[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES, STAVRINIDES AND LOIZOU, JJ.]



GEORGHIOS ARISTIDOU,

*Appellant,*

*v.*

THE REPUBLIC,

*Respondent.*

(*Criminal Appeal No.* 2865)

*Criminal Law—Premeditated murder—Intent to kill—Premeditation—Concept of—Restatement of the law of premeditated murder—Article 7.2 of the Constitution—Sections* 203 *and* 204 *of the Criminal Code, Cap.* 154, *as amended by section* 5 *of the Criminal Code (Amendment) Law,* 1962 (*Law No.* 3 *of* 1962)—*Premeditation—Definition of premeditation in section* 204—*Notion of premeditation in Article* 7.2 *of the Constitution, as interpreted in the* Loftis *cases* (infra) *and thereafter—Interpretation of section* 204 *and its position* vis-a-vis *the concept of premeditation in Article* 7.2—*Intent to kill—Inference of intent to kill should be the only reasonable one that can be drawn from the established facts—It is not sufficient that such inference is a reasonable inference on the evidence—Premeditation is not a presumption of law but a question of fact—Test applicable—Formation of intent to cause death prior to the act—Time to reflect and desist—Between the formation of such intent and its execution there must be sufficient opportunity for the person concerned to reflect upon his decision and relinquish it, if he so desired—This is not merely a question of length of time alone—All the relevant circumstances in each case must be taken into account—Including the condition of such person at the time, his calmness of mind, or the reverse—It follows, therefore, that in the present case due regard ought, also, to have been had to the actual condition of the appellant at the material times—Who was then under the influence of drink and strong passion—Notwithstanding that such intoxication had been held, and rightly so, under section* 13 (3) *of the Criminal Code* (infra), *not to have impaired the appellant's capacity to form the specific intent to cause death required by section* 204 *of the Code—See, also, under the following headings.*

*Criminal Law—Intoxication—Criminal Code, Cap.* 154 *section* 13—*Specific intent—Intoxication as affecting capacity to form*

*a specific intent—Section* 13 (3)*—Test—Burden of proof—A doubt as to whether or not intoxication in a given case has affected such capacity, should be resolved in favour of the accused—Intoxication and premeditated murder—Intoxication is always a material factor which has to be taken into account in considering the issue of premeditation, even though the state of intoxication is not such as to affect the capacity of the person concerned to form an intent to cause death within section* 204 *of the Criminal Code—See, also, under Criminal Law—Premeditated murder, above.*

*Evidence in Criminal Cases—Burden and standard of proof—Premeditation in cases of premeditated murder has to be proved by the prosecution beyond reasonable doubt—Any doubt in that respect must be resolved in favour of the accused—Same principles applicable to all other constituent elements of the crime of premeditated murder, such as intent to kill—The inference of intent to kill must not only be a reasonable one on the evidence—It must be the only reasonable inference that can be drawn from the facts—Intoxication—As affecting capacity to form a specific intent—Burden and standard of proof—See, also, under the two preceding headings.*

*Constitutional Law—Premeditated murder—Article* 7.2 *of the Constitution—Concept of premeditation in that Article—See under the first heading Criminal Law—Premeditated murder, above ; and under Constitutional Law herebelow.*

*Constitutional Law—Interpretation of statutes—It is a principle of constitutional law governing the interpretation of statutes, that where the Constitution and a statute involve a constitutional right they must be construed as one Law—And the statute must be interpreted, if possible, so as to make it consistent with the Constitution—Application of this principle to the question of the interpretation of section* 204 *of the Criminal Code (as amended,* supra) *defining the concept of premeditation—In view of the interpretation of the concept of premeditation in Article* 7.2, *as interpreted by the Supreme Constitutional Court and by the High Court in the* Loftis *cases* (infra).

*Statutes—Interpretation of statutes—See under Constitutional Law, immediately above.*

*Criminal Law—Homicide—Section* 205 *of the Criminal Code, Cap.* 154, *as amended by the Criminal Code (Amendment) Law,* 1962 (*Law No.* 3 *of* 1962)*—Sentence.*

*Homicide—See immediately above.*

*Intoxication—See above.*

*Premeditated Murder—See above.*

*Premeditation—See above.*

The appellant was convicted on the 11th November, 1966, by the Assize Court of Limassol of the premeditated murder at Limassol on the 5th May, 1966, of his mistress and sentenced to death. He appeals against his said conviction. The case, both at the trial and in the appeal, was fought on the issue of premeditation ; and the appeal turns solely on that issue.

The appellant, a taxi-driver of the age of forty-six years admitted having caused the death of the victim, a married woman, of twenty-eight years of age, at her own home, by shot-gun fire. He admitted, in effect, firing no less than eleven shots but he alleged that he did so, while under the influence of drink, with the object of frightening the husband of the deceased. His version was rejected by the trial Court as being incosistent with the evidence as a whole. His defence was briefly that (*a*) having regard to the totality of the evidence, including intoxication, the prosecution failed to prove beyond reasonable doubt that at the material time he had an intention to kill, and/or (*b*) that having regard to the evidence as a whole, the prosecution failed to establish premeditation. This appeal is grounded on alleged misdirections of law and of fact.

The facts of the case are fully set out in the judgment of His Honour the President of this Court. They may be summarized as follows :

The appellant, a taxi-driver, killed on the night of the 5th May, 1966, the deceased, Despina Prodromou. He fired repeatedly eleven shots, with a shot-gun, into, and in, a basement flat at Limassol, where, at the time, the said deceased was residing with her husband and young daughter. There was a past history of amorous relations, between the appellant and the deceased, of which the husband of the deceased must have been aware, because, earlier on in 1966, the deceased had been co-habiting in the aforesaid flat with the appellant to the exclusion of her husband. Later on, however, the deceased was reconciled with her husband and the appellant left the flat.

It appears that the deceased kept up her relations with the appellant even after the reconciliation with her husband. But, in the course of such relations, friction arose, as a result of which, on the day previous to her death, the deceased broke off relations with the appellant. After being told by the deceased on the phone, on the 4th May, 1966, that he should leave her alone, the appellant went and found the deceased at a hairdresser's shop, dragged her out by the hair and beat her up. The deceased reported the matter to the police.

Shortly before midnight, on the 5th May, 1966, the appellant, who was at the time under the influence of drink to some appreciable extent, drove in his taxi outside the flat of the deceased, where, apparently, at the time, she was in bed with her husband and child. He then started annoying them by sounding the horn of his taxi, by playing music on a record-player in his car and by using insulting language. As found by the trial Court his intention at that stage was only an intention to annoy the inmates of the flat. There can be little doubt that the appellant's state of mind then must have been one of strong passion and irate feelings, which were made worse by the influence of the drink which he had consumed shortly before.

After trying to annoy the inmates of the flat at that time of the night, seeing that he failed to get any response, and probably annoyed and infuriated for that reason, under the influence of drink, as he was at that stage, the appellant decided to go and get his brother-in-law's gun and cartridges, with which he returned to the street just outside the flat of the deceased in about twenty minutes. To do that, he drove his taxi a distance of about four miles (there and back) alone in the car. Armed with a gun now and carrying a bandolier containing twenty three cartridges, which he obtained from his brother-in-law, the appellant went to the front door of the flat and called the woman's husband, again making a lot of noise, banging and shouting. Still getting no response from inside, he went down the steps to the entrance-door of the basement flat and, having broken a glass-pane of the door, started firing shots through that front door into the flat a number of times. Pulling the curtain down he fired more shots in the dark house, in the direction where he knew the woman and her husband may have been lying in bed. He fired four shots through this door.

Still failing to get any response from the inmates, at the front door, the appellant went to the back door where he again fired in the dark flat several shots. The neighbours heard screaming which must have been an occurrence at this stage ; but still, there was no sign of the husband. The appellant then getting down the flight of steps at the back door, opened it, entered the flat and switched the light on. According to the findings of the trial Court, while inside the flat, the appellant fired at the deceased " at least " the fatal shot from close quarters. And left before the Police arrived. He then went on foot to his son-in-law's house and from there he drove to his brother-in-law's and to another friend's admitting all along to several persons that he had shot his mistress (the deceased).

It is common ground that during the whole material time, both before and after the crime, the appellant was under the influence of drink ; and obviously under the influence of passion. The appellant began firing into the flat at about 11.40 p.m. and the victim was already dead when the police arrived at the spot at about 11.45 p.m. *viz* five minutes thereafter. As stated before the appellant left the place before the arrival of the police. On the other hand, on the deceased's husband's evidence, the time which intervened between the arrival of the appellant by the deceased's house with the gun and cartridges, and the start of firing, would be a minute or two. Apart from the deceased, her little girl of twelve years was also injured from the firing and died subsequently in hospital.

The trial Court found that, notwithstanding the obvious effect of drink on appellant's mind, he was, still, capable of forming intent, (*in* the present case intent to kill), in the legal sense and that he, in fact, did form such an intent to cause death within section 204 of the Criminal Code (*infra*). The trial Court approached the matter through the provisions of section 13 of the Criminal Code, Cap. 154 and the Court of Appeal did not think that this part of the trial Court's judgment could be challenged on the evidence on record. Section 13 of the Criminal Code reads as follows :

" 13.—(1) Subject to sub-sections (2) and (3) a person shall not, on the ground of intoxication, be deemed to have done any act or made any omission involuntarily, or be exempt from criminal responsibility for any act or omission.

(2) A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of intoxication that he is incapable of understanding what he is doing, or controlling his action, or knowing that he ought not to do the act or make the omission, provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

(3) When a specific intent is a constituent element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, shall be taken into account for the purpose of ascertaining whether such an intent in fact existed."

The Constitution of the Republic by Article 7.2 limited the imposition of the death penalty to " premeditated murder " (*infra*), so that sections 203 to 207 of our Criminal Code, Cap. 154 were repealed and substituted, about one and a half year after the coming into operation of the Constitution, by the Criminal Code (Amendment) Law, 1962 (Law No. 3 of 1962), section 5, in order that the law should be brought into conformity with the Constitution. Section 203 of the Criminal Code as amended by the said Law No. 3 of 1962 provides for the felony of murder " with premeditation " which is punishable with death ; and section 205 (as amended) provides for the felony of homicide by an unlawful act (or omission) which is punishable with imprisonment for life. " Premeditation " is defined by the new section 204 as follows :

" 204. Premeditation is established by evidence proving whether expressly or by implication an intention to cause the death of any person, whether such person is the person actually killed or not, formed before the act or omission causing the death is committed and existing at the time of its commission."

Paragraph 2 of Article 7 of the Constitution directs that a law may provide for the death penalty " only in cases of premeditated murder, high treason, piracy *jure gentium* and capital offences under military law ". The term "premeditated murder " in that paragraph has been interpreted by the Supreme Constitutional Court in the case of *The Republic and Loftis* (1 R.S.C.C. 30, at p. 33). It was held therein that " premeditated murder " in Article 7.2 conveys the notion

of premeditated murder "as understood by Continental legal systems and in particular by the French Code Penal from which the above notion was adopted by the Ottoman Penal Code which applied in Cyprus until the enactment of the Criminal Code Order in Council, 1928". The Supreme Constitutional Court adopted the exposition of premeditation as laid down in 1908 in the case *R.* v. *Shaban* (1908) 8 C.L.R. 82, at p. 84; it quoted the judgment in that case which reads as follows: "The question of premeditation is a question of fact. A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention to reflect upon it and relinquish it. Much must depend on the condition of the person at the time—his calmness of mind, or the reverse. There might be a case in which a man has an appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it. On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation".

On the facts and on the law, summary of which is set out hereabove, the trial Court convicted the appellant (and sentenced him to death) of the crime of "premeditated murder" as provided in the new sections 203 and 204 of the Criminal Code (*supra*). The appeal, as already stated, is grounded on alleged misdirections both on fact and of law, the case for the appellant being that he committed the lesser crime of homicide under section 205 of the Criminal Code (*supra*); and not the crime in section 203. Apart from the killing of the deceased by the appellant, which was never disputed, the main findings of fact on which the verdict of the trial Court was based are as follows:

(1) Notwithstanding the obvious effect of drink on appellant's mind, still his state of intoxication was not such as to prevent him from forming intent in the legal sense, in the present instance an intent to kill (*supra*).

(2) The appellant did in fact form such an intent to cause death within section 204 of the Criminal Code (*supra*).

(3) The fatal shot was fired by the appellant at the victim from close quarters when he, the appellant, was inside the said flat after he had got in from the back-door and switched the light on (*supra*).

(4) The fatal shot was fired by the appellant with intent to kill the deceased.

(5) The appellant formed the intention to kill the deceased or any of the inmates of the said flat from the moment he left the street outside the deceased's said flat and started driving his taxi to go to the house of his brother-in-law to get the latter's shot-gun with the bandolier of cartridges *i.e*, about twenty minutes before he fired the first shot (*supra*).

(6) The killing of the deceased was a premeditated murder because of the time which intervened between the forming by the appellant of the intention to kill—when he left the street outside the flat of the deceased to go and fetch the gun from his brother-in-law's—and the carrying of such intention into execution as aforesaid. The trial Court found that such time, fifteen to twenty minutes—was sufficient for the appellant to reflect on his decision to kill and to desist, if he so desired.

The Supreme Court in allowing the appeal (Josephides, J. *dissenting* on a question of fact), quashed the conviction for premeditated murder under section 203 of the Criminal Code (*supra*), and substituted therefor a conviction of the lesser offence of homicide under section 205 (*supra*), imposing a sentence of 25 years' imprisonment.

*Held*, (*I*) *:* (1) Premeditation is not a presumption of law but a question of fact which, as well as any other constituent element of the crime of premeditated murder, has to be proved by the prosecution beyond reasonable doubt. Therefore, any doubt in that respect should be resolved in favour of the appellant.

(2) Although intent to kill can be inferred as a fact from the sorrounding circumstances, it is not sufficient that such inference is a reasonable one ; it should be the only reasonable inference that can be drawn from the facts ; and the burden of proving intention to cause death always rests upon the prosecution. The above principles apply equally to any other ingredient of the offence.

(3) The term "premeditated murder" and the concept of "premeditation" in Article 7.2 of the Constitution (*supra*) have been interpreted by the Supreme Constitutional Court in the case of *The Republic and Loftis* (1 ,R.S.C.C. 30, at p. 33). It was held therein that "premeditated murder" in Article 7

conveys the notion of premeditated murder "as understood by continental legal systems and in particular by the French Code Penal from which the above notion was adopted by the Ottoman Penal Code which applied in Cyprus until the enactment of the Criminal Code Order in Council, 1928". The Supreme Constitutional Court adopted the exposition on the concept of premeditation as laid down in 1908 in the case *R.* v. *Shaban* (1908) 8 C.L.R. 82, at p. 84 (see that exposition *supra*). This statement in *Shaban's* case (*supra*) regarding premeditation was also adopted by the High Court (shortly after the said judgment of the Supreme Constitutional Court) in its judgment *Loftis* v. *The Republic* ,1961 C.L.R. 108.

(4) The question whether or not the interval of time between the formation of the intention to cause death and the actual killing afforded the person concerned (the killer) sufficient opportunity to reflect upon, or desist from, his decision to kill, if he so desired, much depends on the particular circumstances in each case, including the condition of such person at the time, his calmness of mind, or the reverse. It follows, therefore, that in the present case due regard ought, also, to have been had to the actual condition of the appellant at the material times *i.e.* to his being then under the influence of drink and strong passion, notwithstanding that such intoxication had been held, and rightly so, not to have affected the appellant's capacity to form an intention to cause death.

