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ADAMOS CHARITONOS AND OTHERS
v.
THE REPUBLIC

[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES, STAVRINIDES, HADJIANASTASSIOU, JJ.]

1. ADAMOS CHARITONOS,
2. GEORGHIOS TALIADOROS,
3. ANTONIS SOLOMONTOS,
4. ANTONIS GENAGRITIS,

Appellants,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal Nos.* 3220-3223).

Evidence in criminal cases—Circumstantial evidence—Finger-print evidence—Defence of alibi—And prisoner's explanation as to presence of finger-prints—Burden of proof—Standard of proof—Reasonable doubt—Summing-up—No wrong approach by trial Court as regards test applied in considering explanations of prisoners and, generally, evidence by the defence—No miscarriage of justice—The Criminal Procedure Law, Cap. 155, *section* 145 (1) (b) *proviso.*

Burden of proof—Rule applicable—Prosecution must prove the charge beyond reasonable doubt—Defence evidence—Consideration and evaluation of—Test applicable—"Probability" test—"The reasonable possibility" test—Apart from particular words or embellishments it is sufficient for the defence to raise a doubt.

Defence—Evidence for the defence—Right approach of the Court—Sufficient for the defence to raise doubt.

"Compartmentalization" or "fragmentation" of the evidence—Allegation of such "compartmentalization" not sustained—The trial Court on due consideration of the evidence as a whole, having reached at the end of the case the conclusion that there was no room left for a reasonable doubt as to the guilt of the prisoners.

Judgments—Summing-up—The Court of Appeal should not look at judgments of criminal Courts minutely or microscopically—Or pick a quarrel with a single word or expression—But should read such judgments as a whole to see what is their effect—See also supra passim.

Court of Appeal—Approach by the Court of Appeal to judgments of criminal Courts—See immediately hereabove.

The four Appellants in these consolidated appeals were convicted at the Assize Court of Nicosia of conspiracy to kill and attempting, on March 8, 1970, to kill the President of the Republic Archbishop Makarios and another person. They were sentenced to concurrent terms of eight years' and fourteen years' imprisonment. They now appeal against those convictions.

The appeal was argued on the ground that the Assize Court misdirected themselves in law as to their approach to the case, namely as regards the onus and standard of proof, and that their misdirection was such that the proviso to section 145 (1) (b) of the Criminal Procedure Law, Cap. 155, should not be applied by this Court, because to try a man by a lower standard than that the law allows is in itself a gross miscarriage of justice which goes to the very vitals of any civilized system.

The wrong approach complained of was that:

(a) the trial Court applied a wrong test, that is the "probability test", instead of the "reasonable possibility test", in evaluating the evidence adduced by the defence; and

(b) that the trial Court "compartmentalized" their judgment, that is, they first made definite findings on the prosecution evidence before coming to consider the Appellants explanations; and that in this way the trial Court failed to come to its conclusion and verdict on the whole evidence in the case.

It should be added that it was not argued before the Supreme Court that the verdict was unreasonable having regard to the evidence adduced.

Section 145 (1) (a) and (b) reads as follows:

"145 (1) In determining an appeal against conviction, the Supreme Court, subject to the provisions of section 153 of this Law, may –

(a) dismiss the appeal;

(b) allow the appeal and quash the conviction if it

thinks that the conviction should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable or that the judgment of the trial Court should be set aside on the ground of a wrong decision on any question of law or on the ground that there was a substantial miscarriage of justice:

Provided that the Supreme Court, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

The Supreme Court by majority (*Vassiliades, P. dissenting*) held that the Appellants failed to show that the Assize Court misdirected themselves as suggested; and as there was no complaint that the verdict was unreasonable having regard to the evidence adduced, the Supreme Court proceeded to dismiss the appeal.

I. Held, (*Vassiliades, P.* dissenting):

Certain words or phrases used rather loosely in the judgment might be misunderstood. However, looking at the judgment as a whole and viewing its effect, we are of opinion that the trial Court reached their verdict not as a result of any misdirection, but because, after properly considering the whole evidence, including the evidence adduced by the defence, they were satisfied that there was no reasonable doubt as to the guilt of the prisoners.

II. Held, per Triantafyllides, J. (*Stavrinides, J.* concurring):

(1) (a) I am of the view that expressions regarding the burden of proof in a judgment of a criminal Court in Cyprus may, in a proper case, be construed more liberally and with less anxiety than corresponding expressions in a summing-up to a jury in England; being always understood that both, judgments and summings-up, should be examined as a whole and no fine distinctions should be made between one set of words used and another.

(b) Subject to the above it cannot, in my view, be disputed that there does exist a difference between what is "probable" and what is "reasonably possible"; and that such difference is, indeed, very material when it is to be decided whether or

not the guilt of an accused person has been established beyond reasonable doubt.

(c) Reading their judgment as a whole it is impossible for me to come to any conclusion other than that the trial Court had constantly in mind that the prosecution had to prove the guilt of the Appellants beyond reasonable doubt and that, thus, they did apply the correct principles regarding the burden of proof.

(d) With all the foregoing in mind, I am of the opinion that the word "probability" in the statement in the judgment that "the explanation of the accused need not be true, it is enough if it raises a *probability*" was used in contradistinction to the closely preceding word "true" and not in contradistinction to the notion of "reasonable possibility"; the term "probability" in that statement, which is expressly described by the trial Court as embodying a principle derived from the cases *Schama* and *Abramovitch* [1914] 11 Cr. App. R. 45 and *R.* v. *Mentesh*, 14 C.L.R. 232, was, in my view, used in a loose, and not in its strict dictionary, sense, so as to include the notion of the *possibility* of an explanation being reasonably true; therefore such expression was not used as excluding a "reasonable possibility". What I have just said about the use of the term "probability" in the said statement in the judgment of the Court below, applies equally well to all occasions on which such term, or words to that effect, were used elsewhere in the said judgment.

(e) Moreover, it must be borne in mind that, as is abundantly clear from the judgment of the trial Court, the case for the defence in relation to each one of the Appellants was not rejected as not being "probable" though it might be said to be "reasonably possible", but as being an untrue one, based on concocted stories and afterthoughts.

(f) Regarding, thus, this ground of appeal concerning the aforesaid misdirection as to the burden of proof and the proper test to be applied, I have to hold that in actual fact there is not to be found any such misdirection in the judgment of the trial Court.

(2) (a) I shall deal now with the correlated submission by counsel for the Appellants, regarding "compartmentalization" or "fragmentation" of the case by the Assize Court. This argument boils down to this: That the trial Judges accepted

too early, and before dealing in their judgment with the case for the defence, the opinion evidence of the prosecution witness D. regarding finger-prints found.

(b) A perusal of the judgment shows that the trial Court convicted the Appellants after duly considering the case as a whole and without handicapped by any "compartmentalization" or "fragmentation". Though it may, at first sight, appear that these terms could be said to be applicable to the *scheme of drafting* adopted by the trial Court for their judgment, such terms are not at all applicable to the *thinking* of the trial Judges in reaching their verdict about the guilt of the Appellants.

(c) Consequently, I am of the view that the relevant submission of counsel for the Appellants cannot be upheld; the convictions of the Appellants were decided on after due consideration of the evidence as a whole.

III. Held per Josephides, J.:

(1) (a) Let me say at once that, with great respect to the trial Court and appreciating their difficult task, I am of the view that some of the expressions used in their judgment, coupled with a number of epithets, are not very happy and they are likely to give rise to misunderstandings. But as it has often been said, the Court of Appeal should not look at the summing-up to the jury in England minutely or microscopically or pick a quarrel with a single word, but should read it as a whole to see what is the effect of it. This principle should a fortiori be applied to judgments by criminal Courts in Cyprus.

(b) Having said this, on reading as a whole the judgment of the Assize Court (a judgment of 58 typed pages), I am not prepared to accept that the trial Judges applied a wrong test in considering the evidence for the defence. It would appear that the expressions used by them were only for the purpose of evaluating the evidence, and they were not, in any way, laying down a rule other than the accepted one that it will be sufficient for the defence to raise a doubt. In my view it is clear that it would be enough if the prisoner's explanation raises a doubt, and no other words or embellishment should be used in this connection.

(c) Looking not minutely, but broadly, at the whole judgment, I am of the view that there was no wrong approach

by the trial Court as regards the test applied in considering the explanations of the prisoners and the whole evidence at the end of the case; and I am further of the view that, considering all the evidence in the case which was accepted by the trial Court there was not miscarriage of justice.

(2) (a) The second point taken by counsel for the Appellants was that the trial Court "compartmentalized" or "fragmented" the case *i.e.* that they made definite findings on the prosecution evidence on main issues, before coming to consider the Appellants' explanations.

(b) Considering the judgment I do not think that it can be validly said that it shows that the trial Judges did not keep an open mind until the end of the case, nor that they failed to consider at the end of, and on the whole of, the case whether there was reasonable doubt created by the evidence, given by the prosecution or the prisoners. In fact, it is evident from a perusal of the whole judgment that, on consideration of the whole evidence, they were satisfied of the guilt of the Appellants beyond reasonable doubt; and this was the unanimous decision of all three Judges of the Assize Court.

IV. Held per Hadjianastassiou, J.:

(1) (a) It was submitted that the trial Court misdirected themselves because they assumed that the prisoners, after the prosecution established a *prima facie* case, had to give an explanation which should be probable (and not reasonably possible).

(d) In dealing with this novel point, I would like to make it quite clear that the phrase used by the trial Court "it is enough if it raises a probability", is an expression which ought not to have been used, because it creates misgivings and because it is not what the case quoted (*Schama and Abramovitch, supra*) lays down. It was sufficient for the Court to add: "It is enough if it raises a doubt". But, in my opinion, because the trial Judges have used one form of language or another, is neither here nor there, because in the last resort it is not the particular formula that matters, it is the effect of the summing-up and the reasons given by the trial Court. This applies also to all occasions on which similar words are used in the judgment.

(c) In going through the various passages in the judgment of the trial Court which have been the subject of criticism,

as well as through the whole of their judgment, it seems to me that neither did they assume in their approach that the prisoners had to give an explanation which should be at least probable, nor had they in any way applied in this case the "probability test". On the contrary, I am satisfied that the trial Court adopted and applied the correct direction to themselves, that is, that, on consideration of the evidence as a whole, they had at the end of the case to be satisfied beyond reasonable doubt of the guilt of the prisoners before they could convict.

(2)(a) With regard to the question of "compartmentalization" or "fragmentation" of the expert evidence, I take the view that there was no misdirection in law. Because the trial Court had considered earlier the expert evidence of the prosecution after a submission by the defence that no *prima facie* case had been made out sufficient to require the accused to make their defence. Inevitably, the trial Court had to consider the weight of the evidence for the purpose of deciding whether or not the evidence so far laid before them was such that, in the absence of any explanation on the part of the defence, as a reasonable Court might be ready to convict (see *R.* v. *Moustafa Karamehmet,* 16 C.L.R. 46 at pp. 48–49).

(b) It was, therefore, inevitable at that stage that the trial Court should proceed to weigh the expert evidence and reach its conclusion regarding the reliability and credibility of the expert prosecution witnesses; but this does not mean that the trial Court disabled itself from deciding with an open mind the whole case after listening to the opinion of the defence expert witnesses as well as of the explanations of the accused.

(c) In my opinion the summing-up in the present case must not be too critically dealt with after a long trial. It is sufficient that we are satisfied, as we have to, that the right principle of law has been applied *viz.* that the trial Court, having duly considered the evidence as a whole, reached their verdict because they were satisfied at the end of the case that the Appellants were guilty beyond reasonable doubt.

Appeals dismissed.

Cases referred to:

Woolmington v. *D.P.P.* [1935] A.C. 462; 25 Cr. App. R. 72, at pp. 95–96;

Jayasena v. *The Queen* [1970] 30 Cox C.C. 234; 2 W.L.R. 448, at p. 453;

Bullard v. *The Queen* [1957] 42 Cr. App. R. 1, at p. 7;

Reg. v. *McKenna* (Supreme Court of New South Wales [1964] 31 W.N. 330, at pp. 332–334;

Lilienthal v. *United States* 97 U.S. 237; 24 Law. Ed. 901;

R. v. *Steane* [1947] K.B. 997, at p. 1004;

R. v. *Biffen* (*unreported*); see [1966] Criminal Law Review p. 111;

R. v. *Oliva* [1962] 46 Cr. App. R. 241, at p. 243;

Gan Poh Chye v. *Public Prosecutor* [1968] 1 M.L.J. 288 at pp. 288–289;

R. v. *Allan George Wood,* 52 Cr. App. R. 74, at pp. 78–79;

Schama and Abramovitch [1914] 11 Cr. App. R. 45;

Mancini v. *D.P.P.* [1942] A.C. 1, at p. 12;

R. v. *Bradbury* [1969] 53 Cr. App. R. 217, at pp. 219–220;

R. v. *Garth* [1949] 33 Cr. App. R. 100; [1949] 1 All E.R. 773;

R. v. *Stoddart* [1909] 2 Cr. App. R. 217;

R. v. *Johnson* [1962] 46 Cr. App. R. 52, at p. 57;

Khoo Sit Hoo v. *Lim Thean Tong* [1912] A.C. 325;

R. v. *Abraham Barnett Kritz* [1949] 33 Cr. App. R. 169 , at pp. 176–177;

R. v. *John Robert Aves* [1951] 34 Cr. App. R. 159, at p. 160;

R. v. *Summers* [1952] 1 All E.R. 1059; 39 Cr. App. R. 14 at p. 15;

Henry Walters v. *The Queen* [1969] 2 W.L.R. 60;

R. v. *Wood* [1968] 52 Cr. App. R. 74, at p. 78;

R. v. *Murtagh and Kennedy* [1955] 39 Cr. App. R. 72, at p. 83;

R. v. *Blackburn* [1955] 39 Cr. App. R. 84, at p. 85;

R. v. *Hepworth and Fearnley* [1955] 39 Cr. App. R. 152, at pp. 154–155;

R. v. *Trigg* [1963] 47 Cr. App. R. 94, at p. 99;

Rex v. *Castelton*, 3 Cr. App. R. 74;

Walters v. *The Queen* [1969] 2 A.C. 26, at pp. 29–31; See also in the Notable British trials series the cases (decided after the *Woolmington* case (*supra*)): *R.* v. *Battenburg and Stoner*, *R.* v. *Nodder*, *R.* v. *Barnes and Others*, *R.* v. *Carraher*, *R.* v. *Leg and Smith*, *R.* v. *Camb* and *R.* v. *Craig and Bentley*.

Austria v. *Italy*, a decision of the European Commission of Human Rights reported in the 1963 Yearbook of the European Commission of Human Rights at p. 782.

Chrysanthou v. *The Police* (1970) 2 C.L.R. 95;

R. v. *Mentesh* (1934) 14 C.L.R. 232, at pp. 244–245;

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

Pefkos and Others v. *The Republic*, 1961 C.L.R. 340, at pp. 352, 368;

Kalli v. *The Republic*, 1961 C.L.R. 440, at p. 444;

Kafalos v. *The Queen*, 19 C.L.R. 121, at p. 126;

R. v. *Moustafa Karamehmet*, 16 C.L.R. 46, at pp. 48–49;

Volettos v. *The Republic*, 1961 C.L.R. 169, at p. 180;

Papaprokopiou v. *The District Officer Nicosia and Kyrenia*, 1964 C.L.R. 354, at p. 358;

Fostieri v. *The Republic* (1969) 2 C.L.R. 105, at p. 112;

Aristidou v. *The Republic* (1967) 2 C.L.R. 43, at p. 103;

Demetriou v. *The Republic*, 1961 C.L.R. 309, at p. 312.

Appeals against conviction.

Appeals against conviction by Adamos Charitonos and three Others who were convicted on the 19th November, 1970, at the Assize Court of Nicosia (Criminal Case No. 6971/70)

on one count of the offence of conspiracy to kill contrary to sections 217, 20 and 21 of the Criminal Code Cap. 154 (as amended) and on two counts of the offence of attempt to kill contrary to sections 214(a), 20 and 21 of the Criminal Code (*supra*) and were each sentenced by A. Loizou, P.D.C., Stavrinakis and Stylianides, D.JJ. to eight years' imprisonment on the first count and to fourteen years' imprisonment on each of the second and third counts, all the sentences to run concurrently.

Sir Harold Cassel, Q.C. with *A. Triantafyllides, K. Saveriades* and *P. Demetriou*, for the Appellants.

K. Talarides, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following judgments were read:-

VASSILIADES, P.: By a majority decision, the Court decides that all four appeals fail; and they must be dismissed. I am afraid, I find myself in disagreement with the other members of the Court; and I must state my reasons for this. But, I do not think that it is necessary to go into much detail in doing so. I shall try to do it as briefly as possible.

The four appeals before us, arise in the same case. The Appellants were jointly charged; they were tried together; and they were convicted by one and the same judgment. Their appeals were consolidated by consent; and learned counsel on both sides argued them together, stressing in each individual appeal, the points calling for special consideration. All four appeals stand mainly on the same ground; but beyond that ground, each appeal has its own individual aspects which called for separate consideration. And in this connection, before I proceed into the matter, I wish to express the Court's gratitude—and this is unanimous—to learned counsel on both sides, for the assistance they gave to the Court; and, for the able manner in which they presented the whole case.

The four Appellants were convicted in the Assize Court of Nicosia, on November 19, 1970, of attempted homicide; and of conspiracy to commit murder, by taking part in the attempted assassination of Archbishop Makarios, the Primate of the Greek Orthodox Church of Cyprus and President of

the Cyprus Republic, which took place in Nicosia a year ago, on March 8, 1970. Each of the Appellants was sentenced to 8 years' imprisonment for the conspiracy; and 14 years for the attempted murder. The latter was charged in two counts; one for the attempt on the Archbishop's life, and the other for attempt at the life of the pilot of his helicopter. The Appellants were convicted on all counts charged; the sentences are concurrent.

The appeals challenge the validity of the convictions; and they were argued mainly on two grounds: First, that the trial Court misdirected themselves on the law in a manner resulting in a miscarriage of justice; and secondly, that the evidence affecting each Appellant separately, viewed as a whole and tested properly, cannot result to a conviction free from reasonable doubt. It is contended for the Appellants that the prosecution case rests mainly, if not entirely, on opinion evidence regarding finger-prints; and that the evidence in the case was approached and considered by the trial Court labouring and operating under a misdirection. I shall deal with these matters after I shall have set the background of the case.

In opening the prosecution at the trial, personally, the Attorney-General of the Republic, described the case as one of the most horrifying crimes in the history of this country; the object of which, had it succeeded, would have disastrous repercussions; and would cause irreparable damage to the country. And, he added that this was a crime satanically conceived; infernally hatched; and fiendishly executed; failing only by Divine providence. The trial Court apparently agreed that that was an accurate description of the crime. This may be clearly seen from their approach to the sentence; where the Court added that this was a well-planned political assassination, which, in a democratic state, is a nightmare for every freedom-loving citizen, as it undermines the rule of law; and leads to anarchy and civil war; two deadly calamities for the people of any country.

The trial Court, furthermore, expressed the view that the defendants were not the people who conceived the devilish idea; they were only the executive organs of others. Indeed the conspiracy charged in the indictment, names as one of the conspirators an ex-Minister of the Interior in the President's government for more than eight years, who was killed by

another planned murder a week after the crime now under consideration. The Coroner's verdict in that case was: "Premeditated murder by person or persons unknown;" verifying in a most realistic way, the trial Court's view that political crimes are a curse for any country.

The persons convicted for the execution of this frightful crime are: 1. A 24–years old student of the Highest Agricultural College in Athens, from a farming family of the Cyprus village of Yeri, near Nicosia; 2. A young estate agent of Strovolos, Nicosia, with a wife and three minor children under seven years of age; 3. A fairly young police officer holding the rank of Acting Sub-Inspector, in charge of the Information Service of Famagusta Police, married and the father of two minor children under ten years of age; and, 4. Another policeman, 28 years of age, also in the Information Service of Famagusta Police under the orders of the previous Appellant. This is the description I could find regarding the Appellants in the bulky record of the trial; excepting for the fact that the last two Appellants appear to have had a record for activity in the EOKA organisation during the liberation struggle; and to have been closely connected with the late ex-Minister named in the conspiracy charge, also an EOKA man, in whose confidence they appear to have been for years.

Suspicion fell on the Appellants very soon after the commission of the crime. They were arrested with other persons; interrogated; kept in custody; and eventually charged together with two other persons, early in April last. The preliminary inquiry, lasting for 13 whole days, was completed on May 13, 1970, when all six accused were committed for trial by the Assizes. They were kept in custody until the opening of the trial on September 28, 1970, when as already stated, the case was opened by the Attorney-General of the Republic. At the end of his opening the Attorney-General entered a *nolle prosequi* for accused 6; and he was discharged. The other five accused (including the Appellants) stood their trial. The prosecution called in all eighty (80) witnesses; and produced one hundred-and-one (101) *exhibits*. At the close of the presecution-case, on October 14, counsel for the defence submitted that none of the accused should be called upon, as the prosecution had failed to make out a *prima facie* case against any one of them.

On the other hand counsel for the prosecution strongly opposed that submission; and invited the trial Court to call upon all the accused in the dock, on all the counts in the information. The Court took time to consider their ruling. They delivered it on October 21st. After going carefully into the matter in an eight page decision, the Assize Court acquitted accused 5 on all counts; and called upon all the others (the four Appellants before us) to make their defence. The trial Court's ruling ends in these words:

> " Having reached these conclusions and in the light of the aforesaid authorities, we are of the opinion that irrespective of whether an explanation was given or not, no reasonable tribunal might convict accused 5, hence we acquit and discharge him on all counts. Accused 1, 2, 3 and 4 will be called upon to make their defence on counts 1, 2 and 3".

The case against them rested mainly on evidence of finger-prints; and on circumstantial evidence. None of the eyewitnesses who saw four persons escaping from the scene of the crime, and described them to the police, recognized any; and none identified the accused as one of them.

The case for the defence, in a very brief outline, was: The first Appellant elected to give evidence on oath. He confirmed from the witness-box the contents of his previous statements to the Police, to the effect that he had nothing to do with the crime. He was, he said, in the company of the second Appellant and others on the previous evening, in places of entertainment where plenty of drink was consumed. Later in the night, at the suggestion of the second Appellant, who was obviously under the influence of drink, they drove together to Limassol; returning from there at about 2.30 a.m. They both went to the house of the second Appellant, where the first Appellant was given hospitality for the night, as it was too late to return to his village.

