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

SAMIR MOHAMMED KHADAR AND ANOTHER,

Appellants,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeals Nos.* 3865, 3866).

Assize Court—Special sitting of—Not an "exceptional Court" or an "ad hoc" Court contrary to the provisions of Article 30.1 *of the Constitution.*

Death sentence—Fixing date of execution of—Not contrary to Articles 8 *and* 28 *of the Constitution—Rule* 5*A of the Criminal Procedure Rules not* ultra vires *Article* 163.1 *of the Constitution or section* 176 *of the Criminal Procedure Law, Cap.* 155.

Criminal Procedure—Motion in arrest of judgment—Could not have been made on the ground that the trial Court had no right to fix the date of execution of a death sentence—Section 79 *of the Criminal Procedure Law, Cap.* 155*—Rules of practice in force in England not applicable.*

Criminal Law—Appeal against conviction—Premeditated murder—Unsatisfactory verdict—Evidence of extrajudicial confessions—Disclosed only at the trial and not at preliminary inquiry—Could not be safely relied upon.

Criminal Law—Defence—Points raised by defence—Approach of the Court—Whether trial Court has to refer to all points raised by the defence.

Criminal Law—Failure of accused to give sworn evidence in his own defence—Comment by trial Court—Not a sufficient reason for allowing the appeal in the particular circumstances of this case—Proviso to s. 145 (1) (b) *of the Criminal Procedure Law, Cap.* 155 applied.

Evidence—Expert evidence—Function of expert witness—Whether a

ballistics expert has to produce at the trial photographs of all the objects in relation to which he testifies.

Criminal Law—Circumstantial evidence—Prosecution's case resting on circumstantial evidence—Rule applicable—Whether it is a Rule of Law that a Court must not convict unless satisfied that the facts proved are not only consistent with the guilt of accused, but also such as to be inconsistent with any other reasonable conclusion.

Criminal Law—Common design—Law applicable—Premeditated murder by shooting—Two culprits involved—No evidence as to which one of the two actually fired the fatal shots—Unless the Prosecution proves that the killing was the result of an unlawful common design to which both accused were parties, both accused should be acquitted.

Criminal Law—Premeditated murder—Notion of premeditation—Principles of law applicable—Murder committed by two culprits in furtherance of a preconceived and well prepared plan to which both were parties—Committed with premeditation.

The two appellants were found guilty of the offence of premeditated murder and sentenced to death. The victim was Yusef El Sebai, late of Cairo, who came to Cyprus for the purpose of participating in the conference of the "Afro-Asian Peoples Solidarity Organization" arranged to be held at the Nicosia Hilton Hotel; he died, in the morning of February 18, 1978, of shock and haemorrhage due to fatal injuries caused by three bullet wounds which were inflicted on him immediately before his death while he was outside the book-shop in one of the main corridors at the ground floor of the said hotel:

The following statement of facts is taken from the judgments:

The appellants, who were both foreigners, but of different countries of origin had come to Cyprus a few days before the murder. They were repeatedly seen together at almost all hours of day and night. Appellant 2 was staying at the Hilton Hotel and appellant 1, who was staying at another hotel in Nicosia, spent the night of February 17 to 18 also at the Hilton hotel, in one of two communicating rooms used by appellant 2.

There was no direct evidence as to the identity of the person

of persons who fired the fatal shots. The two appellants appeared at the scene immediately after the shots were heard, as the victim was seen falling dead to the ground Appellant 2, who was armed with a pistol and a handgrenade, disarmed in the hotel lounge, which was very near to the scene of the murder, two policemen, who surrendered to him two revolvers. He then handed one of these revolvers to appellant 1, who was, also, armed with a handgrenade Appellant 1 entered the ballroom of the hotel, which was, too, very near to the scene of the murder and where there was taking place the "Afro-Asian Peoples Solidarity Organization" Conference, in which the victim was a participant, there appellant 1 ordered all the delegates, including the two policemen, to leave the ballroom and herded them at gun point as hostages along the corridor, and past the dead body of the victim, to the cafeteria of the Hilton hotel, which is to be found further down the same corridor. To that same cafeteria appellant 2 brought other persons as hostages, having rounded them up at the lounge of the hotel

The two appellants were seen and heard talking together in Arabic, in the cafeteria, they, also, tied the hands of their hostages and forced one of the policemen, who was armed, to surrender his revolver

By threatening the lives of their hostages the appellants succeeded, within about two hours, to make the Government of the Republic place at their disposal a Cyprus Airways plane at Larnaca Airport, to which they were driven in a police bus with eleven of their hostages, having released the rest

The plane with a crew of four took off soon after it was boarded by the appellants and their hostages, but it returned to Larnaca Airport at about 5 p.m. on February 19, 1978, having not been allowed to land anywhere else except at Djiboudi for refuelling

When the appellants boarded the plane at Larnaca Airport they were both armed appellant 1 with a revolver and a handgrenade and appellant 2 with a pistol and a handgrenade After their return to Larnaca the two appellants released their hostages, surrendered to the police and handed over to them their weapons One of such weapons was a pistol of Chinese origin and of Tokarev type which was handed over by appellant 2

The trial Court believed the evidence of the ballistics expert to the effect that two expended cartridges, a fired bullet and a bullet jacket, which were found at the scene of the crime by a Police Sergeant, and an expended cartridge and a bullet jacket that was found by him, were all fired through the barrel of the Tokarev pistol; and having pointed out that no other cartridges or projectiles were found there, it went on to state that it could not resist drawing the inference that all these cartridges and projectiles were parts of the three rounds of ammunition, fired by the Tokarev pistol, which wounded and caused the death of the victim. It also found that the Tokarev pistol was seen in the hands of appellant 2 in the Hilton after the murder and was subsequently, during the flight, seen sometimes in the possession of the one and sometimes in the possession of the other; and after commenting on the failure of the appellants to give on oath their explanation as to how and when the said pistol came into their possession, by stating that it was a factor related to the issue of their guilt, it went on to find that the only reasonable conclusion to be arrived at in the circumstances was that either appellant 1 or appellant 2 must have fired the three shots at the victim through the Tokarev pistol, to the exclusion of any other person.

The trial Court, also, accepted as reliable evidence the testimony of three prosecution witnesses (Captain Melling, Constable Loizou and Special Constable Georghiou) who testified that appellant 1 made, respectively, extrajudicial confessions to them. The first two witnesses referred to the confessions for the first time during the trial, having made no mention of them at the preliminary inquiry whilst the third witness gave evidence of the confessions at the preliminary inquiry too.

Finally the trial Court, having accepted all the evidence adduced by the Prosecution as true and reliable came to the conclusion that the murder of the victim was committed by the appellants in furtherance of a preconceived and well prepared common plan to which both were parties and that therefore, each of them could be charged with himself having committed the murder as a principal offender no matter who of the two actually pulled the trigger of the pistol used to commit the murder. In coming to this conclusion the trial Court took, *inter alia*, into consideration the movements and conduct of the two appellants from their arrival in Cyprus until the morning

of the murder; their presence at the scene armed so soon after the shots were heard and the victim was seen falling on the ground; the fact that the murder was committed with the Tokarev pistol which was seen in the hands of both appellants; the conduct of the appellants immediately after the victim was shot which showed that each knew the movements and actions of the other and each co-ordinated his role to that of the other in point of time and area of operation.

The grounds on the basis of which the trial Court held that there existed premeditation were: (a) That the appellants, while acting in concert, intentionally killed the victim in the execution of their preconceived and well prepared plan; (b) that the wound that caused the death of the victim was on the head; (c) that the accused assisted each other in the killing and aided each other in securing a safe escape; (d) that the murder was committed by a leathal weapon that was brought to the Hilton hotel by one of the accused; and (e) that the accused had a motive to kill the victim.

After finding the appellants guilty of the offence of premeditated murder the Assize Court passed upon them the sentence of death and acting in pursuance of rule 5A (introduced by means of the Criminal Procedure Amendment Rules*, 1964) of the Criminal Procedure Rules fixed the execution of the sentence of death on June 1, 1978.

On appeal against conviction as well as against the sentence of death, in connection with the fixing, by the trial Court, of the date of its execution, counsel for the appellants contended:

(1) That the Special Assize Court which tried the appellants was, having regard to the way it was constituted, an "exceptional Court" within the meaning of Article 30 of the Constitution and as such was disqualified and/or incompetent to try the appellants for the offence with which they were indicted and convicted.

* These Rules were made in exercise of powers vested in the High Court (now the Supreme Court) by means of Article 163.1 of the Constitution and section 176 of Cap. 155 and provide that an Assize Court must fix the date of execution when it passes sentence of death and that the Supreme Court, or any two Judges of it, may postpone such execution to another date.

Counsel's complaint in this connection was that the date of the sitting of the Assize Court and its composition were fixed for the purposes of this particular case only*.

(2) That the Special Assize Court of Nicosia though admittedly possessing the power to pass a death sentence on appellants after finding them guilty of the offences contained in the information had no power or jurisdiction to fix the date of the execution of the death sentence of the appellants.

This ground was also raised before the Court below at the conclusion of the trial by way of a motion in arrest of judgment under s. 79 of the Criminal Procedure Law, Cap. 155.

Counsel for the appellants submitted in this connection that the execution of the death sentence, as opposed to the passing of the death sentence, was unconstitutional as conflicting with Articles 8 and 28 of the Constitution on the ground that for sixteen years nobody has been executed in Cyprus.

Counsel further argued that Rule 5A of the Criminal Procedure Rules, which makes provision that an Assize Court in passing sentence of death, shall fix the date of execution is *ultra vires* Article 163.1 of the Constitution and section 176 of Cap. 155.

(3) That the trial Court wrongly admitted and acted upon the alleged extrajudicial confessions of appellant 1 to Captain Melling, Police Constable Loizou and Special Constable Georghiou.

(4) That the conviction of the appellants should be set aside because the trial Court has not dealt adequately with all the points which were raised by the defence at the trial.

(5) That the comment of the trial Court regarding the failure of the appellants to take the stand and give on oath

* *Editor's note:* The sittings of an Assize Court in the District of Nicosia in 1978 had been fixed by the Supreme Court, under s. 60 (2) of the Courts of Justice Law, 1960, to commence on February 6, May 8 and October 2, long before the murder of which the appellants have been convicted was committed on February 18, 1978; and as the present case, in view of its nature, was considered to be an urgent one that should not be left to be tried by the Assize Court due to sit on May 8 the Supreme Court directed, after an application had been made for this purpose by the Attorney-General of the Republic, that an extra sitting, described as a "Special Assize" of an Assize Court in Nicosia should commence on March 3, 1978, in order to try the present case.

their explanation as to when and how the Tokarev pistol came into their possession, and the conclusion of the trial Court that such failure was a matter related to the issue of their guilt was a glaring misdirection in law.

(6) That the trial Court erroneously accepted as reliable the evidence of the ballistics expert and drew the conclusion that the expended cartridges and the projectiles found near the body of the victim were fired from the Tokarev pistol because (a) the Police collected them from the scene of the crime before they were photographed at the spot where they were lying and without marking the exact spots with chalk; and (b) the expert did not take photo-micrographs of all the *exhibits* found at the scene.

(7) That the trial Court erroneously came to the conclusion that the facts, as found by it, were consistent only with the guilt of the appellants and inconsistent with any other rational conclusion.

Counsel argued in this connection, that the said facts were, also, reasonably consistent with the appellants' innocence.

(8) That it has not been established that there was a common design of the appellants to murder the victim.

(9) That the trial Court erroneously came to the conclusion that if the murder was committed by the appellants or any of them it was committed with premeditation.

Held, dismissing the appeals:

(1) That the Assize Court which tried and convicted the appellants was not an "exceptional Court" or an "ad hoc" Court contrary to the provisions of Article 30.1 of the Constitution.

2 (a) That rule 5A of the Criminal Procedure Rules was not *ultra vires* Article 163.1 of the Constitution and that, accordingly, the Assize Court could have fixed the date of execution as they did.

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

The appellants could not, in view of the provisions of s. 79 of Cap. 155 move the Court in arrest of judgment on the ground

that "the Court had no right to fix the date of execution"; and that the rules of practice in force in England are not applicable in Cyprus.

(b) That the execution of the death sentence was not unconstitutional as being contrary to Articles 8 and 28 of the Constitution because even though nobody who has been sentenced to death during the last 16 years was executed, in all these previous cases there had been fixed dates of execution but later the death sentences were commuted to life imprisonment by the President of the Republic; and that the question of unequal treatment could perhaps be raised only if the President of the Republic refused to grant a pardon and to commute their sentence to life imprisonment.

(3) That the trial Court could not safely rely on the evidence of Captain Melling and Constable Loizou concerning the extra-judicial confessions of appellant 1 because these witnesses disclosed these confessions at the trial only and not at the preliminary inquiry (see *Kouppis* v. *The Republic* (1977) 11 J.S.C. 1860; *R.* v. *Cooper* [1969] 1 All E.R. 32 and *Hadjisavva* v. *The Republic* (1976) 2 J.S.C. 302); but that, at the same time, it could safely rely on the evidence of Special Constable Georghiou, regarding the confession of appellant 1, because this witness was found by the trial Court to be truthful and reliable and he had mentioned right from the preliminary inquiry what this appellant had stated to him.

(4) That all the points which have been raised by the defence at the trial have been duly dealt with by the trial Court.

Per Triantafyllides P.:

When the judgment of the trial Court is read as a whole (See *Charitonos and Others* v. *The Republic* (1971) 2 C.L.R. 40) there cannot be left any real doubt that all the points which were raised at the trial by counsel for the appellants were duly dealt with by the trial Court, to a certain extent expressly and to a certain extent by way of inescapable implication (see pp. 160–65 of the judgment post and *R.* v. *Coughlan*, 64 Cr. App. R. 11 at p. 19).

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

It is apparent from the judgment that even though the Court may have not specifically mentioned each argument put forward

by counsel this is not an indication, nor can this lead to the conclusion, in view of their findings and inferences drawn, that the Court did not have them in mind or they did not consider them.

(5) The fact that the Assize Court commented adversely on the failure of the appellants to give sworn evidence before it could not constitute, in the particular circumstances of this case, sufficient reason for allowing the appeals (proviso to s. 145 (1) (b) of Cap. 155 applied).

Per Triantafyllides P.:

Though it is rather unfortunate that the trial Court has not, in the present case, referred to the case of *Anastassiades* v. *Republic* (1977) 5 J.S.C. 516 where it was stressed (at p. 686) that "..... in the *Vrakas* case, *supra*, the failure of one of the appellants to give evidence, in his own defence, was treated as a factor related to the issue of his guilt in the light only of the particular circumstances of that case, without this Court intending to lay down then an inflexible rule of general application.....", I am not really satisfied that the trial Court approached this particular aspect of the present case while labouring under a misdirection regarding the Law governing the matter; moreover, it appears from the relevant part of its judgment (vide p. 154 *post*) that it was intended to be limited only to the failure of the appellants to give an explanation as to how the lethal weapon, the Tokarev pistol, came to be found in their possession after the murder. In any event, even if I were to accept as well-founded the complaint of counsel for the appellants, I would have no hesitation, in the light of the circumstances of the present case, to hold that, as stated in the proviso to section 145 (1) (b) of Cap. 155 "no substantial miscarriage of justice has actually occurred" and, therefore, the appeals of the appellants cannot succeed as regards this particular point.

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

The trial Court was in fact commenting on the failure of the accused to explain on oath how the pistol with which the victim was killed came to be in their possession and that the Court was not implying that the burden was on the appellants to prove their innocence. But in any case, having regard to the cir-

cumstances of this case I would have no hesitation in saying that no substantial miscarriage of justice has actually occurred and that the proviso to s. 145 (1) (b) of Cap. 155 could properly be applied (pp. 245–48 *post*).

Per Hadjianastassiou J.:

The very full argument which we have had in the present case has caused me to change the views which I held when *Vrakas* case was decided. I take the opportunity to state that I fully approve and endorse the statement of the law made by the President of the Supreme Court in the *Anastassiades* case (*supra*) to the effect that the failure of one of the appellants in the *Vrakas* case to give evidence, in his own defence, "was treated as a factor related to the issue of his guilt in the light only of the particulars circumstances of that case, without this Court intending to lay down then an inflexible rule of general application". It would indeed make a mockery of the law that in spite of the fact that the accused has a right not to go into the witness box to give evidence but elects to make an unsworn statement from the dock, that would be considered a factor related to his guilt. I have, therefore, reached the conclusion that the trial Court wrongly decided and misdirected themselves in following the principle decided in the *Vrakas* case. I have, however, reached the conclusion that this is not a case in which I would be prepared to set aside the judgment of the trial Court because no substantial miscarriage of justice has actually occurred (see proviso to s. 145 (1) (b) of Cap. 155).

(6) That the Assize Court rightly relied on the evidence of the ballistics expert in order to reach the conclusion that the pistol found in the possession of the appellants was the weapon with which the crime had been committed.

Per Triantafyllides P.:

It is true that the ballistics expert did not photograph all the projectiles and expended cartridges on the basis of which he has based his opinion that they were fired from the Tokarev pistol, but I cannot subscribe to the view that a ballistics expert has to produce at the trial photographs of all the objects in relation to which he testifies. If he satisfies the trial Court by stating in evidence his findings, the methods which he has used in order to arrive to such findings and the conclusions which he has reached on the basis thereof, the trial Court is entitled

to rely on his evidence in order to form its own views concerning the significance of such findings; and that is what has happened in the present case (p. 153 of the judgment *post*).

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

Bearing in mind the law relating to evidence by expert witnesses, whose function is to "furnish the Judge or jury with the necessary scientific criteria for deciding the accuracy of their conclusion so as to enable the Judge or Jury to form their own independent judgment by the application of those criteria to the facts proved in evidence" (see *Davie* v. *Edinburgh Magistrates* (1953) S.C. 34) and, having regard to all the circumstances of this case, I am of the view that the trial Court had before it all necessary scientific criteria to enable it to form its independent judgment by applying such criteria to the facts proved in evidence and I would, therefore, dismiss this ground as unfounded.

Per Hadjianastassiou J.:

I am satisfied that the ballistics expert has discharged his duty and has furnished the Court with the necessary scientific criteria. And I am sure that the trial Court, having before them the necessary scientific criteria have formed their own independent judgment by the application of those criteria to the facts proved in evidence and correctly approached and applied the scientific criteria for testing the accuracy of their conclusions and I am not prepared to say that they went wrong in any way or reached unsafe conclusions as to the facts (*Davie* v. *Edinburgh Magistrates supra, followed*).

(7) That the basic facts of the case established beyond any reasonable doubt that the appellants had killed the victim and excluded the possibility of the appellants being innocent.

Per Triantafyllides P.:

Having in mind the legal principles laid down *McGreevy* v. *D.P.P.* [1973] 1 W.L.R. 267 at p. 282, as well as the totality of the evidence adduced at the trial I cannot agree with counsel for the appellants that, when such evidence is looked at as a whole, it can be said to be, in any way, consistent with the innocence of the appellants; in my opinion, it is solely consistent with their having been directly involved in the killing of the victim

as principal offenders, in the sense of sections 20 and 21 of Cap. 154, and inconsistent with their being accessories after the fact, in the sense of section 23 of Cap. 154. The behaviour of the appellants immediately after the commission of the murder, coupled with their joint possession of the Tokarev pistol, that is the weapon with which the murder was committed, establishes, without any rational possibility of existence of any doubt whatsoever, that it is the appellants who killed the victim (see p. 160 of the judgment *post*). Actually in the present case, the salient facts which were established by reliable evidence are such that they raise "violent presumptions of fact" against the appellants, that is to say presumptions so strong that the conclusion that they are guilty of the offence charged almost necessarily follows (see Archobold on Pleading, Evidence and Practice in Criminal Cases, 39th ed., pp. 657–658).

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

There is no rule that where the prosecution's case is based on circumstantial evidence the Judge must as a matter of Law, not convict unless he is satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion (see *McGreevy* v. *D.P.P.* [1973] 1 All E.R. 503).

Per Hadjianastassiou J.:

Once the trial Judges have found the accused guilty beyond reasonable doubt, I think there is no room for complaint by counsel that they misdirected themselves, in reaching the conclusion that the facts as found by them were consistent only with the appellants' guilt, and inconsistent with any other rational conclusion (Dictum of Lord Morris of Borth-y-Gest in *McGreevy* v. *D.P.P.* [1973] 1 All E.R. 503 *followed*). In any way, once the trial Court found the appellants guilty beyond reasonable doubt they did not have to proceed further because *R.* v. *Hodge* (1838) 2 Lew. C.C. 227 is not laying down a new rule of law.

(8) That the prosecution established that there was a common design of the appellants to murder the victim; and that the appellants acted on the basis of a preconceived common plan which they executed on the day of the commission of the crime.

Per Triantafyllides P.:

(a) The trial Court has approached correctly the legal aspect

of the issue relating to the existence of a common design when they stated "unless the prosecution satisfies the Court that the killing of the victim by one of the two accused was the result of an unlawful common design to which both accused were parties, both accused should be acquitted in view of the failure of the prosecution to prove which one of the two accused actually fired the fatal shots. But if it has been established that the death of the victim was part of the common design of the accused then it makes no difference who fired the shots and they are both answerable for the killing".

(b) I find that the conclusion of the trial Court that "the conduct of each accused immediately after Sebai was killed leaves no doubt in our minds that they were at the time executing a well strategic plan and that each one knew the movements and actions of the other ....." were fully warranted by the evidence before it and that its finding that the two appellants were acting in furtherance of a common design when they became involved in the killing of the victim is free from any reasonable doubt, especially when it is borne in mind that each one of them was armed on that day with a handgrenade and that they had with them, and did use lethally, a pistol, that is the Tokarev pistol, which was identified, eventually, as the weapon with which the murder was committed (pp. 166–68 of the judgment *post*).

(c) In the light of the particular circumstances of this case I have reached the conclusion that even if the murder of the victim was not the primary object of a common design of the appellants, but such design had as its primary purpose the taking of the hostages and the killing of the victim occurred in the process of doing so—(actually just as they had embarked on such a course of action, due to the victim having apparently acted in a way obstructing their purpose)—such killing was a matter included in the common design of the appellants to take hostages, because that design extended to the use of extreme force for the purpose of taking hostages (see, *inter alia, R.* v. *Betty,* 48 Cr. App. R. 6 at p. 10). (pp. 168–71 of the judgment *post*).

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

It clearly appears that in finding the appellants guilty of premeditated murder beyond reasonable doubt the Court had in

mind all relevant considerations and it is evident that it was satisfied that the murder was committed by the appellants and that it could not have been committed by anyone else. The Court further specifically said that as there was no evidence as to who of the two fired the fatal shots both appellants would have to be acquitted unless it was proved that they were acting in concert and that the murder was committed by them in furtherance of a pre-conceived plan to which both were parties and the conclusion of the Court that this was so is not, in my view, having regard to the evidence, open to any criticism either with regard to the findings and the inferences drawn therefrom or with regard to their legal approach (pp. 254–273 *post*).

Per Hadjianastassiou J.:

Where two adventurers embark on a joint enterprise each is liable for acts done in pursuance of it and also for the unusual consequences of such acts, provided that they arise from the execution of the joint enterprise; but if one of the adventurers goes beyond what has been tacitly agreed as the scope of the enterprise, his co-adventurer is not liable for the consequences of that extraneous act. The fact that at the material time the appellants were armed with pistols and handgrenades, as well as from their actions and conduct, show clearly in my opinion that they were acting in concert by virtue of a common design and with a pre-arranged plan in pursuance of which the fatal shots were fired. And whether the one fired the fatal shot or the other it does not make any difference in my view, because once both had embarked on a joint enterprise of killing El Sebai, each is liable for the acts done in pursuance of that joint enterprise in killing the victim.

9. That as the appellants acted on the basis of a preconceived common plan which they executed on the day of the commission of the crime, when they killed the victim, they did so with premeditation.

Per Triantafyllides P.:

In the light of the principles of law applicable to the notion of premeditation (see my judgment in *Anastassiades* v. *The Republic* (1977) 5 J.S.C. 516 at pp. 688–715), I have reached the conclusion—though perhaps not without some initial difficulty—

that the existence of premeditation has been established, with the certainty required in a criminal trial in the present case (pp. 171-76 of the judgment *post*).

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

(After stating the legal principles governing premeditation—vide pp. 274-78). It may well be that not each one of the items enumerated by the Court as evidence relating to the issue of premeditation taken in isolation would be sufficient to establish premeditation but their cumulative effect warrants the conclusion reached by the trial Court that the murder was premeditated. The trial Court's findings and inferences based on credible evidence were that the murder of Sebai was committed in furtherance of a preconceived and well prepared common plan which could not have been prepared only a short period of time before it was put into effect, to which both appellants were parties and that the killing and the taking of the hostages were two phases of the same incident the object of the latter being to force their safe exit from Cyprus.

In the absence of an iota of evidence as to any incident prior to the killing which would justify the Court to consider alternative issues such as provocation, self-defence or accident or generally that the killing was committed on the spur of the moment and as a result of circumstances that would render the act of killing unpremeditated the Court did not have a duty, nor indeed would such a course be correct to consider such possibilities because that would involve going outside the evidence and acting on mere speculation.

Having regard to the state of the evidence and the findings and inferences drawn by the trial Court it seems to me that their conclusion that the murder was premeditated was not only correct but unavoidable.

Per Hadjianastassiou J.:

Once the trial Court found that the killing took place by virtue of a common design and that both appellants were parties to a pre-arranged plan in pursuance of which the fatal shot was fired against the victim, and in spite of the fact that both appellants had ample time to reflect on their decision and desist from carrying out their intention in my view, the Court rightly reached the conclusion that both were guilty of premeditated

murder. I would therefore affirm the judgment on the issue of premeditation and dismiss this ground of appeal.

Also: *Per Triantafyllides P.:*

I am of the view that the verdict of the trial Court that the appellants are guilty as charged is neither unreasonable nor against the weight of evidence adduced and that their guilt has been proved with that degree of certainty which is required in a criminal case; sitting as a member of this appellate Court I do not entertain any doubt even a lurking one as regards the correctness of the conviction of the appellants.

Per L. Loizou, Stavrinides and Malachtos JJ. concurring:

The appellants would only be entitled to be acquitted of the offence altogether if the Court had accepted the theory urged upon them by counsel that there were two groups, one involved in the killing and the other in the taking of the hostages, acting independently of each other and without any knowledge of each other's intentions and actions but, by coincidence, at the same time, and that the appellants were involved only in the taking of the hostages. But such a conclusion would be completely unwarranted by the evidence and, would, therefore, be unreasonable; and that there is a limit to which the long arm of coincidence could be stretched.

Appeals dismissed.

Cases referred to:

Vrakas and Another v. *The Republic* (1973) 2 C.L.R. 139;

Anastassiades v. *The Republic* (1977) 5 J.S.C. 516 at pp. 680–687, 688–715, 721, 763–764; (to be reported in (1977) 2 C.L.R.);

R. v. *Sparrow* [1973] 2 All E.R. 129; [1973] 1 W.L.R. 488;

R. v. *Gallagher* [1974] 3 All E.R. 118 at p. 124;

Kouppis v. *The Republic* (1977) 11 J.S.C. 1860 at pp. 1893–1895, 1951–1953, 1958, 1983–1985; (to be reported in (1977) 2 C.L.R.);

R. v. *Hodge*, 168 E.R. 1136 at p. 1137;

R. v. *Mentesh*, 14 C.L.R. 232;

McGreevy v. *Director of Public Prosecutions* [1973] 1 W.L.R. 276 at p. 282; [1973] 1 All E.R. 503 at pp. 503, 507–508, 510–511;

R. v. *Badjan*, 50 Cr. App. R. 141 at pp. 143–144;

Mancini v. *Director of Public Prosecutions*, 28 Cr. App. R. 65 at pp. 72–73; [1942] A.C. 1 at pp. 7 and 12;

Kunjo s/o Ramalan v. *Public Prosecution* [1978] 2 W.L.R. 130 at pp. 134–135;

Charitonos and Others v. *The Republic* (1971) 2 C.L.R. 40;

Kyprianou v. *The Police* (1977) 6 J.S.C. 906 (to be reported in (1976) 2 C.L.R.);

R. v. *Coughlan*, 64 Cr. App. R. 11 at p. 19;

Loftis v. *The Republic*, 1961 C.L.R. 108 at p. 118;

R. v. *Betty*, 48 Cr. App. R. 6 at p. 10;

R. v. *Smith* (unreported, quoted in 48 Cr. App. R. 6 at p. 10);

R. v. *Anderson and Morris*, 50 Cr. App. R. 216 at pp. 221–224;

R. v. *Lovesey and Peterson*, 53 Cr. App. R. 461 at pp. 464–465;

R. v. *Chakoli*, 8 C.L.R. 93;

Pieris v. *The Republic* (1963) 1 C.L.R. 87;

HjiSavva v. *The Republic* (1976) 2 J.S.C. 302 (to be reported in (1976) 2 C.L.R.);

Furman v. *State of Georgia*, 33 L. Ed. 2d 346 at pp. 355, 360, 378–379, 390, 421;

Sofroniou and Others v. *The Municipality of Nicosia and Others* (1976) 6 J.S.C. 874 at pp. 920–921; (to be reported in (1976) 3 C.L.R.);

Vouniotis v. *The Republic* (1975) 2 C.L.R. 34 at pp. 60–61;

De Freitas v. *Benny* [1975] 3 W.L.R. 388 at pp. 392, 393, 394;

Jackson v. *State of Georgia and Branch* v. *State of Texas*, 33 L. Ed. 2d 346;

Gregg v. *State of Georgia*, 49 L. Ed. 2d 859;

Proffitt v. *State of Florida*, 49 L. Ed. 2d 913;

Jurek v. *State of Texas*, 49 L. Ed. 2d 929;

Woodson v. *State of North Carolina*, 49 L. Ed. 2d 944;

Roberts v. *State of Louisiana*, 49 L. Ed. 2d 974;

Mavrali v. *The Republic* (1963) 1 C.L.R. 4;

Pavlou v. *The Republic* 1964 C.L.R. 97;

R. v. *Shaban*, 8 C.L.R. 82;

Halil v. *The Republic*, 1961 C.L.R. 432;

Aristidou v. *The Republic* (1967) 2 C.L.R. 43;

X against the Federal Republic of Germany (decided by the European Commission of Human Rights (Application No. 1216/61));

Level Brothers Ltd. v. *Kneale and Bagnall* [1937] 2 K.B. 87;

Poyser v. *Minors*, 7 Q.B.D. 329;

The Republic and *Loftis*, 1 R.S.C.C. 30;

R. v. *Cooper* [1969] 1 All E.R. 32 at p. 33;

Waugh v. *The King* [1950] A.C. 203 at p. 211;

R. v. *Mutch* [1973] 1 All E.R. 178 at p. 181;

R. v. *Pratt* [1971] Crim. L.R. 234;

R. v. *Bathhurst* [1968] 1 All E.R. 1175;

R. v. *Brigden* [1973] Crim. L.R. 579;

Davie v. *Edinburgh Magistrates* [1953] S.C. 34;

R. v. *Matheson* [1958] 2 All E.R. 87;

Walton v. *The Queen*, [1978] 1 All E.R. 542;

R. v. *Abbott*, 39 Cr. App. R. 141 at p. 148; [1955] 2 All E.R. 899;

King v. *Reginam* [1962] 1 All E.R. 816 at pp. 818-819, 820;

Mohan and Another v. *Reginam* [1967] 2 All E.R. 58;

Rex v. *Pridmore* [1913] L.T. 330 at p. 331;

R. v. *Smith (Wesley)* [1963] 1 W.L.R. 1200 at p. 1205;

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

Stafford v. *Director of Public Prosecutions* [1973] 3 All E.R. 762 at p. 764;

R. v. *Beecham*, 16 Cr. App. R. 26 at pp. 28 and 29;

R. v. *Browne*, 29 Cr. App. R. 106 at pp. 112-113;

Lascalles Fitzalbert Anderson and Emmanuel Morris, 50 Cr. App. R. 216;

R. v. *Richardson* [1785] 1 Leach 387 at p. 388;

R. v. *Pattinson and Laws*, 58 Cr. App. Rep. 417;

Dervish and Another v. *Rex*, 18 C.L.R. 25.

Appeals against conviction and sentence.

Appeals against conviction and sentence by Samir Mohammed

Khadar and Another who were convicted on the 4th April, 1978 at the Assize Court of Nicosia (Criminal Case No. 4357/78) on one count of the offence of premeditated murder, contrary to sections 203, 204, 20 and 21 of the Criminal Code, Cap. 154 (as amended by Law 3/62) and were sentenced to death by Demetriades, P.D.C. Boyadjis, S.D.J. and Nikitas, D.J.

L. Clerides with *A. Papacharalambous*, for the appellants.

M. Kyprianou, Senior Counsel of the Republic, with *M. Florentzos* and *S. Matsas*, for the respondent.

Cur. adv. vult.

The following judgments were read:

TRIANTAFYLLIDES P.: The two appellants were found guilty on April 4, 1978, by an Assize Court in Nicosia, of the premeditated murder, under sections 203, 204, 20 and 21 of the Criminal Code, Cap. 154, as amended by the Criminal Code (Amendment) Law, 1962 (Law 3/62), of Yusef El Sebai, late of Cairo, Egypt, and they were sentenced to death.

They have both appealed against their conviction, as well as against the sentence of death, in connection with the fixing, by the trial Court, of the date of its execution.

As it has been found by the trial Court the victim died, in the morning of February 18, 1978, of shock and haemorrhage due to fatal injuries caused by bullets. Three bullet wounds were inflicted on him immediately before his death while he was outside the book-shop in one of the main corridors at the ground floor of the Cyprus Hilton hotel in Nicosia.

There is no direct evidence as to the identity of the person or persons who fired the fatal shots.

The two appellants (who were accused 1 and accused 2, respectively, at the trial) appeared at the scene immediately after the shots were heard, as the victim was seen falling dead to the ground.

Appellant 1 had arrived at Larnaca Airport on February 13, 1978, from Belgrade; he is approximately twenty-seven years old and of Jordanian nationality. Appellant 2 had arrived at the same airport on February 14, 1978, from Athens; he is approximately twenty-five years old and a national of Kuwait.

The victim arrived from Cairo on February 16, 1978, and was staying at the Hilton hotel.

The appellants are of different countries of origin, of different professions and they booked rooms at different hotels; but they were repeatedly seen being together, at almost all hours of day and night. Appellant 2 was staying at the Hilton hotel and appellant 1, who was staying at another hotel in Nicosia, spent the night of February 17 to 18 also at the Hilton hotel, in one of two communicating rooms used by appellant 2.

After the murder appellant 2, who was armed with a pistol and a handgrenade, disarmed in the hotel lounge, which is very near to the scene of the murder, two policemen, who surrendered to him two revolvers. He then handed one of these revolvers to appellant 1, who was, also, armed with a handgrenade; appellant 1 entered the ballroom of the hotel, which is, too, very near to the scene of the murder and where there was taking place the "Afro-Asian Peoples Solidarity Organization" Conference, in which the victim was a participant; there appellant 1 ordered all the delegates, as well as two policemen, to leave the ballroom and herded them at gun point as hostages along the corridor, and past the dead body of the victim, to the cafeteria of the Hilton hotel, which is to be found further down the same corridor.

Before leaving the ballroom appellant 1 fired one shot in the air, apparently in order to intimidate those present.

To that same cafeteria appellant 2 brought other persons as hostages, having rounded them up at the lounge of the hotel.

In the cafeteria, the two appellants were seen and heard talking together in Arabic; they, also, tied the hands of their hostages and forced one of the policemen, who was armed, to surrender his revolver.

By threatening the lives of their hostages the appellants succeeded, within about two hours, to make the Government of the Republic place at their disposal a Cyprus Airways plane at Larnaca Airport, to which they were driven in a police bus with eleven of their hostages, having released the rest.

The plane with a crew of four took off soon after it was

boarded by the appellants and their hostages, but it returned to Larnaca Airport at about 5 p.m. on February 19, 1978, having not been allowed to land anywhere else except at Djibudi for refuelling.

When the appellants boarded the plane at Larnaca Airport they were both armed; appellant 1 with a revolver and a handgrenade and appellant 2 with a pistol and a handgrenade.

After their return to Larnaca, and at about 6 p.m., the two appellants released their hostages and surrendered to the police, as a result of negotiations between them and the authorities of the Republic; and they handed over to the police their weapons.

One of such weapons is a pistol of Chinese origin and of Tokarev 7.62 m.m. type; it was handed over by appellant 2 and it was produced at the trial as *exhibit* 34.

The murder of the victim took place at about 11.15 a.m. in the morning of February 18, 1978, and the first police officer, who arrived at the scene of the crime, at about 11.40 a.m., was Sergeant Mateas. As from that time the scene was cordoned off. He found in the corridor, and in the vicinity of a pool of blood at the place where the murder was committed, two expended cartridges, a fired bullet and a bullet jacket, which he delivered to the police ballistics expert, Inspector Christophides. The Inspector arrived at the scene of the crime at about 2.30 p.m., on the same day, and discovered in the book-shop next to where the victim had been killed another expended cartridge; on the following day, February 19, 1978, he searched once again the scene of the crime and discovered at the entrance of a nearby cloak-room another bullet jacket.

According to his evidence the two expended cartridges, the fired bullet and the bullet jacket found by Sergeant Mateas, and the expended cartridge and bullet jacket found by him were all fired through the barrel of the Tokarev pistol.

In its judgment the trial Court stated the following in relation to the testimony of Inspector Christophides:-

> "Inspector Christofides is, to our satisfaction, a properly qualified and adequately trained expert with enough practi-

cal experience. He has been accurate, succinct both in his findings and the opinions he expressed. In answering questions put to him by the Defence counsel, he has properly and adequately reasoned his opinions which he had given regarding the several *exhibits* which he had examined with the help of all necessary scientific equipment, having made all necessary tests and comparisons. He has persuaded us that he has reached at the correct conclusions and we exclude any possibility of his being mistaken. We find him both truthful and reliable and we feel safe to act upon his evidence."

Counsel for the appellants has strenuously tried, during the hearing of this appeal, to persuade us that it was not safe for the trial Court to accept as reliable the evidence of Inspector Christophides. I cannot, however, accept his arguments, in this respect, as correct.

It is true that Inspector Christophides did not photograph all the projectiles and expended cartridges on the basis of which he has based his opinion that they were fired from the Tokarev pistol (*exhibit* 34), but I cannot subscribe to the view that a ballistics expert has to produce at the trial photographs of all the objects in relation to which he testifies. If he satisfies the trial Court by stating in evidence his findings, the methods which he has used in order to arrive to such findings and the conclusions which he has reached on the basis thereof, the trial Court is entitled to rely on his evidence in order to form its own views concerning the significance of such findings; and this is what has happened in the present case.

Nor do I accept as well-founded the argument that the projectiles and expended cartridges were removed from, and replaced at, the scene of the crime, by the police, in such a manner as to give rise to the possibility that Inspector Christophides may have based his scientific investigation on erroneous information; I am of the view that the real evidence concerned was handled in such a way that it was possible for Inspector Christophides to derive from it completely accurate scientific information enabling him to testify on the basis of it at the trial in a manner entitling the trial Court to rely on his evidence.

The trial Court reached the conclusion that the presence at

the scene of the murder of the aforesaid projectiles and expended cartridges was consistent with the firing of three shots with the Tokarev pistol; and having pointed out that no other cartridges or projectiles were found there, it went on to state that it could not resist drawing the inference that all these cartridges and projectiles were parts of the three rounds of ammunition, fired by the Tokarev pistol, which wounded and caused the death of the victim.

The trial Court then went on to say the following in its judgment:-

> "The lethal weapon (*exhibit No.* 34) was seen in the hands of accused No. 2 inside the Hilton after the killing and before the hostages and the two accused left in the police bus. During the flight it was being carried at times by both accused and it was ultimately surrendered to the police by accused No. 2. Neither accused No. 1 nor accused No. 2 gave any explanation as to when and how this gun came into their possession. We have no explanation at all from them which might tend to shake the otherwise irresistible inference which one has to draw from the fact that the lethal weapon was in their possession in the Hilton hotel so shortly after the fatal shots were fired from it.
>
> We believe that we are entitled to comment upon the failure of both accused to take the stand and give on oath their explanation on this matter, if they had one. In the circumstances of this case, the failure of the accused to give evidence in their own defence is a factor related to the issue of their guilt. We cite in this respect the authorities of *R.* v. *Sparrows*, [1973] 1 W.L.R. 488, and *Pantelis Vrakas and Another* v. *The Republic*, (1973) 2 C.L.R. 139. The only reasonable conclusion to be arrived at in the circumstances is that either accused No. 1 or accused No. 2 must have fired the three shots at the victim through the pistol (*exhibit No.* 34) which they possessed, to the exclusion of any other person."

Counsel for the appellants has submitted that the above passage betrays a misdirection in law by the trial Court, in that it mistook what was said in the *Vrakas* case, *supra*, as part of the reasoning of the judgment on appeal in respect of

the special facts of that case, as amounting to a rule of law of universal application.

In *Anastassiades* v. *The Republic*, (1977)* 5 J.S.C. 516, this Court had occasion (at pp. 680–686) to deal with the situation arising when an accused person in a criminal trial does not give evidence on oath, and it stressed (at p. 686) that "..... in the *Vrakas* case, *supra*, the failure of one of the appellants to give evidence, in his own defence, was treated as a factor related to the issue of his guilt in the light only of the particular circumstances of that case, without this Court intending to lay down then an inflexible rule of general application .....".

It is rather unfortunate that the trial Court has not, in the present instance, referred to the *Anastassiades* case, *supra*, in relation to the failure of the appellants to give evidence on oath; but it has referred to *R.* v. *Sparrow*, [1973] 2 All E.R. 129, which was decided in 1973 before the *Vrakas* case and which was found to have laid down correctly the relevant law when it was considered after the *Vrakas* case in *R.* v. *Gallagher*, [1974] 3 All E.R. 118, 124.