(5) Intoxication is a factor to be taken into account in considering the issue whether a person, after forming an intention to kill, has had sufficient opportunity to reflect upon his said decision and relinquish it, notwithstanding that such intoxication, considered under the provisions of section 13 (3) of the Criminal Code, *supra*, cannot be said to have affected the capacity of such person to form the specific intent to cause death as required by section 204 of the Code (*supra*).

(6) Any doubt as to whether or not intoxication had affected the capacity of the person concerned to form a specific intent under section 13 (3) of the Criminal Code should be resolved in favour of the accused.

*Held.* (*II*) *regarding the interpretation and effect of section* 204 *of the Criminal Code as amended* (supra) *as well as its position* vis-a-vis *the notion of " premeditation " and " premeditated*

*murder " in paragraph 2 of Article 7 of the Constitution as interpreted both by the Supreme Constitutional Court and the High Court in the Loftis cases* (supra) :

(1) *Per* VASSILIADES, P.: Both the Supreme Constitutional Court and the High Court adopted in the *Loftis* cases (*supra*) the position stated in *Shaban's* case (*supra*) regarding premeditation as understood by the Constitution in Article 7.2. And in amending, few months after those judgments, the relevant part of the Criminal Code by Law No. 3 of 1962 (*supra*), the legislature did not attempt to give a definition to premeditation, affecting in any way the ordinary meaning of the word ; and make it a technical term for the purposes of the statute. Section 204 of the Criminal Code as amended (*supra*) merely provides that premeditation is established (not deemed to exist) by evidence proving " expressly or by implication, an intention to cause the death of any person .......... formed before the act or omission causing the death is committed, and existing at the time of its commission ". In other words, proving " *animus necandi* " not only at the time of the act causing death but also proving that such *animus* had been formed earlier. That the homicide is the result, not only of an intended act, but also the execution of an earlier meditated decision. In the absence of that earlier meditation leading to the decision to kill, and in the absence of sufficient time to reflect upon such decision, the intentional unlawful act causing death constitutes the crime of homicide under section 205 (*supra*), punishable with imprisonment for life ; but not the aggravated crime of premeditated murder under section 203 (*supra*) which is punishable with death.

(2) Per TRIANTAFYLLIDES, J. : (*a*) It is a principle of constitutional law, governing the interpretation of statutes, that where the Constitution and a statute involve a constitutional right they must be construed as one Law ; and the statute must be interpreted, if possible, so as to make it consistent with the Constitution (see *Cincinnati, New Orleans and Texas Pacific R. R. Company* v. *Commonwealth of Kentucky*, 115 U.S. 321).

(*b*) So, once the Supreme Constitutional Court has adopted the exposition of premeditation, set out in *R.* v. *Shaban* (*supra*), as conveying the notion of premeditation embodied in Article 7.2 of the Constitution (*supra*), the definition of premeditation in the new section 204 of the Criminal Code (*supra*)

must be read in that light and as intended to convey the same notion ; it cannot be construed or applied as conveying a different notion of premeditation ; and it is quite possible to construe and apply constitutionally section 204, as it stands today.

(3) *Per* STAVRINIDES, J.: (*a*) It is remarkable that section 204 of the Criminal Code as amended by Law No. 3 of 1962 (*supra*) makes no reference to state of mind other than intent to kill and does not stipulate any interval of time, however short, between the formation of the intention and its execution.

(*b*) Considering that every intentional act or omission is preceded, by however short a time, by the formation of the intent to do the act or make the omission, that section, if taken literally, would bring every unlawful and intentional killing within the ambit of premeditated murder, for which by the last preceding section of the Code (*i.e.* section 203, *supra*) the death penalty is provided.

(*c*) However, the power of the legislature to provide the death penalty is limited by Article 7.2 of the Constitution to cases of " premeditated murder, high treason . . . . . . ", (*supra*). Accordingly, if and so far as section 204 of the Code, read without reference to the Constitution, could have the effect of attaching to the expression " murder with premeditation " in section 203 a meaning wider than that possessed by the expression " premeditated murder " in Article 7, paragraph 2, of the Constitution, the result would be to make the latter section unconstitutional.

(*d*) The question is : What is the meaning of the expression as used in Article 7.2 of the Constitution ?

*Held, (III) regarding the basic findings made by the trial Court* (1) *to* (4), *both inclusive, set out in the penultimate part of the head-note* (supra), *that is to say :* (1) *The appellant's state of intoxication was not such as to impair his capacity to form the specific intent to kill ;* (2) *the appellant did in fact form such an intent to cause death within section* 204 *of the Criminal Code ;* (3) *the fatal shot was fired by the appellant at the victim from close quarters when he, appellant was inside the flat after he had got in from the back door and switched the light on ;* (4) *the fatal shot was fired by the appellant with intent to kill the deceased :*

(1) There was ample evidence to support, and it was open to the trial Court to make, the aforesaid four findings.

(2) It follows, that they should not be disturbed.

*Held, (IV) regarding the last two basic findings, made by the trial Court,* (5) *and* (6) supra, *that is to say: (5) The appellant formed the intention to kill the deceased or any of the inmates of the flat from the moment he started from outside the said flat to go and fetch the gun and ammunition from his brother-in-law's* i.e. *about twenty minutes before he began firing.* (6) *The interval, which intervened between the formation of this intention and its execution as aforesaid, had afforded the appellant sufficient opportunity to reflect upon his decision to kill and relinquish it, if he so desired:*

(1) *Per* VASSILIADES, P.: (*a*) Taking the conduct of the appellant from the moment he went to fetch the gun till the moment he entered the deceased's flat from the back door and switched the light on, I think that such conduct is, at least, equally consistent with an intent to terrorize and domineer as it is with an intent to kill the deceased or any of the inmates of the flat.

(*b*) I say "at least", because I am rather inclined to the view that the way in which the appellant obtained the gun; the noise he made with his car when he returned with it; his behaviour at the front door before firing; and all the shooting in the dark from outside the front and the back doors, is more consistent with an intent on the part of a person in appellant's condition to terrorise and domineer his mistress. And I draw my inference from such conduct, accordingly (see *Hji Costa* (No. 2) v. *The Republic* (1965) 2 C.L.R. 95 at p. 102).

(*c*) There is, however, undoubtedly, the possibility of the intent to kill the deceased having been formed in the disturbed mind of the appellant, when he saw the deceased after he (the appellant) entered the flat from the back door and after switching the light on. This possibility cannot be safely excluded.

(*d*) The trial Court having found that the appellant formed the intention to kill when he left to fetch the gun (*supra*), went on and found that the time between the formation of such intent and the shooting (*viz.* about 20 minutes) was sufficient time for the appellant to reflect upon his decision or desist therefrom, if he so desired. Without the finding on the point of time when the intent to kill was formed, the trial Court would, apparently, not have convicted the appellant of the premeditated murder of the deceased.

(*e*) Taking the view that that finding cannot be sustained, I am of the opinion that the conviction must be set aside ; and be replaced by a conviction for homicide under section 205 of the Code (*supra*).

(2) *Per* TRIANTAFYLLIDES, J.: (*a*) I am quite satisfied that it was properly open to the trial Court to find that the appellant fired all the shots, right from the beginning, with the intention of killing either the deceased or her husband or both ; moreover I agree with the trial Court that such intention was formed when appellant's annoying tactics failed to bring forth a satisfying, for him, result, and went off to fetch the shotgun. These aspects of the case have raised not even a doubt in my mind in favour of the appellant.

(*b*) What has given me some difficulty is the issue of whether or not the killing of the deceased was, in the circumstances, a premeditated murder, as held by the trial Court, or only a homicide under section 205 of the Code (*supra*) as argued by counsel for the appellant. In my opinion it is only a homicide for the following reasons.

(*c*) I am well aware that it does not necessarily follow that an abnormal state of mind affords no opportunity for premeditation ; even a state of mental disease may not be inconsistent with it (see *Pavlou* v. *The Republic*, 1964 C.L.R. 97). Nor I am prepared to hold that influence of drink or strong passion would in every case be inconsistent with premeditation. But the existence of premeditation is a matter to be examined in the light of the particular circumstances of each case, and in the present case I cannot, with respect, agree with the trial Court that it could be safely inferred that the appellant has had sufficient opportunity, in the short time that elapsed (fifteen to twenty minutes) and in the condition in which he was, to reflect and desist.

(*d*) As correctly stated by the trial Court, premeditation is an element the existence of which has to be established by the prosecution ; and any doubt in that respect has to be resolved in favour of the appellant (see *Koliandris* v. *The Republic* (1965) 2 C.L.R. 72.

(*e*) Sufficient opportunity to reflect upon an intention and relinquish it is not only a matter of pure space of time but a composite notion of the relevant space of time coupled with the actual condition of the person concerned. The trial Court, in reaching the conclusion that there has been premedi-

tation on the part of the appellant, appears to have based itself only on the space of time which intervened between the formation of his intention to kill and the carrying out of it into execution. Nothing has been said about the actual condition of the appellant during such space of time ; namely, his being under the influence of drink and strong passion. This failure amounts to a misdirection of law sufficiently serious to make it necessary to quash the conviction.

(*f*) If on the other hand, it must be presumed that this trial Court had the appellant's said condition in mind—though in dealing with premeditation it has said nothing about such condition—then I find myself unable to agree with the inference of the trial Court that the short space of time, which intervened between the formation by him of the intention to kill and the actual killing (*i.e.* about twenty minutes), afforded the appellant, in the condition in which he was, under the influence of drink and strong passion, sufficient opportunity to reflect on his intention and relinquish it. And that being largely a matter of inference, this Court is in as good a position to draw such inference from the established facts of the case as was the trial Court.

(*g*) I am, therefore, of the opinion that the verdict of premeditated murder was not a reasonable one—in the sense of section 145 (1) (*b*) of the Criminal Procedure Law, Cap. 155, that it must be quashed, and that the appellant should be convicted of the crime of homicide under section 205 of the Code (*supra*).

(3) *Per* JOSEPHIDES, J.: (*a*) The trial Court rightly found that the appellant formed the intention to kill the deceased or any of the inmates of the flat from the time he left the flat to go to the house of Yerakis (his brother-in-law) in order to get the gun.

(*b*) From the moment he left until the moment he returned by the deceased's flat and began shooting from the front door it is estimated that about twenty minutes elapsed. In the course of that time the appellant drove his own car two miles to go and two miles to return, within the built up area of Limassol. On arriving at his brother-in-law's (Yerakis's) house he had opportunity of talking with an outsider, that is, Troodia (Yerakis's wife), who was altogether unconnected with the appellant's affair and differences with the deceased and her husband. There, he put forward a false story, that

he wanted the gun of Troodia's husband to go shooting hares on a trip to Nicosia, which shows calculating, clear and cool mind. On returning to the flat, armed with the gun, he called out to the deceased's husband "come out we two have something to say". But the husband did not reply and he left to go and inform the Police by telephone. The appellant then broke the glass-pane of the front door and started shooting into the room. After firing four shots in the front he went to the rear of the flat where he fired another seven shots, and at least the fatal shot was fired by him at the deceased woman while he (appellant) was inside the flat. He left as the police were arriving and went to the house of his son-in-law on foot where he told him that he (appellant) had "killed them", adding that he had killed his "mistress" as she was slandering his wife and daughter that they were prostitutes. From there he drove two miles to Troodia's house to whom he returned the gun dismantled and said that he went and killed the "prostitute". The appellant began firing at 11.40 p.m. and the victim was dead by 11.45 when the police arrived at the spot. Between 8.30 and 9.30 p.m. on that night the appellant had more than half a bottle of V.O. brandy and a brandy with coca-cola, and he was under the influence of drink ; but the trial Court rightly found that this did not affect his mental faculties nor his capacity to form an intent to kill.

(*c*) In these circumstances I do not think that the finding of the trial Court, that the appellant had sufficient opportunity, after forming his intention, to reflect upon it and relinquish it, is not warranted by the evidence as a whole.

(*d*) I am, further, of the view that the criticism that the trial Court confined its finding on the time element alone, without taking into account all the relevant circumstances, including intoxication, in determining the appellant's calmness of mind and his capacity to reflect on his decision, is not well founded.

(*e*) It is true that in the final part of their Judgment the trial Court did not expressly mention the question of intoxication, but it should be borne in mind that the Court had in the forefront of their consideration of the case the appellant's state of intoxication. They had already decided that drink had not affected his mental faculties and his capacity to form the intent, that is, to think and take a decision. I do not think that it was necessary for them to repeat it in the part

of their judgment to show that, in determining the appellant's calmness of mind and capacity to reflect on his decision and relinquish it. they had taken into account the appellant's state of intoxication along with the other circumstances of the case.

(*f*) I hold the view that on the evidence, including the appellant's state of intoxication, the trial Court rightly reached the conclusion that the appellant had sufficient opportunity, after forming his intention, to reflect upon it and relinquish it

(*g*) On the whole I am satisfied that, having regard to the evidence, the conviction of premeditated murder under section 203 of the Code (*supra*) was not unreasonable, that there was no wrong decision on a question of law and that there was no miscarriage of justice. For these reasons I would dismiss the appeal.

(4) *Per* STAVRINIDES, J.: (*a*) While on the evidence taken as a whole it is probable that the appellant formed the intent to kill some time between his stop by the deceased's flat preceding the fetching of the gun and cartridges and his setting out to bring these things, the possibility that his intention in setting out to do so was merely to frighten the deceased's husband, which is the version he put forward at the trial, cannot be excluded as being merely fanciful.

(*b*) Indeed it is impossible to say with any degree of certainty that the intent was formed before his arrival by the deceased's house with the gun and cartridges. On the other hand it is, in my view, clear that the intent existed when the first shot into the dwelling was fired.

(*c*) It follows that as regards time the issue of premeditation must be decided on the footing that the intent to kill was formed some time between such arrival and the start of the firing, which, on the evidence of the deceased's husband, would be a minute or two after the arrival. On the other hand, clearly, by the time he started firing, the appellant was in a state of great excitement ; he was under the influence of passion exacerbated by drink.

(*d*) Having in mind the principles that this Court is in as good a position as the trial Court to draw inferences from established facts (see *Kalalos* v. *R* 19 C.L.R. 121, at p. 125) and the admirable statement analysing the concept of preme-

ditation in *Shuban's* case (*supra*), I am of the opinion that the conviction for premeditated murder under section 203 of the Code must be set aside and a conviction for homicide under section 205 (*supra*) be substituted for it



(5) *Per* Loizou J : (*a*) In my view it was open to the trial Court, on the evidence, to come to the conclusion that the appellant formed the intent to kill when he left the scene in order to go and fetch the gun from the house of his brother-in-law

(*b*) The interval between the time he formed this intent and the time he put it into execution is the time that it took him to drive the two miles to the house of his brother-in-law, get the gun, and then drive back to the flat, which may well have been in the region of 15 to 20 minutes

(*c*) The question of premeditation cannot be decided on the length of time alone for quite obviously what may be sufficient time in one instance may not be sufficient in another, depending on the mental condition of the person involved and therefore his capacity to meditate

(*d*) On the evidence accepted by the trial Court it cannot be doubted that the appellant at the material time was labouring under the influence of strong passion Similarly it is equally clear that the mental faculties of the appellant both as a result of his state of intoxication (even though his condition was not such as to affect his capacity to form an intent) and of the passion under which he was labouring must have been affected to a certain degree and that in view of this his capacity to reflect on his decision to kill and desist from it must have also been affected

(*e*) Reading the Judgment of the Court it is, in my view, to say the least, open to doubt whether in considering the question of premeditation, as distinguished from the formation of the intent to kill, the Court considered or made any allowance for the state of the appellant's mind as an element affecting his capacity to reflect on his decision and desist from it within the period from the formation of the intent and the carrying of it into execution

(*f*) This, in my opinion, amounts to a misdirection sufficiently serious to warrant the setting aside of the conviction

for premeditated murder under section 203 and the substitution therefor of a conviction for homicide under section 205 of the Criminal Code (*supra*).

