[L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, JJ.]

ANDREAS G. HJISAVVA ALIAS KOUTRAS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3626).

Criminal Law—Homicide—Burden and standard of proof—Death by shooting—Presence of empty shells at scene of crime fired from weapons other than one of appellant—Not explained or accounted for by prosecution—No evidence that any shots had been fired earlier or as to when they had been fired—Failure of prosecution to satisfactorily discharge burden of proof that lay upon it—Such failure rendered oral evidence upon which Court relied inconsistent with real evidence—Reasonable or "lurking doubt" as to who the person who fired the fatal shot was—Appellant entitled to benefit of such doubt.

Criminal Procedure—Conviction for homicide set aside on appeal—Conviction for causing grievous harm to another person substituted therefor—Section 145(1)(c) *of the Criminal Procedure Law, Cap.* 155.

Criminal Law—Sentence—Causing grievous harm—Sentence of three years' imprisonment.

European Convention on Human Rights—Article 6(2)*—Presumption of innocence.*

Evidence—Circumstantial evidence—Inconsistent with evidence of eyewitnesses.

The appellant was a member of a group of armed persons who, after midnight on 7–8 September, 1974, visited Mesa Chorion village with the object of erasing some slogans painted on the walls, mostly in favour of the President of the Republic, and presumably paint their own slogans. This behaviour provoked the feelings of those of the inhabitants who were at the time still awake; there followed tolling of the church bell and very soon the small square in front of the church was crowded with people. The appellant fired a burst in the air over the heads of the crowd in order to terrorize them. In the com-

motion that ensued the victim in this case met with his death at the church square as a result of firing; and another person—Georghios Taki—was, also, injured. While the wife of the victim was chasing the appellant and was about to throw a stone at him he turned back and fired twice and as a result she was wounded.

The appellant admitted that he was a member of the group that visited the village and that he was carrying a firearm, an automatic sub-machine gun of 45 calibre; and that he made use of the firearm in the commotion that ensued. What he denied is that it was a bullet fired by him that hit and fatally wounded the victim.

After the police arrived at the scene where the deceased fell soon after the incident, they found there 42 expended cartridges of .45 calibre, 3 expended cartridges of 9 m.m., 3 live rounds of ammunition of .45 calibre and 1 expended projectile. Ballistic evidence showed that 23, out of the 42 .45 cartridges had been fired by the firearm carried by the appellant; and that the empty shells found near the scene where the deceased fell were fired at least from a distance of about 10 feet from the scene. The oral evidence was to the effect that the only firing, other than by the appellant, was from a distance of 174 feet from the scene.

The trial Court, relying on oral evidence, found that at the time the victim was shot dead nobody else, other than the appellant, was firing and that the empty cartridges at the scene of the crime were the result of earlier shots by those who were carrying those guns out of which they were fired.

Upon appeal against conviction for homicide counsel for the appellant challenged the above finding and argued that there was no evidence to support a finding that any shots were fired at that point or at any other point near enough from which the empty shells could have been ejected where they were found, prior to the shot which caused the death of the deceased.

Held, (A. Loizou, J. dissenting):

(I) Per L. Loizou, J. (Hadjianastassiou, J. concurring): (*After stating the principles of law applicable in Cyprus regarding the burden and the standard of proof in a criminal case and the powers of the Supreme Court on appeal—see* pp. 22–25 *post*):

(1) The presence of the empty shells indicates beyond question that shots were fired at the very scene of the crime not only from the weapon carried by the appellant but also from three other weapons. It was not for the defence to explain and account for the presence, at the scene, of the empty shells fired from those other weapons but for the prosecution.

(2) In the absence of any evidence that any shots had been fired earlier at the scene or as to when they had been fired, the prosecution has failed to satisfactorily discharge the burden of proof that lay upon it and that such failure rendered the oral evidence upon which the Court relied inconsistent with the real evidence and did not warrant the conclusion reached by the trial Court that they must have been fired earlier but, on the contrary, created a reasonable doubt as to who the person who fired the fatal shot was and the appellant is by law and in the interests of justice entitled to the benefit of such doubt.

Held, (II) Per Hadjianastassiou, J.:

(a) The evidence of an eye-witness should be tested with existing circumstantial evidence, and when the first is inconsistent with circumstantial evidence the latter should be given weight; and circumstantial evidence, once its effect has been ascertained beyond the probability of error, is to be relied upon as providing infallible standards of accurancy against which the evidence of eye-witnesses has to be tested (see *Antoniou and* 2 *Others* v. *The Republic*, 1964 C.L.R. 116).

(b) In this case the objective and the undisputed fact was the finding of the empty shells near the scene where the deceased fell. Applying the above principles as to circumstantial evidence, I find that the evidence of the eye witnesses is inconsistent or cannot be reconciled with the circumstantial evidence because, as it has been shown by the ballistic evidence, the empty shells found near the scene where the deceased fell were fired at least from a distance of about 10 feet from the scene and the only oral evidence that there was other firing was that such firing was from a distance of 174 feet.

(c) Once the presence of those empty shells remained unaccounted for, and particularly in the circumstances of this case, after considering the evidence as a whole, I felt that there was a lurking doubt in my mind, and in my view, the charge could not be said to have been proved with the certainty required to justify a verdict of guilty on such a serious case.

Held, (III) in the result:

Having regard to all the circumstances the wounding of the wife of the victim amounts to the offence of causing grievous harm contrary to s. 231 of the Criminal Code and in exercise of the powers of this Court under s. 145(1)(c) we find the accused guilty of this offence. We are unanimously of the view that the appropriate sentence is imprisonment for a term of three years.

Appeal allowed.

Cases referred to:

Woolmington v. *The Director of Public Prosecutions* [1935] A.C. 462 at p. 481;

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

R. v. *Cooper* [1969] 1 All E.R. 32 at pp. 33, 34;

R. v. *Pattinson and Laws*, 58 Cr. App. R. 417 at p. 425;

R. v. *Podmore* (Winchester Assizes, March, 1930);

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

Powell and Wife v. *Stretham Manor Nursing Home* [1935] A.C. 243 at p. 267;

Antoniou and 2 *Others* v. *The Republic*, 1964 C.L.R. 116 at pp. 129, 130, 133;

Koumbaris v. *The Republic* (1967) 2 C.L.R. 1 at p. 9;

William Herbert Wallace, 23 Cr. App. R. 32 at p. 35;

Stafford v. *D.P.P.* [1973] 3 All E.R. 762 at p. 764;

Cyril David Church, 49 Crim. App. R. 206 at p. 213;

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

Shioukiouroglou v. *The Police* (1966) 2 C.L.R. 39 at p. 42;

Miliotis v. *The Police* (1971) 2 C.L.R. 292 at p. 295.

Appeal against conviction.

Appeal against conviction by Andreas G. HjiSavva alias Koutras who was convicted on the 30th April, 1975 at the Assize Court of Paphos (Criminal Case No. 2093/74) on one count of the offence of homicide, contrary to sections 205, 20 and 21 of the Criminal Code, Cap. 154 and was sentenced by Stylianides, P.D.C. HjiConstantinou, S.D.J. and Laoutas D.J. to ten years' imprisonment.

K. Saveriades, for the appellant.

S. Nicolaides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgments were read:

L. LOIZOU, J.: This is an appeal against conviction from the judgment of the Assize Court of Paphos.

The appellant together with five other persons was charged in the information filed by the Attorney-General with the offence of homicide contrary to sections 205, 20 and 21 of the Criminal Code, Cap. 154. The particulars of the offence, as given in the information, are that the accused on the 8th day of September, 1974 at Mesa Chorion in the district of Paphos did by an unlawful act, to wit shooting, cause the death of Demosthenis Georghiou late of Mesa Chorion.

At the close of the case for the prosecution the Assize Court having heard the evidence of 32 witnesses a number of whom were recalled, and after submissions made by counsel appearing for accused 2 to 6 ruled, in so far as those accused were concerned, that no *prima facie* case had been made out against them sufficiently to require them to make their defence; but at the same time the Assize Court found that a *prima facie* case had been made out regarding the offence of carrying firearms the importation of which is prohibited contrary to section 3(1)(2)(a) of law 38 of 1974 and sections 20 and 21 of the Criminal Code, Cap. 154 and ordered that a new count be added charging the said accused 2 to 6 with the said offence. At the conclusion of the trial accused 2, 3 and 4 were found guilty under the new count and accused 5 and 6 were acquitted and discharged. Accused 1 in the information, the appellant before us, was found guilty of homicide and was sentenced to ten years imprisonment.

The incidents which led to the commission of these offences took place in the small hours of the 8th September, 1974; the six accused together with some four other persons arrived at the village in two cars, one landrover bearing no registration number which was at the time in the possession of accused 2 and a Fiat Saloon car registration No. CA 871 the property of accused 6. The appellant and most of the other accused were reservists in the National Guard and were called up for military service at the time of the Turkish invasion. At the beginning of August, 1974, they were, together with others, appointed as special constables under the provisions of the Police Law, Cap. 285, without any remuneration; but to none of these special constables were issued any firearms of any kind or any other

Government property; and none of the accused were detailed for police duty at the relevant time either at Mesa Chorion or anywhere else. It is manifest from the evidence, and the Court so found, that the object of the visit of this group of persons at this small village was to erase some slogans painted on the walls mostly in favour of the President of the Republic Archbishop Makarios and presumably paint their own slogans. This behaviour provoked the feelings of those of the inhabitants of the village who were at the time still awake most of whom were sitting at the only coffee-shop of the village that was open at this late hour, that of Charilaos Constantinou at point 9 of the plan. As a result of the noise caused by the shouts, the shooting and the tolling of the church bell which ensued many of the inhabitants of the village were awaken and very soon the small square in front of the church, the scene where the victim Demosthenis Georghiou a 32 year old man, met with his death as a result of a bullet wound on the head, was crowded with people.

The trial Court found as a fact that the common purpose of the accused and the others was the erasing of the slogans and that there was no intention to use the firearms for the infliction of personal injury or grievous bodily harm to anybody.

The appellant in the course of the trial and before this Court never denied the fact that he was a member of this group of persons nor has it been denied that he was carrying a firearm and more particularly the automatic sub-machinegun of T.M.T. type No. 2889 which is of .45 calibre and which is an imitation of a Thompson sub-machinegun and, as far as the record goes, it is manufactured in Cyprus by the Turkish Cypriots. Nor is it denied that he made use of that firearm in the commotion that ensued following their visit to the village; but what is denied is that it was a bullet fired by him that hit and fatally wounded the victim.

As stated earlier on the scene of the crime is by the church of the village and appears on the plan *exhibit* 3. Point 1 is the point where the victim fell and point 2 is a point on the surrounding wall of the church of a height of about three feet where the appellant was standing when he fired several bursts including, as it is alleged, the fatal shot. After the police arrived at the scene soon after the incident they found there 42 expended cartridges of .45 calibre, three expended cartridges 9 mm., three live rounds of ammunition .45 and one expended projectile.