I am not, therefore, really satisfied that the trial Court approached this particular aspect of the pressent case while labouring under a misdirection regarding the law governing the matter; moreover, it appears from the above quoted relevant part of its judgment that it was intended to be limited only to the failure of the appellants to give an explanation as to how the lethal weapon, the Tokarev pistol, came to be found in their possession after the murder. In any event, even if I were to accept as well-founded the complaint of counsel for the appellants, I would have no hesitation, in the light of the circumstances of the present case, to hold that, as stated in the proviso to section 145(1)(b) of the Criminal Procedure Law, Cap. 155 "no substantial miscarriage of justice has actually occurred" and, therefore, the appeals of the appellants cannot succeed as regards this particular point.

The next aspect of the present case with which I will deal now is that which relates to what have been described as the three extra judicial confessions of appellant 1 which he made,

* To be reported in (1977) 2 C.L.R.

respectively, to three prosecution witnesses, namely Captain Melling, who was one of the two Cyprus Airways pilots who flew the plane by means of which the appellants and their hostages made an abortive attempt to go to another country, Police Constable Loizou, who testified as to what appellant 1 said in the cafeteria of the Hilton hotel after the appellants had taken their hostages there, and Special Constable Georghiou, who, too, has given evidence as regards what was stated by appellant 1 in the cafeteria.

The trial Court accepted as reliable evidence the testimony of all the three aforementioned prosecution witnesses in relation to the said extrajudicial confessions of appellant 1.

Captain Melling testified that just before the departure of the plane from Larnaca Airport he had a conversation with appellant 1, who spoke some English, and who told him, apparently referring to the victim of the murder, "I killed him because he is a bad man and a spy and a traitor to the Arab cause"; appellant said further that "both", that is himself and appellant 2, had come to Cyprus in order to kill the victim. It has transpired, however, during the cross-examination of Captain Melling, that he did not mention at the preliminary inquiry of this case this conversation with appellant 1, because he was not asked about it.

Police Constable Loizou stated, while under re-examination by counsel for the prosecution at the trial, that appellant 1 said, while they were all of them together in the cafeteria of the Hilton hotel with the hostages, "we are Palestinian. Dont afray"—(be afraid)—"anything. We are friends of yours. We kill this man because he was friend of Israel and he write different articles in your gazette". This witness, on being questioned further by counsel for the appellants, admitted that he did not mention this statement of appellant 1 at the preliminary inquiry because, as he said, he was not asked about it; and he went on to say that he did not mention anything in relation to this statement of appellant 1 during his examination-in-chief at the trial because he was, again, not asked about it.

Though the trial Court treated both Captain Melling and Constable Loizou as truthful witnesses, I do not think that this was a case in which the trial Court could rely safely and with

the certainty required in a criminal trial (see, *inter alia, Kouppis* v. *The Republic*, (1977)* 11 J.S.C. 1860) on the belated disclosures of the said witnesses at the trial only, and not at the preliminary inquiry, concerning the extrajudicial confessions to them of appellant 1. I am of the view that the better, and safer course, in the particular circumstances, was for the trial Court not to have acted on such confessions, even though there was no doubt about the credibility of the two prosecution witnesses in question and even if it was not their fault that they testified so belatedly about statements made by appellant 1 to them or in their presence.

The third extrajudicial confession, which was made to Special Constable Georghiou, was again a statement made by appellant 1 whilst being in the cafeteria with the hostages; according to this witness appellant 1 said "We are Palestenians, we come especially for that man, we killed that man because he was friend with the Israelis, and he write some articles in his newspaper against Palestenians". On being cross-examined the witness admitted that at the preliminary inquiry he had said that appellant 1 had stated "we come to kill him" and that what he testified at the trial to the effect that appellant 1 had stated "we killed him" was incorrect. The trial Court found that this witness was truthful and reliable, and as he had mentioned right from the preliminary inquiry what appellant 1 had stated in the cafeteria I see no reason for agreeing with counsel for the appellants that the trial Court was not entitled to rely safely on his evidence in this connection.

As regards all the aforementioned three extrajudicial confessions of appellant 1 counsel for the respondent has, acting, in my view, with the earnest desire to be as fair as possible to the appellants, declared, during the hearing of this case on appeal, that they are not to be treated as evidence against appellant 2 as regards any issue in this case.

Though it might be arguable in law that they could be treated as admissible evidence against appellant 2 in case of the establishment, by the other evidence adduced, of the existence of a common design between the two appellants to murder the victim, I am not prepared to carry myself the case, as against

* To be reported in (1977) 2 C.L.R.

appellant 2, any further than to the extent to which counsel for the respondent has chosen to do, in an effort to be absolutely fair to him; moreover, I am not disposed to do so as no legal argument was advanced during the hearing on appeal that the extrajudicial confessions in question of appellant 1 were evidence against appellant 2, so that an opportunity could have been given to counsel for the appellants to answer such argument.

It has been submitted by counsel for the appellants that, notwithstanding the evidence adduced at the trial against his clients—(and I have referred already to the salient parts of such evidence)—the trial Court erroneously came to the conclusion that the facts, as found by it, were consistent only with the guilt of the appellants and inconsistent with any other rational conclusion; he has argued, in this connection, that the said facts were, also, reasonably consistent with the appellants' innocence.

Counsel for the appellants has referred, *inter alia*, to what came to be known as the "rule" in *R.* v. *Hodge*, 168 E.R. 1136, which has been adopted with approval in Cyprus in *R.* v. *Mentesh*, 14 C.L.R. 232, and explained by the House of Lords in England in *McGreevy* v. *Director of Public Prosecutions*, [1973] 1 W.L.R. 276.

It was, indeed, laid down by Alderson B. in the *Hodge's* case, *supra* (at p. 1137), that, where a criminal charge depends on circumstantial evidence, before the jury could find the prisoner guilty they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

Lord Morris of Borth-y-Gest, in delivering his judgment in the *McGreevy* case, *supra* (at p. 282), referred to the above dictum of Alderson B. and went on to say the following:-

> "He also pointed out to the jury, to quote from the report, the proneness of the human mind to look for (and often slightly to distort) the facts in order to establish a proposition while forgetting that a single circumstance which is inconsistent with such a conclusion is of more importance than all the rest inasmuch as it destroyed the hypothesis

of guilt. In the report of the case it was said that the evidence was all circumstantial and contained no one fact which taken alone would lead to a presumption of guilt. No one could doubt that the wise words used by the learned Judge were helpful and admirable and as such were worthy of being recorded. But there is no indication that the learned Judge was newly laying down a requirement for a summing up in cases where the evidence is circumstantial nor that he was himself employing words so as to comply with an already existing legal requirement.

The painstaking research of Mr. Appleton showed that in some countries in the Commonwealth both learned Judges and also legal writers have made reference to the 'rule' in *Hodge's* case. I do not propose to refer to all the citations which Mr. Appleton made. The singular fact remains that here in the home of the common law *Hodge's* case has not been given very special prominence: references to it are scant and do not suggest that it enshrines guidance of such compulsive power as to amount to a rule of law which if not faithfully followed will stamp a summing up as defective. I think that this is consistent with the view that *Hodge's* case was reported not because it laid down a new rule of law but because it was thought to furnish a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial."

The above view was adopted by this Court in *Vrakas*, *supra*, p. 169 (and, see, also, *Anastassiades*, *supra*, pp. 686–687).

Having in mind the above legal principles, as well as the totality of the evidence adduced at the trial and now on record before this appellate Court, I cannot agree with counsel for the appellants that, when such evidence is looked at as a whole, it can be said to be, in any way, consistent with the innocence of the appellants; in my opinion, it is solely consistent with their having been directly involved in the killing of the victim as principal offenders, in the sense of sections 20 and 21 of Cap. 154, and inconsistent with their being accessories after the fact, in the sense of section 23 of Cap. 154.

I do not think that it is necessary, in this connection, to analyse at length the main features of the relevant evidence;

it suffices to say that the behaviour of the appellants immediately after the commission of the murder, coupled with their joint possession of the Tokarev pistol (*exhibit* 34), that is the weapon with which the murder was committed, establishes, without any rational possibility of the existence of any doubt whatsoever, that it is the appellants who killed the victim; and the supposition that another person or other persons may have been also involved, in any way, in killing the victim—and one can only speculate about such a possibility because there is no evidence to substantiate it—cannot be treated, in the circumstances of this case, as precluding the appellants from being themselves principal offenders involved in the commission of the murder. Furthermore, there is not any evidence which could lead to the conclusion that it is possible that the murder was committed by anybody else and that the appellants embarked upon the operation of taking hostages in order to enable the real culprit to escape, without themselves being implicated in such murder.

Actually, in the present case, the salient facts which were established by reliable evidence are such that they raise "violent presumptions of fact" against the appellants, that is to say presumptions so strong that the conclusion that they are guilty of the offence charged almost necessarily follows (regarding "violent presumptions of fact" see Archbold on Pleading, Evidence and Practice in Criminal Cases, 39th ed., pp. 657–658, paras. 1143, 1144).

I shall deal, next, at this stage of the judgment, with the complaint of counsel for the appellants that three points raised by the defence at the trial were not adequately dealt with by the trial Court.

The importance of paying due regard to a cardinal line of defence has been stressed in, *inter alia*, *R.* v. *Badjan*, 50 Cr. App. R. 141, where Edmund Davies J. said (at pp. 143–144):-

> "In the course of his direction to the jury, the learned Commissioner said nothing about the defence of self-defence which the appellant had raised. It was a defence, which, in the light of the evidence, might have been regarded as of tenuous worth, but it was a defence which the appellant was entitled to have left to the jury for their assess-

ment. Unhappily and unfortunately, the learned Commissioner did not advert to that defence. There are other features of this case which need not detain this Court. Mr. Webster, who appears here for the Crown, confesses to the difficulty of maintaining that no reference to the plea of self-defence was in the circumstances called for, but nevertheless invites this Court to say that, having regard to all the evidence and the nature of the statement made by the appellant, this is a proper case in which to apply the proviso to section 4(1) of the Criminal Appeal Act 1907. This Court is unable to accede to that invitation. Where a cardinal line of defence is placed before the jury and that finds no reflection at any stage in the summing-up, it is in general impossible, in the view of this Court, to say that the proviso can properly be applied so as to say that the conviction is secure in those circumstances. Whether that be right as a general proposition or not, certainly, in the circumstances of this case, the Court finds itself quite incapable of saying that this conviction ought to stand notwithstanding the misdirection by omission already mentioned. It has, accordingly, no alternative but to allow this appeal against conviction."

It is, also, useful to refer, in this respect, to the earlier case of *Mancini* v. *Director of Public Prosecutions*, 28 Cr. App. R. 65, where Viscount Simon L.C. said the following (at pp. 72-73):-

"Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the Judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) did not relieve the Judge from the duty of directing the jury to consider the alternative, if there was material before the jury which would justify a direction that they should consider it. Thus, in *Hopper* (11 Cr. App. R. 136; [1915] 2 K.B. 431), at a trial for murder the

prisoner's counsel relied substantially on the defence that the killing was accidental. But Lord Reading, C.J., in delivering the judgment of the Court of Criminal Appeal, said ([1915] 2 K.B., at p. 435): 'We do not assent to the suggestion that as the defence throughout the trial was accident, the Judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.'

To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder, where the accused pleads Not Guilty, the Judge must include in his summing-up to the jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the Judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt whether this was, or was not, the case. Murder by secret poisoning, for example, does not give room for the defence that, owing to provocation received, the administration of the poison should be treated as manslaughter. On the other hand, if the defence to a charge of murder by poisoning were that the accused never administered the poison at all, the Judge might very well be obliged to direct the jury on the alternative view that the administration was accidental, if the facts proved reasonably admitted this as a possible interpretation, even though the defence had not relied on the alternative."

Furthermore, in the very recent case of *Kunjo s/o Ramalan* v. *Public Prosecutor*, [1978] 2 W.L.R. 130, which was decided on

appeal to the Privy Council in England from the Court of Criminal Appeal in Singapore, Lord Scarman said (at pp. 134–135):–

"Where trial has been by jury and the burden of proof is upon the prosecution to negative the defence, it is settled law that the Judge must put to the jury all matters which upon the evidence could entitle the jury to return a lesser verdict than murder. And, if the Judge fails to do so, the Board will intervene, even if the matter was not raised below. For otherwise there would be the risk of a failure of justice. In *Kwaku Mensah* v. *The King* [1946] A.C. 83, Lord Goddard, giving the reasons of the Board for allowing the appeal, said, at p. 94:

> 'The principles on which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only mentioned in the Courts below, but was not included in the reasons given by the appellant in his case.'

Although different considerations arise where, as here, the burden of proving the defence or exception is upon the defendant and trial is by Judge (or Judges) alone, Mr. French for the Public Prosecutor has not contended either that section 105 of the Evidence Code, or the mere fact of trial being by Judge alone, precludes the Board from considering a defence not raised below. But he does raise the point that it does not follow from a Judge's silence as to a possible defence that he has ignored it. He may have thought the matter too plain for argument—more especially, if it has not been raised by the defence. Moreover it would not, in our judgment, assist the administration of criminal justice if there were to be cast upon the High Court the duty of reciting in judgment only to reject

every defence that might have been raised but was not. Nevertheless there will be cases in which justice requires the Board to consider matters not mentioned in the Court below. It is to be noted that in India, where there is also no trial by jury and the burden of proving the exception of 'sudden fight' is upon the defendant, the Supreme Court of India has considered and given effect to the exception, substituting a verdict of culpable homicide for one of murder, although the exception had not been relied on at trial: see *Chamru Budhwa* v. *State of Madhya Pradesh*, A.I.R. (41) 1954 S.C. 652. In our judgment a defence based upon an exception which the defendant has to prove may be raised for the first time before the Board, if the Board considers that otherwise there would be a real risk of failure of justice. The test must be whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out. If there be such evidence, the Court of trial should have expressly dealt with it in judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below."

The aforementioned three points, which according to the relevant submission of counsel for the appellants were not adequately dealt with by the trial Court, are, first, that the conduct of the appellants on the day of the murder was equally consistent with both guilt and innocence; secondly, that the appellants could not be the murderers because if they had wanted to kill the victim they had had other opportunities of doing so in circumstances enabling them to escape detection or arrest, and, thirdly, that it could not be said with certainty that the projectiles, which were recovered from the scene of the crime, were those which had killed the victim by passing through his body, because they had not been examined in order to ascertain whether there was human blood or tissues on them.

It has been, repeatedly, pointed out that the judgment of a trial Court must be read as a whole (see, *inter alia*, *Charitonos and Others* v. *The Republic*, (1971) 2 C.L.R. 40 and *Kyprianou* v. *The Police*, (1977)* 6 J.S.C. 906).

Also, it appears pertinent to quote, by way of useful analogy,

* To be reported in (1976) 2 C.L.R.

the following passage from the judgment of Shaw L.J. in *R.* v. *Coughlan*, 64 Cr. App. R. 11 (at p. 19):-

> "The due administration of justice does not demand that a summing-up should follow any particular form. In its entirety this summing-up conformed to all the requirements of justice; it was balanced, it was fair and it was clear."

When the judgment of the trial Court in the present case is read as a whole there cannot be left any real doubt that all the aforementioned three points which were raised at the trial by counsel for the appellants were duly dealt with by the trial Court, to a certain extent expressly and to a certain extent by way of inescapable implication.

It might, in any event, be observed, in relation to the said three points, that the fact that, possibly, the appellants had had other opportunities of killing the victim cannot avert the conclusion that it was they who killed him once that the evidence adduced points irresistibly to such a conclusion; likewise, the fact that the projectiles, which were recovered from the scene of the crime and which, according to the evidence of the ballistics expert, were fired with the Tokarev pistol—which was found, subsequently, in the possession of the appellants—were not examined in order to ascertain if there was human blood or tissues on them cannot prevent the drawing of the inevitable conclusion, on the strength of other relevant and cogent evidence, that it was actually those bullets which killed the victim.

Lastly, as regards the contention that the conduct of the appellants on that day was equally consistent with both guilt and innocence, I have, already, stated in this judgment that such conduct could only be treated as being solely consistent with their guilt and I need not elaborate any further in this respect.

I shall deal, next, with one of the basic submissions of counsel for the appellants in this case, namely that it has not been established that there was a common design of the appellants to murder the victim, that the trial Court erroneously found that such a common design existed and that, in the absence of a common design to kill the victim, both appellants should have been acquitted, in view of the failure of the prosecution

to prove at the trial which one of the two appellants actually fired the fatal shots, assuming that one of them has done so.

It is, indeed, correct that, as stated in the judgment of the trial Court, it has not been proved who was the appellant who fired the fatal shots at the victim and, also, there was no direct evidence of the existence of a common design of the appellants to murder him.

In this respect, the trial Court has stated the following in its judgment:-

> "Unless the Prosecution satisfies the Court that the killing of the victim by one of the two accused was the result of an unlawful common design to which both accused were parties, both accused should be acquitted in view of the failure of the Prosecution to prove which one of the two accused actually fired the fatal shots. But if it has been established that the death of the victim was part of the common design of the accused, then it makes no difference who fired the shots and they are both answerable for the killing. We cite in this respect the cases of *R.* v. *Salmon*, [1880] 6 Q.B.D. 79, C.C.R., and *R.* v. *Pridmore*, [1913] 29 T.L.R. 330, (8 Cr. App. R. 198), *Vrakas and another* v. *The Republic*, (1973) 2 C.L.R. p. 139, *Archbold* 38th *Ed. Paragraph* 4128, *Rex* v. *Reginam* [1962] 1 *A.E.R. p.* 816, *Rex* v. *Richardson* (1785) 1 *Leach* 387. *Gour*: The Indian Penal Code Vol. I 9th Ed. Paragraph 21 p. 289. The legal principles governing criminal liability by confederators participating in the execution of an unlawful common plan are in Cyprus the same as those prevailing in England: *R.* v. *Dervish*, 18 C.L.R. 25.
>
> Very rarely direct evidence is available regarding the nature and extent of the common design or purpose of co-adventurers. In the majority of cases, including the present one, common design is a matter of inference by the Court from the acts of the accused persons and the facts as proved before the Court: *R.* v. *Pridmore* (*supra*) and *Vrakas and Another* v. *The Republic* (*supra*)."

From the above passage of the judgment of the trial Court it appears that it has approached correctly the legal aspect of the issue relating to the existence of a common design; and I

have not considered it necessary to refer myself at length to the case-law cited in the said passage.

Later on in its judgment the trial Court proceeded to state, *inter alia*, the following:-

"The conduct of each accused immediately after Sebai was killed leaves no doubt in our minds that they were at the time executing a well studied strategic plan. Each knew the movements and actions of the other and each co-ordinated his role to that of the other in point of time and area of operation.

The pistol (*exhibit No.* 34) was involved both in the incident of killing Sebai and the incident of taking and removing the hostages from Cyprus. Furthermore, the aforesaid killing and taking of the hostages had such a sequence in point of time that we feel bound to infer that they were nothing more than two phases of the same incident. We exclude any probability of the two incidents being separate and distinct and to have been committed out of mere coincidence in the same hotel, at the same time, by two different groups of persons acting independently and without notice or knowledge of each other's acts.

We have no doubt that the only reason for which the accused admittedly took the hostages was to force their safe exit from Cyprus and thus escape the consequences for their having unlawfully killed Sebai.

.....

It is evident from all the above that the murder of Sebai was committed in furtherance of a pre-conceived and well prepared common plan, to which both accused were parties. It matters not, therefore, which one of the two accused actually pulled the trigger of the pistol (*exhibit No.* 34).

Having in mind this finding of ours and the Law, as we have very briefly above expounded, we find that each accused could be charged with himself having committed the killing as principal offender."

I find that the above conclusions of the trial Court were fully warranted by the evidence before it and that its finding that the two appellants were acting in furtherance of a common

design when they became involved in the killing of the victim is free from any reasonable doubt, especially when it is borne in mind that each one of them was armed on that day with a handgrenade and that they had with them, and did use lethally, a pistol, that is the Tokarev pistol, which was identified, eventually, as the weapon with which the murder was committed; it would, indeed, be most extraordinary if it was a mere coincidence that both appellants were, on that day, acting independently of each other, and each one acting separately happened to be armed, in the Cyprus Hilton hotel, at the same time and place, with a handgrenade.

In view, however, of the fact that each one of the appellants was armed with a handgrenade but they had, quite probably, only one firearm available for use by either, or both, of them, I have also examined, in fairness to them, the alternative possibility that the killing of the victim was not their primary object, but that it was committed in the course of taking hostages, assuming that this latter venture was their primary purpose; and, on this basis, I have had to consider, in view of the fact that there is no evidence as to who out of the two appellants has fired the fatal shots, whether, in the circumstances of this particular case, both could have been convicted of the offence of murdering the victim; in other words, whether in such a situation as the one which I have just assumed to have existed the killing of the victim was related to their common design to take hostages and did "not totally or substantially vary from it" (see per Josephides J. in *Loftis* v. *The Republic*, 1961 C.L.R. 108, 118).

In *R.* v. *Betty*, 48 Cr. App. R. 6, Lord Parker C.J. quoted with approval (at p. 10) the dictum of Slade J. in *R.* v. *Smith* (an unreported case) to the effect that "..... anything which is within the ambit of the concerted arrangement is the responsibility of each party who chooses to enter into the criminal purpose."

On the other hand, in *R.* v. *Anderson and Morris*, 50 Cr. App. R. 216, Lord Parker C.J. stated the following (at p. 223):-

> "It seems to this Court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and suddenly formed an intent to kill and has

used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today."

In *R.* v. *Lovesey and Peterson*, 53 Cr. App. R. 461, the facts, as summarized in the headnote, were as follows:-

"The appellants were convicted of robbery with violence and murder. The case for the prosecution was that they were among a number of persons who attacked and robbed a jeweller and in the course of the attack had inflicted injuries on him, as the result of which he died. There was no direct evidence of how many men had been involved in the attack or of their individual roles. The appellants' defence was a denial of all knowledge of the attack."

Widgery L.J. stated in his judgment (at pp. 464-465) the following:-

"As neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing, or the infliction of grievous bodily harm on the victim.

If the scope of the common design had been left to the jury in this way, they might still have concluded that it extended to the use of extreme force. It is clear that the plan envisaged that the victim's resistance should be rapidly overcome. The attack bears the hallmark of desperate men who knew that they had to act quickly, and the jury may have thought it utterly unreal that such men would make a pact to treat the victim gently however much he struggled and however long it might take to subdue him. The jury had also had the advantage of seeing the appellants in the witness-box and may have formed their own views as to whether the appellants would have scruples of this character. There must, in our view, be many cases of this kind where the jury feel driven to the conclusion that the raiders' common design extended to everything which in

fact occurred in the course of the raid, but the question must be left to the jury because it is a matter for them to decide, and this is so notwithstanding that the point was not raised by the defence.

Mr. Buzzard has invited us to consider the substitution on count 2 of a verdict of manslaughter under section 3 of the Criminal Appeal Act 1968. It is clear that a common design to use unlawful violence, short of the infliction of grievous bodily harm, renders all the co-adventurers guilty of manslaughter if the victim's death is an unexpected consequence of the carrying-out of that design. Where, however, the victim's death is not a product of the common design but is attributable to one of the co-adventurers going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others are not responsible for that unauthorised act (*Anderson and Morris* [1966] 50 Cr. App. R. 216; [1966] 2 Q.B. 110).

In the present case the degree of violence used against the victim showed a clear intention to inflict grievous bodily harm, and if this was within the common design the proper verdict against all concerned was one of murder. We cannot say that the jury must have reached this conclusion and, accordingly, feel compelled to quash both convictions for murder. Having reached this point we are unable to substitute verdicts of manslaughter since, if a common design to inflict grievous bodily harm is excluded, the jury might well have concluded that the killing was the unauthorised act of one individual for which the co-adventurers were not responsible at all."

In the light of the legal principles set out above and of the particular circumstances of the present case I have reached the conclusion that if the murder of the victim was not the primary object of a common design of the appellants, but such design had as its primary purpose the taking of hostages and the killing of the victim occurred in the process of doing so—(actually just as they had embarked on such a course of action, due to the victim having apparently acted in a way obstructing their purpose)—such killing was a matter included in the common design of the appellants to take hostages, because that

design extended to the use of extreme force for the purpose of taking hostages. This is amply clear from the fact that both appellants were carrying handgrenades, from which they had removed the safety pins, and that appellant 1, while trying to round up as hostages a number of participants in the Afro-Asian Peoples Solidarity Organization Conference fired a warning shot in the conference room in order to subdue any resistance.

The next issue that has to be considered is whether the appellants, who as can be clearly derived from what has already been stated in this judgment, were, in my opinion, rightly convicted of the murder of the victim, did commit such murder with premeditation:

Counsel for the appellants has submitted that the finding of the trial Court that the appellants caused the death of the victim with premeditation is erroneous.

The trial Court has, in this respect, stated the following in its judgment:-

"The evidence on the issue of premeditation is, in a nutshell, the following:-

(1) The two accused acting in concert intentionally killed the victim in the execution of their preconceived and well prepared plan.

(2) The wound that caused the death of the victim was on the head.

(3) The accused assisted each other in the killing and aided each other in securing a safe escape.

(4) The murder was committed by a lethal weapon that was brought to the Hilton hotel by one of the accused. And

(5) The accused had a motive to kill the victim.

The above evidence, which has been proved by the Prosecution beyond any reasonable doubt, leaves no room for doubt in our minds that the two accused killed El Sebai in the execution of their well prepared and preconceived plan, although they had ample time to reflect on

their decision and desist from carrying out their intentions and though the presence of uniformed armed policemen at the Hilton should have put them off and made them retract."

The policemen, to whom reference is made in the above passage, are those who were posted, at the time, at the Hilton hotel for security purposes in relation to the then in progress aforementioned Conference.

I do not propose to dwell at length on the law relating to the notion of premeditated murder; I have done so in my judgment in the *Anastassiades* case, *supra* (see pp. 688–715); and this Court has had occasion to revert to such notion in the *Kouppis* case, *supra*; in the latter case I observed (at pp. 1893–1984) that "..... I am inclined to the view that when a group of heavily armed persons, such as the appellant and his two companions in the present instance, are roaming the streets of a town, in anticipation of a possible encounter with political opponents of theirs, and if in the course of such an encounter they use their arms with the result that there is caused deprivation of life, then, as a matter of general principle, there do exist elements in the light of which, depending on the special circumstances of each individual case, the conclusion might be reached that there existed premeditation to commit murder; one might describe such premeditation as 'conditional premeditation (see, in this respect, *inter alia*, *R.* v. *Chakoli*, 8 C.L.R. 93, *Pieris* v. *The Republic*, (1963) 1 C.L.R. 87)."

In the light of the principles of law applicable to the notion of premeditation, and of the evidence on record in this case, I have reached the conclusion—though perhaps not without some initial difficulty—that the existence of premeditation has been established, with the certainty required in a criminal trial, in the present case; and my reasons for such conclusion are as follows:–

My main problem, in this respect, has been the fact that there is no direct evidence at all as regards the exact circumstances of the commission of the murder of the victim by the two appellants; and as premeditation is a distinct and separate element of the offence of premeditated murder, and should not be identified with the notion of malice aforethought in

English criminal law, it is always, in my opinion, very important to know exactly how a murder came to be committed before one can reach definite conclusions, beyond doubt, concerning the establishment of the existence of premeditation.

On the other hand, I am not prepared to go so far as to say that it is always essential to have such direct evidence, because there may be instances where the existence of premeditation can be irresistibly and infallibly inferred from circumstantial evidence only.

It had to be examined, therefore, whether premeditation was rightly inferred in the present case from the circumstantial evidence adduced at the trial.

I have already quoted the relevant passage of the judgment of the trial Court in which there are set out the five grounds on the basis of which such Court inferred "beyond any reasonable doubt" the existence of premeditation, on the part of both appellants, in relation to the murder of the victim.

I propose to deal with each one of these grounds separately:

The first is that the appellants, while acting in concert, intentionally killed the victim in the execution of their preconceived and well prepared plan. That is, indeed, a relevant factor, because if somebody kills another person in furtherance of a preconceived plan then, as a rule, premeditation, as understood in our law, has to be regarded as proved, in the sense that the existence of a preconceived plan is proof that the culprit has had sufficient opportunity, after forming his intention to kill, to reflect upon it nd relinquish it.

In the present instance premeditation has to be treated as having been sufficiently proved, because, as found by the trial Court—and I have decided that I am not doubting the correctness of this finding—the appellants killed the victim in furtherance of a common design of theirs, and all the surrounding circumstances, including their conduct before and after the murder, show that they were executing a preconceived plan, which was not formed suddenly at the time of the commission of the murder, but which had been hatched before hand.

Even if I were to assume that the primary object of the appellants was to take hostages, and that they killed Sebai either in

the process of doing so or because for some reason he happened to be an obstacle to the achievement of such a primary object, I would, still, be prepared to hold that the finding that they killed him with premeditation should be upheld on appeal, because, bearing in mind their aforementioned assumed primary object, the manner in which they were armed, and in general the way in which they were pursuing it, there cannot be any doubt whatsoever that they had the intention, stemming from premeditation, to kill anyone who might have obstructed them in what they were out to do. Useful reference, in this respect, may be made to *R.* v. *Chakoli*, 8 C.L.R. 93, where a similar conclusion was reached as regards premeditation, on the basis of the particular circumstances of that case; in giving judgment Tyser C.J. said (at p. 94):-

> "It is admitted that you killed this woman. That you had the intention to kill her is clear from the facts. As to premeditation,—the formation of a previous design—there is ample evidence of that also.
>
> It is not necessary that the premeditation should be directed to a particular person.
>
> The conclusion we have come to is that you had formed the design to kill anyone, whoever it might be, who obstructed you or interfered with your purpose in any way, as you ran away. This is proved by your threat to Janni, your threat to Polybio, and by your repeated threats to Myrofora.
>
> We think that you formed the design to kill anyone who obstructed you as you went along, and that you killed this woman intentionally in pursuance of that design."

I would like to stress in relation to the issue of premeditation that the close association of the appellants before the murder and the way in which they were armed at the time of its commission, plus their co-ordinated conduct after the murder, which was of such a nature that it cannot be attributable to decisions on the spur of the moment but must have been well planned in advance, excludes any rational alternative possibility consistent with the innocence of the appellants, or of either of them, namely that the murder of the victim was an isolated

incident committed on the spur of the moment by either of them and unrelated to a common nefarious enterprise of theirs.

The second ground, on the basis of which the trial Court held that there existed premeditation, was that the wound that caused the death of the victim was inflicted on his head. I regard this as a matter of secondary nature which could, in the circumstances of the present case, have been taken into account, but which is not of a decisive nature by itself.

The third ground relied on, in this connection, by the trial Court, was that the appellants assisted each other in the killing and aided each other in securing a safe escape. This is an inference which could have legitimately and safely been drawn from their conduct before, at about and after the time of the killing and, having already referred to this conduct earlier, I need not add anything more in this respect.

The fourth ground was that the murder was committed by a lethal weapon that was brought to the Hilton hotel by one of the appellants. The weapon in question is the Tokarev pistol (*exhibit* 34) and, in my view, what is more important is not that the weapon used was a lethal one or that the shot which killed the victim was fired at his head—because these two elements might have been treated, if taken by themselves and isolated from all the other pertinent considerations, as being only probative of malice aforethought—but that the lethal weapon was brought to the hotel for the obvious purpose of being used in furtherance of their common design and, therefore, it establishes the existence of premeditation.

The last relevant ground on which the trial Court relied is that the appellants had a motive to kill the victim. This emerges only from the statement made by appellant 1 to Special Constable Georghiou, to the effect that they—the appellants—had killed the victim because he was a friend of the Israelis and he was against the Palestinians. As I have, already, indicated in this judgment, I am not prepared, in view of the way in which this case was argued on appeal, to treat that statement as evidence against appellant 2. It is evidence relating to the issue of premeditation as against appellant 1 only; but I would venture to say that even without treating the statement of appellant 1 to witness Georghiou as evidence against appellant 2, the very fact that appellant 2 was, undoubtedly, acting at the

material time in concert with appellant 1, who disclosed the existence of a particular motive, warrants the safe inference that that motive was being shared by appellant 2 as well.

I might conclude what I have to say on premeditation by stating that the appellants have not discharged the onus of satisfying me on appeal, as it was up to them to do, that the trial Court erred in finding that they murdered the victim with premeditation.

In the light of all that has been stated in this judgment regarding the various aspects of this case, I am of the view that the verdict of the trial Court that the appellants are guilty as charged is neither unreasonable nor against the weight of evidence adduced and that their guilt has been proved with that degree of certainty which is required in a criminal case; sitting as a member of this appellate Court I do not entertain any doubt, even a lurking one (see, *inter alia, HjiSavva* v. *The Republic* (1976)* 2 J.S.C. 302, as well as the *Anastassiades* case and the *Kouppis* case, *supra*), as regards the correctness of the conviction of the appellants.

I shall deal, next, with two other matters, which have been raised by means of the appeals of the appellants, and which are independent of the factual aspects of such appeals:

The first one is the contention of counsel for the appellants that the special Assize Court in Nicosia which tried and convicted them is an "exceptional Court" the establishment of which was excluded by Article 30.1 of the Constitution and that, therefore, the whole trial of the appellants took place in contravention of the Constitution; the said Article 30.1 reads as follows:-

> "1. No person shall be denied access to the Court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional Courts under any name whatsoever is prohibited."

Analogous provisions are to be found in the Constitutions of many other countries, such as Article 8 of the Constitution of Greece, Article 94 of the Constitution of Belgium, Article

* To be reported in (1976) 2 C.L.R.

101 of the Constitution ("Basic Law") of the German Federal Republic and Article 58 of the Constitution of Switzerland (see Peaslee on the Constitutions of Nations, Revised 3rd ed., vol. III, pp. 405, 86, 385 and 952, respectively).

As has been pointed out by Sgouritsas on Constitutional Law (Σγουρίτσα "Συνταγματικὸν Δίκαιον") 1966, vol. B, Part B, p. 58, in relation to Article 8 of the Constitution of Greece, the wording of which corresponds closely to the wording of our own Article 30.1, the second sentence of the said Article 8, which excludes exceptional Courts, is a natural corollary of the first sentence of the same Article, which provides that nobody shall be deprived of the Judge assigned to him by law.

According to Sgouritsas, *supra*, as well as to Svolos and Vlahos on the Constitution of Greece (Σβώλου καὶ Βλάχου "Τὸ Σύνταγμα τῆς 'Ελλάδος") 1955, vol. B, p. 134, an exceptional Court is a Court set up after the event, and not already previously established by law, for the specific purpose of trying a particular case or a particular person.

Article 158.1 of our Constitution provides that:-

> "A law shall, subject to the provisions of this Constitution, provide for the establishment, jurisdiction and powers of Courts of civil and criminal jurisdiction other than Courts to be provided by a communal law under Article 160."

The Courts of Justice Law, 1960 (Law 14/60), has provided by means of subsections (1) and (2) of its section 3 that:-

> "3.-(1) There shall be established under this Law the following Courts to exercise such jurisdiction and powers as are conferred upon them by this Law or any other Law in force for the time being:-
>
> (a) District Courts;
>
> (b) Assize Courts:
>
> Provided that there may be established such other Courts as may be provided by any other Law.
>
> (2) For the purpose of this Law the Republic of Cyprus shall be divided into districts and for each of such districts there shall be held an Assize Court and there shall be a District Court, as provided in this Law."

Also, section 60(2) of Law 14/60 reads as follows:-

"(2) Assize Courts shall be held at such times as the High Court may direct:

Provided that there shall be at least one sitting in the principal town of each district in every six months, unless in the opinion of the High Court, owing to absence of business or sufficient amount of business to be transacted thereat, such sitting may be dispensed with by special direction of the High Court."

By virtue of the provisions of section 3(1) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64), the competence of the High Court under, *inter alia*, section 60(2) of Law 14/60, is now vested in the present Supreme Court of Cyprus.

The sittings of an Assize Court in the District of Nicosia in 1978 had been fixed by the Supreme Court to commence on February 6, May 8 and October 2, long before the murder of which the appellants have been convicted was committed on February 18, 1978; and as the present case, in view of its nature, was considered to be an urgent one that should not be left to be tried by the Assize Court due to sit on May 8, the Supreme Court directed, after an application had been made for this purpose by the Attorney-General of the Republic, that an extra sitting, described as a "special Assize", of an Assize Court in Nicosia should commence on March 3, 1978, in order to try the present case.

It appears from the foregoing that the said "special Assize" is nothing more than a Court which was already envisaged by the law at the time when the murder in question was committed and all that was done was to direct that it should sit on a date not already fixed prior to the commission of the murder, for the purpose of trying the appellants, as persons accused of the commission of such murder. In the circumstances I am of the opinion that the special sitting of the Assize Court on March 3, 1978, did not render the Assize Court which sat on that date, in order to try the present case, an exceptional Court of the nature excluded by Article 30.1 of our Constitution; it was merely a normally existing Court of which an extra sitting was fixed.

The other of the two aforementioned matters, which were

raised by counsel for the appellants, is his submission that the trial Court "though admittedly possessing the power" to sentence the appellants to death after having found them guilty of premeditated murder was not empowered to fix the date of the execution of the sentence of death.

This point was raised by counsel for the appellants at the trial at the stage of the allocutus and the trial Court ruled that there was no merit in it and proceeded to sentence both appellants to death and to fix the execution of the sentence of death on June 1, 1978; such execution was subsequently postponed by this Court, in view of the pendency of the present appeal of the appellants, and is now fixed on August 22, 1978.

Rule 5A of the Criminal Procedure Rules was introduced by means of the Criminal Procedure (Amendment) Rules, 1964, which were published in the Second Supplement to the Official Gazette of May 28, 1964. The said rule 5A provides that an Assize Court must fix the date of execution when it passes sentence of death and that the Supreme Court, or any two Judges of it, may postpone such execution to another date.

The aforesaid Rules of 1964 were made, as it is stated in their preamble, in the exercise of the powers vested in the High Court (now this Supreme Court) by means of Article 163 of the Constitution and section 176 of the Criminal Procedure Law, Cap. 155.

It has been submitted by counsel for the appellants that rule 5A is *ultra vires* Articles 163 and section 176, above.

Counsel for the respondent submitted that the said rule was, in any event, *intra vires* Article 163.1; and he did not appear to place much reliance on the rule-making powers conferred by section 176.

Article 163.1 reads as follows:-

> "1. The High Court shall make Rules of Court for regulating the practice and procedure of the High Court and of any other Court established by or under this Part of this Constitution, other than a Court established under Article 160."

The crucial words to be construed are "..... regulating the

practice and procedure ..... of any other Court....." (" ..... ἐπὶ σκοπῷ ρυθμίσεως τῆς διαδικασίας ..... ἐνώπιον παντὸς ἄλλου δικαστηρίου....."); and in the light of their correct construction it has to be decided whether once a sentence of death has been passed the fixing of the date of its execution is, also, part of the proceedings before the Court concerned.

I have found this problem to be a very thorny one because of the fact that until 1964 it has never been the practice of the Courts in Cyprus to fix the date of the execution of a death sentence; on the contrary it has been the practice in this country to have the date of the execution of a death sentence fixed by the Executive Branch of the Government, after the decision as to whether or not to exercise the prerogative of mercy had been reached. I was, therefore, at first—bearing, also, in mind the fact that our Constitution is based on the doctrine of the separation of powers—inclined to the view that the aforementioned rule 5A was *ultra vires* Article 163.1.

Another aspect of the matter which has given me, also, some difficulty is the fact that "..... the penalty of death differs from all other forms of criminal punishment, not in degree but in kind." (per Mr. Justice Stewart in *Furman* v. *State of Georgia*, 33 L. Ed. 2d 346, 388); especially because "An individual in prison does not lose 'the right to have rights' " but "An executed person has indeed 'lost the right to have rights' " (per Mr. Justice Brennan in the *Furman* case, *supra*, at pp. 378–379). So, in my opinion, it would be an erroneous approach to compare what is done by trial Courts in relation to other forms of punishment in criminal cases, as, for example, the fixing of the date as from when a sentence of imprisonment commences, or in relation, generally, to the execution of Court orders in other proceedings before our courts, with the fixing of the date of the execution of a death sentence, for the purpose of arriving at a conclusion as to whether or not the fixing of the date of the execution of a death sentence can properly be deemed to be part of the proceedings before the trial Court which has passed such sentence.

I have decided, however, eventually, that, notwithstanding my above misgivings, I could not pronounce that the 1964 Rules of Court, which introduced the aforementioned rule 5A, were *ultra vires* Article 163.1 of our Constitution, because doing so

would entail, in effect, to hold that the said Rules were not warranted by such Article at all and they, therefore, are unconstitutional; and I could not go as far as that because unconstitutionality must be established beyond reasonable doubt (see, for example, *Sofroniou and Others* v. *The Municipality of Nicosia and Others,* (1976)* 6 J.S.C. 874, 920–921) and I have not been satisfied to that degree that regulation 5A is completely inconsistent with Article 163.1.

Counsel for the appellants has stated, both at the trial and during the hearing of these appeals, that he is not challenging the validity of the passing of the sentence of death on the appellants, if they have been rightly found guilty of premeditated murder. He has proceeded, however, to argue before this Court that if it were to be found by us that the trial Court was empowered to fix the date of execution of the death sentence then such execution would be unconstitutional as offending against Article 8 of the Constitution, which prohibits torture or inhuman or degrading punishment or treatment, and against Article 28 of the Constitution, which safeguards the right to equality and prohibits discrimination.

He has submitted that the execution of the sentence of death passed on the appellants will amount to unequal treatment, contrary to Article 28, as well as to inhuman punishment, contrary to Article 8, since for the last 16 years nobody who has been found guilty by our Courts of premeditated murder has been executed in Cyprus; and he has stressed, in this respect, also, that the execution of the death sentence in the case of his clients would be a discriminatory course, in the sense that they are aliens and for the last 16 years no Cypriot who was sentenced to death was executed; as a matter of fact no execution of any death sentence has taken place in Cyprus since 1962.

Regarding the matter of the sentence of death in Cyprus I have made certain observations in recent years, which I think it is useful to recapitulate in the present judgment:

In *Vouniotis* v. *The Republic,* (1975) 2 C.L.R. 34, I stated (at pp. 60–61) the following:–

"..... though the death penalty for murder remains

* To be reported in (1976) 3 C.L.R.

statutorily in force in Cyprus, it has, as it can be judicially noticed, not been enforced, irrespective of the gravity of the various murder cases, for more than ten years, so that it might conceivably have been treated as having been de facto abolished, in the course of the evolution of social progress, as in other countries."

