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.

[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

circumstances or evidence which are sufficient for this purpose. The issue is one of fact. The position a man takes up in a riotous assembly, his continued presence despite the strenuous efforts of the Crown forces to disperse the crowd, and his giving an explanation of his presence which is on the face of it improbable are circumstances tending to show that his presence in the riotous assembly were something more than "mere presence" and may be sufficient to support the conclusion that he shared in its common purpose.

(3) In a charge under sections 7 or 8 of the Assemblies, Meetings and Processions Law (Cap. 44), the unexplained presence of the accused in the assembly or procession may be sufficient to support a conviction.

Appeal by accused from the judgment of the Special Court of Nicosia (Case No. 2/55).

Lefkos Clerides and *T. Papadopoullos* for appellants 1, 2 and 4.

F. Markides and *A. Triantafyllides* for appellant 3.

H. G. A. Gosling, Crown Counsel, for the respondents.

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

HALLINAN, C. J.: On the 28th October last there was a serious riot at Morphou. As a result nineteen persons were prosecuted. All except the 12th accused were charged with rioting after a proclamation, contrary to section 72 of the Criminal Code, and, in the alternative, of taking part in an unlawful assembly, contrary to section 68. Of those convicted four have appealed. The first and third appellants were convicted of riot and of unlawful assembly, being each sentenced to two years imprisonment for riot and nine months for unlawful assembly, the sentences to run concurrently; and the second and fourth appellants were found guilty of unlawful assembly and each sentenced to nine months' imprisonment.

In considering both the points of law involved in this case and the sufficiency of evidence against each of the appellants it is necessary to set out the course of the riot which was summarized by the trial Court as follows:

"The facts of this case as proved by the prosecution are that on the 28th October, 1955, a commemoration service was held at Morphou Church to celebrate the anniversary of Greece's entry into World War 2. After the service quite a number of the congregation went home peacefully, while others numbering four to five hundred stood on the street side or formed part of a procession headed by school children and youths. At first the procession paraded around the church but later came outside the precincts of the

church and headed towards the walls of the Morphou Police Station. They were chanting and shouting subversive slogans and carrying banners and Greek flags. As all processions throughout Cyprus were banned by order of the Governor for that day the Police formed up a baton party and moved towards the crowd. They scattered immediately and began throwing missiles at the police. The crowd then reformed into several groups and subjected the Security Forces to heavy stoning. The crowd then made an attempt to attack the police station from several sides. A stable was set alight at the back of the station. A lorry was seen to approach the wall and throw lighted paper which set the building on fire. While the fire was being extinguished a bomb was hurled into the yard and on explosion wounded four of the security forces. The police not being able to deal with the situation single-handed on account of the determination of the attack had had to call to their assistance the Military with them in the station. Reinforcements too had to be asked for. The rioting ultimately became so bad that it was apparent military action would have to be taken in order to protect life and property. Warning was given by way of a notice and the sounding of a bugle to draw attention to it. The notice was to the effect that if the crowd did not disperse at once rifle fire would be opened on them. Then three shots were fired over their heads as no move was made to disperse. The crowds were in three groups then and one shot was fired over the heads of each group. The crowds then withdrew momentarily, but immediately returned to the attack. Order was then given to fire one round into the crowd. A person presumed to be a ringleader from his actions was singled out and a shot fired at him. He was seen to fall and also a man to his right rear. The rioters then dispersed leaving two wounded persons behind them."

Before considering the evidence upon which each of the appellants was convicted it is convenient to discuss the question of what evidence is necessary in law to establish the fact that a person is taking part in an assembly which is unlawful or riotous. In the case of *Reg.* v. *Atkinson and others* (11 Cox, 330) it was held that: "On an indictment for riot persons are not liable merely on account of their having been present and among the mob, even although they had the power of preventing it, unless they by word or act helped, incited, or encouraged it." This decision was adopted by this Court in Criminal Appeal No. 2015 decided on the 22nd November, 1955. The reason for the decision in Atkinson's case no doubt is that it is only by some overt act or word made or uttered by the accused that the Court can infer that the accused

when present in the mob shared the common purpose for which it was assembled.