The following morning at about 7 o'clock they drove to Nicosia town; and whilst passing the road by the stadium, they heard shots. These must have been the firing in the attempt. They wondered what happened; and thought that they would soon hear about it on the wireless news. It may be noted here that the stadium is about half a mile from the place where the crime was committed; and that was some eight minutes after 7 o'clock.

The Appellant then gave his movements, claiming an alibi; and contended that he did not know Appellants 3 and 4 until he met them in the prisons, where they were all detained after their arrest in connection with this crime. He was cross examined at length by able counsel for the prosecution, who strongly contested Appellant's alibi.

The second Appellant elected to make an unsworn statement from the dock. He confirmed what he had earlier stated to the police; adding only certain observations on the evidence of prosecution witnesses against him. He affirmed that he had not seen the third Appellant for the last ten years; and that he had not known the fourth Appellant until they met in the prisons after their arrest for this crime.

The third Appellant elected to give evidence. His version was already in the hands of the prosecution, in the form of statements made during the investigations, when he was interrogated more than once. He stated again from the witness box that he had nothing to do with the commission of the crime; and that he first heard about it when he went to the Famagusta Police Station where he was posted, at about 9 o'clock in the morning, after a telephone call to his house from the Control Room at 8.30. This was the general call-up of the Police, soon after the attempt on the President's life. This Appellant also asserted an alibi, giving particulars and naming persons. His alibi was likewise strongly contested by counsel for the prosecution.

The fourth Appellant also elected to give evidence on oath. Being a policeman, arrested in connection with this state crime, he had already been interrogated by investigating officers; and his statement, long and detailed, was in the hands of the prosecution. He denied having had anything to do with the crime in question; and asserted an alibi which rested mostly on the evidence of members of his family. Being a bachelor, he was living with his mother, two brothers and two sisters. He shared a room with his sister's fiance.

After the evidence of the fourth Appellant, the defence called their witnesses. Twenty-six witnesses were called for the defence (mostly in support of the alibis) including three policemen and a finger-prints expert from abroad.

After elaborate addresses from counsel on both sides, the Assize Court took time to consider their judgment, which

they delivered a few days later, on November 19, 1970. After dealing with the legal aspect of the case and the evidence before them, the Court convicted all four Appellants on all counts in the information. The judgment gives fully, in a text of 65 pages, the approach of the trial Court to the case; and the reasons for which they reached their verdict. This is the judgment challenged by the present appeal. As already stated it is challenged mainly on two grounds; misdirection; and its effect in approaching and evaluating the evidence.

The seriousness of the case has already been underlined earlier in this judgment; there is no room for exaggeration in describing it as such. But this fact must not overwhelm one into forgetting that the Appellants are the first to bear the impact of such a case. Their protection lies in the law of their country; a fundamental part of which is the provision in Article 12 of the Constitution that "every person charged with an offence shall be presumed innocent until proved guilty according to law".

Moreover, this is one of the basic human rights which received recognition in international declarations, intended to give the character of present day civilisation; the civilisation we pride ourselves to belong. It is the right in Article 6, para. 2, of the European Convention of Human Rights, which, according to the interpretation received in the case of *Austria* v. *Italy* (Op. Com. 788/60, para. 199 at page 140 in The Digest of Case Law, relating to the European Convention 1955–1967) requires that " Court Judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged". In our legal system this is the well established fundamental principle which settles the onus of proof on the prosecution. But the commentary goes further. It reads:–

> " Since Article 6(2) is thus primarily concerned with the spirit in which the Judges must carry out their task, it may be asked whether it does not also apply to the attitude of other persons taking part in the proceedings, such as counsel for the prosecution and for the civil plaintiff, experts and witnesses. If such persons express themselves towards the accused in flights of language such as might disturb the calm of the Court by their violence....."

the responsibility rests on the Presiding Judge to react against

such behaviour, lest he may give the impression that the Court shares the obvious animosity towards the accused and regards him from the outset as guilty.

This is the atmosphere which the law requires to be maintained in every criminal trial (let alone a trial of this magnitude) and places the responsibility for maintaining it, on the Court. The Court which carries—and must be seen to be carrying—the still heavier responsibility of actually sustaining individual human rights entrenched in the law. Such atmosphere is most necessary to enable the Court to decide the very important issue of the guilt or otherwise of the accused, starting from the legal presumption that he is innocent; and persistently preserving an open mind on this issue, until the end of the trial, as it is at that stage (and at that stage only) that the Court must weigh the evidence as a whole and decide whether the prosecution have discharged the onus placed upon it by the law, to satisfy the Court's mind and conscience, of the guilt of the accused for the particular offence charged.

I considered it necessary to lay this foundation of a trial under the law (to which the Appellants were entitled) because the main complaint of the Appellants, as presented by learned counsel on their behalf, is that the trial Court reached their verdict, by evaluating the evidence as it came along; and allowing such evaluation to affect their mind before the whole evidence was before them. Their complaint is that the trial Court by "compartmentalising" the evidence—as their counsel put it—failed to preserve an open mind until the end of the case, which put at a disadvantage the evidence for the defence. It is this failure to keep an open mind until the end which, according to counsel for the Appellants, opened the door to the misdirection complained of, resulting in a miscarriage of justice. I shall have to deal with the legal aspect of this complaint, in due course.

I must now turn to the facts. It is common ground in this appeal that the crimes charged were committed. The dispute is whether each of the individual Appellants before us, is a party in the commission of the crimes. The attempt was committed very soon after 7 o'clock on the morning of March 8, 1970, when the Presidential helicopter took off from the grounds of the Archbishopric to take the President to Machera Monastery, where he was to officiate in a ceremony. He was the only passenger in the helicopter, occupying the seat near

the pilot. When the machine rose above the roofs of the neighbouring houses, it was fired at from the roof terrace of a building opposite the Archbishopric; and was forced to land, having been hit by several bullets, one of which seriously wounded the pilot.

Several persons who happened to be in the streets or to live in the vicinity, went to see what was happening. One of them said that he saw the helicopter while it was being fired at. Giving evidence for the prosecution, he stated that he telephoned the police and then went back to his verandah to watch the development of events. He saw four persons escaping from the back of the premises from which the helicopter was shot. He saw them jumping over a wall one after another and coming in his direction. One was taller than the other three. He saw their faces. He called out to them "What happened boys?" He got no reply. One of them tried to conceal his face with his hand. He called out to them to stop, threatening to fire at them with his air-gun which he was holding. He kept watching them until they escaped in a car. He did not recognize them; and later, at a police identification parade he could not identify any of the Appellants as one of them. In fact the Appellants, as they stood up for us to see, they are two persons of about the same height taller than the other two who are again of about the same height. There is none higher than the other three. One of them wears a moustache; the others are clean shaved. None of the witnesses who saw the escaping culprits in the street, speaks of one of them wearing a moustache.

Another eye-witness saw the four culprits coming down the street towards his house. He watched them. His wife was also in the street at the time, coming with a bucket of water, from the opposite direction. He heard his wife asking the culprits "what happened, boys?" One of them put his finger to his lips to signify silence. They passed almost under his balcony. They came face to face with the wife. This witness also describes them as one being taller than the other three. He does not speak of one of them wearing a moustache. The wife was not called as a witness. Neither identified any of the Appellants as one of the four escaping culprits.

It is the case for the prosecution that the four escaping culprits are the four Appellants before us. The evidence connecting each of them with the crime is dealt with in detail

in the judgment of the trial Court. It consists of finger print evidence; circumstantial evidence; and the complete rejection of the evidence of the Appellants and that of their witnesses. As already stated, none of the several persons who saw the four culprits escaping through one street and then through another to the car which was obviously parked there for the purpose, could identify any of the Appellants as one of the culprits who escaped from the scene of the crime. At this stage it may definitely be said that the prosecution case rests on the finger print evidence, and the fact that the escape car was under the hire of the second Appellant. As submitted on behalf of the Appellants, their convictions can only be sustained on the finger-print evidence, which to a great extent is opinion evidence. Especially opinion as to the recency of the finger prints. This is why it is contended that the misdirection complained of, resulted inevitably, in a substantial miscarriage of justice, leaving no room for the application of the proviso. (Section 145 of the Criminal Procedure Law, Cap. 155). So that if the misdirection point succeeds, the appeals must succeed.

Before going into this crucial point, I must briefly refer to the principles upon which the trial Court approached the burden of proof. And, in this connection, I find it necessary to cite verbatim the relevant part of the trial Court's judgment. It reads:-

> " Before we deal with the case for the defence we consider it pertinent to deal briefly with the principles of law relating to the burden of proof in criminal cases which we shall have all along in mind in reaching our conclusions. They are summed up in Archbold 36th Edition, para. 1001, as follows: 'the general rule is that apart from any provision to the contrary (which does not exist in the present case) the burden of proof lies upon the prosecution and it is not for the defence to prove innocence. *Woolmington* v. *D.P.P.*, 25 Cr. App. R. at pp. 95-96. Where the prosecution gives *prima facie* evidence from which the guilt of the prisoner might be presumed and which, therefore, calls for an explanation by the prisoner, and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of 'guilty'. But, if an explanation is given by or on behalf of the prisoner which raises in the mind of the jury reasonable doubt as to his

guilt, he is entitled to be acquitted, ... as the prosecution has failed to satisfy the onus of proof which lies upon them' ".

Learned counsel for the Appellants observed that what was not included in the quotation (replaced by the dotted space) is most important in the instant case. It is important not only because it covers the crux of the main complaint in the appeals; but also because it indicates what the trial Court did not consider of importance. It is this part of the quotation: (.....he is entitled to be acquitted) "because if upon the whole of the evidence in the case, the jury are left in a real state of doubt" the prosecution has failed to satisfy the onus of proof which lies upon them. It is upon *the whole* of the evidence in the case (including the evidence for the defence) that the Court must consider with an open mind at that final stage in order to decide whether they are left in a state of doubt regarding the guilt of the accused. This is the law applicable to the matter, declared time and again by the courts. The law which is so delicate and so difficult in its application by trial Courts, that verdicts are set aside and convictions quashed if there is a misdirection or insufficient direction about it in any criminal case.

There is no dispute in this case, that this is the law. The dispute is whether it was correctly and properly applied. Whether the trial Court preserved an open mind until the whole of the evidence was before them; and then tested it on the right test, as the prosecution contend. Or, they evaluated the evidence as it came along, testing it against earlier evidence already accepted as correct; and having in mind the wrong test (especially regarding the evidence of the defence) as the Appellants complain. The probability test, as counsel described it, instead of the possibility test.

I do not propose going much into the authorities. They are there; a great number of them, referred to and discussed in subsequent cases. Each judgment must be read as a whole, in the background of the facts to which it refers. But I think that I must refer to some cases where I found help. I take it that the *Woolmington* case (*Woolmington* v. *D.P.P.* [1935] A.C. 462, H.L. (E)) is in every lawyer's mind when dealing with the burden of proof. It is a landmark in the development of the law, regarding the burden of proof, not because it changed the law, but because it marked "a change in the

content of the law resulting in a change in the manner of applying it". (Per Lord Devlin in *Jayasena* v. *The Quene* (P.C.) [1970] 2 W.L.R. 448 at 453).

In *Bullard* v. *The Queen* [1957] 42 Cr. App. R. 1, another Privy Council case, where the summing up in a murder trial was challenged for insufficient direction to the jury on the question of provocation, Lord Tucker in giving the reasons of the Court for allowing the appeal had this to say:–

> " In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible".

The difference between "improbable" and "impossible" on the jury's mind, when being directed by the Judge for the purposes of arriving at their verdict, is here underlined.

The effect of *Bullard* v. *The Queen* (*supra*) was considered in *Reg.* v. *McKenna* before a Court of Criminal Appeal in Australia (Supreme Court of New South Wales (1964) 31, W.N. 330). That was a case of recent possession of stolen goods. The Court held that the test to be applied in a criminal case is satisfaction beyond reasonable doubt; and that in directing a jury as to the onus of proof the formula of probability and possibility should not be used. In this connection the Court took the view that it is a misdirection to tell the jury that –

> " If the evidence is so strong against an accused man as to allow only a remote possibility in his favour, which, when considering the matter in the jury room, you can dismiss with the sentence:
>
> ' Of course it is possible but not in the least probable' then the case is proved beyond reasonable doubt".

With great respect, I adopt that view. And I hold that in Cyprus where the Judge does not have to direct the jury, but he must direct himself correctly throughout the trial, and such direction must be reflected in his reasoned judgment, if he

labours with tests of probability and possibility in dealing with the version of the defendant or the evidence of his witnesses, he labours under a misdirection which may well go to the root of his verdict.

Mr. Justice Macfarlan in dealing with the matter at p. 334, took the view that the burden of proof is not concerned –

> "..... with distinctions between possibilities and probabilities. (But he thought) that a jury may still have a reasonable doubt although that upon which they found their conclusion is only a reasonable possibility of innocence. If they think there is that reasonable possibility, that it is one which arises from the evidence or the absence of evidence, then I think it is one which to the jury would raise a reasonable doubt as to the guilt of the accused".

I respectfully agree; and think that it could likewise raise a reasonable doubt in the mind of a Judge functioning as a jury.

Finally, in a still more recent case decided in the Court of Appeal in England, to which learned counsel for the Appellants referred (*Reg.* v. *Bradbury* [1969] 2 W.L.R. 615) the general rule as to proof in the second sub-paragraph of paragraph 1001 of Archbold's 36th Ed. was considered. It is the quotation in the trial Court's judgment to which reference has been made earlier. The confusion which it may create in the jury's mind if used in directing the jury on the burden of proof, is clearly pointed out. Particularly certain portions of it which refer to –

> " a presumption being raised upon which the jury may be justified in returning a verdict of guilty are not such as one should contemplate citing to a jury. They are not calculated to help them; indeed they have an unfortunate tendency to confuse, rather than to elucidate, and to lead a jury to the conclusion that if an accused man gives an explanation which they reject, the step towards convicting him is short and well-nigh inevitable".

It is true that the Court in that case referred also to the distinction between a lawyer and a layman serving on a jury; and described the passage as a very useful one for the lawyer to have in mind. But with the greatest respect to such a view, I find that the present case drives me to the conclusion that

in Cyprus where the Judge or Judges in a trial perform the double function of Judge and jury, the proper direction to follow throughout the trial is to preserve an open mind until the end, ready to consider all possibilities and probabilities, in the light of the whole evidence before them, in order to answer in their mind and conscience the paramount question in a criminal trial: Are you satisfied on the evidence before you, considered as a whole, that every ingredient of the offence stands proved? And are you sure, upon that evidence, that the accused took part in its commission? Because if you have doubt in your mind or you feel any uneasiness in your conscience on any of these matters, the law requires you to say so; as this entitles the defendant to an acquittal.

I now turn to the appeals before us. The four Appellants challenge the validity of their conviction for the grave crime described earlier, on the legal ground that the trial Court misdirected themselves regarding their approach to the evidence; and also regarding the proper legal test for its evaluation. They complain that, overwhelmed by the importance of the case and the gravity of the crime, which undoubtedly has been committed, the trial Court received the prosecution evidence on the finger-prints as the crucial evidence in the case. That was made apparent right from the opening.

Taking the evidence of Police Inspector Economou (P.W.57) a firearms and finger-prints expert, the Court were fully satisfied that the crime was committed by the guns found on the roof terrace of the building opposite the Archbishopric, very soon after the crime. They were a bren machinegun; a semi-automatic rifle; an Enfield rifle; and magazines, ammunition and other accessories of such weapons. Some of these articles appeared to have finger-prints on them.— They were duly protected; and another finger-prints officer, Sub-Inspector Georghiou (P.W.58) who was with him, took care of them for further examination. This witness' evidence was hardly contested. These were the arms; and there were finger-prints on them.

Another article seized very soon after the commission of the crime was the car used by the four culprits for their escape. Finger-prints were noticed on this *exhibit* too. Witness Georghiou examined the car and found identifiable finger-prints on the mirror; on the right and left glass panes of the doors; and on the inside of the right ventilator. These finger-prints were also taken care of for further examination.

The value of finger-print evidence was in the mind of the Police right from the start. The officer in charge of the forensic science laboratory of the Cyprus Police Force, Superintendent Dekatris (P.W.60) was one of the first Police Officers to visit the place where the crime was committed, in order to look for and take care of any finger-print evidence. According to his own testimony he was, with his assistants, on the roof terrace from which the culprits fired at the helicopter, at about 7.40 a.m. This officer saw the arms and accessories already referred to and directed the taking of photographs and the preliminary examination of the *exhibits* for finger-prints. He noticed with the naked eye finger-prints on the magazine which was on the parapet of the terrace wall. He also noticed finger-prints on the brengun magazine fitted on the gun.

Answering a question whether the finger-prints were visible with the naked eye, the witness said: " If one looked carefully yes. I examined both with the naked eye and with a lens". The *exhibits* were taken to the laboratory for further examination, with all due care. A few days later, on the 12th March, the witness was handed two finger-print forms (*exhibits* 7 *and* 8) with the finger-prints of Appellants 3 and 4 respectively. On the following day, he was handed some more finger-print forms for Appellants 1, 3 and 4 (*exhibits* 29, 30 *and* 31).

The finger-print evidence is the evidence upon which this case stands or falls. In the course of the argument before us, counsel for the prosecution frankly, and quite rightly in my opinion, conceded that the convictions could not be sustained if the finger-print evidence is put in doubt. Three Police experts gave evidence in connection with finger-prints found on *exhibits*, *i.e.* Inspector Andreas Economou (P.W.57), Acting Sub-Inspector Georghiou (P.W.58) and Superintendent Dekratis (P.W.60). Their evidence runs into a number of pages on the record and contains a lot of detail. I find it unnecessary to deal with it at length at this stage. The finger-print evidence resulted from the examination conducted under the direction of Superintendent Dekratis who is the main witness in this connection.

All these three prosecution witnesses impressed the trial Court favourably and their evidence was fully accepted. It is to the effect that two finger-prints of the index and middle finger of the right hand, on the empty magazine (*Exhibit* 35*A*)

were identified as coming from the first Appellant. One identifiable finger-print found on the loaded magazine (*exhibit* 35*B*) was identified as coming from Appellant No. 3; finger-prints of the right and left thumbs on two rounds of ammunition in the loaded magazine (35B) were sufficiently identified as coming from Appellant No. 4. Finger-prints of four fingers of the left hand, (two of which were identifiable) found on the glass door of the escape car also came from Appellant No. 4.

The trial Court obviously, in my opinion, accepted the finger-print evidence of the prosecution witnesses and had no doubt in their mind that the finger-prints in question connected directly Appellants 1, 3 and 4 with the commission of the crime. In support of this view there was also other evidence in the case, such as the close co-operation between Appellants 3 and 4 and their connection and long standing relations with the ex–Minister named in the conspiracy charge.

The defence questioned the correctness and the reliability of the finger-print evidence of the prosecution witnesses; but at the same time they explained the presence of any finger-prints on the *exhibits*, by the fact that Appellants 3 and 4 were handling such articles for years, in the course of their police work and also, in connection with activities directed by the late Minister. It may be recalled that for many years now (running as far back as 1955) conditions in the island have been such that weapons of the kind connected with this crime, moved about the country in the hands of many authorised and unauthorised persons. Appellants 3 and 4 handled a great number of such articles, and Appellant No. 1 apparently had his share in such activities from a very young age.

The age of the finger-prints in question was, therefore, an important matter. The first prosecution witness on finger-prints, Inspector Economou, was asked by counsel for the defence whether, as an expert on finger prints, he would expect such prints to remain on a gun for one, two or three years. His answer was "it depends on the condition of the surface; on the gun; on weather conditions; from the circulation of the article here and there; the place where it is stored; and from the health of the person who left the finger-prints". And he added: "I have given the factors which contribute to the life of a finger-print on an arm. When all factors are present, they (finger-prints) may remain for a long time".

Counsel for the Appellants took three points in this connection: (1) That none of the prosecution witnesses spoke regarding the age of the finger-prints in question until the matter was raised by the defence. (2) That no investigation has been carried out for the purpose of verifying whether finger prints of a similar nature could be found on other arms under the control of the authorities, especially arms which in one way or another came under the control of the late Minister and his men. (3) The evidence of the prosecution witnesses referred to the finger-prints in question without attempting to explain the absence of any other finger-prints on the *exhibits*.

Regarding the finger-prints on the escape car, the defence had an explanation connected with the use of this car a few days before the attempt. Evidence was called in support of that explanation, including the evidence of a policeman who was together with Appellant No. 4 when he searched that same car on that earlier occasion.

Regarding the age of finger-prints, especially those on the weapons found on the terrace, the defence called an expert witness from Greece (none being available in Cyprus) a retired police officer with long service and vast experience in a similar branch of the Greek Police, Mr. Nicolaos Spyropoulos (D.W. 15). His evidence is contained in some 25 pages of the record out of which 18 in cross-examination. This is understandable considering the importance of the finger-print evidence in the prosecution case.

What, however, is not understandable to me is the evaluation of this witness' evidence by the trial Court. I have carefully read it and could not find justification in the criticism that his evidence was full of contradictions. The sum total of his opinion that the age of finger-prints cannot be accurately determined: And that it is a matter of opinion formed by the examining expert on the presence or otherwise of various factors, is surely correct.

It was open to the trial Court to prefer the opinion of Supt. Dekratis to that of Mr. Spyropoulos where they differed. But reading the latter's evidence in comparison to that of the former, I think he deserved due consideration; especially as an expert called for the defence in a case of this nature.

This brings me to the complaint of the Appellants, for the approach of the trial Court to the evidence as placed by them

into separate compartments. The "compartmentalization" of the case, as learned counsel for the Appellants put it. Within those separate compartments, the trial Court made findings of fact, rejecting the evidence which was inconsistent with such findings. This offers an explanation, it was submitted, for the rejection by the trial Court of practically every piece of the defence evidence; and the adverse evaluation of practically all defence witnesses.

Again, here, I find it unnecessary to go into detail. Sir Harold Cassel for the Appellants did so; especially when arguing on the ground of misdirection in testing the version of the Appellants and the evidence of their witnesses on the probability test instead of the possibility test.

