1964
August 10, 11,
12, 13, 14,
17, 18,
Oct. 6

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ANDREAS
ANTONIOU
AND 2 OTHERS
v.
THE REPUBLIC

[VASSILIADES, TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

1. ANDREAS ANTONIOU,
2. ARISTOKRATIS THEODOROU,
3. GEORGHIOS ANTONIOU,

Appellants,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeals Nos.* 2691, 2692, 2693)

(*Consolidated*)

Trial in Criminal Cases—Evidence—Criminal Procedure—Premeditated Murder—Circumstantial Evidence—Incompatibility of the evidence of eye-witnesses with the circumstantial evidence—Verdict—Summary form of verdict deprecated—Article 30.2 *of the Constitution—The Criminal Procedure Law, Cap.* 155, *section* 113.

Criminal Procedure—Appeal—Restatement of the principles regarding the powers of the High Court on appeal and its powers and the circumstances under which the appellate Court may order a new trial—The Courts of Justice Law, 1960 (*Law of the Republic No.* 14 *of* 1960) *section* 25 (3).

The appellants in the present case were convicted by the Assize Court of Limassol on one count of the offence of premeditated murder contrary to sections 203 and 20 of the Criminal Code, Cap. 154 as amended by section 5 of Law 3 of 1962 and were sentenced to death.

The main facts are that the victim in this case was on the 14th July, 1963, attacked while sitting at a public coffee-shop at the square of his village near the church, in the morning following Sunday service. And that having been shot at from a close distance in that attack, the victim received bullet-injuries of which he died in hospital two days later.

All three appellants were jointly charged with the premeditated murder of the victim.

The case for the appellants both at the trial and in the appeal, was that they were not the persons who committed the crime. Each of the appellants contended that the evidence adduced against him should not have been acted upon by the trial Court, as biased and unsatisfactory.

The issues arising in this appeal can be put in two main groups : (*a*) the factual issues ; and (*b*) the legal issues pertaining to the facts established by the evidence. The most important issues of fact are, of course, whether the victim was attacked by one or more assailants and whether each of the appellants was sufficiently identified with any of the assailants.

Held, (1) the finding that the first shots were fired by the first appellant is fully supported by the evidence ; and cannot reasonably be questioned. All the eye-witnesses state that he attacked the victim while the latter was sitting by the southern door, firing at him more than once, from close behind ; and that chasing the victim inside the cafe continued firing at him there. He fired several shots before any of the other appellants are said to have shot at the victim at all.

(2) There is no difference in the version of the eye-witnesses, and no discrepancy or contradiction in their evidence, on this point. And, it is supported by the circumstantial evidence (medical, ballistic, and the places where the empty cases were found).

(3) If there was no evidence bringing the other two appellants into the scene, with more pistols and firing, the circumstances in which the crime was committed would have been clearly and unshakably established against the first appellant. It is this other evidence, regarding the presence and the actions of the second and the third appellants, that teams with differences, contradictions and discrepancies.

(4) And it is this evidence which cannot stand the test of the circumstantial evidence if the latter is connected with the first appellant.

(5) The part of the verdict concerning the second and the third appellants cannot, therefore, be sustained. And they must be acquitted and discharged.

(6) If the evidence connecting these two appellants be rejected, no question of other shots, or common design arises. In the circumstances, we do not think that discarding the part of the evidence connecting the other appellants, affects the evidence connecting the first appellant. Nor do we think that the joint-trial he has had with them, prejudiced

his position at all. If anything, it nearly opened the door for him to escape the consequences of a daring murder. The appeal in his case, must fail.

Appeal of appellant No. 1 *dismissed. Conviction and sentence of the Court below affirmed. Appeals of appellants Nos.* 2 *and* 3 *allowed. Conviction and sentence of the Court below set aside.*

Per TRIANTAFYLLIDES, J. : I feel that I ought to observe that, though the trial Court has dealt with the case under examination in a generally commendable manner, it has unfortunately felt it sufficient to pronounce its verdict in a rather summary way. In my opinion, though it is correct that a trial Court in Cyprus performs the functions of both a judge and a jury, in the sense that it decides both the issues of law and the issues of fact, it must be remembered that the analogy between a judge in Cyprus, and a judge and jury in other countries, should never be carried too far. The trial Court retains its judicial character all through the proceedings right down to and including its judgment and it cannot divest itself of it. A jury, as it is composed of laymen, is not called upon to give any reasons for its verdict. On the other hand, a judge, in deciding the issues of fact, has to give reasons for decisions which he reaches in the capacity of a jury. This is clearly laid down in section 113 of Cap. 155 and, since 1960, by Article 30.2 of the Constitution.

The summary form, however, of the verdict of the trial Court has not, in all the circumstances of this case, offended against either section 113 of Cap. 155 or Article 30.2, to such an extent as to vitiate the conviction of appellant No. 1.

Cases referred to :

Ghosh v. *The King Emperor* (1924–25) The Times Law Reports, Vol. XII.

Stelios Simadhiakos v. *The Police* (1961) C.L.R. 64 ;

Charalambos Zacharia v. *The Republic* (1962) C.L.R. 52 ;

Halil Dervish v. *The Republic* (1961) C.L.R. 432 ;

Mustafa Halil v. *The Republic* (1962) C.L.R. 18 ;

R. v. *Smith* (1963) 3 All E.R. 587 at p. 682.

Appeal.

