[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

THE REPUBLIC,

Applicant,

v.

NICOS DEMETRIADES AND ANOTHER,

Respondents-Accused.

(Question of Law Reserved No. 157).

Trial in Criminal Cases—Trial on information before Assize Court—Accused in custody—Wilfully and persistently refusing to attend his trial—He has both a right and a duty to attend—Article 30 *of the Constitution, Article* 6 *of the European Convention on Human Rights and sections* 45(1) *and* 63 *of the Criminal Procedure Law, Cap.* 155*—Question of law reserved by the Assize Court for the opinion of the Supreme Court under section* 148 *of said Cap.* 155*—Cf. further* infra.

Trial in Criminal Cases—Accused in custody persistently refusing to attend Assize Court (supra)*—How his presence may be secured—In exceptional circumstances he may be tried in his absence—Relative plea deemed to be a plea of not guilty—Cf.* supra.

Accused in custody—Refusing to attend Court—See supra.

Statutes—Construction—Construction of section 63(3) *of the Criminal Procedure Law, Cap.* 155.

Criminal Procedure—Question of law reserved for the opinion of the Supreme Court—Section 148 *of the Criminal Procedure Law, Cap.* 155*—Cf.* supra.

A person charged with felonies on information wilfully and persistently refused to attend his trial at the Assize Court of Limassol, though in custody. On a number of questions of law reserved by the President of the Assizes for the opinion of the Supreme Court under section 148 of the Criminal Procedure Law, Cap. 155, the Supreme Court, (*Mr. Justice Hadjianastassiou dissenting*):-

Held (Hadjianastassiou J., dissenting):-

(1) An accused person has both a right and a duty to attend his trial.

(2) Where an accused person, who is in custody, refuses to come to the Court, then the reasonably necessary, in the circumstances, degree of compulsion—(of course, with every possible care being taken to avoid harm) would be justified in order to secure his attendance in Court, in just the same manner as is executed a warrant issued, under section 44 of the Criminal Procedure Law, Cap. 155, to compel the attendance at his trial of an accused who is not in custody.

(3) When an accused person, who is in custody and who is to be tried on information, is not in the dock at the commencement of his trial, because of his having persistently refused to attend and because the authorities concerned did not take measures to bring him to court against his will, the trial Court may by a verbal direction order that the accused shall be brought up, and of course then the said authorities would have to implement such direction; but the Court may, also, in *exceptional circumstances,* even if they do not come within section 63(3) of Cap. 155—decide in the exercise of its inherent powers to proceed with the hearing *in the absence of the accused,* irrespective of whether or not he is represented by counsel; and the Court should proceed as if there was entered a plea of not guilty, because, in view of the presumption of innocence, it is up to the prosecution to prove his guilt according to law.

Per curiam: When it is decided to try in his absence an accused, who is in custody and refuses to come to Court, it would be desirable to serve him with a copy of the charges so that he can have full knowledge of the offence or offences in respect of which he will be tried, and, also, to inform him of his right to be defended by counsel, as well as of his right to ask, in a proper case, for free legal assistance.

Case remitted to the Assize Court (of Limassol) with our opinion as above, upon the questions reserved. Order accordingly.

Cases referred to:

R. v. *Abrahams* [1895] 21 V.L.R. 343, at p. 347;

R. v. *Jones (R.E.W.) (No.* 2) (1972) 2 All E.R. 731;

Diaz v. *United States*, 56 L. ed. 500;

Falk v. *United States*, 45 L. ed. 709;

Niazi Ahmet v. *The Police*, 19 C.L.R. 127;

Kapodistria v. *Petrides*, 22 C.L.R. 181;

Ioannis Socratis alias Kokkalos v. *The Police* (1967) 2 C.L.R. 26;

R. v. *Brook* [1970] Crim. L. R. 600.

Question of Law Reserved.

Question of Law Reserved by the Assize Court of Limassol (Loris, P.D.C., Pitsillides, S.D.J. and Kronides, D.J.) for the opinion of the Supreme Court, under the provisions of section 148 of the Criminal Procedure Law, Cap. 155, upon the refusal of the accused in Cr. Case No. 11032/73, who had been committed for trial before the said Assize Court and were in police custody, to attend the Court on the date of their trial when they were called to do so.