In the *Anastassiades* case, *supra*, I reiterated the above view (at p. 721) and I added that —

" I repeat this observation so that the appropriate authorities of the Republic may, if they deem it fit, enact legislation in respect of this matter, because, irrespective of other aspects of it, the execution now, all of a sudden, of a death sentence might give rise to constitutional problems such as those faced by the Supreme Court of the United States of America in the series of cases commencing with *Furman* v. *State of Georgia*, 33 L. Ed. 2d 346."

The *Furman* case, *supra*, was referred to in argument during the hearing of the present appeals and I shall be dealing with it and other relevant U.S.A. case-law later on in this judgment.

In the *Kouppis* case, *supra*, I said (at pp. 1894–1895) the following, in relation to counsel's contention that Article 7.2 of the Constitution, which provides that the death penalty may be imposed in cases of, *inter alia*, premeditated murder, is unconstitutional as contravening, among others, the provisions of the aforesaid Article 8 of the Constitution, as well as Article 7.1 of the Constitution, which safeguards the right to life:-

" Lastly, I would like to deal, briefly, with the contention of counsel for the appellant that the death sentence was invalidly passed upon the appellant in the present case. Of course, since his conviction, has, in my opinion, to be set aside and a retrial should take place, the death sentence passed upon him would no longer be executed, but I wish, nevertheless, to state that I cannot accept the contention of counsel for the appellant that it is possible to pronounce that the death sentence was invalidly imposed in a case which comes within the ambit of Article 7.2 of the Constitution.

It cannot be held that the said Article 7.2 is not properly in force because it, allegedly, conflicts with Articles 7.1

and 8 of the Constitution; what is expressly provided for in the Constitution can never be treated as being inoperative on the ground that its application is excluded by some other provision of the Constitution.

Nor could the death sentence, which was imposed in the present instance in full conformity with the provisions of Article 7.2 of the Constitution on the basis of the findings of the trial Court, be treated as being vitiated because of any provision to the contrary in any international Convention or Declaration; this Court, when sitting on appeal in a case such as the present one, is exercising territorial jurisdiction within the Republic of Cyprus and, for this purpose, it has to apply the Constitution as the supreme law.

I would like, nonetheless, to reiterate that I still adhere to what I have said about the execution, as contradistinguished from the imposition, of a death sentence, in *Vouniotis* v. *The Republic*, (1975) 5 J.S.C. 524, 553 and in *Anastassiades* v. *The Republic*, (1977) 5 J.S.C. 516, 721; I should, further, refer, in this respect, for whatever guidance it might be found to offer, to the decision of the Privy Council in England in *De Freitas* v. *Benny*, [1975] 3 W.L.R. 388."

The *De Freitas* case, *supra*, has also, been referred to during the hearing of the present appeals and I shall revert to it in due course.

In the *Kouppis* case, Hadjianastassiou J. after referring to my above observations in the *Vouniotis* and *Anastassiades* cases, *supra*, in relation to the death sentence, said (at pp. 1959-1960):-

" But with respect, the argument of counsel is really unacceptable and cannot in any way stand, because one can not attack the constitutionality of one paragraph of Article 7 as contravening another, once the framers of the Constitution thought fit to include in the Constitution that a law may provide for such penalty of depriving a person of his life only in cases of premeditated murder.

Finally, and irrespective of the difficulties which have given rise to constitutional problems on the question of

death sentence in the United States, I would dismiss this contention of counsel."

Also, in the *Kouppis* case, A. Loizou J. stated the following in relation to the same matter (at pp. 1983–1985)I–

" I turn now to the legal and constitutional issues raised by this appeal. The first one is that the addition of a reference to sections 20 and 21 of the Criminal Code, Cap. 154, in the count on which the appellant was convicted, was unconstitutional as contravening Article 7 of the Constitution. This ground is also connected with the next one which is whether the imposition of the death sentence to the appellant is unconstitutional or otherwise invalid, because of Article 7.2 of the Constitution 'being unconstitutional due to the conflict with other provisions of the Constitution, such as Article 7.1 and Article 8'.

Article 7 of the Constitution says:

'1. Every person has the right to life and corporal integrity.

2. No person shall be deprived of his life except in the execution of a sentence of a competent Court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law.

3. ..... '.

And Article 8 provides that 'No person shall be subjected 'to torture or to inhuman or degrading punishment or treatment'.

I find nothing in the aforesaid two Articles to suggest that the death penalty may not be imposed in the case of a person aiding and abetting the commission of a premeditated murder or committing same in furtherance of a common design. This is a pure matter of criminal liability which leads to a conviction for the offence of premeditated murder. Also, the wording of Article 7.2 is so clear and explicit and there is no contradiction in it with paragraph

(1) thereof which must be read subject to the provisions of paragraph 2, nor is there any contradiction with the provisions of Article 8 which prohibits torture or inhuman or degrading punishment or treatment and which has nothing to do with the death sentence permitted in certain cases to be imposed under paragraph (2) of Article 7 of the Constitution."

I think I should point out, at this stage, that Article 7.2 of the Constitution does not render obligatory the imposition of the death sentence in a case of premeditated murder, but only enables its execution if it is provided for by a Law: it reads as follows:-

"2. No person shall be deprived of his life except in the execution of a sentence of a competent Court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law."

It follows, therefore, that a Law providing for the imposition of the death penalty in a case of premeditated murder may be constitutional under Article 7.2, but it may be framed in such a manner as to offend against some other Article of the Constitution, as, for example, Article 8, if the death sentence is to be executed in a manner amounting to torture or inhuman or degrading punishment or treatment contrary to such Article; the said Article 8 reads as follows:-

"No person shall be subjected to torture or to inhuman or degrading punishment or treatment."

Before I proceed further I think it is appropriate to deal now with the *De Freitas* and *Furman* cases, *supra*, which were referred to by counsel during the hearing of these appeals:

In the *De Freitas* case, which was a case decided by the Privy Council in England on appeal from the Court of Appeal of Trinidad and Tobago, it was held (at p. 389):-

".....: that the executive act of carrying out a death sentence pronounced by a Court of law was authorised by laws that were in force at the commencement of the Constitution and the appellant was, therefore, debarred

by section 3 of the Constitution from asserting that it abrogated, abridged or infringed any of his rights or freedoms recognised and declared in section 1 or particularised in section 2.....".

Section 3 of the Constitution of Trinidad and Tobago "debars the individual from asserting that anything done to him that is authorised by a law in force immediately before August 31, 1962", when such Constitution came into force, "abrogates, abridges or infringes any of the rights or freedoms recognised and declared in section 1 or particularised in section 2".

The said section 1 provides, *inter alia*, that nobody shall be deprived of the right to life "except by due process of law", and safeguards, also, "the right ..... to equality before the law and the protection of the law;" and the said section 2 prohibits, *inter alia*, "the imposition of cruel and unusual treatment or punishment". As was already stated it was held by the Privy Council, in view of the provisions of section 3 of the Constitution of Trinidad and Tobago, that carrying out a death sentence pronounced by a Court did not infringe the rights safeguarded by means of sections 1 and 2 of such Constitution, inasmuch as the execution of the death sentence was authorised by Laws which existed before the coming into force of the Constitution.

It is clear that the constitutional situation in Trinidad and Tobago is radically different from the corresponding constitutional situation in Cyprus because under our Constitution Laws existing since before it came into force have to be construed and applied in conformity with the Constitution (see, in this respect, Article 188 of the Constitution); and, actually, the sentence of death is provided for in Cyprus, as a punishment for criminal offences, by means of sections 26 and 27 of Cap. 154, which is a Law existing since before the coming into force of our Constitution on August 16, 1960.

It is interesting to note that in the *De Freitas* case, *supra*, it was submitted, on behalf of the appellant, that a substantial increase of the according to the previously existing practice average period of time which intervened between the passing of a death sentence and its execution resulted in making the death sentence a "cruel and unusual punishment". The Privy Council

did not deal directly with the substance of this submission but rejected it on other grounds.

In the *Furman* case, *supra*, which was determined together with two other similar cases, namely *Jackson* v. *State of Georgia* and *Branch* v. *State of Texas* (33 L. Ed. 2d 346) the U.S.A. Supreme Court dealt with the issue of whether the imposition and carrying out of the death sentence constituted cruel and unusual punishment; the headnote of the report of that case reads as follows (at pp. 346–348):–

" Each of the three petitioners was Negro, was convicted in a state Court, and was sentenced to death after a trial by a jury which, under applicable state statutes, had discretion to determine whether or not to impose the death penalty. One petitioner was convicted of murder, and his death sentence was upheld by the Georgia Supreme Court (225 Ga 253, 167 SE2d 628). The second petitioner was convicted of rape, and his death sentence was upheld by the Georgia Supreme Court (225 Ga 790, 171 SE2d 501). And the third petitioner was convicted of rape, and his death sentence was upheld by the Texas Court of Criminal Appeals (447 SW2d 932).

On certiorari, the United States Supreme Court reversed the judgment in each case insofar as it left undisturbed the death sentence imposed, and the cases were remanded for further proceedings. In a per curiam opinion expressing the view of five members of the Court, it was held that the imposition and carrying out of the death sentence in the present cases constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.

DOUGLAS, J., concurring, stated that it is cruel and unusual to apply the death penalty selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards, and that because of the discriminatory application of statutes authorizing the discretionary imposition of the death penalty, such statutes were unconstitutional in their operation.

BRENNAN, J., concurring, stated that the Eighth Amendment's prohibition against cruel and unusual punishment

was not limited to torturous punishments or to punishments which were considered cruel and unusual at the time the Eighth Amendment was adopted; that a punishment was cruel and unusual if it did not comport with human dignity; and that since it was a denial of human dignity for a state arbitrarily to subject a person to an unusually severe punishment which society indicated that it did not regard as acceptable, and which could not be shown to serve any penal purpose more effectively than a significantly less drastic punishment, death was a cruel and unusual punishment.

STEWART, J., concurring, stated that the petitioners were among a capriciously selected random handful upon whom the sentence of death was imposed, and that the Eighth and Fourteenth Amendments could not tolerate the infliction of a sentence of death under legal systems which permitted this unique penalty to be so wantonly and so freakishly imposed, but that it was unnecessary to reach the ultimate question whether the infliction of the death penalty was constitutionally impermissible in all circumstances, under the Eighth and Fourteenth Amendments.

WHITE, J., concurring, stated that as the state statutes involved in the present cases were administered, the death penalty was so infrequently imposed that the threat of execution was too attenuated to be of substantial service to criminal justice, but that it was unnecessary to decide whether the death penalty was unconstitutional per se, or whether there was no system of capital punishment which would comport with the Eighth Amendment.

MARSHALL, J., concurring, stated that the death penalty violated the Eighth Amendment because it was an excessive and unnecessary punishment and because it was morally unacceptable to the people of the United States.

BURGER, Ch. J., joined by BLACKMUN, POWELL, and REHNQUIST, JJ., dissenting, stated that the constitutional prohibition against cruel and unusual punishments could not be construed to bar the imposition of the punishment of death; that the Eighth Amendment did not prohibit all punishments which the states were unable to prove neces-

sary to deter or control crime; that the Eighth Amendment was not concerned with the process by which a state determined that a particular punishment was to be imposed in a particular case; that the Eighth Amendment did not speak to the power of legislatures to confer sentencing discretion on juries, rather than to fix all sentences by statutes; and that to set aside the petitioners' death sentences in the present cases on the ground that prevailing sentencing practices did not comply with the Eighth Amendment involved an approach which fundamentally misconceived the nature of the Eighth Amendment guaranty and flew directly in the face of controlling authority of extremely recent vintage.

BLACKMUN, J., dissenting, stated that although his personal distaste for the death penalty was buttressed by a belief that capital punishment served no useful purpose which could be demonstrated, and although the arguments against capital punishment might be a proper basis for legislative abolition of the death penalty or for the exercise of executive clemency, the authority for action abolishing the death penalty should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.

POWELL, J., joined by BURGER, Ch. J., BLACKMUN, J., and REHNQUIST, J., dissenting, stated that none of the opinions supporting the Court's decision provided a constitutionally adequate foundation for the decision, and that the case against the constitutionality of the death penalty fell far short, especially when viewed from the prospective of the affirmative references to capital punishment in the Constitution, the prevailing precedents of the Supreme Court, the limitations on the exercise of the Supreme Court's power imposed by tested principles of judicial selfrestraint, and the duty to avoid encroachment on the powers conferred upon state and federal legislatures.

REHNQUIST, J., joined by BURGER, Ch. J., BLACKMUN, J., and POWELL, J., dissenting, emphasized the need for judicial selfrestraint, and stated that the most expansive reading of the leading constitutional cases did not remotely suggest that the Supreme Court had been granted a roving commission, either by the Founding Fathers or by the

framers of the Fourteenth Amendment, to strike down laws which were based upon notions of policy or morality suddenly found unacceptable by a majority of the Supreme Court."

It is the Eighth Amendment to the U.S.A. Constitution which prohibits the infliction of "cruel and unusual punishment" and such Amendment is rendered applicable to all the States in that country by virtue of the "Due Process Clause" of the Fourteenth Amendment to the U.S.A. Constitution (see the report of the *Furman* case, *supra*, at p. 360).

The prohibition against cruel and unusual punishment which is contained in the Eighth Amendment to the U.S.A. Constitution corresponds, in substance, though not in wording, to the provisions of Article 8 of our Constitution.

As already pointed out earlier on in this judgment, in these appeals there has not been challenged the validity of the imposition of the death sentence, but only of its execution, because of the fact that no such sentence has been carried out during the last 16 years; therefore, though, in view of the already pointed out difference between the constitutional situations existing in Cyprus and in Trinidad and Tobago, respectively, it is obvious that the *De Freitas* case, *supra*, could not be treated as preventing me from examining the constitutionality of the imposition of the death sentence as a punishment provided for by a Law existing since before the coming into force of our Constitution, I do not have to do so in the present case since this matter has not been put in issue in relation to the determination of the present appeals.

As regards the carrying out of the death sentence imposed on the appellants, I do not consider that the *Furman* case, *supra*, is directly relevant, because what was under scrutiny there, by the U.S.A. Supreme Court, was not whether the mode of the exercise in past years of the prerogative of mercy in relation to death sentences had rendered the execution in future of a death sentence cruel and unusual punishment, but only whether the mode of the imposition of a death sentence in the course of judicial proceedings entailed such a result.

After the decision in the *Furman* case most of the States in the U.S.A. enacted new statutes providing for the death penalty

and the constitutional validity of five such statutes was determined by the U.S.A. Supreme Court on July 2, 1976, in a cluster of cases, namely *Gregg* v. *State of Georgia*, 49 L. Ed. 2d 859, *Proffitt* v. *State of Florida*, 49 L. Ed. 2d 913, *Jurek* v. *State of Texas*, 49 L. Ed. 2d 929, *Woodson* v. *State of North Carolina*, 49 L. Ed. 2d. 944 and *Roberts* v. *State of Louisiana*, 49 L. Ed. 2d. 974.

In the *Gregg*, *Proffit* and *Jurek* cases, *supra*, a majority of the members of the U.S.A. Supreme Court agreed, in general, that State statutes imposing the death penalty for murder were not unconstitutional if sufficiently definite guidelines were prescribed in relation to passing such sentence, for the purpose of protecting against arbitrary imposition of capital punishment.

In the *Woodson* and *Roberts* cases, *supra*, a majority of the members of the U.S.A. Supreme Court held that the prohibition against cruel and unusual punishment, as contained in the Eighth Amendment to the U.S.A. Constitution, was violated by State statutes making the death penalty mandatory for first degree murder, which in the North Carolina statute involved in the *Woodson* case was defined to include, *inter alia*, a premeditated killing.

As has been pointed out in the *Gregg* case, *supra*, in relation to the constitutionality of the death penalty, a basic concept underlying the prohibition in the Eighth Amendment to the U.S.A. Constitution against the infliction of cruel and unusual punishment is that a penalty must accord with the dignity of man, and this means, at least, that the punishment should not be excessive, both in the sense that it must not involve the unnecessary and wanton infliction of pain and, also, in the sense that it ought not be grossly disproportionate to the severity of the crime; and I think that it is useful to point out that, while the first of the just mentioned safeguards against excessive punishment corresponds to the provisions of Article 8 of our Constitution, which, as already stated, prohibits torture or inhuman punishment, the second such safeguard corresponds to Article 12.3 of our Constitution, which prohibits punishment which is disproportionate to the gravity of the offence.

Also, in the *Woodson* case, *supra*, it has been pointed out that the penalty of death is qualitatively different from a sentence of imprisonment, however long, because death, in its finality,

differs more from life imprisonment than a hundred years' prison term differs from one of only a year or two; and due to this qualitative difference there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

As, however, in the present case there is not in issue the constitutionality of the imposition of the death penalty, but only of its execution, I do not think that it is either proper or necessary for me to examine and to decide, in any way whatsoever, whether or not the provision in section 203(2) of Cap. 154, as amended by Law 3/62, rendering the death sentence mandatory in case of a conviction for premeditated murder, is inconsistent with Article 8 or Article 12.3 or with any other Article of our Constitution, even though the imposition of the death sentence in respect of premeditated murder is permitted by Article 7.2 of the Constitution; and, of course, such imposition has not been made, by virtue of Article 7.2, mandatory in all instances of premeditated murder.

I have thought fit, anyhow, to draw attention to the fact that the constitutional validity of the mandatory death sentence for the offence of premeditated murder has not been upheld (see the *Woodson* case, *supra*) in a country such as the U.S.A., the criminal law of which is based on the English Common Law, like our own, and the Constitution of which, in so far as fundamental human rights are concerned, is quite similar to our own. I hope that this observation may prove to be of some assistance both in relation to the exercise, under Article 53 of our Constitution, of the prerogative of mercy in cases where the death sentence has been imposed mandatorily after conviction for premeditated murder, and, also, in relation to the formation of relevant legislative policy in future.

I revert, now, to the submission of counsel for the appellants that the execution of the death sentence passed upon his clients would contravene Articles 8 and 28 of the Constitution, inasmuch as it would render such execution inhuman punishment and would, also, amount to discriminatory treatment of the appellants, because nobody who has been convicted of premeditated murder and sentenced to death in Cyprus during the last 16 years has been executed.

It is correct that since 1962, when three persons were executed

after they had been convicted and sentenced to death for premeditated murder, there were found guilty of the same offence, and likewise sentenced to death, but they were not executed, though their convictions were upheld on appeal, the accused in *Mavrali* v. *The Republic*, (1963) 1 C.L.R. 4, *Pieris* v. *The Republic*, (1963) 1 C.L.R. 87, *Pavlou* v. *The Republic*, 1964 C.L.R. 97 and in the *Vrakas*, *Vouniotis* and *Anastassiades* cases, *supra*; and it may be added that nobody has been convicted and sentenced to death in Cyprus for any other capital offence since at any rate 1962.

Some of the murders in question were of particularly heinous nature (as, for example, the premeditated murders committed in the *Vrakas* and *Vouniotis* cases, *supra*); so, I am inclined to agree with counsel for the appellants that if it had not, in fact, become the established practice to commute in any event death sentences which had been imposed for premeditated murders, so as to lead to the de facto, though not the de jure, abolition of the death sentence in Cyprus, one would have expected some of those convicted and sentenced to death in the aforementioned cases not to have benefited through the exercise of the prerogative of mercy under Article 53 of the Constitution; and, I do, definitely, take quite seriously his argument that in case the present appellants are executed this will entail a radical departure from what has been taken to be the established approach of the State to the matter of the death sentence over the past years, and has become more and more consolidated as time was passing by. I cannot, therefore, say that it would not be arguable that—subject, of course, always to the application of the principle that each individual case must be examined on the basis of its own particular facts—the execution of the appellants might amount to unequal treatment, contrary to Article 28 and, consequentially, in view of the way in which others during the last 16 years were sentenced to death for premeditated murders but were not executed, might, also, be regarded as inhuman punishment, in violation of Article 8 of the Constitution.

I am, however, of the view that at the present stage of the developments regarding the fate of the appellants, namely at the stage of the determination of their appeals by this Court, the appellants are definitely not in a worse position than anyone of those who, during the said period of 16 years, has been convicted of premeditated murder and sentenced to death.

In each such case there was fixed a date for the execution of the death sentence but, eventually, the death sentence was not executed because it was commuted to life imprisonment, in the exercise of the prerogative of mercy, under Article 53 of the Constitution, by the President of the Republic.

So, by merely standing today convicted of premeditated murder, and having been sentenced to be executed on a fixed date, the appellants are neither the victims of unequal treatment contrary to Article 28 of the Constitution, as compared to those who have found themselves in the same predicament during the said period of the past 16 years, nor are they being treated in an inhuman manner contrary to Article 8 of the Constitution.

Counsel for the appellants has made it perfectly clear, during the hearing of these appeals, that, in case this Court would find that the trial Court was not empowered to fix the date of the execution of the death sentence which it passed on the appellants, then, he would not have—and quite rightly so—proceeded to press now his submissions regarding the violation of Articles 8 and 28 of the Constitution; in other words, no issue of unconstitutionality would arise for the time being. But I fail to see how the fixing of the date of the execution of the death sentence is of any material significance in this respect In my opinion, for the purpose of determining these appeals it cannot be assumed in advance that the President of the Republic will refuse to exercise the prerogative of mercy, under Article 53 of the Constitution, in favour of the appellants and to commute their death sentence to sentences of life imprisonment, and that, therefore, the appellants will be deprived of their lives through the carrying out of the death sentence passed upon them, being thus treated differently from all those who have been sentenced to death in the past 16 years.

As I have already indicated earlier on in this judgment, I am of the view that at the present time there is no violation of either Articles 8 or 28 of the Constitution. The question of unequal treatment, and consequently of inhuman punishment might, perhaps, arise, and be raised, only if the President of the Republic refuses, eventually, to grant a pardon to the appellants and commute their sentence to life imprisonment; but, as I have explained, the death sentence imposed on the appellants

cannot be challenged now as being unconstitutional in anticipation of such an eventuality.

For all the reasons set out in this judgment, in relation to the various grounds of appeal which have been argued in the present proceedings, I have decided that the appeals of the appellants have to be dismissed.

Before concluding, however, I would like to express my appreciation to counsel of both sides for the v luable assistance given to this Court in dealing with this case.

STAVRINIDES J.: I agree that the appeals should be dismissed. I agree in substance with the judgment of my brother Loizou, which I have had the opportunity of reading through, and I think it unnecessary to deliver a detailed judgment.

L. LOIZOU J.: On April 4, 1978, the appellants were convicted by a "special" Assize Court sitting at Nicosia of the offence of premeditated murder and were sentenced to death. They now appeal to this Court against their conviction and sentence on a number of grounds with which I shall be dealing presently in the course of this judgment.

The information filed on behalf of the Attorney-General of the Republic contained one count framed under sections 203, 204, 20 and 21 of the Criminal Code, Cap. 154 as amended by section 5 of Law 3/62, charging both appellants that they, on the 18th February, 1978, at Nicosia, in the district of Nicosia, did by an unlawful act, with premeditation, cause the death of Yusef El Sebai late of Cairo.

The facts of the matter which gave rise to the charge, in so far as they are relevant for the purposes of this appeal, are briefly these:

The victim came to Cyprus for the purpose of participating in the conference of the Afro-Asian Peoples Solidarity Organization arranged to be held at the Nicosia Hilton. He arrived from Cairo at Larnaca airport on the 16th February, 1978 and put up at the Hilton having booked rooms 525 and 526 on the fifth floor of the hotel.

The first appellant Samir Mohammed Khadar is approximately 27 years old and is of Jordanian nationality. He arrived at

Larnaca airport from Belgrade via Athens on the 13th February, 1978 and he put up at the Kennedy hotel in Nicosia for one night and on the following day he moved to the Churchill hotel also in Nicosia.

The second appellant Zayet Houssein Ahmed Al Ali is 25 years old and of Kuwaity nationality. He arrived at Larnaca airport via Athens on the 14th February, 1978 and put up at the Nicosia Hilton in room 506 on the fifth floor of the hotel. This room communicates with room 507 through a common bathroom. The latter room was occupied by a certain Reyad Al Ahad, an Iraqi national, who also arrived in Cyprus via Athens on the 14th February, 1978.

It is in evidence that as from the 15th February and up to the morning of the 18th February when the victim was murdered the two appellants were almost constantly in each other's company. Thus, in the night of the 15th to the 16th the two appellants together with the third man Al Ahad and some other persons were at the Neraidha night-club and there they remained until closing time at 04.30 hours. On the following day, Thursday the 16th February, the two appellants had lunch together at the Hilton restaurant where lunch was being served to the delegates of the conference. They were asked by the restaurant manager whether they were delegates and appellant 1 answered in the affirmative but when the restaurant manager asked him to produce their tickets accused 1 told him that they were not delegates. In the afternoon they were again together in the hotel lobby and in the evening they had dinner together at the hotel. Later that night they visited two night-clubs. First they went to the Neraidha night-club where they stayed until about 00.45 hours of the morning of Friday and then they left and went to the Maxim cabaret. There they stayed until closing time at about 3.30 hours and together with a cabaret artist, one Panayiota Kokonidou, P.W.13, they proceeded to the Churchill hotel. They stayed there for a short while and then appellant 1 accompanied the witness to the boarding-house she was staying and he left after arranging to meet her on the following day at 19.30 hours for the purpose of having dinner at the Hilton. Appellant 1 picked the witness up at the hour arranged and took her to the Hilton hotel. There they met the second appellant and the third man Reyad Al Ahad. After they all had drinks and dinner together appellant 1 accom-

panied the witness to the Maxim cabaret. Later they were joined there by appellant 2. Some time after the floor show was over appellant 2 invited an artist working there, one Olfad Imbrahim, P.W.12, an Egyptian, to join them and the four of them had drinks together. They left the cabaret together in the small hours of Saturday, the 18th and they proceeded to the Hilton and they all went to rooms 506 and 507. The third man Al Ahad was asleep in his room. It may be stated at this stage that Al Ahad left the hotel early in the morning and there seems to be no question that he left Cyprus by air from Larnaca airport at about 08.00 hours on that day and here he drops out of the picture altogether. The two appellants and the two artists remained in the rooms together; the witness Kokonidou left first at about 8.00 or 8.30 hours and about an hour later the witness Imbrahim also left at the insistence of the second appellant who would not agree with her request to let her sleep a little more.

This brings us to the fateful morning of the 18th when the death of the victim was caused on the ground floor of the Hilton hotel as a result of injuries received by bullets fired at him.

The scene of the crime including the actual position where the victim fell after being shot and other relevant points appear on a plan to scale prepared by P.W.1, P. S. Papadopoullos, which was produced at the trial as *exhibit* 1, as well as in a number of photographs taken, developed and bound in book form by P.W.2, P. S. Akamas and produced as *exhibits* 2 and 5.

The trial Court in their judgment give a description of the locus as it emerged from the evidence including the plan and the photographs and it might be convenient and useful to quote their description for the sake of clarity and easy reference.

> "When one enters the Hilton hotel through its main entrance there is the lobby and the lounge. The reception desk is to the right and approximately opposite it there are the lifts used by guests. To the left of the main entrance there is a corridor on either side of which there are shops and show-cases. The first shop on the left side of this corridor is occupied by a bank and the last by a certain Orphanos. This corridor crosses another one and it ends into two rooms marked on the plan as 'Othello' and 'Des-

demona'. To the far right end of this corridor there are two entrances leading to the service lifts and the hotel kitchen. At the point where the two corridors join there is to the right the 'Jet' show-case. The other corridor that traverses the one we have just described is a long one and runs from north to south. Following a direction to the south one reaches an ante-room to the conference hall where the meeting of the Afro-Asian Peoples Solidarity Organization held its meeting. If one follows the opposite direction the corridor takes him to the bar which is on the right side, and to the hotel cafeteria which is on the left. On the right of that part of the corridor that leads to the conference room there is a bookshop, the cloak-room and the ladies toilets."

At about 11.15 hours of that morning while the conference of the Afro-Asian Peoples Solidarity Organization was in session in the conference hall presided over by Dr. Vassos Lyssarides a number of shots were heard by many persons who happened to be in the conference hall and elsewhere on the ground floor of the hotel. To some of the witnesses who testified at the trial it seemed that the number of shots were two to three, to others three to four. At that time of the day there were many people about on the ground floor including, apart from the delegates, members of the staff, guests of the hotel and members of the Cyprus Police Force who were there on guard duty for security reasons in view of the conference.

The victim Sebai was not in the conference hall at the time but was near a book-stand of the bookshop, which was in the corridor between the bookshop and the cloak-room.

P.W.17, one Georghia Roussogeni, a waitress employed at the Hilton was at the time in the cafeteria talking with another female employee. When she heard the first two shots she ran to the door of the cafeteria and there she heard a third shot which came from the same direction as the first two. She looked in that direction and saw the victim who was at the book-stand falling down. At the same time she saw the back of a man running in the direction of the lobby near the "Jet" show-case. Thereupon she ran back and started shouting that a man had been killed. As a result three of the Hilton employees ran out to a point by the junction of the two corridors; one of these

employees P.W.28, Michalakis Lambrianou, stated in evidence that when he reached a point in the corridor marked "D" on *exhibit* 1 he saw appellant 2 who was then by the bank running towards the lobby. He then looked to his right and saw the victim trying to hold on to the book-stand, kneeling and then falling to the ground. At the same time he saw the back of a person whom he identified as appellant 1 entering the ante-room of the conference hall. He went near the victim and noticed that blood was running from his right temple. Then he ran to the lobby and he saw appellant 2 who was holding two guns in his left hand and another in his right hand leading some 10 to 15 persons including two uniformed policemen, with their hands raised, into the bar. After this he turned to go to where the victim was and when he was by the "Jet" show-case he saw appellant 1 who was holding a hand-grenade in one hand and a pistol or revolver in the other leading delegates in the direction of the cafeteria. Eventually both groups of hostages were led into the cafeteria.

Another employee P.W. 20, Evangelou, upon hearing the shouts of Roussogeni also ran to the same corridor and he was in time to see the victim falling down by the book-stand with blood running from his head. He then went towards the lobby and there he saw appellant 1 armed with a pistol and a hand-grenade leading a group of hostages from the conference hall to the cafeteria and appellant 2 leading another group of hostages from the bar also into the cafeteria. The witness attempted to enter the cafeteria and appellant 2 who was standing at the hostess's stand pointed a gun at him and told him to go inside. When, however, the witnesses explained to him who he was the appellant allowed him to stay out. While the two appellants and the hostages were in the cafeteria the witness noticed that appellant 2 had one pistol in his right hand and two in his left hand.

A third employee of the hotel, P.W.32, Simianthos Pavlou, who also ran to the corridor after he heard Roussogeni shouting saw the victim on the floor with his head in a pool of blood. Then he looked to his left and he saw appellant 1 standing between the "Jet" show-case and the door of the pantry holding a revolver in his left hand. The appellant told him "come, come", pointing his gun in the direction of the cafeteria. He explained to him that he belonged to the staff of the hotel and

refused to obey. He saw the first appellant looking towards the victim and the witness then noticed two women and one man standing over the victim. The women were crying and the appellant shouted to them "come, come" and raised his right hand in which he was holding a hand-grenade without the safety pin on and made them go into the cafeteria.

It is now convenient to revert to certain other events that took place between the time the shots were heard and the time when the hostages were put inside the cafeteria.

Two of the police constables who were detailed with guard duty at the Hilton, P.W.34, Loizou and P.W.35, Antoniades, with instructions to keep an eye on the entrance of the hotel were, at the time the shots were fired, in the lobby. Upon hearing the shots they immediately drew their service revolvers and fell on the ground taking cover behind some arm-chairs. The first police constable a few moments later saw a group of people in the corridor with their hands up and in a matter of seconds these two witnesses noticed appellant 2 standing over them holding in his right hand an automatic pistol with his finger on the trigger and in his left hand a hand-grenade. Appellant 2 ordered the witnesses to put their guns on the floor, which they did, and the accused picked them up. The revolver which P.C. Loizou was carrying was a 0.32 calibre under No. A 88542. P.C. Antoniades was carrying a 0.38 revolver which is the revolver which was produced at the trial as *exhibit* 19. After this both witnesses were made to join the group of hostages which was being held by accused 2 and proceeded through the bar to the cafeteria. In the cafeteria both witnesses saw the appellant 1 armed with a 0.38 revolver in one hand and a hand-grenade in the other. Whilst in the cafeteria P.W.35, Antoniades, noticed that the 0.38 revolver that appellant 1 was holding was *exhibit* 19 which appellant 2 had taken from the witness in the lobby of the hotel a short while earlier.

At the crucial time another prosecution witness Inspector Petros Loizou, P.W.37, who was the police officer in charge of the body guard of Dr. Vassos Lyssarides was in the conference hall together with three other police officers on guard duty. Upon hearing the shots he, together with the other policemen, at once started to run in order to go outside the conference hall

to find out what was happening. On approaching the main door the witness had second thoughts and decided to remain in the conference hall in order to protect Dr. Lyssarides. A short while later the policemen who went out returned to the hall and said something. There was great commotion and confusion in the conference hall as one of the delegates, a certain Gamal Bahiedin, who had gone out of the hall for a few seconds came back crying. Some of the delegates attempted to go out but a policeman shouted to them to go back because a gunman was coming. In fact thereupon a gunman appeared at the entrance forcing them back into the hall. This gunman was appellant 1 and he was holding in his left hand a revolver and in his right hand a hand-grenade ready for use. The delegates then gathered together and after the gunman told them something which the witness did not understand he led them all out of the conference hall and along the corridor into the cafeteria. Whilst they were still in the conference hall one of the delegates went back to his desk to collect something and the gunman fired a shot the projectile of which struck the wall. It may be stated at this stage that this projectile is the one which was on the following day delivered to the police ballistics expert Christofides and was produced at the trial as *exhibit* No. 31.

Once the two appellants and all the hostages were in the cafeteria the two appellants had a conversation between them and they then separated the hostages in two groups. In one group they put all Arabs, Egyptians, Syrians, Sudanese, Iraqis and Palestinians and in the other group all Africans, Asians, Cypriots and certain others of different nationalities who happened to be in the cafeteria at the time. Appellant 1, who, it appears, was doing all the talking, then asked if any of the hostages were armed and thereupon those of the policemen who did carry arms willy-nilly put them on a table. The hands of all the hostages were then tied up behind their backs with their neck-ties by one of the hostages whom appellant 1 ordered to do so. Appellant 1 then demanded to see the Prime Minister and when he was informed that in Cyprus there was no Prime Minister but a President who happened to be out of Cyprus and that the President of the House of Representatives was acting in his place he demanded that the President of the House and all Arab Ambassadors should go to the cafeteria within fifteen

minutes otherwise he threatened to kill the hostages. Eventually, the Syrian military attaché, Mr. Haddad, went into the cafeteria and some time later the Minister of the Interior. The two appellants kept the hostages in the cafeteria for about two hours and having managed to force their wishes on the authorities arrangements were made for them to leave the hotel together with the hostages in a police bus provided for the purpose and proceeded to Larnaca airport. The Minister of the Interior, Dr. Lyssarides and the Syrian military attaché travelled in the police bus together with the appellants and the hostages to Larnaca. As they were boarding the bus appellant 1 shouted something and fired a shot in the direction of some people and journalists who had gathered there. At Larnaca airport a Cyprus Airways plane manned by Cyprus Airways Chief Pilot Captain Melling, Captain Cox, Flight Engineer HadjiCostis and Captain Koutsoftides, all of whom had volunteered for the purpose, was waiting for them. The appellants boarded the plane together with eleven of their hostages and the plane took off for its hazardous flight to an unknown, until then, to the crew or anybody else, destination.

Pausing here for a moment I should add that after the hostages boarded the aircraft appellant 1, who was still on the gangway, handed three guns to the Syrian military attaché Mr. Haddad, two pistols and one revolver. Immediately afterwards Mr. Haddad handed these guns to P.W.36, Inspector Stephanou. The revolver was a 0.38 Webley & Scott under No.149474 (*exhibit* 19) in the cylinder of which there were three expended cartridge cases and two live rounds of the same calibre. On the following day Inspector Stephanou handed this revolver to P.W.14, Inspector Frangos.

I will revert to this flight later as I consider it more convenient to complete the account of the events that took place at the Hilton or are related to them.

Immediately after the shots were heard the Hilton employee in charge of the reception P.W. 8, Savvas Poumbouras, dialled 199 and informed Police Headquarters. The call was received by P.W.9, P.C. Stylianou, who immediately conveyed the information to his superiors. One or two minutes later the witness received further information and he rung up the Fire Brigade for an ambulance. As a result P.W.18, Ioannis Yiango-

poulos, an ambulance driver of the Nicosia General Hospital drove an ambulance to the hotel together with a male nurse P.W.9, Charalambos Constantinou. The injured person who, it may be stated, was identified by many persons as Yusef El Sebai was carried to the ambulance and was removed to the Casualty Department of the Nicosia General Hospital accompanied by a Police Inspector, P.W.24, Kazafaniotis. According to the male nurse the victim was already dead when he was placed in the ambulance as he had no pulse, there was no reaction of his pupils and from his mouth apart from blood brain substance was dribbling. Be that as it may, when the ambulance arrived at the Nicosia General Hospital P.W. 11, Dr. Andreas HadjiKoutis, received the victim, he examined him and ascertained that he was dead. He noticed that the victim had a number of bullet wounds, one on the head, one on the outer surface of the right thigh, one on the surface of the left thigh and another on the left wrist. The body was guarded until 16.30 hours of the same day when P.W.16, Dr. Panos Stavrinos, the Government Pathologist carried out a post-mortem examination on the body of the victim. Present at the post-mortem were Police Inspector Frangos and the ballistics expert Christofides.

The findings of the pathologist were the following:

Externally: (a) A bullet round wound, 2 c.m. long, at the right parietal region, which he thought to be the entry wound; (b) a slightly stellate fashion wound, 4 c.m. long, at the left upper part of the occipital region, which the doctor thought to be the exit wound of a bullet; (c) a ragged superficial bullet wound at the left wrist, lacerating the muscles and the soft tissues without bone fracture; (d) a small round entry wound measuring 20 m.m. in diameter at the upper region of the right thigh which traced along the soft tissues and muscles forming an exit wound at the right buttock, near the anus internally. Just opposite the exit of this wound there was another entry wound, caused by the same bullet, at the left buttock internally which traced along the muscles of the left buttock and formed another small exit wound, 30 m.m. in diameter, at the upper region of the left thigh.

Internally, the doctor found that the skull and scalp were severely congested, the meninges were congested and severely

lacerated; the brain was moist, oedematous and severely congested. There was a bullet entry wound at the right parietal region. The bullet that had caused this wound then traced along the base of the brain, lacerating the middle lobe, the ponds, the left occipital lobe and the left upper part of the cerebellum and it then caused the exit wound in the stellate fashion appearance at the left upper part of the occipital region.

After he removed the brain, the doctor said, he noticed that there was a fracture of the base of the skull, extending through the right parietal bone, then at the right and left occipital fossa and ending at the left upper occipital suture. In his opinion the cause of death of the victim was shock and haemorrhage due to fatal injuries that he received on the head and which were caused by bullet wounds. His death, he said, came within seconds.

Police Sergeant Mateas, P.W.15, was one of the first police officers to arrive at the scene after the police were informed by phone. He arrived at the Hilton at approximately 11.40 hours. In the proximity of the pool of blood that he saw in the corridor that leads to the conference hall he found the following:

(a) Two expended cartridge cases at points 1 and 2 of *exhibit* 1.

(b) One fired bullet and one bullet jacket at points 3 and 4 of the same *exhibit* and

(c) Scattered pieces of a wrist-watch chain. These points also appear in photographs 5 and 11 of the book of photographs marked in this Court as *exhibit* 2.

Later that day he delivered the expended cartridge cases, the fired bullet and the bullet jacket to the ballistics expert, P.W.41, Inspector Christofides. The ballistics expert who arrived at the scene at 14.30 hours also carried out a search and found in the bookshop another expended cartridge case at point 5 of *exhibit* 1. This appears also in photo No. 9 of *exhibit* 2. The two expended cartridge cases as well as the fired bullet and the bullet jacket which P. S. Mateas delivered to him were produced in evidence. The two expended cartridge cases are *exhibit* 27, the fired bullet and the bullet jacket are *exhibit* 28 and the expended cartridge case that Inspector Christofides found himself is *exhibit* 29. The witness also noticed two holes on

the wall and on the lower part of the wooden frame of the door leading to the ladies' toilets which were consistent with bullet holes. These appear in photograph 8 of *exhibit* 2. In the hole on the wooden frame of the door there was a metal fragment similar to the core of a bullet.

As a result of certain observations which the witness made during the post-mortem examination on the body of the victim, he revisited the scene of the crime on the 19th February and on searching again he found in the cloak-room at point 6 of *exhibit* 1 a part of another bullet jacket. This also was produced and is *exhibit* 30. On the same day P.W.26, Nicos Christodoulides, a radio technician, whose duty it was to supervise the installation of the simultaneous interpreter system in the conference hall and who had gone back to the Hilton to disassemble the equipment found the fired bullet, *exhibit* 31, which has already been mentioned and delivered it to Inspector Christofides.

It is, at this stage, convenient to deal briefly with the events of the flight from the moment the Cyprus Airways plane took off until its return, as narrated by Captain Melling in the course of his evidence and as set out in the judgment of the trial Court and with the events that took place after the aircraft finally landed on its return at Larnaca airport.

When the two appellants with their hostages boarded the plane at Larnaca airport they were both armed. Appellant 1 was holding a revolver and a grenade and appellant 2 a pistol and a grenade. After take off appellant 1 ordered Captain Melling to fly to Tripoli in Libya but on approaching the Libyan air space they were not allowed to enter it or land anywhere in Libya. Appellant 1 then ordered the witness to fly to Aden but the South Yemen authorities also refused permission to land. Upon that appellant 1 accepted the suggestion of Captain Melling that, in the circumstances, the only course left open to them was to remain airborn till daylight and then make efforts to land somewhere in Yemen. In the meantime at the request of Captain Melling his co-pilot Captain Cox contacted Djiboudi and requested permission to land there. The plane eventually landed at Djiboudi in the early hours of the morning of the 19th February and after a delay of some nine hours, after refuelling, it took off and flew back to Larnaca airport where it landed at 17.20 hours. During the flight Captain

Melling noticed that the appellants had on several occasions exchanged guns. On their return journey to Cyprus appellant 1 turned town an offer to land in Syria. The witness gives an account of the negotiations between the appellants and the authorities after the landing of the plane for the release of the hostages on board and the surrender of the appellants. Also of the attack by Egyptian commandos against the Cyprus Airways plane at a time when the negotiations appeared to have materialized and to the exchange of fire which followed as a result.