As a result of tests carried out by a ballistics expert it was ascertained that 23 out of the 42 .45 cartridges found at the scene and the expended projectile had been fired by the gun *exhibit* 4 *i.e.* the imitation sub-machinegun which admittedly was carried by the appellant; that fifteen of the cartridges of the same calibre had been fired by the firearm *exhibit* 5 which had been issued to one Alexandros Karnavalos but with regard to which there is no evidence by whom it was carried and the other four by an automatic sub-machinegun of the same type which was not before the Court. Furthermore the three expended cartridges of 9 mm. calibre were fired by *exhibit* 6 issued to accused 4, Christofis Georghiou Petrou. Whilst on this point I might mention that the evidence does not support the view that the expended projectile found at the scene by the pool of blood where the deceased was lying was the one that caused his death; on the contrary P.W. 2, Andreas Christofides, the Firearms Identification and Ballistics Expert gave it as his opinion that it could not have been that projectile that caused the death of the deceased.

According to the evidence of P.W. 29, Antonis Christodoulides, who performed the post-mortem on the body of the deceased the cause of death was due to haemorrhage of the big vessels of the neck and that death was instantaneous. The deceased had a wound on the neck 1 x 1 cm. in diameter caused by a bullet. The entrance of the bullet was slightly to the left side of the neck as shown in photograph 'E' of *exhibit* 1 and the exit in the middle of the lower jaw below the lower lip. The witness further said that both the entry and exit wounds were at approximately the same level and that the position of the head of the victim when the injury was inflicted must have been slightly turned to the right and slightly downwards and that the barrel of the gun that fired the bullet which caused the injury must have been a little higher than the entry wound and that the victim must have been shot from behind.

Learned counsel for the appellant strenuously argued before us that the evidence before the Assize Court points to the conclusion that at the time the fatal bullet was fired the deceased was facing the appellant and that, therefore, his death could not have been caused by any bullet fired from the gun of the appellant.

Learned counsel based this submission on the evidence of P.W. 18, Nicolas Armeftis who stated in evidence that at the

time the appellant was firing he, the witness, was looking at him and that he was at the time standing behind the deceased and on the evidence of P.W.8, Stavroulla Demosthenous who, in the course of her evidence before the trial Court, said that immediately before her husband was shot dead, at a time when the appellant was lowering his gun after having fired the first burst with his gun pointed upwards, she heard him (the deceased) shouting to the appellant "re Antrikko enna mas skotosis. Psila to oplon sou" which learned counsel submitted indicates that the deceased was facing the appellant.

I do not think that the above evidence is any safe indication as to the position of the deceased's body at the moment he received the fatal shot, mainly because the evidence with regard to the direction the deceased was facing at the time he received the fatal shot I think relates to the time when the first burst was fired and in any case in the particular circumstances of this case one cannot say with any degree of certainty that the deceased was standing still.

The most vital finding of the trial Court—upon which quite obviously they relied in finding the appellant guilty of homicide —is the finding that at the time the victim was shot dead nobody else other than the appellant was firing. Having made this finding the trial Court then posed this question to themselves: "If there was no other shooting at the time how can the finding of empty cartridges by P.W.1 which were fired by other guns be accounted for?" And the Court proceeded to answer this question by saying that those empty cartridges are the result of earlier shots by those who were carrying those guns out of which they were fired. Quite clearly the trial Court based this assumption on evidence to the effect that none of the inhabitants of the village were armed and that the other companions of the appellant were not at the scene at the crucial time. While on this point I should say that all the empty shells of all calibres *i.e.* 42 expended cartridges of .45, three expended cartridges of 9 mm. as well as the three live rounds of .45 and the expended projectile were found by P.W. 1 in the small area between point 1 where the pool of blood is, the electric pole, point 22, and the gate of the church, point 5.

Learned counsel for the appellant challenged this finding of the Court and argued very forcibly that there was no evidence to support a finding that any shots were fired at that point or at any other point near enough from which the empty shells

could have been ejected where they were found, prior to the shot which caused the death of the deceased. I am quite clearly of the view that the outcome of this appeal turns on this one issue. To drive home his point learned counsel went through the evidence of the various prosecution witnesses on whom the Court relied in coming to this conclusion.

Before I deal with the evidence of these witnesses I think it should be stated that it is not in dispute that at the relevant time the appellant was standing on the surrounding wall, at point 2, and that he was firing with the weapon he was carrying.

The evidence upon which the trial Court relied in finding that at the time the victim was hit by the bullet that caused his death only the appellant was firing from point 2 and from this inferred that the other empty shells found at the scene must be the result of earlier shots by those who were carrying those guns out of which they were fired is that of P.W. 4, 5, 6, 8, 9, 10 and 18. Three of these witnesses P.W. 4, Costas Leonida Boyadjis, P.W. 9, Demetris Ioannou Tsailis and P.W. 18, Nicolas Chr. Armeftis, were up and awake when the accused and the other persons arrived at the village whereas the other witnesses had already gone to bed and were awaken by the shouts, the noise of shooting and the tolling of the church bell.

Almost all of these eye-witnesses are agreed on one point *i.e.* that at the time the victim was hit by the fatal shot only the appellant was firing from point 2 where he was standing. I say almost because P.W. 4, Boyadjis, one of those who were awake and followed and purportedly narrated the incidents from beginning to end and whose house is next to the church very near the scene of the crime, went as far as to say in cross-examination that he was confused at the time. When asked whether he heard any other shots his reply was "I was confused at the time; how could I hear shots? (efallara, ehasa ton noon mou). There was a crowd there, I was confused because I saw the man in front of me holding a gun.

Q. There may have been other bursts and you do not know?

A. I do not know.

Q. Did you hear any?

A. When I tell you I do not know, it means that I did not hear any."

Another of these witnesses P.W. 18, Nicolas Armeftis, one of those who were sitting at the coffee-shop when the appellant and the other members of the group arrived at the village admitted in cross-examination that at the preliminary inquiry he stated that at the time the appellant was firing he did not notice if anybody else was firing and that this was the correct version.

However that may be, none of the prosecution eye-witnesses, including those who were awake and followed the events from beginning to end, has stated in evidence that he saw anybody firing prior to the incident which resulted in the death of the deceased at the place where the 45 empty shells, the three rounds of ammunition and the projectile were found and there was no suggestion that any shots were fired at that spot subsequently. On the contrary according to their evidence the nearest spot that any shots had been fired earlier is in front of the coffee-shop of Charilaos at point 9 which lies at a distance of some 141 feet from the spot where the victim fell.

And the question that falls for consideration is whether in the light of these facts the inference drawn by the trial Court that the empty shells other than those that came out of the weapon used by the appellant must have been fired earlier is a safe one.

In my view the presence of these shells at the scene constitutes real evidence and in the absence of any explanation the irresistible inference to be drawn is that they had been fired from a distance of approximately ten feet from where they were found because according to the expert evidence that is the distance at which weapons of the type used eject the empty shells.

The principles of law applicable in Cyprus regarding the burden and standard of proof necessary in a criminal case are so well settled that hardly need to be repeated.

Under our Constitution (Article 12.4) "every person charged with an offence shall be presumed innocent until proved guilty according to law". To the same effect is Article 6(2) of the European Convention of Human Rights the provisions of which are applicable in Cyprus by virtue of Article 169 of the Constitution since the enactment of the European Convention of Human Rights Ratification Law 1962. But long before independence these principles were applicable in Cyprus by virtue of the English Common Law which was then and con-

tinues by virtue of s. 29(1)(c) of the Courts of Justice Law, 1960 (Law 14/60) to be applicable in Cyprus.

As stated by Viscount Sankey L.C., in *Woolmington* v. *The Director of Public Prosecutions* [1935] A.C. p. 462 (at p. 481) "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".

And in the Cyprus case of *R.* v. *Mentesh*, 14 C.L.R. p. 232 one reads (at pp. 244-245):-

> " 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* 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 evidance 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 consistent with any other reasonable conclusion except the guilt of that accused person'. The second case is *R.* v. *Tymko* 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*, 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' ".

The powers of this Court on Appeal are set out in s. 145 of the Criminal Procedure Law, Cap. 155 and s. 25(3) of the Courts of Justice Law, 1960 (No. 14 of 1960). The relevant parts of these sections read as follows:

"145(1) In determining an Appeal against conviction, the Supreme Court, subject to the provisions of s. 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;

(c) set aside the conviction and convict the appellant of any offence of which he might have been convicted by the

trial Court on the evidence which has been adduced and sentence him accordingly;

(d) order a new trial before the Court which passed sentence or before any other Court having jurisdiction in the matter.

25(3) Notwithstanding anything contained in the Criminal Procedure Law or in any other law or in any rules of Court and in addition to any powers conferred thereby the High Court on hearing and determining any Appeal either in a civil or a criminal case shall not be bound by any determinations on questions of fact made by the trial Court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial Court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of re-trial by the trial Court or any other Court having jurisdiction, as the High Court may direct".

It is perhaps useful to refer briefly to the powers of the Court of Appeal in England on determination of criminal appeals and its approach, in so far as the burden and standard of proof are concerned. Such powers are now to be found in s. 2 of the Criminal Appeal Act 1968. They were first enacted in 1966 when s. 4(1) of the Criminal Appeal Act 1966 amended s. 4(1) of the Criminal Appeal Act 1907.

The relevant part of s. 2 of the 1968 Act reads as follows:

" Grounds for allowing Appeal under s. 1:

(1) Except as provided by this Act, the Court of Appeal shall allow an Appeal against conviction if they think-

(a) That the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory;"

It is I think clear that the provisions of this section are by no means wider than those of our s. 25(3) of the Courts of Justice Law, 1960.

In *R.* v. *Cooper* [1969] 1 All E.R. p. 32, an Appeal against conviction of assault occasioning actual bodily harm Widgery,

L.J., as he then was, in delivering the judgment of the Court of Appeal had this to say (at p. 33):

"The important thing about this case is that all the material to which I have referred was put before the jury. No one criticises the summing-up, and, indeed counsel for the appellant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding Judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court would be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966—provisions which are now to be found in s. 2 of the Criminal Appeal Act 1968—it was almost unheard of for this Court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an Appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it. We have given earnest thought in this case to whether it is one in which we ought to set aside the verdict of the jury notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy. After due consideration, we have decided we do not regard this verdict as safe, and accordingly we shall allow the appeal and quash the conviction."