L. Loucaides, Senior Counsel of the Republic with *S. Nicolaides*, Counsel of the Republic, for the Applicant.

A. Papadopoulos with *C. Tsirides* and *P. Tsiridou (Mrs.)*, for Respondent 1.

Respondent 2 appears in person.

The following decisions were read:

TRIANTAFYLLIDES, P.: In this case we are dealing with three questions of law which were, on the 19th October, 1973, reserved for the opinion of this Court by an Assize Court in Limassol, under section 148 of the Criminal Procedure Law, Cap. 155.

In this Decision there is set out the opinion of five members of this Court; Mr. Justice Hadjianastassiou is expressing a different opinion and so he will give a separate decision.

The President of the Assize Court has placed the matter before us as follows:-

> " Both accused who were committed for trial before the Limassol Autumn Assizes and were in Police custody willingly and persistently refused to attend the Court on

the 17th and the 18th of October, 1973, when they were called to do so.

Counsel appearing for the Republic invited us to rule that the trial of both accused can take place in their absence or in the alternative reserve the questions of Law involved for the opinion of the Supreme Court.

Counsel for Accused 1—Accused 2 is not represented any more by counsel—submitted that the case cannot proceed in the absence of the accused and maintained that there is no provision in the Law for a plea to be entered in the absence of the accused in cases triable on information.

Whereas the Assize Court unanimously decided to reserve the questions of Law involved for the opinion of the Supreme Court and whereas section 148(2) of our Criminal Procedure Law, Cap. 155, provides that the President of the Assize Court 'shall make a record of the question reserved with the circumstances upon which the same has arisen', I do hereby submit for the opinion of the Supreme Court the following questions of Law reserved by the Assize Court:-

(a) Does section 63 of our Criminal Procedure Law, Cap. 155, confer on an accused person charged on information, a right to be present at his trial only—subject to the qualification, of course, that he conducts himself properly—or does it confer a right coupled with a duty to be present at his trial?

(b) Can either of the accused in the present case—one of them not being represented by counsel—charged with felonies on information, who willingly and persistently refused to attend his trial though in custody, be tried in his absence?

(c) If the answer to question (b) above is in the affirmative, can any plea be entered for such an accused in his absence, in view of the provisions of section 68 of our Criminal Procedure Law, Cap. 155?".

Our Criminal Procedure Law, Cap. 155, is based on the English criminal procedure, and, actually, section 3 of such Law provides as follows:-

" As regards matters of criminal procedure for which there is no special provision in this Law or in any other enactment in force for the time being, every Court shall, in criminal proceedings, apply the law and rules of practice relating to criminal procedure for the time being in force in England".

In question (a), above, reference is made to section 63 of Cap. 155 which reads as follows:-

(1) The accused shall be entitled to be present at the Court during the whole of the trial so long as he conducts himself properly.

(2) If an accused does not conduct himself properly, the Court may, in its discretion, direct him to be removed and kept in custody and proceed with the trial in his absence making such provision as in its discretion appears sufficient for his being informed of what passed at the trial and for the making of his defence.

(3) The Court may, if it thinks proper, permit the accused to be out of Court during the whole or any part of the trial, on such terms as it may think fit".

It is to be noted that section 63 is to be found in the part of Cap. 155 which contains " General provisions as to pleas and procedure in all trials, summary and on information"; therefore, it provides about the presence of the accused during both summary trials and trials on information.

In view of the fundamental right of an accused person to have a fair trial in every respect, which is safeguarded by Article 30 of our Constitution—as well as by Article 6 of the European Convention of Human Rights, which was ratified by Cyprus by the European Convention on Human Rights (Ratification) Law, 1962, (Law 39/62)—we are of the opinion that, as is also expressly laid down in section 63 of Cap. 155, an accused person has a right to be present at his trial and, so long as he conducts himself properly, nobody can deprive him of such right.

