delivered in September, 1955, it was over a year since the members of the Court had seen the witnesses and they may well have forgotten their demeanour. Since the Court made no finding as to what witnesses it believed or did not believe, we consider that its reliance in part on its own experience of the 25th May must have considerably influenced its decision. A judicial officer may examine evidence and the *locus in quo* but he may not become a witness in the cause which he decides. On the 25th May the members of the Court did not go to inspect some constant or static phenomenon such as a building or a constant smell or sound; they listened to some sound films; and by relying on the experience of that particular event, they became both judges and witnesses in the same cause. That is the chief weakness in the judgment. There is also this: The experience itself, even if properly taken into consideration by the Court, could hardly be relied upon, for the sound can vary on each occasion according to the film and no doubt the volume can be altered by turning a knob.

We consider, therefore, that the judgment of the Court must be set aside and the case sent back to the District Court of Limassol for rehearing.

Upon the rehearing it will be competent for the trial Court to receive evidence as to the installation of a cinemascope, and its effect on the sound.

The appellants are entitled to their costs on the hearing of this appeal but not the costs of the application to hear fresh evidence; but as regards the costs of the trial and retrial, these should be costs in cause.

[HALLINAN, C. J. and ZANNETIDES, J.]
(February 21, 1956)

1. COSTAS PERICLEOUS PITSILLIDES,
2. ANDREAS GEORGHIOU AYFILIOTIS
3. PAVLOS STAVROU PAVLOS, all of Limassol,

Appellants,

v.

THE POLICE, *Respondents.*

(Criminal Appeal No. 2031)

Criminal Law—Criminal Code, section 54 (3)—Membership of illegal organisation — Presumption arising out of possession of documents—Upon appeal substitution of and conviction upon another charge refused.

The appellants distributed leaflets of EOKA, an unlawful association, and were charged under Criminal Code, section 54 (3), which *inter alia* provides that "any person . . . who has in his possession any document . . .

which appears to imply membership of, or any authority from an unlawful association, shall be presumed, unless or until the contrary is proved, to be a member of an unlawful association."

The leaflets gave particulars of attacks by EOKA on security forces and alleged that the Governor was concealing these forces' losses.

The trial Court held that these facts raised a presumption of guilt; since the accused had not rebutted the presumption, they were convicted.

Upon appeal,

Held: (1) The implication that an accused person is a member of or has authority from an unlawful association must arise out of the document itself and not out of the nature of the possession; not for example out of the fact that the accused had distributed the leaflets. (2) The leaflets in this case were not documents the possession of which was sufficient to raise a presumption under sub-section (3). (3) The Supreme Court could not substitute a conviction under Criminal Code, section 57, as there are elements in a charge under that section not present in a charge under section 54.

Appeal allowed.

Appeal by accused from the judgment of the Special Court of Limassol (Case No. 42/55).

A. Anastassiades, G. Cacoyannis and *K. Talarides* for the appellants.

R. R. Denktash, Acting Solicitor-General, for the respondents.

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

HALLINAN, C. J.: The facts in this case are simple, and the findings on the facts by the trial Court are not challenged in this appeal. On the 11th December, 1955, the appellants, three youths about 16 years old, were caught in the act of distributing leaflets, all of which were copies of the same document. This leaflet was headed: "E.O.K.A. Communiqué" and its purpose appeared to be to inform the public of certain attacks made by the illegal organization known as E.O.K.A. upon the security forces; and it alleged that the Governor was concealing the losses suffered by the security forces as a result of these operations.

The appellants were charged under section 54 of the Criminal Code with being members of an unlawful association; this offence is a felony and punishable with up to three years' imprisonment. Sub-section (3) of this section provides:

"Any person who attends a meeting of an unlawful association or of members of an unlawful association

or of persons who advocate or encourage the doing of any of the acts declared to be unlawful in section 60 of this Law or who has in his possession or custody any badge, ticket book of membership, or any letter or document whatsoever, whenever issued, which appears to imply membership of, or any authority from or any connection with an unlawful association, shall be presumed, unless or until the contrary is proved, to be a member of an unlawful association."