To the same effect is the judgment in the more recent case of *R.* v. *Pattinson and Laws*, 58 Criminal Appeal Reports p. 417. The two appellants were jointly charged and convicted of rob-

bery involving a large sum of money. The evidence against Pattinson was that soon after the crime he bought a car and, while on bail, went on an expensive holiday to Mexico, which evidence would not have justified a committal for trial. The case for the prosecution substantially rested on an alleged oral confession by Pattinson when he was in police custody after his return from Mexico. Two police officers gave evidence of a disjoined statement containing admissions and lasting about twenty minutes. They had made no note at the time, but made a note purporting to record the statement about one-and-a-half hours later. The statement was admitted at the trial. The evidence against Laws was in substance that of one Gibson who said that very soon after the robbery Laws came to him with a bag containing part of the stolen property which he asked Gibson to look after and out of which from time to time Gibson handed sums of money to Laws. For corroboration of this evidence the prosecution relied on a conversation between Laws and his wife who was visiting him when on remand and the suggestion that Laws was coaching her on means of undermining Gibson's evidence. It was held on appeal that both convictions must be regarded as being unsafe and unsatisfactory and, therefore, necessary to be quashed, in the case of Pattinson because the evidence of a confession made in such circumstances was unreliable, and in the case of Laws, because Gibson was to be regarded as an unreliable witness and, accordingly no question of the corroboration of his evidence could arise.

Lord Justice Lawton in the course of his judgment said this: (at p. 425):

> " On behalf of the Crown it is said that when the case is looked at as a whole the strong suspicion is fortified to a sufficient extent by the evidence of the alleged confession. Mr. Potts pointed out to us very strongly indeed, and we have got it very much in mind that this confession was challenged at the trial. The circumstances were investigated in front of the jury. The jury had the benefit of hearing the two police officers concerned and watching their demeanour. They also had the opportunity of watching the demeanour of Pattinson when he was giving his evidence and of the demeanour of his alibi witnesses, who said that he was in the places where he said he had been when he made his first statement on arrest. Mr.

Potts argued that this Court should not attempt on the transcript to re-try the case.

This Court does not seek to do so, but the Court does remind itself that in 1966 Parliament amended the Criminal Appeal Act. Before 1966 the question for consideration for this Court would have been: Was there evidence before the Court upon which a reasonably-minded jury properly directed could have convicted? The answer in this case would undoubtedly have been 'Yes, there was, because there was evidence of a confession'. But the change in the law now requires us to see whether on the information before us the verdict was safe and satisfactory. The terms of the Act are as follows: 'The Court of Appeal shall allow an appeal against conviction if they think (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory'.

The provisions are mandatory. This Court is gravely concerned about the state of the evidence in this case. It has to make a subjective judgment, as was pointed out in the case of *Cooper* [1968] 53 Cr. App. R. 82; the problem for us on this evidence is this: Have we got a lurking doubt about the case? I say on behalf of the Court that we have. We do not like this kind of evidence. It follows that the conviction of Pattinson must be quashed."

Reverting now to the facts of the present case; the presence of the empty shells indicate beyond question that shots were fired at the very scene of the crime not only from the weapon carried by the appellant but also from not less than three other weapons one of which was not before the Court and which must have been carried by other persons. It was not for the defence to explain and account for the presence, at the scene, of the empty shells fired from those other weapons but for the prosecution. And I am firmly of the view that in the absence of any evidence that any shots had been fired earlier at the scene or as to when they had been fired, the prosecution has failed to satisfactorily discharge the burden of proof that lay upon it and that such failure rendered the oral evidence upon which the Court relied inconsistent with the real evidence and did not warrant the conclusion reached by the trial Court that they must have been fired earlier but, on the contrary, created a reasonable doubt as to who the person who fired the fatal shot

was; and the appellant is by law and in the interests of justice entitled to the benefit of such doubt.

In the light of the foregoing I would allow the appeal and quash appellant's conviction of the offence of homicide.

This disposes of the appeal against conviction in so far as the offence of homicide is concerned.

But I am of the view that having regard to the evidence and of the circumstances of the case this is a case in which this Court should exercise its powers under the provisions of s. 145(1)(c) of the Criminal Procedure Law above quoted.

The evidence discloses that as a result of the incidents that took place during that night two other persons were injured; one Georghios Taki, P.W. 10, a young student, the son of P.W. 6 Takis Papagregoriou and also the wife of the deceased P.W. 8, Stavroulla Demosthenous.

Georghios Taki was injured at the same time as the deceased. Both he and his father were awaken by the church bell and the shots and the youth followed his father who went out to see what was happening and eventually went to the small square in front of the church. He was present when shots were fired and actually saw the appellant firing his gun from point 2. Thereupon he turned back in order to return to his house and it is as he started to leave and while he was at point 3 of the plan that he felt a burning sensation and realised that he had been shot. It would appear that he managed to walk home, where, shortly afterwards, his father found him injured. The medical evidence which comes from P.W. 28, Dr. Athanassios Gregoriades, who examined him on the same day is to the effect that he received two wounds from bullets; the one on the right axilla region, on the upper and outer region, with entry at the back and exit on the upper front part of the right arm. The other was a perforated wound of the right hemithorax with entry at the back between the spine and the inferior angle of the right scapula and the exit in the centre of the right armpit. The diameter of both wounds was 1 cm. at the back and 1.1/2 cm. at the front and at the time they were inflicted, always according to the medical evidence, the injured person must have been facing in the opposite direction of the person who fired the shots that caused the injuries. For the reasons that I have explained when dealing with the offence of homicide and in

view of the fact that this young person received the injuries at the same time and place as the deceased I do not think that any safe conclusion may be drawn as to the identity of the culprit.

But the circumstances under which Stavroulla Demosthenous was injured are different and this incident is quite distinct and separate both as regards time and place.

According to the evidence, shortly after the victim Demosthenis Georghiou was shot dead the appellant jumped from point 2 into the yard of the church *i.e.* on the other side of the surrounding wall of the church and started to run away. Stavroulla ran after him and while they were both on the other side of the surrounding wall, Stavroulla at point 6 in the yard and the appellant some 35 feet away from her near the arch of the church at point 7 she picked up a stone to throw at him. The appellant thereupon fired two shots at her one of which injured her. She, also, was taken to the Paphos hospital and was examined by an Orthopaedic Surgeon P.W. 31, Dr. Spyros Spyrou. According to the doctor's evidence she had an injury caused by firearm in the region of the left part of the pelvis with fracture of the pelvis bone. The entry wound was at the front and was of a diameter of about 1 cm. and the exit wound on the same part at the back of a diameter of 1 $^1/_2$ cm. The direction of the wound was from the front towards the back.

The trial Court believed the part of the evidence of Stavroulla Demosthenous in connection with the injury inflicted upon her. Her evidence on this point is corroborated by the evidence of P.W. 9, Demetris Ioannou Tsailis who is her father and who followed her when she ran after the appellant and gave evidence, in connection with this incident, which the Court believed. I see no reason to disturb the trial Court's finding in connection with this incident.

I am of the view that having regard to all the circumstances the wounding of Stavroulla Demosthenous amounts to the offence of causing grievous harm contrary to s. 231 of the Criminal Code and in exercise of the powers of this Court under s. 145(1)(c) I find the accused guilty of this offence.

HADJIANASTASSIOU, J.: I have had an opportunity of reading the judgment of my learned brother L. Loizou, J., and I am in agreement with it, but in view of the importance of the question with which he has dealt, I think it right to express my views in my own words, regarding the unfortunate events which took

place in Mesa Chorio of Paphos on the night of September 7–8, 1974, leading to the death of the late Demosthenis Georghiou: and the wounding of his wife Stavroulla and of Georghios Taki, a 16 year old student.

Sometime after midnight, a group of fifteen to twenty persons travelled in two land rovers on an unauthorised expedition to Mesa Chorio, a small quiet village, armed with automatic weapons, and when they reached that village, they were behaving not only like hooligans, but also in a most reckless and objectionable manner, with the result that Demosthenis Georghiou lost his life from a bullet wound and another two persons were wounded. This group of men was seen at the square of the village, and some of them were engaged in painting over slogans in favour of Archbishop Makarios and the Prime Minister of Greece, and writing new slogans in favour of EOKA B, and to make things worse, there were other members of the group taking different positions in order to ensure control of the situation, obviously not caring at all about law and order and disregarding entirely the feelings of the inhabitants of that small village.

Out of that group, accused 1, 2, 3, 4 and 6 who were seen at the scene had joined the National Guard as reservists soon after the Turkish invasion, and later on they were appointed under s. 30 of the Police Law, Cap. 285 as special constables, but none of those persons were detailed to carry out any police duties or patrol on September 7–8, 1974, although the allegation put forward by accused 1, 2 and 3 was that they went to that village obeying superior orders.

The trial of the six accused charged with the offence of homicide contrary to ss. 205, 20 and 21 of the Criminal Code Cap. 154, has been long and protracted for obvious reasons, and the prosecution called an impressive array of 32 witnesses, ten out of whom were recalled and further cross-examined after the addition by the Court of a second count charging them with carrying firearms. The accused gave evidence on oath, and some called witnesses for their own defence.

It was the version of the prosecution that when the members of the group came out of the land rover, they proceeded towards the centre of the village and two of the armed persons went to the coffee shop of Charilaos (which is shown at point 9 of a plan) where some late customers were still there. Because of

their appearance and behaviour, an incident was caused, and the rural constable, Nicholas Christodoulou, having seen some members of the group erasing slogans, shouted out "hey boys, they have come and they are erasing the slogans in favour of President Makarios". Accused 1 who was standing by the gate referred to by the trial Court as the 'corner gate', retorted to him "be quiet or else I will shoot you". Then the rural constable answered back "If you can, shoot me". Thereupon accused 1 fired a burst into the air at the same time ordering him to go home. When the rural constable started to leave, accused 1 proceeded in the direction of those who were erasing the slogans. Then the rural constable found the opportunity to jump over the wall of the church into the yard and started ringing the church bell to warn the rest of his co-villagers about the appearance of the armed group in their village, but unfortunately, he was caught by accused 1 and was beaten up by him. After the rural constable was stopped from ringing the bell, one Eleni Elia managed to ring once again the bell of the church and again she was told off by accused 1 so she stopped doing so and started to leave; she saw accused 1 proceeding along the south side of the church building. Later on she saw accused 1 again on the surrounding wall (north side) of the church. It is to be added that this is the point where the prosecution alleged that accused 1 fired the shots, and the witness Eleni Elia was questioned in these terms:-

"(*Q*) I put it to you that in fact accused 1 came out from the gate opposite the coffee shop of Charilaos and left.

(*A*) That is not so. I got out from the gate opposite Charilaos' coffee shop".

When accused 1 realized that a lot of people were gathering, he fired in order to terrorize them. It appears further that as a result of the firing on that night, the deceased Demosthenis was hit and fell to the ground speechless and motionless, and met his death instantly. Further, as a result of the firing, Georghios Taki was also injured. Then accused 1 jumped into the yard of the church and ran in a southern direction. When the wife of the deceased saw him, she ran after him, picked up a stone, and when she was about to throw it at him, he turned back and fired at her twice and as a result she was also wounded.

There was further evedence regarding this incident by Elias Nearchou (who impressed the Court as being a truthful witness) who stated that accused 1 came from inside the church yard

carrying a gun and jumped on the surrounding wall. Then Costas Poyiadjis shouted out to him and the accused fired into the air. When he saw that the crowd was approaching him, he turned the gun downwards towards the people and he started firing continously and saw the victim fall to the ground.

