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn".

With all respect, I take this as a careful and correct statement of the law on the point.

In the case in hand, the trial Court had to find the intent of the three appellants, not only in connection with the count for attempted murder, (ct.1) but also in connection with the count for attempted armed robbery (ct.3).

On this latter count, the Court found, from the conduct of the appellants at the material time, that their intention was to commit the crime of armed robbery ; i.e. the Court found the *mens rea* required to establish the attempt charged. Furthermore, from appellants' conduct in the series of acts ending with the attempt to stop the cashier's car, the Court found the *actus reus* required to complete the crime charged.

On these findings the Court convicted all three appellants for attempted armed robbery. And, as I have already said, in my opinion, that conviction cannot, seriously, be challenged, in this case.

Now coming to the count for attempted murder (ct.1), the Court had similarly to find from the conduct of the gunman who fired the wounding shot, the *mens rea* and the *actus reus* required to establish the attempt charged. The Court had to find the *mens rea, i.e.* the intent to cause the death of another, required by sect. 214; and, furthermore to find the *actus reus* necessary to establish sufficiently in law, the crime of attempted murder charged.

The carrying of the revolver in those circumstances might be an act indicating an intent to cause death ; but it would not,

in itself be an *actus reus* sufficient to establish an attempt to kill. Similarly the loading of the revolver might be a step further in carrying out the intent to cause death ; but it might again fall short of constituting the *actus reus* required to establish the crime under s.214.

But the gunman in this case did not stop at the carrying of a loaded revolver. He showed what was his "intent" in so carrying it, when, seeing that the car did not obey the signal to stop, the gunman raised his hand, aimed at the car as it was passing within a few paces from him, and pulled the trigger well knowing that that would cause a bullet to hit the car more or less at the part aimed at, that is to say at the glass of the side-door, behind which the cashier (or another person of his party) was sitting. There was no suggestion at the trial that the person sitting near the glass-window could not be seen. That same person (the cashier, P.W.4) was asked by counsel for the appellant, in cross-examination, to describe the gunman's moustache.

In fact a bullet did go out of the gunman's weapon, as intended, and piercing the glass-window, wounded the cashier on the head. Surely, if the cashier died in consequence of that wound, the killing would amount to murder; causing the death of another with intent.

The trial court found from the series of the gunman's acts ending with the pulling of the trigger, in the circumstances, both, the *mens rea* required by sect. 214, and the *actus reus* sufficient to establish the attempt, as required by law.

The conviction on the count for attempted murder - a unanimous conviction by a court of three legally qualified and experienced judges - to me clearly indicates that the evidence satisfied the court, beyond reasonable doubt, on both elements of the crime.

In my opinion, this Court can only set aside that conviction, if the Court is prepared to hold that the firing of the weapon, in the circumstances, cannot reasonably lead to the conclusion reached by the trial court. That is to say, that the trial court could not reasonably find an intention to cause death, in the act of an armed robber, firing his weapon at his intended victim from a close position, in the circumstances shown by the evidence in this case, and actually wounding the victim on the head.

I find myself completely unable to share such view of the facts. Nay, I may add that I cannot see how the trial court could reasonably reach any other conclusion, as to the crime committed by the gunman who fired the wounding shot.

I must now deal with the position arising from the fact that the gunman was not indentified. And dealing with the appeal of the first appellant, to assume that *he was not* that gunman.

On this footing the appellant can only be convicted, if found by the trial court to have been "a party" to the crime committed by the non-identified gunman. Our law on the point, is to be found in Part I of our Criminal Code (Cap. 154) sections 20 to 25 incl., under the heading "Parties to Offences".

As far as material to the case in hand, sect. 20 provides that -

> "when an offence is committed each of the following persons *is deemed* to have taken part in committing the offence and to be guilty of the offence, and *may be charged with actually committing it.*"

I lay stress on the words which *I have underlined.* These persons are:-

> "(a) .....
>
> "(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> "(c) every person who aids or abets another person in committing the offence;
>
> "(d) ....."