*Appeal allowed. Conviction for premeditated murder set aside ; conviction for homicide substituted therefor. Appellant sentenced to twenty-five years imprisonment as from today.*

Cases referred to :

*Ali* v. *The Republic*, (1966) 2 C.L.R. 112;

*HjiCosta* (No. 2) v. *The Republic* (1965) 2 C.L.R. 95 at p. 102;

*The Republic* and *Nicolas Pantopiou Loftis*, 1 R.S.C.C. 30, at p. 33 ;

*Loftis* v. *The Republic*, 1961 C.L.R. 108 ;

*Dervish Halil* v. *The Republic*, 1961 C.L.R. 432, at p. 434 ;

*Koumbaris* v. *The Republic* (reported in this part at p. 1 *ante*) ;

*R.* v. *Shaban* (1908) 8 C.L.R. 82, at p. 84 ;

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

*Yiannis Pieri* v. *The Republic*, (1963) 1 C.L.R. 87 ;

*Cincinnati, New Orleans and Texas Pacific R.R. Co.* v. *Commonwealth of Kentucky*, 115 U.S. 321 ;

*Evangelos Pavlou* v. *The Republic*, 1964 C.L.R. 97 ;

*Christos Koliandris* v. *The Republic* (1965) 2 C.L.R. 72 ;

*Reg.* v. *Moore* (1852) 3 Car. and Kir. 319 ;

*Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349, at p. 381 ;

*Broadhurst* v. *R.* [1964] A.C. 441 P.C.; [1964] 1 All E.R. 111, at p. 112G and p. 123F ;

*Director of Public Prosecutions* v. *Beard* [1920] A.C. 479 ;

*D.P.P.* v. *Smith* [1960] 3 All E.R 1961 ;

*Pefkos* v. *The Republic*, 1961 C.L.R. 340 ;

*R.* v. *Grimwood* [1962] 3 All E.R. 285 ;

*R.* v. *Steane* [1947] 1 All E.R. 813 ; [1947] K.B. at p. 1004, per Lord Goddard C.J.;

*R.* v. *Church* [1965] 2 All E.R. 72, at pp. 75-76 ;

*Reg.* v. *Nicos Sampson Georghiades* (No. 2) (1957) 22 C.L.R. 128, at p. 133 ;

*Mavrali* v. *The Republic* (1963) 1 C.L.R. p. 4 :

*Kafalos* v. *R.* 19 C.L.R. 121, at p. 125 ;

*Decisions of the Greek Arios Pagos :*

Α.Π. 782/1931 in Θέμις ΜΓ' Γ. 202 :

Α.Π. 546/1938 in 'Αρχ. Π.Ε.Τ.γ. Γ. 26 ;

Α.Π. 65/1931 in Θέμις ΜΒ σ. 211.

**Appeal against conviction.**

Appeal against conviction by the appellant who was convicted on the 11th November, 1966, at the Assize Court of Limassol (Criminal Case No. 6785/66) on one count of the offence of premeditated murder contrary to section 203 of the Criminal Code Cap. 154, as amended by section 5 of Law 3 of 1962 and was sentenced by Malachtos, Ag. P.D.C., Vassiliades and Lorris, D.JJ., to death.

*G. Cacoyiannis*, for the appellant.

*L. Loucaides*, Counsel of the Republic, for the respondent.

*Cur. adv vult.*

The following judgments were read by :

VASSILIADES, P.: This is an appeal against conviction for premeditated murder, of which the appellant was charged, tried, and convicted by the Assize Court of Limassol, on November, 11, 1966, after a strongly contested trial, lasting for a number of days.

The case, both at the trial and in the appeal, was fought on the issue of premeditation, and the appeal turns solely on that issue. It is, in this case, a mixed issue of fact and law as it involves both questions of fact, and questions of law.

The appellant, a taxi-driver of the age of 46 (p. 177, C, of the record) caused the death of the victim named in the charge, a woman of 28 (p. 177, B) at her own home, by shot-gun fire, in circumstances which could well be described as a horrible crime.

The deceased was a married woman of low morals, living with her second husband, and her child, a girl of about 12, in a basement flat at Limassol. The husband is not fully described in the record. He is prosecution witness 34, Prodromos Georghiou (p. 70) ; the type of individual who, knowing that the appellant was the lover of his wife, was prepared to receive frequently, money and other favours from him ; and to accept the appellant regularly in his house.

According to the evidence, this love affair between the appellant and the wife in question, had been going on for over four years (p. 140), the husband pretending ingorance, until the lovers made arrangements to have the husband brought by a " friend " to Nicosia to " catch them " in a hotel bedroom (P.W. 27 : p. 5) and so enable him to have, they said, " a ground for divorce ".

The scene at the hotel is characteristic of the principal actors, and their relations. The " friend " led the husband to the bedroom door (as arranged between him and the lovers) where the appellant answering the husband's knock requested him to wait until " they got dressed " (p. 58, A). And when, after a while, the couple came out of the room, the wife said to the husband : " Go away. I do not want you because you beat my child ". The husband thereupon " spat at her face " (p. 58, B, C) ; and " insulted " her lover (the appellant) by saying : " Den ndrepese, palianthrope, tosa chronia fili, ekames mou emenan etsi praman " (Are you not ashamed ? After being friends for so many years, you did to me such a thing) (p. 70, G). And that was all at that stage.

On returning to Limassol—the husband said in evidence (p. 71, B)—he took his belongings and went to live with his brother. And on the following day he instituted divorce proceedings, he said.

The appellant and the wife returned to Limassol together, and installed themselves at the flat, where they co-habited for some two or three weeks (p. 178, F). But after that, the deceased and the husband reconciled ; and the husband returned to his flat to replace the other man ; while the appellant returned to his own home and family. As already stated, he is a married man of 46, with a wife and five grown up children ; the eldest a son of 24, and the youngest a girl of 16 years of age (p. 102, G).

The affair, however, between the appellant and the deceased, apparently continued much as before. " In spite

of the reconciliation with her husband—the trial Court found—the accused never stopped loving her, and it is clear from the evidence that the deceased responded " (see judgment at p. 179, B). This is clear, the trial Court add, from the fact that the appellant and the wife went together to Larnaca on the 4th February, 1966 ; and when detected by the Police and brought back to Limassol, the wife stated " that she had gone with the accused on her own free will " (p. 179, C).

That was only very few days after the wife had reconciled with her husband ; and only five days after she had made a complaint to the Police, together with him, on the 29th January, against the appellant for annoying them ; and after the appellant had promised to the policeman who warned him in consequence of the complaint that he would " stop annoying her, and stop passing by her house ". (Judgment p. 178, G). Nevertheless, matters went on same as before, the evidence describing the deceased as the appellant's mistress.

These are the characters involved in this case ; and they seem to have continued in this way, for the next two months, when we come to the time of the murder ; late April—early May.

On April 29, the appellant speaks of an outing to the open country, where he and the deceased spent their morning near a river-side for a love picnic (p. 146, B–D). On the 30th April, the appellant was seen coming out of the house of the deceased, by a policeman (P.W. 7) who remarked to him : " Pale pais "? (Do you still go ?) (Judgment p. 179, C). A couple of days later, the appellant happened to be seen by the deceased driving his young daughter and another girl in his car. The deceased apparently took objection to that ; and made a scene of jealousy to the appellant by ringing up to his taxi-office and insulting him. This was on Wednesday, May 4, the day before the murder.

The appellant, obvioulsy not prepared to have his " mistress " behave towards him in that manner, went to put matters right. After another telephone conversation which seems to have made things worse, he went to find her at a hairdresser's (P.W. 18 p. 35) where the appellant called her out, and gave her a beating there and then. The trial Court describe this scene in their judgment (p. 179, D) as follows :

" . . . . the accused opened the door, seized her by the hair, dragged her outside and assaulted her and gave her

a black eye. This was the result of a conversation over the 'phone' where the deceased had said to him : 'You go with your prostitute daughter and wife and leave me alone' (Na pighenis me to poutanaki tin kori sou ke tin yineka sou ke mena na mafisis isihi) ; this makes it clear—the trial Court say—that the deceased wanted to bring her relations with the accused to an end. This incident was reported to the Police by the deceased herself on the same day."

Placed in the background of the history of the relations between the deceased and her lover, however, the inference drawn by the trial Court that she "wanted to bring her relations with the accused to an end" is, at least, I think, doubtful.

Be that as it may, the following day, May 5, the deceased remained in bed with her black eye and swollen nose (P.W.34, p. 73, G). That was the day of the crime. At about six in the evening, the appellant passed again outside her house, and signalled his presence there, by sounding his horn, which seems to have been his habit to do. Some time later, the husband went to the Police and complained about this (p. 112, B and 179, G).

Later that same evening, May 5, at about 8.30 p.m., the appellant together with four other persons, including a Police Inspector (P.W. 44) went to a bar-restaurant for drinks and food. On their way to the restaurant, the Inspector mentioned to the appellant, the husband's complaint (P.W. 44 p. 112, D). But apparently the matter was given very little importance ; and the group of friends proceeded to the place in question, where they were together, eating and drinking until about 10 o'clock. The appellant here seems to have consumed more than half a bottle of strong brandy, which he was drinking with another man ; while the Inspector and two of the others consumed a bottle of whisky (p. 180, B).

From the restaurant the party, with the exception of the Inspector, proceeded to a cabaret where the appellant had one more brandy with coca-cola this time, which seems to have made his condition worse. Here, they found appellant's brother-in-law, Yerakis (P.W. 24) whose gun and cartridges the appellant used later that night, in the commission of the murder.

From the cabaret the appellant and his friends went to the former's taxi-office to collect their cars. That was

shortly before 11 o'clock (P.W. 37 p. 86, B). The appellant was apparently under the influence of drink (p. 87, G).—But well enough to get his Mercedes taxi and drive some passengers to a cabaret (p. 150, B). From there he drove to the street where the deceased woman's house was ; and stopped somewhere near, playing a record on the car's pick up (p. 150, C) ; and making noises with his car and voice (P.W. 5 ; p. 23, B) apparently to make again his presence felt by his angry " mistress " and her miserable husband. The trial Court found as a fact, that the appellant was doing all this with the intention to annoy them. (Judgment at p. 179, G and p. 180, E.).

In fact he did annoy and disturb, not only the woman and her husband (P.W. 34, B–D); but also the neighbours in the street (P.W. 5, p. 23). The inmates of the flat, however, chose to keep quiet. They had already gone to bed, and had their lights out (P.W. 34, p. 74, E). They kept the house dark, and made no reply (P.W. 34, p. 74, G).

The version of the appellant is that the husband insulted him from inside (p. 150, E) ; but this was not accepted by the trial Court. The Court found that from there the appellant drove to his brother-in-law's house a couple of miles away (p. 180, E) where, pretending that he was to go shooting hares at night, he (appellant) persuaded his sister-in-law (P.W. 23) to give him her husband's sporting gun and bandolier with 23 live cartridges (p. 180, F) with which he returned to the place where, about twenty minutes, earlier, he had been " to annoy ".

What happened at this stage, according to the trial Court, is described in the judgment (at p. 180, F—181, A) :

> " He parked his taxi outside the flat, on the left hand side of the road facing towards the sea, he left the ignition keys on, and through the gate came to the entrance door of the flat. He then broke the glass pane of the right middle leaf of the front door, tore down and threw out the corresponding curtain, and fired 4 shots into the flat. After that, he proceeded to the rear of the flat where he must have fired another 7 shots into the said flat. At a point of time, he entered the flat through the rear door which was not locked, and switched the light on, as it was dark. He then came out and proceeded on foot through the back yard of the flat, towards the house of his son-in-law, Nicos D. Aniftos, P.W. 29, at Golgon Street, which is at a distance of about 600 ft. from the flat. He left the gun and the bandolier

outside and rang the bell. His son-in-law opened the door. There and then he confessed to him what he had done, and added : ' E kalo na katigoroun tin yineka mou ke tin korin mou os poutanes ? ' (Was I to let them accuse my wife and my daughter as prostitutes ?."

From there the appellant took the taxi-car of his son-in-law, and went to his brother-in-law's house, where he returned the gun and bandolier with 11 live cartridges (p. 180, B–C). He then drove to the house of one of the employees of the taxi-office, Kambouris (P.W. 43) to whom he said : " Friend, I have made the greatest mistake in my life ; I shot my mistress. I shot them both, mother and daughter ". (p. 181, D)—From there he drove away into the country where he was arrested in a field, next morning.

Dealing with the firing, later in their judgment, the trial Court say (at p. 182, G) :—

> " It is obvious that 4 shots were fired into the flat from the direction of the front door. The one shot went through the first armchair and hit the pillows and one of the sheets on the double bed. The other one hit the middle of the mattress as a result of which cotton was forced out of it. About one foot away from the said shot to the direction of the foot of this bed, there was another shot which corresponded to the shot that hit the arm of the second armchair. The last one was on the foot of the bed, on the wooden part of it. This shot was the one that damaged the blanket. By the side of the foot of the double bed, there was a pool of blood. The table-cloth of the dining table was also perforated by pellets. On this table there were two empty bottles which were smashed by pellets."

Dealing with the injuries found on the dead body of the woman, the trial Court say (p. 184, D) :—

> " The fatal wound was the one on the right base of the thorax which was surrounded by dense blackening."

As described earlier in the judgment (p. 184, A) this was a gunshot wound $2'' \times 1''$ surrounded by blackening " with about nine grazing superficial pellet wounds on the outer aspect of the thorax. Through this wound the liver, right dome of the diaphragm and the right lung were lacerated. A wad and 6 pellets were extracted from the liver and right lung ". The shot that caused this wound, according to the findings of the trial Court, was fired " at the victim while

the accused was inside the flat. This is clear—the Court add—from the size and nature of the wound, the blackening round it and the presence of the empty cartridges within the flat ". (p. 186, G). But this finding is qualified with the words " at least this fatal shot . . . " which indicate that the trial Court found themselves unable to say with certainty whether any other shots, excepting this one, were fired inside the flat.

The defence strongly contested this finding. Learned counsel for the appellant argued extensively to the effect that the circumstantial evidence on which the trial Court inferred that the fatal wound was fired while the appellant was inside the flat, was equally consistent with firing the fatal shot from outside the back door, near which the victim may have taken refuge, after the firing from the front door. The evidence does not necessarily exclude the possibility, counsel submitted, of this shot having been fired from outside the back door. Especially so, in the face of the evidence of the appellant (the only direct evidence on the point) that he did not fire at all after entering the flat.

Appellant's evidence in chief in this connection, is that after firing repeatedly from outside the back door, he went down the steps and opened the door, which he found unlocked, to see what had happened inside. While in the doorway, he switched on the light and saw the deceased wounded on the floor, under the single bed. The shocking sight brought him to his senses, he said. The victim was still alive and said : " Have pity on my daughter. What has happened to you tonight ? What have you done to us ? ". He then saw the girl wounded on the double bed, and hearing a noise outside, which he took to be a police car, he got afraid and left. (P. 152 F–153 A, B, F).

In cross examination, the appellant insisted that he went inside the room from the back door in order to see what had happened in the house. On witching the light on, he saw the wounded woman underneath the single bed which brought him to his senses, he said, especially when she spoke to him. He fired no shot after that. (p. 165).