The trial Court, in considering the evidence of the wife of the deceased said:-

> " We accept from her evidence only that part which is corroborated by the evidence of the other witnesses, including the medical evidence. We accept that she saw accused 1 standing on the surrounding wall, that her husband was shot dead whilst only accused 1 was firing, that she shouted out to the accused, she ran after him and she was shot herself by accused 1 while she was in an upright position immediately she picked up a stone to throw at him".

Accused 1 admitted that he was at Mesa Chorio on that night together with the rest of that group and that he was armed, and his version was that he proceeded and stood in the road in front of Charilaos' coffee shop more to the right towards the gate of the church. He saw the rural constable in the church yard and when he heard the church bell ringing he proceeded into the church yard and when he was near the Cypress tree still in the church yard, he saw some persons trying to disarm accused 3. He then fired two bursts into the air from where he was standing with his gun pointing upwards, but before he fired himself, he heard many bursts fired by others. When he realized that more and more people were gathering, he left on his way towards the south of the church, he jumped over the surrounding wall of the church on the south part where there was an iron railing and left in the direction of Ktima.

The body of the deceased was removed to the mortuary of the hospital in Paphos, where Dr. Christodoulides carried out the post mortem examination. This witness found an entrance wound 1x1 cm. in diameter on the neck, possibly caused by a firearm bullet and an exit wound in the middle of the lower jaw where the bone was damaged and the lower lip injured. It appeared further that the entrance and the exit wounds were at approximately the same level; and according to him the cause of death was haemorrhage due to damage of the big vessels of the neck, namely both the carotid artery and the carotid vein. The death was instant, because of the wound the circulation of blood to the brain came to an end.

When the police were informed of the incident of the death, they visited the scene on September 8, 1974 at about 2.00 a.m. and collected from the road near the pool of blood where the deceased was lying after his death, and from the road between the electric pole No. 22 (*exhibit* 3) and point 5 (the gate of the church opening on the main road near the scene) 42 expended cartridges 0.45, 3 expended cartridges 9 m.m. and 3 live rounds of ammunition 0.45. The police also found next to the pool of blood one expended projectile. Armed with those expended cartridges, the police on the same date, after enquiring which of the automatic weapons of the security company had been recently used, it was discovered that three firearms were recently used which they delivered to Tsathiotis. Those firearms, as well as the expended cartridges, the live rounds and the projectile were handed over to Ag. Inspector Christofides, a firearms identification and ballistics expert for examination.

The three firearms, *exhibits* 4, 5 and 6 were in good serviceable condition. *Exhibit* 4 is an automatic submachine gun T.M.T. type No. 2889, 0.45 calibre, and according to Cleovoulos Papacostas, that gun *exhibit* 4, was issued by the National Guard to accused 1; *exhibit* 5 to a certain Alexandros Carnavalos and *exhibit* 6 to accused 4. Stenguns were also issued to accused 3 and 6.

Acting Inspector Christofides carried out a ballistic examination and compared the expended cartidges with control expended cartridge cases and projectiles which he fired using the firearms *exhibits* 4, 5 and 6, and he made the following observations:– The expended cartridges of 0.45 were tried with T.M.T. firearms. He ascertained that 23 (*exhibit* 8) out of the 42 empty cartridges and the projectile (*exhibit* 7) had been fired by *exhibit* 4. Fifteen of those empty cartridges had been fired by *exhibit* 5; the other four expended cartridges *exhibit* 10 were fired by an automatic sub–machine gun of the same type which was not an *exhibit* before the trial Court. The three expended cartridges of 9 m.m. (*exhibit* 11) were ascertained to have been fired out of *exhibit* 6. The witness fired one out of the three live cartridges of 0.45 calibre and found it in good serviceable condition. The two live cartridges are *exhibit* 12. He produced also the control expended cartridge cases and projectiles which he used for the test and which he fired with the stengun *exhibit* 6 as *exhibit* 13. Two control expended cartridges and the projectiles fired by *exhibit* 5 are *exhibit* 14; and the two control empty cartridges

and two projectiles fired with *exhibit* 4 became *exhibit* 15. One of those two cartridges is the one of the three live cartridges which was handed to him by P.W.1.

The trial Court, having considered the evidence of the prosecution and the defence, as well as the real evidence with regard to the issue as to the time of the departure of accused 1 from Mesa Chorio, accepted and found that accused 1 was the person who jumped on the surrounding wall of the church and who was seen there by all those witnesses for the prosecution. Having rejected the version of accused 1 and that of accused 3, the Court made a finding of fact that accused 1 fled after the incident of the shooting of the deceased by jumping from the surrounding wall into the church yard. Then the Court, having further examined the version of the prosecution witnesses with regard to the place where the deceased was standing, in co-relation with the medical evidence and the evidence of the ballistic experts, came to the conclusion that the real evidence did not in any way contradict the oral evidence. The same version was repeated, as the Court put it, by all the prosecution witnesses who testified before it that there was no other shooting at that time.

There is no doubt that the Court, being faced with the real evidence, that is the finding of the empty cartridges at the scene where the deceased fell, having been shot, posed this question: "If there was no other shooting at the time, how could the finding of empty cartridges by P.W. 1 which were fired by other guns be accounted for?" The reasoning of the Court in answering the question posed, was, that "none of the villagers was seen by accused 3 or anybody else carrying any gun. Accused 1, according to accused 3, had already left the area. All his other companions were not there and it is an undisputed fact that Papaonisiforou and Neofytou, with accused 4 and accused 6, left earlier than the others in the group and actually did not wait for the driver of the land rover or the other passengers of the landrover to arrive, but they left the village in the Fiat car". In the light of that evidence, the Court drew the inference that the other empty cartridges found were the result of earlier shots by those who were carrying those guns out of which they were fired.

The Court, dealing further with the evidence of D.W. 2, Chrysanthi Michael who gave evidence, said that her evidence was given to support the case for the defence, because her story

was unnatural, unreasonable and incredible and her allegation was rejected that any shots were fired at the time from any direction by any other person except accused 1.

The trial Court, having further weighed both the version of the witnesses for the prosecution and the defence, rejected the evidence of the accused and his witnesses and came to the following conclusions:-

" (a) Accused No. 1 was a member of the group that went to Mesa Chorio after midnight on 7th-8th September, 1974; (b) he was armed with a Thompson gun (*exhibit* 4); (c) the deceased Demosthenis Georghiou left his house due to the shootings, shouts etc. and proceeded to the centre of the village; (d) Accused 1 and accused 6 assaulted the rural constable when the latter tolled the bell; (e) the accused 1 told off Eleni Nearchou (P.W .4) when she went to ring the bell; (f) the accused 1, from the place of the tower bell which is at the south-east of the church, proceeded in a westerly direction along the south side of the church building. He then appeared in the church yard on the north; (g) A crowd had gathered along the main road opposite the church; (h) Accused 3, carrying a sten gun was the last of those of the group who proceeded along the main road towards the house of Boyiadjis (P.W. 4) in the direction where the land rover was left; (i) Attempt was made to disarm accused 3, but the deceased did not participate in it; (j) the Accused 1 jumped on the surrounding wall at point 'e' of the plan (*exhibit* 3), carrying his Thompson fiirearm; (k) the deceased was standing some feet from the surrounding wall at point 1 of *exhibit* 3. There was no one in between the deceased and this accused. (1) The accused fired a burst in the air over the heads of the crowd. Then he lowered his gun and the people turned back intending to take cover. The accused fired another burst with his gun so lowered. There was no other shooting at that time. A bullet fired by this accused (No. 1) hit the deceased Demosthenis Georghiou and caused his instant death. The entry and exit wound caused is that described by Dr. Christodoulides (P.W. 9). Bullets fired by the accused hit and injured P.W. 10, Georghios Taki; (m) The deceased's wife (P.W. 8) chased him, but the accused turned back (at point 7 of *exhibit* 3) and shot and injured her while she was at point 6 where blood was later found by P.W. 1. (n) P.W. 9, the deceased's father-in-law

also ran after the accused. The accused jumped over the surrounding wall of the church by the house of Georghios Kyriakou and managed to escape. He returned running to the camp of the security company."

Finally, the Court having regard to the conclusions reached, found that the shooting that caused the death of the late Demosthenis Georghiou was the unlawful act of accused 1, and being satisfied that the prosecution has proved the case against the accused beyond reasonable doubt, convicted the accused and sentenced him to 10 years' imprisonment.

The appellant appealed against the conviction and the point of substance raised by the notice of appeal is: (1) That the conviction having regard to the evidence adduced is unreasonable in view of the material differences, discrepancies and contradictions in the version of the eye witnesses on whose evidence the Court relied; and that the Court wrongly relied upon the evidence of the witnesses which is inconsistent with the substantial evidence, medical findings and ballistic.

The appeal was argued by counsel for the appellant on the ground that the verdict of the trial Court was unreasonable or could not be supported having regard to the evidence, and invited the Court to set aside the verdict as being untenable. The powers of the Supreme Court to interfere with the judgment of the trial Court, in hearing and determining the appeal, are embodied in the provisions of s. 145 of the Criminal Procedure Law, Cap. 155, and I would add that these powers must be read and applied in conjunction with the provisions of s. 25(3) of the Courts of Justice Law, 1960 (Law 14/60), and in particular with that part which says that this Court has power to make any order which the circumstances of the case justify... Section 145(1) of the Criminal Procedure Law, Cap. 155, reads:-

" In determining an appeal against conviction, the Supreme Court 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."

Pausing here for a moment, I do think that there was room for complaint about the manner in which the trial Court had approached or dealt with one of the most crucial points, that is with the finding of empty cartridges at the scene where the deceased fell, having been shot. In my opinion, having regard to the surrounding circumstances and of the prevailing excitement, confusion and the justified grudge against accused 1 for firing against the crowd, the Court ought to have given a most careful consideration to the real evidence, and attached more weight to that circumstantial evidence than the oral one, because the latter is not the safest.

As it is observed by Wills on Circumstantial Evidence at pp. 38–39:– "The direct evidence is more likely to be warped by sympathy, indignation and other similar disturbing causes..... witnesses may be examined, may be corrupted...".

On the other hand, the then Chief Justice of England, Lord Hewart, in the case of *R.* v. *Podmore*, (Winchester Assizes, March, 1930) warned the jurors of the dangers which are contained in the direct oral evidence of witnesses, and pointed out: "But one cannot forget that an eye witness may sometimes be mistaken; there may be a mistake about a person, there may be a mistake about an act; there may be influence, or grudge or spite".

I am aware, of course, of the difficult situation which the Court found itself in, having heard a great number of witnesses, and that because of the criminal behaviour of the group on that night the inhabitants of the peaceful village were terrified, but on the other hand, one should approach the real evidence with that in mind, and because there was confusion, excitement and a grudge against the accused, the Court in my view, I would reiterate, ought to have given more weight to the real evidence, that is to say, the finding of the empty cartridges at the scene of the shooting, particularly so, when there was other evidence with which I intend to deal at a later stage, that the earlier shooting started far away from the scene where the deceased fell.