The complaint of the Appellants in this connection, is that the trial Court tested their version and the evidence called in support of such version, on whether, in their view, it was probable or improbable. While in a criminal case the proper test is whether the version of the defence is at all possible, so as to create a doubt in the mind of the Court regarding the guilt of the defendant. Provided always that the Court has preserved an open mind on the question, until the end, ready to consider whether evidence appearing as improbable, is at all possible. Here, for instance, it was submitted, evidence regarding incidents or events apparently possible, was rejected as a concoction or an afterthought. Examples of this approach to the defence evidence were given in the course of the argument.

The possibility of the presence of finger-prints on other guns, magazines or bullets, among those which passed through the hands of the Appellants (especially Appellants 3 and 4) cannot be excluded. It is not a possibility but a strong probability. This matter does not appear to have been investigated. The presence of finger-prints on such arms found in the Police Stores or under the control of the late ex-Minister, would throw useful light in the case; and could have been very useful to the defence. The trial Court seems to have considered the finger-prints on the *exhibits* without taking account of such a possibility.

The evidence regarding the use of the escape car ZDR.320 (under the control of the second Appellant) for a trip to Famagusta, a few days before the crime, was certainly a possible

story, calling for consideration. The persons who used it for that trip spoke about it from the witness box. Persons who saw it in Famagusta spoke about it; including the policemen who took part in the search; a complaint was made about that search. The whole of this evidence was rejected as "improbable". But it cannot be excluded as impossible.

The same may be said about the evidence of those who saw the car of the 3rd Appellant at Famagusta on the morning of the 8th March; about the evidence of the person who saw the Appellant himself at Famagusta that morning; of those who saw the 4th Appellant at Famagusta at a material time. This evidence could have been partly or entirely rejected as "improbable" but it cannot be said that such incidents could not possibly have taken place.

One can refer to a number of similar examples to demonstrate the difference between what was "probable and what was "possible" in the defence evidence. Reading the judgment of the trial Court, (which undoubtedly goes into great detail) in the light of the able addresses of learned counsel on both sides, I reached the conclusion that the complaints regarding the trial Court's approach to the case for the defence are justified. In my opinion the submission for the Appellants that the trial Court misdirected themselves in reaching their verdict, should succeed. And that in view of the evidence as a whole (especially that of the witnesses who saw the escaping culprits at a close proximity) there is no room for the application of the proviso in section 145 (1) (b) of the Criminal Procedure Law.

I would allow all four appeals; and quash their convictions.

TRIANTAFYLLIDES, J.: In the morning of the 8th of March, 1970, at about 7.05 to 7.10 hours, the President of the Republic, His Beatitude Archbishop Makarios, was taking off from the yard in front of his official residence the Archbishopric in Nicosia—in a helicopter, piloted by Major Z. Papadoyiannis, in order to fly to Macheras Monastery where he was going to officiate at a church service.

Just as the helicopter was gaining height it was fired at several times from a terrace on the roof of a secondary school, the Pancyprian Gymnasium, which is opposite the Archbishopric, across a road.

As a result the helicopter was damaged, its pilot was very seriously wounded, and, with great difficulty, a forced landing was made at an open space in the immediate vicinity.

The four Appellants before us, A. Charitonos, G. Taliadoros, A. Solomontos and A. Yenagritis, were, after a lengthy trial, found guilty, on the 19th November, 1970 (by an Assize Court in Nicosia composed of the President of the District Court of Nicosia and two District Judges of such Court) in respect of a count charging them with conspiracy to kill the President of the Republic (contrary to section 217 of the Criminal Code, Cap. 154) and in respect of two counts charging them with attempt to kill, respectively, the President and the pilot of the helicopter (contrary to section 214(a) of the said Code).

They were all sentenced to concurrent terms of imprisonment in relation to each count, the longest term in the case of each Appellant being fourteen years' imprisonment in respect of the counts for attempt to kill.

It would be useful to refer, at this stage, very briefly, to the *main* evidence against the Appellants and to what they put forward in their defence:-

None of the Appellants was identified by eye-witnesses, who saw four persons running away from the scene of the crime, soon after the helicopter had been fired at; but on ammunition-magazines and ammunition found on the aforementioned terrace there were identified finger-prints of Appellants Charitonos, Solomontos and Yenagritis. According to the evidence of Police Superintendent Chr. Dekratis, an expert witness, with twenty years' experience regarding finger-prints, who was called by the prosecution, all the finger-prints in question were found in such condition and circumstances as to lead him to the conclusion that they were recently caused by the persons who had last used the magazines and ammunition. Also, according to the same witness, on a car which was used by the culprits at some stage of their get-away, and which until quite late on the previous night was in the possession of Appellant Taliadoros and was being used by him for trips in Nicosia in the company of Appellant Charitonos, there were identified finger-prints of Appellant Yenagritis which, in the opinion of the witness, were very recent.

All the aforesaid finger-prints were examined on the 8th March, 1970, within the space of a few hours after the helicopter had been shot down.

Appellants Solomontos and Yeragritis were on the date of the crime policemen stationed at Famagusta. They gave evidence explaining how their finger-prints could have been left on a magazine and ammunition in it (one finger-print only of Solomontos was found on a magazine, on the terrace, which contained rounds of ammunition on only two of which were found clearly identifiable finger-prints of Yenagritis) while handling arms, magazines and ammunition in the course of duty; moreover, Yenagritis, regarding his finger-prints on the get-away car, called evidence to show that a few days before the 8th March, 1970, he had searched, while on duty, the said car.

Appellant Charitonos (two finger-prints of whom were found on an empty magazine on the terrace) stated in evidence that about the end of 1967 he had handled arms and ammunition while serving in the National Guard.

Appellant Taliadoros, very soon after the crime, on the same day, the 8th March, 1970, reported to the police that the get-away car, which had been hired by him and was being used by him for some time past, had been left by him at a parking place just before midnight on the night of the 7th March, 1970, and that when he went to collect it the next morning he found that it had disappeared. He did not give evidence in his own defence but made a statement from the dock.

All the Appellants put forward alibis and called witnesses to substantiate them; the alibis of Charitonos and Taliadoros being interrelated, because they stated that they had been continuously together from the previous evening until about an hour after the crime.

The learned trial Judges rejected the explanations of Appellants Charitonos, Solomontos and Yenagritis about their finger-prints, the story of Appellant Taliadoros about the get-away car as well as the alibis of all four Appellants; and it was found that all the charges against them had been proved beyond any doubt.

All four Appellants appealed against their convictions; but not against the sentences imposed on them.

The Supreme Court in dealing with an appeal against conviction, under sub-section (1) of section 145 of the Criminal

Procedure Law (Cap. 155), may dismiss the appeal, may set aside the conviction and convict an Appellant of any offence of which he might have been convicted by the trial Court on the evidence which was adduced, may order a new trial, or it may—under paragraph (b) of the said sub-section (1)—"allow the appeal and quash the conviction if it thinks that the conviction should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable or that the judgment of the trial Court should be set aside on the ground of a wrong decision on any question of law or on the ground that there was a substantial miscarriage of justice.

Provided that the Supreme Court, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

Sir Harold Cassel, Q.C., a member of the English Bar—who has led in these appeal proceedings the team of learned counsel for Appellants, but who did not appear at the trial—has not argued that the convictions of the Appellants should be set aside as being, having regard to the evidence adduced, unreasonable, but he has brilliantly conceived and very ably presented an argumentation to the effect that such convictions are wrong in law, because due to a misdirection in relation to the burden of proof coupled with a wrong approach to the evidence for the prosecution and the defence (which approach he has described as "compartmentalization" or "fragmentation" of the case) there has occurred a miscarriage of justice; a miscarriage of a substantial nature excluding the course of dismissing the appeal of any one of the Appellants through the application of the proviso to paragraph (b) of section 145(1) of Cap. 155.

Before proceeding to consider the merits of the present case it is, I think, proper and necessary to deal at some length with the application of the principles of law governing the burden and standard of proof in a criminal case. The effect of these principles may be summarized thus: An accused person is presumed innocent until his guilt is proved beyond reasonable doubt, on a consideration of the case as a whole.

Such principles, which are principles of the English common law, have been applicable all along in Cyprus, the common law being still applicable in this respect here.

Also, from 1960 onwards, since Cyprus became an independent State, the said principles have been put into both constitutional and legislative form:

Article 12.4 of our Constitution provides that "Every person charged with an offence shall be presumed innocent until proved guilty according to law"; and Article 6(2) of the European Convention on Human Rights (the provisions of which are applicable in Cyprus, by virtue of Article 169 of the Constitution, ever since the enactment of The European Convention on Rights (Ratification) Law, 1962, Law 39/62,— (see *Chrysanthou* v. *The Police* (1970) 2 C.L.R. 95) provides, as the said Article 12.4, that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

In the case of *Austria* v. *Italy* the European Commission of Human Rights, in dealing with the presumption of innocence (safeguarded, as stated, by Article 6(2) of the Convention) stated the following:- (See the 1963 Yearbook of the European Commission on Human Rights, at p. 782):-

> " Before pronouncing on the complaint that the presumption of innocence was not observed in respect of the accused, the Commission feels called upon to explain its interpretation of Article 6(2) of the Convention.
>
> This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that Court Judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the prosecution, and any doubt is to the benefit of the accused".

It cannot, indeed, be disputed, in my opinion, that Article 12.4 of our Constitution should be construed in the same manner as Article 6(2) of the Convention.

Thus, as already indicated, both by constitutional provision as well as by legislation incorporating into our legal system the corresponding provision of an international Convention, there is being safeguarded for an accused person the benefit of the doubt, as an inevitable implication of the expressly provided for presumption about his being innocent until proved guilty.

As far as the common law aspect of the matter is concerned the principles in question are to be found set out in paragraph 1001 of the 37th ed. of Archbold's Criminal Pleading, Evidence and Practice:-

> "1001. *General rule.* Where the prisoner pleads the general issue, 'not guilty' (see *ante* para. 461), the prosecution is obliged to prove at the trial every fact or circumstance stated in the indictment which is material and necessary to constitute the offence charged. The general rule is that, apart from any provision to the contrary, the burden of proof of guilt lies upon the prosecution, and it is not for the defence to prove innocence. See the observations of Sankey, L.C. in *Woolmington* v. *D.P.P.* [1935] A.C. at pp. 481–482; 25 Cr. App. R. at pp. 95–96.
>
> The appropriate direction now is that the jury must feel sure of the guilt of the defendant before they convict: *R.* v. *Bradbury* [1969] 113 S.J. 70, C.A. In that case the Court of Appeal referred to earlier directions relating to *prima facie* evidence of guilt which called for an explanation from the defendant, and the position which arose when the defendant gave no explanation or, alternatively, gave an explanation which raised in the mind of the jury a reasonable doubt as to his guilt, and stated that though such directions appeared to have been approved in *R.* v. *Stoddart*, 2 Cr. App. R. 217, at pp. 242–243; *R.* v. *Garth*, 33 Cr. App. R. 100; *R.* v. *Cohen* [1951] 1 K.B. 505; 34 Cr. App. R. 239, were likely to cause confusion in the mind of the jury and ought not to be followed".

It may be observed, by way of parenthesis, that practically the same approach on this point was, no doubt due to the influence of the English common law principles, adopted by the Supreme Court of the United States of America in *Lilienthal* v. *United States* (97 U.S. 237; 24 Law. Ed. 901).

A review of relevant case-law in England shows that though the common law principles about the burden of proof in a criminal case have remained unchanged all along, judicial views have tended to vary, from time to time, regarding the exact form of words in which such principles are to be expressed, especially when explained by a Judge to a jury when directing

them on the point in his summing-up; it has, however, been repeatedly stressed, in this respect, that it is the effect of a summing-up as a whole that matters and not the particular formula of words used by the Judge.

I shall refer now to some of the said case-law on these matters:-

In *Woolmington* v. *D.P.P.*, 25 Cr. App. R. 72, Lord Sankey, L.C. said (at p. 95):-

> "..... at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution, so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; heis not bound to satisfy the jury of his innocence.
>
> This is the real result of the perplexing case of *Schama and Abramovitch* [1914] 11 Cr. App. R. 45, which lays down the same proposition, although perhaps in somewhat involved language..... Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner..... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".

In the earlier case of *Schama* and *Abramovitch* (*supra*) Lord Reading, C.J. had said (at p. 49):-

> " Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the

possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution".

Later on in *R.* v. *Garth*, 33 Cr. App. R. 100, Lord Goddard, C.J. referred to the *Schama* and *Abramovitch* case (*supra*) in the following terms (at p. 101):-

"The only point in the case is that the learned Deputy-Recorder in summing-up stated the law far too favourably to the prisoner. He was dealing with *Abramovitch's* case [1914] 11 Cr. App. R. 45, which seems so often to cause some sort of difficulty. The learned Recorder stated the law in this way: 'Anyway, the prosecution have to prove guilty knowledge, and in the absence of any explanation by the accused man you are entitled to convict him of receiving stolen goods knowing them to have been stolen, if he fails to give an explanation which you can possibly believe. If, on the other hand, he gives an explanation, and that is one which, although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted'.

That was stating the law far too favourably because, of course, any explanation may possibly be true. That is not in the least what *Abramovitch*'s case (*supra*) lays down. ..... It is not a question whether the prisoner gives an account which may possibly be true, because as I have said, any account may possibly be true. A much more accurate direction to the jury is: 'If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction' ".

In *R.* v. *Kritz*, 33 Cr. App. R. 169, Lord Goddard, C.J. said at (pp. 176–177):-

"The only other point which has been seriously argued is that because the learned Common Serjeant told the jury that they must be reasonably satisfied, and did not use the words 'satisfied beyond reasonable doubt', he was not stating sufficiently the onus of proof. It would be a great misfortune, in criminal cases especially, if the accuracy or inaccuracy of a summing-up were to depend upon whether or not the Judge or the Chairman had used a particular formula of words. It is not the particular formula of words that matters; it is the effect of the summing-up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the learned Judge uses one form of language or whether he uses another is neither here not there".

In *R.* v. *Summers*, 36 Cr. App. R. 14, Lord Goddard, C.J., said (at p. 15):-

"I have never yet heard a Court give a satisfactory definition of what is a reasonable doubt, and it would be very much better if summings-up did not use that expression, for it seems to me that, whenever a Court attempts to explain what is meant by a reasonable doubt, it gives a definition or tries to explain the term in a way which is often likely to cause more confusion than clarity. It is far better, instead of using the words 'reasonable doubt' and then trying to explain what is a reasonable doubt, to direct a jury; 'You must not convict unless you are satisfied by the evidence that the offence has been committed'. The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt. If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of Guilty, that is much better than using the expression 'reasonable doubt' and I hope in future that that will be done. I never use the expression when summing-up. I always tell a jury that, before they convict, they must feel sure and must be satisfied that the prosecution have established the guilt of the prisoner".

In *R.* v. *Murtagh and Kennedy*, 39 Cr. App. R. 72, Hilbery, J. said (at p. 83):-

> " Having regard to the evidence, it was pre-eminently a case where it was essential for the Judge to make clear to the jury three possible positions in which the jury might find themselves, bearing in mind throughout that it was not for the accused to establish their innocence: That is to say (1) If they accepted the explanation of the accused, they must acquit. (2) Short of accepting that explanation, if it left them in doubt, they must acquit. (3) On consideration of the whole of the evidence they must be satisfied of the guilt of the accused of one or other of the crimes alleged against them".

In *R.* v. *Blackburn*, 39 Cr. App. R. 84, Gorman, J. said (at p. 85):-

> " It is for the Judge to deal properly with the question of the burden of proof. One matter is quite clear. It cannot be said, and this Court does not intend to say, that any particular form of words is sacrosanct or absolutely necessary. The Court is concerned with the question whether, whatever form of words was used, it was made quite clear to the jury that it was for the prosecution to establish the guilt of the prisoner and, if the guilt of the prisoner was not established, the prisoner must, as of right and not by way of favour, be found not guilty. This Court does not subscribe to the view that a particular form of words of necessity means that the summing-up was right or that the absence of a particular form of words necessarily means that it was wrong".

In *R.* v. *Hepworth and Fearnley*, 39 Cr. App. R. 152, Lord Goddard, C.J. said (at pp. 154–155):-

> " Another complaint that is made in this case is that the Recorder used only the word 'satisfied'. It may be, especially in view of the number of cases recently in which this question has arisen, that I misled Courts when I said in *Summers* (36 Cr. App. R. 14, at p. 15; [1952] W.N. 185)—and I still adhere to it—that I think it is very unfortunate to talk to juries about reasonable doubt, because the explanations given of what is and what is not a reasonable doubt are so very often extraordinarily difficult to follow and it is very difficult to tell a jury what

is a reasonable doubt..... I, therefore, suggested in that case that it would be better to use some other expression, by which I meant that it should be conveyed to the jury that they should convict only if they felt sure of the guilt of the accused..... therefore, one would be on safe ground if one said in a criminal case to a jury: 'You must be satisfied beyond reasonable doubt' and one could also say: 'You must be completely satisfied' or better still: 'You must feel sure of the prisoner's guilt".

In *R.* v. *Trigg*, 47 Cr. App. R. 94, Ashworth, J. said (at p. 99), regarding the need to consider a summing-up as a whole:-

"..... but it would be quite wrong, in the view of this Court, to extract that one sentence away from its context, and equally wrong to ignore the fact that at the beginning of his summing-up, and in this passage and again at the end of the summing-up the learned Judge was at pains rightly to emphasise to the jury that it was for the Crown to prove its case. The argument of Mr. Charles,"—counsel for Appellant—"with all respect to him is a classic instance of taking out a single sentence from a perfectly fair summing-up, and treating it as if it stood alone".

In *R.* v. *Gill*, 47 Cr. App. R. 166, Edmund Davies, J. said (at pp. 172-174):-

" We now turn to consider the summing-up in the present case. Two passages, in particular, are said wrongly to have placed the burden of establishing the alleged duress upon the shoulders of the accused..... Taking these two passages in isolation, it has been submitted for the Appellant (a) that the Deputy-Chairman was there wrongly placing the ultimate (or 'persuasive') burden of proof upon the accused, and (b) that, assuming that a burden of any kind rested on the accused, the Deputy-Chairman erred in failing to indicate that such burden was of the less onerous kind indicated in such cases as *Carr-Briant* [1943] 29 Cr. App. R. 76; [1943] K.B. 607.

The Court has anxiously considered these submissions. In the light of them, had the two passages complained of stood alone, we should have felt compelled to quash the conviction on the larceny count, for the reasons already indicated in this judgment. But acceptance of the

submissions would involve taking these two passages out of their context and failing to consider the summing-up as a whole..... Taking the summing-up as a whole, the conclusion this Court has come to is that the verdict ought not to be disturbed. This appeal against the conviction on both counts must accordingly be dismissed".

I would refer next to *R.* v. *Holland*: *R.* v. *Lazarus* (unreported); this summary is from [1968] 118 New Law Journal at p. 1004:

"In *R.* v. *Holland* and *R.* v. *Lazarus*, the Applicants appealed against their convictions of assault occasioning actual bodily harm for which each had been sentenced to three months' detention. Their main ground of appeal was that the standard of proof was put to the jury no higher than that the jury must be 'satisfied'.

It was held (C.A.: Edmund Davies, L.J., Thompson and Waller, JJ.: August 20, 1968) refusing the applications although the mere use of the word 'satisfied' in the summing-up on the standard of proof required to be attained by the prosecution would result in a real risk of an application being launched in the Court of Appeal on the ground of misdirection, the volume of work of the Court of Appeal would, it was believed, be greatly decreased were the word 'satisfied' never used and the word 'sure' always employed. Nevertheless, in the present case, looking at the summing-up as a whole, the Court was satisfied that the jury were left in no doubt that, before they could convict, they had to be so satisfied as to be sure of the guilt of the Applicants".

In *Walters* v. *The Queen* [1969] 2 A.C. 26, Lord Diplock said (at pp. 29–31) in giving the reasons for a decision of the Privy Council:–

"At the trial of the petitioner the Judge thought it desirable to explain to the jury what was meant by the time-honoured phrase 'a reasonable doubt'. In the course of doing so he said:

'a reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other'.

It has for many years been a common practice of Judges in England and other common law jurisdictions when directing the jury on the onus of proof to expand the bare expression 'reasonable doubt' by using this or a similar analogy. On behalf of the petitioner, however, it was contended that a direction in terms such as these is erroneous because it invites the jury to apply a 'subjective' test instead of an 'objective' one.....

In their Lordships' view the correctness or otherwise of a direction to a jury on the onus of proof cannot depend upon such fine semantic distinctions .....

The expressions 'objective test' and 'subjective test' are currently in popular use among lawyers, sometimes in contexts in which they are helpful in indicating a meaningful contrast. But in the context of 'doubt', which cannot be other than personal to the doubter, it is meaningless to talk of doubt as 'objective' and otiose to describe it as 'subjective'.....

..... the use of such analogies as that used by Small, J. in the present case, whether in the words in which he expressed it or in those used in any of the other cases to which reference has been made, may be helpful and is in their Lordships' view unexceptionable. Their Lordships would deprecate any attempt to lay down some precise formula or to draw fine distinctions between one set of words and another. It is the effect of the summing-up as a whole that matters".

In *R.* v. *Bradbury*, 53 Cr. App. R. 217, Edmund Davies, L.J. said (at pp. 219–220):–

" What the learned Deputy Chairman did here, it is quite clear, was to quote from the second sub-paragraph of paragraph 1001 of the 36th edition of Archbold. It is a very useful passage for the legal practitioner and the Judge to have in mind. It is an amalgam of several citations from the decision of Lord Alverstone, C.J. in *Stoddart* [1909] 2 Cr. App. R. 217. But we venture to think that those portions of it which in particular refer to 'a presumption being raised upon which the jury may be justified in returning a verdict of guilty' are not such as one should contemplate citing to a jury. They are not calculated to help them; indeed they have an un-

fortunate tendency to confuse, rather than to elucidate, and to lead a jury to the conclusion that if an accused man gives an explanation which they reject, the step towards convicting him is short and well-nigh inevitable.

The citation of this somewhat involved passage could nevertheless have been cured had there been, either before or after it, as we have already said, a bald direction in such terms as 'You have to be sure in this case before you can convict' or 'You have to be satisfied beyond all reasonable doubt before you can convict' ".