We are, further, of the opinion that (as, was, indeed, submitted by counsel on both sides) an accused person has, also, a duty to be present at his trial; and this duty is not incompatible with his aforesaid right to be present at his trial, because that right is a "right to be present" and not a "right to be or not

to be present". Such duty arises not only because of the nature of a criminal trial—(which, being an essential process for the application of the criminal law, concerns the State and every citizen, and is not only a mere contest of private interests, as is a civil action)—but, also, by necessary inference from the provisions of section 63(3) of Cap. 155, as well as from those of section 45(1) of the same Law regarding the power to "dispense with the personal attendance of the accused" at a summary trial; as stated earlier on in this Decision, section 63 refers to both summary trials and trials on information, and so the said provisions of section 45(1) may properly be taken into account, in addition to those of section 63(3), in reaching our conclusion as to the duty of an accused person to be present at his trial.

In the light of the foregoing our opinion as regards question (a) is that an accused person has both a right and a duty to attend his trial.

In dealing with question (b) we must observe, first, that when an accused person is in custody pending his trial it is inherent in such situation that he should be brought by the gaoler to the Court to attend his trial. As pointed out in Bowen-Rowlands on Criminal Proceedings on Indictment and Information, 2nd ed., p. 144, when an indictment has been presented against a person, who is in custody awaiting his trial, such person "is brought up by the gaoler as a matter of course"; and, as stated in Halsbury's Laws of England, 3rd ed., vol. 10, p. 399, paragraph 722, if an indictment has been signed against an accused, and he is in custody, he is placed in the dock. If, for any reason, an accused person, who is in custody, is not before the Court at the commencement of his trial, his presence may be secured by a verbal direction by the trial Judge (see Bowen-Rowlands, *supra*, at p. 144).

We need hardly point out that where an accused person, who is in custody, refuses to come to the Court, then the reasonably necessary, in the circumstances, degree of compulsion—(of course, with every possible care being taken to avoid harm)—would be justified in order to secure his attendance in Court, in just the same manner as is executed a warrant issued, under section 44 of Cap. 155, to compel the attendance at his trial of an accused who is not in custody. As stated in Archbold's Criminal Pleadings, Evidence and Practice, 38th ed., p. 139, paragraph 363, quoting from " A Treatise of the Pleas of the

Crown" by Hawkins, 8th ed., vol. 2 (c. 28, s.1), the accused is to be brought without any restraint, unless there is danger of escape, and "ought to be used with all the humanity and gentleness which is consistent with the nature of the thing".

Until the abolition in England in 1967—by the Criminal Law Act, 1967—of the distinction between felony and misdemeanour the view was held that in felony the accused must in general be in Court throughout the trial, but that this was not necessary in misdemeanour (see the quotation from the report of the Criminal Law Revision Committee in the judgment of Roskill L.J. in *R.* v. *Jones* (R.E.W.) (No. 2) [1972] 2 All E.R. 731). In Cyprus it appears that no distinction between felonies and misdemeanours, as regards the presence of the accused at his trial, exists, because, as already pointed out, section 63 makes provision about the presence of an accused at his trial in respect of all trials, whether summary or on information.

There exists express provision—subsection (3) of section 63—that a trial Court "may, if it thinks proper, permit the accused" to be out of Court during the whole or part of the trial; the part of subsection (3) which we have put in quotes shows that such subsection, when construed according to its natural meaning, envisages a situation in which the permission of the Court for the accused to be out of Court is sought by or on behalf of the accused on grounds which, when put forward, are found by the trial Court to be such as to render the granting of its permission a proper course in the circumstances, on such terms as it may think fit; it cannot, therefore, be said that under subsection (3) there can be dealt with *every* situation where the accused is absent from the trial and so it may become necessary, where subsection (3) is not found to be applicable, to resort to trial in the absence of the accused, in the exercise of the relevant inherent discretionary powers of the trial Court.