The appellants were convicted on the 6.12.63 at the Assize Court of Limassol (Cr. Case No. 6480/63) on one count of the offence of premeditated murder contrary to sections 203 and 20 of the Criminal Code, Cap. 154 as amended by section 5 of Law 3 of 1962 and were sentenced by Loizou P.D.C., Limnatitis and Kakathimis D.JJ. to death.

G. Cacoyannis, for appellant No. 1.

A. S. Myrianthis, for appellant No. 2.

A. P. Anastassiades, for appellant No. 3.

A. Frangos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was read by :

VASSILIADES, J. : On Sunday the 14th July, 1963, at the church of Omodhos township, a memorial service in requiem of the soul of Joannis Antoniou followed the usual morning service. It was a distressing occasion for his family as the deceased, Joannis Antoniou, was a young man of 24 who had been murdered outside his village about forty days earlier, *viz.* the night of the 8th June. No arrest was effected for that crime ; but apparently in the mind of the young man's family—and perhaps other people in the village also—there was no mystery about it.

Relations, mostly women dressed in deep mourning, stayed on in church for the memorial service, with friends and others ; and no strong imagination is required for anyone acquainted with the village scene, to compose a picture of what may have been taking place on such occasion.

The assassinated young man was the younger brother of appellants 1 and 3 ; and of the wife of appellant 2. The first, a man of 29, is one of the lieutenants in the young Cyprus Army. The second and third appellants, aged 32 and 31 respectively, are carpenters at Omodhos village.

The square outside the church, with several coffee-shops all round, were busy with people. Some of the witnesses assessed the crowd at about 150 or 200. One can safely say that there were a good many persons in the square, both during and after the church service ; and the cafes, all round were well patronised by customers as usual on such occasions.

One of these coffee-shops was Damianos' cafe where the murder under consideration was committed. It is shown in the Land Registry plan before us (*exhibit* 1) ; and in the set of photographs (*exhibit* 3).

The victim of the murder, Andreas Constantinou Tamanis, came there a few minutes before he was attacked in cold blood, while sitting with others, outside the cafe, and received fatal pistol injuries of which he died two days later. He was a married man of the same village, aged 33, with two children.

The attack was made in the presence of over twenty persons sitting at the cafe (P. W. 8 p. 35F) and of the public in the square, without any attempt on the part of the assailant or assailants to conceal their action, or their identity. And without any attempt on the part of the persons present, to protect the victim ; or to arrest the assailant or assailants.

After the attack, the victim was hurried to Limassol hospital where he received treatment. And from there he was removed on the same day to Nicosia hospital where he was operated upon, soon after his arrival. He died two days later of the effects resulting from the multiple injuries received in that attack. (P. W. 6, p. 14 C).

The Police were on the spot shortly after the crime ; a matter of about half-an-hour. The Sergeant in charge of Platres Station was there with his men at 09.40 hrs. And a C.I.D. Officer with his party arrived at 11.15 hrs. (P. W. 16, 228 F ; 231. And P. W. 15, p. 224). The crime was committed between 9 and 9.15 a.m. (P.W. 8, p. 27C ; P.W. 16, p. 228F). Soon after his arrival at the scene, the Sergeant detailed men to guard the houses of the three appellants. (P.W. 16 p. 229F). None of them was found at his house. (Jt. at p. 279C).

The third appellant (accd. 3 at the trial) was found at the house of his brother-in-law and was arrested at about 13.00 hrs. of the same day (P.W. 40 p. 275F). The first and second appellants (accd. 1 & 2 at the trial were arrested at a neighbouring village six days later, on the 20th July. On being told, at the time, that they were being arrested in connection with Tamanis' murder, these two appellants replied that whatever they had to say they would say it in Court. (P.W. 40 p. 277 A-C). The third appellant, arrested the day of the murder, replied that he was in church at the time, and heard about it from people there, who tried to prevent him from going out (P.W. 40 p. 276 BC).

All three appellants were jointly charged with the premeditated murder of the victim. A murder, committed according to the trial Court (vide Jt. at p. 371 C) " in full view of a considerable number of people who were sitting at the various coffee-shops of the village, all ' round the square ' ".

The case for the appellants, both at the trial and in the appeal, was that they were not the persons who committed the crime. Each of the appellants contends that the evidence adduced against him should not have been acted upon by the trial Court, as biased and unsatisfactory.

The first appellant, when called upon for his defence at the trial, stated from the dock that he is innocent. " Those who have given evidence against me have lied," he said. And added that at the time of the crime he was nowhere near Damianos' cafe. When he came to know that his name was being mentioned, he left the village, he said. And when at Pakhna village, on the 20th July, together with second appellant, they heard that the Police were looking for them, they went to inquire what they were wanted for, appellant added. (P. 296E). Five witnesses were called for his defence, mainly to discredit the evidence for the prosecution (Jt. at p. 283 D).

The second appellant, also in his unsworn statement from the dock, said that he had nothing to do with the crime. He was away in Limassol since the 12th of July, he said, as his father was seriously ill in hospital there. And on the 20th July, he joined the first appellant at Pakhna, where they were both arrested by the Police, he added (p. 323 A-C). No evidence was called to support him.

