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

STELIOS MICHAEL SIMADHIAKOS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 2298).

Criminal law—Incitement to commit an offence—Meaning of—Criminal Code, Cap. 154, *section* 370.

Appeal—Findings of fact by the trial courts—Findings resting on the credibility of witnesses—Powers of the High Court to disturb such findings—And to rehear witnesses—Circumstances under which the High Court willl exercise such powers—Onus on the appellant to bring the High Court to such decision—Grounds of appeal—Where rehearing of witnesses is sought, the appellant should say so in his grounds of appeal—And name such witnesses—And make them available at the hearing of the appeal—The Courts of Justice Law, 1960, (*Law of the Republic No.* 14 *of* 1960) *section* 25(3).

The appellant was convicted in a summary trial of inciting a soldier to steal firearms and ammunition contrary to section 370(a) of the Criminal Code, Cap. 154, and sentenced to eighteen months' imprisonment. The trial judge believed the evidence of the soldier C. and disbelieved the evidence of the appellant. The appellant appealed against conviction (and sentence). It was argued on his behalf that the words used by the appellant do not amount in law to incitement to commit a crime as charged. Counsel for the appellant further invoked the application of section 25(3) of the Courts of Justice Law, 1960, to the effect that the High Court is not bound by the findings of the trial court, even though they rested on the credibility of the witnesses, and could reach its own conclusions on the evidence and, if it thought fit, rehear the soldier C. and the appellant. Section 25(3) reads as follows:

"Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby the Hight Court on hearing and determining any appeal either in a civil or a criminal case shall not be bound by any

determinations on questions of fact made by the trial court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of retrial by the trial court or any other court having jurisdiction, as the High Court may direct".

The material parts of section 370 of the Criminal Code, Cap. 154, are as follows: "Any person who incites or attempts to induce another person to commit an offence whether such other person consents to commit the offence or not is guilty —

(a) of a felony, if the offence in question is a felony ......

(b) of a misdemeanour if the offence in question is a misdemeanour................"

Held : I. *As to the question of "incitement":—*

In the context of section 370 of the Criminal Code the words "who incites or attempts to induce" clearly mean what the legislature obviously intended them to mean: that is to say to make it a felony or a misdemeanour respectively, for any person to do or say anything, the natural tendency of which would be to move or encourage another person into action amounting to a felony or misdemeanour under the criminal law. The word "incitement" is used as equivalent to "soliciting".

II. *As to the application of section* 25(3) *of the Courts of Justice Law,* 1960 (O' BRIAIN, P. *dissenting):—*

(1) In the present case there are no circumstances making it desirable for the High Court in the interests of justice either to disturb the conclusions of fact reached by the trial judge or to have recourse to the powers of rehearing any witness provided by section 25(3) of the Courts of Justice Law, 1960. Furthermore, there is no ground whatever for suggesting that the trial judge failed to use or has misused the advantage of seeing and hearing the witnesses and of weighing conflicting testimony.

(2) *Per VASSILIADES, J. :—*

(a) The matter of trial court findings on appeal was not free of difficulty at the time when the legislature in Cyprus

provided for it in the form of section 25 in the new Courts of Justice Law, 1960. But what made things more difficult in Cyprus in this connection were the radical changes in the set up of the courts, resulting from the Zurich and London agreements, and unavoidably incorporated in the constitution of the Republic. So we have in this young Republic a peculiar structure, unique in its kind, with one central source of judicial authority, apparently balanced to satisfy both the Greek and Turkish communities; and with courts of first instance upon a communal basis; Greek Courts, Turkish Courts, and mixed Courts.

(b) With these considerations in mind one may see, clearly, in my opinion, the mischief for which the old law did not provide; and for which the legislature apparently intended to provide a cure by section 25. Bearing in mind, (as they must be assumed to have been) the existing difficulties in the law dealing with trial court findings on appeal, (as I have endeavoured to show earlier in this judgment) enhanced and increased to a possibly dangerous point, by the unusual structure of courts composed upon a communal basis, in a State where the two component communities do not always see eye to eye, the legislature apparently thought fit to make express provision in the section dealing with appeals, that the High Court, as the central and final source of civil and criminal justice, shall not be bound by any determinations on questions of fact made by the trial courts ; nor, for that matter, be fettered by dictums and decisions in this connection, made by the Courts or Judges in England, under very different circumstances.

(c) It is equally clear in my mind, that while the legislature intended to settle in unequivocable language the revisional powers of the Court of Appeal, they did not aim at any substantial alteration in the law. Trial court findings continue to be the valuable conclusion reached by one or more trial judges, subject only to unfettered investigation and criticism on appeal, where only if the circumstances of the case so require, the Court can rehear any witnesses already heard, or order a retrial.

(d) The provisions of sub-section 3 of section 25 mean that this Court on hearing an appeal has the power to review the whole evidence without feeling fettered by determinations on questions of fact made by the trial court ; but in doing so,

the Court should still be guided by the principles which have grown and developed in the light of practical experience, as to the value of trial-court findings.

(e) Before such findings are disturbed, the appellate Court must be satisfied to the extent of reaching a decision (unanimous or by majority) that the reasoning behind a finding is unsatisfactory; or that the finding is not warranted by the evidence considered as a whole. And the onus, in my opinion, must rest on the appellant, both in civil and in criminal appeals, to bring this Court to such decision ; or else, the trial court findings remain undisturbed as part of the case.

(f) It should be for the party attacking a finding, or asking the Court to exercise its powers under section 25, to show that the interests of justice in the case under consideration, require the taking of such course.

(g) And finally, coming to questions of credibility, I likewise take the view, that before an appellant can invite this Court to disturb a finding resting on credibility, he must be able to show that the circumstances of the case, as they appear on the record, require, in the interests of justice, the rehearing of one or more witnesses already heard by the trial court.

(h) The receiving of further evidence in an appeal, or the hearing of any witness already heard, should, in my opinion, be the result of a decision of this Court, same as an order for retrial.

(i) In the present appeal, speaking for myself, far from seeing any reason for disturbing the trial judge's finding, as to the credibility of the witness Courtis and that of the appellant, I think that in the light of the other evidence in the case, the trial judge's finding was fully justified. For the sake of example, I may perhaps add that the reverse finding in the circumstances of this case, might probably point towards the desirability of recalling these two men or either of them in the box.