A perusal of directions to the jury regarding the burden and standard of proof, as they are recorded in the full reports of a number of criminal trials (in the Notable British Trials series) which took place after the case of *Woolmington* (*supra*) had been decided, such as *R.* v. *Rattenbury and Stoner*, *R.* v. *Nodder*, *R.* v. *Barnes and Others*, *R.* v. *Carraher*, *R.* v. *Ley and Smith*, *R.* v. *Camb* and *R.* v. *Craig and Bentley* shows the diversity of expressions used for the purpose. I need not make this rather long judgment even lengthier by quoting the said directions (none of which was found on appeal to be wrong). It suffices to say that such perusal indicates quite clearly that there are bound inevitably to be variations in wording, but not in substance, when different Judges formulate their directions regarding the principles applicable to the matter of the burden and standard of proof in a criminal case.

I shall refer, next, to some Cyprus case-law:-

In *R.* v. *Mentesh*, 14 C.L.R. 232, Thomas, J. said (at pp. 244-245):-

" Can the burden upon the prosecution be said to have been discharged by evidence equally consistent with the acts from which accused's guilt was inferred having been done by him on a lawful occasion; and equally consistent with their having been done by other persons? In our opinion the answer is emphatically: No. Where the evidence does not exclude the possibility of the offence having been committed by other persons it raises a suspicion only, strong or weak, as the case may be, which fails to satisfy the principle that in a criminal case the guilt of the accused must be proved beyond any reasonable doubt. It was laid down in *R.* v. *Hodge* (2 Lew. C.C. 227) that 'where a criminal charge depends on

circumstantial evidence, it ought not only to be consistent with the prisoner's guilt but inconsistent with any other rational conclusion. The principle embodied in this decision is accepted as sound law by the Editors of the English and Empire Digest, Halsbury's Laws of England, and by the following authorities on the law of evidence, Taylor, Wills, Phipson, Best and Roscoe. Two Canadian cases are cited in the English and Empire Digest, the first *R.* v. *Turnbull*, where it was laid down as follows:- 'When circumstantial evidence is relied upon to prove the guilt of any person accused of a criminal offence the circumstances and facts proved to the satisfaction of a jury must be not only such as are consistent with the guilt of that accused person, but must be such as are inconsistent with any other reasonable conclusion except the guilt of that accused person' (14 E. & E. Dig. p. 358). The second case is *R.* v. *Tymko* ((1924) 42 Can. Crim. Cases 147) which decides that: 'It is not admissible to convict a person on circumstantial evidence if such evidence can be interpreted to give any other explanation than the accused person's guilt'. (E. and E. Dig., Supplementary No. 9, referring to Vol. 14, p. 358). Taylor says in this connection: 'But, admitting the facts sworn to are satisfactorily proved, a further, and a highly difficult duty still remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. Moral certainty and the absence of reasonable doubt are in truth one and the same thing'. Vol. 1, p. 74. There can be no doubt that this principle of law is accepted and applied by the highest Courts in England. In *R.* v. *Wallace* (23 Cr. App. R. 32), the headnote is 'The Court will quash a conviction founded on mere suspicion. And in *R.* v. *Bookbinder*, reported at p. 59 of the same volume the headnote runs: 'There ought not to be a conviction when the evidence is equally consistent with innocence and guilt' ".

In *Police* v. *Chrysanthou and Others*, 15 C.L.R. 50, Stronge, C.J. said (at p. 55):-

" It has been authoritatively decided in several cases that it is an essential principle of English Criminal Law"— such Law being applicable, as already stated, in Cyprus— "that the burden of establishing a prisoner's guilt rests throughout the trial upon the prosecution but that while the prosecution must prove the prisoner's guilt it is sufficient for him to raise a doubt as to his guilt: He is not bound to establish his innocence. *R.* v. *Schama*, 24 Cox C.C. per Lord Reading, C.J., at p. 594. *Laurence* v. *The King* [1933] A.C. at p. 707. *Woolmington* v. *Director of Public Prosecutions* [1935] 104 L.J.K.B. at p. 439".

In *Kafalos* v. *The Queen*, 19 C.L.R. 121, Hallinan, C.J. said (at p. 126):-

" The position then at the close of the defence was that the accused had failed to prove an alibi and had been unable to give any reason which the Court could accept as to why he was at Saittas on the day of the murder. But the failure of a defence is only fatal to an accused person if the case for the prosecution which remains unshaken by the defence is strong enough in itself to convict the accused".

In *R.* v. *Georghiades* (*No.* 2), 22 C.L.R. 128, the need for proof of guilt beyond reasonable doubt, as expounded in the *Mentesh* case (*supra*), was relied and acted upon; see in this respect the judgment of Zekia, J. (at pp. 132-135). In the course of such judgment, and while dealing with the question of the burden of proof, Zekia, J. said (at p. 133):-

" When the presence of intent in an attempt to commit a particular offence is sought to be established the nature of the evidence must be such as to rule out all other inferences inconsistent with the presence of such intent. It is not enough in ascertaining whether a particular intent is proved or not to say that this was a reasonable inference to be drawn from the facts but one must go further and be able to say that that was the only reasonable inference which could be drawn from the facts as found; if there be another reasonable view or probability consistent with innocence capable to be taken on the same facts then the onus of proving beyond reasonable doubt the existence of the particular intent has not been discharged".

In *Volettos* v. *The Republic*, 1961 C.L.R. 169, Vassiliades, J. said at (p. 180):-

> "..... the law presumes the accused to be innocent until his guilt be established by the prosecution to the satisfaction of the competent Court, beyond all reasonable doubt....."

In *Pefkos* v. *The Republic*, 1961 C.L.R. 340, Zekia, J. adhered (at p. 352) to his dictum, already quoted, in the *Georghiades* (*No.* 2) case (*supra*) and Josephides, J. adopted (at p. 368) the following dictum of Lord Goddard, C.J. in *R.* v. *Steane*, [1947] K.B. 997, at p. 1004:-

> " The important thing to notice in this respect is that where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted".

In *Papaprokopiou* v. *The District Officer Nicosia and Kyrenia*, 1964 C.L.R. 354, Josephides, J. said (at p. 358):-

> " The general rule is that, apart from any statutory provision to the contrary, the burden of proof of guilt beyond reasonable doubt lies upon the prosecution, and it is not for the defence to prove innocence".

In Fostieri v. *The Republic* (1969) 2 C.L.R. 105, Vassiliades, P. said (at p. 112):-

> " 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".

The stage has now been reached at which, against the background of the already referred to relevant case-law, there should be considered more closely the already mentioned arguments which counsel for Appellants has advanced against the convictions of his clients.

The following is the part of the judgment of the trial Court from which it has to be gathered, according to the submission of counsel for Appellants, that there exists a misdirection in law regarding the question of the burden of proof:-

> " Before we deal with the case for the defence, we consider it pertinent to dwell briefly with the principles of law relating to the burden of proof in criminal cases which we shall have all along in mind in reaching our conclusions. They are summed up in Archbold, 36th Edition, paragraph 1001 as follows:-
>
> > 'The general rule is that apart from any provision to the contrary (which does not exist in the present case) the burden of proof lies upon the prosecution and it is not for the defence to prove innocence. *Woolmington* v. *D.P.P.* 25 Cr. App. R. 95-96.
> >
> > Where the prosecution gives *prima facie* evidence from which the guilt of the prisoner might be presumed, and which, therefore, calls for an explanation by the prisoner and no answer or explanation is given a presumption is raised upon which the jury may be justified in returning a verdict of guilt. But if an explanation is given by or on behalf of the prisoner which raised in the mind of the jury reasonable doubt as to his guilt, he is entitled to be acquitted..... as the prosecution has failed to satisfy the onus of proof which lies upon them'.
>
> As to the explanation of the accused, the cases of *Schama* and *Abramovitch* and the case of *Mentesh* v. *The Police,* 14 C.L.R., lay down the principle that the explanation of the accused need not be true, it is enough if it raises a probability.
>
> As to the alibi, though customary referred to as the defence of alibi, it is a long standing principle of law that it is upon the prosecution to negative the alibi and because an alibi has been put forward by the defence, no burden

is cast on the defence to establish it. The burden lies all along on the prosecution to prove the guilt of the accused. *Rex* v. *Allan George Wood*, 52 Cr. App. R. page 74. We need not repeat here the principles relating to the circumstantial evidence as we already quoted passages in our ruling on the submission of the defence not to call upon the accused.

With these principles in mind, we turn now to the case for the defence".

The passage quoted by the trial Court from the 36th ed. of Archbold's Criminal Pleading, Evidence and Practice is the one which in the *Bradbury* case (*supra*) was described as not appropriate for use in directing a jury; but it was, on the other hand, expressly stated in the *Bradbury* case that it is a very useful passage for a Judge to have in mind; and the Appellants were tried by three Judges, as in Cyprus we do not have any provision at all about trial by jury.

Counsel for Appellants has observed that from the quotation of the said passage there was omitted the following phrase: "Because if upon the whole of the evidence in the case the jury are left in a real state of doubt"; and he has submitted that this is a pointer indicating how it came about that the trial Judges misdirected themselves as to the burden of proof; in other words, that the omission to quote this phrase shows that they failed to give due weight to a vital aspect of the matter.

I cannot agree that any decisive importance should be attributed to such omission. The phrase in question must, obviously, have been read by the learned trial Judges, when they studied the passage concerned in Archbold, and its significance could, certainly, not have escaped their attention; so, though they have omitted it from the text of the passage quoted in their judgment they cannot be regarded as having lost sight of it. In view of the fact that counsel for Appellants has—quite rightly—made it categorically plain that he did not have the least doubt that the trial Judges have acted in this case in all good faith and he has, also, made it absolutely clear that he did not wish to be misunderstood as suggesting that they were in any way prejudiced against the Appellants, I think that the only rational explanation about the omission to quote the phrase concerned is that such omission occurred

due to an effort to abbreviate the quotation of that passage from Archbold by omitting what appeared to be an obvious corollary of the part of such passage which had been already quoted.

The main contention of counsel for Appellants on the issue of misdirection as to the burden of proof has been based on the fact that the trial Court, in the part of its judgment which has aready been set out hereinbefore, stated that "the explanation of the accused need not be true, it is enough if it raises a probability" and that it was with this rule in mind that the case for the defence was approached by the trial Court.

He submitted that, in effect, the trial Court applied to the case for the defence—including the evidence for the defence about the finger-prints, the car and the alibis of the Appellants—a "probability test" which is incompatible with the correct principles of law governing the burden of proof in a criminal case; he argued that such a test is not at all consistent with the cardinal rule that guilt has to be established beyond reasonable doubt and he contended that the proper test to be applied to the case for the defence was the "reasonable possibility test".

In order to show that the trial Judges did actually misdirect themselves counsel for Appellants referred to various parts of their judgment, where, while dealing with what had been stated, regarding various points, by the Appellants or their witnesses, the trial Court used expressions such as "not natural or even probable", "untrue and improbable", "has not been satisfactorily explained", "cannot be accepted either as true or probable".

Mr. K. Talarides, Senior Counsel for the Republic, who appeared for the Respondent and who has impressed me very much indeed by the diligent and learned manner in which he has performed his duty in this case, has argued that if the judgment appealed from is looked upon as a whole it is clear that the trial Judges did not misdirect themselves and that they convicted all four Appellants after having been duly satisfied about their guilt, beyond reasonable doubt, on the totality of the evidence presented at the trial. He has submitted, further, that it cannot be said that there exists an established rule of law requiring the application to the case for the defence, in a criminal trial, of the "reasonable possibility test".

It cannot, in my view, be disputed that there does exist a difference between what is probable and what is reasonably possible and that such difference is, indeed, very material when it is to be decided whether or not the guilt of an accused person has been established beyond reasonable doubt.

This is well illustrated by the following passage from the judgment of Stavrinides, J. in *Aristidou* v. *The Republic* (1967) 2 C.L.R. 43 (at p. 103):-

> " 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".

In the *Aristidou* case (*supra*) what had to be decided was whether the Appellant had been rightly found guilty of premeditated murder and the point of time at which he had formed the intent to kill was, therefore, of vital importance.

In the *Trigg* case (*supra*), in which the appeal was allowed due to the failure of the Judge in his summing-up to warn the jury regarding the question of corroboration of the identification evidence in a sexual offence case, the Judge clearly adopted the reasonable possibility test when he told the jury, *inter alia*, that -

> ..... if having looked at him"—the accused—"and heard him, and bearing the other evidence in mind, you were to say to yourselves, 'We really do not know, he may well be speaking the truth,' or 'it may well be reasonably possible that he is speaking the truth,' he is still not guilty, because that means you are in doubt....." (see p. 98 of the report of the case in 47 Cr. App. R.).

In that case Ashworth, J. in delivering the judgment of the Court of Criminal Appeal said (at p. 98):-

> " If this Court may say so, apart from the topic of corroboration which will be dealt with hereafter, this was a summing-up against which no possible criticism could be directed".

Furthermore, the danger that the jury had adopted a balance of probabilities approach led the Court of Criminal Appeal (with Ashworth, J. being, again, on the Bench) to set aside the conviction in *R.* v. *Biffen*; the following summary of this case—which appears to be unreported—is to be found in [1966] Crim. L.R. p. 111:-

> " Court of Criminal Appeal: Lord Parker, C.J., Ashworth and Widgery, JJ.: The Times, December 1, 1965.
>
> B. was convicted of wounding X. with intent. The prosecution case was that B. produced a knife and stabbed X. B. denied using the knife and his case was that X. produced it and was somehow injured by it in the course of the struggle. After retiring the jury sent a note to the Judge asking whether 'if it were at all likely on a balance of probabilities' that X. originally had possession of the knife and that B. came into possession of it during the struggle in such circumstances that he had the opportunity to consider whether or not to use it and then did use it, was B. guilty of wounding with intent. The Judge said that the short answer was yes and then explained the position.
>
> Held, as the jury's question showed that for some purpose they had the balance of probabilities in mind, the Judge should have redirected them on the burden of proof. The conviction would be quashed but their Lordships would exercise their powers as justices of the peace and bind over B. in the sum of £25 to keep the peace for twelve months .

In *Bullard* v. *The Queen*, 42 Cr. App. R. 1, Lord Tucker, giving the reasons of the Privy Council in relation to allowing an appeal from the Court of Criminal Appeal of Trinidad and Tobago, said (at p. 7):-

" In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible".

This dictum of Lord Tucker in the *Bullard* case (*supra*) was referred to with approval by the Court of Criminal Appeal of New South Wales, Australia, in *R.* v. *McKenna* (1964) 81 W.N. (Pt. 1) (N.S.W.) 330, at p. 333.

The relevant part of the trial Judge's direction to the jury in the *McKenna* case appears from the judgment of McClemens, J. who said (at pp. 332–333):–

> " There is another matter to which exception was taken in the summing-up and that is the passage: 'If the evidence is so strong against an accused man as to allow only a remote possibility in his favour which, when considering the matter in the jury room, you can dismiss with this sentence 'Of course it is possible but not in the least probable' then the case is proved beyond reasonable doubt'. So far as his Honour is concerned he was there no doubt founding himself on a dictum by Denning J., as he then was, in the case of *Miller* v. *Ministry of Pensions* [1947] 2 All E.R. 372, at p. 373. It is not necessary for me to read the passage nor to read the comments on the passage which appear in Glanville Williams, Criminal Law, 2nd ed., p. 873, par. 286. But it does appear that this passage is not consistent with what the Privy Council said in *Bullard* v. *The Queen* (1958) 42 Cr. App. R. 1, at p. 7, where, speaking for the board, Lord Tucker said: 'Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible'."

The *Miller* case, which is described by McClemens, J., in the aforequoted extract from his judgment, as being inconsistent with the Privy Council's decision in the *Bullard* case, has been cited to us, in the present case by counsel for the Respondent

in support of his argument against the notion of the reasonable possibility test.

I think that the correct position is very well stated in the judgment of Macfarlan, J. in the *McKenna* case (*supra*), at p. 334):-

> " I also think that the learned chairman was in error in this case in the direction that he gave, ' Of course if it is possible but not in the least probable, then the case is proved beyond reasonable doubt, but nothing short of that will suffice'. This sentence which I quoted from the summing-up was put by the chairman to the jury as a question which they should ask themselves when having reviewed the evidence they should then be faced with the decision as to whether he was guilty or not. I realize, of course, the word 'possible' follows on references by the learned chairman to 'fanciful possibilities' and to 'a remote possibility' appearing in an earlier sentence but I think the whole matter to the minds of a jury listening to the learned chairman would be crystallized with this sentence which he put, ' You disregard possibilities you consider the probabilities'. *I do not think myself that the burden of proof is concerned with distinctions between possibilities and probabilities. I myself think that a jury may still have a reasonable doubt although that upon which they found their conclusion is only a reasonable possibility of innocene.*
>
> *If they think there is that reasonable possibility that it is one which arises from the evidence or the absence of evidence then I think it is one which to the jury would raise a reasonable doubt as to the guilt of the accused*".

I have underlined the last lines in the above quotation because I do think that they deserve to be given quite some emphasis.

A reasonable possibility being, thus, sufficient to raise a reasonable doubt as to the guilt of an accused person, there has, now, to be decided the issue as to whether or not, in the present case, the statement by the trial Judges, in their judgment, that "the explanation of the accused need not be true, it is enough if it raises a probability", and the use of expressions relevant to the notion of probability in various parts of such judgment which deal with the case of the defence,

do establish a misdirection of law as regards the burden of proof:

In deciding this issue it has to be borne in mind that the manner of approach by an appellate Court to the question as to whether or not there exists a misdirection regarding the burden of proof in a judgment delivered in a criminal case tried without a jury cannot be exactly the same, due to the different nature of the respective proceedings, as the manner of approach to the question as to whether or not there exists such a misdirection in a criminal case tried by a Judge sitting with a jury.

Though, of course, both a judgment delivered after a trial without a jury and a summing-up to a jury have to be examined as a whole and no fine distinctions should be made between one set of words used and another, a summing-up is to be scrutinized more strictly than a judgment regarding the matter of the direction as to the burden of proof; this is so because in the judgment there is to be found both such direction as well as its actual application by the trial Court, which can be ascertained through perusing the reasoning in support of the verdict of the Court (and in Cyprus such reasoning is essential both by virtue of Article 30.2 of the Constitution and section 113(1) of Cap. 155). In the case of a summing-up, however, there should be left no doubt that it was such as to convey to the jury the proper direction in a way excluding any misunderstanding of it on their part, because the verdict of a jury is not reasoned and, thus, there is no means of finding out how the direction as to the burden of proof affected their deliberations. I am, therefore, of the view that expressions regarding the burden of proof in a judgment may, in a proper case, be construed more liberally and with less anxiety than corresponding expressions in a summing-up to a jury.

The cautious approach of an appellate tribunal to the matter of the burden of proof where a criminal case has been tried with a jury is illustrated not only by cases already referred to earlier, such as the *Biffen* case (*supra*), but also by *R.* v. *Oliva*, 46 Cr. App. R. 241, in which Lord Parker, C.J. said at (p. 243):–

> "..... the learned Judge in passage after passage of the summing-up said that they must be sure that the prisoner was guilty, and right at the end of his summing-

up he said: 'You have got to be sure that the defendant is guilty before you can find him guilty,' and again, 'You must as I say acquit this man unless you are sure that he is guilty.' On the other hand, in no passage in the summing-up did the learned Judge ever use any words to show that it was for the prosecution to prove their case, or words to the effect that the burden of proof was on the prosecution..... this Court feels that it is a cardinal principle of our law that the burden of proof is on the prosecution; that it has become almost a rule of law that the jury in every case should be told that that is the law; and that nothing we say should be thought in any way to whittle down that principle..... the Court feels that the principle in issue is so important that it has no option but to quash the conviction".

I venture to say that in the *Oliva* case (*supra*) the conviction might not have been quashed had it resulted after a trial by a Judge, or Judges, without a jury. In *Demetriou* v. *The Republic*, 1961 C.L.R. 309, in relation to the matter of corroboration of an accomplice's evidence—which is a matter directly related to the proof of guilt beyond reasonable doubt—O'Briain, P. said (at p. 312):-

" The law and practice in England with respect to such matters have evolved down the years in Courts where the verdict is given by Juries composed of laymen not versed in the law. There, the Court of Criminal Appeal has to be satisfied that the Jury were properly instructed as to the law applicable in each particular case, a matter which is to be gathered from the terms of the Judge's charge or directions appearing upon the record. In applying this part of English Criminal Law to Cyprus, where the Court delivering the verdict consists of one or more professional lawyers recognition must be given to the difference of circumstances. In my opinion, this Court, in such cases, should impute to the trial Court a full and accurate knowledge of the law, unless the contrary appears upon record. Nevertheless, this Court must, in all cases without exception, be satisfied that the trial Court adverted to the law applicable and applied its knowledge in the course of the trial and, in particular, to its judgment and verdict. The imperfections of the human memory are many and diverse and an Appellate Court should not assume that in every case the law has been recollected

and applied even by trained lawyers unless the record affirmatively shows this to be the case".

That trial Judges, deciding a case without a jury, are to be taken to have had in mind the proper principles regarding the burden of proof, unless the contrary appears from the record, was repeated in *Kalli* v. *The Republic*, 1961 C.L.R. 440, by O'Briain, P. who said (at p. 444):-

> " Mr. Clerides"—cousel for Appellant—"argued that the judgment of the Court shows that the learned Judges tried the case as they would a civil case and gave their verdict upon the preponderance of probabilities. We have carefully read, more than once, the entire judgment and fail to find any justification for this grave and far reaching criticism of the conduct of the trial Judges. It has already been laid down by this Court, in a recent case, that this Court will impute to the Judges a full and accurate knowledge of the law, unless the contrary appears upon the record. In this case three experienced members of the Judiciary, though they had differed on a point of law during the course of the trial were unanimous in convicting and used these words in the second last paragraph of their judgment -
>
> ' having carefully and anxiously considered every aspect of this grave case, we are satisfied that the accused arranged.....'.
>
> We reject entirely the contention of Mr. Clerides that because they did not add after the words 'satisfied' the phrase 'beyond any reasonable doubt' this shows that they fell into the fundamental error of trying a charge of premeditated murder, carrying with it the penalty of death, on the same footing as an action arising out of a street collision or for a shop goods debt".

