NICOS NIKITA FOSTIERI,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3082).

Homicide—Section 205 *of the Criminal Code, Cap.* 154 *as amended by the Criminal Code (Amendment) Law* 1962 (*Law No.* 3 *of* 1962) *section* 5—*Ingredients of the crime of homicide—"Unlawful act"—"Unlawful omission"—Intent required to support a charge of homicide—Burden of proof lies entirely on the prosecution.*

Intent—Homicide—Intent required to support a charge of homicide—See above.

"Unlawful act" in section 205 *of the Criminal Code—See above.*

"Unlawful omission" in section 205 *of the Criminal Code—See above.*

Words and Phrases—"Unlawful act", "Unlawful omission" in section 205 *of the Criminal Code as amended by Law No.* 3 *of* 1962—*See above.*

The appellant was convicted at the Famagusta Assizes on February 15, 1969, for homicide and was sentenced to seven years' imprisonment. The charge upon which the appellant was convicted was based on section 205 of the Criminal Code, Cap. 154 (as amended *infra*). The appeal was taken against conviction only on the following two broad grounds :

(1) That the findings of the trial Court cannot be sustained on the evidence adduced ; and (2) that the trial Court erroneously applied the law. The facts are fully set out in the judgment of the Supreme Court.

Section 205 of the Criminal Code, Cap. 154 as amended by section 5 of the Criminal Code (Amendment) Law 1962 (Law No. 3 of 1962) reads as follows :

"205 (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony of homicide.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty, though such omission may not be accompanied by an intention to cause death."

Dismissing the appeal, the Court—

Held, (1). The Assize Court rejected the version of the appellant ; and reached the conclusion that he used the lethal instrument in such a way as to cause the death of the victim. There can be no doubt as to the correctness of this finding. The manner in which the lethal instrument was used ; the part of the body of the victim where the appellant inflicted the fatal wound ; and the force with which he used the knife lead to the definite conclusion that he used it with the intent to cause grievous bodily harm. This is sufficient to establish the intent required to support the charge of homicide under section 205 of the Criminal Code (*supra*).

(2)—(*a*) The substance of the crime of homicide under section 205 of the Criminal Code (*supra*) lies in the fact that the death of the victim was caused by the unlawful act or omission of the offender. The burden of proof of all the ingredients of the offence lies under the law of this country, entirely on the prosecution. This was never disputed in the present case ; which was tried and decided upon that basis.

(*b*) Sub-section (2) of section 205 of the Criminal Code (*supra*) provides that " an omission amounting to culpable negligence to discharge a duty " is an unlawful omission upon which the crime of homicide may be founded " though such omission may not be accompanied by an intention to cause death " (*supra*). Similar construction must be given to the nature of the unlawful act which caused death referred to in sub-section (1) of the said section 205 (*supra*). So long as it is established to the satisfaction of the Court that the offender intended the unlawful act which eventually resulted in the death of the victim (within the period prescribed by law) it is not necessary for the prosecution to prove that the offender intended the death of the victim.

(3)—(*a*) In the present case the unlawfulness of the act of the appellant in using that dangerous knife in the way he did, was sufficiently established to the satisfaction of the trial Court, upon the evidence before it, at the end of the

trial. The conclusions and findings of the Assize Court to that effect have not been successfully challenged by the appellant. And the conviction resting upon them must be affirmed.

(*b*) No question arises in this appeal regarding the sentence imposed ; and therefore, the sentence is affirmed. But we direct under section 147(1) of the Criminal Procedure Law, Cap. 155 that the sentence imposed shall run from the date of the conviction.

Appeal dismissed.

Appeal against conviction.

Appeal against conviction by Nicos Nikita Fostieri who was convicted on the 15th February, 1969, at the Assize Court of Famagusta (Criminal Case No. 9555/68) on one count of the offence of homicide contrary to section 205 of the Criminal Code, Cap. 154, and was sentenced by Georghiou, P.D.C., Pikis and S. Demetriou, D.JJ., to seven years' imprisonment.