The trial Court, however, did not accept the evidence of the appellant ; and reached the conclusion, on the totality of the evidence before them, that the fatal shot was fired " at the victim while the accused was inside the flat " (p. 186, G). To disturb this finding, the defence must show that it

could not have been made on the evidence on record. (*Kiamil Ali* v. *The Republic*, (1966) 2 C.L.R. 112. We are unanimously of the opinion that, regardless of whether we consider the evidence on the point sufficiently convincing or not, it was open to the trial Court to make this finding ; and it should not be disturbed.

The resulting factual position, therefore, is that the appellant, after trying to annoy the inmates of the flat (which was his intention to do in going there) with the noises he made with his car (P.W. 5, p. 23, D) at that time of the night, and with the insulting language he had used, seeing that he failed to get the expected response, and probably annoyed and infuriated for that reason, under the influence of drink as he was at that stage, the appellant decided to go and get his brother-in-law's gun and cartridges, with which he returned in about 20 minutes. To do that, he drove his taxi a distance of about four miles (there and back) alone in the car. Armed with a gun now, he went to the front door of the flat and called the woman's husband out, again making a lot of noise ; banging and shouting (P.W. 5, p. 23, F). Still getting no response from inside, he started firing through the front door, of which he broke the glass. Pulling the curtain down (P. W. 44, p. 111, B) he fired more shots in the dark house, in the direction where he knew the woman and her husband may have been lying in bed. He fired four shots through this door (p. 180, G).

Still failing to get any response from the inmates, at the front door, the appellant went to the back door where he again fired in the dark flat several shots. The neighbours (P.W. 2, p. 11, D) heard screaming which must have been an occurrence at this stage; but still, there was no sign of the husband. The appellant then getting down the flight of steps at the back door, opened it, and switched the light on (p. 152, F).

According to the findings of the trial Court, while inside the flat, the appellant fired at the deceased, " at least " the fatal shot (p. 186, G) from close quarters. And left before the Police arrived. He then went on foot to his son-in-law's house (p. 180, G) and from there he drove to his brother-in-law's and to another friend's (p. 181, B–D) admitting all along to several persons, scared and horrified, that he had shot his mistress.

It is common ground that during the whole of the material time, both before and after the crime, the appellant was under

the influence of drink ; and obviously under the influence of passion, which I need not attempt to analyse for the purposes of this judgment.

On these facts two important questions arise for determination : the question of intent ; and the question of premeditation. Both mixed questions of fact and law which compose, in this case, the issue of premeditation upon which the appeal turns.

The trial Court found that, notwithstanding the obvious effect of drink on appellant's mind, he was capable of forming intent, in the legal sense of the term. The Court approached the matter through the provisions of section 13 of the Criminal Code (Cap. 154) ; and I do not think that this part of the trial Court's judgment can be challenged, on the evidence in this case. Nor, can I think, be doubted (although not expressly found by the trial Court) that the appellant was also labouring at the material time, under the influence of passion. Arrogance, pride, love, jealousy and anger, may have all played their part. It is not for us to say what mixture of feelings, and in what proportion they were influencing the appellant at the time of the crime ; but there can be no doubt, I think, that his mind, at all material time, was affected by this dangerous combination of drink and passion.

The trial Court found that the fatal shot was fired with intent to kill. We do not think that this finding can be legally questioned. But the point of time at which this intent to kill was formed is a crucial issue of fact in this case.

The trial Court say, in the last part of their judgment (p. 188, C) that on the evidence before them, they took " The view that the accused formed the intention to kill the deceased or any of the inmates of the flat . . . from the time he left the flat to go to the house of Yerakis in order to get his gun ". But one of the inmates of the flat at that time was the little girl of 12, whom, on the evidence, the appellant would have no cause or reason whatsoever, to kill.

The girl was in fact injured, from the firing in the dark house ; and the unfortunate creature, subsequently died in hospital. But, there is no suggestion that after entering the house and switching the light on, the appellant fired at the girl. Can it, in such circumstances, be said that the appellant had at any time fired deliberately with intent to kill the girl ? I am of the opinion that such a finding cannot be sustained on the evidence in this case.

Let me now test the other part of the alternative finding of the trial Court regarding appellant's intention to kill the husband ; the type of husband described earlier in this judgment. After firing in the dark, at the front and at the back of the house, the appellant entered the flat, the trial Court found, and seeing the woman, he fired at her the fatal shot with intent to kill her. Is there any evidence whatsoever, that on entering the flat he looked for the husband ? If his intention was to kill him as well, would he not have done so ? And would he not have made some reference to the husband, when he spoke to the persons he went to, after the crime ? He made none.

The trial Court's finding, therefore, that the appellant had at any time formed the specific intent to kill the deceased " or anyone of the inmates of the flat " cannot, in my opinion , be sustained in its present alternative form. It has to be confined, I think, to a finding that the appellant, on getting no response from the inmates of the flat to all the noise he had made to annoy them, he now formed the intent to kill his mistress.

The trial Court found this change of intent—obviously a very grave change, to a completely different intent—by inference from appellant's conduct *from the moment he* went to fetch the gun, to the time of his arrest, after the commission of the crime. Particularly from the fact that he went to fetch a lethal weapon with the necessary ammunition ; that he used it in firing eleven shots dangerous to life ; one of which, a fatal shot from close quarters, fired at the intended victim.

The defence, however, in this connection, is that the conduct of the appellant from the moment he went to fetch the gun is, at least, equally consistent with an intent to terrorise in furtherance of the original intent to annoy. To terrorise in the dangerous and reckless manner of a drunken and infuriated lover, who accidentally—the defence say—killed his mistress while firing in her dark house from outside.

But at this stage, the defence, regarding intent, has to be considered on the relevant facts as established by the evidence ; and as found by the trial Court. The intent to kill the deceased at the time of the firing of the fatal shot, from close range, with the light on, as found by the trial Court, cannot be questioned at this stage.

There is, however, *undoubtedly, the possibility of the* intent to kill the deceased having been formed in the dis-

turbed mind of the appellant, when he saw the deceased after switching the light on. Can this possibility be, safely excluded ? It may be said that the appellant did not put his case on this footing. But if his intent is to be found by inference from his conduct, this must, I think, be the conduct found by the trial Court ; not the conduct in the rejected version of the appellant.

Taking the conduct of the appellant from the moment he went to fetch the gun till the moment he entered the flat from the back door and switched the light on (and excluding for a moment, for the purposes of this test, what happened thereafter) I think that such conduct is, at least, equally consistent with an intent to terrorise, as it is with an intent to kill the deceased. (I have already dealt with the alternative intent to kill " any one of the inmates ", inferred by the trial Court).

I say " at least ", because I am rather inclined to the view that the way in which the appellant obtained the gun ; the noise he made with his car when he returned with it (p. 74, G) ; his behaviour at the front door before firing (P.W. 34, 74, H ; P.W. 2, p. 11) ; and all the shooting in the dark from outside the front and the back doors, is more consistent with an intent on the part of a person in appellant's condition, to terrorise and domineer his mistress, than an intent to kill her. And I draw my inference from such conduct, accordingly. (*HjiCosta* (*No.* 2) v. *The Republic* (1965) 2 C.L.R. 95 at p. 102).

Moreover, what, I think, is rather significant in this connection, is the part of their judgment where the trial Court make this finding by inference, as to the time when the intent to kill was formed. There is no such finding in the part of the judgment where the trial Court deal with the evidence and state the facts established therefrom. It is found in the last part of the judgment, after dealing with the law applicable to the case ; the law regarding the element of premeditation in the crime charged.

I must now deal with the legal aspect of the issue on which this appeal turns : the mixed issue of fact and law constituting the element of premeditation in the present case. And I must do so, taking every care to deal with this delicate and serious matter, only as far as necessary for the purposes of this case ; as far as the facts of this particular case require.

I think that the best course for this purpose, is to start from the concession which learned counsel for the appellant so

frankly and properly made in the course of the argument before us. The appellant caused the death of the deceased in circumstances which would amount to the crime of murder with malice aforethought, counsel conceded, as known to our law prior to the amendment of the relevant sections by the Criminal Code (Amendment) Law, 1962 (No. 3 of 1962) ; but such circumstances do not amount to the crime of premeditated murder, he argued, under section 203 of the code, in its present form.

By firing the shotgun, with knowledge that his unlawful act would probably cause death or grievous harm to the deceased when he fired at her (as the trial Court found) ; or to some person when he was firing in the dark flat, accompanied by indifference whether death or grievous bodily harm is caused or not, the appellant was deemed, under the provisions of section 207 to have acted with malice aforethought. And, causing the death of another person by an unlawful act, of malice aforethought, was the crime of capital murder provided for in section 204, prior to the amendment of the criminal code.

But the Constitution, learned counsel argued, which came into force on 16th August, 1960, as the supreme law of the new State (Article 179.1) directed (in Article 7.2) that a law may provide for the death penalty "only in cases of premeditated murder, high treason, piracy *jure gentium* and capital offences under military law". This constitutional provision, in the part dealing with fundamental human rights and political liberties, expresses clearly and unequivocably the intention on the part of the new State, to abolish death sentence for the crime of homicide, excepting for its aggravated form of premeditated murder ; one of the aggravated forms of homicide : The planned and calculated assassination of another person.

There is nothing strange in such change in its law, by the new State, at a time when similar changes, with partial or total abolition of the death sentence, are taking place in most of the civilised countries of the world. The courts must apply the law as it comes to them from the legislature, in the spirit in which it was made, as far as this can be gauged from the text.

In the first case of this nature before them, both the Supreme Constitutional Court and the High Court held in *Loftis* Case early in 1961, that causing death, of malice aforethought was not always "premeditated murder"

(*The Republic* and *Nicolas Pantopiou Loftis* 1, R.S.C.C. p. 30; and *Loftis* v. *The Republic*, 1961 C.L.R. p. 108). This was followed a few months later, by the enactment of Law No. 3 of 1962, section 5 of which, repealed the then existing sections 203 to 207 of the Criminal Code pertaining to homicide ; and replaced them by the provisions now in force, which constitute the law governing the present case. Section 203 in its present form, provides for the felony of murder " with premeditation ", which is punishable with death ; and section 205 provides for the felony of homicide by an unlawful act (or omission) which is punishable with imprisonment for life. The difference between the two crimes lies in the element of premeditation which exists in the former, but not in the latter type of homicide.

The case for the appellant is that he committed the crime in section 205 ; and not the crime in section 203, for which he was charged and convicted by the Assize Court. It is contended on his behalf, that the premeditation required to constitute the crime in section 203 has not been established in this case.

The trial Court dealt with this question of premeditation in the last part of their judgment (p. 187, B–188, E) ; and their approach to the matter cannot, I think, be criticised. Reference is made there, to what was said in this connection, by Zekia, J., delivering the unanimous judgment of the Court of Appeal in *Dervish Halil* v. *The Republic* (1961, C.L.R. p. 432 at p. 434) which, I think, may be usefully repeated here :

> " The phrase premeditated homicide or murder, unlike the phrase ' malice aforethought ', is not a term of art, and it has to be taken in its ordinary meaning."

The judgment then, taking reflection from the facts of the particular case, which was being decided on that occasion, proceeds with the view that :

> " When a person makes up his mind, either by an act or omission to cause the death of another person, and notwithstanding that he has time to reflect on such decision and desist from it, if he so desires, goes on and puts into effect his intent and deprives another of his life, that person commits a premeditated homicide or murder which entails capital punishment. There is no presumption of law in the case of premeditation, but this has to be inferred in each particular case from the surrounding circumstances."

This statement, however, authoritative as it may well be, cannot go beyond the facts of the case in respect of which it was made, so as to affect the law in such a delicate and important matter as a capital crime. The law was, and still is, that "the phrase premeditated homicide or murder . . . has to be taken in its ordinary meaning" (*supra*). And premeditation, in the ordinary meaning of the word, has to be established as a fact in each case. It is one of the fundamental ingredients of the crime under section 203 of the code, which must be proved by the prosecution to the satisfaction of the Court, beyond reasonable doubt. And it may, of course, be proved by direct or circumstantial evidence ; it may be inferred from established surrounding facts, leading safely to that one conclusion ; or, it may be a matter so apparent that the defence will not even dispute it. In a very recent case before this Court, the element of premeditation in the murder was so obvious, that it was never questioned. (*Koumbaris* v. *The Republic* ; reported in this part at p. 1 *ante*).

Intent in the act which caused the death of the victim, and premeditation in the conception and preparation of the crime, are two different matters; and the distinction between them must be kept clear in the Court's mind. Frequently they overlap, in as much as to constitute the crime of premeditated homicide, they must both exist at the time of the commission of the crime. But confusion between intent in the act causing death, and premeditation in the commission of the crime, may lead to the error of confusing premeditated murder under section 203 with murder of malice aforethought, under the repealed section 204, no longer part of our Criminal Code.

I do not propose going into examples ; but this case may well present one. Another example may be found in *R.* v. *Shaban* (8, C.L.R. p. 82) decided by majority in an Assize Court with a coram of five judges in 1908, and referred to in *Loftis* case (*supra*). The minority in that case, apparently accepted the submission of the King's Advocate, that even the short period of time, between forming the intent to fire at the policeman on the part of the accused, and the actual shooting, was sufficient "deliberation to constitute premeditation". While the majority of the Court (notwithstanding the views prevailing at that early part of the century with British judges, regarding murder and the capital sentence) having to decide the case on the Ottoman Penal Code, based, in this connection, on the continental notions regarding homicide, held that the facts in the case did not justify a finding of premeditation.

Tyser, C.J., delivering the judgment of the Court (p.84) said that the question of premeditation is a question of fact. And that " much must depend on the condition of the person at the time—his calmness of mind or the reverse ". In other words, much must depend on whether, in the particular case, the person who performed the unlawful act causing death, was in a condition to meditate—in the ordinary sense of that word—upon the intended fatal act, and had the time to do so, prior to its execution.

Both the Supreme Constitutional Court and the High Court adopted in *Loftis case* (*supra*) the position stated in *Shaban's case* (*supra*) regarding premeditation as understood by the Constitution. And in amending the relevant part of the Criminal Code in 1962, the legislature did not attempt to give a definition to premeditation, affecting in any way the ordinary meaning of the word ; and make it a technical term for the purposes of the statute. Section 204 merely provides that premeditation is established (not deemed to exist) by evidence proving " expressly or by implication, an intention to cause the death of any person . . . formed before the act or omission causing the death is committed, and existing at the time of its commission ". In other words, proving " *animus necandi* " not only at the time of the act causing death but also proving that such *animus necandi* had been formed earlier. That the homicide is the result, not only of an intended act, but also the execution of an earlier meditated decision. In the absence of that earlier meditation leading to the decision to kill, and in the absence of sufficient time to reflect upon such decision, the intentional unlawful act causing death, constitutes the crime of homicide under section 205, punishable with imprisonment for life ; but not the crime under section 203, which is punishable with death.

Premeditation, according to the Oxford Universal Dictionary (3rd Ed. 1961 Vol. II, p. 1570, col. 1) is " the action of premeditating ; previous thinking out of something to be done ; now, especially, designing, planning, or contrivance to do something. Premeditate means to meditate beforehand ; now, especially, to plan or contrive previously ". Intransitively it means : " to think deliberately beforehand or in advance (on or of something)" Προμελέτη (which is the Greek word used both in the Greek text of the Constitution, and in the Greek version of the relative provisions in the Criminal Code (Amendment) Law, 1962) means, according to the Νέον Λεξικόν (Δ. Δημητράκου, Β' Έκδοσις 1959) «ή προκαταρκτική μελέτη, προσχέδιον. Έσκεμμένη προσχεδίασις πράξεώς τινος,

ἰδίως ἀξιοποίνου. And προμελετῶ means προπαρασκευάζομαι διὰ τῆς μελέτης. Προσχεδιάζω ἐσκεμμένως, ἰδίως ἀξιόποινόν τινα πρᾶξιν».