Of course, as is to be derived from what was said by O'Briain P. in the *Demetriou* case (*supra*), Judges deciding criminal cases without a jury are not to be credited with infallibility; and in a proper case a decision of theirs will be set aside if it appears that in reaching the verdict of guilty the correct principles regarding the burden of proof in a criminal case were not applied. Thus, in *Gan Poh Chye* v. *Public Prosecutor* (1968) 1 M.L.J. 288, in allowing an appeal in Singapore, Winslow, J. said (at pp. 288–289):-

" The first of the two grounds is directed to a misdirection in law as to the quantum of proof required before an accused person can be convicted. The magistrate, in his grounds of decision, was of the opinion that the story related by the accused was unlikely to be true.....

The learned deputy public prosecutor conceded, with regard to the first ground about the finding that the accused's story was unlikely to be true, that the magistrate should have gone further into the matter by deciding whether this story raised a reasonable doubt in his mind as to the guilt of the Appellant on the charge preferred against him.

I am not at all satisfied that he applied his mind correctly to the measure or standard of proof required to prove a criminal charge. The language in which he has couched his decision is reminiscent of the standard applied in civil cases. Even in dealing with the evidence of the principal prosecution witness, a police officer who made the original arrest, he does not make a positive finding that he believed his version as against the Appellant's accusation that he had been assaulted by that officer. One of his reasons for finding that the Appellant's story is unlikely to be true is that 'it is quite unlikely that a police officer should assault anyone without any apparent reason'. A criminal case should not be approached on the basis of which version is more likely to be true or untrue but on whether the prosecution has satisfied the Court on the case as a whole as to the Appellant's guilt beyond reasonable doubt".

In the present case having anxiously considered the judgment of the trial Court as a whole I have reached the conclusion that the already quoted statement, in the said judgment, that "the explanation of the accused need not be true, it is enough if it raises a probability", as well as other words or expressions conveying the notion of probability, elsewhere in such judgment, do not establish, when properly viewed in their context, that the trial Judges misdirected themselves as to the burden, or the standard, of proof. My main reasons for this conclusion are, *inter alia*, the following:-

It is clear, from what is set out just before the statement in the judgment of the trial Court about a probability being

enough, that such Court had fully in mind the basic principles regarding the burden of proof, as expounded in the *Woolmington* case (*supra*), to which reference was made in the Court's judgment.

The said statement about a probability being enough is in fact a sentence following after a reference to the cases of *Schama* and *Abramovitch* (*supra*) and *Mentesh* (*supra*)—which are both cases in which the Judges who decided them expressed themselves regarding the burden of proof in terms which are extremely in favour of accused persons—and such sentence is expressly stated by the trial Court to be the principle derived from the said two cases.

Immediately after the aforementioned statement there follows the following paragraph: "As to the alibi, though customary referred to as the defence of alibi, it is a long standing principle of law that it is upon the prosecution to negative the alibi and because an alibi has been put forward by the defence, no burden is cast on the defence to establish it. The burden lies all along on the prosecution to prove the guilt of the accused. *Rex* v. *Allan George Wood*, 52 Cr. App. R. page 74". In this connection a relevant passage from the judgment of Lord Parker C.J. in the *Wood* case (*supra*, at pp. 78–79) shows that the trial Court took a view of the law regarding the burden of proof in relation to the defence of alibi which not only was the proper one but which, one might say, was perhaps expressed in rather more favourable terms than in the *Wood* case:–

Lord Parker said:–

> " Apart from that, three main points were taken, and the first and the one which has been pressed upon this Court by Mr. Cowley"—counsel for Appellant—"concerns the manner in which the learned Judge dealt with the alibis. It is said, as I understand it, in the first instance, that it is a rule of law that when an alibi is raised a particular direction should be given to the jury in regard to the burden of proof, and that in every case when an alibi is raised the Judge should tell the jury, quite apart from the general direction on burden and standard of proof, that it is for the prosecution to negative the alibi. In the opinion of this Court, there is no such general rule of law. Quite clearly if there is any danger of the jury thinking that an alibi, because it is called a defence, raises

some burden on the defence to establish it, then clearly it is the duty of the Judge to give a specific direction to the jury in regard to how they should approach the alibi.

In the opinion of this Court, there was no danger here of the jury thinking that there was any burden on the defence. Indeed at the outset in his general direction the Judge made it clear, as it seems to this Court, that at no time would a stage be reached when any burden was put on the defence, because, having said that the obligation lies on the Crown to prove the defendant's guilt, he continued: 'That means that when you consider the whole picture, the whole of the evidence, unless you are fully satisfied that a particular charge has been proved, then he is entitled to be acquitted' ".

In an earlier part of their judgment the trial Judges expressly referred to the *Pefkos* case (*supra*) regarding the need for the prosecution to establish beyond reasonable doubt the intent to cause death as an ingredient of the offence of attempt to kill with which the accused were charged.

In another part of its judgment, in describing the conduct of the four persons seen running away from the scene of the crime after the helicopter had been shot down, the trial Court said: " We find as a matter of fact and as an inference that can be drawn beyond any doubt that these four persons were running away from something they had done".

Regarding the identification, by prosecution witnesses, of the get-away car the trial Judges said that they were "satisfied beyond any doubt".

Then, in relation to Appellants Charitonos and Taliadoros, the trial Judges stated that the prosecution had proved their complicity in the crime "beyond any doubt"; later on, in relation to Appellants Solomontos and Yenagritis, the trial Judges stated that they were "convinced that the only conclusion that can be drawn is that the prosecution has proved beyond any doubt" their complicity in the same crime; and before reaching these conclusions the trial Judges had dealt with the whole of the case for the defence of each one of the four Appellants.

Reading their judgment as a whole it is impossible for me to come to any conclusion other than that the trial Judges had

constantly in mind that the prosecution had to prove the guilt of the Appellants beyond reasonable doubt and that, thus, they did apply the correct principles regarding the burden of proof.

With all the foregoing in mind I am of the opinion that the word "probability" in the statement in the judgment that "the explanation of the accused need not be true, it is enough if it raises a probability" was used in contradistinction to the closely preceding word "true" and not in contradistinction to the notion of a reasonable possibility; the term "probability" in that statement, which is expressly described by the Court as embodying a principle derived from the cases of *Schama* and *Abramovitch* (*supra*) and *Mentesh* (*supra*) was, in my view, used in a loose, and not in its strict dictionary, sense, so as to include the notion of the possibility of an explanation being reasonably true (see the judgment in the case of *Schama* and *Abramovitch*) as well as the notion of any other rational conclusion (see the judgment in the case of *Mentesh*); therefore, it was not used as excluding a reasonable possibility.

What I have just said about the use of the term "probability", in the said statement in the judgment of the Court below, applies equally well to all occasions on which such term, or words to that effect, were used elsewhere in such judgment.

Moreover, it must be borne in mind, as is abundantly clear from the judgment of the trial Court, that the case for the defence in relation to each one of the Appellants was not rejected as not being probable though it might be said to be reasonably possible, but as being an untrue one, based on concocted stories and afterthoughts.

Regarding, thus, the ground of appeal concerning misdirection as to the burden of proof I have to hold, in view of all that was stated till now in my judgment, that, in actual fact, there is not to be found any such misdirection in the judgment of the trial Court.

I shall deal next with the correlated submission, by counsel for Appellants, regarding "compartmentalization" or "fragmentation" of the case by the Court below in such a manner as to deprive, in effect, the Appellants of the benefit of the application of the correct principles about the burden of proof in a criminal case, through having prevented consideration of the case for the defence with the minds of

the trial Judges not already influenced by conclusions which they had reached, before such consideration, on the basis of evidence for the prosecution; with the result that a miscarriage of justice has occurred:

The main complaint of counsel for Appellants in this respect is that the trial Judges said in their judgment, before they had dealt yet in such judgment with the case for the defence, that they accepted the opinion evidence of prosecution expert witness Dekratris about the recency of the finger-prints of three Appellants which were found—as already stated herein—on magazines and ammunition which were discovered, after the crime, on the terrace from which the helicopter was fired at, and of the finger-prints of one Appellant on the get-away car; also, that the trial Judges likewise accepted too early, and before dealing in their judgment with the case of the defence, the opinion evidence of witness Dekatris that the finger-prints found on the terrace indicated that they belonged to the last users of the articles on which they were found.

In my view the judgment of the trial Judges cannot be regarded as demonstrating in a sequence after sequence manner their process of thinking. It is reasonable to conclude that they wrote their meticulously prepared judgment after they had deliberated and decided on the case as a whole, having reserved their judgment at the conclusion of the trial and delivered it about a week later.

In my view the trial Court had, at some stage, to state in its judgment its conclusions about the expert evidence of witness Dekatris; and it did so after it had compared it with the relevant evidence of the defence expert witness N. Spyropoulos, which was rejected by it before it accepted the evidence of witness Dekatris. So, in relation to this most vital aspect of the case, the trial Court did not reach any conclusion until after it had examined, also, the relevant part of the case for the defence; and even then the trial Court proceeded to make it clear, in explicit terms, that it was not expressing a final view before considering the case for the defence as a whole; it stated: "The question of the finger-prints does not however, end here. We shall have to consider if they were left in circumstances unconnected with the last use of these arms and ammunition as well as the use of the car on the morning of the 8th March, but that we shall do when we examine the case for the defence of each accused".

A perusal of the exhaustively thorough judgment before us shows that the trial Court convicted the Appellants after duly considering the case as a whole and without being handicapped by any "compartmentalization" or "fragmentation" of the case. Though it may, at first sight, appear that these terms could be said to be applicable to the *scheme of drafting* adopted by the trial Judges for their judgment, such terms are not at all applicable to the *thinking* of the trial Judges in reaching their verdict about the guilt of the Appellants.

Thus, before setting out its conclusions about the guilt of Appellants Charitonos and Taliadoros the trial Court stated in its judgment: "Having weighed the evidence of both accused 1 and 2, in co-relation with the evidence for the prosecution and the rest of the evidence and the evidence of defence witnesses relevant to the issues raised by these two accused, we have come to the following conclusions".

Also, before setting out its conclusions about the guilt of Appellants Solomontos and Yenagritis the Court stated: "We have already given our conclusions regarding the credibility of material witnesses called by both accused 3 and 4, and considering the evidence of the two accused in relation to the evidence for the prosecution, we have come to the following conclusions".

Consequently I am of the view that the relevant submission of counsel for Appellants cannot be upheld; the convictions of the Appellants were decided on after due consideration of the evidence as a whole.

Once I have found that the points so forcefully argued by counsel for Appellants do not establish that the convictions of the Appellants were due to any wrong decision on any question of law and that no miscarriage of justice has occurred in the course of the trial Court deciding on such convictions, and as counsel for Appellants has not argued that, having regard to the evidence adduced, the said convictions were unreasonable, the appeals of all four Appellants fail and have to be dismissed.

I have not found it either necessary or useful to deal in this judgment with arguments advanced by counsel for Appellants regarding the evidence on which there was based the convictions of the Appellants, because, as I have just stated, he did not

challenge their convictions as being, having regard to the evidence adduced, unreasonable, but has only advanced the said arguments in order to show that in case this Court was of the opinion that the points on which he based the appeals of his clients might be decided in their favour then such appeals should not be dismissed, under the proviso to section 145 (1) (b) of Cap. 155, on the ground that there was no substantial miscarriage of justice.

JOSEPHIDES, J.: The four Appellants in this case were convicted at the Assize Court of Nicosia of conspiracy to kill and attempting to kill. They were each sentenced to concurrent terms of eight years' and fourteen years' imprisonment. They now appeal against those convictions.

This case arises out of the assassination attempt which was made against the President of the Republic, Archbishop Makarios, and the pilot of his helicopter, Major Zacharias Papadoyiannis, on Sunday, 8th March, 1970, at about 7.06 a.m. near the Archiepiscopal Palace in Nicosia. Soon after the helicopter took off it was shot at by the assailants from the roof of the Pancyprian Gymnasium, which is situate opposite the Palace. They fired in all some 38 rounds of ammunition, that is to say, 27 rounds from a brengun (of .303 calibre), 8 rounds from a semi-automatic rifle M. 1 and 3 rounds from an Enfield rifle.

The Assize Court found the following facts which were not challenged on appeal: That the helicopter was well within the effective range of all the above three arms which were found on the roof of the Pancyprian Gymnasium; and that the helicopter was hit by at least eight shots, one of them coming from the rifle M.1. The pilot was hit by one of those bullets of which the exit hole on the pilot's seat corresponded to the injuries he suffered in the abdomen, and this projectile fell from him. The sole intent of the culprits who fired these shots at the helicopter was to kill the persons in it. The culprits could not be less than three and there was strong indication that there were more than three. Four persons were immediately after seen running away from the scene of the crime to a point in Othellos Street where they had a self-drive Fiat car, model "850", under registration No. ZDR 320, in readiness to facilitate their escape; and they, in fact, drove away in that car. The car had been under the hire of the second Appellant who, at 8.30 a.m. on the same day, reported to the Larnaca Road Police Station that this car had been

stolen whilst it was parked behind Mouskos' cafe in Nicosia. He said that he parked it there at 11.30 p.m. on the previous night. Eventually this car was seen by a shopkeeper on the same day (March 8) at about 8.30 a.m. parked near the Ayios Antonios Municipal Market which is not very far from the scene of the crime. As the car was still there until 11 or 11.30 a.m. the police was informed by the shopkeeper and two policemen arrived on the spot and took charge of the car.

Briefly, the main evidence against the Appellants was as follows: Against the first, third, and fourth Appellants, that their finger-prints were found on the magazines and rounds of ammunition which had been used by the assailants; against the second Appellant, that the get-away car ZDR 320 was under hire by him and that, during the previous night up to and including the material time, he had been in company with the first Appellant whose finger-prints were found on the empty magazine of the bren-gun used; and that the finger-prints of the fourth Appellant were found on the left glass-pane of the get-away car ZDR 320. In addition, there was also evidence from an eminent forensic scientist, Dr. Julius Grant, that there was a very strong probability that powder found on the second Appellant's jacket came from a drain pipe on the roof-corridor of the Pancyprian Gymnasium; that there was a close resemblance of the thread found on the second Appellant's jacket with one of the principal fibre constituents of a brown blanket which was found in the toilets of the Pancyprian Gymnasium; that fluff found in this Appellant's trousers-pocket was very similar to the material of the same brown blanket; that there was a high degree of probability that a hair found in the back pocket of the fourth Appellant's trousers came from the same person whose hair was also found on the same blanket, and that a similar hair was found on a pullover of the brother of the fourth Appellant which was seized from the latter's cupboard.

All the Appellants put up alibis, and the three Appellants whose finger-prints were found on the roof of the school-building (including the fourth Appellant whose finger-prints were, in addition, found on the get-away car) gave explanations as to how their finger-prints came to be found there. The trial Court, after reviewing the whole evidence and considering the alibis put up by the Appellants as well as their explanations as to the finger-prints, stated in their judgment that they found all accused guilty beyond any reasonable doubt.

The appeal was very ably argued by Sir Harold Cassel on the ground that the Court misdirected themselves in law as to their approach to the case, and that their misdirection was such that the proviso to section 145 (1) (b) of the Criminal Procedure Law, Cap. 155, should not be applied by this Court. The wrong approach complained of was that:

(a) the Court applied a wrong test, that is the "probability" test, instead of the "reasonable possibility" test, in evaluating the evidence adduced by the defence; and

(b) that the Court "compartmentalized" their judgment, that is, they first made definite findings on the prosecution evidence before coming to consider the Appellants' explanations; and that in this way the Court failed to come to its conclusion on the whole evidence in the case.

In order to appreciate and consider counsel's complaint regarding the wrong approach by the trial Court it is necessary to quote the relevant extract from the judgment in which the trial Judges directed themselves as to the law applicable to the case. It is this (pages 33F to 34E):-

> "Before we deal with the case for the defence, we consider it pertinent to dwell briefly with the principles of law relating to the burden of proof in criminal cases which we shall have all along in mind in reaching our conclusions. They are summed up in Archbold, 36th edition, paragraph 1001 as follows:-
>
> > 'The general rule is that apart from any provision to the contrary (which does not exist in the present case) the burden of proof lies upon the prosecution and it is not for the defence to prove innocence. *Woolmington* v. *D.P.P.* 25 Cr. App. R. 95-96.
> >
> > Where the prosecution gives *prima facie* evidence from which the guilt of the prisoner might be presumed, and which, therefore, calls for an explanation by the prisoner and no answer or explanation is given a presumption is raised upon which the jury may be justified in returning a verdict of guilt. But if an explanation is given by or on behalf of the prisoner which raised in the mind of

the jury reasonable doubt as to his guilt, he is entitled to be acquitted ..... as the prosecution has failed to satisfy the onus of proof which lies upon them'.

As to the explanation of the accused, the cases of *Schama* and *Abramovitch* and the case of *Mentesh* v. *The Police*, 14 C.L.R., lay down the principle that the explanation of the accused need not be true, it is enough if it raises a probability.

As to the alibi, though customary referred to as the defence of alibi, it is a long standing principle of law that it is upon the prosecution to negative the alibi and because an alibi has been put forward by the defence, no burden is cast on the defence to establish it. The burden lies all along on the prosecution to prove the guilt of the accused. *Rex* v. *Allan George Wood*, 52 Cr. App. R. page 74. We need not repeat here the principles relating to the circumstantial evidence as we already quoted passages in our ruling on the submission of the defence not to call upon the accused.

With these principles in mind, we turn now to the case for the defence."

First, with regard to the complaint that the trial Court misdirected themselves in applying the probability test to the defence. Learned Counsel for the Appellants, in support of his argument referred to that part of the judgment (at page 34B-C) where it is stated, "As to the explanation of the accused the cases of *Schama* and *Ambramovitch* and *Mentesh* v. *The Police*, 14 C.L.R. lay down the principle that the explanation of the accused need not be true, it is enough if it raises a probability". Counsel also referred to several parts of the judgment where the trial Court, in considering the alibis and explanations of all the Appellants, made use of the expressions "improbable" (regarding the trip to Limassol of the first two Appellants, at page 43G of the judgment); "untrue and improbable" (at page 45E); "not satisfactorily explained" (at page 45G); "we find no reason" (at page 56B); "true or probable" (at page 57D (the last two instances regarding the explanations of the third and fourth Appellants)).

Counsel submitted that the Court considered the defence through the probability test which was wrong and that this

vitiated the whole judgment. He submitted that the proper test was that of reasonable possibility. In the course of his argument Sir Harold Cassel submitted that if there is a reasonable possibility that the explanation given by the prisoner is true it follows that there must be a doubt of guilt; and that as a matter of logic so long as there is reasonable possibility of another conclusion, there is a reasonable doubt. In support of his argument he cited the well known English cases of *Schama* and *Abramovitch* [1914] 11 Cr. App. R. 45 and *Woolmington* v. *D.P.P.* [1935] A.C. 462, and the Cyprus case of *Rex* v. *Mentesh* (1934) 14 C.L.R. 232, on which the trial Court also relied. In the *Mentesh* case it was, *inter alia*, held that "a conviction is only justified where the evidence is not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion".

I shall presently summarise the law with regard to the burden of proof, but I think that it should be stated at the outset that the use by the trial Court of the phrase, "it is enough if it raises a probability", with regard to the explanation that may be given by the prisoner, is likely to be misunderstood.

Although in one or two reported cases in Cyprus reference is made to a probability which may be consistent with the prisoner's innocence, it is clear that it would be enough if the prisoner's explanation raises a doubt, and no other words or embellishment should be used in this connection. Zekia J., as he then was, referred to a "probability consistent with innocence" in the case of *Regina* v. *Nicos Sampson Georghiades* (No. 2) (1957) 22 C.L.R. 128, at page 133, after having referred in the same case to *Rex* v. *Mentesh*; and the same Judge reiterated this in the case of *Pefkos & Others* v. *The Republic*, 1961 C.L.R. 340, at page 352. In this connection reference should also be made to the following extract from *Kenny's* "Outlines of Criminal Law" (1966), 19th edition, at page 461, where the author is dealing with the "discretionary presumption of fact" that the possessor of goods recently stolen may fairly be regarded as either the actual thief or else a guilty receiver. "This presumption", it is stated, "does not displace the presumption of innocence so far as to throw upon the accused the burden of producing legal proof of the innocent origin of his possession. He merely has to state how it did originate. If his account is given at, or before, the preliminary examination, and is minute and reasonably probable, then he must not be convicted unless the prosecution can prove the

story to be untrue". (It is interesting to note that this extract is reproduced verbatim from the 9th edition of *Kenny* (1920), at page 330, which was edited by the author himself). Reference is then made (in the 19th edition), at page 462, to the proper direction which should be given to the jury (quoting, *inter alia*, *R.* v. *Garth* [1949] 1 All E.R. 773, *Schama* and *Abramovitch*, and *Woolmington*) to the effect that if the prisoner's explanation raises a doubt in the minds of the jury or if they think that it may reasonably be true, the prisoner is entitled to be acquitted.

As it has often been said, the Court of Appeal should not look at the summing-up minutely or microscopically or pick a quarrel with a single word, but should read it as a whole to see what is the effect of it.

Having said this, I now turn to summarize the law on the point.

As stated by Viscount Simon, L.C. in *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1, at page 12, "the law on this subject is thus finally established and is, I think, perfectly clear". *Woolmington's* case [1935] A.C.462 at page 482, is concerned with explaining and re-inforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt and consequently that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law. (The only exceptions arise, as explained in that case, in the defence of insanity and in offences where the onus of proof is specially dealt with by statute). "If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence, given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained..... If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted" (per Viscount Sankey L.C. in *Woolmington's* case, at pages 481 to 482). It

was stated in *Mancini's* case, *supra*, at page 13, that the last phrase should be understood as meaning "the prisoner is entitled to the benefit of the doubt".

A proposition to the same effect, but in different language, had been laid down by Lord Reading, C.J. in connection with a charge of receiving recently stolen goods, in *Schama* and *Abramovitch*, *supra*, and was approved in *Woolmington's* case (see *Mancini's* case, at page 12).

As stated in *Mancini's* case, "there is no prescribed formula for summing-up in a trial for murder, but the essential rules on this particular matter are as above stated" (at page 12), and that "there is no reason to repeat to the jury the warning as to reasonable doubt again and again, provided the direction is plainly given" (at page 13).

The following is the relevant extract from the judgment of Lord Reading C.J. in *Schama* and *Abramovitch* 11 Cr. App. R. 45, at page 49, to which I have referred earlier:-

> "Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution".