(3) *Per JOSEPHIDES, J.:—*

(a) Section 25 (3) empowers the High Court to rehear any witnesses already heard by the trial court "where the circumstances of the case so require". This is a new power

given to this Court which was not previously possessed by the Supreme Court of Cyprus, and for this reason I am of the view that we should be very careful in laying down any principles on which the Court would act in deciding whether to rehear a witness or not. Undoubtedly the legislature has armed this Court with the widest possible powers for the purposes of reviewing the whole evidence and "where the circumstances of the case so require" rehearing any witnesses already heard by the trial court, and in a proper case this Court would not refuse to make use of the powers which are contained in section 25(3).

(b) With these considerations in mind I am of the opinion that only in special circumstances should the High Court act upon the power of rehearing a witness given in section 25(3), and forming its own conclusions of fact, such as where a trial court consisting of two judges and constituted under the provisions of paragraph 3 or 4 of Article 159 of the Constitution, or a Full Court composed of two judges under the provisions of section 22(1) of the Courts of Justice Law, 1960, differ on a question of credibility of a material witness ; or, where this Court, after reading the record of the evidence and hearing counsel's submissions, feels doubt about the determinations on primary facts made by the trial court. But this Court should not rehear a witness in every case in which there is conflicting testimony, because to do so would be to usurp the function of the trial court. The High Court should not normally substitute itself for the trial court and retry the case. That is not our function. If the circumstances of the case justify such a course this Court has power to order a retrial by the trial court or any other court having jurisdiction in the matter, under the provisions of section 25 (3) of the Courts of Justice Law, section 145 (1) (d) of the Criminal Procedure Law, Cap. 155, and in civil cases under O.35, r.9 of the Civil Procedure Rules.

(c) After careful consideration of this matter I think that at present it would not be desirable to seek to lay down any precise principles on which this Court would be prepared to act in deciding whether to rehear a witness. Such principles should, I consider, more properly be left to be evolved in the course of time in the consideration of future appeals. Otherwise, if such principles were now laid down they might fetter unduly the power of this Court to rehear a witness.

(d) I am of opinion that there is nothing whatever in this

case which makes it desirable to have recourse to the special and exceptional power of rehearing a witness, provided by section 25(3) of the Courts of Justice Law. Furthermore, there is no ground whatever for suggesting that in the present case the trial judge failed to use or has misused the advantage of seeing and hearing the witnesses and of weighing conflicting testimory. For these reasons I would dismiss the appeal against conviction.

(4) *Per O' BRIAIN, P. (in a dissenting judgment):—*

(a) It is clear from its terms that the Legislature intended the new High Court of Justice, as the final Court of Appeal under the Constitution, to have more extensive powers in relation to determinations of fact made by trial courts than were possessed by the former Supreme Court. There were, however, several alternatives open to the Legislature in order to effectuate this intention. It might, for instance, have provided that where an Assize Court was unanimous or a *Full District Court was unanimous the position should be* as heretofore. Instead, with a knowledge of what law then was, the Legislature chose to enact section 25 of the Courts of Justice Law in the widest possible terms providing, inter alia, that in "any appeal either in a civil or criminal case" the High Court shall not be bound by "any determinations on questions of fact made by the trial court". It seems to me that much weight must be given to this circumstance in construing the section. Where a power is given to a court in terms such as we find in section 25 and circumstances arise which call for the use of that power it is, in my view, obligatory upon the court to avail of them, though I can appreciate how difficult it may be to determine, in certain cases, whether such circumstances have arisen.

(b) The appellant asked this Court to reverse the decision of the trial court which was based upon the view the trial judge took of the credibility of the two witnesses, Private Courtis and the appellant. If the appellant be right in his contention that Courtis is not worthy of credence, his appeal must succeed. Likewise, he is entitled to succeed if there be a reasonable doubt about this matter. Furthermore, this is an appeal from a judge of the District Court sitting alone. The opinion which any judge may form of the credibility of a witness in any case is governed very largely by personal factors by which I mean the judge's personal reaction to the

testimony, as he listens to it, observing the witness, the latter's demeanour and appearance, and manner of giving testimony, all that connoted by the term "personality". These are factors which cannot be fully conveyed by the written record, a truism which has been referred to by the Judges here and in England and in my own country in case after case. Moreover, I find it difficult not to advert to what was the experience of the Bench and Bar in Ireland, in this connection, following the setting up of new Courts in that country to replace the former British Courts. Section 61 of the Courts of Justice Act 1924 provided, in express terms, for "an appeal on law and fact" from the Circuit Court to the High Court, based on the note of the official stenographer, but, in practice, the judges found that, in the great majority of cases, it was impossible to disturb findings of fact made by the Circuit Court merely upon a perusal of the notes. As a consequence, after some 12 years trial, that system of appeal had to be replaced by the present system whereby the case is retried before a Judge of the High Court.

(c) In Cyprus, the Legislature, it seems to me, appreciated the futility of requiring this Court to review findings of fact unless the Court were given power to rehear any witness already heard by the trial Court, a power not possessed by the former Supreme Court. Section 25 (3) of our Courts of Justice Law 1960, made provision accordingly.

Having regard to what I have said and bearing in mind the powers given to this Court and to the circumstances in which they have been given, it seems to me that we cannot logically and consistently do justice to the appellant if his appeal is to be dismissed without the Court having availed of this new power to hear these two witnesses. Without rehearing their evidence this Court is, in effect, powerless to disturb the finding of the trial Judge unless it chooses to act upon intuition or a mere whim. I am of course, in entire agreement with the view that section 25 does not mean that, in every case, this Court is bound to make use of this power, or that it shall, a priori, disregard the findings of fact made by the trial Court. Indeed, I should be loath in this case, to act upon a different view of the evidence from that taken by the trial Judge, merely upon reading the written record. It is precisely for this reason that it seems to me that this is one of those cases in which the High Court would be justified in rehearing the evidence of witnesses in order to form in-

dependently its own opinion as to their credibility. In my considered opinion, this Court ought to do so with regard to the two named witnesses, Courtis and the appellant.

Cases referred to :

Marcoulli and others v. Rossos, decided by the Supreme Court of Cyprus in 1899 and cited and followed in *Michalakis and others v. Perdios* 5 C.L.R. 33;

Salih Djemali v. The Republic, Criminal Appeal No. 2305, *decided on February* 21, 1961 (*unreported*);

R. v. Mentesh 14 C.L.R. 232;

Mavrovouniotis v. Nicolaidou 14 C.L.R. 272;

Philippos Charalambous v. Demetriou, reported in this volume p. 14 *ante;*

Watt v. Thomas (1947) A.C. 484;

Andreas Hadji Georghiou v. The Police 22 C.L.R. 71.

Per VASSILIADES, J.: Where an appellant wishes to attack a finding of a trial judge resting on the credibility of a witness, he should expressly say so in his grounds of appeal; and he should take all necessary steps to summon the witness in question and make him available at the hearing of the appeal.

