[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

ALI IZZET MAVRALI,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2580)

Evidence in criminal cases—Finding of fact on evidence wrongfully admitted—No miscarriage of justice—Because of the other evidence the trial Court must inevitably have come to the same conclusion i.e. to a verdict of guilty—Proviso to section 145 (1) (*b*) *of the Criminal Procedure Law, Cap.* 155, *applied by analogy.*

Criminal Law—Premeditated murder—Sections 203 (1) *and* (2) *and* 204 *of the Criminal Code, Cap.* 154, *as enacted by Law No.* 3 *of* 1962.

The appellant was convicted of the premeditated murder of his daughter-in-law and sentenced to death under sections 203 (1) (2) and 204 of the Criminal Code, Cap. 154, as enacted by Law No. 3 of 1962. On the issue of premeditation the trial Court relied, *inter alia*, on a damning statement alleged to have been made by the appellant the day before the murder to a certain Husnu Yiakoup to the effect that " he would slaughter both his son and daughter-in-law ". It was argued on appeal on behalf of the appellant, *inter alia*, that the finding of the trial Court with regard to the aforesaid statement was not supported by the evidence on the record. Although the High Court unanimously accepted the submission on this point, they, however, by majority, (ZEKIA, J., *dissenting*), applying by analogy the proviso to section 145 (1) (*b*) of the Criminal Procedure Law, Cap. 155, upheld the conviction on the ground that on the evidence the trial Court must inevitably have come to the same conclusion as to the issue of premeditation even without the finding regarding the aforementioned statement.

Held : (1) We agree with the submission made by counsel for the appellant that the finding of the trial Court that the appellant on the day before the murder stated to a certain Husnu Yiakoup that " he would slaughter both his son and daughter-in-law ", cannot stand upon the evidence as recorded.

(2) (ZEKIA, J., *dissenting*). However, it is our view of the remainder of the evidence that no other conclusion could have been arrived at in this case than that at which the trial Court arrived.

Appeal dismissed.

Appeal against conviction and sentence.

The appellant was convicted on the 29th November, 1962, at the Assize Court of Paphos (Criminal Case No. 1282/62) on one count of the offence of premeditated murder contrary to ss. 203 (1) (2) and 204 of the Criminal Code Cap. 154 as amended by s. 5 of Law No. 3 of 1962 and was sentenced by Dervish P.D.C., Izzet and Malyali D. JJ., to death.

M. Fuad Bey for the appellant.

O. Beha for the respondent.

The following judgments were read by :

WILSON, P. : This is an appeal from the conviction and statutory sentence of death following conviction of the accused upon a charge of murder on November 29, 1962, by the Assize Court of Paphos.

The appeal has been most capably argued by Fuad Bey, the advocate for the appellant who has acted at the request of the Court, namely upon the ground that the evidence adduced does not support the finding that the murder was premeditated.

The case for the Republic was also capably presented by Mr. Beha. In the result, in the majority opinion, the appeal must be dismissed.

The accused was charged with the murder of his daughter-in-law on June 8, 1962, at the village of Lapithiou in the district of Paphos. A short time before this killing occurred, *i.e.* a very short interval of time—probably not more than a few minutes at most—the accused had stabbed his son to death at a point on a street approximately 225 feet away from the house in which the daughter-in-law met her death.

Counsel for the appellant submitted that the killing of the son was unpremeditated ; that the evidence did not prove, previous to the son's death, the accused intended to kill the son or the daughter-in-law ; that the accused in the agitated state of mind in which he found himself after the death of his son was in no condition to form an intention to kill the daughter-in-law, and that the interval of time between the killing of the two was so short he could not have formed such an intention.

This Court is not, of course, a trial Court, and the attack on the conviction must be of necessity an attack on the reasons by which the trial Court arrived at its conclusion. In this case the facts have been fully reviewed by the trial Court and there has been no attack on the conclusions, with the exception of part of the finding of fact at page 46 of the record. (Letter ' E ', para. 2).

I agree with the submissions on behalf of the accused's Counsel that a portion of this finding cannot stand upon the evidence as recorded, namely that the accused " added that he would slaughter both his son and daughter-in-law".

The evidence relating to this particular statement, said to have been made by P.W.5 Husnu Yiakoup, was not cleared up at the trial, and we treat it as not having been proved.

We then have to consider to what extent, the conclusion of the trial Court would have been, or might have been, affected if this statement had not been one of the reasons upon which they arrived at their conclusion.

It is my view of the remainder of the evidence that no other conclusion could have been arrived at in this case than that at which the trial Court arrived. I am importantly influenced in coming to this conclusion by the reasons for judgment given by the trial Court, particularly the reference to the statement made by the accused after he had apparently come to his senses (excepting the submission for the appellant) and set out in paragraph 6, on page 46 : " Since my son has gone, she should go also".