And section 21 provides that -

> "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".

These provisions, same as most of our Criminal Code,

have their origin in the common law of England, from which they derive. So in reading and applying them, we should look for assistance, whenever necessary, in cases where the Courts in England have stated and applied the Common law, as it developed in that country.

Dealing with the conviction for attempted murder at this stage, I do not think that it is necessary for me to go back to the facts which led to the conviction for attempted armed robbery. I shall start from that point.

The trial court found that all three appellants went to the spot where the attempted murder was committed, for the purpose of committing an armed robbery; they were there in order to rob the company's cashier on his way to the farm, with a big sum of money ; two of them, including the appellant were carrying for that purpose, loaded firearms; one of them a pistol the other a revolver. I do not think that any one can suggest that there was no evidence to support these findings.

The trial court further found that -

> ".....The fact that two of them were also armed as they were, to the apparent knowledge of all three, and that when the car of the complainant did not stop, shots were fired at it, shows that it was the intention of the accused to use violence in furtherance of this common design" (Vide judgment at p.83 of the notes).

I do not think that it can be suggested that there was no evidence to support this finding either ; or that it was unreasonable, in the circumstances.

Now, what sort of violence does a robber contemplate, when armed with a loaded revolver, in a case such as this, is not, in my opinion, a difficult question for any Court in Cyprus to answer. And I do not propose going further into this matter. I have already stated the reasons for which, I think that the trial court were right, in holding that the gunman who fired the wounding shot, committed the crime of attempted murder.

What falls to be decided at this stage, is whether the first appellant, being one of that gunman's two companions, was a party to that crime ; or he is deemed to have committed it, under the provisions of sections 20 and 21 of our Criminal

Code. The fine technical distinction between the two is of no practical effect in this case, and I do not propose going into that matter. Whether appellant's conduct at the material time, i.e. the time when his non-identified companion committed the attempted murder, amounts in law, to aiding and abetting the commission of that offence (s.20 (c)); or whether the attempted murder was a probable consequence "in the prosecution" of the common intention to commit armed robbery, (sect.21), the practical result is the same. The appellant is deemed to have committed the offence, and may be charged and convicted accordingly.

The facts of the case point rather in the direction of the second alternative, and I shall approach the question from that side.

Now, there can be no doubt that a "conspiracy" (within the meaning of the word in criminal law) to commit armed robbery, has been established in this case; and that the trial court, on the evidence before them, could treat each one of the appellants as a party to that conspiracy although not charged.

It has been said in this case, that in firing at the persons in the car, the non-identified conspirator went beyond the scope of the common purpose of robbing the cashier. But I do not think that such a view of the facts can stand well the test of reason. Who can say that the three conspirators did not intend to use their lethal weapons in order to cause death, if they found it necessary to do so, for the purpose of carrying out that robbery? Or for the purpose of avoiding arrest? Is there anything in the facts of this case to point in that direction? In my opinion, the facts as proved, point strongly in the opposite direction.

But even assuming that the non-identified gunman had promised the other two conspirators (including the appellant) that he was not going to use his loaded revolver for causing death ; would that be sufficient, either in common sense, or in the common law, to exculpate the appellant from complicity in his companion's attempted or completed murder, if the latter had committed one, contrary to his promise?

The answer to this question is not a difficult legal problem. Professor Glanville Williams in his well known textbook on the Criminal Law deals with this matter in paragr.

65, at p. 215 *et seq.* under the heading: "Acts beyond the scope of the common purpose".

After citing a passage from the Judgment of Lush, J., in *Caton's* case (1874), and after discussing *Betts and Ridley* (22. Cr. App. R. 148), and *Appleby's* case (28 Cr. App. R. 1) the distinguished author concludes with this statement:

> "Notwithstanding the language of the judgment, an agreement to use violence does not implicate the principle in the second degree, *if the violence used is altogether different in kind, from that agreed*".

I have underlined the last part of the statement which, in my opinion, clearly leads to the result that if the violence used is of the same nature as that agreed or contemplated, the common law implicates all the conspirators.