The trial Court relying on the words "who has in his possession or custody... any letter or document whatsoever, whenever issued, which appears to imply membership of, or any authority from or any connection with an unlawful association" held that the facts as proved raised a presumption of guilt against the appellants and that the burden which was thereby thrown upon them to show that their possession was innocent had not been discharged. The appellants were accordingly convicted of being members of an unlawful association.

It must be noted in construing that part of subsection (3) upon which the trial Court relied, that it is the possession, and the possession alone, of a document which must raise the presumption. Once the presumption is raised it is for the accused person to show that such possession is innocent, and upon this issue, evidence of the nature of the possession becomes relevant, and, indeed, important. But in our view, when deciding whether or not the presumption has on the facts been raised, the question of the nature of the possession is not at that stage relevant. It would appear from certain passages in the judgment of the learned trial Judge that he treated the nature of possession as relevant on the issue as to whether the presumption had been raised. In the course of his judgment he said: "The question is, if an accused person is shown to have possessed or distributed this leaflet, can that fact make him a member of an unlawful association, according to a proper construction of this subsection (3)?" And later in his judgment there is this passage: "I, therefore, hold that a person who is shown to possess such a communiqué and to distribute it or give it or leave it where the public can get it, is undoubtedly in possession of a document which appears to imply membership of the association and that he has the authority to help to issue this document, and that he has a connection with the association that issues it."

The trial Court apparently implied membership of the unlawful association out of the possession of the document and its distribution by the appellants, rather than out of anything contained in the document itself. The implication that an accused person is a member of or connected with the unlawful association must arise out of the document itself and not out of the nature of the possession. We do not say that the document must expressly implicate

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the possessor as an authorized agent or adherent of the unlawful association, but its contents must be such as to make it probable that it would only be found in the possession of one who was an adherent or agent. In our view the E.O.K.A. leaflets found in the possession of the accused were not documents the possession of which was sufficient to raise a presumption under sub-section (3).

Undoubtedly the appellants should more properly have been charged under section 57 of the Criminal Code, as amended by Law No. 27 of 1949. We have been invited by the Acting Solicitor-General, should we feel unable to uphold the conviction under section 54, to substitute a conviction under section 57. Since, however, there are elements in a charge under section 57 which are not present in a charge under section 54, we consider that the appellants might be prejudiced if we convict them under section 57 as they were not charged under that section at the time they made their defence.

For these reasons the convictions and sentences in this case are set aside.

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TAKIS GEORGHIOU TRIKOMITIS AND OTHERS
v.
THE POLICE

[HALLINAN, C. J., ZEKIA, J. and ZANNETIDES, J.]
(March 9, 1956)

TAKIS GEORGHIOU TRIKOMITIS AND OTHERS, *Appellants*,

v.

THE POLICE, *Respondents*.

(Criminal Appeal No. 2026)

Unlawful assembly, Criminal Code, Sections 68, 69 and 72— Common purpose — Quantum of proof — Assemblies, Meetings and Processions Law (Cap. 44 — Sections 7 and 8 — Proof of taking part.

The appellants were convicted under section 72 of the Criminal Code of riot after proclamation. The principal question on appeal was whether each of the appellants was present during the riot and shared in the common purpose.

Upon appeal,

Held: (1) The definition of riot in section 57 makes it necessary that there must be some evidence that an accused person was present and shared in the common purpose of an assembly whether it is riotous or merely unlawful before he can be convicted under sections 68, 69 or 72.

(2) The decision in *R.* v. *Atkinson and others*, 11 Cox, 330, does not help an accused person more than this: "Mere presence in a riotous assembly is insufficient evidence that an accused person was taking part in a riot". It is not desirable to define too closely the