For these reasons, I am of the opinion that the appeal must be dismissed.

VASSILIADES, J. : I agree that this appeal must fail, even though the finding of the trial Court regarding the statement which is said to have been made by the appellant to witness Yiakoup, be excluded from the case, for the reasons stated by the President of the Court. I think there is ample evidence to support the other findings, of the trial Court, which I agree that they justify the conviction.

JOSEPHIDES, J. : I agree with the judgment of the Honourable President of this Court. Although I am of the view that the trial Court's finding that the appellant told Yiakoup on the previous day that " he would slaughter both his son and daughter-in-law ", was not supported by the evidence,

nevertheless, I consider that no substantial miscarriage of justice has occurred, as the other evidence in the case (as summarized in the Judgment of the trial Court at pages 46-7) was of such a nature that the trial Court must inevitably have come to the same conclusion, *i.e.* that the killing of the deceased was premeditated. I would, therefore, apply the proviso to section 145 (1) (*b*) of the Criminal Procedure Law, Cap. 155, and dismiss the appeal.

ZEKIA, J. : I respectfully disagree with the majority for the following reasons : In this particular case the only issue was whether appellant killed the victim with premeditation. On the facts of this case, premeditation could only be established from the evidence relating to the events preceding the time the appellant killed his son on the 8th June, 1962. Because soon after the prisoner stabbed to death his son, he ran to the house (223 feet away) where Rahme the victim was and delivered a fatal blow to her with the knife he was holding. The time to form a design for killing Rahme was obviously too short. Premeditation implies a preconceived scheme of killing and requires some time for the perpetrator to conceive a scheme.

The trial Court for reaching a verdict of premeditated murder relied on certain grounds which have been stated in their judgment. In fact there was no statement on the part of the Court that a case of premeditation could be made up of what has happened between the interval of the two killings. In my view they could not do so.

The events, therefore, prior to the killing of the son were very material in ascertaining the presence, or not, of the element of premeditation as an ingredient of the offence of capital murder. The trial Court in their grounds given in support of their verdict, they stated (on page 46, paragraph 'E') :

> "2. On the following day, the 7th June, the accused met Husnu Yiakoup, P.W.5 at Nikiti locality where Yiakoup was grazing some goats. Yiakoup asked him why he had quarrelled with his son and in reply accused made no secret of the reason of the quarrel, and added that he would slaughter both his son and daughter-in-law, and that he would be going to Ktima on the following day to make his preparations."

The alleged statement made to witness Yiakoup as to the intention of the prisoner to kill his son and daughter-in-

law was not in evidence before the Court and it was perhaps by some oversight taken to be so. The Court below further down in their judgment on page 47, they said :

> " We are also satisfied from the evidence that the accused had made up his mind to kill the deceased Rahme at least 24 hours previously, and that his declaration to that effect to Mehmet Yiakoup, whose evidence we have already stated we believe, was no idle talk but a manifestation of his intention".

It appears from this that the trial Court had given serious consideration to the said alleged statement to Yiakoup and was influenced by it in ascertaining the element of premeditation as a prerequisite to the offence under consideration.

Now, what happens when such statement is wrongly taken into account as evidence by a trial Court? I may refer on this point to Archbold, Criminal Pleading Evidence & Practice, 35th edition, p.386, para.928, under the heading "Wrongful Admission of Evidence."—

> "Where it is established that evidence has been wrongfully admitted, the court will quash the conviction unless it holds that the evidence so admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict, and that they would or must inevitably have arrived at the same verdict if the evidence had not been admitted."

Although this is not a straight case for a wrongful admission of evidence, nevertheless, it has to be considered on the same footing.

The question to be answered in the circumstances by this Court is whether on the remaining evidence, and excluding the statement in question, it can be held that the trial Court would inevitably have come to the same conclusion. Although I agree with my learned brothers that there is evidence in this case sufficient for the trial Court to make a finding for a premeditated murder, and that on the material before them it was open to them to come to such a conclusion, nevertheless I am not of opinion that without the damning statement the prisoner allegedly made and wrongfully admitted, the Court would necessarily have come to the same conclusion.

I am therefore of opinion that this appeal should be allowed.

Appeal dismissed.

JUDGMENT OF ASSIZE COURT.

The judgment of the Assize Court of Paphos composed of Dervish, P.D.C., Izzet and Maliali, D. JJ., was as follows :—

"DERVISH, P.D.C. : The accused is charged with the premeditated murder of a certain Rahme Salih under sections 203 (1) (2) and 204 of the Criminal Code as amended by section 5 of Law 3 of 1962.