At 18.10 hours after the fire seized, the two appellants surrendered with their weapons to P.W.33, Acting P. S. Shakallis and P.W.36, Inspector Stephanou, who boarded the plane for this purpose. Acting P. S. Shakallis who is an expert on explosives took one grenade from each appellant. Inspector Stephanou took a 0.32 revolver from appellant 1 and a pistol from appellant 2. Captain Melling who knew that appellant 2 was carrying another gun took from him a revolver which he delivered next day to P. S. Nicolaides who later handed it over to the ballistics expert Christofides. This last revolver which is exhibit 32 was identified by Inspector Loizou, P.W.37, as the one he was carrying in the Hilton conference room on the 18th February and which he was forced to deliver to the appellants in the cafeteria.

On the 20th February, Inspector Stephanou delivered the two guns which he took from the appellants on the plane to Inspector Christofides. These weapons are *exhibits* 33 and 34, respectively. Stephanou also handed to Inspector Christofides two magazines containing eight and three live rounds of ammunition. These magazines are *exhibit* 35. The pistol *exhibit* 34 that appellant 2 delivered to Stephanou is a tokarev of Chinese origin, calibre 7.62 mm. and bears number 16016355. The revolver *exhibit* 33 was identified as the revolver that appellant 2 took from P.W.34, P. C. Loizou, at gun-point on the 18th February, 1978, in the Hilton lounge. The two handgrenades that Acting P. S. Shakallis took from the appellants on the plane were, according to his evidence, defensive fragmentation hand-grenades of Russian origin and operated with detonators with a delay of four seconds. They are *exhibit* 23.

It may be added at this stage that both Inspector Stephanou

and Acting P. S. Shakallis testified that they had seen the tokarev, *exhibit* 24, in the hands of appellant 2 at the Hilton hotel, the former at the time when he was being searched by the second appellant before boarding the bus that was to take them to Larnaca airport and the latter, who was also at the Hilton, at the time the second appellant was leaving the hotel together with the hostages on their way to the bus.

Inspector Christofides examined the revolver, *exhibit* 33, and the tokarev pistol, *exhibit* 34, and found them to be serviceable. He also found that the two magazines, *exhibit* 35, fitted in the tokarev pistol. He fired six rounds with this pistol from the magazine which contained the eight rounds and then he made a microscopic examination and comparison of the tokarev pistol and the rounds of ammunition. He then compared the two expended cartridge cases which were handed to him by Sergeant Mateas, *exhibit* 27, as well as the expended cartridge case which he, himself, collected from the bookshop, *exhibit* 29, with the test cartridge cases which he had fired with the tokarev pistol and he ascertained that *exhibit* 27 and *exhibit* 29 had been fired with this same pistol. He also compared the one fired bullet and the bullet jacket *exhibit* 28 as well as the bullet jacket *exhibit* 30 with the test bullets and ascertained that they, also, had been fired from this pistol.

In the course of his cross-examination the witness said that for purposes of comparison he took photo-micrographs of one of the fired bullets and an expended cartridge case collected from the scene of the crime and of a test bullet and an expended cartridge case which he had fired himself with the tokarev and mounted the photographs together for purposes of comparison. At the request of learned counsel for the defence he produced these photo-micrographs and they are *exhibit* 36.

On the same day, the 20th February, 1968, Inspector Frangos also handed the revolver No. 149474, *exhibit* 19, which he had received on the previous day from Inspector Stephanou to this witness. For purposes of comparison the witness fired the two live rounds of ammunition which were in the cylinder of the revolver and by the use of a comparison microscope ascertained that the expended cartridge cases which were in the cylinder of this revolver and the two test cartridges fired by him were actually fired with this revolver. He also compared the

one fired bullet which was handed to him by P.W.26, Mr. Christodoulides, *exhibit* 31, with the test bullets fired with this revolver and he ascertained that the bullet *exhibit* 31, which, as it will be remembered, was found by P.W.26, Christodoulides, in the conference room had been fired from the barrel of the revolver *exhibit* 19.

The witness had not the slightest doubt about the correctness of his findings.

It only remains to deal with certain extrajudicial confessions alleged to have been made by appellant 1.

These confessions are to be found in the evidence of P.W.34, P. C. Loizou, P.W.38, Georghiou and P.W.29, Captain Melling. In the case of the first witnesses the confessions are alleged to have been made in the cafeteria of the Hilton. According to witness Loizou appellant 1 said "We are Palestenian, do not afray anything, we are friends of yours, we kill this man because he was friend of Israel and he write different articles in your Gazette". According to the evidence of witness Georghiou appellant 1 is alleged to have said "We are Palestenians, we come specially for that man, we kill that man because he was friend with the Israelis and he write some articles in his newspaper against Palestenians". Both the above witnesses also refer to a conversation between appellant 1 and a young lady whom appellant 1 is alleged to have asked where she came from and when she told him that she came from Holland he asked her if she knew anything about the Palestenian problem and when she replied in the negative he is alleged to have said to her that now she knew something and that when she went back to her country to tell her people about the Palestenian problem, or words to that effect.

Captain Melling testified that in the course of the flight he had some conversation with appellant 1 during which the latter told him that he did not wish to harm any of the crew and that they had both come to Cyprus "to kill that man because he was a bad man and a spy and a traitor to the Arab cause".

It may be noted here that P.W.34, Loizou, testified as to this alleged statement by appellant 1 in re-examination and as a result of a question put to him regarding appellant 1's knowledge of English with regard to which he was rigorously cross-

examined. On the other hand Captain Melling admitted in cross-examination that he did not mention anything about this alleged confession at the preliminary inquiry and when asked why he omitted it his reply was that he answered all the questions put to him at the preliminary inquiry and that he was never asked about this.

At the close of the case for the prosecution each of the appellants when called upon to make his defence elected to make an unsworn statement from the dock. Appellant 1 said "I am innocent and I have not committed the offence with which I have been charged. I only participated in the taking of the hostages and their removal from Cyprus to overseas. This is what I did and this is what I told witness Stephanou. At no stage I harmed anyone of the hostages, nor any Cypriot and it was not my intention to do so. All what I did was actuated by an earnest desire to alleviate the great suffering of the Palestenian people which I am proud to be one of it. I have nothing else to state to this Honourable Court at this stage".

Appellant 2 said "I am innocent, I did not kill Sebai, I participated only in removing the hostages from Cyprus to overseas. That is all that I have done. I did not harm anybody from the hostages or the Cypriots and it was not my intention to harm anybody. I am very proud to be Palestenian and what I did for the hostages was for the Palestenian cause. I have nothing to say for Your Honourable Court at this stage".

No witnesses were called for the defence.

The trial Court in substance accepted the evidence adduced in support of the case for the prosecution as true and reliable. They were satisfied that the three shots fired at the victim as a result of which he was fatally injured were fired with the tokarev pistol *exhibit* 34. In the absence of even a shred of evidence suggesting that the person or persons who fired the shots that killed the victim might have done so in self-defence they completely ruled out such possibility and had no doubt that, having regard to the type of the weapon used, the number of shots fired at the victim and the fact that the victim was shot on the head his death was desired and intended. They were also satisfied that the fact that the revolver, *exhibit* 19, which appellant 2 took from P.W.35, Antoniades, in the lobby of the hotel was the weapon that appellant 1 was holding when he entered

the conference room and with which he fired the bullet *exhibit* 31, it was reasonable to presume that appellant 2 handed over this revolver to appellant 1 some time between the moment that he took it from the witness Antoniades and before appellant 1 entered the conference room.

After dealing extensively with the evidence and the submissions made they made their findings and drew their inferences and came to the conclusion that the murder of the victim was committed by the appellants in furtherance of a preconceived and well prepared common plan to which both were parties and that, therefore, each of them could be charged with himself having committed the murder as a principal offender no matter who of the two actually pulled the trigger of the pistol used to commit the murder.

In coming to this conclusion the trial Court took, *inter alia*, into consideration the movements and conduct of the two appellants from their arrival in Cyprus until the morning of the murder; their presence at the scene armed so soon after the shots were heard and the victim was seen falling on the ground; the fact that the murder was committed with the tokarev pistol *exhibit* 34, which was seen in the hands of appellant 2 in the Hilton after the murder was committed and which subsequently was some times in the possession of the one and some times in the possession of the other; the conduct of the appellants immediately after the victim was shot which showed that each knew the movements and actions of the other and each co-ordinated his role to that of the other in point of time and area of operation; that the killing of the victim and the taking of the hostages had such a sequence in point of time justifying an irresistible inference that they were nothing more than two phases of the same incident excluding any probability of the two incidents being separate and distinct and to have been committed out of mere coincidence in the same hotel at the same time by two different groups of persons acting independently and without notice or knowledge of each other's acts; and also that from the manner with which each appellant operated on that particular morning in executing their plan satisfied the Court that such plan could not have been prepared only a short period of time before it was put into effect.

Finally the trial Court dealt with the issue of premeditation.

After dealing with the legal aspect in the light of authorities such as *Rex* v. *Halil Shaban*, VIII C.L.R., p. 82, *Halil* v. *The Republic*, 1961 C.L.R. p. 432, *Anastassiades* v. *The Republic* (1977)* 5 J.S.C., p. 516 and *Kouppis* v. *The Republic* (1977)* 11 J.S.C., p. 1860, the Court concludes as follows:

"The evidence on the issue of premeditation is, in a nutshell, the following:

(1) The two accused acting in concert intentionally killed the victim in the execution of their preconceived and well prepared plan.

(2) The wound that caused the death of the victim was on the head.

(3) The accused assisted each other in the killing and aided each other in securing a safe escape.

(4) The murder was committed by a lethal weapon that was brought to the Hilton hotel by one of the accused. And

(5) The accused had a motive to kill the victim.

The above evidence, which has been proved by the Prosecution beyond any reasonable doubt, leaves no room for doubt in our minds that the two accused killed El Sebai in the execution of their well prepared and preconceived plan, although they had ample time to reflect on their decision and desist from carrying out their intentions and though the presence of uniformed armed policemen at the Hilton should have put them off and made them retract.

Having considered the whole evidence before us, we find that the Prosecution have proved their case beyond any reasonable doubt and that both accused are guilty of premeditated murder as charged."

I now come to the grounds of appeal.

The appeal is founded on no less than 12 grounds and they read as follows as set out in the notice of appeal:

"GROUNDS OF APPEAL

1. The Special Assize Court of Nicosia that tried the

* To be reported in (1977) 2 C.L.R.

appellants was a 'Special' Court within the meaning of Article 30.1 of the Constitution of the Cyprus Republic and as such was disqualified and/or incompetent from trying the appellants for the offences with which they were indicted and convicted.

(*Note*: This point was not raised before the trial Court).

2. The Special Assize Court of Nicosia though admittedly possessing the power to pass a death sentence on appellant after finding him guilty of the offences contained in the information, had no power or jurisdiction to fix the date of the execution of the death sentence of the appellant.

3. The conviction of the appellant should be set aside because the Hon. Court wrongly admitted and acted upon the alleged extrajudicial confessions of the appellant to:

a) Capt. Melling P.W.29

b) G. Georghiou P.W.38

c) L. Loizou P.W.34

Because:

(i) Such confessions were conflicting with themselves.

(ii) Accused is alleged to have made them in a language which is not his own and whose knowledge of it was wholly insufficient.

(iii) None of the witnesses made any record of what accused No. 1 appellant is alleged to have said.

(iv) Taking all the surrounding circumstances of the case into account it would be very unsafe to act upon such admissions.

(v) In any case such confessions were not evidence against appellant-accused No. 2.

4. The conviction of both accused should be set aside because the Hon. Court failed to deal adequately or at all and adjudicate upon the cardinal points raised in support of the defence of the appellant although at page 202 of the judgment the Hon. Court does refer to such points.

5.(a) The conviction of both appellants should be set

aside because of the glaring misdirection in law by the trial Court at page 27 of the judgment 'That the failure of the accused to give evidence in their own defence is a factor related to their guilt', quoting a passage from *Vrakas* v. *The Republic* (1973) 2 C.L.R. page 139 which passage was applicable only to that case and in view of its particular circumstances.

(b) The Hon. Court erroneously thought that they had a right to comment on the failure of the accused to give evidence on oath as a matter of course, when they only had a discretion to do so.

(6) The failure of the prosecution to call or tender as a witness Daphne Nicolaides, of Nicosia who was in the book-shop of the Hilton Hotel at the time of the murder only a few steps away from the place where the murder took place, (though the prosecution made this witness available to be called as a defence witness) is tantamount to a miscarriage of justice.

7. The Hon. Court erroneously accepted the evidence of the ballistics expert P.W.41 Inspector Christofides and drew the conclusion that the expended cartridges and the projectiles found near the body of the victim were fired from exh. 34 which was later found in the possession of accused No. 2, because:

(a) No photos were taken by the expert of the above *exhibits* (except one projectile and one fired bullet) which if produced would have enabled the Court to form its own opinion on the correctness of the expert's evidence, and this failure has deprived the Court of the very basis on which their opinion should be based.

(b) The *exhibits* were so distorted that no reliable opinion on them could possibly have been given.

(c) The characteristic marks found on the *exhibits* were insufficient for definite conclusions to be drawn by the expert especially on *exhs.* 28 and 30.

(d) The Court approached the expert's evidence and accepted it acting contrary to the dicta in the case of *Anastassiades* v. *The Republic* (1977) 5 J.S.C.

8. The Hon. Court erroneously came to the conclusion that the facts as found by them were consistent only with the guilt of the appellant and inconsistent with any other rational conclusion, when it was equally consistent with the appellants' guilt as well as with their innocence.

9. The Hon. Court erroneously reached to the conclusion, by inference only, that appellant was acting in concert for the commission of the murder of the complainant and it is submitted that in the absence of such evidence both appellants should have been acquitted because:

(i) The Court accepted that there was no evidence as as to who fired the fatal shots (P. 28 A-B).

(ii) No direct evidence of common design to murder the complainant (Page 28D)

(iii) The inference drawn by the Court from the evidence that appellant was acting in concert to murder the complainant was unjustified, erroneous mostly based on conjecture and not on evidence.

10. The verdict of the Hon. Court was unreasonable and against the weight of evidence.

11. The Hon. Court erroneously came to the conclusion that if the murder of Sebai was committed by the appellant or any of them it was committed with premeditation.

12. The prosecution failed to prove its case with that degree of certainty which is required in every criminal case."

Ground 6 was, after it was almost fully argued, very wisely in my view, abandoned by learned counsel for the appellants.

I do not propose to deal with every one of the grounds of appeal separately as a number of them are closely connected and indeed overlap.

GROUND 1: This ground was raised by counsel for the appellants for the first time before this Court.

Counsel's submission was that the Assize Court which tried

the appellants was, having regard to the way it was constituted, an "exceptional Court" within the meaning of Article 30.1 of the Constitution and, as such, was disqualified and/or incompetent to try the appellants for the offence with which they were indicted and convicted. Counsel's complaint was that both the date of the sitting of the Assize Court and its composition were fixed for the purposes of this particular case; he also criticized the existing practice of the Supreme Court in deciding the composition of Assize Courts generally only a few days before the date of sitting and submitted that the Judges who sit at Assize Courts should be the same so that all citizens should know who are the Judges who are going to try their cases and in this respect he suggested that the Judges so nominated should be roving Judges dealing with Assize Court work all over Cyprus.

In support of his argument learned counsel referred to the provisions in the constitutions of other countries with particular emphasis on Article 8 of the Constitution of Greece of 1952 and to certain passages in the well known textbook "Constitution of Greece" by Svolos and Vlachos, Vol. B. 1955. I shall be dealing with these later in this judgment.

Before dealing with this ground I consider it useful to make a short reference to the past in connection with the establishment of Assize Courts in Cyprus.

As far as I was able to ascertain, the first statutory provision for the establishment of Assize Courts was made in the Cyprus Courts of Justice Order, 1882. Clause 2 of this Order abolished the then existing tribunals Nizam Courts (*i.e.* the Temyiz Court of Nicosia, the Daavi Courts of the several Cazas or Districts of Cyprus) and the Commercial Court at Larnaca, and so far as the Order directed the several Musulman religious tribunals existing in Cyprus. Clause 6 of the above Order made provision for the establishment and constitution of an Assize Court in each district; section 50 made provision for their jurisdiction which was "to try all charges and offences committed in Cyprus"; and clauses 203 and 206 provided for the place of sitting and the periods of sittings respectively. It is significant to note that the latter clause provided that "the Assize Court for each district shall hold at least one sitting in every six months".

The Cyprus Courts of Justice Order, 1882, was repealed by the Cyprus Courts of Justice Order, 1927 (clause 224). Clause

5 of this Order provided for the establishment of Assize Courts and its opening paragraph reads as follows:

> "5. There shall be established in each Judicial District a Court of Criminal Jurisdiction, to be called an Assize Court and to be constituted of three or five Judges as the Chief Justice may direct."

Clause 55 made provision for the jurisdiction of Assize Courts in terms similar to those of clause 50 of the 1882 Order, and clauses 212 and 215 made provision for the place of the sitting and the periods of sittings respectively.

All the above clauses of the 1927 Order were repealed and substituted by section 60 of the Courts of Justice Law, 1935 (Law 38 of 1935). The relevant provisions of this Law regarding Assize Courts appear in sections 3, 5, 14, 44 and 47. Section 3 deals with the establishment of Courts generally and section 5 with the constitution of Assize Courts, section 14 with their jurisdiction and sections 44 and 47 with the place of sitting and the period of sittings. Regarding the constitution of Assize Courts section 5 reads as follows:

> "5. An Assize Court shall consist of the Chief Justice or such one of the Puisne Judges as the Chief Justice may direct, who shall be the President of the Assize Court, and either —
>
> (a) A President of a District Court and a District Judge nominated by the Chief Justice; or
>
> (b) two District Judges nominated by the Chief Justice."

Regarding the period of sittings section 47 (2) provides for the first time that:

> "2. Assize Courts shall be held at such times as the Chief Justice may direct:
>
> Provided that there shall be at least one sitting in the principal town of each district in every six months".

Then we come to the Courts of Justice Law, Cap. 11 (1949 ed.) which as stated in the preamble was "a law to make better provision for the Administration of Justice and to reconstitute

the Courts of the Colony". The relevant provisions in this Law regarding Assize Courts are in sections 3, 5, 14, 23 and 26.

Cap. 11 was repealed by the Courts of Justice Law 1953 (No. 40 of 1953) and the relevant provisions of this Law are in sections 3, 5, 24, 65 and 68.

Finally the 1953 Law was repealed by the Courts of Justice Law 1960 (14 of 1960) the Law now in force. I will revert to the relevant provisions of this Law and of the Constitution presently.

As stated earlier on in support of his argument counsel quoted certain passages from the textbook "Constitution of Greece" by Svolos and Vlachos, Vol. B 1955 in relation to Article 8 of the 1952 Constitution. Paragraph 27 at p. 134 reads as follows:

"27. Κατὰ τὸν συνηθέστερον ὁρισμόν, κατ' ἀρχήν, τὸ ὑπὸ τοῦ ἄρθρ. 8 ἐδ. 2 Συντ. ἀπαγορευόμενον εἶναι πᾶν 'δικαστήριον', μὴ ἐκ τῶν προτέρων ὑπὸ τοῦ νόμου γενικῶς ἐπὶ ὡρισμένῃ δικαιοδοσίᾳ καὶ ἁρμοδιότητι ἱδρυμένον, ἀλλὰ προσωρινῶς καὶ αὐθαιρέτως, ad hoc, ἐκ τῶν ὑστέρων συνιστώμενον (ἰδίως μετὰ τὴν τέλεσιν ἀξιοποίνου πράξεως) πρὸς ἐκδίκασιν ὡρισμένης ὑποθέσεως ἢ ὡρισμένου προσώπου, ἢ προσώπων δυναμένων νὰ προσδιορισθοῦν ἀτομικῶς ἐκ τῶν προτέρων, δι' ἀποστερήσεως οὕτω τοῦ ἀτόμου ἐν τῇ συγκεκριμένῃ περιπτώσει ἀπὸ τοῦ 'νομίμου' αὐτοῦ δικαστοῦ. Δὲν εἶναι ἀνάγκη, διὰ νὰ χαρακτηρισθῇ ὡς 'ἔκτακτον' τὸ δικαστήριον, νὰ εὑρίσκεται ἁπλῶς ἐκτὸς τοῦ κύκλου τῶν δικαστηρίων τῆς τακτικῆς δικαιοδοσίας, διότι δύναται καὶ τακτικῆς δικαιοδοσίας δικαστήριον νὰ καταστῇ 'ἔκτακτον' εἰς συγκεκριμένην περίπτωσιν, συντρεχόντων τῶν ὅρων τοῦ 'ἐκτάκτου'. Ἐξ ἄλλου ὅμως τὸ 'ἔκτακτον' δικαστήριον δύναται νὰ χαρακτηρίζεται ἀπὸ τὴν 'πολιτικὴν τάσιν', ἀπὸ τὰ ἐλατήρια δηλ. καὶ τοὺς σκοποὺς τῆς συστάσεως αὐτοῦ, τοῦ γνωρίσματος τούτου διαφοροποιοῦντος ὑπὲρ πᾶν ἄλλο τὸ 'ἔκτακτον' καὶ ad hoc ἀπὸ τοῦ τακτικοῦ δικαστικοῦ ὀργάνου."

("27. According to the most usual definition, in principle, what is prohibited by Article 8 (2) of the Constitution is every 'Court' which had not been established in advance by Law generally for a certain jurisdiction and competence, but provisionally and arbitrarily, ad hoc, established afterwards (especially after the commission of a punishable act)

for trying a certain case or a certain person, or persons capable of being determined personally in advance, by depriving thus the person in the particular case of his 'lawful' Judge. It is not necessary, for a Court to be described as 'exceptional', that it should be merely outside the circle of the ordinary jurisdiction Courts, because a Court of ordinary jurisdiction may be rendered 'exceptional' in a particular case, when the conditions of the 'exceptional' come in aid. On the other hand, however, the 'exceptional' Court can be described by the 'political tendency', that is from the motives and the aims of its establishment, and this characterestic differentiates more than anything else the 'exceptional' and ad hoc Court from the ordinary judicial organ.").

I find it pertinent and useful to quote two more passages from this same textbook where the learned authors deal with the term "νόμιμος δικαστής" (lawful judge). These are passages 8 and 9 at pp. 119 and 120 of the textbook:

8. Ὁ 'παρὰ' ἢ 'ὑπὸ' τοῦ νόμου ὡρισμένος δικαστής, ὁ 'νόμιμος δικαστὴς' (der gesetzliche Richter), ἢ ἄλλως, ὁ κοινῶς καὶ ἄνευ νομικῆς ἀκριβολογίας ὀνομαζόμενος 'φυσικὸς' δικαστὴς — ὃν ὅρον εὑρίσκομεν καὶ εἰς συνταγματικὰ κείμενα, παλαιότερα καὶ σύγχρονα εἶναι ὁ ἐκ τῶν ἐκάστοτε ἰσχυόντων ὀργανωτικῶν (λ.χ. ἐκ τοῦ 'Οργανισμοῦ τῶν Δικαστηρίων) ἢ οὐσιαστικῶν (ΠΚ), ἢ δικονομικῶν (Πολ. Δικ. ΚΠΔ), ἢ ἄλλων νόμων ἐκ τῶν προτέρων γενικῶς ὡρισμένος, λόγῳ ὕλης, προσώπου ἢ τόπου ἢ οἱουδήποτε ἄλλου στοιχείου, διὰ τὴν περὶ ἧς πρόκειται ὑπόθεσιν καὶ δὴ διὰ πάσας τὰς ὁμοίας πρὸς αὐτὴν καὶ διὰ πάντα τὰ πρόσωπα καὶ ὁ ὁποῖος εἶναι 'ἁρμόδιος' ὄχι μόνον διὰ τὴν ἔρευναν, ἀλλὰ καὶ διὰ τὴν διεκπαιραίωσιν αὐτῆς.

9. Τῆς ὑπαγωγῆς εἰς τὸν τοιοῦτον δικαστὴν οὐδεὶς κατ' ἀρχὴν ἐπιτρέπεται ν' ἀποστερηθῇ καὶ ν' ἀποκλεισθῇ, ἐν τῇ συγκεκριμένῃ περιπτώσει, διὰ πράξεως διοικητικῆς, νομοθετικῆς ἢ καὶ δικαστικῆς ἐχούσης κατ οὐσίαν ἀτομικὸν χαρακτῆρα καὶ ὁριζούσης ἄλλο ὄργανον, ἐκ τῶν ὑστέρων καθιστάμενον ἁρμόδιον διὰ νὰ ἐπιληφθῇ τῆς ὑποθέσεως. Διότι ἡ ἀποστέρησις αὕτη ἀναιρεῖ τὴν κατὰ τῆς αὐθαιρεσίας ἐν τῇ δικαιοδοτικῇ λειτουργίᾳ καὶ ἰδίως ἐν τῇ ποινικῇ διώξει ὑπὲρ τοῦ ἀτόμου ἐγγύησιν, παραδίδει δὲ τὸν κατηγορούμενον οὐχὶ

πρὸς δίκην ἀλλὰ πρὸς καταδίκην. 'Η ἄμεσος ἢ συγκεκαλυμμένη ἀφαίρεσις ὑποθέσεως ἢ προσώπου ἀπὸ τῆς 'νομίμου' ἢ 'φυσικῆς' δικαστικῆς δικαιοδοσίας, ἀντίκειται εἰς τὸ ἄρθρ. 8 Συντ., ἔστω καὶ ἂν κατὰ τὰ λοιπὰ πρόκειται περὶ ὁμοίου δικαστηρίου (λ.χ. δὲν δύναται ἡ συγκεκριμένη δίκη νὰ ἀφαιρεθῇ τῆς ἁρμοδιότητος τοῦ εἰς ὃ γενικῶς, κατὰ τὸν νόμον ὑπάγεται Πρωτοδικείου καὶ νὰ ὑπαχθῇ εἰς ἄλλο Πρωτοδικεῖον ἢ εἰς ἄλλο πολιτικὸν δικαστήριον), ἔστω καὶ ἂν ἤθελον τηρηθῇ αἱ λοιπαὶ περὶ ἀπονομῆς τῆς Δικαιοσύνης συνταγματικαὶ διατάξεις (δημοσιότης συνεδριάσεων κλπ.).

("8. The Judge provided by the law, the 'lawful Judge' (der gesetzliche Richter), or otherwise, the commonly, and without legal precision named 'natural Judge'—which term is met in constitutional texts, old and modern—is the one generally determined in advance by the in force from time to time organizing (e.g. from the Constitution of the Courts) or substantial, or procedural or other laws, due to the subject-matter, person or place or any other element, for the particular case and specially for all cases which are similar to it and for all persons and who is 'competent' not only for the inquiry but for its determination.

9. In principle it is not permitted that anyone should be deprived or excluded from being subjected to such Judge, in a particular case, by an administrative, legislative and/or judicial act, which has in substance a personal character and appoints another organ, which is afterwards rendered competent to deal with the case. Because this deprivation annuls the guarantee which is accorded to the subject against arbitrariness in the law administering function and especially in the criminal prosecution, and delivers the accused not for trial but for condemnation. The direct or concealed taking of a case or a person from the 'lawful' or 'natural' judicial competence, is contrary to article 8 of the Constitution, even if in all other respects it is a similar Court e.g. a particular trial cannot be taken away from the Court of first instance to which it is generally under the law subjected and be subjected to another Court of first instance or to another Civil Court), even if the remaining Constitutional provisions relating to the administration of justice have been complied with (publicity of hearings etc.)").

In support of his argument counsel also cited the case of *X. against The Federal Republic of Germany* decided by the European Commission of Human Rights (Application No. 1216/61). I do not think that this case is of much assistance inasmuch as Article 6 of the European Convention on Human Rights does not contain a provision similar to paragraph 1 of Article 30 of our Constitution.

The relevant provision in our Constitution on which counsel relied is Article 30.1 which reads as follows:

> "1. No person shall be denied access to the Court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional Courts under any name whatsoever is prohibited."

I now come to the Courts of Justice Law 1960. I need only quote two sections of this Law which are relevant to the point raised in this ground. Sections 5 and 60(2). Section 5 reads as follows:

> "5. An Assize Court shall be composed of a President of a District Court, who shall preside, and two District Judges to be nominated by the High Court:
>
> Provided that the High Court may, in any case other than in a case where the accused is charged with an offence punishable with death, when the circumstances so require, direct that an Assize Court may be composed of three District Judges to be nominated by the High Court, to be presided over by one of such District Judges as the High Court may designate."

Paragraph 2 of section 60 reads as follows:

> "2. Assize Courts shall be held at such times as the High Court may direct:
>
> Provided that there shall be at least one sitting in the principal town of each district in every six months, unless in the opinion of the High Court, owing to absence of business or sufficient amount of business to be transacted thereat, such sitting may be dispensed with by special direction of the High Court."

It has been a long standing practice of this Court to fix in

advance three sittings of Assize Courts in each district every year and to publish in the Gazette the dates so fixed for such sittings. The reason for this practice is obviously to facilitate all concerned and so that when a case is committed for trial before an Assize Court the committing Judge should know when the next sitting is. It is also correct that the composition of the Assize Courts is not always necessarily the same and that the Judges who are to sit are nominated by this Court some time before the date of the sitting of the Assize Court. In the case in hand, as in a number of other cases where it was considered that the nature of the case required expeditious determination, this Court directed that the case of the appellants be tried on a date other than the dates fixed in advance. And the question that falls for consideration is whether the practice followed with regard to the fixing of the sittings of the Court, the composition of the Court and the fact that the Court which tried this case sat, as explained above, on a date other than the dates fixed in advance make this Court an "exceptional Court" within the meaning of Article 30.1 of the Constitution. It will be seen from the review given above that the institution of Assize Courts is deeply rooted in our legal system. Section 5 of the Courts of Justice Law 1960 empowers this Court to nominate the Judges who are to sit; and the only restriction as to the period of sittings of Assize Courts is that contained in the proviso to paragraph 2 of section 60 to the effect that there shall be, at least, one sitting in each district in every six months but otherwise sittings of Assize Courts may be held at such times as this Court may direct.

In the light of the foregoing I think that to suggest either that the Assize Court which tried these appellants was an "ad hoc" Court or an "exceptional Court" within the meaning of Article 30.1 would be stretching the construction and scope of the provisions of this Article beyond breaking point.

GROUND 2:

At the conclusion of the trial of the two appellants before the Assize Court and after their conviction but before sentence was pronounced counsel for the appellants made what purported to be a motion in arrest of judgment in these terms:

"There is no mitigation plea in a premeditated murder case but I make a motion in arrest of judgment. I am

not suggesting that the passing by this Court of a death sentence is unconstitutional. What I am saying is that Your Honours have no right to fix the date of execution."

The Assize Court rejected counsel's motion on the ground that they found no merit in it.

The relevant section of our Criminal Procedure Law, Cap. 155 is section 79 which reads as follows:

"79(1). The accused may, at any time before sentence, whether on his plea of guilty or otherwise, move in arrest of judgment on the ground that the charge or information does not, after any alteration which the Court is willing to and has power to make, state any offence which the Court has power to try.

(2) .....

(3). If the Court decides in favour of the accused, he shall be discharged from that charge or information."

It can be seen at a glance that the grounds upon which a motion in arrest of judgment can be made are clearly defined in the above section and, to my mind, it is quite clear that no such grounds existed in the present case and, therefore, counsel could not have made this motion and that the Court correctly ruled that there was no merit.

Both in this Court and before the Assize Court counsel argued that he relied on section 3 of the Criminal Procedure Law which, in his submission, introduces the English Law with regard to matters of criminal procedure in Cyprus.

Section 3 of the Criminal Procedure Law reads as follows:

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

It is clear from the wording of this section that it is only with regard to matters where there is no special provision in our Criminal Procedure Law or in any other enactment in

force for the time being, that Courts may apply the law and the rules of practice relating to criminal procedure for the time being in force in England.

But in so far as a motion in arrest of judgment is concerned there is special provision in our law and that is section 79 quoted above. Section 3, therefore, cannot be invoked for the purpose of introducing the English Law and rules of practice relating to criminal procedure in force in England.

But let us see what the law and procedure with regard to a motion in arrest of judgment in force in England is. In Archbold's Criminal Pleading Evidence and Practice, thirtyninth ed., at p. 376, paragraph 630 under the heading "Arrest of judgment" it is provided as follows:

"The defendant may at any time between the conviction and the sentence, but not afterwards, move the Court in arrest of judgment. This motion can be grounded only on some objection arising on the face of the record itself; and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which has not been amended during the trial, and is not aided by the verdict, will be a ground for arresting the judgment. Even if the defendant himself omits to make any motion in arrest of judgment, the Court, if on a review of the case it be satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment."

In the light of the foregoing it is clear, in my view, that:

(a) The appellants could not, in view of the provisions of section 79, move the Court in arrest of judgment on the ground that "the Court had no right to fix the date of execution".

(b) That in view of the fact that there is provision in our Criminal Procedure Law for a motion in arrest of judgment the law and rules of practice in force in

England are not applicable in Cyprus under the provisions of section 3 of the Criminal Procedure Law.

(c) That such a motion could not have been made on this ground under the law and rules of practice in force in England either in England or in Cyprus.

But ground 2, the way it is framed, does not seem to me to be directed against the Court's refusal to arrest judgment; counsel by this ground in effect raises the same point in this Court by way of appeal.

Having said this I will deal briefly with this ground.

Counsel argued that Rule 5A of the Criminal Procedure Rules which makes provision that an Assize Court in passing sentence of death, shall fix the date of execution and prescribes the form of the death warrant is *ultra vires* and that, therefore, although an Assize Court could still pass sentence of death by virtue of the Constitution and by virtue of the law it had no power to fix a date for the execution.

But counsel, in the course of his argument, with the indulgence of the Court, it is true, went one step further and submitted that the execution of a death sentence as opposed to the passing of the death sentence was unconstitutional as conflicting with Articles 8 and 28 of the Constitution on the ground that for almost sixteen years nobody has been executed in Cyprus.

I will first deal with the question of the validity of Rule 5A.

This rule was introduced in the Criminal Procedure Rules on the 28th May, 1964 by the Criminal Procedure (Amendment) Rules 1964 published in Supplement No. 2 to the Gazette of the same date.

It reads as follows: (as translated in English)

"5A(1) Every warrant directing the execution of a sentence of death shall be in the form 52 and shall be signed by the President of the trial Court or any of the Judges thereof.

(2) The Assize Court shall, in passing a sentence of death, fix the date of execution. Such date shall not be less than eight weeks and not more than nine weeks from the date of passing sentence.

Provided that the High Court of Justice or two Judges thereof may, on good cause shown, postpone the date so fixed and shall fix another date in lieu thereof. A new warrant of execution shall thereupon be signed by one of the Judges of the High Court."

As stated therein this rule was make in exercise of the powers vested in the High Court by Article 163 of the Constitution and section 176 of the Criminal Procedure Law, Cap. 155.

The relevant part of Article 163 is paragraph 1 thereof which reads as follows:

"1. The High Court shall make Rules of Court for regulating the practice and procedure of the High Court and of any other Court established by or under this Part of this Constitution, other than a Court established under Article 160".

and the Greek text:

"1. Τὸ Ἀνώτατον Δικαστήριον ἐκδίδει διαδικαστικὸν κανονισμὸν ἐπὶ σκοπῷ ρυθμίσεως τῆς διαδικασίας ἐνώπιον αὐτοῦ ὡς καὶ ἐνώπιον παντὸς ἄλλου δικαστηρίου ἱδρυομένου δυνάμει τῶν διατάξεων τοῦ παρόντος μέρους τοῦ Συντάγματος, πλὴν τῶν ἐν ἄρθρῳ 160 προβλεπομένου."

In view of the conclusion that I have reached with regard to this issue I do not consider it necessary to set out the provisions of section 176 of the Criminal Procedure Law.

Counsel submitted that Article 163 does not cover the fixing of the date of execution and that, therefore, Rule 5A is *ultra vires*.

With respect to counsel I think that his submission is ill-founded. In my view the fixing of the date and the signing of the warrant of execution are no more *ultra vires* than a warrant of commitment to prison is.

The words "practice and procedure" or "τῆς διαδικασίας ἐνώπιον αὐτοῦ", as I understand them, are wide enough terms to cover the provisions of Rule 5A and, therefore, the fixing of the date of execution; and in this respect a distinction must be made between the sentence to death and fixing the date of execution which are, in my view, matters of procedure which

may properly be exercised by the Court and the act of execution which is a matter for the executive.

A case which may, by analogy, be relevant to this issue is the case of *Lever Brothers Ltd*, v *Kneale and Bagnall* [1937] 2 K B 87.

In this case Lever Brothers, Ltd, and certain directors and officials, brought an action against William M. Kneale and George Harvey Bagnall claiming damages for libel and an injunction restraining the defendants from fu ther publishing the libels The action was tried before a Judge and a special jury and the learned Judge on the finding of the jury entered judgment for the plaintiffs against the defendants for the sum of £20,000 – with costs, and further made an order "that the defendants, their servants or agents and each and every of them be and they are hereby restrained from writing, printing or causing to be written or printed, circulating, distributing or otherwise publishing the libels herein complained of or any similar libels or slanders injuriously affecting the plaintiff company in its business or otherwise or the other plaintiffs or any other director official or servant of the plaintiff company in their offices"

The defendant Bagnall subsequently disobeyed the injunction and a Judge at chambers made an order committing him to prison for his contempt in disobeying the injunction. He appealed against the order committing him to prison for contempt and at the hearing of the appeal a preliminary point was taken by the respondents that, under the provisions of Order LIV r 23, the Court of Appeal had no jurisdiction to hear the appeal The rule in question was in these terms "In the Kings Bench Division, except in matters of practice and procedure the appeal from a decision of a Judge at chambers shall be to a Divisional Court"

It was held by the Court of Appeal that the order of committal was made in a matter of practice and procedure and that, therefore, under Order LIV, r. 23, of the Rules of the Supreme Court the appeal from such order was to be to the Court of Appeal and not to the Divisional Court.

Slesser L.J., in the course of his judgment after referring to

some cases to which the attention of the Court had been called said: (at p. 93)

> "In the circumstances, the only matter that remains is this. After an order for an injunction has been made and there is a disobedience of it followed by a committal, is that order for committal a part of the practice or procedure? In my opinion, it clearly is."

Then the learned Judge referred to the case of *Poyser* v. *Minors*, 7 Q.B.D. 329 and to the dictum of Lush, L.J. (at p. 333 of that case) in these terms:

> "I think the matter is stated sufficiently in the case of *Poyser* v. *Minors* where Lush L.J., with the approval of Baggallay L.J. speaking of the word 'practice' which occurs in section 32 of the County Courts Act, 1856, which authorizes county Court Judges, with the approval of the Lord Chancellor, to frame rules and orders for regulating the practice of the Courts and forms of proceedings therein. says:
>
> > 'Practice' in its larger sense—the sense in which it was obviously used in that Act, like 'procedure' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product. 'Practice', and 'procedure', as applied to this subject, I take to be convertible terms.' "

In connection with this issue I would like to add that the fixing of the date of execution by the Assize Court cannot, in my view, be said to infringe the doctrine of separation of powers as under the provisions of Article 53 of the Constitution the President of the Republic has absolute discretion to exercise the prerogative of mercy with regard to persons who are condemned to death. The right of the President of the Republic to exercise the prerogative of mercy, therefore, begins where legal remedies end.

I will now deal with the issue of constitutionality raised by counsel under this ground. Quite obviously counsel in arguing

this ground got a clue from some observations made by the learned President of this Court in the case of *Vouniotis* v. *The Republic* (1975) 1 C.L.R. p. 34, *Anastassiades* v. *The Republic* (1977)* 5 J.S.C. 516 and *Kouppis* v. *The Republic* (1977)* 11 J.S.C. 1860.

In *Anastassiades* v. *The Republic* the learned President said this: (at p. 721).

> "Before concluding this judgment I should repeat an observation from the judgment in the Vouniotis case, *supra* (at pp. 60–61) that '..... though the death penalty for murder remains statutorily in force in Cyprus, it has, as it can be judicially noticed, not been enforced, irrespective of the gravity of the various murder cases, for more than ten years, so that it might conceivably have been treated as having been de facto abolished, in the course of the evolution of social progress, as in other countries'; I repeat this observation so that the appropriate authorities of the Republic may, if they deem it fit, enact legislation in respect of this matter, because, irrespective of other aspects of it, the execution now, all of a sudden, of a death sentence might give rise to constitutional problems such as those faced by the Supreme Court of the United States of America in the series of cases commencing with *Furman* v. *State of Georgia*, 33 L. Ed. 2d. 346."

It is pertinent in dealing with this aspect to refer to the relevant Constitutional and legal provisions.

Article 7.2 of the Constitution reads as follows:

> "2. No person shall be deprived of his life except in the execution of a sentence of a competent Court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law".

Article 8 is in these terms:

> "No person shall be subjected to torture or to inhuman or degrading punishment or treatment".

* To be reported in (1977) 2 C.L.R.

Article 28, so far as it is relevant to the present appeal, is in the following terms:

"1. All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby.

2. Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution".

Article 53 deals with the prerogative of mercy.

"1. The President or the Vice-President of the Republic shall have the right to exercise the prerogative of mercy with regard to persons belonging to their respective Community who are condemned to death.

.....

.....

3. In case the prerogative of mercy is exercised under paragraph 1 or 2 of this Article the death sentence shall be commuted to life imprisonment".

Finally section 203(2) of the Criminal Code (as amended by the Criminal Code (Amendment) Law, 1962) provides that any person convicted of premeditated murder shall be sentenced to death.

Before the amendment of the Criminal Code the punishment for murder was provided in section 205 and it was death by hanging and its imposition in case of conviction was also mandatory. Section 27(1) of the Criminal Code provides that "the punishment for death shall be inflicted by hanging the offender by the neck until he is dead".