The third appellant elected to give sworn evidence in the case. The gist of it is given in the judgment of the trial Court at p. 282 G and 383 of the record. He went to church that morning, he stated arriving towards the end of the memorial service. His father, mother and sisters as well as his brother, the first appellant, were there, with other relatives and people. After the service he went up to the ikons for veneration as customary, and while still there with others, he noticed commotion and excitement amongst the public in church (P. 324 C). Hearing his brother's name mentioned, he became upset. Two school-teachers who happened to be near him at the time, tried to calm him down and were with him, he said, until he left the church after the murder. Both these persons, Tsivitanides and Papadopoulos, the first a school-teacher for 18 years (p. 344 D) married to an Omodhos wife, and

the second a teacher of English at the secondary school, 35 years of age, also married to an Omodhos wife, (p. 354D) were called for the defence of this appellant, and supported his alibi.

The trial was a long and exhausting affair, lasting over a month. Forty-three witnesses were called for the prosecution, all of whom, excepting two, were thoroughly examined. Seven of them claimed to have witnessed the actual commission of the crime (Jt. at p. 371 D). Moreover one of the accused persons (appellant No. 3) and seven witnesses gave evidence for the defence. Each of the accused was separately defended by counsel extremely conscious of their several responsibility. The record runs to over 400 pages. The trial Court heard the case with commendable patience and meticulous care. After giving a summary of the evidence of each of the main witnesses in a 15-page judgment, the trial Court conclude that they were " satisfied that all three accused—the appellants herein—fired at the deceased with the intent to kill him, in the way testified to, by prosecution witnesses 8 and 9;" and they convicted and sentenced the appellants accordingly. (Jt. p. 385 A ; 385 E & F).

> " It is clear to the Court—(the judgment runs at p. 382 A-C)—from the medical evidence adduced, and especially from the two projectiles which were found embedded in the superficial tissues under the skin, the one at the front and the other at the back of the chest-wall that the deceased received shots both from the front and from behind. With regard to the empty bullet-cases and the projectiles found, *i.e. exhibit* 6 & 7, and 8 & 9, P.W.20, Sub-Inspector Andreas Economou, an expert in firearms identification, has stated that all four expended cases were fired from the same pistol, and that the two projectiles were also fired from one and the same weapon, but he could not say that both the cases and the projectiles were fired from one and the same pistol, or whether either of the projectiles belonged to any of the cases."

The expert could not definitely connect the two recovered projectiles with any of the four expended cases found. But he could definitely say that all four cases were fired from one and the same pistol ; a weapon of .22 calibre (P.W. 20 p. 240 C & D). And that the two projectiles were fired from one and the same weapon ; also a .22 size pistol (P.W. 20 p. 240 F). All six exhibits are now before the Court, and they clearly appear to have

all come from the same-size weapon : a small-size pistol, .22 calibre. The two projectiles were recovered from the body of the victim. The four cases were found by the Police at Damianos' cafe. Two were found inside, in the middle of the cafe, by the Sergeant who first arrived there and searched the place (P.W. 16 p. 229 C) ; the other two were found outside the cafe where the victim was first shot ; they were found by the C.I.D. Officer who arrived later and conducted a second search of the place (P.W. 15 p. 224 D). He and his three men searched inside and outside the cafe, for about three quarters of an hour (P.W. 15 p. 226 F), they searched at both doors, and in the vicinity ; they also examined the walls (p. 226 D). Nothing else connected with the crime was found. " We stopped the search when we were satisfied that we could not find anything else ", the Officer said (p. 227 B).

The trial Court accepted this evidence. They have also accepted the medical evidence consisting of the Doctor who first treated the victim at Limassol hospital (P.W. 7) ; the Medical Officer who operated the deceased soon after his arrival at Nicosia hospital (P.W. 39) ; and the doctor who performed the post mortem examination (P.W. 6). This evidence confusing as it tends to be, is to the effect, admitted by all parties, that the victim received four, or may be five bullet-wounds ; not less than four, and not more than five.

According to the eye witnesses all three appellants, each holding his own weapon or weapons, fired at the deceased from very close quarters (a matter of a few feet) numerous shots. According to P.W. 8 whose evidence was accepted by the trial Court, the victim was first fired at twice, from close behind, while still sitting outside the southern door, by the first appellant. (P.W. 8 p. 29 C). As the victim tried to make his escape inside the cafe, the same appellant, chasing him, continued firing at him. The witness heard four or five shots (P.W. 8 p. 38 C) inside the cafe ; and as the victim tried to get out through the eastern door, he found himself, the witness stated, under the fire of the other two appellants as well. The witness heard five or six more shots, he said (P.W. 8 p. 39 G). Roughly he spoke of about 15 shots.

He also stated that the second appellant was using two pistols, one in each hand (P.W. 8 p. 44 E). The witness was then within a few feet from the victim, having followed him and the first appellant inside the cafe after the first shots (P.W. 8 p. 37 G). The victim, according to this

witness, lost his feet at the step of the eastern door, fell on the pavement ouside, and from there on to the road, where the three appellants continued firing at him as he was down on the ground (P.W. 8 p. 45 G). He was at Damianos' cafe, the witness said, about five minutes before the victim came (P.W. 8 p. 26 G) ; and while sitting there, he saw the first appellant approaching and firing at the victim's back as he was one or two feet behind him (P.W. 8, 29 C). The witness left the scene after the crime.