The text in the Greek version of section 204 of the code, presents, in my opinion, the matter even clearer. It amounts to this : Premeditation is established by direct or circumstantial evidence showing intention to cause death . . . which was formed and continued to exist before the time of the act causing death, as well as at the time of the killing.

In France the provisions in the Criminal Code regarding homicide and its punishment, underwent several changes from time to time, in the course of evolution in the legal approach to this serious crime. An article by M. Joseph Magnol, Doyen Honoraire de la Faculté de Droit, Université de Toulouse published in the Journal of Criminal Science of the Faculty of Law of the University of Cambridge, in 1960 (Vol. II, p. 210) after the enactment of the Criminal Justice Act, 1948, dealing with the element of intention in the crime of homicide in French law, presents concisely the position regarding intention and premeditation. The French code makes a distinction between "*meurtre*" and "*assassinat*". The latter denoting the aggravated forms of homicide (one of which is the premeditated taking of human life) and is punishable with death ; the former denoting intentional but non-aggravated homicide, punishable with imprisonment for life.

In Italy, the mental and psychological state of the accused, at the material time, are matters of the utmost importance in determining the degree of his responsibility for the conduct constituting the crime. Professor Gennaro Guadagno, at the University of Naples and Consigliere della Corte Suprema di Cassazione, dealing with the causes of exclusion or limitation of guilt in his book on criminal law (Manuale di Diritto Penale—1962 at p. 209) and particularly with the relation between partial defect of mind and the circumstances of the crime (p. 217) refers to premeditation which he says, as far as it relates to guilt, must denote the existence of an independent wilful conduct, consequent upon the decision to act, which contains the possibility of thinking and insisting on the carrying out of the decision already taken. The interval of time between the taking of the decision, and the carrying out of the act decided upon, is of vital importance in determining the existence of premeditation.

In Greece the position as given by Professor Chorafas in his book Γενικαὶ Ἀρχαὶ τοῦ Ποινικοῦ Δικαίου, 6th Ed., 1962, at p. 213, is as follows :—

> «Προμελετημένος δόλος ὑπάρχει, ὁσάκις ὁ δράστης ἐν ἠρέμῳ ψυχικῇ καταστάσει ἐπιτρεπούσῃ τὴν σκέψιν, ἀπεφάσισε τὴν τέλεσιν τοῦ ἐγκλήματος· ἀπρομελέτητος δὲ δόλος εἶναι ἡ ἐν βρασμῷ ψυχικῆς ὁρμῆς ἀποκλείοντι τὴν σκέψιν, λαμβανομένη ἀπόφασις πρὸς τέλεσιν τοῦ ἐγκλήματος.»

One could go on at great length in finding and stating the position regarding premeditation in the crime of homicide, in various countries ; and at different periods. But this would be rather in the nature of an academic discussion. The case before us must be determined upon the Law of Cyprus ; by applying the relevant provisions of the Criminal Code to the facts established by the evidence on record, in this particular case.

I find it unnecessary to refer to more cases decided in this Court after the amendment of the criminal code. The trial Court referred to *Mustafa Halil* v. *The Republic* 1962, C.L.R. p. 18 and to *Yiannis Pieri* v. *The Republic* (1963) 1 C.L.R. 87 upon which they concluded that " unlike malice aforethought, premeditation cannot be presumed from the doing of the act itself, but it must be proved, or inferred from the facts proved and the surrounding circumstances ". I think with all respect, that the Assize Court have correctly stated the position on this point.

It was after this assessment of the legal position, that the trial Court found it necessary to consider at what point of time was appellant's intention to kill, formed. And it was then, that they found that it was formed " from the time he left the flat to go to the house of Yerakis in order to get his gun ". This was the finding through which, the trial Court reached the conviction, on the ground " that the time that elapsed from the moment the intention to kill was formed to the time it was carried into effect, the accused had sufficient time to reflect on such decision and desist from it if he so desired ; " adopting in this connection, the words of Zekia, J. in *Dervish Halil* v. *The Republic* (*supra*).

Without this finding on the point of the time when the intent to kill was formed, the trial Court would, apparently, not have convicted the appellant for premeditated murder. Taking the view, for the reasons set out earlier in this judgment that that finding cannot be sustained, I am of the opinion that the conviction must be set aside ; and be re-

placed by a conviction for homicide under section 205. And that in the circumstances of this horrible crime, the appellant *be sentenced to an appropriate term of imprisonment.*

TRIANTAFYLLIDES, J.: In this appeal I agree, regarding its outcome, with the learned President of the Court, namely, that the conviction for premeditated murder, under section 203 of the Criminal Code, Cap. 154, as amended by the Criminal Code (Amendment) Law, 1962 (Law 3/62), should be set aside and that the Appellant should be convicted, instead, of homicide under section 205 of the same Law.

I would like, however, to give in this judgment my reasons for reaching such a conclusion, because my approach to the matter is not exactly the same as that of the learned President of the Court.

The facts of this case are sufficiently set out in other judgments, which will be given in this appeal, and which I have had the benefit of perusing in advance ; so, I need not dwell, myself, on such facts, at any great length.

They may be summarized as follows :—

The appellant, a taxi-driver from Limassol, found himself convicted and sentenced to death, for the premeditated murder of the deceased, Despina Prodromou, of Limassol, after firing repeatedly, with a shotgun, into, and in, a basement flat, at 58A Ayia Phyla Street, Limassol, where, at the time, the deceased was residing with her husband and young daughter ; the fateful date was the 5th May, 1966.

There was a past history of amorous relations between the appellant and the deceased, of which the husband of the deceased must have been aware, because, earlier on in 1966, the deceased had co-habited in the aforesaid flat with the appellant to the exclusion of her husband. Later on, however, the deceased was reconciled with her husband and the appellant left the flat.

It appears that the deceased kept up her relations with the appellant even after the reconciliation with her husband. But, in the course of such relations, friction arose, as a result of which, on the day previous to her death, the deceased broke off relations with the appellant. After being told by the deceased on the phone, on the 4th May, 1966, that he should leave her alone, the appellant went and found the deceased at a hairdresser's shop, dragged her out of there by the hair and beat her up. The deceased reported the matter to the police.

Shortly before midnight, on the 5th May, 1966, the appellant, who was at the time under the influence of drink to some appreciable extent, arrived outside the flat of the deceased, where, apparently, at the time, she was in bed with her husband and child. He started annoying them by sounding the horn of his taxi and by playing music on a record-player in his car. As found by the learned trial Court his intention at that stage was only an intention to annoy.

There can be little doubt, on the evidence, that the appellant was then under the influence, not only of drink, but of strong passion, too.

We are not concerned, at this stage, with the righteousness of the indignation of the appellant. Though one can certainly not find any moral merit in the appellant feeling resentful of the fact that the deceased had broken off relations with him and was, on that night, at home with her own husband, and with her child, the fact remains that the appellant's state of mind must have been one of strong passion and irate feelings, which were made much worse by the influence of the drink which he had consumed shortly before ; and while on this point it might be usefully pointed out that it has not been suggested that the appellant had consumed drinks on the night of the 5th May, 1966, in order to provide himself with a convenient excuse in relation to any intended violent conduct on his part ; it simply happened that he had been drinking with friends.

As the aforesaid annoying tactics of the appellant, outside the flat of the deceased, did not bring him any satisfactory response—possibly he was insulted by her husband, possibly he met with complete silence on the part of the inmates of the flat, a thing which may have enraged him even more—he drove at once to the house of a close relative of his, obtained from there, under a pretext, a shotgun and a bandolier containing over 20 cartridges, and returned, in a matter of about quarter of an hour, to the street outside the flat of the deceased. He went down the steps to the entrance-door of the flat and, having broken a glass-pane of the door, shot into the flat a number of times. Then, he went to the back-door of the flat and from there more shots were fired into the flat ; and I take the view that, on the evidence adduced, it was correctly found by the trial Court that the appellant fired at least one shot inside the flat, after having entered it through its back-door.

As a result of this indiscriminate shooting the deceased was killed, having received four major gunshot injuries.

I may say at once that I am quite satisfied that it was properly open to the trial Court to find that the appellant fired all the shots, right from the beginning, with the intention of killing either the deceased or her husband, or both ; moreover, I quite agree with the trial Court that such intention was formed when appellant's annoying tactics failed to bring forth a satisfying, for him, result, and he went off to fetch the shotgun. As these aspects of this case have raised not even a doubt in my mind in favour of the appellant, I do not find it necessary to enlarge upon them in this judgment.

What has given me quite some difficulty—and I have to go into it at some length—is the issue of whether or not the killing of the deceased was, in the circumstances, a premeditated murder, as found by the trial Court, or only a homicide, as argued by counsel for appellant.

The notion of " premeditated murder " was introduced into our Criminal Code through the enactment of Law 3/62 ; what led to the enactment of the said Law is Article 7 of the Constitution, which restricts the death penalty to cases of premeditated murder, high treason, piracy *jure gentium* and to capital offences under military law.

The term "premeditated murder" in Article 7 has been interpreted by the Supreme Constitutional Court in the case of *The Republic and Loftis* (1, R.S.C.C. p. 30 at p. 33). It was held therein that " premeditated murder " in Article 7 conveys the notion of premeditated murder " as understood by Continental legal systems and in particular by the French Code Penal from which the above notion was adopted by the Ottoman Penal Code which applied in Cyprus until the enactment of the Criminal Code Order-in-Council in 1928 ". The Supreme Constitutional Court adopted the exposition of premeditation as laid down in 1908 in the case of *R.* v. *Shaban* (Vol. VIII, C.L.R. p. 82, at p. 84) ; it quoted the judgment in that case which reads as follows :—

> " The question of premeditation is a question of fact. A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention to reflect upon it and relinquish it.

Much must depend on the condition of the person at the time—his calmness of mind, or the reverse. There might be a case in which a man has an appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it.

On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation."

Law 3/62 in amending the Criminal Code has introduced section 204 defining premeditation as consisting of an intention to cause the death of any person, whether such person is the person actually killed or not, which is formed before the act or omission causing the death is committed and which exists at the time of its commission.

In my view the notion of premeditation, as introduced into our Criminal Code by section 204 of Law 3/62, must be understood and applied so as to coincide with the notion of premeditation as provided for in Article 7 of the Constitution. The Constitution being the Supreme Law section 204 cannot be validly applied in a manner inconsistent with it. It is a principle of Constitutional Law, governing the interpretation of statutes, that where the Constitution and a statute involve a constitutional right they must be construed together as one Law ; and the statute must be interpreted, if possible, so as to make it consistent with the Constitution (*see Cincinnati, New Orleans and Texas Pacific Railroad Company* v. *Commonwealth of Kentucky*, 115, U.S. 321).

So, once the Supreme Constitutional Court has adopted the exposition of premeditation, set out in *R.* v. *Shaban (supra)*, as conveying the notion of premeditation embodied in Article 7 of the Constitution, the definition of premeditation in section 204 of the Criminal Code must be read in that light and as intended to convey the same notion ; it cannot be construed or applied as conveying a different notion of premeditation ; and it is quite possible to construe and apply constitutionally section 204, as it stands today.

Between the coming into force of the Constitution in 1960 and the present day, the question of premeditated murder has been dealt with in a number of cases, such as *Dervish Halil* v. *The Republic*, 1961 C.L.R., p. 432, *Mustafa Halil* v. *The Republic*, 1962 C.L.R., p. 18, *Yiannis Pieris* v.

*The Republic*, (1963) 1 C.L.R. 87, *Evangelos Pavlou* v. *The Republic*, 1964 C.L.R. 97 and *Christos Koliandris* v. *The Republic* (1965) 2 C.L.R. 72.

It is clearly to be derived from the above case law that the issue as to whether a killing is premeditated murder or homicide (*i.e* unpremeditated murder) has to be resolved in the light of the circumstances of each particular case ; no hard and fast rule can be derived from the actual outcome of anyone of the aforesaid cases.

It has to be examined, therefore, now in this judgment whether the trial Court in this case has applied correctly the law relating to premeditated murder to the facts which were established by evidence before it.

As it appears from the judgment of the trial Court, it has found that the killing of the deceased was a premeditated murder because of the time which intervened between the forming by the appellant of the intention to kill— when he left the street outside the flat of the deceased to go and fetch the shotgun—and the carrying out of such intention. It found that such time—about quarter of an hour—was sufficient for the appellant to reflect on his decision to kill and to desist, if he so desired.

In my opinion this finding of the trial Court is not a satisfactory one because it appears not to have taken into account, duly or at all, the actual condition of the appellant during that quarter of an hour during which he has been found by the trial Court to have had sufficient time to reflect and desist.

As it appears from the above-quoted judgment in *R.* v. *Shaban*—which unfortunately is not one of the cases which has been relied upon in its judgment by the trial Court—in deciding whether or not a person has had sufficient opportunity to reflect and desist much depends on the condition of such person at the time, on his calmness of mind, or the reverse. Very little time may be sufficient for premeditation for a man who is in a calm and deliberate condition ; but an appreciable length of time may not be sufficient for premeditation by one who is not in such a condition of mind as to be able to consider his intention after its formation and before the carrying of it into execution. Sufficient opportunity to reflect upon an intention and relinquish it is not only a matter of pure space of time but a composite notion of the relevant space of time coupled with the actual condition of the person concerned.

In the present case the decision regarding the existence or not of sufficient opportunity for the appellant to reflect on, and desist from, his intention to kill is largely a matter of inference, to be drawn from the primary facts as established at the trial.



The trial Court in reaching the conclusion that there has been premeditation on the part of the appellant appears to have based itself only on the space of time which intervened between the formation of his intention to kill and the carrying of it into execution. Nothing has been said about the actual condition of the appellant during such space of time, namely, his being under the influence of drink and strong passion. If such condition has not been taken into account at all, by the trial Court, this would clearly amount to a misdirection of law regarding the proper notion of sufficient opportunity to premeditate ; and such misdirection, in the circumstances of the present case, is a sufficiently serious one to make it necessary to quash the conviction of the appellant.

If, on the other hand, it must be presumed that the trial Court had the appellant's condition in mind—though in dealing with premeditation it has said nothing about such condition—then I find myself unable to agree with the inference of the trial Court that the short space of time, which intervened between the formation by him of the intention to kill and the actual killing of the deceased, afforded the appellant, in the condition in which he was, under the influence of drink and strong passion, sufficient opportunity to premeditate, to reflect on his intention to kill and relinquish it ; and it being largely a matter of inference this Court is in as good a position to draw such an inference from the established facts of the case as was the trial Court.

I am well aware that it does not necessarily follow that an abnormal state of mind affords no opportunity for premeditation ; even a state of mental disease may not be inconsistent with it (see (*Pavlou* v. *The Republic*, supra). Nor am I prepared to hold that influence of drink or strong passion would in every case be insconsistent with premeditation. But the existence of premeditation is a matter to be examined in the light of the particular circumstances of each case, and in the present case I cannot, with respect, agree with the trial Court that it could be safely inferred that the appellant has had sufficient opportunity, in the short time that elapsed and in the condition in which he was, to reflect and desist. As correctly put by the trial Court, premedi-

tation is an element the existence of which has to be established by the prosecution ; and any doubt in that respect has to be resolved in favour of the appellant (see *Koliandris* v. *The Republic*, supra).

In the light of all the circumstances of this case I cannot find that the verdict of premeditated murder was a reasonable one—in the sense of section 145 (1) (*b*) the Criminal Procedure Law, Cap. 155 ; therefore, the appellant's conviction for premeditated murder has to be set aside and he should be convicted of the offence of homicide, under section 205 of the Criminal Code, an offence of which he could no doubt have been convicted by the trial Court on the evidence adduced.