It is significant to note that in the *Loftis* case which went to the Supreme Constitutional Court by way of reference under the provisions of Article 144 of the Constitution from the High Court one of the questions of constitutionality raised

which was reserved for the decision of the Supreme Constitutional Court was whether, having regard to Article 7.2 of the Constitution sections 204, 205 and/or 207 of the Criminal Code, Cap. 154, are wholly or partially unconstitutional.

It was held that section 205 of the Criminal Code, Cap. 154, to the extent to which it provides for the death penalty for murder other than premeditated murder, was inconsistent with Article 7.2, but that, in compliance with Article 188, it must be applied modified as follows: "Any person convicted of premeditated murder shall be sentenced to death and any person convicted of murder other than premeditated murder shall be liable to imprisonment for life .

The question of the "constitutionality" of Article 7.2 of the Constitution was raised, but in a somewhat different form, in the *Kouppis* case. Counsel appearing in that case argued that paragraph 2 of Article 7 was unconstitutional in view of the safeguard provided by paragraph 1 of the same Article and in view of the provisions of Article 8. It was there decided that it was impossible to pronounce that the death sentence was invalidately imposed in a case which comes within the ambit of Article 7.2 of the Constitution and that it could not be held that Article 7.2 was not properly in force because it allegedly conflicted with Articles 7.1 and 8 of the Constitution and that what is expressly provided in the Constitution can never be treated as being inoperative on the ground that its application is excluded by some other provision of the Constitution.

In support of his argument on this aspect of ground 2 counsel for the appellants cited the cases of *Michael de Freitas* v. *George Ramoutar Benny and Others* [1975] 3 W.L.R. 388 and *Furman* v. *Georgia*, 33 L.Ed. 2d. 349.

The three petitioners in the latter case, Branch, Furman and Jackson were sentenced to death, the first in a Texas Court, and the second and the third in a Georgia Court one of them for murder and the other two for rape. Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in (these cases) constitute a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" The Court held by majority of five to four that the imposition and carrying out of the death penalty

in those cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Each of the nine Judges gave a separate opinion and the report covers not less than 136 pages. The reasons for the majority judgment are stated in five separate opinions expressing as many separate rationales. Reading through the concurring opinions it would appear that only two Judges thought that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. It also appears that the petitioners' sentences were set aside, not because the punishment was impermissibly cruel but because juries and Judges had failed to exercise their sentencing discretion in acceptable fashion. It is significant to note that the determination whether or not to impose the death sentence was, under the law of the States where the three applicants were tried and convicted, in the discretion of the jury. I may usefully cite one or two passages from the concurring opinions.

Mr. Justice Douglas who gave the first opinion says: (at p. 355)

> "A study of capital cases in Texas from 1924 to 1968 reached the following conclusions:
>
> Application of the death penalty is unequal: most of those executed were poor, young and ignorant.
>
> Seventy-five of the 460 cases involved codefendants, who, under Texas Law, were given separate trials. In several instances where a white and a Negro were codefendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.
>
> Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.

But the learned Judge concluded his opinion by these words:

> "Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach."

Mr. Justice Brennan also deals with the question that sentence

of death is arbitrarily inflicted by juries: (at p. 380) and at p. 381 he says this:

> "For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision..... In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death."

and at p. 390:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.
>
> .....
>
> But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Mr. Justice White at p. 390:

> "The narrow question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorises the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to Judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) Judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist.

It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment."

Finally Mr. Justice Marshall says this in his opinion: (at p. 421)

"There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society."

It is abundantly clear that this case is not of much assistance because it is clearly distinguishable from the case in hand in that under our legal system the offences for which the death penalty is provided are clearly defined and the imposition of the death sentence upon conviction in such cases is mandatory whereas in the case cited the imposition of the death sentence was in the discretion of the jury. And as it appears from the opinions expressed by the concurring Judges of the United States Supreme Court juries failed to exercise their sentencing discretion in acceptable fashion.

I will now deal with the case of *de Freitas* v. *Benny and Others*. This is a Privy Council case on appeal from the Court of Appeal of Trinidad and Tobago.

The facts are briefly these:

The appellant was convicted of murder in the Supreme Court of Trinidad and Tobago and sentenced to death. His appeal against conviction was dismissed by the Court of Appeal and a petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed. The appellant applied to the High Court for, *inter alia*, a declaration that the carrying out of the death sentence would contravene his human rights recognized under section 1(a) and protected under section 2(b) of the Trinidad and Tobago(Constitution)Order in Council 1962. The High Court dismissed the application and its deci-

sion was affirmed by the Court of Appeal. The appellant appealed to the Judicial Committee of the Privy Council.

The appellant's claim was founded on Chapter 1 of the Constitution of Trinidad and Tobago which came into force on August 31st, 1962. Section 1 of the Constitution, so far as is relevant to the present appeal, is in the following terms:

> "It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law."

Sections 2 and 3, so far as relevant, read as follows:

> "2. Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms herein before recognised and declared and in particular no Act of Parliament shall ..... (b) impose or authorise the imposition of cruel and unusual treatment or punishment; ..... (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; ..... (h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms. 3(1) Sections 1 and 2 of the Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution. (2) For the purpose of subsection (1) of this section a law in force at the commencement of this Constitution shall be deemed not to have ceased to be such a law by reason only of—(a) any adaptations or modifications made thereto by or under section 4 of the Trinidad and Tobago (Constitution) Order in Council 1962....."

Section 4(1) of the Offences against the Person Ordinance

which was enacted in 1925 provides as follows: "Every person convicted of murder shall suffer death as a felon."

Lord Diplock who delivered the report of their Lordships after going through the history of the proceedings and dealing with the relevant constitutional and legal provisions said: (at p. 392)

"The appellant's claim that it would be unlawful to carry out the sentence of death pronounced on him on August 21, 1972, was based on the contention that this would constitute an 'imposition of cruel and unusual punishment upon him such as is prohibited by section 2(b) of the Constitution, and so would infringe his right under section 1(a) not to be deprived of life except 'by due process of law'. Their Lordships agree with the Court of Appeal that this contention fails in limine. Sentence of death for murder, as their Lordships have already pointed out, is mandatory under the Offences against the Person Ordinance which was in force at the commencement of the Constitution. Although in the High Court it had been contended that the death sentence itself was unconstitutional, before the Court of Appeal and before this Board counsel for the appellant felt constrained to concede that the pronouncement of the sentence by the Judge at the conclusion of the trial did not offend against the Constitution. He focussed his attack upon the act of the executive in carrying out an admittedly lawful order of a Court of law. The attack upon the constitutionality of carrying out the death sentence was based upon two alternative grounds. The first was that capital punishment was per se a cruel and unusual punishment and that, although the pronouncement of the death sentence by the Court was mandatory, the executive act of carrying it out was not authorised by any law that was in force before August 31, 1962. The alternative ground was that, even if the carrying out of the death sentence is not per se unconstitutional, the average lapse of time between sentence and execution has become substantially greater since the commencement of the Constitution and this has the effect of making it unconstitutional to carry out the death sentence."

With regard to the first alternative their Lordships held that the executive act of carrying out a death sentence pronounced

by a Court of law was authorized by laws that were in force at the commencement of the Constitution and the appellant was, therefore, debarred by section 3 of the Constitution from asserting that it abrogated, abridged or infringed any of his rights or freedoms recognized and declared under section 1 or particularized in section 2.

In dealing with the second alternative argument Lord Diplock said: (at p. 393)

> "Their Lordships find some difficulty in formulating the alternative argument based upon delay. It is not contended that the executive infringed the appellant's constitutional rights by refraining from executing him while there were still pending legal proceedings that he himself had instituted to prevent his execution. There was no law which compelled the executive to refrain from executing him at any time after December 12, 1973, but the Criminal Proceedings Ordinance leaves the date of execution in the discretion of the Governor-General who under section 70(2) of the Constitution acts on the advice of a designated Minister.
>
> The argument for the appellant, however, does not depend upon the delay which actually occurred in the instant case. So far as their Lordships have been able to understand it, it runs thus: (1) there is evidence that prior to independence the normal period spent in the condemned cells by prisoners before execution was about five months. (2) The very fact that this occurred in practice was sufficient to have given rise to an 'unwritten rule of law' in force at the commencement of the Constitution that the executive must so organise the procedure for carrying out the death sentence upon prisoners that the average lapse of time between sentence and execution is not more than about five months. (3) Since the coming into force of the Constitution the average lapse of time has increased substantially beyond five months. (4) The very fact that this increase in the average lapse of time has occurred in practice has given rise to the substitution for the previous unwritten law of a new 'unwritten rule of law' which was not in force at the commencement of the Constitution. (5) This new 'unwritten rule of law' is not

exempted from scrutiny by section 3 of the Constitution.

.....

.....

This contention in their Lordships' view needs only to be stated to be rejected. Not only does it involve attributing to the expression 'unwritten rule of law' in section 105(1) of the Constitution a meaning which it is incapable of bearing, but it conflicts with the very concept of the nature of a law.

Their Lordships are, accordingly, of opinion that there is nothing in the Constitution which would render unlawful the carrying out of the death sentence on the appellant in the instant case."

His Lordship next dealt with the prerogative of mercy and a contention made on appellant's behalf that he was entitled (1) to be shown the material which the Minister who tenders the advice has placed before the Advisory Committee on the prerogative of mercy and (2) to be heard by the Committee in reply at a hearing at which he is legally represented, and said: (at p. 394)

"Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."

In the result their Lordships advised Her Majesty that the appeal should be dismissed.

Reverting now to the issue of the constitutionality regarding the execution of the death sentence, if I understand counsel's submission correctly, the sole ground upon which such submission is based is discrimination. In other words, what counsel is saying is this. If for so many years the late President of the Republic has, in exercise of his prerogative of mercy, been commutting to life imprisonment the sentence of death passed on persons who have been found guilty of premeditated

murder it would be inhuman and discriminatory for these two appellants to be treated differently.

If his argument had simply been that one Article of the Constitution may be treated as "unconstitutional" because of the provisions of some other Article or Articles of the Constitution this would seem to me to be a contradiction in terms.

But let us examine counsel's submission on the basis of the alleged discrimination.

In the same way that we may take judicial notice of the fact that no person sentenced to death during the last 16 years or so has been executed, we may also take judicial notice of the fact that all persons found guilty of the offence of premeditated murder during the same period have been sentenced to death.

So, the whole question turns on the exercise of the prerogative of mercy by the Head of the State.

But discrimination entails some sort of comparison. And it does not seem to me that one may complain that he has been discriminated against unless he has been treated differently than others in similar circumstances. How then does the question of discrimination arise in the present case? The appellants having been found guilty by a Court of competent jurisdiction of the offence of premeditated murder have been sentenced to death, the same as everybody else who has been found guilty of the same offence and they cannot be heard to say that in this respect they have been discriminated against.

This being the position, it seems to me, that they cannot complain of discrimination at this stage. Assuming that such complaint could legitimately be raised this would only arise after the pleasure of the Head of the State becomes known.

By this I should not be understood as intending to convey the idea that the exercise of the prerogative of mercy by the Head of the State can in any way be challenged or that these appellants have a legal right to demand mercy by any legal process. That is a matter entirely for their legal advisers.

GROUND 3:

As stated earlier on three witnesses testified as to the extra-judicial confessions alleged to have been made by appellant 1:

P.W.34, P. C. Loizou, P.W.38, Georghiou and P.W.29, Captain Melling. Counsel's complaint generally was that appellant's knowledge of English was not good enough for him to communicate and make himself understood. He also commented on the fact that the first of these witnesses P. C. Loizou mentioned for the first time the confession at the trial and only in his re-examination and had said nothing either in the examination-in-chief or at the preliminary inquiry and that P.W.29, Captain Melling, said nothing about the confession at the preliminary inquiry and only mentioned it at the trial in his examination-in-chief. Counsel's only complaint with regard to P.W.38, Georghiou, was that in his examination-in-chief when quoting what appellant 1 had said he used the phrase "we killed that man" whereas at the preliminary inquiry he said "we come to kill him". The witness admitted this in cross-examination and stated that the correct words were "we come to kill him" as he had stated at the preliminary inquiry and that he had made a mistake in his examination-in-chief when he said "we killed that man".

The trial Court in dealing with these confessions had this to say -

> "From the whole evidence before us, we are satisfied that accused No. 1 knew enough English to express himself in the way described before us by the persons who heard the admissions. We are satisfied that by these aforesaid spontaneous and voluntary statements accused No. 1 gave to his hostages the reason of their coming to Cyprus as being to kill the victim Sebai, because the latter's acts were, in their minds, harmful to the cause of the Palestenian people where both accused, as they said from the dock, were proud to belong".

In a recent case *Kouppis* v. *The Republic* [1977]* 11 J.S.C. p. 1860 the majority of this Court held that the trial Court was wrong in accepting as true the evidence of a prosecution witness who had given very material evidence concerning the case at the trial which he had failed to mention in his evidence on oath at the inquest before the coroner on the ground that it was unsafe to do so. The circumstances of that case were, of course, very different from the circumstances of the present

* To be reported in (1977) 2 C.L.R.

case and some members of the Court were of the view that the witness's evidence was, in the circumstances of that case, suspect in any case. In the present case although the Court believed the witnesses who testified as to the confessions and although quite obviously all three witnesses were independent and disinterested yet the omission to mention such an important piece of evidence at the preliminary inquiry is a matter for concern. It may well be that their failure was not due to any fault of theirs; but due to the fact that one of the three witnesses, Georghiou, was asked and did testify at the preliminary inquiry as to the confession, one, I think, may reasonably assume that there was nothing in the statements made to the police by the other two witnesses regarding the confessions; for it is difficult to understand how, otherwise, counsel appearing for the prosecution could have failed to ask them about such an important piece of evidence. Although I have no reason whatsoever for believing that either of these two witnesses was not a truthful witness and although there was nothing in the evidence to suggest that the confessions were not admissible, I have decided, very reluctantly, that in the circumstances it is preferable to err in favour of the appellants and hold that it was not safe for the Court to attach the weight they did on the confessions with regard to which the two witnesses have testified. In taking this course I rely on the provisions of section 25(3) of the Courts of Justice Law, 1960 and on a line of cases both of the English and the Cyprus Courts such as *R.* v. *Cooper* [1969] 1 All E.R. 32, *R.* v. *Pattinson and Laws*, 58 Cr. App. Rep. 417 and *Hadjisavva* v. *The Republic* [1976]* 2 J.S.C. 302.

At the same time I am clearly of the view that neither the admission nor the weight attached to the confession as to which P.W.38, Georghiou testified by the trial Court are, in the circumstances, open to any criticism.

GROUND 4:

The points which counsel raised in support of the defence and with which he complains that the trial Court failed to deal adequately or at all are, as stated in this ground, set out and enumerated at p. 202 of the judgment. They read as follows:

* To be reported in (1976) 2 C.L.R.

"A. The Prosecution failed to prove a concerted act in the commission of the offence.

B. There is complete absence of common design.

C. There is no evidence that any of the accused committed the murder, nor the evidence discloses that any of the accused fired the shots that killed the victim.

D. The conduct of the accused prior to the commission of the offence is of no importance to the case.

E. The conduct of the accused on the day the murder was committed is equally consistent with guilt and innocence.

F. The evidence that the accused took the hostages does not connect them with the murder.

G. The accused, if they wanted to kill the victim, had other opportunities to do so.

H. The alleged admissions made by accused No. 1 should not be accepted because –

(i) accused No. 1 cannot speak English;

(ii) those admissions alleged by Captain Melling (P.W.29) and Loizou (P.W.34) were first made during this trial and were never mentioned earlier.

(iii) Georghios Georghiou (P.W.38), who mentioned the alleged admissions during the Preliminary Inquiry and in his examination-in-chief at this trial, used different words in his cross-examination that change the original meaning of the alleged admission.

I. The evidence of the police ballistics expert Inspector Christophides does not prove that the fired bullet found at the scene killed the victim, in that, as it was not examined whether there was blood or human tissues on it, it cannot be said that it transgressed the body of the victim and killed him."

In arguing this ground counsel clarified that what the Court failed to deal with were items 'E', 'G' and 'I'. But he did not deal with item 'E' because, he said, he has a ground by itself

i.e. ground 8 with regard to this item and he would be arguing it under that ground. Counsel did not argue item 'I' either under this ground except in an indirect way in connection with the prossibility that *exhibits* might have been removed from the scene or tampered with, quite probably in view of his ground 7, which deals with the evidence of the ballistics expert.

Counsel embarked on his argument on this ground by saying that the trial Court failed to appreciate the possibility that the appellants might have been accessories after the fact, to the murder, and that there might have been two groups, the one the killer group and the other the group which was to help them to escape by taking the hostages. But he finally abandoned this point for two reasons, as he explained, firstly, because the evidence on record was not sufficient to raise a probable inference to substantiate such possibility and, secondly, because it could not be shown whether, assuming that there was a second group and it had knowledge of the activities of the first, it had such knowledge only after the killing and not before.

Counsel next dealt with item 'G' and argued that as the rooms of the victim and appellant 2 were on the same floor of the hotel, if the appellants wanted to kill the victim they had an easier opportunity to kill him there, instead of doing so openly on the ground floor in the presence of so many people and that this fact showed that the killers might have been others. In support of this he mentioned that the role of the third man, Al Ahad, had not been "unearthed" and although he, admittedly, had left Cyprus a few hours before the murder had been committed and he could not have been the killer yet his connection with the two appellants might go to show that they were not the only persons involved and there must have been others; that the passport of accused 2 had not been found and produced which means that somebody must have taken it and this could not have been done unless others were involved; that the fact that, according to the evidence and the finding of the Court, soon after the murder was committed the second appellant had the murder weapon, *exhibit* 34, and a hand-grenade and the first appellant had a revolver which was not his own and a hand-grenade, it was not reasonable to assume that the two appellants would commit this murder with only one pistol between them and the hand-grenades and this was an indication that other people must have been involved or that the two

appellants were not the killers because, if they were, one would have expected them to have one gun each and not for the one to expect the other to disarm the policeman and give him his gun. In his reply counsel also added that another possibility that the two appellants might have not been the killers was the fact that between the time of the shooting and the arrival of the police about 25 minutes elapsed and that it was possible that during this time *exhibits* might have been removed from the scene.

With respect to counsel, I do not think that the fact that the appellants may have had the opportunity to kill the victim on the fifth floor of the hotel is a reasonable ground for saying that they could not have been the killers, especially in view of the conclusion that the Court reached that the killing and the taking of the hostages were two phases of the same incident and that the reason for taking the hostages was to force their safe exit from Cyprus. If this conclusion of the Court is correct, it certainly would not have served the purpose of the culprits to kill the victim at any place where there were no people whom they could take as hostages. Nor am I prepared to subscribe to the proposition that because the passport of the second appellant has not been found and because the two appellants had only one pistol between them—assuming that that is so—in addition to the hand-grenades are grounds for concluding that others and not the appellants were the killers, especially in view of the finding of the Court that this one pistol which they had between them (*exhibit* 34) is the one with which the murder was committed. With regard to the possibility that any *exhibits* may have been removed from the scene I only have to point out that according to the finding of the trial Court, based on evidence accepted by them, as to the number of shots fired at the scene, the number of injuries on the body of the victim and the *exhibits* found at the scene, this possibility is ruled out.

Finally I do not think that whether Al Ahad, either alone, or with others were involved in the conspiracy to murder—and there is no evidence at all to warrant such conclusion—it would have made any difference to the appellants in view of the finding of the trial Court regarding their own role and complicity.

It is, in my view, apparent from the above and from the judgment as well, that even though the Court may have not

specifically mentioned each argument put forward by counsel this is not an indication, nor can this lead to the conclusion, in view of their findings and inferences drawn, that the Court did not have them in mind or that they did not consider them. I, therefore, find no merit in this ground either.

GROUND 5:

The part of the judgment attacked by this ground reads as follows:

> "The lethal weapon (*exhibit No.* 34) was seen in the hands of accused No. 2 inside the Hilton after the killing and before the hostages and the two accused left in the police bus. During the flight it was being carried at times by both accused and it was ultimately surrendered to the police by accused No. 2. Neither accused No. 1 nor accused No. 2 gave any explanation as to when and how this gun came into their possession. We have no explanation at all from them which might tend to shake the otherwise irresistible inference which one has to draw from the fact that the lethal weapon was in their possession in the Hilton hotel so shortly after the fatal shots were fired from it.
>
> We believe that we are entitled to comment upon the failure of both accused to take the stand and give on oath their explanation on this matter if they had one. In the circumstances of this case, the failure of the accused to give evidence in their own defence is a factor related to the issue of their guilt. We cite in this respect the authorities of *R.* v. *Sparrow* [1973] 1 W.L.R. 488, and *Pantelis Vrakas and Another* v. *The Republic*, (1973) 2 C.L.R. 139. The only reasonable conclusion to be arrived at in the circumstances is that either accused No. 1 or accused No. 2 must have fired the three shots at the victim through the pistol (*exhibit No.* 34) which they possessed, to the exclusion of any other person."

Counsel for the appellants has submitted that the comment appearing in the above passage regarding the failure of the appellants to take the stand and give on oath their explanation and the conclusion of the trial Court that such failure is a matter related to the issue of their guilt is a glaring misdirection in law.

Counsel for the respondents, on the other hand, has, in the course of his address, submitted, *inter alia*, that the correct construction to be placed on the passage in question was that what the Court was criticizing was not the fact that the two appellants failed to give evidence on oath but that the Court merely expected from them to explain either from the dock or on oath as to how they came to be in possession of the lethal weapon shortly after the killing and that this is clear from the use of the words "on this matter" appearing in the second paragraph.

I must say that reading the passage this would not be an unreasonable construction had it not been for the fact that in the first paragraph of the passage quoted, the Court referred to an explanation generally as to how the appellants came to be in possession of the lethal weapon whereas in the second paragraph they refer clearly to their failure to give their explanation on oath. As this question is, at least, ambiguous I think the safer course is to approach this issue on the assumption that the trial Court were in fact criticizing the failure of the two appellants to give evidence on oath on this matter.

The paragraph in *Vrakas and Another* v. *The Republic* (1973) 2 C.L.R. 139 on which the Court relied in making their comment is to be found at p. 188 and it reads as follows:

> "In this respect it is to be noted that at his trial appellant 1 chose, as it was his right to do, not to give evidence on oath, but to make an unsworn statement from the dock; he stated, *inter alia*, that he was innocent and that he had no reason to kill his wife.
>
> Without, in the least, departing from, or doubting, the principle that it is not to be expected of an accused person to prove his innocence, but it is up to the prosecution to establish his guilt beyond reasonable doubt we are of the view that the failure of appellant 1, as an accused, to give evidence in his own defence is a factor related, in the circumstances of the present case, to the issue of his guilt."

In *Anastassiades* v. *The Republic* (1977)* 5 J.S.C. 516, Trianta-

* To be reported in (1977) 2 C.L.R.

fyllides, P., in the course of his dissenting judgment referred to the above passage and had this to say: (at p. 686)

> "In the light of the above case-law and because, in my view, in the *Vrakas* case, *supra*, the failure of one of the appellants to give evidence, in his own defence, was treated as a factor related to the issue of his guilt in the light only of the particular circumstances of that case, without this Court intending to lay down then an inflexible rule of general application, I have reached the conclusion that the safest course, in the present case, is to disregard the fact that the appellant has elected to make an unsworn statement from the dock, instead of giving evidence on oath, and, thus, not to treat it as a factor influencing the outcome of this appeal, especially as the trial Court itself made no adverse comment in this respect."

The question of comment by a Judge in his summing-up on the defendant's failure to testify in a trial with a jury is dealt with in Archbold, 39th ed., p. 353, paragraph 600.

I shall refer to a few of the cases referred to therein. In *Waugh* v. *The King*, [1950] A.C. 203, a Privy Council case, Lord Oaksey, who delivered the advice which the Board proposed to tender to His Majesty said: (at p. 211)

> "It is true that it is a matter for the Judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a Judge should be in making such comment. Here the appellant had told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover, his story was corroborated by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place. In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course."

Their Lordships accordingly advised his Majesty that the conviction should be quashed.

The dictum of Lord Oaksey was approved and applied in *R.* v. *Mutch* [1973] 1 All E.R. 178 where Lawton L.J., said: (at p. 181)

> "Judges who are minded to comment on an accused's absence from the witness box should remember, first, Lord Oaksey's comment in *Waugh* v. *R.*"

and the learned Judge went on to quote the comment.

In *R.* v. *Pratt* [1971] Crim. L.R. 234 the Judge's comment to the jury on the accused's failure to give evidence was in these terms:

> "You might have thought that P would have gone into the witness box and told you what he had been doing and explained (his actions)..... and seen fit to give his version on oath and to allow you to have the opportunity of seeing him cross-examined so that you could assess his evidence... He has not chosen to do so. So you have not heard from P and he has not seen fit to answer the evidence in this case. It is a matter for you as to what inference you draw."

Held there was a strongish case against P but on balance the Court thought it right to quash his conviction on the ground that the Judge went too far by way of comment on his failure to give evidence. The effect of it was plainly to suggest to the jury that they could draw the inference of guilt because he had not given evidence.

In *R.* v. *Bathurst* [1968] 1 All E.R. 1175, a case of murder in which a plea of diminished responsibility under section 2(1) of the Homicide Act 1957 was raised on behalf of the appellant the trial Judge in his summing-up made strong comment on the appellant's failure to give evidence intimating that many symptoms which the doctors described depended entirely on their evidence and that, though the appellant was entitled to remain silent, he had abstained from adding to the material on which the jury could reach a verdict, and that the jury might ask themselves why.

Lord Parker, C.J., in delivering the judgment of the Court of appeal had this to say:

> "Then, as is well known, the accepted form of comment is

to inform the jury that, of course, the accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness box."

The Court of Appeal, Criminal Division, held that as there was no challenge to the appellant's truthfulness when giving information to the medical expert, it was unfair to comment on his not giving evidence, and set aside his conviction of murder and substituted a conviction of manslaughter.

This dictum of Lord Parker was approved and applied in *R.* v. *Mutch* (*supra*) and *R.* v. *Sparrow* [1973] 2 All E.R. 129. In the latter case it was stated that what is said must depend on the facts of the particular case and that in some cases a stronger comment is called for than in others. The Judge must exercise his discretion to ensure that the trial is fair and his discretion is not to be fettered by laying down rules for its exercise. He should not, however, seek to bolster up a weak case by strong comments and he must be careful to avoid telling or implying to the jury that absence from the witness-box is to be equated with guilt.

R. v. *Brigden* [1973] Crim. L.R. 579 is an example of where the Court held that a strong comment was justified. The allegation of the defence in this case was that the police had planted certain incriminating articles (a piece of glass and a piece of paper) on the appellant, who, eventually, chose not to give evidence at the trial; the Judge commented that, due to his failure to give evidence the jury had not heard from him and that this might have helped them in deciding whether there was any truth in the allegation of planting. The Court of Appeal refused leave to appeal on the ground that the comment made by the Judge was justified in the circumstances.

In the case in hand it is clear, in my view, from the passage quoted that the comment of the Court was directed at the failure of the accused to give evidence on oath and explain how the pistol, *exhibit* 34, came to be in their possession and not with a view to establishing their innocence. But, be that as it may, I would not, in the circumstances of this case, have any hesita-

tion to hold that no substantial miscarriage of justice has actually occurred and that the proviso to section 145(1)(b) of the Criminal Procedure Law may properly be applied.

GROUND 7:

The main points argued in support of this ground were that P.W.15, P. S. Mateas, collected the *exhibits* found by him at the scene of the crime before they were photographed at the spot where they were lying and without marking the exact spots with chalk. The position of the *exhibits*, counsel argued, was most important in deciding the position where the man who had fired the shots was standing and that this affects the evidence of the expert.

The witness explained that he did in fact, acting on instructions, collect these *exhibits* but that he was in a position to indicate where the exact spots were because he had counted the tiles and the angles from which he had picked up the *exhibits* and he did point these spots to the ballistics expert who placed the number tags at the spots before the photographs were taken.

His next complaint was that the expert did not take photomicrographs of all the *exhibits* found at the scene but only of one of the fired bullets and of an expended cartridge case collected from the scene of the crime and of a test bullet and an expended cartridge case which he fired himself with the tokarev pistol and that, therefore, it was not safe for the Court to accept his opinion that *exhibits* 27, 28, 29 and 30 were fired with the tokarev pistol *exhibit* 34.

He also submitted that since the missiles found at the scene were not chemically analysed to ascertain whether there was any human blood or human tissue on them there was no satisfactory evidence that they were the missiles that transgressed the body of the victim and caused his death and that, therefore, he might have been killed with another weapon.

The witness in the course of his evidence, stated to the Court the following:

> "I compared the two expended cartridge cases which were handed over to me by Sgt. Mateas P.W.15 which are *exhibit No.* 27 and one expended cartridge case which I

collected from the bookshop which is *exhibit No.* 29, with the test cartridge cases which I fired in this pistol and I ascertained that the cartridge cases which were handed over to me by Mateas, *exhibit No.* 27 and the one that I found in the bookshop *exhibit No.* 29 had been fired in pistol No. 16016355, *exhibit No.* 34.

Furthermore, I compared the one fired bullet and the one bullet jacket which were handed over to me by Sgt. Mateas, *exhibit No.* 28 as well as the one part of bullet jacket which I found at the crime scene, *exhibit No.* 30, with test bullets which I fired through the barrel of *exhibit No.* 34 and I ascertained that all of them, I mean *exhibits* 28 and 30, were fired through the barrel of this pistol."

In his cross-examination he explained that he started his examination by using astereoscopic binocular microscope and after making some observations through this microscope he used a large forensic comparison microscope with several magnifications. He explained further that for comparison purposes one takes into consideration the extractor and the ejector marks because some times there may not be sufficient characteristics due to the extractor marks but one may find sufficient characteristics on the ejector marks or on the whole head of the cartridge case or within the firing pin hole. In this particular case, he said, he examined the extractor marks and on one of the cartridge cases he found sufficient characteristics caused by the extractor and on the remaining two he found sufficient breech block characteristics on the cartridge head but the breech block characteristics were common for all the three expended cartridge cases. The witness was of the opinion that the *exhibits* found at the scene of the crime were all fired with the pistol *exhibit* 34.

As to counsel's submission regarding the importance of the exact spot where the *exhibits* were found for the purpose of deciding where the person who fired the shots was standing it will be remembered that, in the present case, there was no direct evidence at all where the person who fired the shots was in fact standing at the time of firing, nor, indeed, as to his identity, nor does anything turn on this point, in the circumstances of this case. But, in any case, the witness was in a position to indicate the spots from where he recovered the *exhibits.*

But I really do not see how the fact that the *exhibits* were removed before being photographed can affect the evidence of the expert in deciding the issue which he had to decide *i.e.* the identity of the weapon with which they were fired.

The Court in dealing with the evidence of this witness had this to say:

"Inspector Christofides is, to our satisfaction, a properly qualified and adequately trained expert with enough practical experience. He has been accurate, succinct both in his findings and the opinions he expressed. In answering questions put to him by the Defence counsel, he has properly and adequately reasoned his opinions which he had given regarding the several *exhibits* which he had examined with the help of all necessary scientific equipment, having made all necessary tests and comparisons. He has persuaded us that he has reached at the correct conclusions and we exclude any possibility of his being mistaken. We find him both truthful and reliable and we feel safe to act upon his evidence.

We are satisfied that the projectile (*exhibit No.* 31) which was found by Nicos Christodoulides (P.W.26) inside the conference room was fired through the barrel of the revolver (*exhibit No.* 19) which was at the time in the hands of accused *No.* 1.

We are also satisfied that the two expended cartridges (*exhibit No.* 27) collected from the corridor by P. S. Mateas (P.W.15), the one expended cartridge (*exhibit No.* 29) which himself (P.W.41) collected from inside the bookshop, the fired bullet and the bullet jacket (*exhibit No.* 28) collected by P. S. Mateas from the same corridor, as well as the part of the jacket of a third bullet (*exhibit No.* 30) collected by the witness from inside the cloakroom, were all fired through the barrel of the Chinese Tokarev pistol (*exhibit No.* 34).

Exhibits Nos. 28 and 30 were not examined with a view to ascertaining whether either of them bore any traces of human blood or tissue and there is no direct evidence establishing that anyone of the said missiles penetrated the body of Sebai.

The presence by the scene of the murder of the aforesaid *exhibits Nos.* 27, 28, 29 and 30 is consistent with the firing at the scene of three shots through the pistol (*exhibit No.* 34). Although the scene was cordoned off upon the arrival of P. S. Pateas (P.W.15) at 11.40 a.m. no other cartridges or missiles were found. The finding that three shots were fired tallies completely with the evidence of Roussogeni (P.W.17) whom learned counsel for the defence urged us to believe."

It is fair and pertinent to mention that at the request of counsel for the defence and with the consent of counsel of the Republic appearing in the case, a ballistics expert of counsel's for the defence own choice was made available to him and paid out of public funds and the said expert was sitting next to counsel throughout the evidence of P.W.41, A. Christofides, in order to assist him and that at the conclusion of the examination-in-chief at about lunchtime of the 22nd March, 1978, the case was adjourned to the following morning in order to afford the expert assigned to assist the defence the opportunity to examine the *exhibits* himself.

P.W.41, A. Christofides, was cross-examined by counsel for the defence rigorously and ably and at great length but going through the record it cannot be said that his evidence was shaken on any material point; and it was not otherwise contradicted.

It might be appropriate at this stage to deal briefly with the legal aspect relating to evidence by expert witnesses.

In *Davie* v. *Edinburgh Magistrates* (1953) S.C.34 Lord President Cooper had this to say regarding the functions of an expert witness:

"Their duty is to furnish the Judge or jury with the necessary scientific criteria for deciding the accuracy of their conclusion so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence".

In *R.* v. *Matheson* [1958] 2 All E.R. 87, a case of capital murder where the accused, who had a long recorded history of conduct indicative of mental abnormality, had killed a 15-

year-old boy under peculiarly revolting circumstances, three medical witnesses testified at the trial that they were satisfied that that the accused's mind was so abnormal as substantially to impair his mental responsibility, giving their reasons for that view, and no medical evidence was led in rebuttal. The jury returned a verdict of guilty of murder. The Court of Criminal Appeal quashed that verdict and substituted one of manslaughter. Lord Goddard C.J., delivering the judgment of the Court, having regard to the medical evidence said:

> "What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen? While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this Court would not and indeed could not disturb their verdict but if the doctors' evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence'."

After considering other circumstances of the case Lord Goddard C.J. continued:

> "If then there is unchallenged evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances appear that can displace or throw doubt on that evidence it seems to the Court that we are bound to say that a verdict of murder is unsupported by the evidence."

The above dicta were applied in *Walton* v. *The Queen* [1978] 1 All E.R. 542, a Privy Council case.

Bearing all the above in mind and, having regard to all the circumstances of this case, I am of the view that the trial Court had before them all necessary scientific criteria to enable them to form their independent judgment by applying such criteria to the facts proved in evidence and I would, therefore, dismiss this ground as unfounded.

GROUNDS 8, 9, 10 *and* 12:

I think I may conveniently deal with grounds 8, 9, 10 and 12 together as all these grounds are connected in the sense that in all of them the correctness of the trial Court's findings and inferences drawn therefrom are involved.

In this respect I find it necessary and useful to quote certain passages from the judgment of the trial Court, even though their substance may be covered by the summary of the facts I have already given, to which reference has been repeatedly made by counsel in dealing with these grounds.

After dealing with the evidence adduced, the submissions made and making certain other findings the trial Court proceed in their judgment as follows:

> "There is no direct evidence as to the identity of the person or persons who fired the shots.
>
> The two accused appeared at the scene seconds or minutes after the shots were heard and Sebai, with his head bleeding, was seen falling on the ground dead. Their behaviour differs considerably from the reaction of the other persons in the hotel who heard the shots. They are both armed; accused No. 1 holding a revolver and a handgrenade and accused No. 2 a pistol and a hand-grenade. Accused No. 1 sees a group of two women and one man weeping over the body of the victim and orders them to move from there and enter the cafeteria of the hotel. He shows no interest at all in the fact of the victim who lies in a pool of blood in the corridor close to him.
>
> The two accused practically took full control over a large part of the ground floor of the hotel in the vicinity of the scene of the murder. Under the threat of their weapons they force their wishes on all the persons who happened to be in that part of the hotel.
>
> Accused No. 2 operates in the hotel lounge. Pointing his gun at them, he disarms two policemen in uniform whilst they were on the ground taking cover behind some arm-chairs. The police officers were P. C. Loizos Loizou (P.W.34) who surrendered his 0.32 revolver (*exhibit* No.

33), and P. C. Theophanis Antoniades P.W.35) who surrendered his Webley revolver a 0.38 calibre, (*exhibit No.* 19).

Accused No. 2 then at gun point forced the persons in the lounge, including the two policemen, to proceed into the bar and from there into the cafeteria of the hotel.

Accused No. 1 operates in the room where the delegates of the Afro-Asian Peoples Solidarity Organization held their conference at the moment the shots killing the Egyptian delegate were heard. At some stage after accused No. 2 took *exhibit No.* 19 from P.W.35 and before entering the cafeteria with his hostages, he presumably passed it over to accused No. 1. Armed with this gun and a hand-grenade accused No. 1 went into the conference room and ordered all the delegates, including Inspector Petros Loizou (P.W.37) and special constable Georghios Georghiou (P.W.38), to go out of the room. After firing one shot inside the room, he herded at gun point all these hostages through the corridor by the dead body of Sebai into the same cafeteria.

Inside the cafeteria the two accused are seen and heard talking together in Arabic. The room and the hostages are now under their joint power and control. The hands of the hostages are tied and Inspector Petros Loizou (P.W. 37) is forced to surrender his revolver, 0.32 calibre (*exhibit No.* 32).

From the cafeteria, threatening the lives of their hostages the two accused succeed within two hours to force the Government of the Republic to acceed to their demands. A Cyprus Airways plane is made available to them at Larnaca Airport, and a police bus arrives at the Hilton to drive them and their hostages to the Airport. Some of the hostages are released; 11 of them board the plane with the two accused."

Further down the Court say this:

"The conduct of the accused from their arrival in Cyprus until the morning of the murder is also relevant on the question whether the accused were parties to a common plan to kill the victim. Accused No. 1 arrived at Larnaca

Airport on the 13th February, whereas accused No. 2 arrived also by air on the 14th February. The two accused are of different countries of origin, different profession and took rooms in different hotels. Despite the above, they are in company almost all hours of day and night."

After dealing with certain other movements of the appellants and with the evidence of P.W.41, the ballistics expert and after making their findings with regard to the *exhibits* found at the scene and the weapon used for the murder the Court proceed to deal with the legal aspect of the issue of common design in these terms:

"Unless the Prosecution satisfies the Court that the killing of the victim by one of the two accused was the result of an unlawful common design to which both accused were parties, both accused should be acquitted in view of the failure of the Prosecution to prove which one of the two accused actually fired the fatal shots. But if it has been established that the death of the victim was part of the common design of the accused, then it makes no difference who fired the shots and they are both answerable for the killing.

.....

.....

Very rarely direct evidence is available regarding the nature and extent of the common design or purpose of co-adventurers. In the majority of cases, including the present one, common design is a matter of inference by the Court from the acts of the accused persons and the facts as proved before the Court."

And further down in their judgment they say this:

"The conduct of each accused immediately after Sebai was killed leaves no doubt in our minds that they were at the time executing a well studied strategic plan.

Each knew the movements and actions of the other and each co-ordinated his role to that of the other in point of time and area of operation.

The pistol (*exhibit No.* 34) was involved both in the incident of killing Sebai and the incident of taking and

removing the hostages from Cyprus. Furthermore, the aforesaid killing and taking of the hostages had such a sequence in point of time that we feel bound to infer that they were nothing more than two phases of the same incident. We exclude any probability of the two incidents being separate and distinct and to have been committed out of mere coincidence in the same hotel, at the same time, by two different groups of persons acting independently and without notice or knowledge of each other's acts.

We have no doubt that the only reason for which the accused admittedly took the hostages was to force their safe exit from Cyprus and thus escape the consequences for their having unlawfully killed Sebai.

We are also satisfied from the objects and extent of their strategic plan and the manner in which each accused operated in the morning in question in executing it, that their plan could not have been prepared only a short period of time before it was put into effect. It required knowledge of the lay-out of the hotel, the works and sessions of the conference, the customs of the delegates, the movements of Sebai and the effectiveness and extent of the security measures taken in the hotel. This accounts for the presence of the two accused in Cyprus about four days prior to the murder which was committed two days after the conference started its work. Relevant to the preparation of this plan in its details is also the presence on the 16th February of the two accused in the hotel restaurant where lunch was being served to the delegates of the conference and the lie which accused No. 1 said to P.W.20 that they were also delegates.

It is evident from all the above that the murder of Sebai was committed in furtherance of a pre-conceived and well prepared common plan, to which both accused were parties. It matters not, therefore, which one of the two accused actually pulled the trigger of the pistol (*exhibit No.* 34).

Having in mind this finding of ours and the Law, as we have very briefly above expounded, we find that each accused could be charged with himself having committed the killing as principal offender."

In the course of his argument when dealing with ground 8 counsel for the appellants submitted that the appearance of the appellants at the scene of the crime, even armed, soon after the murder was not consistent only with guilt but was equally consistent with innocence in so far as the murder was concerned because they may have only been there in connection with taking the hostages; the fact that they were together before and at the time of the murder is not by itself something from which one may infer that they were guilty of the killing of Sebai; the inference of the Court that the killing of Sebai and the taking of the hostages were two phases of the same plan is arbitrary and unwarranted by the evidence; and in conclusion he submitted that the inferences which the Court drew are not inferences which are inconsistent with innocence and it was unsafe for the Court to draw these inferences in a way which excluded other rational possibilities.

In fact the trial Court, as it clearly appears from the part of their judgment cited above, in coming to their conclusion took into consideration in addition to the matters that learned counsel has mentioned other facts and circumstances such as the behaviour of accused 1 when he saw the man and the two women weeping over the dead body; the taking up of full control over a large part of the ground-floor in the vicinity of the scene of the murder; the enforcement of their wishes on all the persons present in the vicinity; the disarming of the two policemen; the activities of appellant 2 in the lounge and of appellant 1 in the conference room; the activities of both appellants in the cafeteria; the imposition of their will on the authorities to acceed to their demand to leave Cyprus; the finding that the pistol, *exhibit* 34, was involved both in the incident of the killing and the taking of the hostages; and that this weapon was in the possession of the second accused at the Hilton but subsequently changed hands.