According to the other witness whose evidence was accepted by the trial Court, (P.W. 9) the three appellants came together (P.W. 9, p. 65 C) soon after the victim sat at Damianos' cafe. Appellants 2 and 3 stopped at the eastern door while the first appellant approached the victim from behind and fired at him (P.W. 9, p. 65 D). As the victim made for the southern door, near him, his assailant fired at him twice more (p. 65 E). Four shots in all from the first appellant (p. 87 B). When the victim got inside the cafe he came under the fire of the other two appellants and fell, the witness said. The third appellant then taking a step up to him, took the victim by the hair and lifted his head up (P.W. 9, p. 66 B and 82 F). At that point the witness left the scene, he stated. He heard about seven shots in all (P.W. 9, p. 73 G) ; and was definite that the victim fell inside the cafe where he was being attacked and shot at by all the appellants. The witness repeatedly described the way in which the third appellant lifted the victim's head by the hair while the victim was on the ground.

So the two prosecution-witnesses whose evidence was accepted and acted upon by the trial Court, state that the first appellant fired at least four shots at the victim, from a close distance, before any of the other appellants are said to have fired at all. In this connection the court say that " with the exception of the first shots fired by the first accused, it is not clear from the evidence whether all or any of the other shots fired by each accused, found their mark ". (Jt. at p. 385 B).

Reaching this conclusion, the trial Court found it necessary to consider next, the question of the common design. And this they found " in the light of the facts of this case and especially in view of the fact—

(*a*) that all three accused were armed at that particular time,

(*b*) that all three appeared at the scene at the same time,

(c) that all three acted simultaneously and without apparent reason or provocation".

In other words the court found the common design on the evidence of the eye-witnesses who claimed to have witnessed the crime.

The case for the appellants at the trial, and in the appeal, was mainly based on the contention that the evidence of the eye-witnesses called for the prosecution, is unreliable. It all comes from the family group of the victim. And in the case of an audacious murder, committed in the presence of a large public which must have included independent witnesses, this is a very suspicious setting, they submit. The apparent bias of some of the witnesses, and the inconsistencies and discrepancies in their different versions, make such evidence all the more suspicious, unsafe and inadequate to support a conviction for murder, counsel submitted.

The grounds of appeal for each appellant were carefully and elaborately prepared by learned counsel. We find it unnecessary to repeat them here in detail. At the hearing before us counsel for the first appellant put his grounds in four groups :

1. The first five grounds, all dealing with facts ;
2. Grounds 8 and 9 dealing with credibility ;
3. Ground 6 regarding common design ; and
4. Ground 7 regarding premeditation.

The last two groups were taken together.

Dealing with the first and second groups, (facts and credibility) learned counsel went very carefully and extensively into the evidence, pointing out material differences in the versions of witnesses, discrepancies and contradictions, upon which he submitted that the verdict was untenable. Counsel further submitted that the trial Court after summarising the evidence of the alleged eye-witnesses and other important parts of the case, went directly to a general verdict, without stating the reasoning leading to such result ; and without making findings of fact upon which to rest their verdict.

Regarding grounds 6 and 7 (common design and premeditation) counsel submitted that the judgment rests entirely on the same unreliable evidence ; and that in any event there being no evidence to connect his client with a particular wound which caused the victim's death, his client

could not be convicted on the present charge, unless the Court found common design amongst all the assailants ; which the evidence failed to establish.

In support of this contention, counsel referred to a number of English reports and particularly relied on *Ghosh* v. *The King-Emperor* (1924–25, The Times Law Reports, Vol. XII) where the Judicial Committee of the Privy Council so lucidly expounded the law in this connection.

In the circumstances, counsel submitted, the judgment of the trial Court should be set aside ; and this Court, making use of its powers under section 25 (3) of the Courts of Justice Law, 1960, should order a new trial as it may seem fit.

Counsel for the second appellant now, argued his client's case exhaustively on the nature of the evidence of the eye-witnesses and pointing out numerous discrepancies and contradictions between them, he attacked the verdict. He moreover submitted that the circumstantial evidence established four shots only ; those fired by the first assailant. And therefore the evidence connecting his client and the third appellant, could not be true ; or, at least, it could not establish guilt in their case beyond reasonable doubt.

Counsel for the third appellant adopting the submissions already made regarding the nature of the evidence and the credibility of the eye-witnesses, he further pointed out that his client's version from the witness-box found considerable support in the evidence of prosecution-witnesses. He particularly referred to P.W. 10 one of the relatives of the victim who, after going from church to the square, after the memorial service, saw the first appellant approaching. And when the witness's attention was drawn to the scene by the first shots, he " saw the first accused standing behind a certain person who was sitting under the mulberry tree, with a pistol in his hand and shooting at him " (P.W. 10, p. 93 FG).

This witness also stated that he saw the second appellant approaching Damianos' cafe after the first shots, and while shooting went on inside the cafe. This witness did not see the third appellant at Damianos' cafe. But when he " heard the first shots and the deceased and the first accused had entered the coffee-shop " the witness saw, he said, the third appellant on the door-step of the gate to the yard of the church. This is the witness whose

evidence the trial Court explained by saying (at p. 385 B) that he " must be making a mistake ". Otherwise, the conviction of his client cannot stand, counsel submitted.

He, moreover, referred to the evidence of P.W. 13 (Christakis Philippou) ; and to that of the two school-teachers, whom counsel described as independent and reliable witnesses. All this evidence, he submitted, throws grave doubt on the guilt of the third appellant, apart of the inescapable effect of the circumstantial evidence.

