[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

PANAYIOTIS CHR. ANDREOU,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3699).

Criminal Law—Attempt to kill—Section 214(*a*) *of the Criminal Code, Cap.* 154*—Intent—Specific intent—Need to prove intent to commit the complete offence—Room for doubt as to specific intent that appellant had when delivering the blow on the victim.*

Criminal Procedure—Appeal against conviction—For attempt to kill—Room for doubt as to specific intent—Conviction set aside—Conviction for unlawfully causing grievous harm contrary to s. 231 *of the Criminal Code, Cap.* 154 *substituted therefor—Section* 145(1)(c) *of the Criminal Procedure Law, Cap.* 155.

Criminal Procedure—Trial in criminal cases—Charge or information containing alternative counts—Conviction on one count—No verdict to be given on alternative one.

Intent—Intent to kill—Specific intent—Proof of—See, also, under "Criminal Law".

The appellant and his friends became involved in a scuffle, outside a discotheque, with the complainant and his group in the course of which he assaulted the complainant by hitting him on the chest. After the fight had come to an end with the intervention of bystanders, the appellant entered the discotheque and picked up two beer bottles which he broke by hitting one on the other. He then whilst holding in either hand the necks of the broken bottles advanced towards the complainant who was engaged in the collection of his torn buttons from the pavement. A cousin of the complainant tried to stop the appellant but did not manage to do so as he had been scratched by one of the two bottles. The complainant was then warned by one of his companions; and when he looked up he saw the appellant in front of him administering a blow onto the right front side of his neck above the clavicle, a most sensitive part of the body.

The appellant was convicted of the offence of attempt to kill and was acquitted of the offence of unlawfully wounding with intent to do grievous bodily harm, contrary to section 228 (a) of Cap. 154. Upon appeal against conviction counsel for the appellant contended that on the facts as found by the trial Court (vide pp. 83–85 *post*) the inference of specific intent was not correct, as at the time the complainant was moving and the appellant had no time to consider that the blow would land at that sensitive part of the neck or throat, nor could it be said that the conduct of the appellant revealed an unequivocal intent.

Held, (1) that on a charge of attempted murder it must be shown that the accused intended to kill (see Halsbury's Laws of England 4th ed. vol. 11 para. 65, and *R.* v. *Whybrow* [1951] 35 Cr. App. R. 141); that considering the facts and circumstances of this case and in particular the scuffle that preceded, the size of the bottle neck and the fact that the victim was, at the time, stooping and he only stood up when warned of the impending attack on him by his friend, this Court has come to the conclusion that there was room for doubt as to the specific intent that the appellant had, when delivering the blow on the victim; and that, accordingly, the conviction must be set aside.

(2) That, in exercise of the powers of this Court under section 145(1)(c) of the Criminal Procedure Law, Cap. 155 the appellant is found guilty of the offence of unlawfully causing grievous harm, contrary to section 231 of the Criminal Code and is sentenced to three years' imprisonment.

Appeal allowed; conviction for attempted murder set aside; conviction for unlawfully causing grievous harm substituted therefor.

Per curiam: When a trial Court convicts on the one count, is should not give a verdict on the alternative one, as such a course would enable this Court on appeal, where appropriate, on setting aside the conviction, to substitute for that verdict, a verdict on the alternative count, if need be.

Cases referred to:

Regina v. *Georghiades* (*No.* 2), 22 C.L.R. 128;

Kkolis v. *Republic*, 1961 C.L.R. 53;

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

Ioannides v. *Republic* (1968) 2 C.L.R. 169;
Aristidou v. *Republic* (1967) 2 C.L.R. 43 at pp. 89, 91 and 92;
Tattari v. *Republic* (1970) 2 C.L.R. 6;
R. v. *Mohan* [1975] 2 All E.R. 193;
R. v. *Whybrow* [1951] 35 Cr. App. R. 141;
R. v. *Belfon* [1976] 3 All E.R. 46;
R. v. *Seymour* [1954] 38 Cr. App. R. 68 at p. 72.