The facts of the case are shortly as follows :

The deceased was the wife of Salih Ali Mavrali and the daughter-in-law of the accused. Salih is also dead and it is alleged that the accused killed him on the same day, immediately prior to killing the deceased, but the information on which the accused is being tried to-day concerns solely the death of Rahme Salih. The deceased and her husband lived in a house at Lapithiou, marked 1 on Exh. 1. In the yard of this house there is another smaller house, marked 2 on Exh. 1 in which the accused and his wife lived until the 7th June, 1962. It is in evidence that there were certain accusations made against the accused by the deceased, to the effect that he, the accused, made advances of an immoral nature to her. She spoke to her husband about it as a result of which the husband quarrelled with his father, the accused, and asked him to evacuate the house in which he lived with his wife and which belonged to him. The accused and his wife vacated the said house on the following day, the 7th June, 1962, and moved into the house of a certain Mahir, on a road running parallel to the old one and marked 3 in Exh. 1.

The accused travelled to Paphos in the car of the mukhtar, Kufi Osman early in the morning of the 8th June together with other passengers including one Hussein Yiakoup, P.W.5. In Paphos the accused went to the shop of a certain Costas Nicola Mavros, P.W.15, from whom he ordered a knife. About 2 or 2 ½ hours later he called at the shop of the above witness and inquired whether the knife was ready. He was told that it was, he paid its price, had a coffee and left with the knife. Some time between noon and 1 p.m. of the same day, Osman Kufi left Ktima to return to Lapithiou together with the same passengers. Hussein Yiakoup was sitting in the car next to the accused. It appears that there were many passengers and that they were in a squeeze and Yiakoup put his right hand onto the shoulder of the accused in order to sit more comfortably. During the course of the journey his hand dropped down

to the waist of the accused and there he felt that the accused was carrying something hard in his waist which the witness took to be a knife. The car finally reached Lapithiou and the passengers alighted. When the Mukhtar was driving towards his home he passed by the new house which was occupied by the accused and his wife and there the wife of the accused stopped him and complained to him that her daughter-in-law, the deceased, had assaulted her and that she had also broken the pane of a cupboard. When she was talking to the Mukhtar who had come out of his car, the accused came out of his house and joined in the complaint. At that moment the Mukhtar saw the deceased Salih coming across the field, from the direction of his house, and when he was 20-25 paces away he heard him say, "What are you saying and complaining about, to the Mukhtar ? Did you not like it that I sent you out of my house ? Did you expect that I would let you stay in my house and allow you have intercourse with my wife ?" To this the accused replied : "What if I do have intercourse with her, everybody else has." Upon this Salih called out to the Mukhtar who was about to go away to be a witness and that he would sue the accused. In saying so, Salih came down to the road and walked a little towards the accused. The accused also walked a few paces towards Salih. Then when they were face to face, Salih said to the accused, "Are you playing the brave, are you going to assault me ?" The accused replied : "You are my son and I have pity on you, otherwise you would see what I would do to you." Salih said, "Since I am your son, why did you pull my wife off the animal at Stavrathkies locality ?" Upon this the accused made a movement and Salih twinged. Accused was then seen making stabbing movements with his hands several times. The mukhtar went and pulled Salih away and he then saw that Salih had been stabbed. The accused ran off towards the premises of the Club which is marked 5 on Exh. 1. To the north of the Club house and across the road, is a house belonging to Pembe Ahmet, P.W.7 which is marked 4 in Exh. 1. The deceased, Rahme, was in that house having gone there earlier in order to take some milk to Pembe. A certain Fatma Salih was also in the house with them and when Fatma saw the accused coming to Pembe's house running, she warned the deceased and shut the door of the house, but no sooner was the door shut, than the accused kicked or pushed open the door and entered the house. The two women Pembe and Fatma were terrified. Pembe rushed out calling and beckoning for help and Fatma stood by, helpless. Fatma says that the accused and the deceased came to grips and fell down. The deceased did not get up

again. Mashar Yiakoup, P.W.9 who was attracted by Pembe's shouts and beckonings went into the house to see what was the matter. He saw the deceased lying down with the accused kneeling on top of her. Both Fatma and Mashar state that the deceased was holding the blade of a knife and the accused its handle and they were both pulling at it. Fatma states that the deceased begged the accused to let her free saying, " Let me go my father," and on seeing Mashar, she, the deceased asked him to save her. Mashar said that the accused would not stab her while he was there. The deceased let go the blade of the knife, upon which Mashar lifted the accused up and took him out. It was then seen that the accused was limping and that he was wounded on the right knee. He was still holding the knife, Exh. 5. He was helped out of the house and while passing by the fence surrounding the house of Pembe, he threw the knife into the fence. People started gathering, amongst whom the Mukhtar, Osman Suleyman Spashi, P.W.10 and Salih Halil P.W.11. Spashi and Halil got hold of the accused and took him to the cafe of the Mukhtar which is marked 6 on Exh. 1. The deceased died soon after. The police were informed and first Sgt. Demetriades P.W.20 and P.C. Cleanthous P.C.19 from Panayia Police station arrived, followed by Det. Insp. Kemal Osman, P.W.22, from Paphos who took over the investigation of the case. The accused was interviewed by Insp. Kemal and same afternoon at the cafe whereupon the accused told him that he wanted to make a statement and his statement was taken there and then. This statement was produced in Court and is Exh. 4.