Per O' BRIAIN, P.: It would be desirable that the notice of appeal should, in all cases, where a rehearing of witnesses is sought, set this out together with the names of the witnesses whom it is sought to recall.

Per VASSILIADES, J.: For the purposes of rehearing, the witness should be called to be further questioned before the High Court as it may be necessary; but not to be examined or cross-examined *de novo*, as that would be in the nature of a retrial, which may be ordered, if necessary, before the proper court.

Appeal against conviction and sentence.

The appellant was convicted on the 31st December, 1960, at the District Court of Nicosia (Criminal case No. 14456/60) of the offence of inciting another person to commit a felony contrary to section 370(a) of the Criminal Code, Cap. 154, and was sentenced by Stavrinides, P.D.C. to eighteen months' imprisonment.

Lefcos Clerides with *G. Tornaritis* for the appellant.
E. Munir, for the respondent.

Cur. adv. vult.

The following judgments were read:

O' BRIAIN, P. : In this case I am in agreement with the majority of the Court save as regards one point viz. the applicability of the provisions of section 25 sub-section 3 of the Courts of Justice Law, 1960, to the present appeal. I may add, it is very doubtful if the point has been properly raised in the Notice of Appeal but it was discussed here and became a cardinal point in this appeal, and because of that I propose to set out briefly my views on the matter and to state the reasons for which I feel compelled to dissent from the other members of this Court.

Prior to the enactment of the Courts of Justice Law, 1960, the powers of the former Supreme Court in relation to the findings of fact made by the lower courts were well settled. Briefly they were analogous to those of the Court of Appeal in England in cases tried by a judge sitting without a jury. In particular, where the matter turned upon the credibility of witnesses, that Court save in exceptional and fairly well defined cases, would not disturb the conclusions of trial Courts, lacking as it did the power to rehear witnesses already heard by the trial Court and thereby form its own opinion of their credibility.

The legislature in enacting the Courts of Justice Law must be taken to have known the state of the law relating to this matter. The Courts of Justice Law, 1960, is no mere amending act altering in some respects the earlier statutes relating to the Courts. It is, as the preamble sets out, a law to provide for the constitution, jurisdiction and powers of the Courts of the Republic and for other purposes relating to the administration of justice. It was made necessary by the promulgation of the Constitution in August last. By its provisions it supplemented the articles of the Constitution relating to the judicial power and set up a completely new system of lower courts though, unfortunately, the latter are given the same titles as the former Colonial courts which they replace and which were completely abrogated by the new Constitution. This nomenclature is likely to lead to confusion of thought.

Nevertheless, section 25 deals with the matter of appeals from trial courts to the Appellate Court.

It is clear from its terms that the Legislature intended the new High Court of Justice, as the final Court of Appeal under

the Constitution, to have more extensive powers in relation to determinations of fact made by trial courts than were possessed by the former Supreme Court. There were, however, several alternatives open to the Legislature in order to effectuate this intention. It might, for instance, have provided that where an Assize Court was unanimous or a Full District Court was unanimous the position should be as heretofore. Instead, with a knowledge of what law then was, the Legislature chose to enact section 25 of the Courts of Justice Law in the widest possible terms providing, inter alia, that in "any appeal either in a civil or criminal case" the High Court shall not be bound by "any determinations on questions of fact made by the trial court". It seems to me that much weight must be given to this circumstance in construing the section. Where a power is given to a court in terms such as we find in section 25 and circumstances arise which call for the use of that power, it is, in my view, obligatory upon the court to avail of them, though I can appreciate how difficult it may be to determine, in certain cases, whether such circumstances have arisen.

In this case, on the issue which I am considering, the appellant asked this court to reverse the decision of the trial court. That decision, in this respect, was based upon the view which the learned trial judge took of the credibility of the two witnesses, Private Courtis and the appellant.

Pte. Courtis alleged that the accused addressed to him on the 25th August certain words. These in their context and in the circumstances in which they were spoken, can only be understood as being a direct incitement to steal. The appellant on his part denied this categorically and stated moreover that he never saw Courtis until the evening of 26th of August. Here we have a case of oath against oath. The trial judge after a very careful hearing and a considered judgment chose to believe Courtis and disbelieve the accused. It is this decision of the trial judge that is now directly challenged in this court. There can be no doubt about the legal right of the accused to ask this Court to review that decision if he feels aggrieved by it.

If the appellant be right in his contention that Courtis is not worthy of credence, his appeal must succeed. Likewise, he is entitled to succeed if there be a reasonable doubt about this matter. Furthermore, this is an appeal from a judge of

the District Court sitting alone. The opinion which any judge may form of the credibility of a witness in any case is governed very largely by personal factors by which I mean the judge's personal reaction to the testimony, as he listens to it, observing the witness, the latter's demeanour and appearance, and manner of giving testimony, all that connoted by the term "personality". These are factors which cannot be fully conveyed by the written record, a truism which has been referred to by the Judges here and in England and in my own country in case after case. Moreover, I find it difficult not to advert to what was the experience of the Bench and Bar in Ireland, in this connection, following the setting up of new Courts in that country to replace the former British Courts. Section 61 of the Courts of Justice Act 1924 provided, in express terms, for "an appeal on law and fact" from the Circuit Court to the High Court, based on the note of the official stenographer, but, in practice, the judges found that, in the great majority of cases, it was impossible to disturb findings of fact made by the Circuit Court merely upon a perusal of the notes. As a consequence, after some 12 years trial, that system of appeal had to be replaced by the present system whereby the case is retried before a Judge of the High Court.

In Cyprus, the Legislature, it seems to me, appreciated the futility of requiring this Court to review findings of fact unless the Court were given power to rehear any witness already heard by the trial Court, a power not possessed by the former Supreme Court. Section 25(3) of our Courts of Justice Law 1960, made provision accordingly.

Having regard to what I have said and bearing in mind the powers given to this Court and to the circumstances in which they have been given, it seems to me that we cannot logically and consistently do justice to the appellant if his appeal is to be dismissed without the Court having availed of this new power to hear these two witnesses. Without re-hearing their evidence this Court is, in effect, powerless to disturb the finding of the trial judge unless it chooses to act upon intuition or a mere whim. I am of course, in entire agreement with the view that section 25 does not mean that, in every case, this Court is bound to make use of this power, or that it shall, a priori, disregard the findings of fact made by the trial court. Indeed, I should be loath in this case, to act upon a different view of the evidence from that taken by the trial judge, merely upon reading the written record. It

is precisely for this reason that it seems to me that this is one of those cases in which the High Court would be justified in re-hearing the evidence of witnesses in order to form independently its own opinion as to their credibility. In my considered opinion, this Court ought to do so with regard to the two named witnesses, Courtis and the appellant.