Such a discretion was found to exist in the *Jones* case (*supra*) where the Court of Appeal (Criminal Division) in England observed that the position had been "admirably stated" in *R.* v. *Abrahams* [1895] 21 V.L.R. 343, and the following passages from the judgment of Williams J. (at p. 347 of the report of that case) were referred to:-

> " ' ... in cases of felony, not capital, and of misdemeanors where the accused is in custody, but represented by counsel, elects to waive his right to be present, the discretion would

probably be exercised in the same way; but, on the other hand, in cases both of felony and misdemeanor where the accused is not represented by counsel, the Judge would, in all probability, refuse to proceed with the trial in the absence of the accused, notwithstanding that he waives his right, unless the Judge be satisfied that the prisoner elects to be absent, and absents himself through caprice or malice, or for the purpose of embarrassing the trial.

.....

It will thus be seen that in my opinion in all cases whether of felony or misdemeanor, whether the accused be on bail or in custody, whether he be represented by counsel or not, he has a right to be present, subject only to one qualification, and that is, that he does not abuse that right. If he abuses that right for the purpose of obstructing the proceedings of the Court by unseemly, indecent, or outrageous behaviour, the Judge may have him removed and proceed with the trial in his absence, or he may discharge the jury, but subject to that qualification the right of being present remains with the accused as long as he claims it. When he waives it, then the discretion of the Judge comes into play. To take an extreme case by way of illustration: Suppose an accused person to be out on bail, to appear and take his trial for either a felony or misdemeanor, and that when his trial comes on he is found to have absconded. By so doing, I take it, the accused has clearly waived his right to be present, and the Crown might elect to go on with the trial in the prisoner's absence, but then the presiding Judge has to exercise his discretionary power; if in such a case the accused was not represented by counsel in Court, or even if he were so represented, his presence was necessary for the proper conduct of his defence by his counsel, the Judge would, I apprehend, certainly exercise his discretion by postponing the trial. In short, it seems to me that the Judge's discretion is very much at the root of the whole matter, subject to the accused's right, when he has not forfeited the right, does nothing to forfeit it, or does not waive it, to be present' ".

We are, therefore, of the opinion that the proper answer to question (b) is that when an accused, who is in custody and who is to be tried on information, is not in the dock at the commencement of his trial, because of his having persistently refused to

attend and because the authorities concerned did not take measures to bring him to Court against his will, the trial Court may, by a verbal direction, order that the accused shall be brought up, and of course then the said authorities would have to implement such direction; but the Court may, also, in exceptional circumstances—even if they do not come within section 63(3)—decide, in the exercise of its inherent powers (see the *Abrahams* case, *supra*, referred to in the case of *Jones*, (*supra*), to proceed with the hearing in the absence of the accused, irrespective of whether or not he is represented by counsel. Our Criminal Procedure Law, Cap. 155, provides, expressly, for trial in the absence of the accused in relation only to certain summary cases—by section 89—but that, in view of section 3 of Cap. 155, does not exclude resorting to the aforesaid inherent powers.

We might point out that on each occasion when it is decided to try in his absence an accused, who is in custody and refuses to come to Court, it would be desirable to serve him with a copy of the charges so that he can have full knowledge of the offence or offences in respect of which he will be tried, and, also, to inform him of his right to be defended by counsel, as well as of his right to ask, in a proper case, for free legal assistance.

As the concepts of criminal procedure in the United States of America are based on the same system of law as ours, we might conclude, in dealing with question (b), by referring to *Diaz* v. *United States*, 56 L. ed. 500, in which Mr. Justice Van Devanter quoted with approval, in relation to the question of trial in the absence of the accused, the following, from the judgment of Mr. Justice Morris in *Falk* v. *United States*, 45 L. ed. 709:-

> " The question is one of broad public policy, whether an accused person, placed upon trial for crime, and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of Courts and Juries, and turn them into a solemn farce... Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong".

We are of the view that the above observations apply quite aptly to an accused person who refuses to appear at his trial.

Lastly, in relation to question (c) we are of the opinion that notwithstanding that section 68(3), of Cap. 155, is applicable only where the accused is present in Court, in a case in which the trial Court decides to try an accused in his absence such Court should proceed as if there was entered a plea of not guilty because, in view of the presumption of innocence, it is up to the prosecution to prove his guilt according to law.

This case is remitted to the Assize Court in Limassol with our opinion, as above, upon the questions reserved.