The defence of the accused is that he killed the deceased under circumstances which do not amount to premeditated murder. In his very able address to the Court, the learned counsel for the accused stated that the onus of proving that the killing of the deceased amounts to premeditated murder rests on the Prosecution. We fully agree with him.

We have gone through the evidence very carefully examining the evidence of each individual witness minutely. We find that the witnesses in this case were one and all very reliable and we had no difficulty in deciding that they were all truthful and that they gave us their evidence without exaggerating. It is true that there is a certain amount of discrepancy especially between the evidence of Osman Suleyman Spashi and Salih Halil but in view of the commotion which must have been present on that day after the stabbing, and in view of the fact that these two witnesses' evidence relates in part to different points of time, we find that such discrepancy is normal and is to be expected in witnesses of

truth. It is quite natural and probable that the utterings which the accused made to Spashi may not have been heard, or even if heard, not remembered by Halil, and conversely what accused told Halil may not have been heard and remembered by Spashi.

We had no difficulty in believing the evidence of each witness called by the Prosecution.

The Prosecution submitted that on the evidence it was proved that the killing of Rahme Salih was premeditated. We agree with this submission for the following reasons :—

1. The accused had quarrelled with his son on the 6th June, 1962, because he had been accused of immoral behaviour towards the deceased, Rahme.

2. On the following day, the 7th June the accused met Husnu Yiakoup, P.W.5 at Nikiti locality where Yiakoup was grazing some goats. Yiakoup asked him why he had quarrelled with his son and in reply accused made no secret of the reason of the quarrel, and added that he would slaughter both his son and daughter-in-law, and that he would be going to Ktima on the following day to make his preparations.

3. Early on the following day the accused came to Ktima and went to the shop of knife-maker Costas Mavros, P.W.15, and ordered the knife, Exh. 5, which he bought and took to the village with him on the same day.

4. Soon after his arrival at the village, and after stabbing and killing his son, he ran to the house of Pembe where he knew the deceased Rahme to be and stabbed her.

5. After the stabbing of Rahme as he was being led to the cafe, he told Salih Halil twice to let him go, because he was afraid that though he had stabbed the deceased she would not die. We are satisfied that this statement was made with reference to the stabbing of the deceased, Rahme, and not to the stabbing of his son Salih. This becomes evident from what the accused told Osman, P.W.13, *i.e.* "I stabbed my son, he has died but I am afraid she will not die ".

6. In his statement to the police, Exh. 4, referring to how he stabbed Rahme, the accused says, "My son fell down, after he fell down I went straight to the house of Ahmet Ali, (presumably Pembe's husband), because I saw that

my daughter-in-law had taken milk there. I said to myself : 'Since my son has gone, she should go also.' When I entered the house my daughter-in-law was holding something and she hit me on my knee, and at once I thrusted the knife which I was holding into her, and we both fell to the ground".

From this portion of his statement, it is clear to us that the accused went into the house of Pembe with the intention of killing Rahme and that no sooner than he entered the house he stabbed and killed her.

We are also satisfied from the evidence that the accused had made up his mind to kill the deceased Rahme at least 24 hours previously, and that his declaration to that effect to Mehmet Yiakoup, whose evidence we have already stated we believe, was no idle talk but a manifestation of his intention.

In view of our finding that the accused had made up his mind to kill the deceased, long before he actually stabbed her, the statement of the accused to Rahme when she was clutching the blade of the knife, to let go the blade because he had come to his senses, can have no effect on the case. The wound which was the cause of death was a particularly vicious one, the blade of this knife entered the abdomen between the 9th and 10th ribs and pierced the liver from end to end and then entered the chest cavity and pierced the right lower lobe of the lung.

For all the above reasons we find the accused guilty as charged.

ALLOCUTUS : NIL.

COURT : Your learned counsel did all that was possible for you, but in our opinion the evidence against you is overwhelming. You killed your daughter-in-law for a very minor reason and it is in evidence also that you killed your own flesh and blood for the same reason. There is only one sentence for premeditated murder and that is death.

The sentence of the Court is that you be taken from this place to a lawful prison and thence to a place of execution and that you there suffer death by hanging, and that your body be afterwards buried within the precincts of the prison in which you shall have been confined before your execution, and may God have mercy on your soul.