I would add that my only hesitation in coming to this conclusion was due to the fact that Counsel for the appellant appeared to refrain deliberately from asking this Court to re-hear any witnesses. He contented himself with directing the attention of the Court to the fact that it had the powers which are set out in section 25(3) of the Courts of Justice Law. I think that in future it would be desirable that the notice of appeal should, in all cases, where a re-hearing of witnesses is sought, set this out together with the names of witnesses whom it is sought to recall. At the hearing of the appeal, Counsel, if he desires the Court to take that course, should expressly apply to have the named witnesses re-heard, and state to the Court a satisfactory reason for his application.

As regards the matter of sentence, if I were of opinion that the verdict of the Court below ought to be affirmed, I would not be disposed to interfere with the sentence imposed by the trial judge.

ZEKIA, J.: I had the advantage to read the judgments of my brother Judges Vassiliades and Josephides, and I agree with them that this appeal should be dismissed, and I am of the opinion also that the circumstances in the instant case do not require to recall any witness for rehearing before this Court.

As to the sentence, I am of the opinion that the sentence imposed is an adequate one and should not be disturbed.

VASSILIADES, J.: This is an appeal against conviction and sentence in a summary trial before the District Court of Nicosia.

The appellant was convicted by Judge Stavrinides, a President, District Court, on the 31st December, 1960, of inciting a soldier to steal firearms and ammunition ; and was sentenced to 18 months imprisonment.

At the opening of the trial the appellant was jointly charged with three other persons, on two counts : (a) cons-

piracy to receive firearms, contrary to section 371 of the Criminal Code ; and (b) incitement to steal firearms, ammunition and other property , contrary to section 370(a).

At the close of the case for the prosecution, the trial-judge, sustaining a submission of counsel for the defence, acquitted all four accused on the count for conspiracy, and the three other accused on the count for incitement to steal; but called upon the appellant on the latter count. And after hearing his evidence and that of another witness, the judge convicted the appellant.

The appeal against conviction is made on four grounds, with which I shall presently deal. And the appeal against sentence is made on the ground that, considering (a) the nature of the offence ; (b) the age and antecedents of the appellant ; and (c) his probable dismissal from the Police Force, the sentence of 18 months imprisonment imposed on the appellant is manifestly excessive.

The grounds against conviction, as presented by counsel at the hearing of the appeal, are :—

(a) that the Court failed to appreciate the position that the main prosecution witness was either an accomplice or an agent provocateur ;

(b) that the evidence does not amount to "incitement" in law ; in any case it does not show incitement to steal ;

(c) that the evidence, even if totally accepted, is insufficient to support the conviction ; and

(d) that the Court having acquitted the other three accused, could not, on the same evidence, convict the appellant. In this connection counsel invoked the application of section 25(3) of the Courts of Justice Law 1960, to the effect that this Court is not bound by the findings of the trial court, and could reach its own conclusions on the evidence.

As to the first ground, it seems to me clear that on the evidence as a whole, it cannot be said that witness Courtis, (the soldier alleged to have been incited to steal) was at any time either an accomplice, or what is described as agent provocateur. He reported the matter to his sergeant in due

course ; and he agreed to play his part in assisting the Police to bring the culprits to justice.

As to the second ground, *viz.* whether the words used by the appellant, amount to incitement to commit a crime as charged, I find myself completely in agreement with the view taken by the trial judge on this point.

The judge accepting the evidence of the soldier, held that telling a soldier, in the circumstances of the present case that appellant was ready to do big business with him in the purchase of arms, at the attractive prices of £20 for a pistol, £50 for a sten-gun, and a shilling for each round of ammunition, amounted to inciting the soldier to steal arms and ammunition as charged.

Counsel for the appellant submitted that "to incite" means something more than to tell ; and the appellant did nothing more in this case, he argued.

The expression to incite a person to commit a crime has long been used in legal phraseology in connection with the criminal law. It is used as equivalent to soliciting ; and does not appear to have given any difficulty as to its meaning.

In the eleventh edition of Russell on Crime, the matter is dealt with in part III of Chapter 6, at p.209 of Vol.I, under the heading : Soliciting or Inciting to Commit a Crime. There is no indication there that the meaning of these expressions has ever presented difficulty.

In the shorter Oxford English Dictionary (3rd Edition' 1956) the meaning of the verb, as given at p.979, is : to urge or spur on ; to stir up, instigate, stimulate, to do something. In the Royal English Dictionary at p. 283 one of the meanings given is : to move the mind to action.

Now the parallel word "solicit" ; one of the meanings of this verb as given in the same edition of the Shorter Oxford Dictionary at p.1941 is : to affect a person by some form of physical influence or attraction ; to tempt to attract or draw by enticement.

We are here concerned with the meaning of the verb "to incite" as it occurs in the context of section 370 of the Criminal Code, (Cap. 154) the material part of which reads:-

"Any person who incites or attempts to induce another person to commit an offence, whether such other person consents to commit the offence or not, is guilty -

(a) of a felony, if the offence in question is a felony....

(b) of a misdemeanour if the offence in question is a misdemeanour.................."

In their ordinary meaning, the words : "who incites or attempts to induce", in this context, clearly mean, in my opinion, what the legislature obviously intended them to mean ; that is to say to make it a felony or a misdemeanour respectively, for any person to do or say anything, the natural tendency of which would be to move or encourage another person into action amounting to a felony or a misdemeanour under the criminal law.

Same as other parts of the Criminal Code, the section is intended to codify the common law principle that suggesting and encouraging the commission of a crime, is as much culpable and antisocial conduct, as committing or attempting to commit the crime itself. The offender conceives the crime in his mind ; puts the intention to have it committed, behind the conception ; and then proceeds into action for the purpose, by getting or attempting to get someone else to commit it.

Such conduct is apparently, in the view of the legislator, as dangerous to the community as an attempt to commit the crime ; and deserves equal punishment, at least as a deterrent. A mere comparison of sections 366 and 370 leaves, in my mind, no room for doubt on this point.

What fell to be decided in this case, was whether the effect of the words used by the appellant when he spoke to the soldier Courtis, coupled with appellant's conduct at the material time, amounted to stirring or moving the soldier's mind to action for the purpose of stealing arms.

Accepting the soldier's evidence as that of a truthful witness, the learned trial judge was, in my opinion, fully justified in reaching the conclusion which he reached ; and he was right in convicting the appellant on the count of incitement to steal as charged.