HADJIANASTASSIOU, J.: We have been asked by the Assize Court of Limassol to give our opinion on three questions of law made on the application of the Attorney-General under s.148(1) of the Criminal Procedure Law, Cap. 155, and I propose reading those questions:-

"(a) Does s. 63 of our Criminal Procedure Law, Cap. 155, confer on an accused person charged on information, a right to be present at his trial only—subject to the qualification, of course, that he conducts himself properly—or does it confer a right coupled with a duty to be present at his trial?

(b) Can either of the accused in the present case—one of them not being represented by counsel—charged with felonies on information, who willingly and persistently refuses to attend his trial though in custody, be tried in his absence?

(c) If the answer to question (b) above is in the affirmative, can any plea be entered for such an accused in his absence in view of the provisions of s. 68 of our Criminal Procedure Law, Cap. 155?".

It appears that charges have been brought against both accused for a number of offences not triable summarily, and a preliminary inquiry was held by a Judge in accordance with the provisions of s. 93 of the Criminal Procedure Law. At the close of the case for the prosecution, both accused were committed for trial before the next autumn Assize Court sitting in Limassol in which the offences are alleged to have been committed, and the Judge committed them to the central prison for safe keeping to stand their trial.

On October 17, 1973, because both accused did not exercise their right to be present at the Court during the trial, counsel appearing for the Republic informed the Court that although an order which he described as a "bring up order" issued apparently, as Mr. Tsirides claimed, under S. 53 of the Criminal Procedure Law, was handed to the police in order to bring the accused from the central prison at which they were in custody, nevertheless, the accused refused to come and face their trial. In the light of their refusal, counsel argued that under the provisions of ss. 62 and 63 of our Law, the Court had the power to try the case of the accused in their absence once they have elected not to be present at the Court during their trial, because, counsel went on to argue, s. 63 entitled the accused to be present at the trial, and did not also impose an obligation or a duty to be present. The Court, having heard also counsel for accused 1 (accused 2 not being represented) adjourned the case on the application of counsel for the Republic to enable him to adduce evidence to show that both accused refused to appear in Court.

On the following day, i.e. on October 18, a senior warden No. 925, Mr. Soteriou, of the central prisons, gave evidence on oath that two bring up orders were sent to him ordering the superintendent of the prisons to bring the detainees before the Court sitting in Limassol on October 17. He called both accused, and after informing them that they had to appear before the Court to face their trial, they replied in these terms:–

> " We do not intend appearing either today or ever, and please notify them not to wait".

He then informed the police sergeant in charge of the police team who had come from Limassol to Nicosia in order to convey the accused from the central prisons to Limassol. Then counsel questioned the witness in these terms:–

> "*Q.* After they refused to come, what would you have to do in order to convey them before the Court?
>
> *A.* Following their refusal, we would have to use force in order to convey them to the Court.
>
> *Q.* Have you used force?
>
> *A.* No.
>
> *Q.* Why have you not used force?

A. Because had we done so we would have caused them bodily harm".

There was further evidence before the Court by S/I Pantelis Leonida of Limassol, that he proceeded to the central prisons and saw Superintendent Nicolaides. He handed to him the two bring up orders by which detainees Nicos Demetriades and Saveris Savvides were ordered to appear before the Limassol Assize Court on that date. In his presence the witness explained, the superintendent showed the two bring up orders to the accused and explained to them the contents of the said orders, that they were required to attend the Court and that he, the witness, was to escort them to Limassol. The accused in reply said:-

> " We shall not go Mr. Panteli, and we refer you to a previous statement of Siros and other political detainees which was published in 'Ethniki' newspaper and which expresses the views of all the political detainees".

The witness, apparently in an answer to a question added that he did not use force to bring them as this might have resulted in unpleasant events, because the other political detainees who were in a nearby compound in the central prisons started insulting and booing. Then, for reasons appearing on record, the case was adjourned to the afternoon sitting, and the Court made this order:- " Accused to remain in custody", apparently because Criminal Case No. 11032/73 had been called before them.