In the case in hand, as I have said earlier, the appeal was argued by counsel on the question only that the conviction should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable. There is no doubt that the provisions of s. 145(1)(b) correspond in some respects

to those of s. 4(1) of the Criminal Appeal Act, 1907, but it was said judicially that the variations in the wording of the two enactments are more of a phraseological rather than substantial nature, as it appears from the case of *Kafalos* v. *The Queen*, 19 C.L.R. 121, where it was held that "the phrase appearing in s. 145(1)(b) that is, 'unreasonable having regard to the evidence adduced' had a similar meaning to the corresponding provision in the English enactment, that is to say, 'unreasonable or cannot be supported having regard to the evidence' ".

With this in mind, I have given anxious consideration to the facts of this case and having examined the evidence most carefully and during the appeal we have gone through the evidence again with the assistance of counsel for the appellant, who has materially helped us by directing our attention to the various important passages in the evidence, and particularly the evidence upon which the trial Court relied of prosecution witnesses 4, 5, 6, 8, 9 and 18, in making its findings of fact, namely, that at the time the deceased was hit by the bullet which caused his death only the appellant was firing, and that as a result, the Court drew the inference that the empty shells found at the scene where the deceased fell, were the result of earlier shots by the persons who were carrying those guns out of which they were firing.

It is important to state that all of the witnesses who gave evidence, except Poyiadjis (P.W. 4) Shallis, (P.W. 9) and Armeftis, (P.W. 18) did go to bed on that night, and, therefore, these three witnesses were the ones who witnessed from the beginning to the end the incidents referred to earlier in this judgment. However, in order to stress once again that it has been accepted by all the witnesses that during that night there was a confusion all around, Poyiadjis, when questioned, his reply was "I was confused at the time; how could I hear shots? There was a crowd there, I was confused because I saw the man in front of me holding a gun". Then this witness was questioned in these terms:–

"(*Q*) There may have been other bursts and you did not know?

(*A*) I do not know.

(*Q*) Did you hear any?

(*A*) When I tell you I don't know, it means that I did not hear any."

It is significant to state that going through the evidence of all the witnesses, that nowhere is it to be found that anyone saw anybody firing prior to the incident which resulted in the death of the deceased and where the 45 empty shells, the three rounds of ammunition and the projectile were found. Furthermore, as the evidence shows, no-one even suggested from the array of witnesses that any shots were fired at that spot subsequently; and once again in my view, because of the reasoning behind the finding of the trial Court based on inference, such reasoning quite rightly in my view, became the subject of severe criticism by counsel on behalf of the appellant before us.

I think that having regard to the finding of the empty shells, which is an undisputable fact, and in view of the fact that there was evidence on behalf of Poyiadjis that the first burst of firing from the group came from the direction of the cafe which, according to the evidence, is 141 ft. away from the scene where the deceased fell, and because the holders of the guns from which the shells were fired were ex-co-accused, it was up to the prosecution to establish the guilt of the appellant and, therefore, the Court should, in the case in hand, as indeed in any other case where there is direct evidence, weigh the said evidence in the light of the existing circumstances, namely the confusion and grudge against the appellant with objective criteria. "The Judge may be deceived"—said Lord Wright in *Powell and Wife* v. *Stretham Manor Nursing Home* [1935] A.C. 243 at p. 267—"by an adroit and plausible knave or by apparent insolence... Yet even where the Judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact". I may add that the objective fact and the undisputed fact was the finding of the empty shells near the scene where the deceased fell. This view was adopted also by the Supreme Court of Cyprus in the case of *Andreas Antoniou and* 2 *Others* v. *The Republic*, 1964 C.L.R. 116, that the evidence of an eye witness should be decided with existing circumstantial evidence, and when the first is inconsistent with circumstantial evidence, the latter should be given more weight. Vassiliades J., (as he then was) said at p. 129:-

> " Moreover, the appellants complain, that such evidence, full of discrepancies and contradictions in material particulars, as counsel claimed to have been able to show by reference to the record, was not tested against the circumstantial evidence which came from independent pro-

secution-witnesses; the medical, the ballistic, and the police-evidence regarding the examination of the scene soon after the crime. Indeed, the results of such a test are inescapable; and they are inconsistent with the finding of the trial Court that the crime was committed 'in the way testified to, by prosecution-witnesses 8 and 9'. It is in this connection that the verdict is most vulnerable...".

Later on he said at p. 130:-

"Here we have a case where a most serious verdict—a verdict entailing death sentence for three persons—turns mainly on the evidence of several eye-witnesses, who cannot possibly be described as independent, and whose versions 'not altogether tally on all particulars' according to the trial Court (at p. 378A); but in fact their evidence presents numerous important contradictions, in material particulars; especially regarding the case of the second and the third appellants.

This evidence, and the verdict based thereon, are challenged on one of the most effective tests of truth in any trial; the test of circumstantial evidence. It is, therefore, material to find the effect of such evidence (medical, ballistic and locus in quo) as it comes from the record, and as it is reflected in the judgment."

Triantafyllides, J., (as he then was) delivering a separate judgment in that case adopted also the same principle and had this to say at p. 133:-

"The cardinal consideration which has led me to the view that the convictions of appellants 2 and 3 have to be set aside is the incompatibility of the evidence of the eyewitnesses, on the one hand—which has formed the foundation for their convictions by the trial Court—with the circumstantial evidence, on the other hand.

Circumstantial evidence, once its effect has been ascertained beyond the probability of error, is to be relied upon as providing infallible standards of accuracy against which the evidence of eyewitnesses has to be tested. Though, indeed, it is not the rule that the evidence of eyewitnesses should not be accepted unless supported by circumstantial evidence, it is certainly difficult to visualize a case where the accounts of eyewitnesses can properly be relied upon

to the extent to which such accounts are inconsistent with the circumstantial evidence on the point.

In the present case the circumstantial evidence which is of fundamental importance is that relating to the medical findings and the ballistic exhibits."

See also the observations made in the case of *Koumparis* v. *The Republic*, (1967) 2 C.L.R. 1 at p. 9.

Applying the principle formulated so forcibly in that case to the present case, I find that the evidence of the witnesses is inconsistent or cannot be reconciled with the circumstantial evidence as it has been shown by the ballistic evidence that the empty shells found near the scene where the deceased fell were fired by those persons holding the said guns at least from a distance of about 10 feet from the scene and, as I said earlier, the only evidence before the trial Court that there was other firing was at a distance of 174 ft. near the cafe. Once, therefore, the presence of those empty shells remained unaccounted for, and particularly in the circumstances of this case, after considering the evidence as a whole, I felt that there was a lurking doubt in my mind, and in my view, the charge could not be said to have been proved with the certainty required to justify a verdict of guilty in such a serious case.

In *William Herbert Wallace*, 23 Cr. App. R. 32, Hewart, L.C.J., delivering the judgment of the Court of Criminal Appeal said at p. 35:-

> " Now the whole of the material evidence has been closely and critically examined before us during the past two days by learned and experienced counsel on both sides, and it does not appear to me to be necessary to discuss it again. Suffice it to say that we are not concerned here with suspicion, however grave, or with theories, however ingenious. Section 4 of the Criminal Appeal Act of 1907 provides that the Court of Criminal Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it cannot be supported having regard to the evidence.
>
> I should like to add that there is not, so far as we can see, any ground for any imputation upon the fairness of the police, but the conclusion at which we have arrived is that the case against the appellant, which we have care-

fully and anxiously considered and discussed, was not proved with that certainty which is necessary in order to justify a verdict of guilty, and, therefore, that it is our duty to take the course indicated by the section of the statute to which I have referred. The result is that this appeal will be allowed and this conviction quashed."

I must confess, however, that during the hearing of this appeal I felt that there was a lurking doubt in my mind that made me wonder whether an injustice has been done in this case, particularly because of the confusion and the justified grudge by the crowd and of the witnesses against the appellant for behaving in such a reckless and criminal manner, and this is another reason why I have considered it necessary to interfere with the verdict of the trial Court, because I consider it my duty to take the course indicated by the combined effect of s. 145(1)(b) and s. 25(3) of the Courts of Justice Law, 1960.

In *Rex* v. *Cooper*, [1969] 1 All E.R. 32 Widgery, L.J., delivering the judgment in a Criminal Appeal, has referred also to the provisions of s. 2(1)(a) of the English Criminal Appeal Act, 1968, granting additional powers to the Court of Appeal to interfere with the judgment of the trial Court in circumstances where it was of the opinion that the verdict is unsafe or unsatisfactory.

Widgery, L.J., had this to say at pp. 33–34:–

" The important thing about this case is that all the material to which I have referred was put before the jury. No one criticises the summing-up, and, indeed, counsel for the appellant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding Judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court would be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966—provisions

which are now to be found in s. 2 of the Criminal Appeal Act 1968—it was almost unheard of for this Court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it. We have given earnest thought in this case to whether it is one in which we ought to set aside the verdict of the jury, notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy. After due consideration, we have decided we do not regard this verdict as safe, and accordingly we shall allow the appeal and quash the conviction."

In *Stafford* v. *D.P.P.*, [1973] 3 All E.R. 762, Viscount Dilhorne, sitting in the House of Lords dealing with s. 2(1)(a) of the Criminal Appeal Act, 1968, said at p. 764:-

> " Section 4(1) of the Criminal Appeal Act 1907 required the Court of Criminal Appeal to allow an appeal if they thought (i) that the verdict was unreasonable; or (ii) could not be supported by the evidence; or (iii) that the judgment of the trial Court should be set aside on the ground that there was a wrong decision on a question of law; or (iv) that on any ground there was a miscarriage of justice. It contained the proviso that the Court might, notwithstanding that they were of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they considered that no substantial miscarriage of justice had actually occurred.
>
> This section was amended in 1966. Under the 1907 Act it might not have been possible to say that a verdict was unreasonable or not supported by the evidence or that a miscarriage of justice had occurred and so quash the conviction although considerable doubt was felt as to

its propriety. So in 1966 a wider discretion was given to the Court by Parliament and s. 4(1) was amended.

It is now replaced by s. 2(1) of the Criminal Appeal Act 1968, a consolidation Act. That subsection provides:

> 'Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think— (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or (b) that the judgment of the Court of trial should be set aside on the ground of a wrong decision of any question of law; or (c) that there was a material irregularity in the course of the trial...'.

It also contains a proviso in the same terms as that of the proviso to s. 4(1) but with the omission of the word 'substantial'.