As regards the ground going to the sufficiency of evidence, I have very little to say. The crime charged, could be proved by the uncorroborated evidence of a single witness.

In this case the testimony of a truthful witness - (in the judge's opinion) - found ample corroboration in the circumstances of the case, as shown by other evidence.

I now come to the last ground of appeal : that the Court having acquitted the other three accused, could not, on the same evidence, convict the appellant. And that this Court, no longer bound by the findings of the trial court, can go into the matter under the provisions of section 25(3) of the Courts of Justice Law, 1960, and proceed to make its own findings.

Apart of the effect which section 25 may have on the case, I find no merit in this ground. The learned trial judge distinguished the position of the appellant from that of the other three accused, for the reasons stated in his judgment; and whether or not, he was right in acquitting all or any of the other accused, he was, in my opinion quite justified in convicting the appellant, on the evidence which he accepted.

But the judge should not have accepted the evidence of the soldier Courtis, counsel for the appellant submits, which stands contradicted by appellant on oath ; and this Court is not bound by the trial judge's finding on the point ; or, to put it crudely, by his choice between their respective testimony Section 25(3) gives power to this Court to enter into the matter and make its own finding, rehearing the evidence on the point, if required.

The effect and application of the provisions of this section is, in my mind, the salient point in this appeal. As it is a new provision in the Courts of Justice Law it must be approached with all due care.

It is a fundamental principle in the interpretation of statutes, that the object of the legislature in making the provision in question, be properly ascertained in the construction and application of the statute. In the tenth edition of Maxwell on the Interpretation of Statutes, at p.19, one reads:

> "To arrive at the real meaning (of a statutory provision) it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider according to Lord Coke (in *Heydon's* case 1584) :
>
> 1. What was the law before the Act was passed ; 2. What was the mischief or defect for which the law had

not provided ; 3. What remedy Parliament has appointed; and 4. The reason of the remedy".

"According to another authority (Lord Lindley M.R. in the *Mayfair Property Co.* 1898, 2 Ch. 28, 35 and a number of other cases given in foot-note (z) of p.19 of the same text-book) in order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's* case, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief".

And in p.20, supported by a long list of cases, ending with *Seaford Court Estates v. Asher* (1949) 2 K.B. 481, *per* Denning L.J., the learned authors put the same principle of interpretation in these words :-

> "The true meaning of any passage, it is said, is to be found, not merely in the words of that passage, but in comparing it with other parts of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the legislature had in view".

With these guiding considerations in mind, I shall now proceed to deal with the provisions of section 25(3). And in the first place : What was the law, in Cyprus, regarding the findings of trial courts in proceedings on appeal ? And what were the circumstances with reference to which the House of Representatives of our young Republic, embodied in this connection, the provisions of sub-section 3 in the new Law, enacted to regulate the working of the Courts of Justice?

The law regarding the findings of fact on appeal, was never free of difficulty in Cyprus, where the courts did not have juries. Going back to the end of last century when the District Courts were constituted by one English President and two Cypriot Judges, one Turk and one Greek, we find the Court of Appeal (which was then the Supreme Court of Cyprus) taking the view in *Marcoulli and others v. Rossos* that : "In cases of this description where the question is purely one of fact, it has been the practice of the Appeal Courts in the United Kingdom, (the report reads) not to interfere with the verdict of the Court which tried the case, and

heard the witnesses and saw their demeanour, unless some very strong ground is adduced to show that the verdict is against the weight of the evidence".

This case was cited and followed in *Michalakis and others v. H. Panayioti Perdio*, decided early in 1900 by the same Court, and reported in 5 C.L.R. p. 33.

Some thirty years later, when most of the trial courts in what was then the Crown Colony of Cyprus, were constituted by a single judge, the Supreme Court in its appellate jurisdiction, still had to cope with the same problem regarding trial court findings.

In *R. v. Mentesh* (14 C.L.R. p. 232) one of the most frequently cited cases in criminal proceedings in Cyprus, where the present Attorney-General with Zekia Bey appeared for the prisoner and Mr. St. Pavlides, later an Attorney-General, appeared for the Crown, the Court of Appeal quashed a conviction for murder by an Assize Court presided over by the then Chief Justice, as upon analysis of the evidence, found themselves unable to sustain the trial court findings.

In a civil appeal decided in about the same period, *Mavrovouniotis v. Nicolaidou* (14 C.L.R. p. 272) the Court of Appeal consisting of three judges, were divided in dealing with the findings of the trial judge (Fuad, J., in that case, sitting as Divisional Court). Strong C.J., is reported to have said at p. 277 :—

> "......Although the Rules of Court in Cyprus dealing with appeals do not expressly provide as does O. LVIII, r. 1, of the English Rules that an appeal is to be a re-hearing, the Court of Appeal is empowered by O. XXI, r. 20.............. to draw inference of fact, and to give any judgment or make any order which it shall appear to the Court should have been given or made and to make such further or other order as the nature of the case may require.
>
> In view of the wide powers thus conferred on the Cyprus Court of Appeal, I think that in dealing with appeals from a Judge where the veracity of the witnesses is in question, it is in much the same position as the Court of Appeal in England in regard to reviewing the evidence. That position is stated in the following well known passage of Lord Sumner in the *S.S. Hontestroom* v. *S.S.*

Sagaporack (1927) A.C. 370 where, after pointing out that an appeal is by O. LVIII, r. 1 made a rehearing, the noble lord proceeds to say : 'None the less not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge and, unless it can be shown that he has failed to use, or has pulpably misused his advantages, the higher Court ought not to take the responsibility of reversing conclusions so arrived at , merely on the results of their own view of the probabilities of the case..........If his estimate of the man (the witness) forms any substantial part of his reasons for his judgment, the trial Judge's conclusions of fact should, as I understand the decisions, be let alone."

Upon these considerations, the learned Chief Justice took the view that the trial Judge's findings should be sustained and the judgment based upon them upheld.

But the other two members of the Court of Appeal (Thomas and Sertsios JJ.) took a different view of the matter. Thomas, J., after dealing at length with the evidence in the case and the trial Judge's findings thereon is reported to have said at p. 294:

> "........For a great many years this Court in the hearing of appeals has acted upon the principle that the finding of the trial Judge on questions of fact should not be set aside unless it is one, viewing the evidence reasonably, the Court could not have arrived at".