In *R.* v. *Garth* [1949] 1 All E.R. 773, the Deputy Recorder, on the trial of a person for receiving, directed the jury that if the prisoner gave an explanation of his possession of the stolen goods "which, although you do not think it be true, you think might possibly be true, then he is entitled to be acquitted". It was held by the Court of Criminal Appeal that that direction was unduly favourable to the prisoner "because any explanation may possibly be true, and that is not what *Abramovitch's* case lays down" (at page 774 in the *Garth*

report). As pointed out in the judgment of the Court by Lord Goddard, C.J., a proper direction to the jury would be: "If the prisoner's account raises a doubt in your minds, then, of course, you ought not to say that the case has been proved to your satisfaction" (at page 774).

Finally, it was recently held in *Bradbury* [1969] 53 Cr. App. R. 217 that "a direction on burden of proof based solely on the judgment in *Stoddart* [1909] 2 Cr. App. R. 217, as set out in Archbold (36th ed.), p. 381, para. 1001, is too complicated for a *jury* and should not be followed". In the judgment of the Court of Appeal (Criminal Division) it is stated that the jury should be told in terms, not only that the burden is upon the prosecution, "but also that in the last resort they had to be satisfied beyond all reasonable doubt (or that they had to be sure of the guilt of the accused) before they could convict" (page 219). And, further down, referring to the second sub-paragraph of paragraph 1001 of the 36th edition of *Archbold*, the Court had this to say:-

" It is a very useful passage for the *legal practitioner* and the *Judge* to have in mind. It is an amalgam of several citations from the decision of Lord Alvertone, C.J. in *Stoddart* [1909] 2 Cr. App. R.217. But we venture to think that those portions of it which in particular refer to 'a presumption being raised upon which the jury may be justified in returning a verdict of guilty' are not such as one should contemplate citing to a *jury*. They are not calculated to help them; indeed they have an unfortunate tendency to confuse, rather than to elucidate, and to lead a *jury* to the conclusion that if an accused man gives an explanation which they reject, the step towards convicting him is short and well-nigh inevitable". (pp. 219–220).

I have *italicized* the words which I wish to emphasize in order to show that what the Court of Appeal had in mind in *Bradbury's* case was the risk of confusing the *jury*, but that otherwise, so far as "the *legal practitioner* and the *Judge*" are concerned, the position in law, with regard to the burden of proof and the prisoner's explanation, remains exactly the same as it was before *Bradbury*.

Reverting now to the present case, the Appellants' complaint is that the Assize Court did not keep an open mind in the sense that they applied the probability test to the evidence for the

defence and the fragmentation procedure; that they first said the Appellants' accounts were not true, then they considered whether they were probable, but they failed to consider whether such explanations were reasonably true. It is submitted that when it was stated in the judgment of the trial Court that the explanations of the Appellants were rejected as not being "true or probable", the addition of the word "probable" was not superfluous; and that what the Court meant was that they did not accept the explanations as true as they were not probable.

Let me say at once that, with great respect to the trial Court and appreciating their difficult task, I am of the view that some of the expressions used in their judgment, coupled with a number of epithets, are not very happy and they are likely to give rise to misunderstandings. But on reading the judgment as a whole (a judgment of 58 typed pages), I am not prepared to accept that the trial Judges applied a wrong test in considering the evidence for the defence. It would appear that the expressions used by them were only for the purpose of evaluating the evidence, and they were not, in any way, laying down a rule other than the accepted one that it will be sufficient for the defence to raise a doubt. The Assize Court was composed of three experienced Judges who had in the past tried a very considerable number of criminal and civil cases and, once they referred in their judgment, *inter alia*, to the principles laid down in the cases of *Abramovitch* and *Mentesh*, it would, to my mind, be inconceivable that they went on to consider the explanations of the Appellants on the probability test, and that they fell into the fundamental error of trying the very serious felonies of conspiracy to kill and attempted murder on the same footing as an action arising out of a street collision or a claim for goods sold and delivered (cf. per O'Briain P. in *Kalli* v. *The Republic*, 1961 C.L.R. 440, at page 444).

Although if I were the trial Judge I might have taken a different view of the evidence of one or two of the defence witnesses, it is not for me, sitting as a Court of Appeal, to substitute my own opinion for that of the trial Court. Looking not minutely, but broadly, at the whole judgment, I am of the view that there was no wrong approach by the trial Court as regards the test applied in considering the explanations of the prisoners and the whole evidence at the end of the case, and I am further of the view that, considering all the evidence

in the case which was accepted by the trial Court, there was no miscarriage of justice. It should, perhaps, be added that it was not argued before us that the verdict was unreasonable having regard to the evidence adduced.

The *second point* taken by learned counsel for the Appellants was that the trial Court "compartmentalized" or "fragmented" the case. As already stated, he complained that they made definite findings on the prosecution evidence on main issues, before coming to consider the Appellants' explanations; e.g. that the third Appellant was the person who had last handled the loaded magazine (*Exhibit* 35*B*) which was found on the parapet of the roof; that is, that the Court had decided on the third Appellant's finger-prints on the roof before coming to consider his explanation; and that, consequently, the Court failed to come to its conclusion on the whole evidence in the case.

According to counsel's submission, the right approach for the Court would have been to take the evidence of innocence adduced by the defence and, after examining it, take the prosecution evidence to see whether it was displaced by the explanations given by the defence if they may reasonably be true. It was wrong, according to counsel, to make definite findings on an issue without looking at the whole evidence. In this case, counsel submitted, the Court, having made definite findings on the prosecution evidence, were prisoners of that state of mind and, consequently, their judgment was vitiated. Finally, counsel submitted that the Court should have looked at the whole evidence, which had been adduced on behalf of the prosecution and the defence, before reaching their final verdict.

The key to this wrong approach is to be found, in counsel's submission, in the omission of the following phrase from the extract from *Archbold* (36th edition), paragraph 1001, which they quoted in their judgment (and which is re-produced earlier in this judgment):- " Because if upon the whole of the evidence in the case the jury are left in a real state of doubt". The whole of that sentence in Archbold reads as follows: "But if an explanation is given by or on behalf of the prisoner which raises in the mind of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted, because if upon the whole of the evidence in the case, the jury are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon them".

Counsel argued that if the omitted phrase was important why omit it; and he submitted that the deliberate omission of that phrase was a strong indication that the Court overlooked its importance; and that, having made definite findings before considering the explanations offered by the Appellants, the Court were prisoners of that state of mind, and that they consequently failed to consider the case for the defence with an open mind.

Undoubtedly, the evidence of the finger-print expert, Superintendent Dekatris, was the backbone of the case for the prosecution; and it was appropriate that the Court should consider first to see whether his evidence regarding the finger-prints of the first, third and fourth Appellants raised a presumption of guilt which might warrant their conviction, unless they gave an explanation which raised doubt in the minds of the Court. I shall revert to this point presently.

As regards the defence of alibi there is no complaint that the Court misdirected themselves on the law. They said clearly in their judgment (at page 34C) that it is upon the prosecution to negative the alibi and that because an alibi has been put forward by the defence, no burden is cast on the defence to establish it. The burden lies all along, they said, on the prosecution to prove the guilt of the accused. Having considered the alibis put forward by the four Appellants, the Court rejected them giving their reasons for that conclusion.

Reverting to the complaint that the Court made definite findings regarding the finger-prints of the Appellants relying on the evidence of Supt. Dekatris, before considering the evidence adduced on behalf of the defence, I think we should look at the judgment to see how the Court went about this matter.

After summarising the evidence of Supt. Dekatris in 3½ pages of their judgment, the Court stated that, "As this is a matter of scientific evidence, we consider it pertinent to compare the evidence of this witness with that of the defence expert, Spyropoulos, D.W. 15". Then they go on to give a summary of the evidence of Mr. Spyropoulos in four pages of their judgment, including extracts from his cross-examination. Having done that, they said that they considered the weight to be attached to the evidence of the experts called by both sides and that they came to the conclusion that the evidence of Supt. Dekatris has been concrete, positive and could be

safely relied upon by this Court. We do not accept the evidence of Spyropoulos, whose evidence was full of contradictions to the extent that it disagrees with that of Dekatris, especially regarding the ability of an expert to express an opinion as to whether a finger-print is recent or not. He contradicted himself on this point, he disagreed with the textbook writers including passages from Professor Gardikas and he discarded them as being theories and that experts will give as to the recency of a finger-print their opinion and nothing more. Although he agreed and made use himself of other passages from the same textbook. He said that there was no mathematical way of calculating the age; that may be correct, but in assessing the evidence of an expert one considers the criteria given by him generally accepted as correct, competency to form an opinion acquired by special study and the years of experience and these are possessed by Dekatris who seemed to be a fair and an impartial witness upon whom we rely".

Pausing there it should, I think, be observed that it was never suggested by the defence that Supt. Dekatris was not a thruthful witness. The only allegations made against him were that he may have been making a mistake regarding the opinions he expressed as an expert, and that as such he dealt with the matter in an unscientific way.

No doubt all these arguments were advanced before the trial Court who are the proper tribunal of fact. That tribunal, having considered the matter, after weighing the evidence of Supt. Dekatris against that of Mr. Spyropoulos, made their findings regarding the finger-prints of the first, third and fourth Appellants. They further said that they were satisfied that all the finger-prints were recently caused; that, as regards the thumb finger-print on the loaded magazine on the parapet (*Exhibit* 35*B*), it had been identified as belonging to the third Appellant, recently caused and by the person who last handled that magazine; and that as regards the finger-prints found on the two rounds of ammunition (*Exhibit* 36), they had been identified as belonging to the fourth Appellant, that they were recent and caused by the person who loaded that magazine. Having stated that, the trial Court go on to say in their judgment that "the question of the finger-prints does not, however, end here. We shall have to consider if they were left in circumstances unconnected with the last use of these arms and ammunition as well as the use of the car on the morning of the 8th March, but that we shall do when we

examine the case for the defence of each accused". They then proceed to consider the evidence of Dr. Julius Grant, with regard to threads, fibres and powder found on the Appellants, and, after analysing it, they say that they accept his conclusions fully.

It was at this stage that the trial Court directed themselves as to the law to which reference has already been made. They then proceeded to consider the explanations given by the three Appellants with regard to their finger-prints and by the other Appellant (the second Appellant) with regard to the alleged theft of the car under his hire (ZDR320) and the powder found on his coat; and they also considered the alibis put up by all the Appellants.

After analysing the explanations and alibis of the first and second Appellants, they conclude as follows: " Having weighed the evidence of both accused 1 and 2, in co-relation with the evidence for the prosecution and the rest of the evidence and the evidence of defence witnesses relevant to the issues raised by these two accused, we have come to the following conclusions". The Court then state their conclusions in respect of the first and second Appellants, rejecting the explanations and alibis of the Appellants and stating that they are satisfied that the prosecution "has proved beyond any doubt" the guilt of these Appellants.

The Court then proceeded to examine the alibis and explanations regarding the finger-prints of the third and fourth Appellants and, after stating their conclusions regarding the credibility of material witnesses called by these Appellants they say that "considering the evidence of the two accused in relation to the evidence for the prosecution, we have come to the following conclusions", and they give their conclusions; and, finally, they state that they are convinced that the only conclusion that can be drawn is that the prosecution had proved "beyond any doubt" that the third and fourth Appellants were guilty of the offences charged.

Considering all these I do not think that it can be validly said that the judgment of the trial Court shows that the Judges did not keep an open mind until the end of the case, nor that they failed to consider at the end of, and on the whole of, the case whether there was a reasonable doubt created by the evidence, given by the prosecution or the prisoners. In fact,

it is evident from a perusal of the whole judgment that, on consideration of the whole evidence, they were satisfied of the guilt of the Appellants beyond reasonable doubt; and this was the unanimous decision of all three Judges of the trial Court.

Learned counsel for the Appellant emphasised that the only evidence which connected the Appellants with the crime was expert evidence of opinion. But it should be observed that, considering the fact that a great number of people in Cyprus handled arms and ammunition over the past few years, if the three Appellants (the first, third and fourth Appellants) did not participate in the crime, it would be a very disastrous coincidence if the only finger-prints found at the scene of the crime were their finger-prints and of no other person. The evidence as a whole against them is such as to leave only a remote possibility in their favour which would not be sufficient to raise a reasonable doubt; because it should be borne in mind that proof beyond reasonable doubt does not mean beyond the shadow of a doubt.

As regards the second Appellant there was evidence that he was together with the first Appellant (whose finger-prints were found at the scene of the crime) during the previous night up to and including the time of the commission of the crime, and the second Appellant reported to the police that the car which was under his hire (which was the car with which the culprits drove away from the scene of the crime) had been stolen on the previous night from the parking place where he had left it. But at his trial he failed to go into the witness box and give evidence on oath with regard to his alibi and explanation as to the theft of the get-away car. The trial Court, considering the whole evidence in the case rejected his alibi and explanation and found him guilty beyond reasonable doubt. In these circumstances I do not think I could hold that the Court misdirected themselves.

The appeals against convictions on the conspiracy count were not argued by counsel for the Appellants who conceded that these appeals stood or fell together with the appeals against the convictions on the attempted homicide.

In the result, considering the judgment of the trial Court as a whole, I am of the view that the trial Court did not misdirect themselves in law and I do not find that there was

any miscarriage of justice. I would, therefore, dismiss the appeals.

STAVRINIDES, J.: Having had the advantage of reading the elaborate judgment of Mr. Justice Triantafyllides and agreeing, as I do, with it, I consider it unnecessary to add anything.

HADJIANASTASSIOU, J.: The Appellants were convicted at the Assize Court of Nicosia on November 19, 1970, on three counts of an indictment charging them with conspiracy to kill Archbishop Makarios the President of the Republic, attempt to kill Archbishop Makarios, and attempt to kill Zacharias Papadoyiannis on March 8, 1970, and each accused was sentenced to eight years' imprisonment on count 1, fourteen years' on count 2 and fourteen years' on count 3, the sentences in respect of those counts to run concurrently. They appealed against conviction, and the points of substance raised by the notice of appeal are:-

(1) that the conviction, having regard to the evidence adduced, is unreasonable;

(2) that the Court misdirected itself in finding that to displace a presumption of guilt raised by the prosecution evidence, the explanation of a defendant must raise a probability of his innocence;

(3) that the evaluation of the evidence adduced was erroneous because it was made on a wrong approach and/or application of the law in connection with the onus of proof cast upon the prosecution; and

(4) that the inferences drawn by the Court from their findings in relation to the finger-prints found on *exhibits* 35*a*, 35*b*, and 36 were not warranted by the evidence adduced as a whole and/or were made on a wrong assumption of the law as to the onus of proof upon the prosecution.

As most crimes are committed in secret and as the question of intention and guilty mind plays a much more prominent part in criminal than in civil proceedings, direct evidence of the guilt of an accused person is often impossible, and a great deal of the evidence, as in this criminal trial, is of the kind which is called indirect or circumstantial or presumptive. Circumstantial evidence, of course, going to prove the guilt

of a person is this: One witness proves one thing and another proves another thing and all these things prove the conviction beyond a reasonable doubt; but neither of these separately prove the guilt of the person accused. But taken together, it has been said in a decided case, do lead to the one inevitable conclusion and if that is the result of circumstantial evidence, it is a very much safer conclusion to come to than if one witness gets into the box and gives direct evidence and says "I saw this crime committed".

The facts of the case, so far as it is necessary for me to state them, can be summarized as follows:–

At 7.06 a.m. on March 8, 1970, the President of the Republic, Archbishop Makarios, took his seat in the helicopter on the left side of the pilot, Zacharias Papadoyiannis, which was waiting for him in front of the Archbishopric Palace. The helicopter took off on its way to Macheras Monastery and when it reached above the height of the Archbishopric, the pilot made a turn of 150 degrees and placed the helicopter in the stream of air. Its speed was accelerated and it was gaining height, always, with the head of the helicopter towards the direction of Troodos mountains. When he reached a point of 10 meters above the roof of the left wing of the Archbishopric, the pilot heard a shot. He realized that the shot had come from the left and rear and that the helicopter was hit. Immediately thereafter there was a machine gun burst from the same direction and he was hit in the abdomen. The shots continued and although the pilot had lost all feeling of the lower part of his body he decided, in order to save the life of the Archbishop and his own, to land on an open space which is situated on the corner of Isokratous and Patriarchou Gregoriou Streets in Nicosia. Archbishop Makarios immediately got out of the helicopter followed by the pilot and both were running towards and along Hadjiyiorgadjis Street when Papadoyiannis collapsed on the ground on account of the injury he had received from the shots. With the help of neighbours he was placed into a car and was taken to the Nicosia General Hospital at about 7.30 a.m. Papadoyiannis was found to be suffering from heavy shock and heavy internal injuries on account of a bullet wound that entered from the left lumbar region and it went through the abdomen and came out from the anterior abdominal wall, on the right and below the umbilicus.

The shooting at the helicopter was also witnessed by Panayiotis Poullitas who, upon hearing the last burst he tried unsuccessfully to get through the telephone to Paphos Gate police station. He returned to the verandah carrying his shot-gun and saw a person jumping from the wall of the Pancyprian Gymnasium followed by three more persons who were running along Thisseos Street one after the other towards him. He called out to the first person in the line "What happened boys?" but he received no reply. This person turned into Othellos Street in the direction of Mitsides factory. He kept his attention on the other three; he called out to the other two "Stop, otherwise I shall shoot you". The third concealed his face with his hands and turned back and said to the fourth person who was coming behind them and who was holding a pistol "They are shooting at us". The others also turned into Othellos Street in the same direction where the first one had gone. Outside the entrance of Mitsides factory there was a lorry and behind it a small car facing to the direction of Famagusta Street. He did not see how the first one got into the car, but he saw the third one who was taller than the others standing by the left door of the car and waiting for the fourth to come near him. He saw the fourth one reach the open door of the car and bending down and entering with difficulty, as the third one was holding the door for him to enter.

There was further corroborative evidence from other witnesses, but Costas Papapanayiotou who also saw the four culprits walking at a quick pace as if they were running, added that the first, second and fourth were wearing proper suits, the colour of their trousers being the same as the colour of their corresponding jacket, whereas the third one who was taller than the others was wearing a jacket of a different colour than his trousers, and had a stain on the right front side of his jacket.

With regard to what route the culprits had followed after they escaped in the car ZDR 320 which was under hire to accused 2, it is not known, but this car was seen by Makris at about 8–8.30 a.m. on March 8, 1970, about a mile from the scene of the crime, parked near Ayios Antonios Municipal Market. The police were telephoned by this witness at about 11–11.30 a.m. and at 1.30 p.m. Georghiou, Supt. Dekatris and Nicolaides arrived at the place where the car was parked. In the presence of Supt. Dekatris, Georghiou, after powdering the

car, found identifiable finger-prints, which were photographed, on the mirror, on the right and left glass panes of the doors, and on the inside of the right fan ventilator, corresponding with the finger-prints of accused 1 and 4. I should have said that it has not been challenged by the defence that this was the car ZDR 320 in which the four culprits escaped from the scene of the crime.

On the terrace of the Pancyprian Gymnasium, Sgt. Moustakas and P.C. Marneros found on its parapet wall a bren gun magazine, and on the floor of the terrace a bren gun fitted with its magazine, a rifle and a M1 rifle, a great number of expended cartridges scattered thereon, a clip of the M1 rifle, and the safety-pin of a handgrenade. From the arms found on the terrace, and in the way the plot to kill was put into effect, it is clearly shown, that it was a very daring and masterly planned crime.

Moustakas remained guarding the scene whilst Marneros went and led Supt. Dekatris on to the terrace. Supt. Dekatris called his men, Nicolaides, Georghiou and Economou for the purpose of photographic finger-print and for ballistic examination; they arrived at 9.15 a.m. and after the scene with the various objects was photographed by Nicolaides, Georghiou and Dekatris examined the various articles for finger-prints on the two bren gun magazines. Georghiou noticed finger-prints visible to the naked eye. The empty bren gun magazine and the loaded magazine, *exhibits* 35*a* and 35*b* respectively, have been placed in a wooden showcase by Georghiou at the laboratory. The loaded magazine, *exhibit* 35*b*, was emptied by him and 27 rounds of ammunition were found. He examined them and powder was used on them. He found on three of them identifiable finger-prints. These three live rounds were placed in a wooden showcase, *exhibit* 36. On *exhibit* 35*a* no other finger-prints beside the two finger-prints appearing in the contact print of *exhibit* 60 were found by Dekatris. Their comparison with the finger-prints of the forefinger and the middle finger of the right hand of accused 1, showed that they were in agreement in the sequence of 13 ridge characteristics each and he was satisfied beyond any doubt, that the two finger-prints on this *exhibit* were caused by the corresponding fingers of the same person, that is to say, accused 1. With regard to *exhibit* 35*b*, the loaded magazine, he found that the print belonged to the right thumb of accused 3 and there were 16 ridge characteristics. No other

finger-prints were found on this *exhibit*. Moreover, on one of the three rounds which was taken from *exhibit* 36, there were two fingerprints. He compared the one on the base of the round nearer to the percussion cap with the impression of the left thumb of accused 4, and he reached the conclusion that the two fingerprints are in agreement in the order of their ridge characteristics. His conclusion was that both impressions on this round were made by one and the same person. All the identifiable finger-prints on these two live rounds belonged to the left and right thumb of accused 4. With regard to the finger-prints found on the outside of the left glass pane of the door of motor car ZDR 320, Dekatris identified those finger-prints as belonging to accused 4, and they are the impressions of the little finger and ring finger, middle finger and fore finger of the same left hand. Of these four impressions, only the middle finger contained sufficient characteristics for presentation to Court.

Cross-examined with regard to the finger-prints on the magazines, *exhibit* 35*a* and 35*b*, he said that from the condition of the articles which were found there and the subsequent photographs taken of the finger-prints thereon, he was of the opinion that they were recently caused on them. He added that after he took into consideration these magazines on which the impressions were found, and the use made of them, he reached the view, that the finger-prints on these two magazines must have been caused by the person who last used them. With regard to the three live rounds of *exhibit* 36, I ought to have said that although no reasons were given, he said that he was of the opinion that the finger-prints were recently left on these rounds by the person who loaded that magazine. As regards the finger-prints on the motor-car ZDR 320, they must have been caused, he said, very recently because they appeared to be clean, there was no dust on them, and they were absorbing quickly the finger-print powder they used, which is an indication that they were recent.