In dealing with ground 9 learned counsel submitted that the evidence which was adduced before the Court and upon which they relied in finding that there was common design and that the two accused were acting in concert is entirely insufficient and did not warrant the inference that the appellants were acting in concert to kill Sebai. In support of his submission learned counsel argued that the only clear evidence in this case was that the appellants were involved in the taking of the

hostages but that it is not clear that the two appellants were the killers or at what stage they decided to kill the victim; that had they, in fact, committed the murder with the lethal weapon as found by the trial Court one would have expected them to do away with it if they knew that this was the weapon with which the victim was killed instead of surrendering it to the authorities on their return flight. And lastly that the Court in coming to their conclusion must have been influenced by the extrajudicial confessions and by the fact that they failed to give evidence on oath.

Counsel's complaint with regard to ground 10 was the finding of the Court that the killing and the taking of the hostages had such a sequence in point of time that they inferred that they were nothing more than two phases of the same incident. First of all, he said, if instead of seconds minutes had passed between the shooting and the taking of the hostages the two incidents could have been separate and distinct and that the Court went wrong in coming to the conclusion that the time which elapsed between the two incidents was not longer than they thought. This, he argued, was apparent from the fact that appellant 1 was later found to possess the revolver, *exhibit* 19, and that it must have taken some time for appellant 2 to deliver this pistol after he had taken it from P.W.35, Antoniades, to the first appellant. Finally, he submitted that the Court wrongly accepted the evidence of the expert and found that *exhibit* 34 was the revolver used to kill the victim and that this revolver was the only link that connected the incident of the killing and that of the taking of the hostages and once this link goes the two incidents are disconnected.

In support of his ground 12, which is a general ground, counsel submitted that when considering this case as a whole, in the light of the evidence, this Court must feel that there is a lurking doubt and a feeling of uncertainty regarding the guilt of the appellants because of the misdirection regarding the failure of the appellants to give evidence on oath, and the weight that the trial Court attached on the extrajudicial confessions and on the fact that the trial Court wrongly accepted the expert's evidence.

I will now deal with the legal aspect pertaining to these grounds.

In *McGreevy* v. *The Director of Public Prosecutions* [1973] 1 All E.R. 503, the House of Lords held that in a criminal trial it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. There is no rule that, where the prosecution's case is based on circumstantial evidence the Judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.

Lord Morris of Borth-y-Gest in the course of his speech had this to say: (at p. 505)

> "In presenting his most careful and lucid argument counsel formulated his proposition of law in somewhat varied terms as follows: that in a criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial Judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.
>
> I think that it is apparent that if the proposition were accepted there would hereafter be a rule of law which it would be obligatory on the Judges to follow. As I will indicate it would, in my view, be a new rule. It would be a rule applicable in criminal cases where (as to the commission of the act) the prosecution case (or an essential ingredient of it) depended entirely on circumstantial evidence. It is not contended that the rule would apply if the case depended partly on direct and partly on circumstantial evidence. The application of the rule would therefore depend on defining and identifying what evidence is direct and what is circumstantial and deciding which

label was applicable. If the rule existed then despite the qualification that the explanation need only be in 'terms appropriate to the case' it might well become a virtual necessity for a Judge to employ the language of the concluding words of the proposition.

It has first to be considered whether the proposition would involve the formulation of a new rule binding on Judges. If it would then the question arises whether such a new rule would be desirable".

His Lordship in dealing with the arguments advanced by counsel for the appellant both before the Court of Criminal Appeal and before the House said: (at pp. 507–508)

"..... The argument on behalf of the appellant in the terms of the proposition of law which I have set out seems to me inevitably to involve the suggestion that in the absence of a direction in the terms propounded a jury would not be likely to consider evidence critically so as to decide what it proves.

I must turn, therefore, to consider the two questions to which I have adverted: (a) does the proposition formulated on behalf of the appellant state the existing law and (b) if not—should there be a new rule which will be binding on Judges? Reliance was placed on the report of *R* v. *Hodge*. The accused in that case was charged with murder and the trial in 1838 took place at the Assizes in Liverpool. The short report of the case records what Alderson B. said in summing-up to the jury. He told them that the case was 'made up of circumstances entirely' and that before they could find the prisoner guilty they must be satisfied —

> 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.'

He also pointed out to the jury, to quote from the report, the proneness of the human mind to look for (and often slightly to distort) the facts in order to establish a proposition while forgetting that a single circumstance which is

inconsistent with such a conclusion is of more importance than all the rest inasmuch as it destroyed the hypothesis of guilt. In the report of the case it was said that the evidence was all circumstantial and contained no one fact which taken a'one would lead to a presumption of guilt. No one could doubt that the wise words used by the learned Judge were helpful and admirable and as such were worthy of being recorded. But there is no indication that the learned Judge was newly laying down a requirement for a summing-up in cases where the evidence is circumstantial nor that he was himself employing words so as to comply with an already existing legal requirement.

The painstaking research of counsel for the appellant showed that in some countries in the Commonwealth both learned Judges and also legal writers have made reference to the 'rule' in Hodge's case. I do not propose to refer to all the citations which counsel made. The singular fact remains that here in the home of the common law Hodge's case has not been given very special prominence: references to it are scant and do not suggest that it enshrines guidance of such compulsive power as to amount to a rule of law which if not faithfully followed will stamp a summing-up as defective. I think that this is consistent with the view that Hodge's case was reported not because it laid down a new rule of law but because it was thought to furnish a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial."

and at pp. 510-511

"In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury

could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.

In my view, it would be undesirable to lay it down as a rule which would bind Judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt. In the present case there were only two possible verdicts: one was a verdict of not guilty and the other a verdict of guilty. In the judgment of Lowry L.C.J. it is noted that during the course of a long summing-up the learned Judge had on at least ten occasions warned the jury of the need to be satisfied beyond reasonable doubt. The issue before the jury was whether it was the appellant or whether it was someone else who killed the deceased. If the jury were satisfied beyond reasonable doubt that it was the appellant they must have been satisfied beyond reasonable doubt that it was no one else. They could only have been satisfied beyond reasonable doubt of the appellant's guilt if the evidence which they accepted led them irresistably to that conclusion.

To introduce a rule as suggested by learned counsel for the appellant would, in my view, not only be unnecessary but would be undesirable.

.....

.....

In agreement with the Court of Criminal Appeal I would reject the contention that there is a special obligation on a Judge in the terms of the proposition of law that I have set out. There should be no set formulae which must be used by a learned Judge. In certain types of cases

there are rules of law and practice which require a Judge to give certain warnings although not in any compulsory wording to a jury. But in the generality of cases I see no necessity to lay down a rule which would confine or define or supplement the duty of a Judge to make clear to a jury in terms which are adequate to cover the particular features of the particular case that they must not convict unless they are satisfied beyond reasonable doubt."

In *R.* v. *Abbott*, 39 Cr. App. R. 141 Lord Goddard C.J., said this: (at p. 148)

"If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of Not Guilty in the case of both because the prosecution have not proved the case."

In *King* v. *Reginam* [1962] 1 All E.R. 816, an appeal to the Privy Council from the Federal Court of West Indies the question of common design was considered.

The appellant and Y. were tried in Barbados for the murder of P. The case for the Crown was that the two accused were acting in concert, and the trial Judge, in his summing-up to the jury, told them that, unless they came to the conclusion that the two accused had had a common design, the jury could not possibly convict both of them. The jury found both the accused guilty. All appealed to the Federal Supreme Court of the West Indies, the appellant's appeal was dismissed and Y.'s appeal was allowed and his conviction was quashed.

Lord Morris of Borth-y-Gest in the course of his judgment dealt with the summing-up of the trial Judge and had this to say: (at pp. 818-819)

"In a careful and detailed summing-up, the learned Judge told the jury that they should consider the evidence against each accused separately, and reminded them very clearly that the unsworn statement of the one was not evidence against the other. He said:

'The Crown asked you to convict both because they say the murder was a result of joint agreement or a

pre-arranged plan between the two accused to kill Peterkin. Or to put it another way: that they were acting in concert.'

He told the jury that it was open to them to convict both; or to acquit the appellant and convict Yarde; or to convict the appellant and acquit Yarde; or to acquit both. He told them that, in order to find both accused guilty, they would have to find that there was a joint, pre-arranged agreement to kill Peterkin, and he added:

'If the evidence does not justify you in finding that Peterkin's death was brought about as a result of a concerted plan by (the appellant) and Yarde, then you cannot possibly convict both of these two accused. You will have to consider which one killed him, and if you cannot make up your minds beyond reasonable doubt as to which one killed, then you will have to acquit both. Of course, the common purpose—the joint agreement to kill—does not have to be entered into hours before the act.'

The learned Judge proceeded fully to review and to analyse the evidence affecting the appellant. Having done that, he did the same in regard to the evidence affecting Yarde. He then considered the evidence concerning the submission of the Crown that the two accused had had a common design or had acted in concert; in so doing, he pointed to what was the evidence against each one but which was not evidence against the other. He advised the jury against drawing the inference of a pre-arranged plan. He told them over and again that, unless they came to the conclusion that there was such a plan, they could not possibly convict both accused. In one passage he said:

'So that if you come to the conclusion that there was no pre-conceived plan; no acting in concert; you cannot find both accused guilty. You can only find both accused guilty if you find the accused were acting in concert. If they were not acting in concert, then consider if you can find either guilty and, if so, which one.'

Finally, he quoted the following words from the judgment of LORD GODDARD, C.J., in *R.* v. *Abbot*:

> 'If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case' ".

And his Lordship continued as follows:

> "Having regard to the terms of the summing-up, there can be no room for doubt that, in returning verdicts of guilty against both accused, the jury must have decided that they were acting in concert. The view of the jury may have been that it was the appellant who struck the blow or blows that killed Peterkin, and that Yarde, being present, had been a party to a plot to kill, or being present had aided and abetted. The view of the jury on the other hand may have been that it was Yarde who struck the blow or blows (which, according to the learned Judge's view, must have been inflicted with some force), and that the appellant was a party to their infliction. The view of the jury may, however, have been that they could not say which of the two had killed Peterkin, but that they considered that both accused were parties to the killing."

In conclusion his Lordship said: (at p. 820)

> "The jury found both accused guilty, which involves a finding that they were acting in concert. Accordingly, they were never obliged to consider the individual guilt of each of the accused on the footing that they were not acting in concert. The Federal Supreme Court has acquitted Yarde, so that the finding of the jury that both are guilty no longer stands, and it is not possible to ask them how they would have answered the question if it had been limited to the case of the appellant only. There are no means of knowing what the verdict of the jury would have been had it been ruled and had they been told that they could not hold that Yarde acted in concert with the appellant. There are various possibilities. They might have

found that the appellant alone was guilty. They might have considered that the killing was done by one only (the other not being implicated) but that they could not decide which and so could not have avoided acquitting both. Leaving aside the question whether it could have been held that there was admissible evidence of a common design against the appellant, even though there was no such evidence against Yarde, the fact remains that, had the jury been directed in accordance with the view of the Federal Supreme Court, it cannot be said with certainty that the jury must inevitably have convicted the appellant."

In these circumstances, their Lordships concluded that it could not be satisfactory to allow the conviction of the appellant to stand and advised Her Majesty that the appeal of the appellant should be allowed.

The dictum of Lord Morris in the above case was approved in *Mohan and Another* v. *Reginam* [1967] 2 All E.R. 58, another Privy Council case.

In *Rex* v. *Pridmore*, 1913 Times Law Reports, 330, the appellant and another man were engaged in night poaching, one of them having a gun and the other a stick. Finding that they were followed by three keepers, the two men turned round one of them saying "stand back, stand back" and the other, putting the stick that he was carrying on his shoulder continued to retire facing the keepers. One of the keepers then ran forward to the poacher who carried the gun; the other two ran towards the poacher with the stick. The poacher with the gun fired at one of the keepers injuring him seriously. On the trial of the two poachers for shooting with intent to murder, the jury found both prisoners guilty; they said they were unable to say which of the two fired the shot, but that they were agreed that the intention was to prevent arrest at all costs even to the extent of murder, and that the prisoners were acting with a common purpose. No evidence was offered by the prosecution of any actual arrangement made between the prisoners to act with a common purpose other than their actions and conduct when they became aware of the keepers approaching them.

Held, that the jury could infer the common purpose from the actions and gestures of the prisoners.

Mr. Justice Phillimore in delivering the judgment of the Court had this to say: (at p. 331)

> "The main question that had been raised was whether there was any evidence to justify the learned Judge in leaving the question of common purpose to the jury. When it was all threshed out, what was the case as to the gestures of the man with the stick? If with a stick—a formidable stick 3 ft. 6 in. long or more—he faced round towards the keepers, whether from hearing his companion with the gun say 'Stand back, stand back' or to see what was happening, if he held his stick in a threatening attitude, showing that if the keepers came near enough he would strike even though he was retiring—in such a case the jury might well have thought that each of these men showed fight for himself, and also for his companion. They agreed there was not much to support such a finding. But there was in their opinion evidence to support it and, therefore, the appeal must be dismissed."

In the Cyprus case of *Nicolas Pantopiou Loftis* v. *The Republic*, 1961 C.L.R. 107, the appellant together with a certain Varellas were charged before the Assize Court of Nicosia of the murder of a certain Gavrias. The material facts, as found, by the Assize Court were as follows: Varellas asked the appellant to help him "to frighten Gavrias, the deceased, give him a good beating and let him go". The deceased received several blows on the head with a piece of iron and, eventually was strangled with a rope. The deceased died of asphyxia due to strangulation. The blows on the head although serious were not fatal. Apart from the victim the only other persons present at the scene of the crime at the time of the murder were Varellas, a certain Hambis and the appellant. But the trial Court was unable to come to a positive finding as to who of the three accomplices actually used the rope to strangle the victim. The Assize Court applying the provisions of section 21 of the Criminal Code convicted the accused (appellant) of the murder of the deceased, and sentenced him to death under section 205 of the Criminal Code.

Josephides J., in delivering his judgment had this to say in relation to common design: (at p. 118)

> "As the trial Court was unable to come to a positive finding

as to who of the three accomplices actually used the rope to strangle the victim, in order that the appellant may be found guilty of murder it must be proved or inferred from the evidence that he and Varellas formed a common intention to prosecute an unlawful purpose and in carrying it out the deceased was killed, and that the killing was a probable consequence of the prosecution of such purpose, within the provisions of s. 21 of the Criminal Code. It is a well-settled principle of law that if persons have agreed to waylay a man and rob him, and they come together for the purpose armed with deadly weapons, and one of them happens to kill him, every member of the gang is held guilty of the murder. But if their agreement had merely been to frighten the man, and then one of them went to the unexpected length of shooting him, such a murder would affect only the particular person by whom the shot was actually fired. The act done must relate to the common design and not totally or substantially vary from it."

In *Regina* v. *Smith* (Wesley) [1963] 1 W.L.R. 1200 which is another case relevant to the issue of common design the facts were briefly as follows:

On the night of September 13, 1960, the appellant, Wesley Wilburn Smith, was in the Rainbow public-house at Ipswich with three other coloured men, Thomas, Scarlett and Atkinson. At about 8.30 p.m. an argument broke out between them and the other persons in the public-house. One of the other men, Scarlett, went outside and the appellant followed him when, according to appellant's statement, Scarlett said "I am going to tear up 'the joint' ". Scarlett got some bricks and the appellant some as well and they threw them through the glass door of the public-house. Meanwhile, the other two men, Atkinson and Thomas remained inside and Atkinson engaged in an argument with the barman, Maurice Herbert Britton, which developed into a fight in the course of which Atkinson drew a knife which he carried on his person and stabbed Britton causing a wound from which he died. The appellant knew that Atkinson was carrying a knife. All four men were charged at the Central Criminal Court with the murder of Britton. The case for the prosecution was that all four were acting in concert to "tear up the joint", or make an attack upon the bar and anyone

who attempted to prevent them from doing so. The trial Judge, summing-up directed the jury, *inter alia*, that anyone who was party to an attack which resulted in an unlawful killing was a party to the killing and asked them to consider whether the appellant was taking part in a general attack or assault aimed at the barman. The jury found Atkinson and the appellant guilty of manslaughter and the other two men, somewhat surprisingly it may be, not guilty altogether. The appellant appealed against his conviction on the grounds that the use of the knife by Atkinson was outside the scope of their contemplated common purpose and the appeal was adjourned for hearing by the full court.

Slade J., in the course of his judgment in the Court of Criminal Appeal after dealing with the facts and the summing-up said: (at p. 1205)

> "The term 'agreement', 'confederacy', 'acting in concert', and 'conspiracy', all pre-suppose an agreement express or by implication to achieve a common purpose, and so long as the act done is within the ambit of that common purpose anyone who takes part in it, if it is an unlawful killing, is guilty of manslaughter. That does not mean that one cannot hypothesise a case in which there is an act which is wholly outside the scope of the agreement, in which case no doubt different considerations might apply; but the Judge was not dealing with that case at all. He was dealing with the case and reading the statement of the appellant where, in the appellant's own words, he said that Scarlett said he was going to tear up the joint and was going to get bricks to do it, and he went out with Scarlett to get bricks. What were the bricks to be thrown for? Did they think the bar tender, the licensee and the other people would stand by while these men tore up the joint, or did they think he would do something to protect the property, and what would happen if he did? What did happen? The bar tender got the night stick, and we know he was stabbed to death by Atkinson."

After dealing further with the trial Judge's summing-up and his summary on the law he concluded as follows: (at p. 1206)

> "The grounds of appeal in this case although worded in defferent ways really, as I understand them, amount to the

same thing; that is, that the use of a knife by Atkinson in this case was a departure, that is to say, assuming against Smith, as must be assumed in the light of the jury's verdict, that he was a party to some concerted action being taken against the barman, he certainly was not a party to the use upon the barman of a knife which resulted in the barman's death. It is significant, as I have shown by reading Smith's own statement, that he knew that Atkinson carried a knife. Indeed, I think he knew that one of the other men carried a cut-throat razor. It must have been clearly within the contemplation of a man like Smith, who to use one expression, had almost gone bersek himself to have left the public-house only to get bricks to tear up the joint, that if the bar tender did his duty to quell the disturbance and picked up the night stick, anyone whom he knew had a knife in his possession, like Atkinson, might use it on the barman, as Atkinson did. By no stretch of imagination, in the opinion of this Court, can that be said to be outside the scope of the concerted action in this case. In a case of this kind it is difficult to imagine what would have been outside the scope of the concerted action, possibly the use of a loaded revolver, the presence of which was unknown to the other parties; but that is not this case, and I am expressing no opinion about that. The Court is satisfied that anything which is within the ambit of the concerted arrangement is the responsibility of each party who chooses to enter into the criminal purpose."

Useful reference may be made to the case of *R.* v. *Appleby* reported in 28 Cr. App. R., 1.

In *Woolmington* v. *The Director of Public Prosecutions* [1935] A.C. 462, a case related to the proof of guilt, Viscount Sankey L.C. said: (at p. 481)

"..... It is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must

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

and further down in his judgment:

"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."

Lastly in *Mancini* v. *The Director of Public Prosecutions* [1942] A.C., 1, Viscount Simon L.C., said: (at p. 7)

"Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the Judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the Judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it."

and at p. 12:

"If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the Judge to invite the jury to speculate

as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either Judge or jury went outside it."

I consider it sufficient to say that, in the light of the authorities, and having regard to the findings of the trial Court, based on credible evidence, and the inferences drawn therefrom the submissions of counsel for the appellants on all four grounds cannot be sustained.

It clearly appears that in finding the appellants guilty of premeditated murder beyond reasonable doubt the Court had in mind all relevant considerations and it is evident that they were satisfied that the murder was committed by the appellants and that it could not have been committed by anyone else. The Court further specifically say that as there was no evidence as to who of the two fired the fatal shots both appellants would have to be acquitted unless it was proved that they were acting in concert and that the murder was committed by them in furtherance of a pre-conceived plan to which both were parties; and the conclusion of the Court that this was so is not, in my view, having regard to the evidence, open to any criticism either with regard to the findings and the inferences drawn therefrom or with regard to their legal approach.

GROUND 11:

In arguing this ground counsel submitted that since the trial Court relied on the extrajudicial confessions—which in his submission should not have been accepted or relied upon—and deduced the motive of the appellants from such confessions then their whole judgment on premeditation falls to pieces. He further complained that once the trial Court found that there was a pre-conceived and well prepared plan to which both appellants were parties they, in fact, decided the issue of premeditation and the fate of the appellants before they dealt with this issue.

Then counsel dealt with the various items relating to the

evidence upon which the Court relied in finding premeditation and with regard to items 1 and 3 (that the two accused acting in concert intentionally killed the victim in the execution of their pre-conceived and well prepared plan and that the accused assisted each other in the killing and aided each other in securing a safe escape) he argued that people may act in concert on the spur of the moment and that because two people are involved in an offence that does not mean that such offence was committed with premeditation.

With regard to items 2 and 4 (that the wound that caused the death of the victim was on the head and that the murder was committed by a lethal weapon that was brought to the Hilton hotel by one of the accused) counsel argued that in any kind of murder or homicide the aim is to kill and that if one aims at the head or at the heart of someone it proves that he intends to kill but not that there was premeditation.

With regard to item 5 (that the accused had a motive to kill the victim) he submitted that the motive was wrongly deduced from the extrajudicial confessions.

Counsel further submitted that the possibility that the offence was committed on the spur of the moment cannot be excluded and that the trial Court never examined this possibility. It was also possible, he argued, that the decision to kill may have been taken at the time they saw that the security at the Hilton was relaxed and that in such a case they would not have time to reflect and desist. Counsel finally submitted that there was a lurking doubt as to the time the appellants formed the intent to kill the deceased, if they were in fact the killers, and there is also a doubt whether one of them or both of them formed that intent.

I do not propose to dwell at any length on the legal aspect of premeditation as there is a wealth of case-law on this issue.

The trial Court in dealing with premeditation referred to the case of *R.* v. *Halil Shaban*, VIII C.L.R. 82 and to a passage of Zekia J., (as he then was), in *Halil* v. *The Republic*, 1961 C.L.R. 432 and also mentioned that they had in mind the case of *Aristidou* v. *The Republic* (1967) 2 C.L.R. 43 and the very recent cases of *Anastassiades* v. *The Republic* (1977)* 5 J.S.C. 516 and *Kouppis* v. *The Republic* (1977)* 11 J.S.C. 1860.

* To be reported in (1977) 2 C.L.R.

The case of *Rex* v. *Shaban* (*supra*) was decided in 1908 when the law in force was the Ottoman Penal Code. The notion of premeditation in its present form was introduced in our legal system with the coming into force of the Constitution by Article 7 thereof as a result of which the Criminal Code (Amendment) Law, 1962, was enacted which, *inter alia*, repealed and substituted sections 203 to 207 of the Criminal Code (Cap. 154) which dealt with murder and manslaughter. The relevant sections of the Criminal Code are now sections 203 and 204 which read as follows:

"203(1). Any person who with premeditation by an unlawful act or omission causes the death of another person is guilty of the felony of premeditated murder.

(2) Any person convicted of premeditated murder shall be sentenced to death.

204. Premeditation is established by evidence proving expressly or by implication an intention to cause the death of another person whether such person is the person actually killed or not formed before the act or omission causing the death is committed and existing at the time of its commission."

Quite obviously, the notion of premeditation as set out in section 204 above quoted must be understood, construed and applied in a manner consistent with the provisions of Article 7 of the Constitution; and in this respect it may be usefully noted that the then Supreme Constitutional Court in the case of *The Republic and Nicolas Pantopiou Loftis*, 1 R.S.C.C., 30, adopted the exposition of premeditation as laid down in the *Shaban* case.

Tyser C.J., in delivering the majority judgment of the Court in the *Shaban* case states the legal proposition as follows:

"The question of premeditation is a question of fact.

A test often applicable in such cases is whether in the circumstances a man has had sufficient opportunity after forming his intent, to reflect upon it and relinquish it. Much must depend on the condition of the person at the time—his calmness of mind, or the reverse.

There might be a case in which a man has appreciable

time between the formation of his intent and the carrying of it into execution, but he may not be in such a condition of mind as to be able to consider it.

On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intent and its execution might be sufficient for premeditation."

In the case of *Halil* v. *The Republic* (*supra*) in delivering the judgment of the High Court Zekia, J., said: (at p. 434)

"The phrase premeditated homicide or murder, unlike the phrase 'malice aforethought' is not a term of art and it has to be taken in its ordinary meaning. When a person makes up his mind either by an act or omission to cause the death of another person and notwithstanding that he has time to reflect on such decision and desist from it, if he so desires, goes on and puts into effect his intent and deprives another of his life that person commits a premeditated homicide or murder which entails capital punishment.

There is no presumption of law in the case of premeditation but this has to be inferred in each particular case from the surrounding circumstances."

In *Pantelis Vrakas and Another* v. *The Republic* (1973) 2 C.L.R. 139, Triantafyllides, P., in delivering the unanimous judgment of the Court said: (at p. 176)

"In the present case it was natural, as the case for the prosecution was that the killing of the deceased took place on the basis of a pre-arranged plan between the appellants, that the trial Court, in dealing with the issue of premeditation as a question of fact, would have to deal with such issue as regards both appellants together in so far as there was concerned evidence tending to establish the said pre-arranged plan, from the existence of which premeditation could be inferred in relation to each of the appellants; we do not, therefore, think that the trial Judges erred in this respect in any way."

and at p. 187:

"Taking into account the whole conduct of appellant 1 before, at the time of, and after, the murder of his wife,

plus the presence, as above, of appellant 2 at the scene of the crime, we have to conclude, as the trial Court did, that appellant 1 not only is guilty of the murder of his wife, but, also, that such murder was a premeditated one, having been committed on the basis of a pre-arranged plan which was duly implemented though in relation thereto appellant 1 had had plenty of time to reflect and to decide to desist therefrom."

In Sir Hari Singh Gour's Penal Law of India, 9th ed., vol. 3 at p. 2299 one reads the following on the issue of premeditation:

"To constitute a premeditated killing it is necessary that the accused should have reflected with a view to determine whether he would kill or not; and that he should have determined to kill as the result of that reflection; that is to say, the killing should be a pre-determined killing upon consideration and not a sudden killing under the momentary excitement and impulse or passion upon provocation given at the time or so recently before as not to allow time for reflection."

and at p. 2301:

"Premeditation may be established by direct or positive evidence or by circumstantial evidence. Evidence of premeditation can be furnished by former grudges or previous threats and expressions of ill-feelings; by acts of preparation to kill, such as procuring a deadly weapon or selecting a dangerous weapon in preference to one less dangerous, and by the manner in which the killing was committed. For example, repeated shots, blow or other acts of violence are sufficient evidence of premeditation. Premeditation is not proved from the mere fact of a killing by the use of a deadly weapon but must be shown by the manner of the killing and the circumstances, under which it was done or from other facts in evidence."

It follows from the above that premeditation is a question of fact which must be proved by the prosecution either by direct or circumstantial evidence. And that for premeditation to be established it is essential to show intent to cause death which was formed and continued to exist before the time of the act causing the death as well as at the time of the killing notwith-

standing that, having regard to the assailant's state of mind, he had the opportunity to reflect upon and desist from such decision.

It may well be that not each one of the items enumerated by the Court as evidence relating to the issue of premeditation taken in isolation would be sufficient to establish premeditation, but their cumulative effect, in my opinion, warrants the conclusion reached by the Court that the murder was premeditated.

The appellants on their own admission, as disclosed by their unsworn statements from the dock, admitted that they were acting in concert in relation to the taking of the hostages. It will also be remembered that the murder of the victim preceded the taking of the hostages but that the intervening period was very short indeed, a matter of seconds or minutes. The trial Court's findings and inferences based on credible evidence were that the murder of Sebai was committed in furtherance of a pre-conceived and well prepared common plan, which could not have been prepared only a short period of time before it was put into effect, to which both appellants were parties and that the killing and the taking of the hostages were two phases of the same incident the object of the latter being to force their safe exit from Cyprus.

In the absence of an iota of evidence as to any incident prior to the killing which would justify the Court to consider alternative issues such as provocation, self-defence or accident or generally that the killing was committed on the spur of the moment and as a result of circumstances that would render the act of killing unpremeditated the Court did not have a duty nor indeed would such a course be correct, to consider such possibilities because that would involve going outside the evidence and acting on mere speculation.

Having regard to the state of the evidence and the findings and inferences drawn by the trial Court it seems to me that their conclusion that the murder was premeditated was not only correct but unavoidable.

The two appellants would, of course, be entitled to be acquitted of this offence altogether had the trial Court accepted the theory urged upon them and indeed upon this Court by counsel for the appellants, that there were two groups, one involved

in the killing and the other in the taking of the hostages, acting independently of each other and without any knowledge of each other's intentions or actions, but, by coincidence, at the same time, and that the appellants were involved only in the incident of the taking of the hostages. But such a conclusion would, in my view, be completely unwarranted by the evidence and the circumstances of the case and would, therefore, be unreasonable. There is a limit to which the long arm of coincidence could be stretched.

For all the above reasons, which I hope I have not stated at too great length, I find no ground for interfering with the conviction of either appellant and I would dismiss these appeals.

HADJIANASTASSIOU J.: On the 4th April, 1978 at the Assize Court of Nicosia, the two appellants were convicted of the premeditated murder of the late Yusef El Sebai, contrary to sections 203 and 204 of the Criminal Code Cap. 154 (as amended by section 5 of the Criminal Code (Amendment) Law 1962) and were sentenced to death. They now appeal against the conviction and/or sentence on a number of points of law.

The facts can be put shortly and are somewhat exceptional. At about 11.15 a.m. on 18th February, 1978, El Sebai, a most distinguished politician and a friend of Cyprus, who arrived on the 16th February, was murdered in the "Hilton" hotel of Nicosia where he was staying, when he was on his way to address the conference of the Afro-Asian People's Solidarity Organization which was held there.

There was no direct evidence as to the identity of the person or persons who fired the fatal shots, and the first person who immediately when the shots were fired started shouting "a murder has taken place" was Rousouyeni. On hearing the two shots, she proceeded to the door of the cafeteria in which she was working as a waitress; she turned right in order to see what was happening and again she heard a third shot. She saw a person falling who was at the stand of the book-shop. Then, immediately after she saw the back of a man running towards the lobby of the hotel.

The murder of the unfortunate victim took place at a time when a number of police officers were on duty guarding the

hotel for the safety of a great number of delegates, who as I said earlier, came to Cyprus to attend the conference. The shouting of Rousougeni was heard by three employees of the hotel, namely G. Evangelou the restaurant manager, M. Lambrianou a waiter, and S. Pavlou the person in charge of the Hilton swimming pool. All three ran through the kitchen door and narrated what they had seen. Lambrianou said that he ran out through the kitchen door and found himself in the corridor, he saw accused 2, who was running towards the lobby. He then looked to his right and noticed a person trying to hold onto the stand of the bookshop, kneeling and then falling on the ground. That person we now know was the victim El Sebai. This witness further said that at the same time he saw the back of a person who was entering the anteroom to the conference hall, and identified him as being accused 1. He reached the victim and noticed that blood was running from his right temple. He then ran to the lobby and saw accused 2 herding 10-15 people, including two uniformed policemen who had their hands raised, into the bar. That culprit (accused 2) was holding two guns in his left hand and another in his right hand.

In the meantime, when he was by the Jet show-case on his way back to where the victim was lying, he saw accused 1 herding some delegates in the direction of the cafeteria. Accused 1 was holding in his left hand a handgrenade and in his right hand a pistol or a revolver. In cross-examination by counsel for the defence, that witness said that when he was in the lobby he noticed that the hostages that accused 2 was herding entered the bar, and he added that the two groups of hostages entered the cafeteria at about the same time.

There was further evidence by Evangelou who ran out of the kitchen into the corridor and also saw the victim with blood running from his head, falling down by the stand of the book-shop. He then proceeded towards the lobby and after a while he saw two men—one coming out of the conference hall, and the other coming out of the bar, heading towards the cafeteria. Those men (the two accused) had hostages with them. Accused 1 was holding a pistol and a handgrenade, and accused 2 when coming from the bar towards the cafeteria, was holding a pistol. When accused 2 was seen again by this witness in the cafeteria, he was holding one pistol in his right hand and two

pistols in his left hand. Then the witness attempted to enter the cafeteria, but accused 2 pointed his gun at him and told him "come in". He explained to the gunman who he was and he told him "out". Later on he added that he was sent by our authorities to the cafeteria in order to find out what were the demands of the two gunmen.

In the meantime, the three shots were also heard by Inspector Loizou who was in charge of the bodyguards of Dr. Vassos Lyssarides who was presiding at the conference at that time. Inspector Loizou heard the shots at about 11.15 a.m. when the Russian delegate was speaking. He and other policemen ran to find out what was happening, but he added that as he approached the main door of the conference hall, on second thoughts he decided to remain in the room in order to protect, if necessary, the life of Dr. Lyssarides.

Within a short period the other policemen who went out returned to the conference room and informed the others that El Sebai was murdered. There was a great commotion and confusion, and the proceedings immediately stopped. Some of the delegates attempted to leave the conference room, but because a policeman was shouting "go back, a gunman is coming", they remained there. Accused 1 appeared and forced the delegates back into the room. He was holding in his left hand a revolver and in his right a handgrenade without the safety pin on. The delegates were then ordered to go to the cafeteria, and whilst there, the witness noticed that accused 2 was standing next to the hostesses' stand holding a pistol in his right hand.

Georghiou, a special constable attached to the personal bodyguard of Dr. Lyssarides, drew his service revolver (on hearing the shots) and went out of the conference room into the corridor. He saw a man lying on the floor; he moved his head slightly and realized that the victim was El Sebai, because he knew him personally. Georghiou returned to the conference room and whilst there accused 1 entered holding a handgrenade and he was leading the delegates and other people along the corridor into the cafeteria. In entering the cafeteria, he noticed, together with the rest of the people, that accused 2 was holding at gun-point a number of delegates standing behind the hostesses' stand.

There was some sort of difficulty as to the correct number of

shots fired, but according to Christodoulides, a specialist in the installation of simultaneous interpreter systems, he heard three shots; and a few seconds or minutes later a gunman entered the conference room and shouted what he understood to be "all Arabic out". When one of the delegates went back to his desk to collect something, the gunman fired a shot, the projectile of which struck a wall. On the 19th February, this witness found a projectile (*exhibit* 31) which he delivered to Inspector Christophides, a police ballistic expert.

Earlier on, and before the shots were fired, P. C. Loizou and P. C. Antoniades had instructions to keep an eye on the entrance of the "Hilton" hotel and to patrol in the corridor, no doubt with a view to tightening the security measures. At about 11.15 to 11.20 a.m., the two policemen heard three or four shots and immediately they drew their service revolvers and took cover behind the armchairs which were in the hotel lounge.

P. C. Loizou, within a few seconds after he heard the shots, saw a group of people in the corridor with their hands up. Suddenly, he realized that accused 2 was standing over them holding in his right hand an automatic pistol with his finger on the trigger, and in his left hand a handgrenade. The gunman, accused 2, told them to put their guns down immediately. They both obeyed and placed them on the floor, and accused 2 then picked them up. The gun carried by P. C. Loizou was a .32 calibre number A.88542, and the one carried by Antoniades was a .38 calibre revolver (*exhibit* 19).

Accused 2 herded a group of people, including these two policemen, to the cafeteria. Whilst there, they saw accused 1 holding in his left hand an .38 revolver and in his right a handgrenade. Accused 1 was talking with accused 2 and then he turned to P. C. Loizou and ordered him to pick up the phone and connect him with the Government in order to talk to them.

He complied with that order, but as he was unable to get through, he asked accused 2 in English if he wanted another policeman to try again, and the accused agreed.

It appears further that the hands of the hostages, who were separated into two groups—one group consisting of Arabs, Egyptians, Iraqis, Palestinians, Syrians and Sudanis, and

the other group of Africans, Asians, Cypriots and certain other foreigners who happened to be sitting in the cafeteria, were tied up behind their backs with neck ties by a persón who was a hostage and who was ordered to do so by accused 1.

It is to be added that almost immediately after the shots were fired, Poumbouras, who was in charge of the reception, phoned the police at 11.22 a.m., and P. C. Stylianou informed his superiors about the tragic incident. Then Stylianou phoned the fire brigade for an ambulance, and at a very commendable speed, at 11.25 a.m., the medical authorities sent an ambulance. The driver, Yiangopoulos, drove to the Hilton hotel together with a male nurse, Constantinou. The victim, El Sebai, was removed to the ambulance and was taken to the casualty department of the Nicosia General Hospital. The victim was examined by Dr. Andreas Hadjikoutis at about 11.45 a.m., but regretfully, he found that he was already dead. The doctor noticed that the victim had a number of bullet wounds, one on the head, one on the outer surface of the right thigh, one on the surface of the left thigh, and another on the left wrist.

The body of the victim was guarded by the police, and at 4.30 p.m., Dr. Panos Stavrinos, the Government pathologist, in the presence of Inspector Frangos, carried out a postmortem examination on the body of the victim. Externally, Dr. Stavrinos found (a) a round bullet wound 2 cm. long at the right parietal region, which he thought to be the entry wound; (b) slightly stellate fashion wound 4 cm. long, at the left upper part of the occipital region which the doctor thought to be the exit wound of a bullet. Internally, he found that the skull and scalp were severely congested, the meninges were congested and severely lacerated, the brain was moist, oedematous and severely congested. There was a bullet entry wound at the right parietal region. The bullet that had caused this wound was then traced along the base of the brain, lacerating the middle lobe, the ponds, the left occipital lobe, and the left upper part of the cerebellum; and it then caused the exit wound in the stellate fashion appearance at the left upper part of the occipital region. In the opinion of Dr. Stavrinos, the cause of death of the victim was shock and haemorrhage, due to fatal injuries that he received on the head and which were caused by bullet wounds and finally, Dr. Stavrinos concluded that El Sebai's death came within seconds.

It was the case for the prosecution all along that the murder of the victim El Sebai, was the result of a preconceived and pre-arranged plan by the two accused who carried it out acting in concert. It was further alleged that the two accused in committing this attrocious crime, were prompted by a strong motive because of their opposition to the opinions or views held by the victim, and because of his activities which the two gunmen believed were harming the Palestinian cause. With this in mind, I think it is necessary to see what were the acts and deeds of the two gunmen both before the murder of El Sebai, and after, particularly because counsel for the defendants, in a strong and able argument, tried to convince the Court (a) that they intended to take hostages only with a view to informing public opinion of the Palestinian cause; and (b) that they never acted in concert or had a common design with other persons to kill El Sebai. I have already stated earlier that the two gunmen, when they took all the hostages in the cafeteria, informed the police that they wanted to contact the Government of Cyprus, apparently with a view to affording them ways and means to leave Cyprus in safety.

Who were then the two gunmen? According to the first accused, Samir Mohammed Khadar, he is of Jordanian nationality and 27 years of age. He arrived at Larnaca airport on 13th February last from Belgrade via Athens; he stayed at the Kennedy hotel one night, and on the following morning he moved to the Churchill hotel. Accused 2, Zayet Houssein Ahmed Al Ali he is of Kuwaity nationality and 25 years of age. He arrived in Cyprus via Athens on 14th February last. He booked room No. 506 on the 5th floor of the Hilton hotel. This room communicates with room No. 507—having a common bath, and was given by the Manager of the hotel to a certain Reyad Samir Al Ahad, an Iraqi, who also arrived in Cyprus from Athens on the very same date as accused 2. There was unchallenged evidence that Reyad left Cyprus by air at approximately 8.00 a.m. on 18th February, 1978.

Regarding the movements of the two culprits, according to the receptionist of the Churchill hotel Gregoriades, Evangelou the Hilton restaurant manager, Iroulla Neophytou a singer at "Neraidha" night spot, Olfad Imbrahim and Panayiota Kokonidou (who both work as artists at the Maxim cabaret), the accused have been seen during day and night in the company

of each other. Accused 1 was seen at "Neraida" night spot on 15th–16th February in the company of others by Gregoriades. Iroulla Neophytou corroborated his statement and further said that accused 2 was also in their company. According to the latter, the two accused left the night spot at 4.30 a.m. on the 16th February. The two accused were seen also having lunch on 16th February at the "Hilton" restaurant by Evangelou when lunch was being served to the delegates of the conference. When they were asked whether they were attending the conference as delegates, accused 1 replied in the affirmative, but when that witness asked them for their tickets, accused 1 conceded that they were not members of the conference.

In the afternoon of the same day, Neophytou met the two accused in the lounge of the Hilton; and in the evening the accused were again seen together in the dining-room of the same hotel. At night time they visited "Neraidha" and left at about 12.45 a.m. and went to the "Maxim". There they met Panayiota Kokonidou in whose company they stayed till 3.30 in the morning and left when the cabaret closed. Together with this witness, the two accused went to the Churchill hotel and she left to go to her pansion escorted by accused 1 only. Before parting, however, they arranged to meet later on at the Hilton for dinner.

According to Kokonidou, she met the two accused and Reyad Samir Al Ahad and had drinks and dinner together. Accused 1 later on took her to the Maxim and accused 2, together with Olfad Imbrahim joined them there. They all stayed in the cabaret until closing time and they all went to the Hilton in rooms 506–507. As I have said earlier, Al Ahad was sleeping in one of those rooms and apparently Kokonidou and Imbrahim spent the night with the accused in those rooms till the morning of 18th February. Imbrahim was waken by accused 2 who told her to leave as he wanted to go out for shopping. She left at 9.30 a.m.—Kokonidou having left earlier between 8.00–8.30 a.m.

Reverting once again to the two accused at the cafeteria of the Hilton on the 18th, we find them still endeavouring to approach officials of the Government of Cyprus. Accused 1 was doing all the talking and was insisting that the President of the House of Representatives and all the Arab Ambassadors

should be informed to come to the cafeteria within a period of 15 minutes, otherwise he threatened to kill the hostages.