And in this connection the learned Judge makes reference to *Michalakis v. Perdios* (*supra*). After reviewing, however, several cases on the point, decided in England, he goes on to say towards the end of p. 296 :

> "........The authorities I have cited establish a very different rule from that one that has always been followed in Cyprus. The principles to be extracted from these cases appear to me to be : (1) an appellate Court treats the findings of a judge sitting without a jury on questions of fact quite differently from verdict of jury ; (2) that, while great weight should be given to a judge 's finding of fact, it is the duty of the appellate Court to weigh conflicting testimony itself, and draw its own conclusions on questions of fact; and (3) that, even when the Judge's

findings of fact depend upon the credibility of witnesses, an appellate Court has power to set such findings aside, but will not usually do so unless the trial Judge has failed to take account of circumstances material to an estimate of the evidence, or where he has believed testimony which is inconsistent with itself or with indisputable fact".

Upon these considerations the learned Judge reached the conclusion that the findings of the trial Judge could not be sustained and the judgment based upon them be set aside. The same view was also taken by Sertsios J., who after reviewing several English cases as well as the facts in the case under consideration, and the law applicable thereto, reached the same conclusion as Thomas J. ; with all respect to the learned Judge of first instance, and although he attached much importance, as he said, to the dissenting view of the learned Chief Justice.

The Courts of Cyprus faced this problem of trial court findings, in the light of English decisions, not always easy to reconcile, for another long spell of years, until the establishment of the Republic with its new Courts under the present Courts of Justice Law.

That the position was none the easier at this time, is apparent from the judgments delivered in this Court in a recent case before us on appeal from the District Court of Famagusta; one of the last appeals heard before the enactment of the new Law, and the provisions of section 25.

In a civil action for damages for assault, where the defendant denied the assault and set up an alibi, the trial judge found for the plaintiff accepting his evidence on the assault, although he rejected the evidence of plaintiff's two witnesses on the same issue ; and disbelieved the defendant and his witnesses. This finding was attacked on appeal as unreasonable and against the weight of evidence.

The learned President of this Court, after dealing with the trial Judge's findings concluded that the appellant had not satisfied him that the trial Judge who had the advantage of seeing and hearing the witnesses had failed to use or had misused that advantage. And in such circumstances he could not take the view that reading of the written record of the evidence put him in a position to conclude that the trial Judge was clearly wrong.

My learned brother Zekia, J., took the view that a finding of the trial court based on the credibility of a witness save in exceptional instances, according to English authorities which were followed hitherto in this Island, cannot be disturbed by an appellate court. But towards the end of his judgment, my learned brother expressed in clear language, dissatisfaction at "the way some judgments are given by trial courts where without stating adequate reasons dispose of an issue in the case by merely saying 'I believe or disbelieve so and so."'

My learned brother Josephides J., took the opportunity of restating the powers of the Court of Appeal in Cyprus at the time of the hearing of that appeal, in reviewing the findings of fact by trial courts. After recording statements of high authority made in a number of cases, ended with *Watt v. Thomas* (1947) A.C. 484 and cited from the opinion of Lord Thankerton (at p. 487) where the noble lord states three principles as governing the position of trial court findings in appellate courts. The effect of the principles stated, is that such findings should not be disturbed and should be treated as binding on the appellate court, unless certain conditions appearing on the record, show that the matter has become at large for the appellate court to deal with.

On these principles my learned brother concluded that as the findings of the trial judge in that case were clearly based on his estimation of the witnesses, should not be disturbed on what was a question of fact.

In a dissenting judgment, I stated the reasons which led me to the conclusion that applying the principles stated in the majority judgment of the Supreme Court of Cyprus in *Mavrovouniotis v. Nicolaidou* (*supra*) I should go into the trial judge's findings; and upon doing so I reached a different result.

I have gone at some length in that case (*Philippos Charalambous v. Demetriou*, Civil Appeal 4314 decided on 10.2.61) in order to show that the matter of trial court findings on appeal, was not free of difficulties at the time when the legislature in Cyprus provided for it in the form of section 25 in the new Courts of Justice Law.

But what made things still more difficult in Cyprus in this connection, were the radical changes in the set up of the courts, resulting from the Zurich and London agreements,

and unavoidably incorporated in the Constitution of the Republic.

Within four months of the establishment of the Republic its legislature had to provide under a new statute, a structure for the administration of justice as required by the political settlement reached under the agreements. The litigants were no longer members of a general public with the same standing before the courts. For the purpose of court proceedings, civil or criminal, they were divided in two communities, the Greek and Turkish ; a division permeating the whole constitution of the Republic.

The very first article of the Constitution providing for the State of the independent and sovereign Republic of Cyprus, speaks of the two separate communities. And article 2 defines the division, and places the citizens of the new State into either the one or the other of the two distinct communities. With very few exceptions, this division runs from the top down to the roots of the structure of the State.

Part X of the Constitution (Articles 152-164 inclusive) dealing with the Courts for the administration of civil and criminal justice, provides for a High Court vested practically with the responsibility for the proper working of all civil and criminal courts to be established under a new statute ; and having appellate jurisdiction over all such courts as the highest court of appeal in civil and criminal matters.

Article 153 provides for the composition of the High Court. It must consist of a President, who cannot be a citizen of the Republic and is described as the "neutral" judge : and of three other members, citizens of the Republic, two of whom must be Greek and one a Turk. The neutral judge has two votes in all decisions, which are taken by majority.

Article 159 provides that all proceedings civil or criminal, excepting proceedings on appeal, must be heard before judges belonging to the same community as the litigants. And where the parties do not belong to the same community, the case must be heard before a mixed Court, the composition of which is determined by the High Court.

So we have in this young Republic of ours, a peculiar structure, unique in its kind, as far as I know, with one central source of judicial authority, apparently balanced to satisfy

both communities ; and with courts of first instance upon a communal basis ; Greek courts, Turkish courts, and mixed courts.

With these considerations in mind one may see, clearly, in my opinion, the mischief for which the old law did not provide ; and for which the legislature apparently intended to provide a cure by section 25. Bearing in mind, (as they must be assumed to have been) the existing difficulties in the law dealing with trial court findings on appeal, (as I have endeavoured to show earlier in this judgment) enhanced and increased to a possibly dangerous point, by the unusual structure of courts composed upon a communal basis, in a state where the two component communities do not always see eye to eye, the legislature apparently thought fit to make express provision in the section dealing with appeals, that the High Court, as the central and final source of civil and criminal justice, shall not be bound by any determinations on questions of fact made by the trial courts ; nor, for that matter, be fettered by dictums and decisions in this connection, made by the Courts or Judges in England, under very different circumstances "The High Court... . . shall not be bound by any determinations on questions of fact made by the trial court", in the context of section 25(3) does not, in my opinion, mean "shall ignore" or "shall disregard". It means that the High Court shall not be bound to take at its face value every such determination, but shall be entitled to go into the reasoning behind it, and enquire as to its correctness, in the circumstances of the case in hand, as shown by the evidence

It is equally clear in my mind, that while the legislature intended to settle in unequivocable language the revisional powers of the Court of Appeal, they did not aim at any substantial alteration in the law. Trial court findings continue to be the valuable conclusion reached by one or more trial judges, subject only to unfettered investigation and criticism on appeal, where only if the circumstances of the case so require, the Court can rehear any witnesses already heard, or order a retrial.