K. Saveriades, for the appellant.

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

The facts sufficiently appear in the judgment of the Court delivered by :—

VASSILIADES, P.: The appellant, Nicos Nikita Fostieri, a Greek national, now a resident of Tricomo, was convicted at Famagusta Assizes on February 15, 1969, for homicide and was sentenced to seven years' imprisonment. The charge upon which the appellant was convicted was based on section 205 of the Criminal Code (Cap. 154) as amended by section 5 of the amending law No. 3/62. The appeal is taken against the conviction ; but not against the sentence. We are, therefore, concerend with the conviction only.

The grounds given by the appellant's advocate in the notice of appeal filed, eight in number, may be summarized in two : (1) that the findings of the trial Court cannot be sustained on the evidence ; and (2) that the trial Court erroneously applied the law.

The facts of the case present no difficulty, except as to what happened immediately before the wounding, in consequence of which the victim lost his life, and the appellant is now in prison.

On this material point there is no direct evidence before the Court, the victim having died in hospital a few hours after the wounding, and the appellant having elected to give no evidence on oath when called upon for his defence at the trial. No other person was in the kitchen of the restaurant at the time of the wounding, all other persons in the shop being in the dining room, from where the persons in the kitchen were not visible.

The events which led to the incident, are, shortly, as follows :—

On Sunday, November 3, 1968, the victim went out shooting together with a friend—witness Vassos Leondis. At about midday, they had their lunch at a restaurant by the sea in the area of Akanthou village ; and drank between them two bottles of Cyprus brandy. Leondis, who was a fishmonger, bought a quantity of fish which he placed in his van ; and at about 3.00 p.m., the victim and his friend got into the latter's van and set out on their return trip to Famagusta. On the way, they had a short stop at Gypsou village, after which the victim, with his friend's consent, took the wheel of the van and drove in the direction of Famagusta through Tricomo, which is only a few miles further away and some twelve miles from Famagusta.

At Tricomo, the victim stopped the van outside the appellant's restaurant and called out to the appellant to bring them two brandies out to the car. His friend tried to dissuade the victim by saying that he was rather in a hurry to reach Famagusta in order to place the fish he bought in cold storage. Apparently, he thought that they should not have more drink. The victim, however,—apparently under the influence of drink—walked into the restaurant followed by his friend.

There were some customers in the dining room at that moment, but the shopkeeper (the appellant) was in the adjacent kitchen. As it appears from the photographs taken by a police photographer for the purposes of this case and produced in Court as *exhibit* 2, the kitchen is a long and narrow room containing the necessary equipment, which makes the place still narrower. A narrow door with a curtain leads from the main dining room to the kitchen. Close to this communicating door there was a musical machine known as a " juke-box ", operated by electric current on the insertion of the appropriate coin into the slot.

The victim tried to operate this instrument, but finding that he had no change, he entered into the kitchen and obtained change for a 5/- note. Until that moment, the victim and the appellant did not know one another except by sight ; and it may be added here that the victim was a healthy and robust man, 33 years of age, about 6 ft. tall (5 ft. 11 ins.) and that the appellant was a man of 25 years of age of good physique but about 3 ins. shorter than the victim.

On obtaining the change, the victim returned to the main dining room, and attempted to put in motion the juke-box by dropping a half shilling coin into the slot. The instrument did not respond, as the plug was not in its place. He complained to the appellant, who connected the machine with the current by inserting the plug. The victim then dropped a second coin into the slot and put the instrument in action.

The victim then demanded from the appellant the return of the first coin. The appellant replied that he could not return the coin. As it is usually the case, the money dropped in such machines is under the control of the owner of the machine and not that of the shop-keeper. The victim insisted on the return of his half shilling coin. The appellant returned to his work in the kitchen. The victim followed him there insisting on the return of his coin. The two men were now alone in the narrow kitchen, out of sight of the persons in the dining room.