Counsel for Republic on the other hand forcibly and ably argued in support of the conviction. There are two main issues in this appeal, he submitted : (1) The factual issue ; covering credibility of witnesses, findings of fact, etc., and (2) The legal issue, covering common design and premeditation. The first was primarily the province of the trial Court, he said, whose findings of fact and assessment of the evidence should not be disturbed on appeal ; especially in this case where a long trial and a very exhaustive examination of the eye-witnesses, gave the trial Court a clear advantage in this respect, over the Court of appeal.

Learned counsel then dealt at length with the evidence of the main witnesses and referred to several cases bearing on the question of credibility ; particularly he referred to *Stelios Simadhiakos* v. *The Police* (1961) C.L.R. p. 64 and *Charalambos Zacharia* v. *The Republic* (1962) C.L.R. 52. On the issue of premeditation and common design, counsel referred to *Halil Dervish* v. *The Republic* (1961) C.L.R. 432 ; *Mustafa Halil* v. *The Republic* (1962) C.L.R. 18 ; *Ghosh* v. *The King-Emperor* (*supra*) ; *R. v. Smith* (1963) 3 All E.R. 597 at p. 682 ; and to the relative provisions in the Criminal Code in its present form.

It is common ground that the issues arising in this appeal can be put in two main groups : (*a*) the factual issues ; and (*b*) the legal issues pertaining to the facts established by the evidence. The most important issues of fact are, of course, whether the victim was attacked by one or more assailants ; and whether each of the appellants was sufficiently identified with any of the assailants.

The main facts of the case, hardly contested and well established by the evidence are that the victim was attacked while sitting at a public coffee-shop ; when a great number of persons was in the vicinity, at the village square, near the church ; soon after 9 o'clock in the morning, following Sunday service. And that having been shot at

from a close distance in that attack, the victim received bullet-injuries of which he died in hospital two days later. On the evidence there can be no doubt that the attack was premeditated and audaciously performed, with intent to kill. The trial Court found accordingly ; and this part of the judgment cannot, we think, be questioned.

The main complaint against the judgment is that the trial Court failed to make its own findings on the vital issues of fact surrounding the crime. After stating the effect of the evidence of a number of witnesses, the trial Court concluded their judgment with a general verdict of the nature of a jury-verdict, the appellants complain, without finding the facts.

In effect, after describing the evidence of seven eye-witnesses in the first eight pages of their judgment, and after dealing with the police and the medical evidence in the next three pages, and then with the statements of the appellants and the seven witnesses called for the defence, in the following three pages, the trial Court conclude in the last part of their judgment (p. 384 F and 385 A of the record) as follows :

> " Having dealt with the evidence, we wish to state that having heard and seen each of the witnesses in this case, and without for one moment losing sight of the differences between the versions of the eye-witnesses, we feel not the slightest hesitation in arriving at the conclusion that the prosecution-witnesses were witnesses of truth, and that on the contrary we have not believed the witnesses for the defence ;
>
> We do not attach any importance to the minor variations, between the evidence of the witnesses before this Court and what they are reported to have said in their depositions before the committing judge ; nor do we consider it unnatural, especially in all the circumstances of this case, that the versions of the eye-witnesses did not tally in all particulars.
>
> We are satisfied that all three accused fired at the deceased with intent to kill him in the way testified to by prosecution-witnesses 8 and 9 ; and that P.W. 10 must be making a mistake as to the time he saw accused 3 at the entrance of the church-yard."

And after dealing shortly with the question of common design and premeditation, the trial Court conclude with their verdict : " In all the circumstances, we find all three accused guilty of the charge on the information ".

Nobody has suggested in this appeal, that the appellants have not had a very fair, patient and exhaustive trial ; a trial which lasted over a month, with long and exacting sittings. Nor has it been suggested by anyone, that the trial Court have not received and considered the evidence of the forty-eight witnesses and one accused called in this case, with the utmost care. The record and the judgment, amply show a satisfactory trial.

What the appellants complain of is that the trial Judges, dealing with this most serious and audacious murder, failed to appraise correctly the fact that out of a great number of persons of the village community, who must have witnessed the crime, most of the eye-witnesses came from the family group of the deceased, whose *bias* against the appellants was both natural and obvious.

Moreover, the appellants complain, that such evidence, full of discrepancies and contradictions in material particulars, as counsel claimed to have been able to show by reference to the record, was not tested against the circumstantial evidence which came from independent prosecution-witnesses ; the medical, the ballistic, and the police-evidence regarding the examination of the scene soon after the crime. Indeed, the results of such a test are inescapable ; and they are inconsistent with the finding of the trial Court that the crime was committed " in the way testified to, by prosecution-witnesses 8 and 9 ". It is in this connection that the verdict is most vulnerable ; and it should be re-opened, appellants contend, by virtue of the powers of this Court in section 25 (3) of the Courts of Justice Law, 1960.

Now the fundamental difference between the general verdict of a lay-jury after the judge's summing up, under the English system, on one hand, and the verdict of a trial Court in Cyprus, reached as a result of the reasoning contained in the judgment as required by section 113 (1) of our Criminal Procedure Law (Cap. 155) on the other, needs no elaboration here. The position was discussed in *Stelios Simadhiakos* v. *The Police* (*supra*) one of the first cases decided on appeal, after the enactment of the Courts of Justice Law of the new Republic, (No. 14 of 1960) with its unequivocal provisions in section 25 regarding appeals. The object and effect of sub-section (3), so wide in its terms, have been fully considered in that case ; and its provisions have been interpreted and applied in numerous cases, both civil and criminal ever since.