In this respect I can do no better than cite a passage from chapter 3 of Maxwell on the Interpretation of Statutes (10th Edition) under the heading "Restriction to the specific object in view", at p. 81:-

"..... There are certain objects which the legislature

is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided.... One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed"

With these considerations in mind, I shall now proceed to read the whole of section 25 before going into its effect on the case in hand.

"25(1) Subject to Rules of Court every decision of a court exercising civil jurisdiction shall be subject to appeal to the High Court.

(2) Subject to the provisions of the Criminal Procedure Law but save as otherwise in this sub-section provided every decision of a court exercising criminal jurisdiction shall be subject to appeal to the High Court.

Any such appeal may be made against conviction or sentence on any ground.

(3) Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby, the High Court on hearing and determining any appeal either in a Civil or a Criminal case, shall not be bound by any determinations on questions of fact, made by the trial court, and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of retrial by the trial court or any other court having jurisdiction, as the High Court may direct".

The present appeal is against both conviction and sentence. And it can be made on any ground. At this stage I am dealing with the appeal against conviction ; and specifically with the ground that this Court, not being bound by the finding of the trial court that the evidence of the soldier Courtis is truthful and reliable, should proceed to reconsider

it as against the evidence of the appellant who contradicted Courtis, and viewing it in the light of the other evidence in the case, should come to the conclusion that the evidence of Courtis (which forms the basis of the conviction) should not have been accepted, or at least should have left upon the mind of the trial judge a doubt upon which appellant should have been acquitted.

Counsel for the appellant left it at that. He did not ask the Court to rehear Courtis or the appellant ; he merely said that the Court had power to do so, and should consider whether such power should not be exercised in this case. Incidentally this raises the question how is this Court to decide whether the trial judge was right or was wrong in preferring the evidence of Courtis to that of the appellant?

In the first place, it seems to me, that where an appellant wishes to attack a finding of a trial judge or judges, resting on the credibility of a witness, he should expressly say so in his grounds of appeal ; and he should take all necessary steps to summon the witness or witnesses in question, and make them available at the hearing of the appeal, so that they may be called if required.

In this case, the appellant contends that the evidence was not sufficient to warrant a conviction. "Even if the evidence for the prosecution was believed in toto, paragraph (i) reads, there was no evidence of incitement to commit any offence or to commit the offence of stealing". This point, I have already dealt with.

Secondly, I read the provisions of sub-section (3) to mean that this Court on hearing an appeal has the power to review the whole evidence without feeling fettered by determinations on question of fact made by the trial court; but in doing so, the Court should still be guided by the principles which have grown and developed in the light of practical experience, as to the value of trial-court findings.

Before such findings are disturbed, the appellate Court must be satisfied to the extent of reaching a decision, (unanimous or by majority) that the reasoning behind a finding is unsatisfactory ; or that the finding is not warranted by the evidence considered as a whole. And the onus, in my opinion, must rest on the appellant, both in civil and in criminal appeals, to bring this Court to such decision ; or else, the trial-court findings remain undisturbed as part of the case.

It should be for the party attacking a finding, or asking the Court to exercise its powers under section 25, to show that the interests of justice in the case under consideration, require the taking of such course.

And finally, coming to questions of credibility, I likewise take the view, that before an appellant can invite this Court to disturb a finding resting on credibility, he must be able to show that the circumstances of the case, as they appear on the record, require, in the interests of justice, the rehearing of one or more witnesses already heard by the trial court. And for the purposes of such rehearing the witness should be called to be further questioned as it may be necessary ; but not to be examined or cross-examined de novo, as that would be in the nature of a retrial, which may be ordered, if necessary, before the proper court.

The receiving of further evidence in an appeal, or the hearing of any witness already heard, should, in my opinion, be the result of a decision of this Court, same as an order for retrial.

In the present appeal, speaking for myself, far from seeing any reason for disturbing the trial judge's finding, as to the credibility of the witness Courtis and that of the appellant, I think that in the light of the other evidence in the case, the trial judge's finding was fully justified. For the sake of example, I may perhaps add that the reverse finding in the circumstances of this case, might probably point towards the desirability of recalling these two men or either of them in the box.

Having reached these conclusions, I take the view that the appeal against conviction must fail.

I now come to deal with the appeal against sentence. In a recent case *Salih Djemali* v. *The Republic* (Cr. Appeal 2305), unreported, where the appellant, a mason by trade, was sentenced by the trial court to six months imprisonment for attempting to import in the heels of his shoes 25 rounds of pistol ammunition, this Court found the sentence inadequate and increased it to one of 12 months.

In the circumstances of this case, for a policeman to incite a soldier to steal arms for big business at £20 a pistol, £50 a sten-gun, and 1/- for every round of ammunition, I think that in the conditions now prevailing in the Island, the

sentence should not be less than two years imprisonment from to-day.

JOSEPHIDES, J. : The Appellant was convicted of the offence of inciting a soldier to steal firearms and ammunition, under section 370(a) of the Criminal Code, and he was sentenced to 18 months' imprisonment. He now appeals against his conviction and sentence.

The main evidence against him was that of one Maxwell Courtis, a Private in the First D.E. Battalion of the British Army, who at the material time was stationed at Wayne's Keep Camp near Nicosia. Courtis stated that on the 25th August, 1960, while he was in his tent in the Camp, appellant together with a girl (who was one of the accused persons in the same case but was acquitted) went up to the fence of the camp and signalled to him (Courtis) to approach them. He did so and the girl introduced to him the appellant who spoke to him in English. The relevant part of Courtis's evidence reads as follows:

> "He said to me: "I want to do big business with you". I said: "What kind? What do you mean?" He said as the camp was closing down, there was a chance of doing black market business. He also said "My friends want small things, but I don't want small things. I want big things". He added: "I want pistols or Sten guns. I'll pay you £20 for a pistol, £50 for a Sten gun and 1/- for each round of ammunition". I said : "These are very big things to get and the job is a very difficult one". He explained he preferred pistols and Sten guns because whisky and cigarettes were small things and involve him in trouble with the Police. He said he would get double what he would pay me for that firearm and would pay me part of his profits. I said I would not supply firearms or ammunition as being a serviceman, I might get into serious trouble. I added : "First to make sure, I 'll meet you at 2 p.m. to-morrow afternoon". He said he would not come at 2 p.m. next day but he would send accused 3. I said that will be alright. Thereupon we parted".