Eventually, the Syrian Military Attaché Mr. Haddad, arrived at the Hilton and went into the cafeteria to see the two ccused. Later on the Minister of Interior also went there with a view to finding a solution with regard to the safety of all concerned, and particularly the hostages. After a lot of bargaining between the Minister and the two accused—nothing was revealed in Court—an agreement was reached for the release of some of the hostages who had been kept in the cafeteria for nearly two hours. In the meantime, the policemen who were also there surrendered their guns to the two gunmen.

According to Inspector Andreas Stephanou attached to C.I.D., on instructions of the Chief of Police he drove a police bus on that day at about 1.25 p.m. and parked it outside the Hilton. He was told to alight and when he did so, he saw accused 2 in the hotel who approached him. Then he signalled to him to board the bus again. Accused 2 was holding a pistol in one hand and a hand grenade in the other. Within a few minutes the hostages were boarding the bus, including the Minister and Dr. Lyssarides. Accused 1, on entering the bus held in one hand a .38 calibre revolver and in the other a hand grenade without a safety pin. During the boarding of the hostages, accused 1 was shouting about something, and then he fired a shot in the direction of the people and a group of journalists. Accused 1 sat on the back seat to the left of the bus, and accused 2 stood inside the door on the step. Then accused 1 told him to start the bus. He already had an idea that their destination was Larnaca airport. Nothing happened during the journey; when they arrived at the airport, accused 1 indicated to him to proceed on to the tarmac and parked the bus at a point which he pointed out to him. Stephanou thought that there were 18 people in the bus, and when he parked the bus he heard accused 1 saying that this was his job and that he came to take them with him.

Then, when it was agreed that a plane would be provided to fly them abroad, accused 1 again ordered all the hostages to board the aircraft; when accused 1 was at the entrance of the plane on the gangway, he handed three guns to Mr. Haddad, the Syrian Military Attaché, who was acting as the interpreter

in the bus. Mr. Haddad, having completed his humanitarian mission, left the plane and handed to Inspector Stephanou two pistols and one revolver .38 which accused 1 was seen holding earlier. Later on he opened it and found inside three expended cartridges and two live bullets. That revolver was handed to Inspector Frangos on the following day. But that was not the end of the drama of the people who boarded the plane, because on the 19th February, 1978, the plane returned to Cyprus for reasons which I shall be narrating later on. Once again Inspector Stephanou had to go to the airport, and was there at 6.10 p.m. He boarded the plane and accused 1 handed to him a .32 revolver. Accused 2 handed to him also a pistol, the very same pistol which he was holding at the Hilton when he first saw him. He handed both weapons to Inspector Christophides the next day.

As to what had happened during the flight from Cyprus, according to Captain Melling, the pilot of Cyprus Airways, when he received instructions, he left Nicosia at 4.30 p.m. on 18th February and went to Larnaca, having volunteered to fly the plane. It was 8.30 p.m. when both accused still armed with eleven hostages went on board the plane. Accused 1 was in the cockpit, and spoke some English. Counsel for the prosecution questioned him in these terms:-

"*Q.* Can you quote him, as far as you can remember?

A. May be not in the exact words but I will try. He said that he did not wish to harm any of the crew and that they had both come to Cyprus to kill this man. He said 'I killed him because he is a bad man and a spy and a traitor to the Arab cause'. The only conversation I had was with accused No. 1."

When the plane took off accused 1 told the Captain to fly to Tripoli, but when permission was not given by the authorities to land anywhere in Lybia, the captain headed towards Aden. Ultimately, for various reasons, they landed at Djibudi airport in the early hours of the morning of February 19. After refuelling, the Captain took off and, having not been given permission to land anywhere else. arrived at Larnaca airport at about 5.20 p.m. of the same day. In the meantime, the two

accused at different times changed between them the pistol and the revolver. Finally, the two gunmen surrendered to the authorities in Cyprus and the hostages were freed.

On the following day, 20th February, Inspector Komodikis, the investigating officer at Nicosia C.I.D., arrested the two accused on the strength of a judicial warrant. Having explained the reason for their arrest and having cautioned them in English, they remained silent. On the same date, a statement was obtained from accused 1 at Nicosia Central Prisons, but after a trial within a trial, the trial Court reached the conclusion that the statement was inadmissible because in those circumstances it could not rule out the possibility that its contents did not present the real picture of what the accused said or wanted to say (in English).

Turning now to the scene of the crime once again, it appears that the first policeman who arrived at the Hilton on the 18th February, 1978, was P. S. Mateas at 11.40 a.m. He found there two expended cartridges (*exhibit* 27), two missiles (a fired bullet and a bullet jacket (*exhibit* 28)), which he delivered to Inspector Christophides the ballistic expert who arrived at the scene at 2.30 p.m. The latter carried out also a search and discovered in the bookshop of the Hilton another expended cartridge (*exhibit* 29). He revisited the scene of the crime on February 19, and on searching again, he discovered in the cloakroom part of another bullet jacket (*exhibit* 30). He also examined both the revolver, *exhibit* 33, and the Tokarev pistol (*exhibit* 34) and the magazines and found that the two magazines fitted in the said pistol.

He found also that the revolver was serviceable. He then fired six rounds of ammunition with the Tokarev pistol (*exhibit* 34) from the magazine which contained eight rounds and found both the pistol and the ammunition in a serviceable condition. He further made a microscopic examination and comparison of the Tokarev pistol and the rounds of ammunition. After he compared the two expended cartridge cases, (*exhibit* 27), as well as the expended cartridge case which he himself collected from the bookshop (*exhibit* 29), with the test cartridge cases which he fired in the Tokarev pistol, he ascertained that exhibit No. 27 and *exhibit* No. 29 had been fired in the Tokarev pistol

(*exhibit* 34). He also compared the one fired bullet and the bullet jacket (*exhibit* 28), as well as the part of the bullet jacket, (*exhibit* 30) with the test bullets which he fired through the barrel of the Tokarev pistol and he ascertained that all, *viz.*, *exhibits* 28 and 30, were fired through the barrel of that pistol. *Exhibits* 27 and 28 were photographed by P. S. Akamas.

The trial Court in its long and detailed judgment, found from the evidence before them on the whole that the two accused killed the victim in the execution of a preconceived and well-prepared plan. After dealing with the question of premeditation and having addressed their mind to a number of authorities on that issue, the Court came to the conclusion that the two accused killed El Sebai in the execution of their well-prepared and preconceived plan, although they had ample time to reflect on their decision and desist from carrying out their intentions. Finally, the Court having considered the whole evidence before it, found that the prosecution had proved their case beyond any reasonable doubt and that both accused were guilty of premeditated murder, and sentenced both of them to death.

As I have said earlier, the appellants have raised on appeal a number of legal points and I find it convenient to start first with the complaint raised in ground 3 that the conviction of the appellants should be set aside once the trial Court wrongly admitted and acted upon the alleged extrajudicial confessions of appellant 1 to Captain Melling, G. Georghiou and L. Loizou. Indeed, counsel argued with great force (a) that those confessions were in effect conflicting with themselves, because appellant 1 was alleged to have made them in a language which was not his own and whose knowledge of it was wholly insufficient; (b) that none of the witnesses made any record of what appellant 1 was alleged to have said, and in taking into account all the surrounding circumstances of this case, it would be unsafe to act upon such admissions; and (c) that in any case the confessions of appellant 1 were not evidence against appellant 2.

The trial Court, having watched the demeanour of the witnesses in the witness box, said that they had not the slightest doubt in their minds that they were all witnesses of truth. But with the greatest respect to the Court, nothing was said, or in any way any criticism was heard or made regarding the

evidence of Captain Melling, and Loizou on this point. Indeed, I have no doubt at all that the Court was aware that in spite of the fact that those admissions of appellant 1 were made to both witnesses, yet, no such reference was made at the preliminary enquiry when the prosecution was presenting their case, but only at the Assize Court. In fact the latter, P. C. Loizou made no reference at all about the admission of accused during the examination in chief, but when he was re-examined he was questioned by counsel in these terms:

"*Q* You were asked by the defence if you had heard or seen anything and you said that some of the things you heard and saw, you can relate. To be more precise, I want you to tell us what you heard accused No. 1 say in a language that you understood

A We are Palestinian Don't affray (*i.e* be afraid) anything. We are friends of yours We kill this man because he was friend of Israel and he write different articles in your gazette".

The question therefore arises whether, irrespective of the credibility or not of the two witnesses—being a factual issue—the Supreme Court is entitled to interfere and set aside those findings on the ground that under the circumstances of the case they were unsafe or unsatisfactory.

In a recent case, *Kouppis* v. *The Republic* (1977)* 11 J.S.C 1857, the Supreme Court, dealing with the very issue as in this case, *viz.*, that one of the key witnesses in giving evidence at the preliminary inquiry failed to refer to a most damning statement with regard to the accused, and only referred to it later at the trial of the case before the Assize Court at Larnaca, I had reached the conclusion that in those circumstances it was unsafe or unsatisfactory to rely on the evidence of that witness. In fact, I had this to say at p 1958.-

> "Having reached the opinion that the judgment of the trial Court should be set aside on the ground that under the circumstances of the case it is unsafe or unsatisfactory, (having a reasonable doubt or a lurking doubt) and notwithstanding the fact that the Judges had every advantage,

* To be reported in (1977) 2 C.L.R.

I shall allow the appeal and quash both the conviction and the death sentence, exercising my additional powers under s. 25(3) to interfere with the judgment of the trial Court on appeal".

With this in mind, and particularly because P. C. Loizou in giving evidence in chief, did not even refer to the confessions but only in re-examination, I have reached the conclusion that it was unsafe for the Court to act on the evidence of the two witnesses in the circumstances of this case. I would lay particular emphasis on the fact that my decision to interfere has nothing to do with the question of credibility of the two witnesses, but because it is based on a well-established principle accepted both in England and in Cyprus in *R.* v. *Cooper* [1969] 1 All E.R. 32 at p. 33; in *Stafford* v. *D.P.P.*, [1973] 3 All E.R. 762 at p. 764; in Hjisavva alias *Koutras* v. *The Republic* (1976)* 2 J.S.C. 302 at p. 327; and in *Anastassiades* v. *The Republic* (1977)** 5 J.S.C. 516 at pp. 763-764. I would reiterate once again that we interfere with the judgment of the trial Court in circumstances where we are of the opinion that the verdict is unsafe or unsatisfactory. But with regard to the explanation of the latter witness I think I must make it quite clear that I am not prepared to accept that the reason why he did not refer to the admissions of appellant 1 was that because he was not asked by counsel for the respondent. It was his duty—being a police officer—to place before the trial Court what he has seen or heard.

Turning to Georghiou, it is clear that in giving evidence before the Assize Court, he made it quite clear that when he found himself in the cafeteria along with the rest of the hostages, he heard accused 1 saying: "We are Palestinians, we come specially for that man, we killed that man because he was friend with the Israelis and he wrote some articles in his newspaper against Palestinians". This witness was cross-examined at length and he was questioned particularly about the statement which he has given at the preliminary enquiry in these terms:-

"*Q.* In the Preliminary Inquiry you said 'we came to kill him' and today you said 'we killed him'. Do you

* To be reported in (1976) 2 C.L.R.

** To be reported in (1977) 2 C.L.R.

realise the difference between 'we came to kill him' and 'we killed him'? This is a significant difference, which of the two is correct?

A. 'We come to kill him'.

Q. So when you said today in Court 'we killed him' you made a mistake.

A. Yes.

Q Why should I not suppose that you made other mistakes in this statement you made today? Could you have made other mistakes?

A No."

It is true that the evidence of this witness contains some inconsistency, but having given this matter my best consideration and having regard to the fact that this witness frankly admitted his mistakes, I find myself unable to accept the contention of counsel and I am prepared to support the finding of the Court, as I find no reason for interfering I would, therefore, dismiss this contention of counsel, once again.

There was a further complaint by counsel that the Court in admitting the extrajudicial confessions must have been influenced by them in reaching their verdict of guilty against the appellants With respect, I think the Court quite rightly proceeded to examine the confessions, independently of the other material, and I find no room for complaint, at this stage, of the Court being influenced once admissible evidence was accepted

Turning also to the question whether appellant 1 knew enough English the trial Court said that from the whole evidence before them, they were satisfied that he did know enough English to express himself in the way described before them by the persons who heard the admissions and I do not think that there is room for interfering on this point

Counsel in his anxiety not to spare any labours in fully arguing the appeal, went even further in submitting that even if those admissions or confessions of appellant 1 were admissible evidence, then again such admissible evidence could not be treated as evidence against appellant 2, because whatever defendant 2 says not on oath is not evidence against the other

co-defendant, and that the Court misdirected themselves in reaching the conclusion that because accused 1 admitted killing El Sebai, defendant 2 immediately was also guilty of the same offence. Counsel relied mainly on two cases: *Henry Beecham*, 16 Cr. App. R. 26 at p. 29; and *Charles Reginald Brown*, 29 Cr. App. R. 106 at p. 113, for the proposition that wrongful admission of evidence is sufficient to quash the conviction.

Having had the opportunity of reading the decisions in the two cases quoted earlier, I find myself in agreement with the proposition that when inadmissible evidence was accepted, the summing up was defective, and that where points of law were wrongly decided against an appellant, then the Supreme Court should quash the conviction unless it is of the opinion that in the circumstances it could apply the proviso. In effect, the question is whether notwithstanding the irregularity, the jury must inevitably arrive at the same verdict of guilty against the appellant. But this is not the position in the present case because no miscarriage of justice has occurred for the reasons I have given earlier, and particularly because the evidence as to the confession was properly admitted by the trial Court. I had interfered only because I thought it was not safe to rely on the evidence of Captain Melling and P.C. Loizou and no question of the proviso is called for. I would dismiss this contention of counsel.

There was another complaint by counsel in ground 5 that the conviction of both appellants should be set aside because of the glaring misdirection in law by the trial Court in following a passage from the judgment in *Vrakas* v. *The Republic*, (1973) 2 C.L.R. 139, which passage was applicable only to that case, and erroneously thought that they had a right to comment on the failure of the appellants to give evidence on oath as a matter of course when the Court had a discretion only to do so. I had the occasion, during the hearing of the present appeal to state that the trial Court in relying on that case, overlooked the fact that the case of *Anastassiades* v. *The Republic*, (1977)* 5 J.S.C. 516, overruled the *Vrakas* case regarding the failure of an accused to give evidence on oath. The trial Court in the present case, in dealing with the failure of both appellants to

* To be reported in (1977) 2 C.L.R.

take the stand and give evidence on oath, thought that they were entitled to comment upon such failure to do so. In the circumstances of this case, the Court said that the failure of the accused to give evidence in their own defence is a factor related to the issue of their guilt. In reaching that conclusion, the cases of *R.* v. *Sparrow* [1973] 1 W.L.R. 488, and *Pantelis Vrakas and Another* v. *The Republic*, (*supra*), were followed.

It is true that in *Vrakas* case the Full Bench said at page 188:

"Without, in the least, departing from, or doubting, the principle that it is not to be expected from an accused person to prove his innocence, but it is up to the prosecution to establish his guilt beyond reasonable doubt, we are of the view that the failure of appellant 1 as an accused, to give evidence in his own defence is a factor related, in the circumstances of the present case, to the issue of his guilt."

The very full argument which we have had in the present case has caused me to change the views which I held when Vrakas case was decided. But it has convinced me that I made a mistake in agreeing and not writing a separate judgment, when I had my reservations even at that time.

In *Anastassiades* case (*supra*), the President of the Supreme Court, in dealing with the failure of an accused person to give evidence on oath in his own defence at the trial, said at p. 686:–

> "..... in my view, in the *Vrakas* case, *supra*, the failure of one of the appellants to give evidence, in his own defence, was treated as a factor related to the issue of his guilt in the light only of the particular circumstances of that case, without this Court intending to lay down then an inflexible rule of general application, I have reached the conclusion that the safest course, in the present case, is to disregard the fact that the appellant has elected to make an unsworn statement from the dock, instead of giving evidence on oath, and, thus, not to treat it as a factor influencing the outcome of this appeal, especially as the trial Court itself made no adverse comment in this respect."

I take the opportunity to state that I fully approve and endorse the statement of the law made by the President with which I had concurred in *Anastassiades* case. It would indeed make a mockery of the law that in spite of the fact that the accused has

a right not to go into the witness box to give evidence but elects to make an unsworn statement from the dock, that would be considered a factor related to his guilt. With this in mind, I have reached the conclusion that the trial Court wrongly decided and misdirected themselves in following the principle decided in the *Vrakas* case. The question is, can we in these circumstances apply the proviso?

In the *Beecham* case, Darling, J., dealing with the very same question had this to say at pp. 28 and 29:-

> "We have considered the cases cited to us. There are decisions which seem to us sufficient. In W. F. Wilson, 11 Cr. App. R. 251, 1915, Avory J. gave the judgment of the Court: and in Williams and Woodley 14 Cr. App. R. 135, 1920, Lord Reading C.J. quoted with approval the language of Channell J. in Cohen and Bateman, 2 Cr. App. R. 197, 1909, at p. 208, to the effect that the question is whether, notwithstanding the irregularity, the jury must inevitably have arrived at the same verdict of guilty against the appellant.
>
> In our opinion the expression of the true principle on which this proviso is to be applied is to be found in those two cases, and we have unanimously come to the conclusion, on a careful examination of all the indisputably legal evidence, that the jury in the present case must have found the appellant guilty of manslaughter.
>
> We have unhesitatingly come to the conclusion that, even had there been a perfect summing up and even had that question not been allowed in cross-examination and the answer given, the jury, who heard all the evidence, must certainly have come to the conclusion that the appellant was guilty of manslaughter."

In *Charles Reginald Browne*, [1944] 29 Cr. App. R. 106, the conviction has been quashed. Cassels, J. in delivering the judgment of the Court of Criminal Appeal, said at pp. 112-113:-

> "What this Court has to decide is: Was this a satisfactory trial? Did the jury arrive at a proper conclusion upon properly admitted evidence? A jury is sworn to give a verdict according to the evidence. It is not sworn to give a verdict according to any suggestions or propositions

which may have been followed up in the course of the trial. This jury had evidence for the prosecution, then evidence for the defence, then more evidence for the prosecution, and in addition to that listened to an inadequate summing-up.

From all those circumstances, this Court has come to the conclusion that this conviction cannot stand It was suggested that we might put into operation the proviso to section 4(1) of the Criminal Appeal Act, 1907 The proviso says 'Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred' This Court cannot say that no substantial miscarriage of justice has occurred If this had been a regular trial, with the recognised procedure properly observed, it may well be that the jury would have had a doubt, and would have said. 'We are not quite satisfied ' We cannot be certain on the material before us that in any circumstances the jury would have returned a verdict of guilty We have, therefore, come to the conclusion that this conviction cannot stand, and it is accordingly quashed "

In the *Anastassiades* case, dealing with the question as to whether the proviso to s 145(1)(b) of our Criminal Procedure Law Cap 155 should apply, I said this at pp 804–805 –

"Having reached the conclusion that in this case there had been a substantial miscarriage of justice on a number of issues, I have carefully and anxiously considered, in the light of the reasons I have stated in my judgment, what would be the proper course to adopt in deciding this appeal Having considered a number of cases, such as *Ioannis Nestoros* v *The Republic*, 1961 C L R. 217, *Petrides* v *R.*, 1964 C L R 413 *Costas Hjicosta* (*No* 2) v *The Republic*, (1965) 2 C L R 95, *Andreas Zannettos* v *The Police*, (1968) 2 C L R 232, *Aristotelis Loizias alias Aristos* v *The Republic*, (1971) 2 C L R 263, I have made up my mind, in the interest of justice, that this is not a case in which I would be prepared to apply the proviso to s 145 (1)(b) of the Criminal Procedure Law, Cap. 155."

Directing myself with these judicial pronouncements, I have reached the conclusion that this is not a case in which I would be prepared to set aside the judgment of the trial Court because no substantial miscarriage of justice has actually occurred. I would, therefore, dismiss this ground of the appeal.

Dealing now with ground 7, counsel further argued that the evidence of the ballistic expert was erroneously accepted by the trial Court and wrongly drew the conclusion that the expended cartridges and the projectiles found near the body of the victim were fired from the Tokarev pistol (*exhibit* 34) which was later found in the possession of accused 2; and because no photos were taken by the expert regarding the *exhibits* (except one projectile and one fired bullet); and if produced it would enable the Court to form its own opinion on the correctness of the expert's evidence; and because that failure has deprived the Court of the very basis on which their opinion should be based. Furthermore, counsel submitted that the trial Court approached the expert's evidence and accepted it, acting contrary to the dicta in the case of *Anastassiades* v. *The Republic* (*supra*).

In the *Anastassiades* case, (*supra*), speaking about the duties of expert witnesses, I have adopted and followed a statement encunciated in *Davie* v. *Edinburgh Magistrates* (1953) S.C.34 at p. 40 where Lord President Cooper said:–

> "There duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

Furthermore, the Court of Session in that case repudiated the suggestion put forward that the Judge or jury is bound to adopt the views of an expert even if they remain uncontradicted, because, the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.

In *Kouppis* v. *The Republic* (*supra*), 1860, I have once again adopted and followed the statement in the *Davie's* case, and in criticising the evidence, I had this to say at pp. 1951–1952:–

> "..... although the evidence of the expert, as I have said earlier, remains uncontradicted, and having had the occasion

to go with great care through the whole of his evidence, I have reached the view without hesitation that the evidence regarding his examination of the coat of the victim is not safe, not only because of the long passage of time, but also because his observations, being the result of an examination with the naked eye, do not give that certainty required in a capital case, in the absence of being also tested in a laboratory, as was the case in *Anastassiades* case (1977) 5 J.S.C. 516. Furthermore, I would add that in the *Anastassiades* case (*supra*) I have reached the conclusion that the trial Court did not have in mind the warning given by Lord President Cooper in *Davies* case (*supra*), to enable the Judges to form their own independent judgment by the application of these criteria to the facts proved in evidence....."

The trial Court, in dealing with the evidence of the ballistic expert Mr. Christofides, had this to say:-

"We have examined the evidence of this witness in the light of the judicial pronouncements in the recent case of *Anastassiades* v. *The Republic*, (1977) 5 J.S.C. 516, and of the relevant passages of the English cases therein cited with approval. Inspector Christophides is, to our satisfaction, a properly qualified and adequately trained expert with enough practical experience. He has been accurate, succinct both in his findings and the opinions he expressed. In answering questions put to him by the Defence counsel, he has properly and adequately reasoned his opinions which he had given regarding the several *exhibits* which he had examined with the help of all necessary scientific equipment, having made all necessary tests and comparisons. He has persuaded us that he has reached at the correct conclusions and we exclude any possibility of his being mistaken. We find him both truthful and reliable and we feel safe to act upon his evidence.

We are satisfied that the projectile (*exhibit No.* 31) which was found by Nicos Christodoulides (P.W.26) inside the conference room was fired through the barrel of the revolver (*exhibit No.* 19) which was at the time in the hands of accused No. 1.

We are also satisfied that the two expended cartridges

(*exhibit No.* 27) collected from the corridor by P. S. Mateas (P.W.15), the one expended cartridge (*exhibit No.* 29) which himself (P.W.41) collected from inside the book shop, the fired bullet and the bullet jacket (*exhibit No.* 28) collected by P. S. Mateas from the same corridor, as well as the part of the jacket of a third bullet (*exhibit No.* 30) collected by the witness from inside the cloakroom, were all fired through the barrel of the Chinese Tokarev pistol (*exhibit No.* 34).

Exhibits Nos. 28 and 30 were not examined with a view of ascertaining whether either of them bore any traces of human blood or tissue and there is no direct evidence establishing that anyone of the said missiles penetrated the body of Sebai.

The presence by the scene of the murder of the aforesaid *exhibits Nos.* 27, 28, 29 and 30 is consistent with the firing at the scene of three shots through the pistol (*exhibit No.* 34). Although the scene was cordoned off upon the arrival of P. S. Mateas (P.W.15) at 11.40 a.m., no other cartridges or missiles were found. The finding that three shots were fired tallies completely with the evidence of Rousogeni (P.W.17) whom learned counsel for the Defence urged us to believe.

We shall now pause for a moment in order to refer to some of the inferences which we have inevitably drawn from the primary facts hereinabove set out.

We cannot resist drawing the inference that *exhibits Nos.* 27, 28, 29 and 30 are parts of the three rounds of ammunition fired by the pistol, (*exhibit No.* 34) which actually hit and caused the death of the victim, Sebai.

The lethal weapon (*exhibit No.* 34) was seen in the hands of accused No. 2 inside the Hilton after the killing and before the hostages and the two accused left in the police bus. During the flight it was being carried at times by both accused and it was ultimately surrendered to the police by accused No. 2. Neither accused No. 1 nor accused No. 2 gave any explanation as to when and how this gun came into their possession. We have no explanation at all from them which might tend to shake the otherwise

irresistible inference which one has to draw from the fact that the lethal weapon was in their possession in the Hilton hotel so shortly after the fatal shots were fired from it."

I have considered very carefully everything which was said or could be said by counsel in his criticism of the trial Court in a long and forceful argument. But irrespective of the difficulties created by the removal of some of the *exhibits* from the scene of the crime—without photographing them and without pointing out the exact place where they were found, and not forgetting that the Court had not been shown the photographs, and also that they were faced with some difficulties in following some of the points appearing in the photographs, nevertheless, I am satisfied that the ballistic expert has discharged his duty and has furnished the Court with the necessary scientific criteria. This becomes in my view more obvious when one reads through the long and exhaustive cross-examination made by counsel for the appellants in touching all the points, and particularly whether the expert found sufficient characteristics caused by the extractor as well as sufficient breech block characteristics on the cartridge heads; and with regard to his omission to make a chemical analysis of the projectiles—which counsel alleged was fatal to his identification.

It will be recalled that this expert, speaking about the characteristic markings, said that he had examined them under the comparison microscope and found sufficient individual characteristics and formed the opinion that all of them had been fired by the same weapon. To a further question why he was not in a position to show to the Court those characteristic markings, he said that he could not do so unless he put them under a comparison microscope.

To another question with regard to his failure to carry out a chemical analysis of the projectile and as to whether such analysis could provide valuable evidence, his reply was that it depended on what one was trying to find out. He further said that in the case of identification, the chemical analysis of a projectile is unnecessary.

With this in mind, I am sure that the trial Court, having before them the necessary scientific criteria for testing the accuracy of their conclusion, have formed their own indepen-

dent judgment by the application of those criteria to the facts proved in evidence. The mere fact that the Court treated the evidence of the expert as regards admissibility like that of any other independent witness and said that "we believe that he is a truthful witness" that does not in my view give a cause for complaint once the scientific criteria were before them, and therefore, in my view, the Judges have not acted contrary to the dicta in *Anastassiades* case, because in considering the testimony of the expert, they could have accepted his evidence.

As I said earlier, in spite of some of the difficulties in the present case, I think the Court correctly approached and applied the scientific criteria for testing the accuracy of their conclusions and I am not prepared to say that they went wrong in any way and/or reached unsafe conclusions as to the facts. I would, therefore, dismiss this ground of appeal also.

Counsel in arguing ground 8 of the appeal submitted that the Court wrongly came to the conclusion that the facts as found by them were consistent only with the guilt of the appellants and inconsistent with any other rational conclusion, when it was equally consistent with the appellants guilt as well as with their innocence.

The trial Court having reviewed and analysed the evidence based on circumstantial evidence, drew certain inferences—in the absence of direct evidence—and said:

> "We cannot resist drawing the inference that *exhibits Nos.* 27, 28, 29 and 30 are parts of the three rounds of ammunition fired by the pistol (*exhibit No.* 34) which actually hit and caused the death of the victim, Sebai.
>
> The lethal weapon (*exhibit No.* 34) was seen in the hands of accused No. 2 inside the Hilton after the killing and before the hostages and the two accused left in the police bus. During the flight it was being carried at times by both accused and it was ultimately surrendered to the police by accused No. 2. Neither accused No. 1 nor accused No. 2 gave any explanation as to when and how this gun came into their possession. We have no explanation at all from them which might tend to shake the otherwise irresistible inference which one has to draw from the fact that the lethal weapon was in their possession in the Hilton hotel

so shortly after the fatal shots were fired from it. ..... The only reasonable conclusion to be arrived at in the circumstances is that either accused No. 1 or accused No. 2 must have fired the three shots at the victim through the pistol (*Exhibit No.* 34) which they possessed, to the exclusion of any other person."

In *McGreevy* v. *Director of Public Prosecutions* [1973] 1 All E.R. 503 the House of Lords dealt with a similar point. Lord Morris of Borth-y-Gest having dealt with the facts in a case of murder and having dealt with the point of law raised, said at p. 505:

"In presenting his most careful and lucid argument counsel formulated his proposition of law in somewhat varied terms as follows: that in a criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial Judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.

I think that it is apparent that if the proposition were accepted there would hereafter be a rule of law which it would be obligatory on the Judges to follow. As I will indicate it would, in my view, be a new rule. It would be a rule applicable in criminal cases where (as to the commission of the act) the prosecution case (or an essential ingredient of it) depended entirely on circumstantial evidence. It is not contended that the rule would apply if the case depended partly on direct and partly on circumstantial evidence. The application of the rule would therefore depend on defining and identifying what evidence is direct and what is circumstantial and deciding which label was applicable. If the rule existed then despite the qualification that the explanation need only be in 'terms appropriate to the case' it might well become a virtual necessity

for a Judge to employ the language of the concluding words of the proposition.

It has first to be considered whether the proposition would involve the formulation of a new rule binding on Judges. If it would then the question arises whether such a rule would be desirable."

Then his lordship having referred to certain criticisms of the summing up which were made by learned counsel, continued in these terms at pp. 507–508:–

"The argument on behalf of the appellant in the terms of the proposition of law which I have set out seems to me inevitably to involve the suggestion that in the absence of a direction in the terms propounded a jury would not be likely to consider evidence critically so as to decide what it proves.

I must turn, therefore, to consider the two questions to which I have adverted: (a) does the proposition formulated on behalf of the appellant state the existing law and (b) if not—should there be a new rule which will be binding on Judges? Reliance was placed on the report of *R.* v. *Hodge*.[1] The accused in that case was charged with murder and the trial in 1838 took place at the Assizes in Liverpool. The short report of the case records what Alderson B.[2] said in summing-up to the jury. He told them that the case was 'made up of circumstances entirely' and that before they could find the prisoner guilty they must be satisfied –

> 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion that that the prisoner was the guilty person.'

He also pointed out to the jury, to quote from the report, the proneness of the human mind to look for (and often slightly to distort) the facts in order to establish a proposition while forgetting that a single circumstance which is inconsistent with such a conclusion is of more importance

1. [1838] 2 Lew. C.C. 227.
2. [1838] 2 Lew. C.C. at 228.

than all the rest inasmuch as it destroyed the hypothesis of guilt. In the report of the case it was said that the evidence was all circumstantial and contained no one fact which taken alone would lead to a presumption of guilt. No one could doubt that the wise words used by the learned Judge were helpful and admirable and as such were worthy of being recorded. But there is no indication that the learned Judge was newly laying down a requirement for a summing-up in cases where the evidence is circumstantial nor that he was himself employing words so as to comply with an already existing legal requirement.

The painstaking research of counsel for the appellant showed that in some countries in the Commonwealth both learned Judges and also legal writers have made reference to the 'rule' in Hodge's case. I do not propose to refer to all the citations which counsel made. The singular fact remains that here in the home of the common law Hodge's case has not been given very special prominence: references to it are scant and do not suggest that it enshrines guidance of such compulsive power as to amount to a rule of law which if not faithfully followed will stamp a summing-up as defective. I think that this is consistent with the view that Hodge's case was reported not because it laid down a new rule of law but because it was thought to furnish a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial."

Later on his lordship continued his speech in these terms at pp. 510-511:

"In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. ..... Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.

In my view, it would be undesirable to lay it down as a rule which would bind Judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt. In the present case there were only two possible verdicts: one was a verdict of not guilty and the other a verdict of guilty. ..... The issue before the jury was whether it was the appellant or whether it was someone else who killed the deceased. If the jury were satisfied beyond reasonable doubt that it was the appellant they must have been satisfied beyond reasonable doubt that it was no one else. They could only have been satisfied beyond reasonable doubt of the appellant's guilt if the evidence which they accepted led them irresistibly to that conclusion.

To introduce a rule as suggested by learned counsel for the appellant would, in my view, not only be unnecessary but would be undesirable. In very many criminal cases it becomes necessary to draw conclusions from some accepted evidence. The mental element in a crime can rarely be proved by direct evidence. I see no advantage in seeking for the purposes of a summing-up to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence (a term which would need to be defined) the Judge becomes under obligation to comply when summing-up with a special requirement. The suggested rule is only to apply if the case depends 'entirely' on such evidence. If the rule is desirable why should it be so limited? And how is the Judge to know what evidence the jury accept? Without knowing this how can he decide whether a case depends entirely on circumstantial evidence? If it were to apply not only when the prosecution case depends entirely on circumstantial evidence but also if 'any essential ingredient' of the case so depends there would be a risk of legalistic complications in a sphere where simplicity and clarity are of prime importance."

Finally his lordship in dismissing the appeal said:

"In agreement with the Court of Criminal Appeal I would

reject the contention that there is a special obligation on a Judge in the terms of the proposition of law that I have set out. There should be no set formulae which must be used by a learned Judge. In certain types of cases there are rules of law and practice which require a Judge to give certain warnings although not in any compulsory wording to a jury. But in the generality of cases I see no necessity to lay down a rule which would confine or define or supplement the duty of a Judge to make clear to a jury in terms which are adequate to cover the particular features of the particular case that they must not convict unless they are satisfied beyond reasonable doubt."

As long ago as in 1934 in Cyprus the Supreme Court in *Rex* v. *Mentesh*, 14 C.L.R. 232 in a case of murder followed the principle laid down in *Rex* v. *Hodge supra. viz.*, 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.

I think, having read the judgment of Lord Morris, it is clear that the dictum of Alderson B. in *R.* v. *Hodge supra*, has not been given very special prominence and it did not lay down a new rule of law. In fact the House of Lords made it quite clear in dismissing the appeal that there was no misdirection in the summing up and that there was no duty on the trial Judge to give the jury a special direction, telling them in express terms that before they could find the accused guilty they had to be satisfied, not only that the circumstances were consistent with his having committed the crime but also that the facts proved were such as to be inconsistent with any other rational conclusion. On the contrary it was made clear that it was sufficient for the trial Judge to direct the jury that they had to be satisfied of the guilt of the accused beyond reasonable doubt. With this in mind I should have added that although reference was made of *Rex* v. *Hodge supra* in *Vrakas* case, nevertheless, nowhere it appears in the judgment that the Court decided one way or another that the trial Judges were bound in a case which depended wholly or substantially on circumstantial evidence that there was a duty on them to warn themselves in the terms suggested in *R.* v. *Hodge supra.*

With respect I would adopt and apply the dictum of Lord

Morris and state that once the trial Judges have found the accused guilty beyond reasonable doubt, I think there is no room for complaint by counsel that they misdirected themselves, in reaching the conclusion that the facts as found by them were consistent only with the appellants' guilt, and inconsistent with any other rational conclusion. In any way, once the trial Court found the appellants guilty beyond reasonable doubt they did not have to proceed further because *R.* v. *Hodge* is not laying down a new rule of law. I would, therefore, dismiss this ground of law also.

I turn now to ground 9. In presenting his most careful and lucid argument counsel submitted that the Court erroneously reached the conclusion, based on inferences, that the appellants were acting in concert for the commission of the murder of the complainant; and that in the absence of such evidence, both appellants should have been acquitted: (a) because the Court accepted that there was no evidence as to who fired the fatal shots; (b) there was no direct evidence of common design to murder the victim; and (c) that the inferences drawn by the trial Court from the evidence that appellants were acting in concert to murder the victim, were unjustified, erroneous, based on conjecture and not on evidence.

The trial Court, having observed that very rarely direct evidence is available regarding the nature and extent of the common design or purpose of co-adventurers, said that in the majority of cases, including the present one, common design is a matter of inference from the acts of the accused persons and from the facts as proved before the Court. In dealing with the conduct of each accused, immediately after El Sebai was killed, the Court said that it left no doubt in their minds that they were at the time executing a well-studied strategic plan and that each accused knew the movements and actions of the other and each co-ordinated his role to that of the other in point of time and area of operation. The pistol, (*exhibit No.* 34), was involved both in the incident of killing El Sebai, and the incident of taking and removing the hostages from Cyprus. Killing and taking of the hostages had such a sequence in point of time that they felt bound to infer that they were nothing more than two phases of the same incident. Finally the Court having excluded any possibility of the two incidents being separate and distinct, *viz.*, to have been committed out of mere

coincidence in the same hotel; and at the same time, by two different groups of persons acting independently and without notice or knowledge of each other's acts, reached the conclusion that the only reason for which the appellants admittedly took the hostages was to force their safe exit from Cyprus and thus escape from the consequences of their having unlawfully killed El Sebai.

It has been said in a number of cases that where several persons are engaged in a common design and another person is killed, whether intentionally or unintentionally by an act of one of them done in prosecution of the common design, the others present are guilty of murder, if the common design was to commit murder, or to inflict felonious violence and violently to resist all opposers.

The Court of Criminal Appeal dealt with the question of common purpose in *R.* v. *Pridmore*, [1913] 29 T.L.R. 330, a case of shooting with intent to murder, and the facts are these:

> "The appellant and another man were engaged in night poaching, one of them having a gun and the other a stick. Finding that they were followed by three keepers, the two men turned round, one of them saying, 'stand back, stand back', and the other, putting the stick that he was carrying on his shoulder, continued to retire facing the keepers. One of the keepers then ran forward to the poacher who carried the gun; the other two ran towards the poacher with the stick. The poacher with the gun fired at one of the keepers injuring him seriously. On the trial of the two poachers for shooting with intent to murder, the jury found both prisoners guilty; they said they were unable to say which of the two fired the shot, but that they were agreed that the intention was to prevent arrest at all costs even to the extent of murder, and that the prisoners were acting with a common purpose. No evidence was offered by the prosecution of any actual arrangement made between the prisoners to act with a common purpose other than their actions and conduct when they became aware of the keepers approaching them".

Mr. Justice Phillimore, delivering the judgment of the Court, said at p. 331:-

> "The main question that had been raised was whether

there was any evidence to justify the learned Judge in leaving the question of common purpose to the jury. When it was all threshed out, what was the case as to the gestures of the man with the stick?. If with a stick—a formidable stick 3 ft. 6 in. long or more—he faced round towards the keepers, whether from hearing his companion with the gun say 'Stand back, stand back' or to see what was happening, if he held his stick in a threatening attitude, showing that if the keepers came near enough he would strike even though he was retiring—in such a case the jury might well have thought that each of these men showed fight for himself, and also for his companion. They agreed there was not much to support such a finding. But there was in their opinion evidence to support it, and therefore, the appeal must be dismissed."

The question of common design was examined in *King* v. *Reginam*, [1962] 1 All E.R. 816. In that case, the appellant and Y. were tried in Barbados for the murder of P. The case for the Crown was that the two accused were acting in concert, and the trial Judge, in his summing-up to the jury, told them that, unless they came to the conclusion that the two accused had had a common design, the jury could not possibly convict both of them. The jury found both the accused guilty. On appeal to the Federal Supreme Court of the West Indies, the appellant's appeal was dismissed and Y.'s appeal was allowed and his conviction was quashed. On appeal by the appellant to the Privy Council.

Lord Morris of Borth-y-Gest said at p. 818:-

"Though the statement of each accused was evidence against him or her (but not of course against the other), the statement of each was of an explicatory nature. There was undoubtedly some direct evidence against the appellant which, if the jury accepted it, was evidence against her of the existence of motive and, always provided that the jury accepted it, there was some evidence against her that it was she who used the knife, though it was not suggested that the knife wounds were a cause of death. Apart from such or similar parts of the evidence, the case against each accused either of being the actual killer or of being an accessory or principal or participating party was mainly

inferential and circumstantial. In a careful and detailed summing-up, the learned Judge told the jury that they should consider the evidence against each accused separately, and reminded them very clearly that the unsworn statement of the one was not evidence against the other. He said:

> 'The Crown ask you to convict both because they say the murder was a result of joint agreement or a pre-arranged plan between the two accused to kill Peterkin. Or to put it another way: that they were acting in concert.' "

Later on Lord Morris continued at p. 819:

> "Having regard to the terms of the summing-up, there can be no room for doubt that, in returning verdicts of guilty against both accused, the jury must have decided that they were acting in concert. The view of the jury may have been that it was the appellant who struck the blow or blows that killed Peterkin, and that Yarde, being present, had been a party to a plot to kill, or being present had aided and abetted. The view of the jury on the other hand may have been that it was Yarde who struck the blow or blows (which according to the learned Judge's view, must have been inflicted with some force), and that the appellant was a party to their infliction. The view of the jury may, however, have been that they could not say which of the two had killed Peterkin, but that they considered that both accused were parties to the killing."

In *R.* v. *Abbott* [1955] 2 All E.R. 899, Lord Goddard C.J. said at p. 901:

> "If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case."

In considering what was said in *R.* v. *Abbott supra* reference may also be made to *R.* v. *Richardson* [1785] 1 Leach 378 in which case it was said at p. 388:

"One of them is certainly guilty, but which of them personally does not appear. It is like the Ipswich case, where five men were indicted for murder; and it appeared, on a special verdict, that it was murder in one, but not in the other four; but it did not appear which of the five had given the blow which caused the death, and the Court thereupon said, that as the man could not be clearly and positively ascertained, all of them must be discharged."

In *Mohan and another* v. *Reginam* [1967] 2 All E.R. 58 Lord Pearson delivering the opinion of the Privy Council approved the dictum of Lord Morris and said at p. 61:

"It is however clear from the evidence for the defence, as well as from the evidence for the prosecution, that at the material time both the appellants were armed with cutlasses, both were attacking Mootoo, and both struck him. It is impossible on the facts of this case to contend that the fatal blow was outside the scope of the common intention. The two appellants were attacking the same man at the same time with similar weapons and with the common intention that he should suffer grievous bodily harm. Each of the appellants was present and aiding and abetting the other of them in the wounding of Mootoo.

That is the feature which distinguishes this case from cases in which one of the accused was not present or not participating in the attack or not using any dangerous weapon, but may be held liable as a conspirator or an accessory before the fact or by virtue of a common design, if it can be shown that he was party to a pre-arranged plan in pursuance of which the fatal blow was struck. In this case one of them was present aiding and abetting him. In such a case the prosecution do not have to prove that the accused were acting in pursuance of a pre-arranged plan.....