That this Court, in dealing with the present appeal has power to re-open the trial Court's verdict, had not, and cannot be disputed. Nor can it be questioned that, unlike other jurisdictions, this Court has power " to review the whole evidence, draw its own inferences .....and may give any judgment or make any order which the circumstances of the case may justify...." The question to consider is whether the circumstances of the case require the exercise of such powers. And this is a question of mixed law and fact, in the present case. One could cite a number of cases, where the Court of Appeal came to the conclusion that " the circumstances of the case " did not require the exercise of such powers ; and declined to disturb trial Court findings and verdicts. And, similarly, numerous other cases where the circumstances of the case brought the Court to the conclusion that their powers under section 25 (3) should be exercised ; and in fact they were. The question turns in each case on whether, on appeal, the Court is positively persuaded upon the record, that the powers in question should be exercised in the circumstances of that particular proceeding.

Here we have a case where a most serious verdict—a verdict entailing death sentence for three persons—turns mainly on the evidence of several eye-witnesses, who cannot possibly be described as independent, and whose versions " do not altogether tally on all particulars " according to the trial Court (at p. 378 A) ; but in fact their evidence presents numerous important contradictions, in material particulars ; especially regarding the case of the second and the third appellants.

This evidence, and the verdict based thereon, are challenged on one of the most effective tests of truth in any trial ; the test of circumstantial evidence. It is, therefore, material to find the effect of such evidence (medical, ballistic and locus in quo) as it comes from the record, and as it is reflected in the judgment.

Confusing and unsatisfactory as the medical evidence may be, it leads to the result that the victim was injured by four or five bullets ; not less than four and not more than five. No other injuries were found. This result was submitted by counsel for the appellants and was, quite properly in our opinion, admitted by counsel for the respondent. The medical evidence, moreover, suggests that the wounds of the victim were all caused by a small-size bullets. The two projectiles recovered from the victim's

body and the four empty bullet-cases recovered by the police from the scene, establish beyond any doubt that they were caused by .22 calibre bullets.

The ballistic evidence accepted by the trial Court (P.W. 20) establishes equally well, that the two projectiles recovered, came from one and the same weapon ; a pistol of .22 calibre. " I found—the witness stated—that they are of calibre .22 and both of them were discharged from a pistol of the same calibre, I mean one and the same pistol ". (P.W. 20 at p. 240 F). The four expended bullet-cases found, were all fired from " one and the same pistol ;" a pistol of .22 calibre—(P.W. 20 at p. 240 DE). If one man was firing, the conclusion that they came from the same weapon, is inevitable. If more than one man were firing, strange coincidences appear, even if they were using similar pistols.

Now the police-evidence as to the examination of the place soon after the crime. The first police-party who arrived on the spot within about half an hour found the two of the expended cases inside the coffee-shop ; " about in the middle of the cafe ", the Sergeant stated. (P.W. 16 p. 229 C). The other two expended cases were found by the C.I.D. Officer (P.W. 15) who arrived about a couple of hours later from Limassol with three of his men, and thoroughly searched the place including the walls (p. 226 D & E) for about three quarters of an hour. He found the other two bullet-cases, outside the cafe, near the door where the victim was first fired at (p. 224). Nothing which the C.I.D. Officers could connect with the crime was found on the walls, on the pavements, or at the other door (referred to by the witnesses as the eastern door) where the victim was said to have been repeatedly fired at by the second and third appellants.

The trial Court found that the first shots were fired by the first appellant " with the exception of the first shots fired by the first accused—the Court say—it is not clear from the evidence whether all or any of the other shots fired by each accused, found their mark " (p. 385 B.)

The finding that the first shots were fired by the first appellant is fully supported by the evidence ; and cannot reasonably be questioned. All the eye-witnesses state that he attacked the victim while the latter was sitting by the southern door, firing at him more than once, from close behind ; and that chasing the victim inside the cafe

continued firing at him there. He fired several shots before any of the other appellants are said to have shot at the victim at all.

There is no difference in the version of the eye-witnesses, and no discrepancy or contradiction in their evidence, on this point. And, it is supported by the circumstantial evidence (medical, ballistic, and the places where the empty cases were found). The only reasonable conclusion to be reached from the evidence on this point, is that the first appellant attacked the victim first at the southern door, firing at him twice before the victim ran inside the cafe, with a .22 pistol from very close distance. Then chasing the victim inside the cafe, the first appellant fired at the victim two or three more shots with his pistol ; the .22 calibre pistol which all the four empty cases found, came from. There is no reason whatever to think that any of those four, or maximum five, shots missed their target. The evidence points to the contrary.

If there was no evidence bringing the other two appellants into the scene, with more pistols and firing, the circumstances in which the crime was committed would have been clearly and unshakably established. It is this other evidence, regarding the presence and the actions of the second and the third appellants, that teams with differences, contradictions and discrepancies. And it is this evidence which cannot stand the test of the circumstantial evidence if the latter is connected with the first appellant. Is it, then, reasonable that this evidence should disturb the position so firmly established as to the first appellant? Or, is it that the position so established, should negative, or at least throw grave doubt on such other evidence? It seems to us that at this stage of the present case, there can be only one answer to these questions.

The part of the verdict concerning the second and the third appellants cannot, therefore, be sustained. And they must be acquitted and discharged.

If the evidence connecting these two appellants be rejected, no question of other shots, or common design arises. And in the circumstances, we do not think that discarding the part of the evidence connecting the other appellants, affects the evidence connecting the first appellant. Nor do we think that the joint-trial he has had with them, prejudiced his position at all. If anything, it nearly opened the door for him to escape the consequences of a daring murder. The appeal in his case, must fail.