The appellant, who is a policeman, is married and has one child. He denied that he ever approached or spoke to Courtis and he put up an alibi which was rejected by the trial judge.

In addition to Courtis's evidence the trial judge relied on the fact that the appellant was found at the material time in the vicinity of the place where the delivery of the pistol was to be made, and that he gave to the Court an explanation which was not accepted by the court. The appellant's explanation was that he went to the house of his girl friend in the afternoon of that day intending to spend the night with her and that while in her house he decided to go for a stroll, and that while doing so he found himself very near the place where delivery of the pistol was to be made. Another significant factor which weighed with the trial judge was that the appellant was found in possession of a sum of money slightly in excess of that which, according to Courtis, he had agreed to pay for a pistol ; and, finally, the judge believed the statement of Inspector Violaris that the appellant said to him that the two other co-accused had arranged with a serviceman to take delivery of Army cigarettes and that he (the appellant) was watching them. This was in conflict with the explanation which the appellant gave in his evidence, and it betrayed knowledge of an illicit transaction concerning Army property.

Appellant's counsel argued that, even if Courtis's evidence as to the alleged conversation were believed in toto, that did not amount to incitement to steal, but that it was simply an expression of a wish on the part of the appellant that he wanted pistols. But the appellant did not simply say I want pistols, he said I want pistols or Sten guns and I will pay you £20 for a pistol and £50 for a Sten gun and one shilling for each round of ammunition ; and he added that he would get double of what he would pay Courtis for a firearm and that he would pay him part of his profits, and thereupon Courtis replied that he was not willing to supply firearms or ammunition as, being a serviceman, he might get into serious trouble.

If I may adopt the reasoning in the judgment of the Court of Appeal in *Andreas Cleanthous Hadji Georghiou v. The Police* 22 C.L.R., at page 73, if Courtis's evidence is accepted as it was accepted by the trial court, the appellant tried to persuade Courtis, a serviceman, to secure him pistols, Sten guns and rounds of ammunition from a military camp and this could only be carried out in one of the following ways: (a) Courtis might steal these firearms and ammunition within the camp and pass them to the appellant ; (b) Courtis might come to possess a pistol, Sten gun or ammunition lawfully

as a bailee and he might deliver it to the appellant and (c) Courtis might secure the possession of a stolen firearm or ammunition within the camp and deliver it to the appellant.

There is no evidence that Courtis was carrying a firearm or ammunition at the time the appellant asked him to provide him with such articles, nor is there evidence whether Courtis was authorised to carry a pistol or a Sten gun if he wished to do so ; but it would be reasonable to infer that a serviceman might lawfully become the possessor of a firearm or ammunition. But assuming Courtis to have come to possess a pistol or a Sten gun for the purpose of delivering it to the appellant his parting with the possession to the appellant would have amounted to theft. The incitement involves the commission of theft either before the delivery or by the delivery of the firearm to the appellant. If Courtis was lawfully in possession of a firearm in his capacity as a serviceman he was then a bailee and as such he would be committing a theft, within the definition of section 255 of the Criminal Code, by delivering such a firearm to the appellant.

For these reasons I am of opinion that the words used by the appellant amounted to an incitement to steal.

Appellant's counsel submitted further that as the conviction was based on the evidence of a single witness this Court should re-hear Courtis under the provisions of section 25(3) of the Courts of Justice Law, 1960, which reads as follows:

> "(3) Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby the High Court on hearing and determining any appeal either in a civil or a criminal case shall not be bound by any determinations on questions of fact made by the trial court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence, and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of retrial by the trial court or any other court having jurisdiction, as the High Court may direct".

It will be observed that this section empowers the High Court to re-hear any witnesses already heard by the trial court "where the circumstances of the case so require". This is a new power given to this Court which was not previously possessed by the Supreme Court of Cyprus, and for this reason I am of the view that we should be very careful in laying down any principles on which the Court would act in deciding whether to re-hear a witness or not. Undoubtedly the legislature has armed this Court with the widest possible powers for the purposes of reviewing the whole evidence and "where the circumstances of the case so require" re-hearing any witnesses already heard by the trial court, and in a proper case this Court would not refuse to make use of the powers which are contained in section 25(3).

With these considerations in mind I am of the opinion that only in special circumstances should the High Court act upon the power of re-hearing a witness given in section 25(3), and forming its own conclusions of fact, such as where a trial court consisting of two judges and constituted under the provisions of paragraph 3 or 4 of Article 159 of the constitution, or a Full Court composed of two judges under the provisions of section 22(1) of the Courts of Justice Law, 1960, differ on a question of credibility of a material witness; or, where this Court after reading the record of the evidence and hearing counsel's submissions, feels doubt about the determinations of primary facts made by the trial court. But this Court should not re-hear a witness in every case in which there is conflicting testimony, because to do so would be to usurp the function of the trial court. The High Court should not normally substitute itself for the trial court and retry the case. That is not our function. If the circumstances of the case justify such a course this Court has power to order a retrial by the trial court or any other court having jurisdiction in the matter, under the provisions of section 25(3) of the Courts of Justice Law, section 145(1)(d) of the Criminal Procedure Law, Cap.155, and in civil cases under 0.35, r. 9 of the Civil Procedure Rules.

After careful consideration of this matter I think that at present it would not be desirable to seek to lay down any precise principles on which this Court would be prepared to act in deciding whether to re-hear a witness. Such principles should, I consider, more properly be left to be evolved in the

course of time in the consideration of future appeals. Otherwise, if such principles were now laid down they might fetter unduly the power of this Court to re-hear a witness.

I am of opinion that there is nothing whatever in this case which makes it desirable to have recourse to the special and exceptional power of re-hearing a witness, provided by section 25(3) of the Courts of Justice Law. Furthermore, there is no ground whatever for suggesting that in the present case the trial judge failed to use or has misused the advantage of seeing and hearing the witnesses and of weighing conflicting testimony. For these reasons I would dismiss the appeal against conviction.

On the question of sentence I do not consider that it is either wrong in principle or manifestly excessive or inadequate in view of the circumstances of the case.

I would, therefore, dismiss the appeal both against conviction and sentence.

Appeal dismissed. Conviction and sentence affirmed.