In *Appleby's* case, (*supra*) the Court of Criminal Appeal in England, after reviewing earlier cases on the point, dismissed the appeal against conviction for murder where the trial judge directed the jury that:-

> "It is not the law that if Appleby did not know at the outset that Ostler (the other conspirator) had taken a gun with him, he cannot be guilty".
>
> "I tell you that this is the way in law (the judge directed) the matter is put and urged, against Appleby: If you are satisfied that these two men were jointly engaged on this felonious enterprise, of breaking and entering the co-operative premises in order to steal, and were united in a common resolution to resist by violence any constable who should oppose them, and the shot was fired at the constable by one of them, in pursuance of that common resolution, and killed him, that is murder, and both are liable to be found guilty of murder".

I find it unnecessary to carry the point further. The inference of fact that the three appellants in this case (including the non-identified gunman) shared the common purpose of using their lethal weapons for the armed robbery, is clearly, I think, unavoidable. And the legal consequence of that position is, just as clearly, in my opinion, that if one of them, while so using his weapon, committed another crime involving violence of similar nature, such as murder or attempted murder, the other two are deemed to have taken

part in the commission of that offence, by operation of sections 20(c) and 21 of our Criminal Code, and may be charged with actually committing it.

Ordinary good sense, concerned with public safety, and the suppression of crime, would clearly, I think, have it that way; the Common Law, originating in good common sense, has it that way; and our codified law in the form of sections 20 and 21 of the Criminal Code, emanating from the Common Law, provides that each of such persons *is deemed* to have committed the offence, actually committed by his mate.

Persons choosing to take part in crimes such as the subject matter of this case, must realise that they draw upon them all the risks which may result from such expeditions. And they should further know, that the law in such matters, does not require the Court to enter into speculations, as to what exactly was the agreed violence ; or as to where the violence for the one crime ended, and that for the other crime commenced.

Upon these considerations, I reach the conclusion, without any difficulty or hesitation, that the answer to the question whether the first appellant can be convicted of the attempted murder committed by his non-identified companion, must be in the affirmative. And that the Assize Court were right in their view of the law upon which they convicted all three appellants on the first count.

Appellant's conviction on counts 4-8 incl., are, as I have already said, merely incidental, and I do not propose dealing with them. They are of purely academic effect.

As regards, now, the appeals against sentence, after discussing the matter with the other members of the Court, I found myself in agreement with the view that the second and third appellants stand on a different footing from that of the first appellant. He was apparently the leader ; and the fact that he was, at the time, a policeman, makes his position as regards sentence, far worse.

I agree that the sentences of the second and third appellants, are manifestly excessive, in the circumstances; and should be reduced to ten years imprisonment on each of these counts (1 & 3) to run concurrently from conviction. I would pass no sentence on the other counts. And as far as the first appellant is concerned, I should say that a sentence of 14 years on each of the two principal counts to run concurrently

from conviction, would be an adequate sentence for this appellant.

JOSEPHIDES, J.: I propose dealing first with the appeal of the first appellant against his conviction on count 1, i.e. attempted murder contrary to sections 214(a) and 20 of the Criminal Code. The appeal of the other appellants is against sentence only.

The facts as found by the Assize Court are, briefly, that as the cashier of a company was travelling in a car, carrying £5,000, three men attempted to hold up and rob him. The cashier was sitting in the front seat next to the driver and there were four other passengers sitting at the back. As the car was proceeding from Limassol to Fassouri, at a speed of about 30 to 35 miles per hour, in heavy rain, two men emerged from a hedge of cypress-trees and signalled to the car to stop. They were then joined by a third man. Two of them (including the first appellant) were armed. The driver did not stop and two shots were then fired from a pistol or revolver when the car was level with these men. The window-pane next to the cashier was smashed by a bullet which hit and wounded him on the back of his head, fracturing his skull. The gunman was about 11 feet away when he fired at the cashier in the moving car. The three appellants were chased by the Police (who were following the complainant's car), and two of them were arrested nearby. They were the second and third appellants who admitted taking part in this incident. The first appellant was arrested shortly afterwards at some distance from the scene of the crime. His defence was one of alibi, but the Assize Court found that he was one of the three assailants, and there was ample evidence before the Court to support that finding.