The subject of riots and unlawful assemblies is dealt in *Russell on Crime*, 10th Edition, in Chapter 20. The chapter opens with Hawkin's definition of riot; this definition was adopted in *R.* v. *Cunningham Graham* (1888) XVI Cox, 420; there, common purpose is one of the necessary elements in riot. When one turns to the section of Chapter 20 on unlawful assemblies at common law (p. 257), the first paragraph makes no mention of common purpose as an element in unlawful assembly at common law. The essential elements appear to be a concourse of people which cause reasonable fear that the peace will be disturbed. Hawkin's definition of unlawful assembly at common law was quoted by Bayley J. in *R.* v. *Hunt and others* (3 B. & Ald. 566). It is cited in argument by Talfour, Sergt. in *R.* v. *Vincent* (173 E.R. at 756): "Any meeting whatsoever of a great number of persons with such circumstances of terror as could not but endanger the public peace and raise fear and jealousies among the King's subjects, properly constitutes an unlawful assembly." Of course the object or purpose of a meeting may be one of the reasons why a member of the public may fear a breach of the peace, but I am inclined to the view that the essence of the offence was merely the threat to the King's peace; for all who join such an assembly, by their mere presence increase the public alarm, the '*terror populi*'." The burden might well be thrown on such persons to establish that their presence was innocent. On the other hand, when the assembly resorts to violence a man should not be held vicariously responsible for such violence unless the prosecution shows that he was in the assembly sharing the common purpose and remained there after the peace is disturbed in execution of such purpose.

But when the authorities have sought to distinguish between unlawful assembly and riot at common law they have stated that an unlawful assembly becomes a riot when it proceeds to execute the purpose for which it was assembled by a breach of the peace. As an example I refer to the definition of H. M. Commissioner on Criminal Law in 1840 set out after Hawkin's definition in Chapter 20 of Russell, 10th Edition, and the citation from *R.* v. *Birt*, 5 C. A., p. 154 at page 258 of the same chapter. Now when framing the definitions of unlawful assembly and riot in s. 67 of our Criminal Code, the legislature has (in my opinion unfortunately) cast the definition in such a way as to treat unlawful assembly as an earlier stage of riot and so imported into the definition of unlawful assembly this notion of purpose. I say "unfortunately" because unlawful assembly is only a minor offence with a maximum penalty of one year's imprisonment and it is not unjust to convict a person of contributing to the '*terror*

populi' by his presence unless he can establish that he was not willingly part of the crowd. It is a very different thing where a man is charged with riot punishable with from 3 years imprisonment (or 5 years if after proclamation) and where it is sought to make him responsible for the violence of another.

However, this Court must apply the law of unlawful assembly and of riot according to the definitions contained in section 67 as it finds them. It is clear from these definitions that there must be some evidence that an accused person was present at 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; however, I do not consider that Atkinson's case is authority for anything more than the proposition that mere presence in a riotous assembly is insufficient evidence that an accused person was taking part in the riot. It is not, I think, desirable to define too closely the circumstances or evidence which are sufficient for this purpose. The issue is one of fact: Was the accused while present in the assembly sharing in its common purpose? The circumstances from which a *prima facie* presumption of intent may be inferred are as varied as life itself and should not be circumscribed by a neat legal definition. When a captain stands on the bridge of his sinking ship and goes down with it, his heroic intent is manifested by inactivity. The position a man takes up in a riotous assembly, his continued presence despite the strenuous efforts of the Queen's forces to disperse the crowd and his giving an explanation of his presence which is on the face of it improbable are circumstances tending to show that his presence in the riotous assembly was something more than "mere presence", and may be sufficient to support the conclusion that he shared in its common purpose.

The position of those who are charged with riot or unlawful assembly under the Criminal Code should be contrasted with that of a person charged under section 10 of the Assemblies, Meetings and Processions Law (Cap. 44) with taking part in an assembly prohibited under sections 7 and 8 of that Law. The word "assembly" in Cap. 44 includes "any public gathering whatsoever"; the purpose or object of such gathering is not an element in an offence under section 10; here it is not necessary for the prosecution to prove that the accused helped, incited or encouraged those assembled for a common purpose; his unexplained presence in such a gathering is evidence that he was taking part therein and it is in the discretion of a Court to convict on such evidence. The penalty is imprisonment up to six months or a fine not exceeding £50 or both.