JOSEPHIDES, J.: The appellant was convicted by the Assize Court of Limassol of the premeditated murder of his mistress and sentenced to death. He admitted firing 11 shots but he alleged that he did so, while under the influence of drink, with the object of frightening the husband of the deceased. His version was rejected by the trial Court as being inconsistent with the evidence as a whole.

His defence was briefly that " (*a*) having regard to the totality of the evidence, including intoxication, the prosecution failed to prove to the satisfaction of the Court that the appellant had at the material time an intention to kill, and/or (*b*) that having regard to the evidence as a whole the prosecution failed to establish premeditation ".

This appeal is grounded on alleged misdirections of law and of fact. The facts of the case are fully stated in the judgment of the learned President of this Court and I do not propose re-stating them except where necessary for the purpose of considering the findings of fact made by the trial Court.

One of the main grounds of appeal argued before us by the learned counsel for the appellant was that the Assize Court misdirected themselves on the law of intent and on the effect of section 13 (3) of the Criminal Code, as well as on the burden of proof. On the question of intoxication, counsel's criticism was based on the fact that the trial Court referred to " incapacity " to form the intent to kill as the test. Section 13 of the Criminal Code reads as follows :

> " 13. (1) Subject to subsections (2) and (3) a person shall not, on the ground of intoxication, be deemed to have done any act or made any omission involuntarily, or be exempt from criminal responsibility for any act or omission.

(2) A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of intoxication that he is incapable of understanding what he is doing, or controlling his action, or knowing that he ought not to do the act or make the omission, provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

(3) When a specific intent is a constituent element of an offence, *intoxication, whether complete or partial*, and whether intentional or unintentional, shall be taken into account for the purpose of ascertaining whether such an intent in fact existed."

As I understand it, the law is that drunkenness does not exempt a person from criminal responsibility for any act or omission, subject to the two exceptions provided in sub-sections (2) and (3) of section 13, namely, (*a*) cases in which drunkenness produces a condition of insanity, and (*b*) cases in which a specific intent must be proved.

With regard to (*a*) if a man by drinking brings on a distinct disease of the mind such as delirium tremens, so that he is temporarily insane within the M'Naughten Rules (section 12 of our Criminal Code), that is to say, he does not at the time know what he is doing or that it is wrong, then he has a defence on the ground of insanity.

With regard to (*b*), if a man is charged with an offence in which a specific intention is essential (as in premeditated murder or attempted murder), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer : section 13 (3) of our Criminal Code. " 'This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing (see *Reg.* v. *Moore* (1852) 3 Car. & Kir. 319), as where, at a christening, a drunken nurse put the baby behind a large fire, taking it for a log of wood (Gentleman's Magazine, 1748, p. 570) ; and where a drunken man thought his friend (lying on his bed) was a theatrical dummy placed there and stabbed him to death (' The Times ', January 13, 1951) " : per Lord Denning in *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349 at p. 381. In each of those cases it would not be premeditated murder but it would be homicide without premeditation.

The present case does not come within the first exception of insanity. Does it come within the second exception ?

A provision similar to our section 13 (3) is to be found in the Tasmanian Criminal Code of 1924, section 17 (2), and in the Maltese Criminal Code, section 35 (4), which reads as follows :—

> " Intoxication should be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

Lord Devlin when tendering the advice of the Judicial Committee of the Privy Council in *Broadhurst* v. *R.* ([1964] A.C. 441 ; [1964] 1 All E.R. 111) an appeal from Malta in which drunkenness was one of the issues, expressed the view that superficially, at any rate, section 35 (4) of the Maltese Code and *Director of Public Prosecutions* v. *Beard* ([1920] A.C. 479) approached differently the problem of proving intent. Lord Devlin said (at page 122 G of the All E.R.) :

> " One way of approaching the problem is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime ; and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. *Prima facie* intoxication is one circumstance to be taken into account and on this view all that section 35 (4) is doing is to make it plain that intoxication is not to be excluded."

And at page 123 F he said :

> " Before the Board the Crown conceded that it is not for an accused to prove incapacity affecting the intent and that, if there is material suggesting intoxication, the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent. Their lordships approve this concession."

Counsel complained that the trial Court misdirected themselves by stating in their judgment that in order to negative intent to kill it had to be established that the appellant owing to his intoxication " was unable or incapable to form the intent to kill " or that his intoxication was such as " to negative capacity . . to form the requisite intent ", and that they applied the wrong test of insanity provided in section 13 (2) of the Code, instead of the test laid down in section 13 (3). He also complained that they misdirected themselves as to the burden of proof.

With great respect I do not think that the trial Court applied the wrong test. In their judgment they referred to the whole of section 13 of the Code and to the provision regarding insanity, and then they quoted *verbatim* the provisions of sub-section (3) of section 13, and reminded themselves that the burden of proving intent was on the prosecution. It is true that they make use of the expression " capacity " and " capable to form " an intent, but it is obvious from the context that they refer to incapacity to form the specific intent and not to incapacity of understanding the physical or moral nature of one's act. In these circumstances no valid criticism can be based on the fact that the trial Court referred to incapacity as the test, nor that they misdirected themselves on the burden of proof.

The second question is whether on the totality of evidence, including the appellant's state of intoxication, he was capable of forming an intent to kill. It was conceded by the prosecution that the appellant was under the influence of drink but it was submitted that his state of intoxication was not such as to affect his capacity to form an intent to kill. In support of his submission learned counsel for the respondent referred to extracts from the evidence of Troodia Menelaou, the wife of the appellant's brother-in-law (P.W. 23 at p. 47–50) to the effect that when the appellant went to her to ask for the gun he put forward the false explanation that he wanted the gun and the cartridges to go shooting hares at night ; that when he went to her house he was speaking clearly and his speech was not blurred, and that, although he looked to her to be drunk, she said that she did not realise that his drunkenness was of a dangerous nature, and that it was not dangerous for him to take the gun. Counsel also referred to the statements made by the appellant to his son-in-law Aniftos (P.W. 29, at p. 61) immediately after he shot the deceased in her flat, to this effect : " I killed them " ; and on being asked whom, he replied " my mistress ", adding " was I to let them slander my wife and daughter as prostitutes ? ". Reference was also made to the appellant's statement to Troodia (soon after leaving the house of Aniftos) to whose house the appellant drove himself and delivered the gun dismantled. He said " take it ; I have gone and done the most evil thing ". On being asked what he had done he said " I went and killed the prostitute ". A short time later he said to his taxi-office employee Kambouris (P.W. 43) " I have made the greatest error in my life " ; " I shot my mistress "; " friend, I have shot both mother and daughter ".

On the other hand, counsel for the appellant referred to evidence to the effect that the appellant earlier on that evening had more than half a bottle of brandy, "Supreme V.O." in a bar-restaurant with friends, and later on a brandy with coca-cola in a cabaret; to the evidence of persons in whose company he was that evening who described him as being "kefoudhi" (in a merry mood) (Inspector Solomonides at p. 115 F); "sto kefi" (merry) in the cabaret (P.W 37 Silidjiotis, p. 88 B); that he was "drunk" in the cabaret (P.W. 24, Yerakis, the appellant's brother-in-law); that he was drunk from the way he walked and that he drank water in Troodia's house; that after the commission of the crime he was drunk and "excited" (exagriomenos), that his speech was blurred, and that he was not driving properly (appellant's son-in-law, P.W. 29, Aniftos, at pages 61–2).

The trial Court, after considering all the evidence in the case and weighing all the statements made by the witnesses and the appellant, came to the conclusion that on the whole evidence, including the appellant's state of intoxication, he was capable of forming an intent to kill. Can it be said that their finding was wrong, or that it has been shown that the finding could not have been made on the evidence on the record? Because we should not lose sight of the fact that we are considering this case as a Court of Appeal and not as a trial Court. I am of the view that, on the evidence before them, it was open to the trial Court to make the finding they made, and that the reasoning behind it is not unsatisfactory.

The effect of alcohol varies greatly with different people. It is not enough to show that before the event the accused had been drinking heavily nor that when examined after the event he was pronounced to have been under the influence of drink. It must be shown that his mental faculties were affected at the time of the event to the extent of affecting his capacity to form an intent, and I think that in the present case the trial Court cannot be criticised for reaching the conclusion, on the evidence before them, that the appellant was in a position, in spite of his state of intoxication, to form an intent to kill.

The third question is, did the appellant form such an intent to kill? The trial Court found that he did form "the intention to kill the deceased or anyone of the inmates of the flat from the time he left the flat to go to the house of Yerakis in order to get the gun". Counsel for the appel-

lant submitted that in dealing with the ingredient of intent the Court failed to signify the test it followed; but that, from the eight reasons given in the judgment in support of their finding, it was evident that the Court did not follow the subjective test, as submitted by the defence, but the objective test, *i.e.* the one laid down in the case of *D.P.P.* v. *Smith* [1960] 3 All E.R. 1961 on the issue of "malice aforethought" in murder ; and that this was a misdirection in law and/or in fact.

In support of his submission Counsel referred to the following cases and authorities : *Pefkos* v. *The Republic* 1961 C.L.R. 340 ; *R.* v. *Grimwood* [1962] 3 All E.R. 285 ; The Law Quarterly Review (1962), volume 79, page 313, in which reference is made to the criticism by the Australian High Court (in *Parker* v. *The Queen*) of the subjective test laid down in the *Smith* case ; *R.* v. *Steane* [1947] 1 All E.R. 813 ; and *R.* v. *Church* [1965] 2 All E.R. 72 at p. 75–6 ; and he submitted that the Court, " in order to find that there was intent, must be satisfied, so as to be sure, on the totality of the evidence, including the state of intoxication in which the accused was at the time, that no other reasonable conclusion could be arrived at than that the accused actually foresaw and desired to kill the deceased ".

In the *Pefkos* case, quoted above, which was a case of attempted murder, we had occasion to consider the question of the intent to kill which is the principal ingredient of that crime. We expressed the view that *Smith's* case does not overrule *Steane's* case, but distinguishes it on the basis that the principle restated in the *Steane* case is confined to cases in which an actual or overall intent or desire has to be proved ; and that where on a true construction of a statute a specific intent has to be proved then the rule laid down by Lord Goddard in the *Steane* case would be applicable ([1947] K.B. at p. 1004), *i.e.* "if, on a review of the whole evidence (the jury) either think the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted ". It was held in the *Pefkos* case that, although intent to kill can be inferred as a fact from the surrounding circumstances of a particular case, it is not sufficient that such an inference is a reasonable one ; it should be the only reasonable inference that can be drawn from the facts. If on a review of the whole evidence, the Court either think the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted (adopting the statement of the law in the *Steane* case and *Reg.* v. *Nicos Sampson Georghiades* (No. 2) (1957, 22 C.L R. 128 at page 133).

In cases of premeditated murder, as now known to our law, an intent to kill is one of the principal ingredients of the crime, and an intent to do grievous harm or any other intent or circumstance which would be adequate to prove " malice aforethought " under the repealed section 207 of our Criminal Code, would not be sufficient to establish a charge of premeditated murder. Although an intent to kill can be inferred as a fact from the surrounding circumstances of a case, it is not sufficient that such an inference is a reasonable one ; it should be the only reasonable inference that can be drawn from the facts. I would, therefore, adopt the following direction which the trial Court would have to put to itself in deciding the matter :

The question is whether the trial Judges are satisfied, beyond reasonable doubt, that the accused intended to bring about this result. The burden of proving the intention rests upon the prosecution. The Judges are entitled to use their knowledge of human behaviour, and the common understanding of what results follow when one behaves in a certain way, to help them to arrive at a conclusion as to what the accused intended. They must consider the whole of the evidence that has been laid before them in arriving at their conclusion. Did the accused purposefully bring about the result, or was it an unintended outcome ? Is there any rational explanation why he should have behaved in the way he did if he did not intend it ? Do the Judges believe the statement he has made ? If not, do they think that the only explanation that will reasonably fit the facts is that he intended the result ? The question, then, is whether the trial Court is satisfied beyond reasonable doubt, from all the evidence in the case, including (the accused's state of intoxication at the time and) the evidence of what he did, that he must have intended to bring about this result. (Cf. " The Mental Element in Crime " (1965), by Dr. Glanville Williams, at page 116). This direction substantially adopts the statement of the law as given in Dr. Glanville Williams' book to whom I am indebted for his suggested instruction to the jury.

With this test in mind I now turn to consider the facts of this case. As already stated, the trial Court found that the appellant formed the intention to kill the deceased or anyone of the inmates of the flat. The question may be asked what about the young girl ? Can it be said that he intended to kill her ? What about the husband ? Did he really intend to kill him ? Can it be said that he formed the

intention to kill his mistress only ? Or, as it was submitted by the defence, that his intent was to terrorise and not to kill ? Finally, can it be said that he formed the intent to kill after he began shooting ? As already stated, this is a matter of inference, but it must be the only reasonable inference that can be drawn from the facts.

Under the provisions of section 204 of our Criminal Code (as amended by Law 3 of 1962, section 5), the evidence has to prove " whether expressly or by implication an intention to cause the death of any person, *whether such person is the person actually killed or not . . .* ". This, to my mind, answers the question as to whether he intended to kill a particular person or not. It is really immaterial in the eyes of the law. The trial Judges, as stated above, are entitled to use their knowledge of human behaviour, and the common understanding of what results follow when one behaves in a certain way, to help them to arrive at a conclusion as to what the accused intended. Needless to say that in this case the trial Court had to take into consideration also the appellant's state of intoxication. Assuming, for instance, that the appellant, who had been frequenting the deceased's one-room flat for the past three years, and who knew very well the placing of the various pieces of furniture, including the beds, and who also knew that at the material time there were one or more persons in the room (see the evidence of Barbara Bye at pages 14 and 17, regarding the screaming of women immediately before the shooting), threw a hand-grenade in the room, could it be said that he intended to terrorise, or that he did not intend to kill the young daughter or the husband or the deceased ? The answer is, unhesitatingly, in the negative. The eleven shots which were fired by the appellant on that night, in the way they were fired (and I shall deal with this point later in my judgment), amount to no less than the throwing of a hand-grenade in that room.

It is, I think, appropriate at this stage to refer again to *Pefkos* case to show how that case may be distinguished from the present one. In the *Pefkos* case two shots were fired from a pistol at a passing car which was going at a speed of 30–35 miles per hour. The trial Court failed to direct their mind to the question of intent and there was no finding on this point. The High Court held (by majority) that the intent to kill had not been proved beyond reasonable doubt, because on the totality of the evidence in that case there was room for three or four views as to the intent of the assailant in firing at the complainant who was a cashier

carrying with him at the time the sum of £5,000. Two men had signalled to the car to stop but the driver did not stop and the two shots were then fired. The High Court were of the view that the assailant may have had an intention to frighten the occupants of the car, or an intention to stop the car, or an intention to kill, etc. ; and, as on a review of the whole evidence, the trial Court would be left in doubt as to the actual intent, the appellant was entitled to be acquitted of the charge of attempted murder. His conviction of attempted armed robbery was affirmed.