Appeal against conviction.

Appeal against conviction by Panayiotis Chr. Andreou who was convicted on the 21st February, 1976 at the Assize Court of Larnaca (Criminal Case No. 7037/75) on one count of the offence of attempt to kill, contrary to section 214(a) of the Criminal Code, Cap. 154 and was sentenced by Pikis, Ag. P.D.C., Artemis and Constantinides, D.JJ. to seven years' imprisonment.

G. Nicolaou with *A. Andreou*, for the appellant.

Gl. Michaelides, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, P.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU, J.: The appellant a twenty-year old builder, was convicted by the Assize Court of Larnaca of the offence of attempting to kill on the 7th September, 1975, Antoni Savva Michael, under section 214(a) of the Criminal Code, Cap. 154 and was sentenced to seven years' imprisonment. He was, however, acquitted of the charge of unlawfully wounding with intent to do grievous bodily harm, under section 228(a) of the Criminal Code, an alternative aspect of the same facts. He appealed against both the conviction and sentence, and the only ground of his appeal against conviction was that no intent to kill or any other intent had been established on the facts, as accepted by the trial Court, which are as follows:

On the night of the 6th September, 1975 the complainant Antonis Savva Michael, known to his friends as "Attos", a twenty-two-year old moulder, displaced from his home at Yenagra and living at Limassol, on his way to "Vrysoulles" stayed at Larnaca at the house of his uncle, Michalis Kadjanis with whose sons, Antonis and Theodoros, he went out in the evening to a bar house where each one of them had one or two

pints of beer. They were later joined by Georghios Ioannou, a brother-in-law of the two Kadjanis and shortly before midnight, they decided, on the suggestion of a friend of the complainant, to go to Spilia Discotheque, at Pallas Square. To the right of it, as one stands at its entrance facing the street, there is a photographer's shop and to its left, a restaurant, usually open all night. Then there is a projection of the building on the corner of which there is a boutique and further up, a pharmacy. The pavement outside Spilia and the restaurant is about two or three meters wide, whereas by the corner of the boutique it narrows down to a width of about one meter.

One enters Spilia by climbing a short flight of stairs under an arch. At the top of the stairs there is a door opening into a corridor wherefrom one gains entrance to the discotheque itself through a door at the end of that corridor. Along this corridor to the left there is a recess with a table where the entrance attendants sit. In fact, on the night in question, Christodoulos Andreou and Andreas Iosif HadjiKyriacou were in attendance.

The complainant on arriving there proceeded towards Pavlos Pavlou, a friend of his, whom he noticed standing on the pavement outside Spilia and the two were chatting on the pavement. His companions Theodoros and Georghios alighted and stopped looking at the photographer's show window, whereas Antonis stood somewhere on the pavement near the complainant. A friend of Pavlos stood neaby.

Whilst the complainant was conversing with Pavlos, the appellant passed by rubbing his shoulder against the shoulder of the complainant in a provocative and aggressive manner. The complainant took objection to that and told the appellant to be more careful. Upon that the appellant stopped turned back and told him that he was not a man to caution him in any way and that he would settle accounts with him. It was at that time that the complainant and Pavlos realised that that person was the one with whom they had an altercation with him and his friends some five months earlier.

After this incident the appellant entered Spilia and shortly afterwards emerged therefrom accompanied by two other persons. The appellant then assaulted the complainant by hitting him on the chest. There followed a scuffle between the two groups with the exception of Pavlos who remained an

onlooker. They were, with the intervention of bystanders separated, and the fight came to an end.

At this moment the appellant shouted angrily, "Dkiaole Mavre" and proceeded, once more, quickly to Spilia. He picked up two beer bottles from under the attendants' table at the entrance and came out. When about to step on the pavement, he broke the two bottles by hitting the one on the other, and kept in either hand their necks. He then advanced rapidly towards the complainant who was at that time engaged in the collection of his torn buttons from the pavement. Antonis, the cousin of the complainant, tried to stop the appellant but did not manage to contain him for long, as he had been scratched by one of the two bottles held by the appellant and let him free. As the appellant advanced towards the complainant, who was only a few paces away, Theodoros, warned the complainant who looked up and saw the appellant in front of him administering a blow onto the front part of the right side of his neck and hitting with the broken bottle that he held in his left hand, the body of the complainant. The appellant then ran away. A passing taxi was stopped, and the complainant was conveyed to Larnaca Hospital bleeding and in a state of collapse.