The 1st and 3rd appellants were convicted of riot and also of unlawful assembly. The offence of riot of course

is more serious and includes the offence of unlawful assembly if the charge on each count refers to the same incident. In the present case the evidence against both these appellants refers to a time when the unlawful assembly had become a riot. If the evidence is sufficient to support the conviction of each appellant for riot then in my view the charge of unlawful assembly should have been stayed and no conviction recorded on that count.

The evidence against the 1st appellant is ample to support a finding that he was, as demonstrated by his acts, taking part in the riotous assembly. He was seen throwing stones or attempting to throw stones and he was seen driving a lorry behind which people were sheltering and throwing stones at the security forces. He was apparently slightly apart from the crowd while throwing stones or attempting to throw them but there is sufficient evidence to support a finding that he shared in the common unlawful purpose of the riotous assembly and was part of it.

Concerning the 2nd appellant the trial Court has only this to say:

> "Accused No. 7 giving evidence in a convincing manner says he went to the troubled area out of curiosity to see what was happening. He calls witnesses who corroborate his statement. He is very lucky that his curiosity did not lead him into greater trouble than he admits as only one witness for the prosecution (No. 10) identified him throwing stones. I am accepting his admission for being present at the scene but I am satisfied he was there with an unlawful intention, but did not actually throw stones."

The summing up of the trial Court against the 4th appellant is as follows:

> "The 13th accused gives evidence and says he returned from work as a gardener and found that two of his sons were absent. He took his cycle and went to look for them but could not find them. He returned home and found one son had come back. He again went out to seek the other. He found him behind the church and brought him home on his cycle. He was to have called witnesses but after cross-examination had shown he had tried to pass letters (Ex. 22) to them on his way to Court to tell them what to say, it was decided not to call any. This accused was identified by P.C. Reshad (wit. 10) throwing stones but there is no corroboration to that evidence. It would be unwise to convict of riot, as previously stated, on the evidence of a single witness on such occasion. There is no doubt that witness 10 did identify him in the crowd and on accused's own admission he was there supposedly looking for

his children in the area and passed through a crowd on the way home. I do not believe his story and am satisfied he was in the crowd with an unlawful intent."

There is nothing in the law to prevent a trial Court from finding that a person was taking part in a riot upon the uncorroborated evidence of one witness. However, the Court in the case of the 2nd and 3rd appellants has not considered the evidence of P. C. Reshad sufficient to prove the fact that either of them was throwing stones. The Court appears to accept the evidence of the 2nd appellant that he was in the crowd out of idle curiosity but did not accept the story of the 4th appellant as to why he was in the crowd.

As already stated, to support a conviction for unlawful assembly it must be shown that the accused person was present in the assembly and shared the common purpose for which the crowd was assembled; in my view the evidence that both these appellants were present in the crowd is not sufficient to establish that they shared the common purpose of the assembly even though the explanation of the 4th appellant as to his presence there was not accepted. The conviction and sentences of these appellants on the charge of unlawful assembly must therefore be set aside. However, it is open to this Court under section 142 (1) (c) of the Criminal Procedure Law to convict them of any offence of which they might have been convicted by the trial Court on the evidence which has been adduced and sentence them accordingly. The question, therefore, remains to be considered whether they should be convicted or not under section 10 of the Assemblies, Meetings and Processions Law for taking part in an assembly prohibited by proclamation by the Governor under section 8. As I have already stated in this judgment: unexplained presence in a public gathering prohibited by proclamation is sufficient to support a conviction. The explanation of the 2nd appellant appears to have been accepted by the Court but the explanation of the 4th appellant was rejected. In my view, therefore, the 4th appellant but not the 2nd appellant should be convicted under section 10.

The evidence against the third appellant is summarized by the trial Court in the following paragraph:

"9th *accused giving evidence says* he was in Morphou for the purpose of getting a marriage licence and inviting 'best men' to his wedding which was to take place in a couple of days. He was about to put down the names of one of these on his list when he was struck on the left shoulder and fell down unconscious. The only evidence against him is that of Christos Mandralis (wit. 8 of P.) who says he took him from a house near the scene of the

shooting at Morphou on the 28.10.55 and took him to Pendayia Hospital. There is only the circumstantial evidence that his wound was caused by a bullet and that he was taken from a house close to where the shooting took place to connect him with the riots at Morphou on the 28.10.1955. His evidence sounded quite convincing too, but for any normal person moving about in that crowd to say under cross-examination that he saw no stones thrown, heard no warning bugle to disperse and in fact thought the situation nothing unusual, he can hardly expect the Court to believe. There is sufficient evidence to convict on a charge of rioting. The circumstantial evidence together with answers under cross-examination are in the opinion of this Court sufficient to convict him of unlawful assembly and riot."