On those facts the Assize Court found all three appellants guilty of attempted murder (count 1), as well as of attempted armed robbery (count 3). The trial Court did not make a finding as to who of the three assailants fired the bullet which wounded the complainant; but they found that the firing was done in furtherance of a common design.

In a charge of attempted murder the intent to kill is the principal ingredient of the crime. This was laid down in the case of *R. v. Whybrow*, 35 Cr. App. R. 141, and was followed by this Court in the case of *Nicolas Georghiou Kkolis v. The*

Republic, Criminal Appeal No. 2291, dated the 29th March, 1961. In the *Whybrow* case the Lord Chief Justice, at page 146 said:

> "In murder the jury is told - and it has always been the law - that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm".

The burden of proving the intent is on the prosecution. Lord Goddard in *R. v. Steane* (1947) K.B. 997 at page 1004 said:-

> "While no doubt the motive of a man's act and his intention in doing the act are, in law, different things, it is, none the less true that in many offences a specific intention is a necessary ingredient and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of the act might, if nothing else were proved, be said to show the intent for which it was done. To take a simple illustration, a man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, unless the Crown

can prove that the intent was to do the prosecutor grievous bodily harm, he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent and to convict only of the misdemeanour of unlawful wounding. Or again, a prisoner may be charged with shooting with intent to murder. Here again, the prosecution may fail to satisfy the jury of the intent, although the natural consequence of firing, perhaps at close range, would be to kill. The jury can find in such a case an intent to do grievous bodily harm or they might find that if the person shot at was a police constable, the prisoner was not guilty on the count charging intent to murder, but guilty of intent to avoid arrest. The important thing to notice in this respect is that where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted".

This was no doubt a special case dealing with broadcasting in an enemy country with intent to assist the enemy; but the principle enunciated by Lord Goddard was evidently not then intended to be restricted to such cases.

It was argued on behalf of the prosecution that on the authority of the recent case of *Reg. v. Smith* (1960) 3 W.L.R. 92, intention can usually be determined inferentially from the surrounding circumstances, including the presumption of law that a man intends the natural and probable consequences of his acts. But it should be borne in mind that the Court of Criminal Appeal in that case were considering the summing-up of the trial Judge in a case of murder. The House of Lords subsequently restated that proposition in the following terms (*D.P.P. v. Smith* (1960) 3 W.L.R. 546, at p. 547):

"It is immaterial what the accused in fact contemplated as the probable result of his actions, provided he is in law responsible for them in that he is capable of forming an intent, is not insane within the M'Naghten Rules and cannot establish diminished responsibility. On that assumption, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result and the only test of this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.

Once the accused's knowledge of the circumstances and nature of his acts has been ascertained, the only thing that can rebut the presumption that he intends the natural and probable consequences of those acts is proof of incapacity to form an intent, insanity or diminished responsibility. The test of the reasonable man, properly understood, is a simpler criterion than that of the "presumption of law" and contains all the necessary ingredients of malice aforethought".

Unless the House of Lords has by inference overruled the existing authorities, a man cannot be convicted of wounding with intent to murder, unless his attitude of mind was such that he intended to kill. *Smith's* case does not overrule *Steane's* case, but distinguishes it on the basis that the principle restated in that authority (*R. v. Steane*) is confined to cases in which an actual or overall intent or desire has to be proved (*D.P.P. v. Smith, supra*, at page 558). Such cases do not include cases of murder, but they are confined to cases like *R. v. Steane*, and cases of attempted murder, or wounding with intent to murder, such as *R. v. Whybrow*, where the intent is the principal ingredient of the crime.