There will be judgment and orders accordingly in the three consolidated appeals.

TRIANTAFYLLIDES, J: In this case I agree with the conclusion reached by my brother judge Mr. Justice Vassiliades.

In doing so I would like first to make it clear that had it been only a question of disturbing the verdict of the trial Court, in respect of any of the appellants, on the basis of contradictions or variations among the eye-witnesses themselves, I would not have been prepared to do so. Such a course is, as a rule, beyond the ambit of the powers of an appellate tribunal once the witnesses concerned have been found reliable by the trial Court before which they testified, after a careful evaluation of their evidence, as in this case.

The cardinal consideration which has led me to the view that the convictions of appellants 2 and 3 have to be set aside is the incompatibility of the evidence of the eyewitnesses, on the one hand—which has formed the foundation for their convictions by the trial Court—with the circumstantial evidence, on the other hand.

Circumstantial evidence, once its effect has been ascertained beyond the probability of error, is to be relied upon as providing infallible standards of accuracy against which the evidence of eyewitnesses has to be tested. Though, indeed, it is not the rule that the evidence of eyewitnesses should not be accepted unless supported by circumstantial evidence, it is certainly difficult to visualize a case where the accounts of eyewitnesses can properly be relied upon to the extent to which such accounts are inconsistent with the circumstantial evidence on the point.

In the present case the circumstantial evidence which is of fundamental importance is that relating to the medical findings and the ballistic exhibits.

The medical evidence establishes that the deceased was hit by not more than five, probably only four bullets.

The ballistics evidence establishes that one and the same assailant, who fired at least two shots at the deceased near the pavement outside the southern door of Damianos' coffee-shop, fired also at least two more shots at the deceased in the coffee-shop, during the subsequent dash of the victim through the premises. This is so because both the two cardridges found outside the said southern

door and the two cartridges found in the coffee-shop are all of .22 calibre and have been fired, according to the ballistics expert called by the prosecution, by one and the same .22 pistol.

On the basis of the evidence of the eyewitnesses—and this part of their evidence is based on observation before great confusion had ensued after the initial shots—the assailant who fired at the victim outside the southern door of the coffee-shop is appellant 1. So, in view of the ballistics evidence, he must have fired at the deceased four times at least, two outside and two inside the coffee-shop, with a .22 pistol. I said "four times at least" because it is always possible that one of the cartridges ejected by his pistol may have not been found.

Only two projectiles were traced. They are both of .22 calibre and were fired by one and the same .22 pistol both of them. In this respect, it should be added, that the ballistics expert should be taken to have chosen his terms with precision, being an expert, and so when he spoke about a "pistol" he cannot be presumed to have meant a firearm, *i.e.* either a pistol or a revolver, but a pistol as such. It is common ground that pistols eject the cartridges while firing.

The said expert could not establish if both the four cartridges and the two projectiles were fired by one and the same pistol but he did not exclude it either. In all the circumstances of this case the reasonable inference is that this must be so. To assume otherwise would entail the very improbable assumption that though appellant 1, a trained army lieutenant, had fired at least four times at the deceased from close quarters, yet none of the bullets from his gun was actually traced in the body or clothing of the deceased, where the two .22 projectiles were found, and at the same time another assailant or assailants, armed again with .22 pistol or pistols, fired at the victim, but only projectiles were eventually recovered, whilst none of the cartridges, which had to be ejected from such pistol or pistols, were found, in spite of repeated and thorough police searching soon afterwards. It would not be permissible to stake the outcome of this case on such a far-fetched assumption *viz.* that at least two .22 pistols have been fired and all the four cartridges found emanated from one of them and the only two projectiles found emanated from the other.

Once then it is reasonably to be inferred that all ballistic exhibits, cartridges and projectiles, emanated from

the .22 pistol of the first assailant, appellant 1, we are at once, concerning appellants 2 and 3, up against a glaring incompatibility of the evidence of the eyewitnesses—(and particularly prosecution witnesses 8 and 9 relied upon by the trial Court)—with the circumstantial evidence, already discussed, as follows :

According to the eyewitnesses who testified against them, appellants 2 and 3 fired at the victim, not once or twice—in which case one might have been able to accept that may be the projectiles or cartridges from their weapons were not found—but many times, from practically point blank range and with the deceased lying most of the time on the ground motionless at their mercy. Yet apart from the ballistic exhibits attributable, as above, to the pistol of appellant 1, and corresponding, more or less, with the number of wounds of the deceased, no additional wounds—which ought to have been many—were found to correspond with the many shots allegedly fired by appellants 2 and 3, nor were any, at all, projectiles, or possibly cartridges, traced, emanating from their weapons.

In the face of such a decisive discord between the accounts of eyewitnesses, regarding appellants 2 and 3, and the circumstantial evidence, I have reached the conclusion that the convictions of these appellants, based on the premise that " all three accused fired at the deceased with intent to kill him in the way testified by prosecution witnesses 8 and 9 " (see the Judgment at p. 385) cannot be sustained, as far as appellants 2 and 3 are affected.

Once the possibility of appellants 2 and 3 having fired at the victim repeatedly, as testified by the eyewitnesses, and particularly prosecution witnesses 8 and 9, has to be discarded, it is not permissible, in my opinion, to speculate that appellants 2 and 3 may have been seen there at the scene, armed in order to assist appellant 1, and, therefore, they could still have been convicted by the trial Court, on such a view, even if they did not fire.