The Act thus gives a wide power to the Court of Appeal and it would, in my opinion, be wrong to place any fetter or restriction on its exercise. The Act does not require the Court, in making up its mind whether or not a verdict is unsafe or unsatisfactory, to apply any particular test. The proper approach to the question they have to decide may vary from case to case and it should be left to the Court, and the Act leaves it to the Court, to decide what approach to make. It would, in my opinion, be wrong to lay down that in a particular type of case a particular approach must be followed. What is the correct approach in a case is not, in my opinion, a question of law and, with respect, I do not think that the question certified in this case involves a question of law."

Then, after quoting a passage from the case of *R.* v. *Cooper* (referred to earlier in my judgment) Viscount Dilhorne continued:–

> " That this is the effect of s. 2(1)(a) is not to be doubted. The Court has to decide whether the verdict was unsafe or unsatisfactory and no different question has to be decided when the Court allows fresh evidence to be called."

Lord Kilbrandon, delivering a separate speech in the same case dealt also with the same section of the Criminal Appeal Act 1968 and said at pp. 768–769:–

" The difference between these words and the phrase used in the Criminal Appeal Act 1907, 'unreasonable or incapable of being supported' is important as indicating the erection of a standard for the setting aside of convictions which, until the new phrase was introduced in 1966, it would not have been deemed possible to quash. This is not truly a consequence of a different form of words necessarily and from its own content demanding a standard different from that operative theretofore. It would have been possible for the Courts, after 1907, to have said that if a verdict was unsafe or unsatisfactory it was not reasonable. But this line was not taken; more emphasis was laid on the concluding part of the phrase, and verdicts which were supported by evidence which in law the jury could accept—and it was for the jury to say whether they would accept—were held to be unassailable. A conviction depending solely on the fleeting identification by a single stranger could, for example, have been upheld, though on a different view of the 1907 Act, it would have been possible to condemn it as unreasonable, just as today it would very probably be thought unsafe or unsatisfactory, and be set aside on those grounds.

The setting aside of a conviction depends on what the Appellate Court thinks of it—that is what the Act says. If it were necessary to expand the question which a member of the Court, whose thoughts are in question, must put to himself, it may be 'Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory? If I have I must quash. If I have not, I have no power to do so'.

The primary criticism offered on behalf of the appellants against the Court of Appeal's approach was this: It was said that, having decided that certain significant new evidence was credible, in the sense that it was not, from the ill-demeanour of the witnesses or its inconsistency with other evidence, obviously unworthy of belief, the Court, instead of asking themselves whether the new evidence might have caused the original jury, had they heard it, to have a reasonable doubt, asked the question whether the new evidence was a circumstance which caused themselves to have a reasonable doubt. This criticism seems to me to ignore the plain words of the Act, which, in the context

we are here considering, direct the Court to set aside the conviction if, and only if, 'they think' the verdict is unsafe or unsatisfactory. We were referred to a number of cases in which, it was said, the potential effect on a jury rather than the actual effect on the appellate Judges was held to be the proper test. I agree that this test may be one of the routes which a Judge may follow in making up his mind; he may say to himself, 'I think this verdict is unsafe, because the fresh evidence might have caused a jury to have reasonable doubt'. But, in my opinion, he cannot say to himself, 'After hearing the fresh evidence I have no reasonable doubt of the appellant's guilt, but I concede that a reasonable doubt is open, and might influence someone else, that is, a jury'. To concede that a reasonable doubt is open is to admit that one has a reasonable doubt oneself. Having a reasonable doubt, one must 'think' that the conviction is unsafe; on the other hand, being convinced, as the Court of Appeal was in the present case, that 'the inference of guilt is irresistible', they could not think that the conviction was unsafe or unsatisfactory, and therefore had no statutory power to interfere with the verdict."

In these circumstances, and for the reasons I have advanced, I would quash the accused's conviction for homicide, but I think in view of the evidence which has been accepted by the trial Court, the proper and indeed the only course that I can take in this case is to substitute a verdict of guilty for the offence of grievous bodily harm to *Stavroulla Demosthenous*, contrary to s. 231 of the Criminal Code against the accused, exercising my powers under s. 145(1)(c) of the Criminal Procedure Law. I would, therefore, allow the Appeal.

A. LOIZOU, J.: I regret I have not been able to agree with the approach of my brothers Judges to this Appeal, for the reasons that I am about to give.

The appellant, accused No. 1 at the trial, was found by the Assize Court of Paphos, guilty of the offence of homicide, contrary to section 205 of the Criminal Code, Cap. 154, the particulars of which were that on the 8th day of September, 1974, at Mesa Chorio, in the District of Paphos, did, by an unlawful act, to wit, shooting, cause the death of Demosthenis Georghiou, late of Mesa Chorio.

He was a member of a group of persons who went in two cars, a land rover and Fiat saloon car, to Mesa Chorio village, some time after midnight of the 7th to the 8th September, 1974. The conduct of this group of people caused a commotion in the village and brought from their beds many of the villagers. The happenings of that night culminated to the death from a bullet, of the said Demosthenis Georghiou, a 32 year-old person and the wounding by bullets of his wife Stavroulla Demosthenous and a 16 year-old student, Georghios Taki, whilst they were in the centre of the village, outside the church.

The police arrived at the scene and commenced their investigation, the outcome of which led to the accused and five other members of that group being charged with homicide, contrary to sections 205, 20 and 21 of the Criminal Code, Cap. 154, as amended. At the close of the case for the prosecution, the Court added a new count charging the other five accused with carrying firearms, the importation of which was prohibited, contrary to section 3(1)(2)(a) of Law 38/74. It did not call them upon on the homicide count, and eventually convicted accused No. 1 the present appellant, to ten years' imprisonment, on the first count. Accused 2, 3 and 4 were convicted on the new added count and accused 5 and 6 were acquitted.

The hearing of the case commenced on the 13th January, 1974 and was concluded on the 21st April, 1974. It was a long and protracted case for reasons which appear on the record. They include, *inter alia*, the entering of a plea of guilty and then withdrawing it on the advice of the Court, as facts alleged by counsel for the appellant in mitigation were inconsistent with a plea of guilty, and for other reasons the blame for which could not be attributed to the court which has my admiration for the patience and meticulous care with which it heard these proceedings.

In all 32 witnesses were called, 10 of which were recalled and further cross-examined after the addition of the new counts. All the accused gave evidence on oath and some of them called witnesses for their defence.

The appellant was a reservist who joined The National Guard soon after the Turkish invasion of the 20th July, 1974. Some days later, a so-called Security Company was formed which was stationed at all times in Paphos town and was encamped originally in a cinema and later in an elementary school behind the headquarters of the 5th Higher Command. The appellant

and the other members of this group belonged to this company. In addition, accused 1 like most of the other ex-accused, was appointed a special constable, without remuneration, under section 30 of the Police law, Cap. 285. On the night in guestion, and particularly so at Mesa Chorio, none of them was on duty, either as a member of the National Guard or as special constable. They had gone on their own, for the purpose of painting over slogans in favour of Archbishop Makarios and Mr. Karamanlis who had then assumed the presidency of the Government of Greece. Their presence in the village was made known by shots that were heard by people, and the ringing of bell, in addition to having been seen by some of the witnesses arrive.

It is not necessary, for the purposes of this judgment, to relate all the incidents that happened in the village after their arrival, as they relate to acts and utterances by the other members of the group or the appellant, unconnected with the point in issue.

At some stage, however, and after the church bell rang, people started gathering in the central street of the village which forms a square in front of the church. Costas Leonida Boyadjis (P.W. 4) who had seen the land rover arrive, came out from the entrance gate of his house and walked about two or three paces, when he saw an armed person—ex-accused 3—coming towards his gate. After asking him what was the matter, he tried to disarm him by grasping the gun from the butt, whereas accused 3 was holding it from the barrel. It was then that the appellant jumped on the wall and fired a burst. The witness was standing at the time two or three paces away from the appellant. After the first burst was fired, the witness cautioned the appellant by calling him by his name to be careful lest they might be shot from the shooting. The appellant then turned the gun downwards and fired another burst. Both bursts were fired at the direction away from the church, as the appellant was standing on the surrounding wall with his back to it. The square in front of the surrounding wall was crowded with people. It was at that time that Demosthenis Georghiou was hit and fell to the ground. People shouted that he had shot him. The appellant then jumped from the surrounding wall into the church yard and started running away. The wife of the victim, Stavroulla (P.W. 8), also saw the appellant on the surrounding wall of the church firing to the direction of the crowd; on seeing her husband

being hit and fall, she shouted at him and chased him but the appellant jumped from the wall and ran away. In the course of this chase the appellant turned back, fired two shots at her and wounded her. The determination with which this witness reacted and risked her life, is indicative of the firmness of her conviction regarding the events she witnessed there and then and about which she testified to the Court.

Demetris Ioannou Tsiailis (P.W. 9), the father of Stavroulla, after relating certain happenings with which we are not particularly concerned at this stage, stated that he saw the accused on the surrounding wall of the church firing in the air. Then he heard Boyadjis (P.W. 4) who was standing near the appellant warning him of the dangers that might result from his shooting. It was then that the appellant lowered his gun and fired and saw a man fall on the ground and heard his daughter Stavroulla shouting at the appellant and chasing him when the latter jumped from the wall and ran away. He followed them and witnessed also the shooting of his daughter.

Takis Papageorghiou, (P.W. 6) of Emba, resident of Mesa Chorio, witnessed the incident of the attempt by Boyadjis and some other women to disarm ex-accused 3. He intervened also and when he heard accused 3 say that the automatic firearm was loaded, he let him go. Accused 3 left to the direction of Mesoi village. In a matter of seconds he saw the appellant come from the church yard, jump on its surrounding wall and fire a burst in the air; he heard Boyadjis cautioning the appellant who, at that moment, lowered his gun and fired again to the direction of the crowd in front of him. He then heard Stavroulla call out that her husband was shot, and saw a man falling to the ground. Stavroulla chased the appellant who jumped into the church yard and ran away. When he witnessed this shooting incident he was about one foot from the surrounding wall and the appellant was 5'-6' to his right. There was nobody in front of him, but there were people to his left who, on hearing the shots, were trying to take cover.

Georghios Taki (P.W. 10) who is the son of the previous witness, and pupil of the 5th form of Paphos College, was awakened by the ringing of the church bell and by shots. He witnessed the incident of the attempt to disarm ex-accused 3 and saw the appellant jump on the surrounding wall of the church, fire in the air and then lower his gun over their heads, to the direction where the people were gathered. He was standing

at the time in the street, about 2–3 meters from the appellant and on the direction of Mesoi village. On hearing the shots he turned to go home. At that moment he was hit from a bullet and from the position he was he saw the deceased fall to the ground. The direction of the wound of this witness was such as to suggest that the person firing must have been standing at a higher level and at the time he was hit the witness was stooping down and turning to go away, a normal reflex movement of a person trying to escape from danger.