Now, what were the facts of this case, as found by the trial Court. On the day preceding the killing, the deceased, who had been the appellant's mistress for three or four years, spoke to him on the telephone and put him on his election by telling him that he had to choose between her and " that prostitute daughter of his and his wife ". The appellant resented strongly this behaviour of the deceased ; he drove up to the hairdresser's shop, where she was to be found at the time, he seized her by the hair, dragged her out into the street and beat her up, giving her a black eye, so that she had to stay in bed with face injuries on the following day. In the evening of the following day (5th May) he had been drinking with friends in a bar-restaurant and then in a cabaret, where he consumed the amount of drink described earlier. He then drove at about 11 p.m. a fare from his taxi office to the cabaret. At about 11.15 p.m., the Court found that he drove his car outside the deceased's flat with an intent to annoy. He played a record on the pick-up of his car which was stationed outside the flat, he sounded his horn and made noises. The inmates kept quiet, they had gone to bed, the lights were out and there was no reply. It was the appellant's case that he had been insulted by the deceased's husband Prodromis with the word " bugger " and that thereupon he went and fetched the gun to frighten him (Prodromis), but this was rejected by the trial Court and on the evidence which was before them I am not prepared to disturb their finding. It is significant, however, to observe that, in the statement which the appellant made to the police on arrest on the day following the killing, he did not make mention at all of his intention to frighten Prodromis or anybody else. What he said in his statement was " I didn't know what I was doing, I felt dizzy and I was very offended by a worthless bugger whom I was maintaining for four years and giving him money". In fact he introduced for the first time his intention to frighten Prodromis in the course of his evidence before the trial Court (p. 151 D and 163 G).

Be that as it may, the appellant left the deceased's flat and drove his car to the house of Yerakis, some two miles away, driving through the built-up area of Limassol. It was shortly before 11.30 p.m. when he knocked at the door, which was opened by Yerakis's wife Troodia, and he then asked her to give him her husband's shotgun and a bandolier containing 23 live cartridges, stating falsely that he intended to go shooting hares on a trip to Nicosia (Troodia, at page 47 C). According to Troodia, at the time he was speaking clearly but he was thirsty and went and drank water from the kitchen tap which he left running. On getting the gun from Troodia he drove his car all the way back to the deceased's flat. It is estimated that a period of about twenty minutes elapsed between the moment he left the flat and the moment he returned armed with the shotgun. On arriving, he broke the glass-pane of the front door, tore down the curtain and fired four shots into the flat. Before the appellant broke the glass, the deceased's husband left the flat quietly, through the back door, to go to a neighbour's house from where the police were informed by telephone. After the glass-breaking there were shouts and screaming by women in the flat (see evidence of Barbara Bye at pages 14 and 17). After firing four shots in the front, the appellant went to the rear of the flat where he fired another seven shots and, as found by the trial Court, at least the fatal shot was fired at the victim while the accused was inside the flat.

This finding of the trial Court was strongly challenged by counsel for the appellant, but the Court gave their reasons for such finding which I am not prepared to disturb, as it has not been shown that it could not have been made on the evidence nor that the reasoning behind such finding is unsatisfactory. In fact the appellant himself admits going into the flat through the rear door (which he found unlocked) and putting on the light. But his version was that, after seeing the deceased and her daughter lying on the ground, he did not fire any other shot and he left.

The Police arrived as the appellant was leaving the flat to go to the house of his son-in-law Aniftos. On entering the flat, the police officer found the victim dead and her daughter mortally wounded, and the latter was moved to the hospital where she died later. On arriving at the house of his son-in-law the appellant said to him " I killed them " ; on being asked whom, he replied " my mistress ; was I to let them slander my wife and daughter as prostitutes ?" He then took the car of Aniftos which he drove as far as Yerakis'

house where he delivered the gun dismantled, and the bandolier with 11 live cartridges, to Troodia to whom he said "take it; I have gone and done the most evil thing. I went and killed the prostitute". A short while later he repeated to his employee Kambouris, (P.W. 43), that he had shot his "mistress" and her daughter.

The deceased was found at the postmortem examination to have the following injuries:

(*a*) a gunshot wound 2 in. by 1 in., surrounded by dense blackening, on the right base of the thorax. Through this wound the liver and right lung were lacerated and it proved to be the fatal wound. A wad and six pellets were extracted from the liver and right lung;

(*b*) a gunshot wound 4 in. by 2 in., deep to the bone, on the right thigh, lower region. From the depth of the wound a wad and three pellets were extracted;

(*c*) a gunshot wound 4 in. by 3 in. on the left arm near the elbow involving the muscles;

(*d*) ten scattered pellet wounds in a region of 3 inches in diameter on the right arm.

The three first wounds show that the victim was shot from a close range estimated between one and three meters.

As regards the damage to the furniture, of the four shots which were fired into the room from the front door, the one shot went through the first armchair and hit the pillows and one of the sheets on the double bed, which the appellant knew that the deceased and her husband used to occupy. The other shot hit the middle of the mattress as a result of which cotton was forced out of it. About 12 inches away from this shot, in the direction of the foot of the double bed, there was another shot which corresponded to the shot that hit the arm of the second armchair. The last shot was on the foot of the bed and it damaged the blanket. By the side of the foot of the double bed there was a pool of blood. The table-cloth of the dining table was also perforated by pellets, and two empty bottles on the table had been smashed by pellets. All the damage to the furniture was between three and four feet from the ground, which showed that the shots had been fired at the level of the bedstead and the armchairs.

Considering all this evidence, including the accused's state of intoxication at the time, can it be said that the killing of the deceased was an unintended outcome ? Can it be said that the 11 shots were fired for the purpose of frightening the inmates of the room ? Is there any rational explanation why the appellant should have behaved in the way he did if he did not intend causing death ? Or, is the only explanation that will reasonably fit the facts, that he intended the result ? The trial Court reached the conclusion that, beyond reasonable doubt, he must have intended to bring about this result, that is, to kill the deceased or any one of the inmates of the flat at the time, and that he formed this intention from the time he left the flat to go to the house of Yerakis in order to get his gun. In these circumstances I am not prepared to say that the finding of the trial Court is, having regard to the evidence, unsatisfactory. On the contrary, I am of the view that it was the only reasonable finding in the circumstances.

And now as to premeditation : The trial Court after directing themselves on the law found that " the time that elapsed from the moment the intention to kill was formed to the time it was carried into effect, the accused had sufficient time to reflect on such decision and desist from it if he so desired ". This finding is criticised by the appellant's counsel in that in dealing with premeditation the Court failed to take into account all relevant circumstances, including intoxication, in determining the appellant's calmness of mind and his capacity to reflect on his decisions, and that it confined its finding on the time element alone.

The Constitution of the Republic by Article 7.2 limited the imposition of the death penalty to " premeditated murder " (see *Loftis* case, 1 R.S.C.C. 30), so that sections 203 to 207 of our Criminal Code were repealed and substituted by Law 3 of 1962 in order that the law should be in conformity with the Constitution.

Premeditation as a constituent element of the felony of murder has been judicially considered and applied by the High Court of Justice until 1964 and since then by the present Supreme Court in at least six cases, both before and after the 1962 amendment. Section 204 as amended reads as follows :

> " 204. Premeditation is established by evidence proving whether expressly or by implication an intention to cause the death of any person, whether such

person is the person actually killed or not, formed before the act or omission causing the death is committed and existing at the time of its commission."

The trial Court in their judgment referred to the first three cases decided by the High Court of Justice, namely to *Dervish Halil* v. *The Republic* 1961 C.L.R. 432 ; *Mustafa Halil* v. *The Republic* 1962 C.L.R. 18, decided prior to the 1962 amendment, and the case of *Yiannis Pieri* v. *The Republic* (1963) 1 C.L.R. 87, decided after the amendment. Other cases on this point are *Mavrali* v. *The Republic* (1963) 1 C.L.R. 4 ; *Pavlou* v. *The Republic* 1964 C.L.R. 97 ; and *Koliandris* v. *The Republic* (1965) 2 C.L.R. 72. In the *Dervish Halil* Case (1961) it was held that (at page 434)—

> " When a person makes up his mind either by an act or omission to cause the death of another person and notwithstanding that he has time to reflect on such decision and desist from it if he so desires, goes on and puts into effect his intent and deprives another of his life, that person commits a premeditated homicide or murder which entails capital punishment.
>
> There is no presumption of law in the case of premeditation but this has to be inferred in each particular case from the surrounding circumstances."

In the *Pieris* case reference was made to the case of *Rex* v. *Halil Shaban* (1908) 8 C.L.R. 82, in which the Chief Justice, presiding at the Assize Court of Larnaca, said (at page 84) :—

> " The question of premeditation is a question of fact.
>
> A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention, to reflect upon it and relinquish it.
>
> Much must depend on the condition of the person at the time—his calmness of mind, or the reverse.
>
> There might be a case in which a man has an appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it.
>
> On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation."

The facts in *Shaban's* case were that a zaptieh riding along a road saw the accused near a riverbed carrying a gun without a licence. He rode towards him for the purpose of demanding his gun or, according to other evidence, his licence. The accused shot the zaptieh. It was not clear whether he shot him when parleying, or while being pursued, or while the zaptieh was attempting to cut off his retreat across the river. It was held by the majority of the Court that premeditation was not proved. If I may say so, with respect, it was the only reasonable conclusion in the circumstances of that case.

The law in force at the time when *Shaban's* case was decided was the Ottoman Penal Code, Article 169. The English translation (by Bucknill and Utidjian) reads as follows :—

> " Art. 169. To kill premeditatedly is for a person to have conceived and resolved upon in his mind the act of killing before committing it."

Article 170 reads as follows :—

> " Art. 170. If a person's being a killer with premeditation is proved according the law sentence for his being put to death is passed according to law."

The Ottoman Penal Code was promulgated in 1858 and the general scheme of it follows substantially that of the French Code Penal which was promulgated in 1810, the relevant sections of which are, I believe, still in force (see Dalloz, Code Penal (1966), page 143). The following is a rough translation of the French sections attempted by me :

> " Art. 295. Homicide committed voluntarily is called murder."

> " Art. 296. Any murder committed with premeditation or from an ambush (guet-apens) is called, assasination."

> " Art. 297. Premeditation consists of an intent conceived (formed) before the act, to make an attempt upon the life of a particular individual, or whoever may be found or encountered, even though this intent may depend on some event or condition."

> " Art. 298. Ambush (lying in wait) consists of waiting for some time, long or not, in one or

different places, for an individual, either to kill him or to commit acts of violence on him."

" Art. 302. All persons guilty of assasination, parricide, infanticide and poisoning shall be sentenced to death ". (This has since been amended with regard to infanticide).

It will thus be seen that at the time of *Shaban's* case the Ottoman Penal Code defined premeditation substantially in the same way as the French Penal Code, and the Court at the time was applying the law as it stood to the facts of the case, namely Article 169 of the Ottoman Penal Code which is quoted above. The test laid down in the *Shaban* case was " whether in all the circumstances of the case the accused had a sufficient opportunity, after forming his intention, to reflect upon it and relinquish it ", and on the facts of that case it appears that (*a*) the accused was carrying his gun at the time of his encounter with the zaptieh and he did not go to fetch it to kill the victim (as in the present case), and (*b*) it would appear that the whole incident of the encounter and the killing, that is, the time that elapsed from the formation of the intention to kill up to its execution, was not more than one or two minutes. From the report of the case it is abundantly clear that the accused formed the intention to kill the zaptieh on the spur of the moment and that he executed his plan almost instantaneously.

On the other hand, it should be borne in mind that the interval of time envisaged for reflection before final execution of the intention need not be a long interval to establish premeditation, depending on the circumstances of the case.

With regard to " the condition of the person at the time—his calmness of mind, or the reverse ", referred to in the judgment of the Chief Justice in the *Shaban* case (at page 84), it was recently held by this Court in *Pavlou* v. *The Republic*, 1964 C.L.R. 97, that the disease of mind affecting the prisoner, which prevented him from reflecting and desisting from his original plan, did not alter the nature of the offence once the intention to kill was a calculated one from the very start. The following is the relevant extract from the unanimous judgment of the Court delivered by Zekia, P. (at page 101 of the report) :—

" Although there was a long interval between the time the prisoner conceived the killing of his mother and the

time he executed his intention, it was submitted that owing to the disease of mind affecting him, he could not avail himself or he could do very little by reflecting on the terrible consequences of his act and could not desist from his original plan. In our view this does not alter the nature of the offence once the intention to kill was a calculated one from the very start, or became so before the intention was put into execution and continued as such up to the time of the commission of the offence."

As stated in Bucknill's book entitled " Ottoman Penal Code " (1913), in the commentary to Article 170 of that Code (at page 125), it is a question of fact in every case whether or not a homicide is premeditated ; " sometimes, as in a case in which a man lies in wait for and shoots another, and in many cases of poisoning, the circumstances surrounding the homicide justify the conclusion of premeditation without difficulty ; sometimes as in cases in which in a fit of hasty temper or a tavern brawl a man has killed, a conclusion of premeditation is similarly without difficulty not justifiable ; the difficulties lie in the cases falling between the well defined extremes. But much French commentary exists in the mode of ascertainment as to whether premeditation is present or not, and it is generally agreed that it must be clear, in order to find premeditation, that the offender must have had time within which to resolve upon, to reflect upon and finally to execute the intention ; this period is not accurately measurable in time but must be considered and determined from all the circumstances attendant upon the facts of the case ".

In Greece since 1950 the constituent element of premeditation in murder has been dropped, and it is now provided that all intentional killing is punished by death or life imprisonment, but if the act was decided upon and executed in the heat of passion (ἐν βρασμῷ ψυχικῆς ὁρμῆς) then imprisonment only is imposed. Article 299 of the Greek Criminal Code reads as follows :—

«1. Ὅστις ἐκ προθέσεως ἀπέκτεινεν ἕτερον τιμωρεῖται διὰ τῆς ποινῆς τοῦ θανάτου ἢ τῆς ἰσοβίου καθείρξεως.

2. Ἐὰν ἡ πρᾶξις ἀπεφασίσθη καὶ ἐξετελέσθη ἐν βρασμῷ ψυχικῆς ὁρμῆς ἐπιβάλλεται ἡ ποινὴ τῆς προσκαίρου καθείρξεως.»

I believe that the Swiss Code is on the same lines.

The following is an extract on the question of premeditation from the objects and reasons accompanying the draft Greek Penal Code in 1929 (Αἰτιολογικὴ Ἔκθεσις 1929):

«Ὑπάρχουσι πρόσωπα ἀποφασίζοντα μὲ τὴν ταχύτητα τῆς ἀστραπῆς καὶ τὰ ὁποῖα ἐν τούτοις ἐνεργοῦσιν ἐσκεμμένως· ὑπάρχουσιν ἀντιθέτως ἕτερα σκεπτόμενα ἐπὶ μακρὸν καὶ ἀποφασίζοντα βραδέως, τὰ ὁποῖα, ἐν τούτοις, ἀποφασίζουσιν ὁριστικῶς ὑποκύπτοντα ἴσως εἰς αἰφνιδίαν τινὰ ἔμπνευσιν. Ὥστε ἡ ταχύτης ἐν τῇ ἀποφάσει καὶ τῇ ἐκτελέσει δὲν ἀποκλείει τὴν προμελέτην πρὸ παντὸς δὲ δὲν ἀποκλείει τὴν σκέψιν, καὶ ἀντιθέτως ἡ βραδύτης περὶ τὴν λῆψιν τῆς ἀποφάσεως δὲν ἀποδεικνύει τὸ ἐσκεμμένον τῆς πράξεως. Καὶ ὅταν ἀκόμη τὸ ἀδίκημα ἐξετελέσθη ἐν προφανεῖ καταστάσει ἐξάψεως, εἶναι κάλλιστα δυνατὸν νὰ προέρχεται ἐκ σκέψεως ψυχρᾶς καὶ λελογισμένης, διότι εἶναι δυνατὸν ἡ ἔξαψις νὰ ἐγεννήθη διαρκούσης τῆς ἐκτελέσεως. Ἡ ἔξαψις ἐκδηλοῦται κατὰ τρόπον διάφορον ἀναλόγως τῆς ἰδιοσυγκρασίας ἑκάστου καὶ θὰ παρεῖχον εἰς τὸν ψυχολόγον ἀντικείμενα μελέτης ριζικῶς διάφορα ἀπ' ἀλλήλων εἷς χωρικὸς τῆς Γερμανικῆς Ἑλβετίας καὶ εἷς Ἰταλὸς ἐργάτης.»