The appellant was summoned to the Police Station for interrogation at about 6 o' clock on that morning. In a written statement to the Police, the appellant disclaimed any knowledge of the events leading to the injury of the complainant, but some time later, whilst still at the Police Station, he made a second statement admitting having caused injury to the complainant with the neck of a broken bottle, but without any intention to cause injury to him and whilst under physical pressure from the complainant and his companions.

At his trial the appellant testified on oath that after the first incident and whilst being hit he became frightened and went back to Spilia, informed his companions about it and asked for their assistance. When he went out again, the complainant and his companions assaulted him, cornered him at the boot of the car and were banging his head on the car. He also saw his companion Andreas falling to the ground. He struggled to free himself and for a moment he extricated himself from his assailants. He then picked up a bottle that was at the corner of the boutique intending to use it as a defensive weapon, but before he had the opportunity to make any use of it, the complainant and his companions seized him and banged his

head once more against the side of the car, at the level of the wheel, kicking him thereafter in the abdomen in consequence of which he turned about, fell down having placed his right hand on the wheel of the car for support. As he fell, the bottle that he held in his hand broke up and he was left with the neck of it in his hand. His attackers persisted in their assault and in an effort to keep them away, he waived the bottle neck that he held in his hand in front of him. While so waiving the bottle, the complainant surged over him, was caught on the side of the neck and was injured. The appellant did not, as he told the Court, notice at any time the neck of the bottle penetrate the body of the complainant. He became frightened when he saw blood streaming down the body of the complainant and ran away.

The Assize Court accepted as truthful the testimony of the complainant and the prosecution witnesses and came to the following conclusion, after referring to the quarrel and scuffle that preceded the main incident.

> "Armed with a lethal weapon in either hand the accused advanced towards the complainant and refused to desist when intercepted by Antonakis Kadjanis.
>
> Having freed himself from the grip of Antonakis Kadjanis, he advanced towards the complainant and when virtually face to face he struck him by a direct blow on the right front side of the neck, above the clavicle, a most sensitive part of the body. The complainant, who just before the attack was engaged in the collection of his torn button from the ground, did not follow the accused advancing towards him. It was only just before the attack that he had been warned by Theodoros to be on his guard; but he had no opportunity as he had just risen and was in the process of turning leftwards when he faced the accused right in front of him and the first thing he sensed was the stabbing blow delivered by accused, which caused the grave injuries that complainant suffered.
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> When the accused administered the blow he was standing right in front of the complainant, he raised his left hand and stabbed the complainant by a direct blow, thrusting the bottle deep into his neck."

The Assize Court dealt with the legal aspect of the case and referred to a number of authorities relating to the proof of

intent which has been the subject of judicial pronouncement in a number of cases of this Court. They include that of *Regina* v. *Nicos Sampson Georghiades* (*No.* 2), 22 C.L.R. p. 128, *Nicolas Georghiou* (*Kkolis*) v. *The Republic*, 1961 C.L.R., p. 53, *Ioannis Michael Pefkos and Others* v. *The Republic*, 1961 C.L.R., 340 *Ioannides* v. *The Republic* (1968) 2 C.L.R. p. 169, *Aristidou* v. *The Republic* (1967) 2 C.L.R., p. 43 at pp. 89, 91 and 92 and *Chariklia Sozou Tattari* v. *The Republic* (1970) 2 C.L.R. p. 6. It referred, also, to the case of *R.* v. *Mohan* [1975] 2 All E.R., 193, where it was held—

> "In order to prove the offence of attempt to commit a crime the Crown had to prove a specific intent, i.e. a decision by the accused to bring about, so far as it lay within his power, the commission of the offence which it was alleged that he had attempted to commit. It was not sufficient to establish that the accused knew or foresaw that the consequences of his act would, unless interrupted, be likely to be the commission of the complete offence; nor was a reckless state of mind sufficient to constitute the necessary mens rea."