Elias Nearchou, (P.W. 5) who lives opposite the house of Boyadjis, (P.W. 4), was awakened by shots, bursts and noises. He went out of his house and saw some of the accused there. Other people started gathering after they heard the bursts of shots, he said. He saw Boyadjis in a crowd of about 15 persons coming from the direction of the coffee shop, towards the place where the witness was, that is to say, the square outside the church. He saw Boyadjis trying to disarm a person, apparently he refers to the incident regarding ex-accused 3, and then saw accused 1 coming from the church yard and jumping on the surrounding wall. He saw the appellant fire a burst in the air. Then the appellant lowered his gun towards the ground and started firing continuously, when the crowd turned away towards the witness who was at the time standing opposite the accused at a distance of 9–10 paces from the wall of his yard. It was then that he saw Demosthenis fall to the ground. The appellant then jumped from the wall into the church yard.

Eleni Elia, (P.W. 11), is the daughter of Elias Nearchou. She was awakened by shots. She rang the church bell and was sent home by the appellant who was known to her, as he used to go to their village with his tractor for work. Whilst proceeding towards her home, she saw the appellant on the surrounding wall shooting first in the air and then lower the gun downwards towards the crowd. She saw also ex-accused 6 in the church yard behind accused 1, but saw no other person firing at the time, except the appellant.

Nicolaos Christodoulou, (P.W. 16), was at the coffee shop of Charilaos when the armed band arrived there. Eventually he went to the church to ring the bell when the appellant and another accused hit him and forced him to stop and then he saw Eleni Elia also try to ring the church bell.

Nicolaos Armeftis, (P.W. 18), heard bursts from the direction

of the church yard whilst at the coffee shop of Charilaos and later he saw the appellant go into the church yard through the main gate of the church. He witnessed the incident of the attempt by Boyadjis to disarm ex-accused 3 outside the gate of his yard opposite the coffee shop of Georghios Constantinou and the passage to the house of Elias Nearchou. The deceased Demosthenis was in the crowd and he witnessed the appellant coming from the church yard, jumping on the surrounding wall of the church and fire a burst in the air over the heads of the crowd and then lower the gun and fire one more burst and Demosthenis fall down with blood coming out of his head. The deceased and the wounded were removed to the Paphos Hospital.

There was moon light at the time and the street was illuminated by street lights, one of them No. 22 away a few feet from the point on the surrounding wall on which the appellant stood and fired the fatal shots. There was also light coming from the verandah of the house of Boyadjis, (P.W. 4), and in these circumstances the trial Court concluded that there was no difficulty from the illumination point of view for anyone to see and recognize the appellant when on the surrounding wall. Any one who goes through the evidence of all these eye witnesses and bears in mind that the appellant was holding a firearm and standing alone on that wall at a level of two feet higher than the rest of the crowd, cannot help feeling that the accused at the time looked like a statute on a pedestal in the central square of the village the details of which were so conspicuous to sight-seers on account of there being no obstruction of the view.

The deceased was removed to Paphos Hospital, where Dr. Christodoulides (P.W. 29) carried out a post mortem examination. It was found that there was an entrance wound on the neck possibly caused by a firearm bullet which came out in the middle of the lower jaw where the bone was damaged and the lower lip was injured. The entrance and the exit wounds were in approximately the same level. The cause of death was haemorrhage, due to the damage of the big vessels of the neck, namely, the carotid artery and vein. The death was instant as, on account of the wound, the circulation of blood to the brain came to an end.

The police was informed of the incident and at about 2 a.m. of the 8th September, 1974, Police Inspector Tsadiotis, (P.W. 7), Police Sergeant Georghiades, (P.W. 1) and other constables

arrived at the scene and they saw, on the right side of the road, opposite the church, a pool of blood. From that place where the pool of blood was, 42 expended cartridges .45, three expended cartridges of 9 m.m. and three live rounds of ammunition .45 were collected. Next to the pool of blood an expended projectile was also recovered. They were all handed to the firearms identification and ballistic expert, Inspector Christofides, (P.W. 2), together with three firearms, *exhibits* 4, 5 and 6 which had been issued to appellant, a certain Alexandris Karnavalos and to ex-accused 4, respectively.

Exhibit 4 is an automatic sub-machine gun, T.M.T. type, No. 2889, .45 calibre; *exhibit* 5 is an automatic sub-machine gun of the same type and calibre as the previous one, No. 2922 and *exhibit* 6 an automatic sub-machine gun, sten gun type, No. 49969, 9 m.m. calibre of English make. All were in good serviceable condition. The T.M.T. type is an imitation of Thompson sub-machine gun and was manufactured locally by Turkish Cypriots.

A ballistic examination was carried out and it was ascertained that 23 out of the 42 empty cartridges and the projectile had been fired from *exhibit* 4; 15 of those empty cartridges had been fired from *exhibit* 5; the other 4 expended cartridges were fired from an automatic sub-machine gun of the same type, which was not *exhibit* before the Court. The three expended cartridges of 9 m.m. were ascertained to have been fired out of *exhibit* 6. The projectile, though fired from the gun of the appellant, was not connected with the fatal wound of the deceased. Furthermore, this ballistic expert, stated that expended cartridges fired from an automatic sub-machine gun are ejected and fall to the righthand side of the shooter, about ten feet away, in a circle of five-feet diameter, provided of course, the expended cartridges remain at the place of the first impact.

The trial Court accepted as true and reliable the testimony of the witnesses for the prosecution and in particular witnesses 4, 6, 8, 9, 10 and 18 who were also positive in their assertion that there was no other shooting at the time the appellant was on the surrounding wall firing the two bursts. It made a number of findings, the material one to the points raised by the present appeal being the following:-

" .....

(h) Accused 3, carrying a sten gun, was the last of those

of the group who proceeded along the main road towards the house of Boyadjis (P.W. 4) to the direction where the land rover was left.

(i) Attempt was made to disarm accused 3 but the deceased did not participate in it.

(j) The accused No. 1 jumped on the surrounding wall at point 2 of the plan, *exhibit* 3, carrying his Thompson firearm.

(k) The deceased was standing at some feet from the surrounding wall at point 1 on *exhibit* 3. There was no one in between the deceased and this accused.

(l) The accused fired a burst in the air over the heads of the crowd. Then he lowered his gun and the people turned back intending to take cover. The accused fired another burst with his gun so lowered. There were no other shootings at that time. A bullet fired by this accused (No. 1) hit the deceased Demosthenis Georghiou and caused his instant death. The entry and exit wound caused is that described by Dr. Christodoulides (P.W. 29). Bullets fired by the accused hit and injured P.W. 10 Georghios Taki.

(m) The deceased's wife (P.W. 8) shouted out to the accused. The accused jumped into the church yard and started running away. P.W. 8 chased him but the accused turned back at point 7 of *exhibit* 3 and shot and injured her whilst she was at point 6, where blood was later found by P.W. 1.

(n) P.W. 9 the deceased's father-in-law also ran after the accused. The accused jumped over the surrounding wall of the church by the house of Georghios Kyriacou and managed to escape. He returned running to the Camp of the Security Company.

The shooting that caused the death of the late Demosthenis Georghiou was an unlawful act of the accused No. 1. We are satisfied that the prosecution has proved beyond reasonable doubt the case against this accused."

The substance of the offence of which the appellant was found guilty lies in the fact that the death of the victim was caused by the unlawful act or omission of the offender, a degree of mens rea being essential.

The trial Court relied on the case of *Cyril David Church*, 49 Crim. App. R. 206 at 213, where, in relation to the offence of manslaughter in England, it was said that "The unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to at least the risk of some harm resulting therefrom, albeit not serious". It further relied on the case of *Fostieri* v. *The Republic* (1969) 2 C.L.R. 105, where at p. 112, it was said:–

> "So long as it is established to the satisfaction of the Court that the offender intended the unlawful act which eventually resulted in the death of the victim, within the period prescribed by law, it is not necessary for the prosecution to prove that the offender intended the death of the victim."

The presence of expended cartridges by the pool of blood fired from firearms other than the one carried and used at the time by the appellant, is in effect the foundation upon which the present appeal has been argued, the grounds of which are the following:–

"1. Having regard to the evidence adduced, the verdict is unreasonable.

2. In view of the material differences, discrepancies and contradictions in the versions of the eyewitnesses (P.W. 4, 5, 6, 8, 9, 10, 11, 16 and 18) on whose evidence the trial Court relied, the verdict is untenable.

3. The evidence of the aforesaid eyewitnesses is inconsistent with the circumstantial evidence (medical findings and ballistic exhibits) and, therefore, it was wrongly relied upon by the trial Court.

4. In view of the findings of the Court that no common design arises and in view of the totality of the evidence adduced, oral and real, the conclusion of the trial Court that it was appellant who unlawfully caused the death of the victim is unsafe."

It has been urged, that assuming that the finding of the trial Court that the appellant did fire the bursts described in its finding hereinabove set out under paragraph (1), is correct, yet, it was not proved beyond reasonable doubt that the accused fired the fatal wound as it was the case for the appellant that the shots fired by him were not the only ones fired at the time,

when there were other shootings, as borne out by the presence of the expended cartridges found by the pool of blood.

The trial Court in fact considered this aspect and posed to itself this question: "If there was no other shooting at the time, how can the finding of empty cartridges by P.W. 1 which were fired by other guns be accounted for?" Its answer is the following:

> " It is in evidence that earlier, there was a lot of shooting. None of the villagers was seen by accused 3 or anybody else carrying any gun. Accused 1, according to accused 3 (D.W. 4) had already left the area. All his other companions were not there and it is an undisputed fact that Papaonissiforou and Neophytou with accused 4 and accused 6 left earlier than the others of the group and actually did not wait for the driver of the land rover or the other passengers of the land rover to arrive, but they left the village in the Fiat car. The other empty cartridges found are the result of earlier shots by those who were carrying those guns out of which they were fired."

Furthermore, the trial Court did not believe either the appellant or his witnesses. His version was that he was by the cypress tree in the church yard which is at some distance from the point where the prosecution witnesses saw him standing on the surrounding wall and when he saw the people gathering in increasing numbers, the members of his group tried to go away. At a moment he noticed five or six persons who were trying to take the gun of ex-accused 3 (D.W. 4). Whilst at that position by the cypress tree he fired two bursts in the air, he ran and left alone to the direction of Paphos town and returned on foot to his camp where he found his companions.

Ex-accused 3, spoke about the hostile crowd that had gathered around him and made him retreat towards Mesoi village to avoid them. Then somebody tried to disarm him when the deceased Demosthenis went and stood in front of the women and took his gun with both his hands. The witness looked around to see what was happening because bursts were fired continuously. He saw the appellant standing by the corner of the church yard where there is a cypress tree and had his gun pointed upwards and firing in the air. H looked to see if there were any of the members of his group around, but he was not able to see anyone of his companions and decided to defend

himself on his own. He pushed the man who was holding the gun from the butt. At that moment many bursts were passing over his head. They were coming from all directions, from everywhere, as he said. It was at that moment that the deceased made a jerk and fell backwards. At that time he could not see the appellant. After the deceased fell he turned back and ran towards the land rover. Behind him he could still hear bursts continuously. The land rover's engine was on, he got in and they left immediately. The appellant was not there.