On the resumption of the case, the Court, having heard further argument by counsel for the Republic, who relied on the authority of *R.* v. *Jones* (R.E.W.) (No. 2) [1972] 2 All E.R. 731 in support of the proposition that once the accused had a right to be present at their trial, and voluntarily waived that right, the Assize Court had a discretion to continue the proceedings in the absence of the accused. In concluding his argument, counsel invited the Court to reserve the point of proceeding with the trial in the absence of the accused for the opinion of the Supreme Court had they felt that they would probably not decide this point in favour of the Republic. On the contrary, counsel for accused 1, whilst agreeing with counsel for the Republic that the point should be reserved, nevertheless, he argued that the trial Court could not proceed with the trial unless the accused were before the Court to plead.

Thus, it appears to me, that the question to be answered is whether the accused, apart from having a right to be present at their trial, are also burdened with a duty to be present at least at the commencement of the criminal proceedings. I think I ought to state from the very beginning in this opinion that I am delivering, that the constitution of Cyprus safeguards the right of an accused person to be present at his trial, by Articles 12 and 30. I would further add that our constitution, in almost all its articles guaranteeing individual rights, puts a restriction on the power of the legislator in regulating such rights, and such restrictions or limitations of those rights have to be provided by law and have to be absolutely necessary only "in the interest of the security of the Republic, or the constitutional order or the public safety or the public order ... or for the protection of the rights guaranteed by the constitution to any person". Those constitutional provisions relating to restrictions or limitations of the fundamental rights should be interpreted of course strictly and shall not be applied for any purpose other than those for which they have been prescribed. Certainly, in my view, the notion of a guaranteed right given by the constitution for the protection of a right that "every person charged with an offence shall be presumed innocent until proven guilty according to law (Article 12.4) and that in the determination of any criminal charge against him, every person is entitled to a fair and public hearing", it presupposes that the accused himself has the right voluntarily to waive the right to be present and to defend himself in person or through a lawyer of his own choice and to examine or have examined witnesses against him. I would, therefore, find myself unable to follow the argument put forward that in deciding to exercise that right, an accused person is also bound by a duty or an obligation to appear in Court. One would think that once an obligation or duty is cast on the accused to be present at their trial, the right to be present at their trial can no longer in my view be described as their fundamental right to be present at the trial, but a worthless right coupled with a duty which destroys his right once the duty to attend is exercised or is made at the instance of another organ or authority which has the power to force him to do so.

With this is mind, I now turn to consider the general provisions as to pleas and procedure in all trials summary and on information, and s. 63 which deals with the presence of the accused during the trial is in these terms:-

"(1) The accused shall be entitled to be present at the Court during the whole of the trial so long as he conducts himself properly.

(2) If an accused does not conduct himself properly, the Court may, in its discretion, direct him to be removed and kept in custody and proceed with the trial in his absence making such provision as in its discretion appears sufficient for his being informed of what passed at the trial and for the making of his defence.

(3) The Court may, if it thinks proper, permit the accused to be out of Court during the whole or any part of the trial, on such terms as it may think fit".

Thus it appears that under subsection 1, the right of the accused that "shall be entitled to be present during the whole of the trial" is curtailed or regulated only when his behaviour in Court is not the proper one, and this is consonant with the principle expounded earlier regarding the respect to the decorum of the Court, as well as for the protection of the rights of the prosecution and the witnesses. Quite rightly, therefore, once the legislator had given the accused rights which it is for him to exercise, he has also the obligation to behave in a Court of law and to show respect for the rights of others.

Of course, even before the creation of these constitutional rights, the common law recognized the right of the accused to be present at his trial on a criminal charge preferred against him. The Courts, in their endeavour to secure a fair trial of an accused person, devised rules to safeguard the proper exercise of this right, laying down that an accused person shall receive advance notice of the charges pending against him and the date of his trial. It is not surprising, therefore, that the Courts, exercising their discretionary powers to ensure that a fair trial would take place, adjourned the hearing of a case to a future date when the accused for a proper reason was unable to attend the Court on the date of his trial. As I said, the discretionary power of the Court in adjourning cases, was consonant with the notion of a fair trial in view of the adversary system of trial followed under the common law both in England and in Cyprus. There is no doubt, of course, that as a matter of practice, our Courts in the exercise of their discretion to secure a fair trial and in order to enable the accused to be given a chance to hear what was the case against him and allow him to examine wit-

nesses as well as to exercise the other safeguards laid down under our criminal procedure, insisted, in serious cases, on the presence of the accused at the trial for two reasons: (a) To make certain that the accused suffered no prejudice on account of his absence which may be due to a number of reasons including the ignorance of the accused or of a non-proper valuation or appreciation of the consequence of defaulting to exercise his relevant rights; and (b) to make sure that the accused is amenable to the arm of the law if as a result of the trial of the accused the Judge was of the view to impose sanctions against him including a term of imprisonment.