(Ζαχαροπούλου «Ἑλληνικὸς Ποινοικὸς Κῶδιξ» (1950), σελὶς 287).

All this shows that it all depends on the mental faculties and temperament of the individual (*ibid*, at page 287). There are persons who can take a decision in a very short time and act deliberately ; and that, consequently, speed in taking a decision and carrying it into effect does not preclude premeditation, and that, above all, it does not preclude reflection or thinking. Conversely, slowness in taking a decision does not prove deliberation.

The Arios Pagos in Greece held in case No. 782/1931 that enmity and any passions which urge a sane person to kill another do not preclude the calmness of thinking or execution which constitutes premeditation. This is the relevant extract from that case :—

«διότι ἡ ἔχθρα καὶ τὰ πάθη ἐν γένει τὰ παρακινήσαντα εἰς τὴν ἐκτέλεσιν τῆς ἀνθρωποκτονίας τὸν ὑπ' αὐτῶν κατεχόμενον, ἔχοντα τὴν ἀντίληψιν τοῦ καλοῦ καὶ τοῦ κακοῦ καὶ γιγνώσκοντα τὴν φύσιν τῆς ὑπ' αὐτοῦ διαπραττομένης πράξεως, δὲν ἀποκλείουσι τὴν ἠρεμίαν τῆς σκέψεως ἢ τῆς ἐκτελέσεως, ἥτις ἀποτελεῖ τὴν προμελέτην». Α.Π. 782/1931, Θ. ΜΓ., σ. 202.

The Arios Pagos further held in case No. 546/1938 that the " moderate confusion " (μετρία σύγχυσις) of the bodily or mental faculties of the perpetrator, due to anger caused

in the course of the execution of the act, is not inconsistent with the meaning of homicide decided by premeditation or executed deliberately. The following is the relevant extract from their decision :—

«Ἐπειδὴ εἰς τὴν ἔννοιαν τῆς ἐκ προμελέτης ἀποφασισθείσης ἢ ἐσκεμμένως ἐκτελεσθείσης ἀνθρωποκτονίας δὲν ἀντιτίθεται ἡ μετρία σύγχυσις τῶν αἰσθήσεων ἢ τοῦ νοὸς τοῦ δράστου ἐξ ὀργῆς, προκληθείσης κατὰ τὴν ἐκτέλεσιν τῆς πράξεως». Α.Π. 65/931, Θ.ΜΒ., σ. 211, 546/938 ἐν 'Αρχ. Π.Ε. τ. γ. σ. 26.:



With these principles of law in mind, I now turn to the facts of the case to consider whether the criticism of the appellant's counsel of the trial Court's finding, that it confined its finding on the time element alone, is well founded.

As stated earlier, the trial Court rightly found that the accused formed the intention to kill the deceased or any one of the inmates of the flat from the time he left the flat to go to the house of Yerakis in order to get the gun. From the moment he left until the moment he returned to the flat and began shooting from the front door it is estimated that about 20 minutes elapsed. In the course of that time he drove his own car two miles to go and two miles to return, within the built-up area of Limassol. On arriving at Yerakis's house he had the opportunity of talking with an outsider, that is, Troodia, who was altogether unconnected with the appellant's affair and differences with the deceased and her husband. There, he put forward a false story, that he wanted the gun of Troodia's husband to go shooting hares on a trip to Nicosia, which shows a calculating, clear and cool mind. On returning to the flat, armed with the gun, he called out to the deceased's husband " Prodromi, come out, we two have something to say ". But the husband did not reply and he left to go and inform the Police by telephone. The appellant then broke the glass-pane of the front door and he started shooting into the room. After firing four shots in the front he went to the rear of the flat where he fired another seven shots, and at least the fatal shot was fired by him at the deceased while he (appellant) was inside the flat. He left as the police were arriving and he went to the house of his son-in-law on foot where he told him that he (appellant) had " killed them ", adding that he had killed his " mistress " as she was slandering his wife and daughter that they were prostitutes. From there he drove two miles to Troodia's house to whom he returned the gun dismantled and said that he went and killed the " prostitute ". The appellant began firing into

the flat at about 11.40 p.m. and the victim was dead by 11.45 p.m. when the Police arrived at the spot. Between 8.30 and 10.30 p.m. the appellant had more than half a bottle of V.O. brandy, and a brandy with coca-cola, and he was under the influence of drink ; but the trial Court rightly found that this did not affect his mental faculties nor his capacity to form an intent to kill.

In these circumstances I do not think that the finding of the Court, that the appellant had sufficient opportunity, after forming his intention, to reflect upon it and relinquish it, is not warranted by the evidence as a whole. I am, further, of the view that the criticism that the Court confined its finding on the time element alone, without taking into account all the relevant circumstances, including intoxication, in determining the appellant's calmness of mind and his capacity to reflect on his decisions, is not well founded.

It is true that in the final part of their judgment the Court did not expressly mention the question of intoxication, but it should be borne in mind that the Court had in the forefront of their consideration of the case the appellant's state of intoxication. They had already decided that drink had not affected his mental faculties and his capacity to form the intent, that is, to think and take a decision. I do not think that it was necessary for them to repeat it in this part of their judgment to show that, in determining the appellant's calmness of mind and capacity to reflect on his decision and relinquish it, they had taken into account the appellant's state of intoxication along with the other circumstances of the case. I hold the view that on the evidence before them, including the appellant's state of intoxication, the trial Court rightly reached the conclusion that the appellant had sufficient opportunity, after forming his intention, to reflect upon it and relinquish it.

On the whole I am satisfied that, having regard to the evidence, the conviction was not unreasonable, that there was no wrong decision on a question of law and that there was no miscarriage of justice. For these reasons I would dismiss the appeal.

STAVRINIDES, J.: I agree that the conviction for premeditated murder must be set aside and a conviction for unlawful homicide be substituted for it.

Since there is no direct evidence as to when the intent to kill was formed, the court's finding on that point is based on inference. Now in *Kafalos* v. *R.*, 19 C.L.R. 121, the former Supreme Court said at p. 125 :

> " The Supreme Court is very slow to reverse the finding of an Assize Court on fact but this court is in as good a position to draw inferences from fact ;"

and the principle underlying each limb of that proposition has been applied in several cases since, both by the High Court established under the Constitution and by this Court.

While on the evidence taken as a whole it is probable that the appellant formed the intent to kill some time between his stop by the deceased's dwelling preceding the fetching of the gun and cartridges and his setting out to bring these things, the possibility that his intention in setting out to do so was merely to frighten the deceased's husband, which is the version he put forward at the trial, cannot be excluded as being merely fanciful, particularly in view of the trial Court's finding that on that stop the appellant received no provocation, the deceased's husband having kept completely silent. Indeed, it is impossible to say with any degree of certainty that the intent was formed before his arrival by the deceased's house with the gun and cartridges. On the other hand it is, in my view, clear that the intent existed when the first shot into the dwelling was fired.

It follows that as regards time the issue of premeditation must be decided on the footing that the intent to kill was formed some time between such arrival and the start of the firing, which on the deceased's husband's evidence would be a minute or two after the arrival. Clearly, by the time he started firing, the appellant was in a state of great excitement ; he was under the influence of passion exacerbated by drink.

Premeditation is dealt with by section 204 of the Criminal Code (as enacted by section 5 of the Criminal Code (Amendment) Law, 1962) in these terms:

> «Προμελέτη εἶναι ἡ ἀποδεικνυομένη εὐθέως ἢ συμπερασματικῶς, πρόθεσις προκλήσεως θανάτου οἱουδήποτε προσώπου, ἀδιαφόρως ἐὰν τὸ τοιοῦτο πρόσωπον εἶναι τὸ φονευθὲν ἢ μή, ὑφισταμένη τόσον πρὸ τῆς τελέσεως τῆς προκαλούσης τὸν θάνατον πράξεως ἢ παραλείψεως ὅσον καὶ κατὰ τὸν χρόνον τῆς τοιαύτης τελέσεως.»

It is remarkable that this section makes no reference to state of mind other than intent to kill and does not stipulate any

interval of time, however, short, between the formation of the intent and its execution. Considering that every intentional act or omission is preceded, by however short a time, by the formation of the intent to do the act or make the omission, that section, if taken literally, would bring every unlawful and intentional killing within the ambit of premeditated murder, for which by the last preceding section of the Code the death penalty is provided. However, the power of the legislature to provide the death penalty is limited by Article 7, paragraph 2, of the Constitution to cases of " premeditated murder, high treason, piracy *jure gentium* and capital offences under military law ". Accordingly, if and so far as section 204 of the Code, read without reference to the Constitution, could have the effect of attaching to the expression " ἐκ προμελέτης " in section 203 a meaning wider than that possessed by that expression in Article 7, paragraph 2, of the Constitution, the result would be to make the latter section unconstitutional. The question is, what is the meaning of the expression as used in Article 7, paragraph 2 ? It is unknown to English Law, but it is a term of continental law. It has received attention by this Court and the former High Court in several cases since independence. But in one of these, *Halil* v. *Republic*, 1961 C.L.R. 432, Zekia, J., reading the judgment of the Court, said at p. 434 :

> " The phrase premeditated homicide or murder, unlike the phrase ' malice aforethought ' is not a term of art and it has to be taken in its ordinary meaning. When a person makes up his mind either by an act or omission to cause the death of another person and notwithstanding that he has time to reflect on such decision and desist from it, if he so desires, goes on and puts into effect his intent and deprives another of his life that person commits a premeditated homicide or murder which entails capital punishment."

With all respect this seems to me to be an echo of the judgment in *R.* v. *Shaban*, 8 C.L.R. 82, decided on a charge of premeditated murder under the Ottoman Penal Code, where the Court said :

> " The question of premeditation is a question of fact. A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention to reflect upon it and relinquish it. Much must depend on the condition of the person at the time—his calmness of mind, or the reverse. There might be a case in which a man has an

appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it.

On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation."

I think that that judgment admirably analyses the concept of premeditation and therefore I adopt it.

I believe the foregoing sufficiently explains the reasons for which I came to the conclusion indicated at the beginning of this judgment.

Loizou, J.: I agree with the result reached by the majority of this Court that the conviction must be set aside and substituted by a conviction for homicide under section 205 of the Criminal Code.

It is not necessary for me for the purposes of this judgment to go into the facts of the case, as they appear sufficiently in the judgments just read.

I would, however, like to state that my decision is not based on any disagreement with the finding of the trial Court as to the time the appellant formed the intent to kill. In my view it was open to the Court, on the evidence before it, to come to the conclusion that the appellant formed the intent to kill the deceased when he left the scene in order to go and fetch the gun from the house of P.W. 23, Troodia Menelaou.

The interval between the time he formed this intent and the time he put it into execution is the time that it took him to drive the two miles to the house of Troodia, get the gun, and then drive back to the flat, which may well have been in the region of 15 to 20 minutes.

In dealing with the question of premeditation and particularly with the time factor the Court following the wording of the judgment of this Court in *Dervish Halil v. The Republic*, 1961 C.L.R. p. 432, which they had cited earlier on, had this to say: "We further hold the view that the time that elapsed from the moment the intention to kill was formed to the time it was carried into effect, the accused had sufficient time to reflect on such decision and desist from it if he so desired".

An interval of 15 to 20 minutes, or indeed a shorter interval, could no doubt be a sufficient period of time for a person to reflect ; but the question of premeditation cannot be decided on the length of time alone for quite obviously what may be sufficient time in one instance may not be sufficient in another, depending on the mental condition of the person involved and therefore his capacity to meditate.

Tyser C.J. in delivering the majority judgment of the Court in *Rex* v. *Halil Shaban*, 8 C.L.R. p. 82 states the legal position on the issue of premeditation as follows :—

> " The question of premeditation is a question of fact.
>
> A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention, to reflect upon it and relinquish it.
>
> Much must depend on the condition of the person at the time—his calmness of mind, or the reverse.
>
> There might be a case in which a man has an appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it.
>
> On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation."

It follows from the above that in considering the question of premeditation the state of a person's mind is no less material than the length of time.

In the present case there is no question that the appellant was to a certain extent under the influence of drink. In the course of their judgment, when considering the issue of intent, the trial Court dealt with the condition of the appellant's state of mind, as a result of the drink he had taken, in the light of the provisions of section 13 of the Criminal Code Cap. 154 and came to the conclusion that " the accused was at all material time capable to form an intent and in fact he did form the intent to kill ". And they went on to enumerate the reasons upon which they based this finding.

On the evidence accepted by the trial Court and in the light of his behaviour it cannot, in my view, be doubted that the appellant at the material time was also labouring

under the influence of strong passion This may have been brought about either by anger, as a result of his being ignored by the deceased and her family, the persons he went with the original intent of annoying, as found by the trial Court, or by jealousy because the deceased broke off relations with him, or more likely by both the above and other sentiments

Similarly it is equally clear that the mental faculties of the appellant both as a result of the influence of drink (even though his condition was not such as to affect his capacity to form an intent) and of the passion under which he was labouring must have been affected to a certain degree and that in view of this his capacity to reflect on his decision to kill and desist from it must have also been affected.

Reading the judgment of the Court it is, in my view to say the least, open to doubt whether in considering the question of premeditation, as distinguished from the formation of the intent to kill, the Court considered or made any allowance for the state of the appellant's mind as an element affecting his capacity to reflect on his decision and desist from it within the period from the formation of the intent and the carrying of it into execution

This in my opinion amounts to a misdirection sufficiently serious to warrant the setting aside of the conviction for premeditated murder and the substitution therefor of a conviction under section 205 of the Criminal Code

I think I might add that in the circumstances of this case I do not think that the proviso to section 145 (1) (*b*) of the Criminal Procedure Law may safely be applied

VASSILIADES, P In the result, the majority of the Court taking the view that this appeal must succeed on the issue of premeditation, the appeal shall be allowed to that extent, and the conviction of the appellant under section 203 for the premeditated murder described in the information, shall be substituted by a conviction for homicide under section 205, committed at the time and place, and against the person named in the charge There will be judgment and order for conviction accordingly

The Court must now proceed to consider sentence But before doing so, we wish to express unanimously this time our deep appreciation for the help derived from the

very able and exhaustive argument of Mr. G. P. Cacoyiannis who appeared for the appellant, in this difficult case ; and for the fair and conscientious manner in which Mr. Loucaides handled the case for the Republic.

Has the appellant anything to say why sentence should not be passed on him ? And have, counsel, anything to say, at this stage regarding sentence ?

*Alloc :* NIL.

*Mr. Cacoyiannis :* The appellant is a first offender. No violence in his character.

*Mr. Loucaides :* Did not wish to say anything regarding sentence.

*Sentence :* The taking of human life is considered a most serious crime under the law. The circumstances under which the appellant committed the homicide in this case, indicate a most reckless disregard for human life, which brought the victim to her grave, and the appellant very close to a death sentence. Moreover his utter disregard for his legal and moral responsibilities to his family, and to the community at large, during the period which led to the crime, call for an exemplary and deterrent sentence. We have considered this matter with all due care and anxiety. The sentence of this Court, decided upon unanimously, is twenty-five years imprisonment from today.

Judgment and sentence accordingly.

*Appeal allowed. Conviction for premeditated murder set aside ; substituted by a conviction for homicide. Appellant sentenced to twenty-five years imprisonment from today.*