The Assize Court then concluded its findings as follows:

> "Reverting to our findings we are in no doubt that the natural and probable consequence of the act of the accused, in stabbing the complainant in the way he did, was to bring about the death of the latter. In fact, had it not been for a fortunate combination of circumstances such as the presence of the taxi at the scene of the crime and the timely medical intervention, the complainant might well have died. As indicated in the case of *Mohan* (*supra*), this must not be equated with the existence of an intent on the part of the accused to cause the death of the complainant. But the Court must arrive at this conclusion as a positive fact before sustaining the charge. The nature of the weapon used, the sensitive part of the body at which the blow was delivered and the depth at which it had been thrust, virtually piercing the entire neck of the complainant, strengthen the inference that the accused intended, at the time of hitting the complainant, to cause his death. The arming of the accused with the bottles and the circumstances under which he became so armed, throw further light on his state of mind at the time. The accused did not content himself with arming himself with two bottles, dangerous weapons

in themselves, but chose to sharpen his weapons, a fact indicative of what he intended to do, seem manifestly by what he did. That the accused did not desist when intercepted by Antonakis and persisted in what he had in mind to do, is indicative of the firmness of his intent.

Having given extremely careful consideration to the evidence before us, in the light of what is said hereinabove, and bearing in mind our findings we find that the prosecution discharged the onus cast on them and proved beyond any reasonable doubt that the accused, at the time of perpetrating his attack, intended to cause thereby the death of the complainant.

In the light of the above, we find the accused guilty on count 1. He is acquitted and discharged on count 2."

Learned counsel for the appellant has argued that on the facts as found by the trial Court, the inference of specific intent to kill was not correct, as, at the time, the complainant was moving and the appellant had no time to consider that the blow would land at that sensitive part of the neck or throat, nor could it be said that the conduct of the appellant revealed an unequivocal intent. It was in fact a chance hit and the bottle was indicative of an intention to scare only. The line in fact which the defence persued at the trial, was that the appellant was engaged in a brawl and that the injuries were caused either in self-defence or alternatively, recklessly; therefore, no specific intent was proved either to kill or to cause grievous harm, under section 228, and the appellant should be acquitted. If he was found to have acted negligently or recklessly, he should be found guilty under section 231 of the Code which provides that any person who unlawfully does grievous harm to another, is guilty of a felony and is liable to imprisonment for seven years or to a fine or to both.

In Halsbury's Laws of England, 4th ed. vol. 11, para. 65, under the heading, "The mental element in attempts", it is stated:

" In order to support a charge of attempting to commit a crime, it must be shown that the defendant intended to commit the completed crime to which the charge relates. Notwithstanding that the completed crime might be established by proof or recklessness, an attempt to commit

it requires a specific intention, and this is so even where the completed offence is one of strict liability."

We agree with this statement of the law which is derived from the authorities, and as pointed out in the footnote (1) to the said paragraph, "..... on a charge of attempted murder, it must be proved that the defendant intended to kill; it is a misdirection to direct the jury that the charge may be supported by evidence of an intent to cause grievous harm". (Reference is made to the case of *R.* v. *Whybrow* [1951] 35 Cr. App. R. 141).