Cross-examined further as to how he could Judge the age of a finger-print, he said that this he does from the surface of the article, taking into consideration the surroundings from the dust that may be lying on the article in question, whether it has had interfered with the dust or whether the surface is so clean that one could easily say that it was not so long exposed to dust and that, therefore, the impression must have been fresh and recent. As regards the magazine (*exhibit* 35*b*), he

said it was clear and it had a very thin layer of grease. The impression appeared very well, there was no dirt to obliterate it, and when he later on saw it photographed, the ridges came out clearly. If it was old, he said, the mark would flatten down and could not have been seen so easily; and because dirt would have interfered with grease.

Questioned further as to whether the condition of the finger-print on the day he was giving evidence would be the same as they were on the terrace on the day of the attempt, his reply was that he did not think so, because although it would be still visible, nevertheless, he said it would flatten down, even if it is protected in a glass case.

I would like to state that experience has shown that the finger-print method of identification is without doubt the only absolute and infallible method of identification, because no two persons have identical finger or palm prints. This system depends upon the fact that the skin on the terminal phalanx of each finger is covered with ridges which form definite curved patterns. These remain constant in any individual from birth to death, and even the most minute structures and details are never the same on any two fingers; that is to say that finger-prints are absolutely individual and are unchanged by time. It is, however, a question for the jury whether the expert explanations are sufficiently reliable to establish identity. In this case, however, from the fact that finger-prints of some of the accused were found at the scene corresponding to their own, the Court may accept the evidence of finger-prints though it be the sole ground of identification. See *Rex* v. *Castelton*, 3 Cr. App. R. 74; also *Rex* v. *Bacon*, 11 Cr. App. R. 90.

It appears that the main point of difference of opinion between Sup. Dekatris and Mr. Spyropoulos is as to whether an expert can ascertain the age of a finger-print on the question of recency. The trial Court, after weighing the expert evidence for the prosecution as well as for the defence, in the course of summing up such evidence, has reached the conclusion that the evidence of Georghiou and Sup. Dekatris has been concrete, positive and could be safely relied upon by the Court. In criticizing the evidence of the expert witness Mr. Spyropoulos, the Court said:-

> " We do not accept the evidence of Spyropoulos, whose evidence was full of contradictions to the extent that it

disagrees with that of Dekatris, especially regarding the ability of an expert to express an opinion as to whether a finger-print is recent or not. He directed himself on this point, he disagreed with the textbook writers including passages from Professor Gardikas and he discarded them as being theories and that experts will give as to the recency of a finger-print their opinion and nothing more. Although he agreed and made use himself of other passages from the same textbook, he said that there was no mathematical way of calculating the age; that may be correct, but in assessing the evidence of an expert one considers the criteria given by him generally accepted as correct, competency to form an opinion acquired by special study and the years of experience and these are possessed by Dekatris who seemed to be a fair and an impartial witness upon whom we rely".

Then comes a passage, which has been criticized by counsel for the Appellant, that the trial Court accepted the opinion evidence of Dekatris as a question of fact. The passage reads as follows:–

" We find, therefore, as a matter of fact, that the finger-prints found on *exhibit* 35*A* belong to the forefinger and the middle finger of accused 1, they are impressions of two fingers in their natural position and since both have 13 characteristics identical with those of the impressions of the said accused, it is concluded without hesitation that his identity has been established. In such case the proof has not only been based on the characteristic details, but also upon the coincidence of two series of the same details. The left thumb impression of accused No. 1 was also found on the inside of the glass of the right ventilator of *exhibit* 2, car ZDR 320, with 16 ridge characteristics and very recent".

With regard to the question of recency, the Court went on to say:–

" We are satisfied that all the finger-prints were recently caused. As regards the thumb finger-print on *exhibit* 35*b*, it has been identified as belonging to accused 3 recently caused and by the person who last handled that magazine. As regards the finger-prints found on the two rounds of ammunition, *exh.* 36, they have been identified as belonging

to accused 4, are recent and caused by the person who loaded that magazine. In fact, there is abundant evidence as to the way magazines are loaded and the position they were found is consistent with the impressions on the live rounds being left at such loading".

The Court then put this forensic question:-

" If finger-prints were to dry after 5–10 minutes we do not see how the advice of authorities to finger-print experts to examine the condition of the surrounding of finger-prints in order to ascertain the time they were made would be of no value and one wonders why Gardikas, with the passage of whom Spyropoulos agreed and under whom he served and in whose book Spyropoulos contributed, gives such advice".

The defence by each Appellant was a complete denial of the case made by the prosecution, and they called evidence which, had it been believed, was to the effect that they were elsewhere at the time they were supposed to have been at the scene of the crime. In other words, the real defence was one of an alibi at the all important times.

Appellant's 1 explanation with regard to the finger-prints found was that he was coming into contact with arms and ammunition because since 1963 his duties as a national guard were to handle and load bren gun magazines. He was demobilized on August 2, 1967, but during the general mobilization he was called up again in November, 1967, and was again handling arms and ammunition. With regard to his whereabouts, his alibi was that he was in company with Appellant 2 from the previous night and until 7.30 of the morning of March 8, 1970. In support of his whereabouts with regard to the morning time, Charalambos Georgialas, a co-villager of his, gave evidence that at 7.10 or 7.15 at the latest of that morning, whilst he was on his way to his shop, he saw accused No. 1 in a small car with another person at Lemonias traffic lights. He sounded the horn but accused 1 did not see him. He went on to say that the car of accused 1 was travelling from G.S.P. Stadium towards High Life confectionery. I must say, that the evidence of this witness has been criticized by the Court as being evidence which is also in itself improbable.

Appellant's 2 explanation, tending to show that he was not

or was unlikely to have been at the place where the offence is alleged to have been committed, was that on the previous night at about 11-11.15 p.m. he was in the company of Appellant 1. They parked the car ZDR 320 at Mouskos parking place, and they entered into the car which Appellant 1 was using, and travelled to Limassol in order to have fun there. They returned back to Nicosia at 2.30 a.m. and Appellant 1 spent the night at Appellant's 2 house, since it was rather late to go to his village. At 7.15 in the morning of March 8, 1970, Appellant 1 went together with Appellant 2 in the same car to Mitsis building at 7.25 a.m. in order to get car ZDR 320. Appellant 2 noticed that this car was missing and remarked to Appellant 1: " Aeroporos took the car, the keys were left on it, and he probably took it". Then they proceeded to the office of Aeroporos to see whether the missing car was there; but although the office was open, no one was there. I should have said earlier that Aeroporos was the person who hired the motor car ZDR 320 to Appellant 2 since February 8, 1970.

At about 8.30 a.m. Appellant 2 went to Larnaca road police station and complained to P.C. Messios that car ZDR 320 had been stolen. He gave an open statement to Sup. Demetriou, who, after noticing powder on the shoulder of the jacket of Appellant 2, asked him about it, and his reply was that he did not know where the traces of gypsum came from, adding that he had leaned somewhere probably when he sat on the bench in the yard of the police outside the canteen. In his unsworn statement in Court, he gave a further explanation saying that he would not exclude that the powder might be due from his visits to various houses which he was doing in connection with his work as an estate agent. In rejecting the allegation of Appellant 2 on this point, the trial Court had this to say:-

> " His allegation that the dust on his jacket might have come from contact with houses he visited in his capacity as an estate agent, is not natural or even probable, as even, according to his allegation, the previous night he had attended a dance, he was in company of others, and this could not but be noticed by his companions or others.....".

I think it has to be said that the weight to be attached to evidence depends largely on rules of common sense and the factors taken into consideration in eliciting the truth vary in

each case with the circumstances. Tests which have been applied from time to time may or may not be suitable to apply in similar cases.

The trial Court, after weighing and testing the evidence of the prosecution and the rest of the evidence, as well as the evidence of defence witnesses relevant to the issues raised by these two Appellants, reached certain conclusions referred to in the judgment at p. 43 et seq. At the same time, the Court rejected the alibi of both Appellants 1 & 2, and said that the alibi of both has collapsed completely and was found to be untrue and improbable, and it has been negatived by the evidence for the prosecution. Finally, the Court having examined the evidence for the prosecution in respect of each of these two Appellants 1 & 2, made certain findings, and the reasoning behind such findings is that:

> " The aggregate effect of all our findings and having accepted that the finger-prints of accused 1 on *exhibit* 35*A* could not have been caused but when on the terrace in view of their freshness, we find that the prosecution has proved beyond any doubt accused 1 guilty on counts 2 & 3.
>
> (2) Furthermore, all these facts may not each one in themselves prove the guilt of accused 2, but taken altogether constitute such an amount of coincidence that the prosecution has proved beyond any doubt his guilt as to counts 2 & 3".

Appellant's 3 explanation with regard to the finger-prints was that among his duties at Famagusta was also the collection of arms and ammunition. In particular, he had received arms from the Minister of Interior, from Kykko Metochi and from Government buildings in which arms were stored, as well as from the Archbishopric on many occasions. He used to sign receipts for the delivery of those arms to him on some of the occasions only. Before those arms were distributed to other quarters, they were cleaned because they were covered with grease, and the cleaning of those arms was done by Appellant 4, who had instructions to place them in cases. When this was done by Appellant 4, he would check them himself to make sure that everything was in order.

In cross-examination, counsel for the Republic put this question to him: " On the terrace of the Pancyprian

Gymnasium a magazine was found with finger-prints on it. Provided that these finger-prints are yours, what is your explanation?"

The answer of Appellant 3 was: "As I said earlier, many arms, magazines and ammunition passed through my hands in the past, and it is most probable that these arms and ammunition passed through my hands at some time. I am sure that if the police make a search for finger-prints in other stores, they will find my finger-prints on many arms, magazines and ammunition".

With regard to the alibi that Appellant 3 was at home at about 10.00 p.m. and that he parked his car outside the kitchen of his flat which is on the ground floor of the Riviera block of flats, his explanation was that he remained at home till 8.30 a.m. of the following morning of March 8, 1970, when he received a telephone order from the Div. Commander of Police to go to the police station; and that he arrived there at 9.00 a.m. In support of his alibi that he was at home on the morning of the 8th March, three witnesses were called, one of whom, Panayiotis Stavrou, stated that at about 8.30–8.45 a.m. he saw accused 3 coming out of his house, he was greeted by him by raising his hand and he reciprocated. He also saw earlier the car of accused 3 parked outside his flat at the usual place. He saw accused 3 get into his car and drive away. The Court, after rejecting the evidence of the three defence witnesses, said that as the explanation of the accused regarding the handling of arms and ammunition was closely connected with that of accused No. 4, they proposed to deal with that part of the evidence of both accused at a later stage.

Appellant's 4 explanation with regard to the finger-prints found was that he was handling arms and ammunition and that he was doing the cleaning and packing in accordance with the instructions of Appellant 3. He used to place 30 rounds of ammunition in each magazine, but before closing the boxes Appellant 3 would inspect them and give him instructions sometimes to remove 2 or 3 rounds of ammunition or he would do it himself for the protection of the spring of the magazine. With regard to his finger-prints found in car ZDR320, his explanation was that on March 5, 1970, he entered into a Fiat 'Z' car with a white line from the side of the driver in order to carry out a search at Famagusta. This 'Z' car

which Appellant 4 searched, was, in accordance with the evidence of Costas Antoniades, ZDR320. In support of the question of the search of the car, evidence was given by Theofanis Liveras and Antoniades, both members of the information service of Famagusta. The Court, after considering the evidence on this issue, and after taking into consideration the discrepancies on material facts, said:-

> " We are not rejecting this allegation only because of the discrepancies, but because to our mind it is a concoction of the last moment".

However, I must add that the Court, after giving more reasons for the rejection of the evidence on this issue, said:-

> " We have watched the demeanour of both witnesses and we have come to the conclusion that they are unreliable, and we reject their allegation as well as the allegation of accused 4 about this search".

Then the Court put this question:

> " Even if we would accept that a search was made in the way they describe it, we find no reason for accused 4 to have touched the door in such a way as to leave his finger-prints in the position they were found on the glass pane. But even if this had happened, the evidence of Dekatris is that these finger-prints were clean, free of dust, made on a dirty dusty surface. Had they been caused on 5.3.70, obviously with the use made of the car by accused 2, the condition of the finger-prints would have been different, especially on account of the humidity and the dust that they would collect in the meantime".

With regard to his whereabouts on the previous evening, the explanation was that he was in his bedroom from 9.10 p.m. where he stayed until 10.30 of the following day. In support of this allegation, he called his sister, Nitsa Yenagritou, who said that on returning home with her fiancé at about 1-1.30 a.m. of the 8th March, they went to her brother's room, but on noticing him there she immediately left, obviously embarrassed by his presence.

The Court, after dealing with the explanations of both Appellants 3 & 4 in respect of their finger-prints on *exhibit* 35*b* and *exhibit* 36, and on the rounds of ammunition, and

having assessed the evidence before them in respect of the allegation of meticulous packing of the arms which they said for the first time was said in Court, they rejected it as a late invention of accused 4 in order to give an explanation as to the preservation of their finger-prints on the *exhibit* in question.

With regard to the alibi of Appellants 3 & 4, the Court, after considering the evidence of the two accused in relation to the evidence for the prosecution, have reached certain conclusions, giving their reasons, that their alibi was not true in their judgment. Finally, the Court in its finding said:-

> " We have considered the case of each of these two accused separately, and having in mind the evidence of the prosecution as accepted by us and our aforesaid findings, we are convinced that the only conclusion that can be drawn is that the prosecution has proved beyond any doubt that accused No. 3 and accused No. 4 were at the terrace at the scene at the time of and participating in the attempt to kill, and we, therefore, find them both guilty on counts 2 & 3".

I do not think that there is room for complaint about the manner in which the trial Court has dealt with the alibis, because, in my opinion, the Court properly directed itself that no burden is put on the defence to establish the alibi.

In *Kafalos* v. *The Queen*, 19 C.L.R. Hallinan, C.J. said, on the question of alibi, at p. 126:-

> " The position then at the close of the defence was that the accused had failed to prove an alibi and had been unable to give any reason which the Court could accept as to why he was at Saittas on the day of the murder. But the failure of a defence is only fatal to an accused person if the case for the prosecution which remains unshaken by the defence is strong enough in itself to convict the accused".

In *Rex* v. *Johnson*, 46 Cr. App. R. 55, Ashworth, J., had this to say at p. 57:-

> " It may be that the true view of an alibi is the same as that of self-defence or provocation. It is the answer which the accused puts forward, and the burden of proof, as will appear in a moment, in the sense of establishing the

guilt of the accused, rests throughout on the prosecution. If a man puts forward an answer in the shape of an alibi or in the shape of self-defence, he does not in law thereby assume any burden of proving that answer".

Sir Harold Cassel on behalf of the Appellants contended that the trial Court misdirected themselves as to the probability test, and they misdirected themselves by compartmentalizing their approach, and he invited this Court, under s. 145 of the Criminal Procedure Law, to allow the appeal on the ground of a wrong decision on that question of law and, as he submitted, against the whole background of this very difficult case, in which the only evidence which connects these Appellants or any of them is expert evidence of opinion. He further contended that if these men are to be convicted it is on the opinion of Sup. Dekatris and on the opinion of Dr. Grant, and he submitted that a wrong approach in law against the background of this particular case inevitably involves a miscarriage of justice because to try a man by a lower standard than that the law of the land allows, is itself a miscarriage of justice which goes to the very vitals of any civilized system.

The powers of this Court in determining an appeal against conviction are governed by section 145(1) of the Criminal Procedure Law Cap. 155, which is in these terms:- " In determining an appeal against conviction, the Supreme Court (a) may dismiss the appeal; (b) allow the appeal and quash the conviction if it thinks that the conviction should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable —no one ventures to say in this case that the verdict of the trial Court should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence—"or that the judgment of the trial Court should be set aside on the ground of a wrong decision on any question of law or on the ground that there was a substantial miscarriage of justice".

With regard to the burden of proof, the general rule is that, apart from any provision to the contrary, the burden of proof of guilt lies upon the prosecution, and it is not for the defence to prove innocence. (Per Sankey, L.C. in *Woolmington* v. *D.P.P.* 25 Cr. App. R. 72 at pp. 95–96).

The trial Court directed themselves in accordance with paragraph 1001 in Archbold Criminal Pleading, Evidence and

Practice, 36th ed. (1966) at p. 361, on the burden of proof in the following terms:-

> " Where the prosecution gives prima facie evidence from which the guilt of the prisoner might be presumed, and which, therefore, calls for an explanation by the prisoner and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of guilt. But if an explanation is given by or on behalf of the prisoner which raises in the mind of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted..... as the prosecution has failed to satisfy the onus of proof which lies upon them".

In the first place, Sir Harold argued, it was wrong for the trial Court, after directing themselves in accordance with paragraph 1001 in Archbold's Criminal Pleading, to omit the words "*because if upon the whole of the evidence in the case the jury are left in a real state of doubt.....*", and to proceed to decide first the case for the prosecution and not the whole case including the defence.

With regard to the probability test, the passage which is objected to, in the judgment of the trial Court, is as follows: " As to the explanation of the accused, the case of *Schama* and *Abramovitch*, [1914] 11 Cr. App. R., 45, and the case of *Mentesh* v. *The Police*, 14 C.L.R. 232, lay down the principle that the explanation of the accused need not be true, it is enough if it raises a probability".

This was a misdirection in law, Sir Harold argued, because it assumes that the prisoners have to give an explanation which should be probable and not reasonably possible, and is also contrary to *Schama* and *Abramovitch* (*supra*) which laid down that "if the jury consider that the explanation may be reasonably true, although they are not convinced of its truth, they should acquit the accused, because the Crown has not discharged the burden which rests upon it to satisfy the jury, beyond reasonable doubt, that the accused is guilty".

He pointed out that an explanation may reasonably be true, but it may not be probable, and that the trial Court misinterpreted the probability test which was lifted into the *Mentesh* case (*supra*) from the judgment of the Privy Council in *Khoo Sit Hoo* v. *Lim Thean Tong* [1912] A.C. 325, which is a civil case, and the standard of proof may be established by a balance of probabilities.

Sir Harold, on referring to other passages in the summing up of the Court, which have been the subject of criticism, argued that it does appear that the Court never directed themselves that, if they were satisfied as to the reasonable possibility of the truth of the explanations put forward by the prisoners, the prosecution have not established beyond reasonable doubt, that the Appellants were guilty.

Mr. Talarides, on behalf of the Respondent, in his submission, has contended that the Court have not misdirected themselves, because, he argued, the only correct direction is whether upon the whole of the evidence in the case the Court are left in a real state of doubt they can acquit. The test is subjective and there is neither a direction to the jury nor a test of probability or of possibility. When the Court used the words "probability" and "improbability" they were not directing themselves that any burden rested on the defence, but only to describe the evidence as to the truthfulness of an account of a witness. Moreover, he submitted that the omission of the words in the passage of the Court complained of is not a misdirection because the trial Court, in arriving at their conclusion as to the guilt of the Appellants, took into consideration the whole of the evidence in the case. He further contended that the trend of the authorities show that there is no difference between "reasonable doubt" and "real doubt".

With regard to the misdirection, I find it pertinent to deal first with the *Mentesh* case which was decided after the *Abramovitch* case (*supra*); although the first case is not an authority on the burden of proof, nevertheless, the decision of the Court shows that the criterion adopted that "a conviction is only justified where the evidence is not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion" is in my view within the four corners of the principle formulated in *Schama's* case.

In order to try to find out what is the proper direction to the jury, I would start first with *Abramovitch.*

In the case of *Abramovitch* the learned Judge misdirected the jury with regard to the question as to the onus of proof. The passages in the summing up which were objected to were as follows:

> " It is the duty of the prosecution to prove the case against the prisoners. The burden of proof is upon the

prosecution up to a certain point—that is to say, they must prove that the goods were stolen, and that the stolen goods were in the possession of the accused; then the accused have to explain how the goods came into their possession, and stolen goods, as was said by the learned counsel, might be in the possession of any of us, but at the same time we could in most cases give an explanation as to how we got them which would completely satisfy a jury". And later on, "As I said at the outset, the prosecution must prove that the accused were dealing with stolen goods. This they have done. The accused have then to explain how it happened that they were dealing with these stolen goods, and their explanation must satisfy twelve reasonable men. If you think that these three men, or any one of the three, have given an explanation of how they were honestly dealing with these goods, and if you are prepared to accept their explanation, by all means accept it; but if you think you cannot accept it in the case of one, two, or three, then gentlemen, you will find each of them guilty".

Lord Reading, C.J., delivering the judgment of the Court of Criminal Appeal said:

"Where an accused person is charged with receiving property recently stolen, after the prosecution have proved possession by the accused and that the property has been recently stolen, the jury should be told that they may, not that they must, find the accused guilty, in the absence of any reasonable explanation. But if the explanation given may be true, it is for the jury to say, having regard to the whole of the evidence, whether the accused is guilty or not. If the jury consider that the explanation may reasonably be true, although they are not convinced of its truth, they should acquit the accused, because the Crown has not discharged the burden which rests upon it of satisfying the jury, beyond reasonable doubt, that the accused is guilty".

Later on Lord Reading said:

"This Court, looking at the summing up from a broad point of view, cannot find that principle of law anywhere stated, and the jury might have thought that directly they were satisfied that the Appellants were in possession of the stolen property, it lay upon the Appellants to prove

the truth of their explanation. The direction given in the summing up would have this effect and the Court cannot say that the direction given was right".

In *Woolmington* v. *D.P.P.* 30 Cox C.C., at p. 234, Lord Sankey, L.C. said:-

" But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case of *Rex* v. *Abramovitch* (24 Cox C.C. 591; 112 L.T. Rep. 480; 11 Cr. App. Rep. 45) which lays down the same proposition, although perhaps in somewhat involved language. Juries are always told that if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must 'satisfy' the jury. This is the law as laid down in the Court of Criminal Appeal in *R.* v. *Davies* (8 Cr. App. Rep. 211) the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".

In *R.* v. *William Daniel Garth*, 33 Cr. App. R. 100, Lord Goddard, L.C.J. said:-

" The only point in the case is that the learned Deputy-Recorder in summing-up stated the law far too favourably

to the prisoner. He was dealing with *Abramovitch's* case, [1914] 11 Cr. App. R. 45, which seems so often to cause some sort of difficulty. The learned Recorder stated the law in this way:

'Anyway, the prosecution have to prove guilty knowledge, and in the absence of any explanation by the accused man you are entitled to convict him of receiving stolen goods knowing them to have been stolen, if he fails to give an explanation which you can possibly believe. If, on the other hand, he gives an explanation, and that is one which although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted'.