Very shortly after the victim's entrance into the kitchen, the persons in the dining room heard the noise of a fight in the kitchen. Those who ran immediately into the kitchen saw the victim walking towards the dining room with his hand on his wounded abdomen ; some kitchen utensils and some coins on the kitchen floor ; the back door open, and the appellant in the yard outside the back door with a fresh burn on his right forearm near the elbow. How did the fight start and what exactly happened during that violent encounter between the two men in the narrow kitchen, there is only circumstantial evidence. There are several versions from witnesses who hurried into the kitchen upon hearing the noise of the fight ; but there is no direct evidence, either on the part of the victim or on the part of the appellant.

The fatal wound, as described by the medical evidence, was a severe cutting wound on the left upper region of the victim's abdomen caused by a sharp and pointed cutting instrument which perforated both the front and the back

wall of the stomach, and cut the pancreas behind it almost in two. Part of the intestine protruded from the mouth of the wound, which was 3½ ins. long and about 4–6 ins. deep.

Besides this fatal wound, the victim was found to have scratches on the right side of the nose below the eye, which could have been caused, according to the medical evidence, by one, or probably two fist blows.

The appellant, examined the following day by a medical officer, was found to bear a fresh roundish burn of about 6 ins. diameter with blisters in the area, on the upper part of the right forearm, and some scratches on the first phalanx on the exterior part of the right index towards the thumb.

The noise from the kitchen heard by the witnesses in the dining room, together with all the other circumstantial evidence on the point, led the trial Court to the conclusion that the two men had a violent encounter, during which the appellant caused the fatal wound on the victim by a rather large kitchen knife, produced at the trial as *exhibit* 5. This is a sharp and pointed knife 12½ ins. long with a blade of 7½ ins. long and 1½ ins. wide near the handle. A usual, perhaps, kitchen tool in a restaurant ; but obviously a dangerous weapon in a violent encounter.

The correctness of the above findings of the trial Court cannot be doubted. What, according to learned counsel for the appellant, was in a cloud of doubt were the circumstances in which the dangerous knife in question was used by his client. Two different persons to whom the appellant spoke regarding the incident, presented it in rather different versions. One of them was that the victim attacked the appellant with the kitchen knife ; and that when the appellant seized the victim's hand with the knife and the parties were in grips, the victim received accidentally, the fatal wound. At the trial, the appellant confined himself to a statement from the dock to the effect that he told his father-in-law what happened during the fight with the victim ; and that he also made a statement to Police Inspector Elia and Police Constable Christoforou, both of whom gave evidence at the trial.

The Assize Court, after dealing with the evidence, rejected the version of the appellant ; and reached the conclusion that he used the lethal instrument in such a way as to cause the death of the victim. As it has already been said, there can be no doubt as to the correctness of this finding.

It was, perhaps, natural that the appellant, finding himself suddenly under the effect of a scene which developed so quickly, made to different persons statements presenting variations. But, three months later at the trial, having in the meantime followed the proceedings in the preliminary enquiry with the help of his advocate, the appellant elected to adopt a defence of uncertainty, which would give him the benefit of any eventual doubts, instead of founding his defence on the true facts, hard and bitter as these may have been. He must now be prepared to take the consequence of the course which he chose.

The manner in which the lethal instrument was used ; the part of the body of the victim where the appellant inflicted the fatal wound ; and the force with which he used the knife, lead to the definite conclusion that he used it with the intent to cause grievous bodily harm. This is sufficient to establish the intent required to support the charge of homicide under section 205 of the Criminal Code. Learned counsel for the appellant, rightly in our opinion, conceded that this is so. It is not necessary for the prosecution to prove an intent to cause death when this is the result of an unlawful act committed with intent to cause grievous bodily harm, as in the present case.

The right to life and corporal integrity is one of the fundamental human rights entrenched in the Constitution (Article 7.1) and vigilantly safeguarded by our law. It is a right which all civilizations throughout history have respected and protected long before it became the subject of international declarations and conventions in our times, regarding human rights.