We wish to refer also to the case of *R.* v. *Belfon* [1976] 3 All E.R. p. 46, where it was held that "in order to establish an offence under section 18 of the Offences against the Person Act 1861, it was necessary to prove that the accused had done the acts in question with intent to cause grievous bodily harm; the fact that the accused had foreseen that such harm was likely to result from his acts, or that he had been reckless whether such harm would result, did not constitute the necessary intent." In this respect we quote from the judgment of Wien J. at p. 53, where he says:

> " At any rate we do not find in that speech or in any of the speeches of their Lordships in *Hyam* v. *Director of Public Prosecutions* [1974] 2 All E.R. p. 41, anything which obliges us to hold that the 'intent' in wounding with intent is proved by foresight that serious injury is likely to result from a deliberate act. There is certainly no authority that recklessness can constitute an intent to do grievous bodily harm. Adding the concept of recklessness to foresight not only does not assist but will inevitably confuse a jury. Foresight and recklessness are evidence from which intent may be inferred but they cannot be equated either separately or in conjunction with intent to do grievous bodily harm."

Considering the facts and circumstances of the present case and in particular the scuffle that preceded, the size of the bottle neck which the appellant was holding and the fact that the victim was, at the time, stooping and he only stood up when warned of the impending attack on him by witness Theodoros, we have come to the conclusion that there was room for doubt as to the specific intent that the appellant had; when delivering the blow on the victim. Had the victim not been warned by Theodoros, the appellant would have certainly assaulted the complainant, and one wonders whether that particular sensitive part of the

body of the complainant could then be his target, in the circumstances, as the size of the sharpened broken neck of the bottle he was holding, could hardly be capable of causing death, if a blow was delivered with it at some other part of the body.

Having come to the conclusion that the appellant could not properly be found guilty of the offence of attempting to kill, contrary to section 214(a) of the Code, and as the appellant was acquitted of the offence of causing grievous bodily harm, contrary to section 228(a) of the Code, the question whether we could find the appellant guilty of an offence under section 228(2) of which he has already been acquitted, does not really arise, as we are of the opinion that finding the appellant guilty of the offence of unlawfully causing grievous harm, contrary to section 231 of the Code, meets adequately the situation.

In exercise, therefore, of the powers of this Court under section 145(1)(c) of the Criminal Procedure Law, we accordingly find the appellant guilty of this offence and sentence him to three years' imprisonment, taking into consideration all the circumstances of the case, including the mitigating factors that have been put forward on his behalf during the hearing of this appeal.

Before concluding, however, we would like to deal, briefly, with the considerations that may arise, where an information contains charges alternative to each other, and an accused person is either acquitted or found guilty on one and acquitted on the alternative.

As pointed out in Archbold, Criminal Pleading, Evidence and Practice, 39th Edition, para. 337a, "..... where the jury convict on the wrong count (e.g. handling where the evidence clearly points to theft) and acquit on the other it has been held on appeal that the Court had no power under section 5(2) of the Criminal Appeal Act 1907 (rep.) (see now Criminal Appeal Act. 1968, s. 3—in virtually identical terms) to substitute a verdict of theft. To substitute the alternative verdict in such circumstances would be to substitute a verdict which the jury not only refused to find but on which they acquitted: *R.* v. *Evans* [1916] 12 Cr. App. R. 8; *R.* v. *Hayward* [1949] 33 Cr. App. R. 1; *R.* v. *Melvin and Eden* [1953] 37 Cr. App. R. 1; cf. *R.* v. *Smith* [1923] 17 Cr. App. R. 133 (same circumstances, verdict substituted semble because the jury did not give verdicts on both counts)."

It seems that the corresponding statutory provision of our

Criminal Procedure Law, namely, section 145 (1)(c) is in effect the same as section 5(2) of the Act of 1907 (repealed) or section 3 of the Act of 1968, and it is desirable that trial Courts follow what was pointed out in *R.* v. *Seymour* [1954] 38 Cr. App. R. 68 at 72 that when a trial Court convicts on the one count, it should not give a verdict on the alternative one, as such a course would enable this Court on appeal, where appropriate, on setting aside the conviction, to substitute for that verdict, a verdict on the alternative count, if need be.

In the result, the appeal is allowed and the conviction for attempting to kill is hereby substituted by a conviction for the offence of causing grievous harm to Antoni Savva Michael, of Limassol, contrary to section 231 of the Criminal Code and sentenced to three years' imprisonment.

Appeal allowed.