That was stating the law far too favourably because, of course, any explanation may possibly be true. That is not in the least what *Abramovitch's* case (*supra*) lays down. I have more than once endeavoured to say what *Abramovitch's* case (*supra*) does lay down, and it is this: Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen. It must be borne in mind that the onus is always on the prosecution; but if the prisoner gives an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted. It is not a question whether the prisoner gives an account which may possibly be true, because as I have said, any account may possibly be true. A much more accurate direction to the jury is: 'If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction'.

If quarter sessions would bear that simple fact in mind, I think a good deal of the confusion which, somehow or other, arises through an attempt to lay down the law in accordance with *Abramovitch's* case (*supra*) will be avoided".

Sir Harold in criticising the decision in this case contended that the said decision does not explain *Abramovitch*, because

there was no argument by counsel before the Court and the observations were obiter; and if the Chief Justice, counsel went on to say, meant unreal and fanciful, it has nothing to do with his proposition and does not help the argument of the prosecution. If he meant a reasonable possibility does not raise doubt then the Chief Justice was out of logic and authority, and for these reasons must be rejected because it was obiter and the observations were thrown unnecessarily.

In *R.* v. *Abraham Barnett Kritz*, 33 Cr. App. R. 169 at p. 176, Goddard, L.C.J. said:-

> " The only other point which has been seriously argued is that because the learned Common Serjeant told the jury that they must be reasonably satisfied, and did not use the words 'satisfied beyond reasonable doubt', he was not stating sufficiently the onus of proof. It would be a great misfortune, in criminal cases especially, if the accuracy or inaccuracy of a summing-up were to depend upon whether or not the Judge or the Chairman had used a particular formula of words. It is not the particular formula of words that matters; it is the effect of the summing-up. It the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the learned Judge uses one form of language or whether he uses another is neither here nor there".

Later on, Lord Goddard said:-

> " It is right that they should be reminded that the onus is on the prosecution all the way through the case. It is right that they should be reminded in a criminal case that they must be fully satisfied of the guilt of the accused person and should not find a verdict against him unless they feel sure. That is the direction which I myself constantly give to juries when I am at assizes or at the Old Bailey. When once a Judge begins to use the words 'reasonable doubt' and tries to explain what is a reasonable doubt and what is not, he is much more likely to confuse them than if he tells them in plain language: 'It is the duty of the prosecution to satisfy you of the man's guilt'.

I am not saying that the learned Common Sergeant used that formula of words, nor am I saying that is to be preferred before all others, but what I do say is, and I am sure I can say it with the full assent of my brethren, that it is not the actual formula used that matters, but the effect of the summing-up, and if the effect of the summing-up is to convey to the jury what is their duty, that is enough".

In *R.* v. *John Robert Aves* [1951] 34 Cr. App. R. 159, Goddard L.C.J., in dismissing the appeal said at p. 160:-

"Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offerred is one which leaves the jury in doubt as to whether he knew the property was stolen, they should be told that the case has not been proved, and, therefore, the verdict should be Not Guilty.

I may add this as an addendum to the formula above stated: If there is evidence that prisoner was in possession of property recently stolen and other evidence as well which tends to show guilty knowledge, then the Chairman should direct the jury so far as they are dealing with recent possession in the terms which I have mentioned, and then go on to deal with the other evidence against the prisoner, if there is any, which may or may not be consistent with the explanation, if any, which he has given".

In *Rex* v. *Summers* [1952] 1 All E.R. 1059, Lord Goddard, L.C.J. said:-

"There is no ground for interfering with the conviction so far as the evidence is concerned, but the learned single Judge gave leave to appeal because of a passage in the summing up. The chairman of quarter sessions said:

'We have used the words 'reasonable doubt'. Some people have difficulty in understanding that. I feel sure you will not have any difficulty in understanding it. If you come to the conclusion on the evidence when you are dealing with these

conversations: 'This might have happened, or it might not', that is a reasonable doubt, I do not want you to bring yourself into that frame of mind if your real view is: 'It is just barely possible'..... Look at it from the point of view of ordinary people, as if you were considering something in your ordinary lives. Would you, as ordinary people, if this had been something you had been told about by friends of yours, be inclined to believe them or disbelieve them? That is the sort of thing which is meant by 'reasonable doubt'. It is nothing to do with lawyers' jargon; it is merely the sort of judgment which the ordinary man of the world brings to bear on his own affairs, and look at it from that point of view'.

In the opinion of the Court, no jury hearing that would think that the learned chairman was saying any more than: 'If you have a doubt in this matter, remember the case is not proved and you must acquit'.

I have never yet heard any Court give a real definition of what is a 'reasonable doubt', and it would be very much better if that expression was not used. Whenever a Court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words 'reasonable doubt' and then trying to say what is a reasonable doubt, to say to a jury: 'You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed'. The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one".

In the *Johnson* case (*supra*), referred to earlier in this judgment, with regard to the alibi, Ashworth, J. dealing with the point of misdirection, said at pp. 57–58:–

" Unhappily, in the course of summing up in the present case there were not once, but several times, references to a burden of proof which the learned Judge directed the jury had been assumed by the present Appellant when he

put forward his defence of alibi. In the first place, he said this: 'Now, when I said that the defendant has no task to prove his innocence, that is quite true, but of course he may take upon himself to prove something which would necessarily mean that he must be innocent and that is the situation here'. A little lower down he said: 'Of course if his evidence about it and that of his witnesses support his alibi, convincing you of the accuracy of the alibi, it is established of course he has proved his innocence; but short of that, what is the situation as far as he is concerned with regard to the burden of proof that is on him in such circumstances?' Perhaps the most damaging passage occurred on the following page where the learned Judge said this: 'In setting up his positive defence, the burden which is on the defendant is no more than this; he has only to leave you satisfied that his defence, the defence he has set up has, on the whole, been established. That is to say, it has been established to this extent, that on consideration of all the evidence and the probabilities you feel that scale goes down in favour of the defence that he has set up; goes down on balance in favour of him. That is much less a burden of proof than the burden of proof on the prosecution and, members of the jury, when an alibi is set up, it is of course a defence which is, if it is established, a cast-iron defence'.

It is unnecessary to cite further passages from this summing-up because, although Mr. Back submitted that, viewed as a whole, this summing-up did not constitute a misdirection to the jury, he was constrained at the end of his argument to concede, and rightly concede, that there is in law no burden of proof on an accused man who puts forward as his defence an alibi. He was constrained and rightly constrained to concede that in these circumstances this summing-up contains not in one, but in several places, a misdirection in law. In the view of this Court, it was a misdirection in law which was, absolutely fundamental".

In *Henry Walters* v. *The Queen* [1969] 2 W. L. R. 60, Lord Diplock, delivering their reasons said:–

" In their Lordships' view the correctness or otherwise of a direction to a jury on the onus of proof cannot depend

upon such fine semantic distinctions. No jury, whether in the West Indies or England, as it listens to an oral summing-up by the Judge is capable of appreciating them. As Lord Goddard C.J. said in *R.* v. *Kritz* [1950] 1 K.B. 82 at p. 89.

> 'It is not the particular formula that matters: It is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the Judge uses one form of language or another is neither here nor there'.

The expressions 'objective test' and 'subjective test' are currently in popular use among lawyers, sometimes in contexts in which they are helpful in indicating a meaningful contrast. But in the context of 'doubt', which cannot be other than personal to the doubter, it is meaningless to talk of doubt as 'objective' and otiose to describe it as 'subjective'. It is the duty of each individual juror to make up his own mind as to whether the evidence that the defendant committed the offence with which he is charged is so strong as to convince him personally of the defendant's guilt. Inevitably, because of differences of temperament or experience some jurors will take more convincing than others. That is why there is safety in numbers. And shared responsibility and the opportunity for discussion after retiring serves to counteract individual idiosyncrasies.

By the time he sums up the Judge at the trial has had an opportunity of observing the jurors. In their Lordships' view it is best left to his discretion to choose the most appropriate set of words in which to make that jury understand that they must not return a verdict against a defendant unless they are sure of his guilt; and if the Judge feels that any of them, through unfamiliarity with Court procedure, are in danger of thinking that they are engaged in some task more esoteric than applying to the evidence adduced at the trial the common sense with which they approach matters of importance to them in their ordinary lives, then the use of such analogies as that used by Small J. in the present case, whether in the

words in which he expressed it or in those used in any of the other cases to which reference has been made, may be helpful and is in their Lordships' view unexceptionable. Their Lordships would depreciate any attempt to lay down some precise formula or to draw fine distinctions between one set of words and another. It is the effect of the summing-up as a whole that matters".

Having shown from the authorities I have just quoted what is the proper direction to be given to the jury on the onus of proof, irrespective of the formula of words used, I would consider it pertinent to state that, a conviction by an Assize Court is not like the verdict of 12 reasonable men sitting as a jury, but the decision of three Judges sitting in banco. Unlike a jury, the trial Court is obliged to give reasons for their decision, and these reasons are part of the record of the proceedings upon an appeal. I would point out that the trial Court in giving their reasons stated not only their findings of fact, but the inferences drawn from the facts. Sir Harold, however, in his complaint about misdirection, draws the distinction between Judges and juries and has pointed out that once Judges have misdirected themselves the whole judgment is under suspect and the onus is on the Respondent to prove it.

In the light of the authorities, it is necessary to consider whether the trial Court did direct themselves in terms not only that the burden was upon the prosecution, but also that in the last resort, they had to be satisfied beyond all reasonable doubt or that they had to be sure of the guilt of the accused before they could convict.

With regard to the misdirection complained of, the question which is posed is whether the trial Court—as Sir Harold submitted—after the evidence for the prosecution established a prima facie case, misdirected themselves because they assumed that the prisoners had to give an explanation which should be probable and not reasonably possible.

In dealing with this novel point, I would like to make it quite clear from the very beginning, that the phrase used by the trial Court "it is enough if it raises a probability", is a phrase which ought not to have been chosen, because it creates misgivings and because it is not what *Abramovitch's* case lays down. It was sufficient for the Court, of course, to add "it

is enough if it raises a doubt". But, in my opinion, because the Judges have used one form of language or another, is neither here nor there, because in the last resort it is not the particular formula that matters, it is the effect of the summing up and the reasons given by the trial Court.

Be that as it may, the trial Court, after having properly addressed their mind by quoting from paragraph 1001 of Archbold's Criminal Pleading on the question of what allegations must be proved, unquestionably they say that "they shall have all along in mind in reaching their conclusions the principles of law relating to the burden of proof in criminal cases". I would, therefore, pose this question: Could it be said that because of the omission of the words "because if upon the whole evidence in the case" one, would have taken the view that a bench consisting of three experienced Judges had not in mind those words when they were trying this case; moreover, doesn't it indicate from the use of the dots that the Judges were saying " We need not quote them here because we remember them too well when we sit in Court every day trying criminal cases"? Personally, I have no difficulty in answering this question in the affirmative, i.e. the trial Court had in their mind all along the words complained of and had in fact decided this case upon the whole of the evidence, irrespective of the scheme they have adopted in writing their long judgment.

I would further add that the trial Court did not regard probability as a prerequisite, but only used the words "unnatural" and "improbable", in order to weigh and evaluate the evidence of a particular issue, appears from the next passage immediately following the passage criticized by Sir Harold. This passage reads:

> " As to the alibi, though customarily referred to as the defence of alibi, it is a long standing principle that it is upon the prosecution to negative the alibi and because an alibi has been put forward by the defence, no burden is cast on the defence to establish it. The burden lies all along on the prosecution to prove the guilt of the accused".

It would be observed that the trial Court placed the burden on the right shoulders and in a way stated the law more favourably to the defence with regard to the approach of the alibis.

As was said in *Rex* v. *Wood*, 52 Cr. App. R. 74, at p. 78 by Lord Parker, C.J.:

> " It is said, as I understand it, in the first instance, that it is a rule of law that when an alibi is raised a particular direction should be given to the jury in regard to the burden of proof, and that in every case when an alibi is raised the Judge should tell the jury, quite apart from the general direction on burden and standard of proof, that it is for the prosecution to negative the alibi. In the opinion of this Court, there is no such general rule of law. Quite clearly if there is any danger of the jury thinking that an alibi, because it is called a defence, raises some burden on the defence to establish it, then clearly it is the duty of the Judge to give a specific direction to the jury in regard to how they should approach the alibi.
>
> In the opinion of this Court, there was no danger here of the jury thinking that there was any burden on the defence. Indeed at the outset in his general direction the Judge made it clear, as it seems to this Court, that at no time would a stage be reached when any burden was put on the defence, because, having said that the obligation lies on the Crown to prove the defendant's guilt, he continued: 'That means that when you consider the whole picture the whole of the evidence, unless you are fully satisfied that a particular charge has been proved, then he is entitled to be acquitted' ".

In addition, I would like to state that in going through the various passages in the summing-up of the trial Court which have been the subject of criticism, as well as through the whole of the judgment, it appears to me that neither did they assume in their approach that the prisoners had to give an explanation which should be probable, nor in any way had they introduced the probability test. On the contrary, I am satisfied, that the trial Court in dealing with the case for the prosecution as well as for the defence, they adopted and applied the correct direction to themselves in terms that they had to be satisfied beyond any doubt of the guilt of the accused before they could convict.

I would, with respect to Sir Harold's argument, having gone through the authorities, state that I have been unable to find a single authority in which the possibility test has been

considered or adopted as a proper direction to the jury; possibly because, to quote the words of Lord Goddard in *Garth's* case " It is not a question whether the prisoner gives an account which may possibly be true, because as I had said, any account may possibly be true. A much more accurate direction to the jury is: If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction".

I believe that the case of *Regina* v. *Bradbury* [1969] 2 W. L. R. 615, relied upon by Sir Harold, makes the point more clear. Davis, L.J. dealing with the second sub-paragraph 1001 of Archbold's Criminal Pleading on the question of misdirection, giving the judgment of the Court, had this to say at p. 617:-

> " But we venture to think that those portions of it which in particular refer to 'a presumption being raised upon which they jury may be justified in returning a verdict of guilty' are not such as one should contemplate citing to a jury. They are not calculated to help them; indeed they have an unfortunate tendency to confuse, rather than to elucidate, and to lead a jury to the conclusion that if an accused man gives an explanation which they reject, the step towards convicting him is short and well-nigh inevitable.
>
> The citation of this somewhat involved passage could nevertheless have been cured had there been, either before or after it, as we have already said, a bald direction in such terms as, 'You have to be sure in this case before you can convict' or 'You have to be satisfied beyond all reasonable doubt before you can convict'. But, unhappily, a direction in those familiar, simple terms intelligible to the jury was never employed".

Having reached the view that the trial Court have not misdirected themselves because the passages criticized by Sir Harold do not constitute a misdirection on the burden of proof, I would adopt and apply in this case the dictum of Lord Goddard L.C.J. in *Rex* v. *Kritz* [1950] 1 K.B. 82 at p. 89.

In the second place, with regard to the question of compartmentalization which Sir Harold argued it is interwoven with the probability test, I take the view that there was no misdirection in law. Because the trial Court had considered

earlier the expert evidence of the prosecution after a submission by the defence that no prima facie case has been made out for the purpose of deciding whether a prima facie case had been sufficiently made out to require the accused to make their defence. Inevitably, the trial Court had to consider the weight of the evidence for the purpose of deciding whether or not the evidence so far laid before them was such that as a reasonable Court might be ready to convict. If authority is needed, *R.* v. *Moustafa Karamehmet*, 16 C.L.R. 46, at pp. 48–49 is on the point. In *R.* v. *Stoddart*, 2 Cr. App. R., 217 at p. 241, the Lord Chief Justice said that "the facts and circumstances may be of so little weight that the jury ought to be told that they raise no presumption which calls for an answer from the defendant". Moreover, they have not decided the case for the prosecution only, because what the Court has done in the scheme of their judgment was to scrutinize the evidence of the experts, both of the prosecution and the evidence of Mr. Spyropoullos for the defence. Admittedly, of course, after weighing the evidence of these experts, they have reached their conclusions with regard to the scientific evidence as well as the credibility of the experts, but this was inevitable because of the importance of the evidence of the experts, and at the same time the trial Court leaving an open mind to decide the whole case after listening to the explanations of the accused. In my opinion, in the present case, the summing up must not be too critically dealt with after a long trial and speeches by counsel. But this Court has to be satisfied that the right principle of law has been applied and in going through the reasoned decision of the trial Court, it does appear that they were satisfied beyond doubt that the Appellants were guilty.

In the third place, Sir Harold complains, the trial Court has accepted the opinion evidence of Sup. Dekatris as a matter of fact, and at no stage considered that it might have been necessary to scrutinize such evidence in the absence of the corroborative evidence of Georghiou and Inspector Economou, the other two experts for the prosecution. Counsel attacks the evidence of Sup. Dekatris on a number of points, particularly having regard to the question of recency, and as to the question whether the inferences drawn from the prints as to the last use of the arms were correct. Moreover, he argued that when Sup. Dekatris was recalled to deal with the finger-print on the magazine, *exhibit* 35(*B*), he gave a different

version, and because the two points cannot stand together, counsel submitted, it goes both to his value as an expert witness and also to his credibility.

I consider it necessary to go through some of the passages of the evidence of Sup. Dekatris on these two points. In cross-examination, Sup. Dekatris said:–

> " The finger-print on the magazine on the parapet wall, *Exhibit* 35(*B*), was on the top of the *exhibit* exposed to the light and we saw it there on the spot. Others saw it with naked eye.
>
> The finger-prints are caused by the sweat of a person which contains salt and water and when we apply the powder on an impression, the impression is developed, is made visible, because the powder gets on the ridges".

Counsel then put these questions to him:

> "*Q.* What is the margin of error in fixing the age of a finger-print, that is to say, whether old or recent?
>
> *A.* The whole thing is a matter of examination of the finger-print itself and not a matter of theory.
>
> *Q.* When we say that a finger-print is old, what do we mean?
>
> *A.* It means that it is not recent.
>
> *Q.* How many days or how many weeks should a finger-print be on an object in order to say that it is old?
>
> *A.* When it is dry and does not absorb the powder easily, one can tell about it and will say that it is old. When a finger-print is old, there will be dust stuck on it and there are other characteristics which make you say that it is old".

When Sup. Dekatris was recalled, counsel for the prosecution put this question to him:

> " *Q.* We have in evidence that there is a right side to the magazine and a left side when being in position fitted on the bren-gun. How was this magazine lying when it was photographed?

A. This magazine *Exhibit* 35(*B*) was lying on its left side on the parapet wall and all *exhibits* were photographed before we touched them for finger-print examination".

Cross-examined by counsel for the defence, he said:–

"The bren-gun magazine, *exhibit* 35(*B*), was lying on its side on the parapet wall, that is to say, the side of it from which the rounds of ammunition are loaded into it, faced to the right of the photograph as one looks at it".

Pausing here for a moment, I would like to observe that I am unable to find any contradiction in the two answers regarding the finger-print on *Exhibit* 35(*B*).

Mr. Spyropoulos, the expert for the defence, was questioned in these terms:–

"*Q.* If there is only one finger-print and there are no other finger-prints is it not an indication that it was caused by that person who used it?

A. Possibly yes and possibly no. It is possible that the last person who touched the object did not leave finger-prints. For example, he may have used it with hand-gloves. When there is only one, we cannot say that he is the last person who used it and nobody else used it, and also the contrary may happen. Somebody else touched it, long ago, and I took it myself later and took measures and left no finger-prints. If gloves are used, we cannot see any finger-prints.

Q. You said that the clearness of the ridges has no relation to the age of the print?

A. I shall explain. There are persons who have more perspiration and, therefore, they cause stronger ridges. This refers to different finger-prints, but for the same finger-print caused on different times, of course in some way we can give an opinion as to its age. The clearness of the ridges has significance and we can express an opinion about the age. When I said that the powder does not help us ascertain the age, I referred to the powder placed by the expert, not the dust on the print which may be caused from the

atmosphere. If there is dust on a finger-print, I shall draw a conclusion from the amount of the dust and the extent it was covered, as to its age. But we have to take into consideration also the circumstances and the place where the object was found, etc."

I have gone through the whole of the evidence of Sup. Dekatris, Inspector Economou, P. S. Georghiou and Mr. Spyropoulos, and much to my regret, I have noticed that defending counsel have failed to cross-examine Sup. Dekatris on the part of his evidence relating to the arms, viz. that they were recently cleaned and that all finger-prints were erased; moreover, they have failed to cross-examine him as to the reasons of his conclusions and to show by questioning this witness that he approached the evidence as to the recency question without caution. What is more surprising, however, Sir Harold complained, is that although neither Inspector Economou nor P. S. Georghiou said anything about the question of recency, or about the last use of the arms or about the loading of the magazines—except that Inspector Economou spoke about how long prints would remain—nevertheless, defending counsel failed again to question these two experts on points of such importance. Sir Harold very tactfully, of course, says that even if there were mistakes on the part of the defence, it does not harm the Appellants when the Court would decide whether or not to apply the proviso to s. 145 of the Criminal Procedure.

In this case, the trial Court, after hearing and weighing the evidence of these four experts, have accepted the evidence of Sup. Dekatris and P. S. Georghiou and rejected the evidence of Mr. Spyropoulos. As to the evidence of Mr. Spyropoulos, my own criticism is that I would describe it as an expression of his opinion in a negative fashion. Once the trial Court has accepted the evidence of the police experts, in my view, it was sufficient to warrant a conviction without corroboration.

Although this Court is always reluctant to reject a finding by a Judge on such specific or primary facts, especially when founded on the credibility of a witness, nevertheless, it is willing to form an independent opinion upon the proper inferences of fact to be drawn from it. In reviewing such evidence, I am of the opinion, that the inferences drawn by the trial Court as to the question of recency and last use of

the arms were open to them and that they were the proper inferences of fact.

It seems to me that regarding all the Appellants, the trial Court, after hearing and weighing the evidence, came to a determinate conclusion that the result of such evidence pieced together, dovetailed together, combined and considered as a whole, made them reach their conclusion beyond doubt that the Appellants were guilty.

Having carefully considered the reasoned judgment and the evidence for each Appellant, and having heard submissions clearly and forcibly put by Sir Harold, I have come to the conclusion that there is no reason which would justify me interfering with the judgment of the trial Court, and the appeal against conviction is dismissed.

VASSILIADES, P.: In the result the Court holds by majority, that all four appeals fail.

Appeals dismissed.