Despite this practice, however, and the anxiety of the Judges to secure the presence of the accused for his own interest mostly, I know of no case as at present advised in which it was laid down that an accused person is under a duty to appear once he exercised his right safeguarded under the constitution and the criminal procedure not to use that right and be present at the trial.

As I said earlier, there are a number of cases in which it was laid down that in serious criminal cases, it is desirable that accused be present at the hearing and determination of his case. See *Niazi Ahmet* v. *The Police*, 19 C.L.R. 127, *Christos Kapodistria* v. *Petrakis N. Petrides*, 22 C.L.R. 181, also *Ioannis Socratis alias Kokkalos* v. *The Police* (1967) 2 C.L.R. 26.

In a recent case of *R.* v. *Jones* (*supra*) the principle was reiterated that the presence of the accused at his trial is a right personal to the accused, that may be waived at his instance without invalidating the proceedings. In that case reference is made with approval to the earlier authority of *R.* v. *Abrahams* [1895] 21 V.L.R. 343, where the view was expressed that irrespective of whether the accused is present or not, the Judge may proceed and hear the case in the absence of the accused if the latter refuses to attend out of malice or caprice or in an effort to embarrass the trial.

Reading carefully the case of *Jones* (*supra*) and the cases referred to, in my view the reasoning behind those decisions is that the notion of a fair trial is not served by the presence of an unwilling or throublesome accused, particularly so when compulsion is likely to be resorted to secure accused's presence in Court. That this is so appears also from subsection 2 of our s. 63 of the law, and particularly when in this present case

the accused made it clear, to quote from the words of the Assize Court, that they persistently refused to attend their trial.

That rights are exercised at the instance of the person on whom they are bestowed, I find further support in a recent case of *R.* v. *Brook* [1970] Crim. L. R. 600. In this case the Court of Appeal (Criminal Division) was composed of Lord Parker C.J., Sachs, L.J. and Eveleigh, J., and shortly the facts are:-

> " B pleaded guilty to driving a motor-vehicle when unfit through drink or drugs. He appealed against conviction on the ground that in making his plea he did not exercise a free choice. The Judge told his counsel that if B was convicted by the jury he was minded to send him to prison but if he pleaded guilty he would not do so. Counsel passed this information to B who said that he pleaded guilty in consequence.

The Court held:-

> the prosecution conceded that B did not have a free choice of plea and it would appear to be a true case of plea bargaining. The plea would be treated as a nullity and a *venire de novo* ordered".

There is no doubt that the criminal proceedings commence against a person when a charge or an information is filed before the Court against such person; and when an accused person is exercising his rights under s. 63 of our law, before pleading to the charge or information, because of the notion of a fair trial, certain safeguards are secured to him under s. 62.

Having read earlier the provisions of s. 63, I think with the greatest respect to any other view, I can find nothing in this section that the presence of the accused is indeed necessary or is needed and his trial can proceed in his absence once the information is filed in Court. That the trial can begin in the absence of the accused, I find further support by reading subsections 2 and 3 of our law, that the Court—once accused decided to exercise his right to be present—may, if it thinks proper, permit the accused to be out of Court during the whole or any part of the trial on such terms as it may think fit. Furthermore, in reading s. 62 which precedes s. 63, "the person to be tried upon any charge or information shall *when present* (the underlining is mine) be placed before the Court unfetter-