In the first place it is not safe to assume what could have been the decision of the trial Court, in such a case, concerning the guilt of either of or both appellants 2 and 3. Secondly one must bear in mind that after the firing at the southern door considerable confusion and commotion naturally ensued and it was thus quite possible for the eyewitnesses to have formed mistaken impressions of the presence or behaviour there of appellants 2 and 3.

Thirdly, even if appellants 2 and 3 were seen there on the scene armed, but not firing, such conduct could be equally consistent with innocence ; one must remember that appellants 2 and 3 had fresh in their mind the recent murder of the brother of appellant 3, and brother-in-law of appellant 2, in undetected but possibly known to them circumstances, consequently they may have been going about armed for their own protection, and when they heard that a shooting incident was taking place between appellant 1 and the deceased they may have rushed to the scene, without being participants at all in any common design.

Upsetting the verdict of the trial Court with regard to appellants 2 and 3 should not be taken as upsetting also the finding of such court on the credibility, as a whole, of the eyewitnesses. It means only that such evidence of the eyewitnesses as relates to appellants 2 and 3, ought not to have been relied upon in order to convict them, because it does not measure up to the standard of reality set by the ballistic findings ; such evidence may well have been the result of mistaken impressions during the confusion and excitement caused by the shots and is not consequently to be taken to be fabricated. So in other aspects, where it was compatible with the circumstantial evidence, it could be properly relied upon by the trial Court.

I have, in this connection, very anxiously considered whether the evidence of those eyewitnesses who appear, in accordance with the circumstantial evidence, to have testified incorrectly concerning the firing by appellants 2 and 3, could have been relied upon to support the conviction of appellant 1. I have reached, however, the conclusion that, though if I were to decide the matter as a trial Court it would have been open to me to consider the possibility of not relying, in the circumstances, on the evidence of some, at least, of the eyewitnesses, it is nevertheless not open to me, on appeal, to interfere with the verdict of the trial Court about appellant 1 ; it was certainly reasonably open to such court to accept the evidence of the eyewitnesses and to convict appellant 1 on it, the more so as such evidence is amply supported by the circumstantial evidence.

Due consideration has been given to the necessity of a new trial, in the interests of justice, for appellant 1. I have not found it possible to accede to this view, as put forward by counsel. Appellant 1 has not, in my opi-

nion, been prejudiced in his defence by the joint trial with the other appellants. No irregularity in the trial has occurred so as to warrant a new trial. On the contrary the trial has been very fairly and carefully conducted. I find also that the court below has not made any improper use of *exhibit* " Z ", which is part of the statement to the police of prosecution witness 12.

The finding of the trial Court, regarding appellant 1, on the existence of premeditation, was also reasonably open to it on the evidence before it and the causation of the death of the deceased by the shots fired by appellant 1 is clear, once there is no circumstantial evidence of shots by other assailants. Even if, however, it is assumed that there have been shots by other assailants I should think that, in the circumstances of this case, there was evidence of common design entitling the trial Court to act upon it in convicting appellant 1.

Counsel for appellant 1 has spared none of his talents in an effort to overcome the overwhelming odds against his client but the case against appellant 1 is such that his conviction cannot and should not be interfered with. Certain, however, of the aspects of this case, which were so ably brought out, may possibly be found to be relevant to the question of executive action concerning the sentence passed on appellant 1.

Finally, I feel that I ought to observe that, though the trial Court has dealt with the case under examination in a generally commendable manner, it has unfortunately felt it sufficient to pronounce its verdict in a rather summary way. In my opinion, though it is correct that a trial Court in Cyprus performs the functions of both a judge and a jury, in the sense that it decides both the issues of law and the issues of fact, it must be remembered that the analogy between a judge in Cyprus, and a judge and jury in other countries, should never be carried too far. The trial Court retains its judicial character all through the proceedings right down to and including its judgment and it cannot divest itself of it. A jury, as it is composed of laymen, is not called upon to give any reasons for its verdict. On the other hand, a judge, in deciding the issues of fact, has to give reasons for decisions which he reaches in the capacity of a jury. This is clearly laid down in section 113 of Cap. 155 and, since 1960, by Article 30.2 of the Constitution.

The summary form, however, of the verdict of the trial Court has not, in all the circumstances of this case, offended

against either section 113 of Cap. 155 or Article 30.2, to such an extent as to vitiate the conviction of appellant 1.

The appeal, therefore, of appellant 1 has to be dismissed and the appeals of appellants 2 and 3 allowed for the reasons stated above.

JOSEPHIDES, J. : I agree that the appeal of the first appellant should be dismissed.

I must confess to having had some difficulty in coming to the conclusion that the appeals of the second and third appellants should be allowed, as I was of opinion that there was upon the record in this case ample evidence, if it were accepted, to warrant the Assize Court in coming to the conclusion that the second and third appellants were guilty of premeditated murder.

Having had the advantage of discussing the matter with the other members of this Court I am not now prepared to dissent from the conclusion reached by them with regard to the second and third appellants. I would, therefore, dismiss the appeal of the first appellant and allow the appeal of the second and third appellants.

Appeal for appellant No. 1 *dismissed; conviction and sentence of the court below affirmed. Appeals for appellants* 2 *and* 3 *allowed; conviction and sentence of the court below set aside.*