The law regarding homicide is developing in Cyprus same as in other countries in the light of modern scientific knowledge, medical, social, legal, etc.; and receives the constant attention and interest of the authorities concerned. The taking of human life continues to carry, as in the past, serious consequences ; and this, not so much for reasons of punishment or vindication as for reasons of public security and social stability. The family of the deceased and its narrow or wider circle would feel deeply concerned in the matter with unpredictable repercussions, if the hard consequences resulting from the taking of human life, fell only on its own side.

There is no allegation that the appellant in the present case intended to take the life of the victim. But, unfortunately, this was the consequence of his intentional unlawful act ; and he must now be prepared to accept the consequences

resulting from the true facts and the application of the law thereto, hard and cruel as these may appear to him to be.

The relevant provision in the Cyprus Criminal Code reads as follows :—

" 205—(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony of homicide.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty, though such omission may not be accompanied by an intention to cause death."

The substance of the crime lies in the fact that the death of the victim was caused by the unlawful act or omission of the offender. The burden of proof of all the ingredients of the offence lies, under the law of this country, entirely on the prosecution. This was never disputed in the present case ; which was tried and decided upon that basis.

What constitutes an unlawful omission is expressly stated in sub-section (2) of section 205, which provides that " an omission amounting to culpable negligence to discharge a duty " is an unlawful omission upon which the crime of homicide may be founded " though such omission may not be accompanied by an intention to cause death ". Similar construction must be given to the nature of the unlawful act which caused death. So long as it is established to the satisfaction of the Court that the offender intended the unlawful act which eventually resulted in the death of the victim within the period prescribed by law, it is not necessary for the prosecution to prove that the offender intended the death of the victim. In the present case, the unlawfulness of the act of the appellant in using that dangerous knife in the way he did, was sufficiently established to the satisfaction of the trial Court, upon the evidence before it, at the end of the trial. The conclusions and findings of the Assize Court to that effect, have not been successfully challenged by the appellant. And the conviction resting upon them must be affirmed.

The Greek Criminal Code (Law 1492 of the 17th August, 1950—sec. ed. ' B ' (1965) J. N. Zacharopoulos) provides for the crime of homicide in Cap. IE, under the heading of " Crimes Against Life ". Article 299 provides :—

«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.»

Here again, an intentional act resulting in the death of another person constitutes the crime of homicide even if it was decided and carried out in the heat of passion (ἐν βρασμῷ ψυχικῆς ὁρμῆς).

The Swiss Criminal Code deals with the crime of homicide in Articles 111-117. There, the intent of the offender is a matter going to guilt (and not only going to sentence). If the offender could reasonably foresee that his act could have fatal consequences, this may amount to an intention to cause the death of the victim. (See the Journal of Criminal Science—Vol. 2—(1950) published under the auspices of the Faculty of Law, University of Cambridge, page 197 at p. 206).

And as regards the law pertaining in France in this connection, it may be found expounded in the article of Professor Magnol of the Law School of the University of Toulouse under the title *L'element intentionnel dans le meurtre en droit Francais* at p. 210 of the same book. The Professor concludes (at p. 217) that beyond the crimes specifically provided for in the relative Articles of the code, the question of the offender's intention is governed, in cases of homicide, by the principles in the maxims "*dolus indeterminatus determinatur eventu*" and "*qui in re illicita versatur tenetur etiam pro casu*".

We do not think that it is necessary for us to deal any further with the principles which govern the question of intention in the crime of homicide in other jurisdictions. The conclusion we reach in the present appeal may be summed up in that the two main grounds upon which the appeal against conviction was taken, are found devoid of substance ; and the appeal must fail. No question arises in the appeal regarding the sentence imposed by the trial Court ; and, therefore, the sentence is affirmed. We direct, under section 147 (1) of the Criminal Procedure Law (Cap. 155) that the sentence imposed shall run from the date of conviction. Whether appellant's sentence will run to its full extent or otherwise, it is a matter for the appropriate executive authority to decide in due course.

In the result, the appeal is dismissed ; and the sentence is affirmed to run as from the date of conviction.

Appeal dismissed ; sentence to run from date of conviction.