What the appellant is, therefore, challenging by this Appeal are the findings of the Assize Court on the ground that they rest on wrong evaluation of the credibility of witnesses which make the conviction unreasonable, having regard to the evidence adduced. In a long line of decisions the Supreme Court has stated the principles upon which it will interfere with such findings based on credibility. As pointed out in the case of *Kafalos* v. *The Queen*, 19 C.L.R. 121 at p. 125,

> " Unlike a jury, the trial Court is obliged to give reasons for its decisions and these reasons are part of the proceedings upon an Appeal. In these reasons the trial Court states not only its findings of fact but the inferences drawn from the facts. The Supreme Court is very slow to reverse the findings of an Assize Court on fact but this Court is in as good a position as a trial Court to draw inferences from fact."

In order to succeed in an Appeal of this nature, the appellant has to persuade this Court that considering the evidence on record properly assessed the findings are unreasonable. In *Shioukiouroglou* v. *The Police*, (1966) 2 C.L.R. 39 at 42, it was stated,

> " In a criminal case, it is for the trial Court to assess the evidence and find the facts necessary to constitute the offence charged. If on the evidence before it, or such of it as it was admissible, it is open to the trial Court to make such findings, these can only be disturbed on Appeal, if this Court is persuaded that they are unsatisfactory to the extent of requiring intervention in order to do justice in the case according to law."

The position is summed up also in the case of *Miliotis* v. *The Police*, (1971) 2 C.L.R. 292 at p. 295:

> " The first ground, therefore, upon which the Appeal was

argued, poses for consideration the question how far this Court is to interfere with the findings of fact of a trial Court. By section 25(3) of the Courts of Justice Law, 14 of 1960, this Court 'in determining any Appeal either in a civil or a criminal case, shall not be bound by any determinations on questions of fact made by the trial Court and shall have power to review the whole evidence, and draw its own inferences ...'. Wide as these powers are, it has been recognized in a number of decisions that where the trial Court findings of fact depend on its view of the credibility of witnesses, this Court will be slow to upset such findings unless it can be shown from the record that such findings could not be made on the evidence. (*Vassos Lambrou* v. *The Police*, 1962 C.L.R. 295; *Iordanis Pavlou Shioukiouroglou* v. *The Police* (1966) 2 C.L.R. 39; *Mehmet* v. *The Police*, (1970) 2 C.L.R. 62)."

With the aforesaid principles to guide me and having outlined the facts of the case, I turn now to some aspects of the evidence in order to see whether the crucial findings of the Court could not be made on the record and they are unsatisfactory to the extent of requiring intervention in order to do justice in the case, according to law.

In the first place, we have the finding of the Court that at the very moment of the commission of the crime none of the five ex-accused were present at the very scene. Tsiailis (P.W. 9) left the coffee shop of Charilaos after it was ordered to be closed by the armed men, went down the street and there he saw near an electric pole ex-accused 5 who fired 5-6 bullets over the heads of the witnesses in the area. When the witness called out, this armed person left towards the direction of Anavargos village. Accused 2 was seen by Stavroulla Demosthenous (P.W. 8) at the corner church gate. He fired a burst in the air. Ex-accused 3 proceeded to leave the village towards the direction of Mesoi, when Boyadjis (P.W. 4) with others, tried to disarm him. Accused 3 warned them that the gun was loaded, he was let free and proceeded towards Mesoi village. Ex-accused 3 and 4 followed the same route, stopped at some point by the house of a certain Londos who made certain remarks to them and ex-accused 2, still holding his firearm replied that they went to Mesa Chorio to erase slogans. Ex-accused 6, according to prosecution witnesses 8 and 11, was in the church yard, but P.W. 11, Eleni Elia, noticed him jump over the surrounding

wall and leave towards the direction of Mesoi. Apparently he joined accused 3 and both proceeded towards their stationary cars and were chased by Eleni. On their way and at some distance from the scene, they were heard firing shots. It was then that the appellant after telling off Eleni Elia, came from behind the church, jumped on the surrounding wall of the church at point 2, he fired originally over their heads and shortly later he lowered his automatic gun and fired again. It was shortly before the fall of the victim that Eleni chased away ex-accused 3 and 6. These two accused and three or four other persons were seen on their way to their vehicles by P.W. 20, Antonakis Assos. The Fiat car was recognized by this witness as the one belonging to ex-accused 6.

In the second place, we have the evidence of the ballistic and firearms expert, according to which expended cartridges ejected from an automatic sub machine-gun fall to the right of the shooter at a distance of about 10 ft. from him. Consequently, the users of the firearms in question (*exhibits* 5, 6 and the unidentified one) from which the remaining expended cartridges found at the scene were also fired, could not but have been standing in a radius of about 10 ft. from the place they were recovered. This means that they were either standing by the wall, in which case they would be very conspicuous as being next to or in the place of the appellant, or they were standing among the witnesses, when the likelihood of their being not noticed should also be completely excluded.

Once, therefore, the presence of the remaining members of the group as well as the presence of other persons firing at the time of the death of Demosthenis has been excluded, it remains now to consider whether this piece of evidence stripped of any other supporting element is of such probative effect, as by itself to persuade this Court that the findings of the trial Court based on the credibility of witnesses were unsatisfactory to the extent of requiring intervention. In other words, whether the testimony of this array of eye witnesses, whose credibility was evaluated by the Assize Court composed of three experienced Judges, after watching them in the witness box, day after day and weighing their testimony in the context of the totality of the evidence and as against the testimony of the appellant and his witnesses and in particular that of ex-accused 3 (D.W. 4), the only one who spoke of other shots being fired at the time, should be discarded as untrue and unreliable and that the trial Court was wrong in giving credence to them. In considering this

point, it should be borne in mind, that these expended cartridges were found in a public street to which any one had access at any time prior to the firing of the fatal shots and when the circulation of armed people in villages was not an infrequent occurrence. Furthermore, on that particular night, the villagers were awakened from their beds from the shuttering noise of shooting, the tolls of the church bell and shouts. Witnesses spoke of what each one personally perceived and was asked about. However, not all shots or bursts of shots were identified and pin-pointed as having taken place at a particular time and location. Each one of them identified particular shots or bursts of shots, but that cannot be taken as being to the exclusion of any other shots having been fired elsewhere.

For example, Elias Nearchou (P.W. 5), was awakened by shots which were fired before he came out of his house and definitely before the fatal ones which he subsequently witnessed being fired at the scene.

Nicolaos Armeftis (P.W. 18) whilst at the coffee shop of Charilaos heard a burst from the direction of the church yard and then this witness saw the appellant go into the church yard through the main gate.

Stavroulla Demosthenous (P.W. 8), saw ex-accused 2 Kleanthis, fire in the area outside the church.

The appellant himself in his evidence stated that he saw ex-accused 3 walking backwards and a lot of people trying to disarm him. When he saw this, he fired two bursts in the air, whilst standing by the cypress tree in the church yard which is at some distance from both the pool of blood in the street and the surrounding wall on which he was seen standing by the witnesses. When asked, "up to the time you fired these bursts did you hear any other shots", his reply was, "Yes, there were frequent bursts, (Vevea, ihe syhna)". So, the two bursts fired by him were the last to be fired. Bursts were heard from all over the place on that night.

Boyadjis (P.W. 4) related briefly as to how he saw the land rover arrive, its five passengers descend from it and proceed towards the centre of the village. Whilst relating the incident of Tsiailis (P.W. 9) arguing with them, after the two of the five occupants proceeded towards the coffee shop of Charilaos, he mentioned having heard two or three shots being fired, the one

after the other and the church bell ring. Then he proceeds to testify as to the attempt to disarm ex-accused 3 and the circumstances of the death of Demosthenis.

Since we have the overwhelming evidence that shots and bursts of shots were fired all over the place, a fact accepted by all, Boyadjis must be taken as referring to the three shots fired in connection with the Tsiailis incident and not that by his testimony he excludes the fire of any other shots at any time between the arrival of the armed men in the village and the fatal shots. If it was held otherwise, the whole evidence about the various shots mentioned by different witnesses at different places should be discarded as unreliable, which is not the case. It is in this context that the evidence relating to particular shots should be examined, and it appears to have been so examined by the trial Court when it evaluated the credibility of the witnesses and made its finding regarding the origin in time of the expended cartridges found at the scene.

Bearing in mind all the circumstances of the case, as at some length stated hereinabove, because of its very nature and guided by the principles applicable in cases where the interference of this Court is sought by an appellant in respect of findings of fact based on the credibility of witnesses and conclusions drawn therefrom and having given due consideration to the submissions of learned counsel for the appellant, I find no justification or sufficient cause for interfering with such findings and conclusions.

It was reasonably open to the Assize Court, on the evidence before it, to arrive at the verdict it did and convict the appellant on the charge of homicide. There was the unshaken evidence of eight eye-witnesses, in addition to ample supporting evidence. The possibility of these witnesses being confused as to the happenings at the time of the shooting is, by the circumstances, ruled out; particularly so, because of their proximity to the appellant, the illumination of the area and the location where the expended cartridges were found, which, according to the expert witness, would inevitably require the presence of any other person firing at the time besides the appellant, standing at a place that his presence could not but have been noticed by them. Furthermore, the conclusion of the trial Court that cartridges not connected with the firearm of the appellant must have been fired before the incident relating to the fatal shot, was a correct one, in view of the findings

made on the credibility of the witnesses and all the surrounding circumstances of the case which have already been explained. There was no misdirection and it cannot be said that the verdict is one no reasonable jury could arrive at. The appellant, upon whom the burden of proof lay, failed to persuade me to say, following the wording of section 145(1)(b) of the Criminal Procedure Law, Cap. 155, applicable in this instance, that the conviction was, having regard to the evidence adduced, unreasonable.

I would, therefore, dismiss the appeal.

L. LOIZOU, J.: In the result, reached by majority, the appeal shall be allowed; and the conviction for homicide shall be substituted by a conviction for the offence of causing grievous harm to Stavroulla Demosthenous contrary to s. 231 of the Criminal Code.

If counsel wish to say anything with regard to sentence we shall hear them. We have, of course, in mind everything that learned counsel for the appellant said in his address for mitigation of sentence before the Assize Court.

Both counsel say that they have nothing to add.

Allocutus: Nil.

We have considered the question of sentence bearing in mind all the circumstances of the case, the fact that the appellant has no previous convictions involving violence and everything which learned counsel appearing for him said in mitigation before the Assize Court.

The offence of which appellant has been found guilty by this Court is a felony and carries a maximum sentence of seven years' imprisonment.

We are unanimously of the view that the appropriate sentence of this new offence is imprisonment for a term of three years to run from the date of his conviction by the Assize Court for the offence of homicide *i.e.* from the 30th April, 1975.

Appeal allowed; conviction for homicide set aside; substituted by a conviction for causing grievous harm. Appellant sentenced to three years' imprisonment the term to run from the 30th April 1975.