Where on a true construction of a statute "intent" equals "desire" or "purpose", as in the case of attempted murder, or wounding with intent to do grievous bodily harm, then the rule laid down by Lord Goddard in *R. v. Steane* would be applicable, *i.e.* "if, on a review of the whole evidence (the jury) either think the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted". ((1947) K.B. p. 1004). As Lord Denning (a member of the House of Lords in the *Smith* case) said recently, there is nothing illogical or inconvenient about interpreting 'intent'

in some statutory offences to mean *desire* or *purpose* whereas in murder cases it means not only desire or purpose but includes an intentional act done with *knowledge* of the probable consequences. ("Responsibility before the Law" by Lord Denning (1961), page 28).

To sum up, intent to kill in a charge of attempted murder is the principal ingredient in the offence, and the burden of proving that intent remains throughout on the prosecution.

In this case the record shows that the trial Court did not direct their mind to the question of intent. In fact there is no finding of the Court in their judgment on this point. On the totality of the evidence in this case there is room for three or four views as to the intent of the assailant in firing at the complainant, namely (a) an intention to frighten the occupants of the car; (b) an intention to stop the car; (c) an intention to wound or do grievous bodily harm; or (d) an intention to kill. As it is for the prosecution to prove the intent to the Court's satisfaction, and as on a review of the whole evidence, the Court would be left in doubt as to the intent, the appellant is entitled to be acquitted of the charge of attempted murder (although on the evidence he may be convicted of some lesser offence).

Having reached that conclusion it is unnecessary for me to consider whether the firing was so much the result of a common purpose that all three accused were in law guilty of an attempt to murder.

For the reasons stated above, and having regard to the convictions of the first appellant on the other counts, which must be affirmed, I would set aside his conviction of attempted murder on count 1, without ordering a retrial or considering whether he should be convicted of any lesser offence.

With regard to the first appellant's conviction of attempted armed robbery on count 3, I would only say that there was ample evidence on which the trial Court could find him guilty of the offence charged.

As to counts 4, 5, 6, 7 and 8, i.e. the charges of carrying and using a pistol and a revolver, and possessing rounds of ammunition, although technically the first appellant is guilty on those charges, nevertheless, as the same facts and circumstances formed part and parcel of the attempted armed robbery charged of which he has been convicted and sentenced

I consider that no sentence should have been passed upon those counts (Cf. Article 12, paragraph 2, of the Constitution, and section 40, sub-section (3), of the Criminal Procedure Law, Cap. 155).

In the result the appeal of the first appellant on count 1 is allowed, and his conviction and sentence set aside. His appeal on all other counts is dismissed, and his convictions affirmed.

Now, as to sentence : The first appellant was sentenced to fourteen years' imprisonment on the attempted armed robbery (count 3). Considering the circumstances of this case, the fact that this appellant was a police-constable and the audacity with which this crime was carried out, I do not consider that the sentence is excessive.

The second and third appellants were sentenced to eighteen years' imprisonment on the charge of attempted murder (count 1) and to fourteen years' imprisonment on the attempted armed robbery charge (count 3). Having regard to the circumstances of this case, and considering that they played a lesser role than that of the first appellant in the commission of the crime, I think that those sentences are manifestly excessive and should be reduced to ten years' imprisonment on each count to run concurrently.

As stated earlier in this judgment, no sentence should have been passed on counts 4 to 8 on any of the appellants, and accordingly those sentences against the appellants should be set aside.

O' BRIAIN, P.: In the result this Court by majority in the case of Pefkos allows the appeal against conviction on count 1, *and sets the conviction and sentence aside. The Court unanimously dismisses the appeal against the other convictions. As regards Pefkos's appeal against sentence on count* 3, *the Court dismisses the appeal and allows the appeal against sentence on remaining counts and sets same aside.*

As regards the other two appeals (2397 *and* 2398) *against sentence, the Court unanimously allows the appeals and reduces the sentences to ten years' imprisonment on each of counts* 1 *and* 3 *and sets aside the sentences on the remaining counts. The sentences in all cases are to run concurrently from the date of conviction.*