ed...", it means as a correct construction in my view, that the trial can proceed in the absence of the accused. Had the legislature intended it to be otherwise, it would have said so specifically in clear and unambiguous language, that the person to be tried shall be present. In fairness, of course, it can be said that under the provisions of s. 44 of our law, the accused person has also a duty cast upon him to be present at his trial. But the question remains, can this section be invoked in this case? I think that the answer is in the negative, because s. 45 cannot be invoked both in construing s. 62 and indeed is inapplicable to cases of trial on information, because it is specifically provided in s. 44, under which a Judge is enabled after the filing of a charge in a summary trial or for a preliminary inquiry only, to exercise his discretionary powers and issue either a summons or a warrant as the case may be, to compel the attendance of the accused before the Court. Then I must add that s. 45 deals with the machinery of issuing the forms and contents of the summonses, and after being signed by a Judge or an officer of the Court, is directed to the accused requiring him to appear before the Court at such time and place and stating shortly the offence with which the person against whom it is issued is charged; and under the first proviso a Judge "may, by general order dispense with the personal attendance of the accused, and

"(a) permit him to appear and plead by an advocate, in which case such accused may so appear and plead;

(b) permit him, if he desires to plead guilty, to send in such plea duly certified and sealed by a mukhtar together with the summons in respect of which the plea is made, in which case such plea shall be treated as a plea of guilty for the purposes of the proceedings".

And under the second proviso, the Judge, notwithstanding any such special direction, may, at any stage of the proceedings, order the personal attendance of the accused.

Reverting now to the case of the accused, it appears that they are already aware of the charges which were preferred against them at the preliminary inquiry as well as the bulk of the evidence that would be adduced by the prosecution against them at the trial. Accused also know the date of the hearing of their case by the Assize Court of Limassol, and indeed once

they have had the benefit of legal advice, I am sure they are fully aware of their difficulties, and that they have been told that the onus remains upon the prosecution to prove the guilt of the accused beyond all reasonable doubt, and yet they have still elected not to exercise the right of being present in Court during the whole of their trial. In my view, therefore, their presence in the light of what I have said earlier, is not a prerequisite to the commencement of the trial, because a person is on trial before the Assize Court in which he has been committed, as soon as the information is filed by the Attorney-General. But I go further and say that even if the provisions of s. 45 were applicable—which as I said are not—the only practical difference between offences coming under s. 45(1) and those covered by the proviso to the same section is that whereas in the latter case an accused may plead in a summary, so to say manner, in the former case the same course is not open to him and the accused cannot enter a plea except in person. There is nothing, therefore, in s. 45 adding to or qualifying the provisions of s. 63 by converting accused's right to attend his trial into a duty to do so.

The final question which is posed is whether the presence of the accused is essential before a valid plea is on record. The matter is regulated by s. 68 which deals with the plea of guilty or not guilty and subsection (3) is in these terms:–

> " If the accused refuses, or will not answer directly, or by reason of physical infirmity is unable to plead, the Court shall proceed in the same manner as if he had pleaded not guilty".

The important question is whether the refusal of the accused in subsection 3 of section 68 shall be signified in person. Having given the matter some consideration, I believe that the answer must be in the negative because the refusal of the accused to plead may be evidenced by one's actions including the persistent refusal of the accused to attend their trial in order to plead. See also the Concise Oxford Dictionary, 5th edn., where the first meaning of "refuse" is given: " Say or convey by action that one will not accept". Furthermore, that accused's presence at the time of plea is not essential, as I have explained earlier, is also borne out in construing the provisions of s. 63(1) whereby accused may, even after originally presenting himself, be excluded from the precincts of the Court for misbehaviour before their plea is entered. I should have added, however, that when the

case of the accused is heard in absentia, in the interest of justice a copy of the information should be served on them, particularly so when new charges were added in the information.

In the light of the reasons I have given, and exercising my powers under the provisions of s. 148 (3) (b) of Cap. 155, the answer to question (A) is in the affirmative to the first leg of the question, viz. that the accused shall be entitled to be present in Court during the whole of the trial so long as he conducts himself properly, and in the negative, regarding the second leg. Coming to question (B), the answer must be in the affirmative, i.e. that both the accused can be tried in their absence; and finally, as regards question (C), the answer again is that a plea of not guilty can be entered for both accused in their absence in view of the provisions of s. 68(3) of our Criminal Procedure.

Order accordingly.