The difficult question to decide as to the conviction of this appellant is whether the circumstantial evidence which surrounded his unexplained presence in the riotous assembly is sufficient for a Court to hold that this was not a case of mere presence but of something more. This, in my view, is a question of fact not of law. It must be remembered that it was a statutory offence under the Assemblies, Meetings and Processions Law to be in a public gathering on the 28th October. In that sense no person in the assembly was innocent. Moreover a riot had been in progress for some considerable time; a building had been set on fire; a bomb had been exploded; a bugle had been blown and the security forces had fired shots over the crowd; finally a shot was aimed at and hit the ring-leader of the crowd passing through the body of the 10th accused who was next to the ring-leader. The shot then lodged in the body of the 3rd appellant who was speaking to the 10th accused at the time. His explanation that during this scene of violence and confusion he was calmly noting down the name of his friend, the 10th accused, whom he was inviting to his wedding is a grotesque story which was rightly rejected by the trial Court. I consider that besides the unexplained presence of the appellant in the crowd, the surrounding circumstances make this case something more than mere presence and that the evidence is sufficient to support his conviction of riot. I would, however, emphasize that this is a matter of fact and not of law; if the trial Court had acquitted the appellant on these facts, I should not say that the Court had erred. Having regard to the fact that the appellant was seriously injured by a bullet of the security forces I consider that his sentence on a charge of riot should be reduced from two years to six months.

The order of the Court on this appeal will therefore be: *The sentence and conviction of the 1st appellant for riot is confirmed. The conviction of the 3rd appellant for riot*

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is also confirmed but the sentence is reduced from two years to six months.

The conviction and sentences for unlawful assembly in the case of the 2nd and 4th appellants are set aside. The 2nd appellant is therefore discharged. In the case of the 4th appellant he is found guilty of taking part in a prohibited assembly contrary to section 10 of the Assemblies, Meetings and Processions Law and sentenced to six months imprisonment. All sentences to run from the date of conviction.

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ARISTODHIMOS MICHAEL *alias* TSAOUSHIS
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[HALLINAN, C. J., ZEKIA, J., and ZANNETIDES, J.]
(March 9, 1956)

ARISTODHIMOS MICHAEL *alias* TSAOUSHIS, *Appellant*,

v.

THE QUEEN, *Respondent*.

(Criminal Appeal No. 2029)

Criminal Law—Mens rea—An element in offences under the Firearms Law (Cap. 86)—Connivance as proof of mens rea—Burden of proof of mens rea—Whether possession of an article an offence.

The appellant was sent to deliver a sack in a coffee shop in circumstances which should have led him to suspect the legality of the transaction. The sack was still under his control when opened by the Police and found to contain firearms and ammunition. The trial Court found that the prosecution had not proved that the appellant knew what the sack contained and therefore that *mens rea* had not been proved.

The appellant was charged on three counts: First, under the Property of Her Majesty (Theft and Possession) Law (Cap. 28) section 3 (1) (c); secondly, under the Firearms Law (Cap. 86) section 3 (1) (b); and, thirdly, under the Explosive Substances Law (Cap. 83) section 4 (4) (d). The trial Court held that *mens rea* was an element in the 1st and 3rd counts but not under the Firearms Law, section 3 (1) (d). The appellant was accordingly acquitted on counts 1 and 3 and convicted on the second count.

Upon appeal,

Held: (1) *Mens rea* is a necessary element in a charge under the Firearms Law section 3 (1) (b).

(2) (*a*) The finding of the trial Court that the transaction had not proved *mens rea* was justified by the facts. The evidence of connivance by an accused must go to show that the accused person not merely connived at some undetermined illegality but the accused connived at the commission of the offence with which he is charged or possibly a kindred offence.

(*b*) Where a statute makes it an offence to be in possession of an article and when such an article is found in the possession of an accused person the fact whether