The same distinction was drawn, though incidentally, in *King* v. *Reginam* where Lord Morris of Borth-y-Gest, delivering the judgment of the Board, said:

'The view of the jury may have been that it was the appellant who struck the blow or blows that killed Peterkin, and that Yarde, being present, had been a

party to a plot to kill, or being present had aided and abetted '

Finally Lord Pearson in dismissing the appeal continued at p 62:

"A person who is present aiding and abetting the commission of an offence is without any pre-arranged plan. or plot guilty of the offence as a principal in the second degree

Accordingly on the facts of this case the argument for the appellants cannot be sustained "

In the case of *Lascelles Fitzalbert Anderson and Emmanuel Morris*, 50 Cr. App. R. 216, the two appellants were convicted at Nottingham Assizes in July, 1965 for the murder of a man called Welch In the result the appellant Anderson was convicted of what was then—non-capital murder—and Morris of manslaughter They both applied for leave to appeal against conviction

The Lord Chief Justice delivering the judgment of the Court and having dealt with the submission of counsel said at pp. 221-222·

"Mr Lane submits that that was a clear misdirection He would put the principle of law to be invoked in this form that where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise; but (and this is the crux of the matter) that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally, he says it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise.

In support of that, he refers to a number of authorities to which this Court finds it unnecessary to refer in detail, which in the opinion of this Court shows that at any rate for the last 130 or 140 years that has been the true position This matter was in fact considered in some detail in an

unreported case of SMITH, which was heard by a Court of five Judges presided over by Hilbery J. on November 6, 1961, a case in which Slade J. gave the judgment of the Court. Though that case is not reported, it was referred to at some length in the later decision in this Court of BETTY [1963] 48 Cr. App. R. 6. It is unnecessary to go into that case in any detail. It followed the judgment of Slade J. in SMITH'S case (*supra*), and it did show the limits of the general principle which Mr. Lane invokes in the present case. In SMITH'S case (*supra*) the co-adventurer who in fact killed was known by the accused to have a knife, and it was clear on the facts of that case that the common design involved an attack on a man, in that case a barman, in which the use of a knife would not be outside the scope of the concerted action. Reference was there made to the fact that the case might have been different if in fact the man using the knife had used a revolver, a weapon which he had, unknown to Smith.

The Court in BETTY (*supra*) approved entirely of what had been said in SMITH'S case (*supra*), and in fact added to it. In passing, it is to be observed that, as Mr. Lane has pointed out, the headnote to that case may go somewhat further and may have led the learned Judge in the present case to think that there were no such limits to the principle."

Then dealing with the submission of counsel for the Crown his Lordship said at pp. 223-224:

"It seems to this Court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today. .....

The law, of course, is not completely logical, but there is nothing really illogical in such a result, in that it could well be said as a matter of common sense that in the latter circumstances the death resulted or was caused by the

sudden action of the adventurer who decided to kill and killed. It is well known that in the doctrine of causation, if one goes into it, that there may well be an overwhelming supervening event which is of such a character that it will relegate into a matter of history matters which could otherwise be looked upon as causative factors.

Looked at in that way, there is really nothing illogical in the result to which Mr. Caulfield points. Be that as it may, this Court is quite satisfied that they should follow the long line of cases to which I have referred, and it follows accordingly that, whether intended or not, the jury were misdirected in the present case, and misdirected in a manner which really compels this Court to quash the conviction."

In the recent case of *John Dennis Lovesey, Anthony Peterson*, 53 Cr. App. R. 461, the appellants were convicted of robbery with violence and murder. The case for the prosecution was that they were among a number of persons who attacked and robbed a jeweller and in the course of the attack had inflicted injuries on him, as the result of which he died. There was no direct evidence of how many men had been involved in the attack or of their individual roles. The appellants' defence was a denial of all knowledge of the attack. The learned trial Judge gave the jury an impeccable direction on the ingredients of the offence of robbery with violence and on the guilt of individuals who joined in a common purpose to rob. He continued:

"Then comes the second and more important charge, namely, murder, and that arises in this particular case and on the evidence in this way: if a man is attacked with the intention of causing him really serious physical injury and as a result of that injury he dies, he or any who became party to that attack, if they joined in for the purpose that he should suffer serious physical injury, are guilty of murder. Again the same observation applies: if one is keeping watch outside or sitting in the car, once you are satisfied that the offence has taken place, and they are all acting with that common purpose, and it resulted in death, and that there was in the mind of all of them an intention to do really serious physical harm, then there is the offence of murder."

Finally the learned trial Judge concluded that the two offences stood or fell together.

On appeal L. J. Widgery delivering the judgment of the Court of Appeal, (Criminal Division) said at p. 464-465:

"In fact, the two offences did not necessarily stand or fall together. As neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing, or the infliction of grievous bodily harm on the victim.

If the scope of the common design had been left to the jury in this way, they might still have concluded that it extended to the use of extreme force. It is clear that the plan envisaged that the victim's resistance should be rapidly overcome. The attack bears the hallmark of desperate men who knew that they had to act quickly, and the jury may have thought it utterly unreal that such men would make a pact to treat the victim gently however much he struggled and however long it might take to subdue him. The jury had also had the advantage of seeing the appellants in the witness-box and may have formed their own views as to whether the appellants would have scruples of this character. There must, in our view, be many cases of this kind where the jury feel driven to the conclusion that the raiders' common design extended to everything which in fact occurred in the course of the raid, but the question must be left to the jury because it is a matter for them to decide, and this is so notwithstanding that the point was not raised by the defence. ..... It is clear that a common design to use unlawful violence, short of the infliction of grievous bodily harm, renders all the co-adventurers guilty of manslaughter if the victim's death is an unexpected consequence of the carrying-out of that design. Where, however, the victim's death is not a product of the common design but is attributable to one of the co-adventurers

going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others are not responsible for that unauthorised act (*Anderson* and *Morris* [1966] 50 Cr. App. R. 216: [1966] 2 Q.B. 110).

In the present case the degree of violence used against the victim showed a clear intention to inflict grievous bodily harm, and if this was within the common design the proper verdict against all concerned was one of murder. We cannot say that the jury must have reached this conclusion and, accordingly, feel compelled to quash both convictions for murder."

Turning now to the case law in Cyprus on the issue of common design in *Nicolas Pantopiou Loftis* v. *The Republic*, 1961 C.L.R. 108, the appellant together with a certain Varellas were charged before the Assize Court of Nicosia of the murder of a certain Gavrias. The Assize Court found that Varellas asked the appellant to help him "to frighten Gavrias, the deceased, give him a good beating and let him go". The deceased received several blows on the head with a piece of iron and, eventually, was strangled with a rope. The deceased died of asphyxia due to strangulation. The blows on the head although serious were not fatal. Apart from the victim the only persons present at the scene of the crime at the time of the murder were Varellas, a certain Hambis and the appellant. But the trial Court was unable to come to a positive finding as to who of the three accomplices actually used the rope to strangle the victim. The assize Court applying the provisions of section 21 of the Criminal Code convicted the appellant of the murder of the deceased and sentenced him to death under section 205 of the Criminal Code. On appeal Josephides, J. having related the facts of that case in quashing the conviction of murder said at p. 118:

"As the trial Court was unable to come to a positive finding as to who of the three accomplices actually used the rope to strangle the victim, in order that the appellant may be found guilty of murder it must be proved or inferred from the evidence that he and Varellas formed a common intention to prosecute an unlawful purpose and in carrying it out the deceased was killed, and that the killing was a

probable consequence of the prosecution of such purpose, within the provisions of section 21 of the Criminal Code. It is a well-settled principle of law that if persons have agreed to waylay a man and rob him, and they come together for the purpose armed with deadly weapons, and one of them happens to kill him, every member of the gang is held guilty of the murder. But if their agreement had merely been to frighten the man, and then one of them went to the unexpected length of shooting him, such a murder would affect only the particular person by whom the shot was actually fired. The act done must relate to the common design and not totally or substantially vary from it. .....

In the present case the trial Court accepted in substance the evidence of the appellant. His evidence was to the effect that Varellas told him that he wanted to 'frighten' the deceased and that he intended to give him 'a good beating and let him go'. In cross-examination, on being asked by counsel for the Republic 'You knew that he might use violence for that purpose?' Appellant replied: 'I knew he might have to use violence'.

Finally Josephides, J. concluded in these terms:

"Now, had the deceased died of the blows he received on the head, the killing could be held to be a natural consequence of that common design to assault, and therefore the act of the appellant would come within the provisions of section 21 of the Criminal Code and render him liable for murder. But in this case the cause of death was asphyxia by strangulation with a rope. Having considered all the circumstances of this case, we are not prepared to hold that the strangulation related to the common design to frighten the deceased and give him a good beating and let him go. We are of opinion that the act of strangulation totally or substantially varies from the common design, and in those circumstances the appellant cannot be deemed to have committed the offence."

In an earlier case *Aziz Dervish and another* v. *Rex* (1942) 18 C.L.R. 25, it was held that if there was a common design to assault the deceased with walking sticks the killing with a knife

is not a natural consequence of that common design to assault, and therefore the act of the one assailant of striking the deceased with a walking stick did not come within section 22 (now section 21 of the Criminal Code) and render him liable for murder. It would be seen that the act done must relate to the common design and not totally or substantially vary from it.

Having reviewed the authorities at length, it appears to me that the true principle is that where two adventurers embark on a joint enterprise, each is liable for acts done in pursuance of it and also for the unusual consequences of such acts, provided that they arise from the execution of the joint enterprise; but if one of the adventurers goes beyond what has been tacitly agreed as the scope of the enterprise, his co-adventurer is not liable for the consequences of that extraneous act.

Where, therefore, two persons take part in a concerted attack and one of them departs completely from the scope of the common design and forms an intent to kill or cause grievous bodily harm and uses a weapon in a manner in which the other party had no reason to suspect he would act, and so causes death, the other party is not necessarily liable to be convicted, and may be entitled to an acquittal.

As I have said earlier, the trial Court accepted that there was no direct evidence in this case regarding the identity of the person or persons who fired the fatal shots against El Sebai. But it is equally true to say that from the evidence, the two appellants appeared at the scene of the crime within seconds or minutes after the shots were heard and the victim was seen falling on the ground dead. Then, we have the evidence that after the shots, the two appellants took full charge or control of the ground floor of "Hilton" hotel. In disarming the police as well as collecting the hostages they imposed their will on everyone under the force of arms.

Mr. Clerides is a full and lucid argument invited this Court to accept that there was no sufficient evidence before the trial Court to enable it to draw the inference that the two appellants were acting in concert or embarked on a joint enterprise with a view to killing the victim only. But in fairness to counsel, although he tried to go further in order to convince this Court

that their main purpose might have been to collect hostages only—in order to make known to the world the problem of the Palestinean people, I am sure, he was also aware of his difficulties regarding the statement made by appellant 1. He was aware of his difficulties once appellant 1, gave the reasons why he took the decision to kill El Sebai. "We came to kill (he says) this man because he is a spy and a traitor."

The fact that at the material time the appellants were armed with pistols and handgrenades, as well as from their actions and conduct, immediately show clearly in my opinion that they were acting in concert by virtue of a common design and with a prearranged plan in pursuance of which the fatal shots were fired. Now whether the one fired the fatal shot or the other it does not make any difference in my view, because once both had embarked on a joint enterprise of killing El Sebai, each is liable for the acts done in pursuance of that joint enterprise in killing the victim.

I agree, of course, with counsel for the appellants that though the statement of each appellant is evidence against him (but not of course against the other), nevertheless, the statement of appellant 1, once rightly accepted by the trial Court was evidence against him regarding the existence of motive and admissible against the other in order to establish pursuance of a common purpose or design against both.

In Phipson on evidence, 11th edition at p. 119 paragraph 263 dealing with the question of enterprise the learned author says:

> "Where two persons are engaged in a common enterprise, the acts and declarations of one in pursuance of that common purpose are admissible against the other. This rule applies in both civil and criminal cases and in the latter whether there is a charge of conspiracy or not. It is immaterial whether the existence of the common purpose or the participation of the person therein be proved first although either element is nugatory with out the other."

In *Vrakas* case, *supra*, the Court dealing with the very same point and relying on the principle formulated in Phipson, said:

"We are of the view that the above described behaviour of appellant 1, after he had noticed the injuries of his wife on the 21st August, 1972, could be treated, by the trial Court, as indicative of knowledge on his part of what had happened at the "Anemones" incident: also, it is conduct constituting circumstantial evidence which could be properly taken into account regarding the existence of a common design of the appellants with very sinister implications as regards the fate of the wife of appellant 1."

One, I repeat, the trial Court accepted, in the light of all the circumstances in the present case, and particularly regarding the whole behaviour of the two appellants who clearly were determined to terrorize and to oppose everyone who tried to stop them in pursuing their common design of killing El Sebai, I have reached the conclusion that the trial Court reached a correct decision that the murder of El Sebai was committed in furtherance of a preconceived and well prepared common plan to which both appellants were parties. I further agree with the trial Court that the aforesaid killing and taking of the hostages are nothing more than two phases of the same incident and, I exclude any possibility or probability that the two incidents were separate and distinct, *i.e.* had been committed by two different groups of persons acting independently and without notice or interest of each other's acts. Having reached the conclusion that the Court has not misdirected themselves and that their verdict was neither unreasonable nor against the weight of circumstantial evidence I would therefore dismiss this contention of counsel.

The next question is whether the crime of killing was committed in those circumstances with premeditation.

Counsel for the appellants in arguing ground 11 contended that the Court erroneously came to the conclusion that if the murder of El Sebai was committed by the appellants or anyone of them it was committed with premeditation. Indeed, counsel bitterly complained, that once the trial Court reached the conclusion that the killing was as a result of the execution of a preconceived and well prepared plan, in effect, the Court had already decided that such act was done with premeditation. In reaching that conclusion, counsel added that the fate of his

clients was sealed even before the Court had embarked or considered the question of premeditation. It is true that the trial Court decided that because of the circumstances under which the crime was perpertrated it was evident that it was committed after a preconceived and well prepared common plan to which both appellants were parties, but with respect to counsel the fate of the appellants was not sealed because of of what was said earlier in view of the fact that the Court approached the question of premeditation separately.

It has been said in a number of cases that it is for the prosecution to prove its case beyond reasonable doubt, and any doubts the Court may entertain must invariably be resolved in favour of an accused person. In recent years, the onus cast on the prosecution in a criminal case and the standard of proof that must be obtained before a Court of Law is justified to return a verdict of guilty, was the subject of discussion in many decisions of our Courts in Cyprus. See the decision of the Full Bench of the Supreme Court in *Adamos Charitonos and Others* v. *The Republic* (1971) 2 C.L.R. 40. In that case, as well as in others, to which I need not refer to, it is consistently stressed that the Court must not be unduly pre-occupied with verbal formulae, and must, at all times, strive to ensure that no-one is convicted unless the Court feels certain, beyond reasonable doubt, that the accused is guilty. I may also add that a finding of premeditation must be made independently of a finding of an intention on the part of the appellants to kill the deceased. But, on the other hand, the circumstances under which death is inflicted and the surrounding circumstances may, themselves, be indicative of the existence of a decision to kill, formed at a point of time prior to the killing.

In a recent case, *Kouppis* v. *The Republic*, (1977)* 11 J.S.C. 1860, dealing with the question of premeditation, I have rejected the version of the prosectuion that the killing was planned and/or that the culprits acted under a common design to kill. In delivering a separate judgment, I said at pp. 1952-1953:-

> "Reverting once again to the seventh conclusion of the trial Court that from the range at which the appellant had

* To be reported in (1977) 2 C.L.R.

fired at the victim when his car ended on the left side of the road—and the surrounding circumstances under which he did so are indicative to his determination to kill the victim, I indeed entertain grave doubts that one could or might reach such a conclusion with certainty, for the reasons I have given earlier in this judgment, having regard to the evidence as a whole on the issue of premeditation. I think I would repeat that the question of premeditation is a question of fact, not of law, and as I have entertained doubts as to what has actually happened when the victim was stopped by the appellant on the road on that fateful night, which made him kill the victim in such a brutal manner, I think one may be driven to think, in all those circumstances, *viz.*, that because the killer did not fire at the victim immediately he stopped him on the road, that it was a killing committed really after the refusal of the victim to alight, after a continuous shouting and banging on the window and/or apart from any other conceivable reason, his dashing away to leave the scene, rather than pursuant to a cool preconceived plan."

Finally, I concluded my judgment in these terms at p. 1958:

"Having reached the opinion that the judgment of the trial Court should be set aside on the ground that under the circumstances of the case it is unsafe or unsatisfactory, (having a reasonable doubt or a lurking doubt) and notwithstanding the fact that the Judges had every advantage, I shall allow the appeal and quash both the conviction and the death sentence, exercising my additional powers under s. 25(3) of the Courts of Justice Law to interfere with the judgment of the trial Court on appeal. But in the circumstances the appellant should be convicted of homicide only, under the provisions of s. 20 of the Criminal Code, Cap. 154."

With this in mind, I think that is the feature which distinguishes the present case from cases in which one of the accused was not present or not participating in the attack, but may be held liable as a conspirator or an accessory before the fact. Once the trial Court found that the killing took place by virtue of a common design and that both were parties to a pre-arranged

plan in pursuance of which the fatal shot was fired against El Sebai, and in spite of the fact that both appellants had ample time to reflect on their decision and desist from carrying out their intention, in my view, the Court rightly reached the conclusion that both were guilty of premeditated murder. I would therefore affirm the judgment on the issue of premeditation and dismiss this ground of the appeal.

Although the point now raised on appeal before this Court regarding jurisdiction it was never argued before the Assize Court of Nicosia, in the interest of justice, leave was granted by the Supreme Court to counsel to argue ground 1 of the appeal.

Counsel contended that the Assize Court in dealing with this case was a special Court within the meaning of Article 30 of the Constitution and as such was disqualified or was incompetent to try the appellants for the offences which they were indicted and finally convicted.

As I said when I was speaking at the Faculty of Law of the University of Graz, of Austria, the protection of human rights and fundamental freedoms occupies a very special place not only in the Constitution of Cyprus, but also in the hearts of its people. Although the Constitution of Cyprus is a sui generis, in Part II it contains an elaborate set of the fundamental rights and liberties. Article 30.1 says that:-

> "No person shall be denied access to the Court assigned to him by or under the Constitution. The establishment of judicial committees or exceptional Courts under any name whatsoever is prohibited.";

and in para (2) we have it in clear and unambiguous language that:

> "In the determination of his civil rights and obligations or any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent impartial and competent Court established by law ....."

This fundamental right appears also both in the 1952 Constitution of Greece, and in the new Constitution of 1975 which

came into force on the 9th June, 1975, after the fall of the junta which was ruling Greece. Article 8 which is similar to ours says that:-

> "No person shall be denied access to the Judge assigned to him by law. The establishment of judicial committees or exceptional Courts under any name whatsoever is prohibited."

This principle prevails also in all member states of the Council of Europe, and according to the Basic Law for the Federal Republic of Germany, Article 101.1 says that:

> "Extraordinary Courts shall be inadmissible. No one may be removed from the jurisdiction of his lawful Judge."

Which then, are the Courts assigned to a person by or under the Constitution?

In accordance with Article 133.1:

> "There shall be a Supreme Constitutional Court of the Republic composed of a Greek, a Turk and a neutral Judge. ....."

Turning now to Part X of the Constitution, regarding the High Court and the subordinate Courts, Article 152.1 reads:

> "The judicial power, ... shall be exercised by a High Court of Justice and such inferior Courts as may, subject to the provisions of this Constitution, be provided by a law made thereunder."

Article 155.3 says that:

> "The High Court shall, to the exclusion of any other Court, determine the composition of the Court which is to try a civil case ..... and of the Court which is to try a criminal case .....".

When the Constitution came into force, the House of Representatives enacted on the 17th December, 1960, the Courts of Justice Law, 1960 (Law 14/60) and section 3(1) says that:-

> "There shall be established under this Law the following Courts to exercise such jurisdiction and powers as are

conferred upon them by this Law or any other Law in force for the time being:–

(a) District Courts;

(b) Assize Courts:

Provided that there may be established such other Courts as may be provided by any other Law".

Regarding the composition of the Assize Courts, section 20(1) provides that:–

" ..... every Assize Court shall have jurisdiction to try all offences punishable by the Criminal Code or any other Law and committed –

(a) within the Republic .....".

With regard to the period of sittings of the Assize Court, section 60(2) provides that:–

"Assize Courts shall be held at such times as the High Court may direct:

Provided that there shall be at least one sitting in the principal town of such district in every six months, unless in the opinion of the High Court ... such sitting may be dispensed with by special direction of the High Court."

Speaking about the special and exceptional Courts, Professor Svolos said in his well-known text-book on the Constitution of Greece, 1955 at pp. 133–136.

" 'Ασχέτως τῶν ἐκ τῆς ἐννοίας τοῦ ἐδ. 1 συναγομένων ὡς ἄνω, ἡ ρητὴ ἀπαγόρευσις τοῦ ἄρθρ. 8 ἐνσαρκοῦται εἰς τὸ ἐδ. 2, τὸ ὁποῖον στρέφεται κατὰ τῶν ὑφ' οἱανδήποτε ὀνομασίαν 'δικαστικῶν ἐπιτροπῶν καὶ ἐκτάκτων δικαστηρίων' (Ausnahmegerichte, tribunaux d' exception). Τοιαῦτα ὄργανα ἀπονομῆς τῆς δικαιοσύνης ἢ ἐν γένει δικαιοδοτικῆς λειτουργίας 'δὲν ἐπιτρέπεται νὰ συσταθῶσιν'. Οὔτε, ἑπομένως, ἡ ἐκτελεστικὴ ἐξουσία, οὔτε ὁ νόμος δύνανται νὰ προβοῦν εἰς τὴν ἵδρυσιν αὐτῶν. Δι' ὃ καὶ ὁσάκις, παρ' ἡμῖν συνεστήθησαν, ἡ πρᾶξις περιεβλήθη ηὐξημένον τυπικὸν κῦρος (λ.χ. συντ. πρ. 1 τῆς 6.11.1944 περὶ ἐπιβολῆς ποιν. κυρώσεων κατὰ τῶν συνεργασθέντων μετὰ τοῦ ἐχθροῦ.).

'Η ἀπαγόρευσις ἰσχύει διὰ πᾶσαν περίπτωσιν καὶ ἀφορᾷ παντὸς εἴδους δικαιοδοσίαν, ἰδίως ὅμως τὴν ποινικήν. Ἔχει τοὐτέστι, κατ' ἀρχήν, τὴν αὐτὴν ἔκτασιν, τὴν ὁποίαν, καὶ ἡ ἔννοια τοῦ 'νομίμου δικαστοῦ'. Διὰ τῆς ἐν λόγῳ ἀπαγορεύσεως τὸ Συντ. θέλει νὰ κατοχυρώσῃ τὴν 'ἀσφάλειαν' τῶν ἀτόμων, ἀποκλεῖον τὰς γνωστὰς ὑπὸ τὸ καθεστὼς τῆς ἀπολυταρχίας δικαστικὰς αὐθαιρεσίας, τῶν ὁποίων θῦμα ἦτο ἰδίως ὁ διωκόμενος ὑπὸ τῆς κρατικῆς ἐξουσίας. Ἄλλως, τὸ Συντ. θέλει νὰ ἐξασφαλίσῃ ἀπολύτως τὸ ἄτομον ἀπὸ ἐξαιρετικῆς — ἑπομένως, κατὰ τεκμήριον, ὑπόπτου καὶ δυσμενοῦς — μεταχειρίσεως, ἐν σχέσει πρὸς τὴν ἐπ' αὐτοῦ καὶ τῶν ὑποθέσεών του ἐφαρμογὴν τῆς δικαιοδοτικῆς λειτουργίας τοῦ Κράτους.

'Εκ τοῦ συνδυασμοῦ τῶν δύο διατάξεων τοῦ ἄρθρ. 8 συνάγεται ὅτι στέρησιν τοῦ 'νομίμου' δικαστοῦ ἀποτελεῖ καὶ ἡ ἁπλὴ ἀφαίρεσις ὡρισμένης ὑποθέσεως ἀπὸ τοῦ γενικῶς ἁρμοδίου δικαστηρίου, χωρὶς νὰ ἱδρυθῇ δι' αὐτὴν ἔκτακτον δικαστήριον.

Κατὰ τὸν συνηθέστερον ὁρισμόν, κατ' ἀρχήν, τὸ ὑπὸ τοῦ ἄρθρ. 8 ἐδ. 2 Συντ. ἀπαγορευόμενον εἶναι πᾶν 'δικαστήριον', μὴ ἐκ τῶν προτέρων ὑπὸ τοῦ νόμου γενικῶς ἐπὶ ὡρισμένῃ δικαιοδοσίᾳ καὶ ἁρμοδιότητι ἱδρυμένον, ἀλλὰ προσωρινῶς καὶ αὐθαιρέτως, ad hoc, ἐκ τῶν ὑστέρων συνιστώμενον (ἰδίως μετὰ τὴν τέλεσιν ἀξιοποίνου πράξεως) πρὸς ἐκδίκασιν ὡρισμένης ὑποθέσεως ἢ ὡρισμένου προσώπου, ἢ προσώπων δυναμένων νὰ προσδιορισθοῦν ἀτομικῶς ἐκ τῶν προτέρων, δι' ἀποστερήσεως, οὕτω τοῦ ἀτόμου ἐν τῇ συγκεκριμένῃ περιπτώσει ἀπὸ τοῦ 'νομίμου' αὐτοῦ δικαστοῦ. Δὲν εἶναι ἀνάγκη, διὰ νὰ χαρακτηρισθῇ ὡς 'ἔκτακτον' τὸ δικαστήριον, νὰ εὑρίσκεται ἁπλῶς ἐκτὸς τοῦ κύκλου τῶν δικαστηρίων τῆς τακτικῆς δικαιοδοσίας, διότι δύναται καὶ τακτικῆς δικαιοδοσίας δικαστήριον νὰ καταστῇ 'ἔκτακτον' εἰς συγκεκριμένην περίπτωσιν, συντρεχόντων τῶν ὅρων τοῦ 'ἐκτάκτου'. 'Εξ ἄλλου ὅμως τὸ 'ἔκτακτον' δικαστήριον δύναται νὰ χαρακτηρίζεται ἀπὸ τὴν 'πολιτικὴν τάσιν', ἀπὸ τὰ ἐλατήρια δηλ. καὶ τοὺς σκοποὺς τῆς συστάσεως αὐτοῦ, τοῦ γνωρίσματος τούτου διαφοροποιοῦντος ὑπὲρ πᾶν ἄλλο τὸ 'ἔκτακτον' καὶ ad hoc ἀπὸ τοῦ τακτικοῦ δικαστικοῦ ὀργάνου."

Translated into English, the Professor in clear and lucid language said about these "special" and "exceptional Courts" at pp. 133–136:

"25. Independently of what is hereinabove deduced from the meaning of Art. 1, the express prohibition of Art. 8 is embodied in para. 2, which is directed against the 'judicial committees and exceptional Courts" (Ausnahmegerichte, tribunaux d' exception) by whatever name they are known. Such organs of administration of justice oi administrative function 'are prohibited'. Neither, therefore, the executive, nor the Law can proceed with their establishment. Thus and whenever they were established here, the act has been invested with increased formal validity (e.g. legislative act 1 of 6.11.1944 for imposition of criminal sanctions on those who have collaborated with the enemy).

The prohibition is valid in every case and refers to all kinds of jurisdiction, especially criminal jurisdiction. That is, in principle, it is of the same extent as the concept of the 'lawful Judge'. By the said prohibition the constitution wishes to safeguard the 'security' of persons by excluding the known, under absolute regime, judicial arbitrariness, whose victim was particularly the person prosecuted by the state authority. Otherwise the Constitution intends to safeguard absolutely the person from exceptional—therefore, by presumption, suspicious and discriminatory treatment, in relation to the application of the Justice-administering function of the State upon him and his affairs.

26. By a combination of the two provisions of Art. 8 it is deduced that deprivation of the 'lawful' Judge may be constituted even by the mere taking away of a certain case from the generally competent Court, without establishing an exceptional Court, for such case.

27. According to the most usual definition, in principle, what is prohibited by Article 8(2) of the Constitution is every 'Court' which had not been established in advance by Law generally for a certain jurisdiction and competence, but provisionally and arbitrarily, ad hoc, established afterwards (especially after the commission of a punishable act) for trying a certain case of a certain person, or persons capable of being determined personally in advance, by depriving thus the person in the particular case of his 'lawful' Judge. It is not necessary, for a Court to be described as 'exceptional', that it should be merely outside the circle

of the ordinary jurisdiction Courts, because a Court of ordinary jurisdiction may be rendered 'exceptional' in a particular case, when the conditions of the 'exceptional' come in aid. On the other hand, however, the 'exceptional' Court can be described by the 'political tendency', that is from the motives and the aims of its establishment, and this characteristic differentiates more than anything else the 'exceptional' and ad hoc Court from the ordinary judicial organ."

It is true that the present case was fixed for hearing after the Assize Court of Nicosia had already dealt and completed the list of cases before it on the dates fixed earlier.

But in view of the circumstances prevailing in Cyprus after the Killing of El Sebai by the two foreign killers, the Supreme Court, in the interest of justice, and for no other reason, by special direction ordered a new sitting of the Assize Court composed of the same three Judges. In my view, this is consistent with s. 60 of the Courts of Justice Law and in the interest of the appellants to avoid the delay of trying their case.

Certainly the appellants cannot be heard complaining neither that they were deprived of their lawful Judges nor that the Assize Court had not been established in advance by law for the jurisdiction and competence to try capital cases for all persons accused for such crimes. This Assize Court, I repeat, was not provisionally and arbitrarily ad hoc, established afterwards in order to meet the needs of the present case, but it was established a long time before the Constitution came into force.

In fairness to counsel, however, although I found his argument on this point a very lucid and interesting one, I think that in all the exceptional circumstances prevailing after the killing of El Sebai, this was not the proper case to raise such an argument. The appellants, no doubt, were afforded by the State every legal facility including legal aid in order to present their case in the best possible way both before the trial Court and in this Court. In my view this is a case in which fairness and justice was extended to the appellants, and they cannot be heard now complaining against the trial Court. They cannot complain, I repeat, because as it was aptly said delayed justice is no justice. I am

positive that the trial Court has done its best to complete the case before them at a commendable speed, and in my view, it was to the benefit of every one and particularly to the appellants themselves to know the result of the trial.

That the Assize Court is neither a "special", nor an "exceptional" one, finds further support in Application No. 1216/61, in the case of *X. against the Federal Republic of Germany.* In that case the applicant was convicted by the third Criminal Chamber of the Regional Court at C. on charges of having bribed a public officer and of having been an accessory to the misappropriation of funds. He was sentenced to eight months' imprisonment and a fine of 5,000 DM. The applicant submitted that the third Criminal Chamber was not a "tribunal established by law" within the meaning of Article 6(1) of the Convention but an "extraordinary Court", and, as such, inadmissible under Article 101(1) of the Basic Law. In support of his submission, he stated that the third Criminal Chamber was seized of all criminal charges concerning the Supplies Office of the Armed Forces at C., while most of the cases normally falling within its competence were dealt with by an auxiliary Chamber. Posing here for a moment Article 6 of the European Convention on Human Rights reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...".

The Commission in declaring the application 1216/61 inadmissible had this to say, in the 1963 edition, of the Collection of Decisions, at p. 7:

> "Whereas, in regard to his conviction and sentence in 1959/61, the applicant alleges a violation of Article 6, paragraph (1), of the Convention, in that the Third Criminal Chamber of the Regional Court at C. which convicted and sentenced the applicant in 1959, was not a 'tribunal established by Law' within the meaning of Article 6 paragraph (1), but an 'extraordinary Court' ('Ausnahmegericht') and, as such, excluded under Article 101, paragraph (1), of the Basic Law (Grundgesetz) of the Federal Republic of Germany; whereas, in support of this allegation, the applicant stated that the Third Criminal Chamber of the Regional

Court dealt with all criminal charges concerning the Supplies Office of the Armed Forces at C. while most of the cases normally falling within the competence of the Third Chamber were dealt with by an auxiliary chamber; whereas, however, it appears that the Third Criminal Chamber remained competent for all proceedings concerning crimes and offences committed in the exercise of a public office under Articles 331 to 369 of the German Penal Code (Strafgesetzbuch), concerning offences against Article 12 of the Act against Unfair Competition and against the Ordinance Against Bribery and Breaches of Security by Persons Not Holding a Public Office and, finally, for proceedings concerning perjury and false declaration made by persons not under oath (Articles 153 to 161 of the Penal Code); whereas the Judge Rapporteur of the Federal Constitutional Court, in a letter (in) ..... 1958, informed the applicant that, in view of these terms of reference, the Third Criminal Chamber could not be deemed to be an 'extraordinary Court' within the meaning of Article 101 of the Basic Law; whereas, having taken note of the opinion expressed by the Federal Constitutional Court, the Commission finds that the Third Criminal Chamber of the Regional Court was a 'tribunal established by law' within the meaning of Article 6, paragraph (1) of the Convention".

For the reasons I have endeavoured to explain at length, I have reached the conclusion, that the contention of counsel cannot stand in law and, I would, therefore, dismiss this point of law.

There was another effort by counsel for the appellants, and indeed in arguing ground 2 of the appeal contended that the Assize Court had no power or jurisdiction to fix the date of execution of the death sentence passed on the appellants.

Having perused the two documents which were placed before this Court, it appears that until the year 1964 no date was fixed in the warrant of commitment for execution of a person sentenced to death. The warrant of commitment to prison on a conviction dated 25th of February, 1957, signed and issued by B.V. Shaw, Judge of the Special Court, to the Director of Prisons of Nicosia and other Police Officers in Cyprus is in these terms:

"You are hereby commanded to take Evagoras Miltiadou Pallikarides of Tsada now Ktima, who has been convicted of carrying a firearm contrary to Regulation 52(c) of the Emergency Powers (Public Safety & Order) Regulations, 1955 to (No. 17) 1956, and convey him to the prison at Nicosia and there deliver him to the Officer in Charge thereof together with this warrant there to be imprisoned by the Officer in charge of the said prison under sentence of death until H.E. Governor's Pleasure is further known.

And for this the present warrant shall be a sufficient authority to all whom it may concern".

The warrant issued on 4th Secember, 1961, and signed by Limnatitis D.J., reads as follows:

"You are hereby commanded to take Charalambos Zacharia, of Ypsonas, who has been convicted of Murder by Premeditation, and sentenced to suffer death by hanging and convey him to the prison at Nicosia, and there deliver him to the Officer in Charge thereof together with this warrant there to be kept by the Officer in Charge of the said prison until the pleasure of His Excellency the President of the Republic of Cyprus, be known.

And for this the present warrant shall be a sufficient authority to all whom it may concern".

As I said earlier this was the position but on 28th of May 1964, the Supreme Court exercising their powers under Article 163 of the Constitution and s. 176 of the Criminal Procedure Law, Cap. 155, published the Criminal Procedure Rules in the Official Gazette of the Republic No. 318. The question is whether these Rules are *ultra vires*, Article 163 of the Constitution, regarding the fixing of a date for the execution of the sentence of death.

Section 176 of the Criminal Procedure Law, gives power to make Rules of Court for the better carrying out of that law; and

Article 163 says that:

"1. The High Court shall make Rules of Court for regulating the practice and procedure of the High Court and

of any other Court established by or under this Part of this Constitution, ...".

Turning now to Rule 5(A)(1) of the Criminal Procedure Rules, I read:

"Every warrant directing the execution of a sentence of death shall be in the form 52 and shall be signed by the President of the trial Court or one of the Judges thereof; and

(2) The Assize Court shall, in passing a sentence of death, fix the date of execution. Such date shall not be less than eight weeks and not more than nine weeks from the date of passing sentence.

Provided that the High Court of Justice or two Judges thereof may, on good cause shown, postpone the date so fixed and shall fix another date in lieu thereof. A new warrant of execution shall thereupon be signed by one of the Judges of the High Court".

I must confess that during the hearing of the appeal I found the argument of counsel a convincing one but later on having given the matter a further consideration during our deliberations with my brother Judges, I was satisfied that Rule 5(A)(1) is not *ultra vires* Article 163 of the Constitution. I do not think that it matters very much in effect in fixing the date of execution, once sufficient time is provided in Article 5(A)(2) to enable the President of the Republic to consider whether he would be prepared to exercise the prerogative of mercy, under Article 53, and if so, then the death sentence shall be commuted to life imprisonment. Furthermore, in my view the fixing of the date of execution in some way may be to the benefit of the appellants who would be in a position to know about their fate, without being kept in suspense, and within the time limits specified in Rule 5(A)(2). I think I would have added also that in making up my mind that the fixing of the date of execution is within the provisions of Article 163, is the fact that these Rules bear the signature of at least two eminent Judges who had vast experience in criminal law and in matters of criminal procedure.

For all these reasons, I would dismiss this contention of counsel.

Finally, counsel further argued, that even if those Rules are *intra vires* then again the execution of death sentence, as distinct from the passing of death sentence—once execution was not carried out for the last 16 years, is unconstitutional because is in conflict with Article 8 of the Constitution and it contravenes also Article 28. Furthermore he alleged that if execution would take place now without a warning, that by itself, it would create discrimination and unequality before the law and the administration.

It is true that according to the command of the Constitutional drafter in Article 8, "No person shall be subjected to torture or to inhuman or degrading punishment or treatment"; but it is equally true that in Article 7 it is said that: "Every person has the right to life and corporal integrity"; and in para. 2 in a mandatory language the Constitutional drafter says that: "No person shall be deprived of his life except in the execution of a sentence of a competent Court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law".

Having listened carefully to the lengthy argument of counsel on this constitutional issue, and having addressed my mind to the American authorities quoted in this Court, I find myself in full sympathy with counsel for doing his very best to convince this Court that his clients would be treated, if execution would be carried out, in a discriminatory manner once they are entitled to equal protection before the administration and justice. With respect I bear in mind the words of the Constitutional drafter, but I think I am entitled to make this observation: that it is the function of every Court in this country or abroad to enforce the law and the supreme law of the land. The trial Court, I am sure, had this in mind, and irrespective of whether or not hanging has not been carried out for a long time, once the appellants were found guilty of premeditation and rightly were sentenced to death, the Court was bound to direct that the death penalty should be executed by hanging as provided by the law and regulations of this land.

It has been said in a number of cases of this Court that the President of the Republic has in accordance with Article 53 of

the Constitution, the right to exercise the prerogative of mercy to persons who were condemned to death. There is no doubt that the late President of the Republic for a number of years and for a number of reasons examined each individual application of a person who was condemned to death and had always exercised his right, and used the prerogative of mercy; and the death sentence was commuted to life imprisonment. I, would reiterate once again, that it is the constitutional right of the President of the Republic, and he had exercised the prerogative of mercy because he believed that that was in the public interest. But with respect to counsel the decision of the President of the Republic cannot in any way create a legal precedent binding on the new President of the Republic. In my view, the new President of the Republic is not bound because he has the constitutional right to exercise or refuse the prerogative of mercy in each case, having regard to the facts and circumstances before him.

In the light of this constitutional principle I think that the argument put forward by counsel appears to be premature, and in any event once we are not in a position to know what would be the decision of the President of the Republic about the two condemned men, I cannot add anything more at this stage. But there is a further complication in this case, derived from the argument, because once the law remains in force, and the death penalty for murder would continue to be imposed by the trial Courts. then I find it difficult to understand why the President of the Republic should be prevented from exercising his constitutional right either in favour or against the two appellants.

I am aware of course that observations were made in *Vouniotis* v. *The Republic* (1975) 2 C.L.R. 34 by the President of the Court at pp. 60–61, to the effect that because the death penalty has not been enforced for more than 10 years, it might conceivably have been treated as having been de facto abolished, in the course of the evolution of social progress as in other countries. But with respect—though such observations made obiter. were repeated also in *Anastassiades* v. *The Republic* (1977)* 5 J.S.C. 516, 712 and in *Kouppis* v. *The Republic* (1977)* 11 J.S.C. at pp. 1860–1895, the position remains unchanged

* To be reported in (1977) 2 C.L.R.

until the Authorities in Cyprus would decide to introduce new legislation in respect of abolishing the death penalty for murder. In my view, the law remains in force and the Courts are under a duty to enforce it, because the death penalty, once it is imposed by law it cannot be said or treated as having been de facto abolished.

I have further considered very carefully the judgments in the American authorities relied upon by counsel, but with the greatest respect some of those cases are not only distinguishable, but they have been also decided under different laws, and I am afraid do not provide any guidance to this Court.

I would of course agree that there is now a trend in some of the countries to abolish the death penalty for murder in the evolution of social progress, and I am confident that the House of Representatives should look into this matter, at an opportune moment, in order to decide what to do in the public interest. But until that moment I am bound to adopt and follow what I have said in *Kouppis* case *supra* at pp. 1959–1960:

> "The argument of counsel is really unacceptable and cannot in any way stand, because one cannot attack the constitutionality of one paragraph of Article 7 as contravening another, once the framers of the Constitution thought fit to include in the Constitution that a law may provide for such penalty of depriving a person of his life only in cases of premeditated murder.
>
> Finally, and irrespective of the difficulties which have given rise to constitutional problems on the question of death sentence in the United States, I would dismiss this contention of counsel".

Giving the best consideration that I can to all the circumstances of the case that I have narrated here, and having regard to the legal principles to which I have referred at length, I have reached the conclusion that, even assuming that the President of the Republic would decide not to exercise the prerogative of mercy in favour of the two appellants, his decision cannot be treated as contravening Articles 8 and 28 of the Constitution.

I think, I ought not to conclude this judgment without saying

how much I owed in the preparation of it to the lucid arguments of all counsel appearing in this appeal.

I would, therefore, dismiss this appeal.

MALACHTOS J.: I have had the opportunity of reading and fully considering the judgment just been announced by my brother Judge Loizou and I can only add that I concur unreservedly in the reasons he has given and in the result he has arrived. I would, therefore, dismiss the appeals.

TRIANTAFYLLIDES P.: In the result these appeals are dismissed unanimously. As already ordered the date of the execution of the death sentence remains August 22, 1978.

Appeals dismissed.