1978 March 17

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

IOANNIS KTIMATIAS AND ANOTHER,

Appellants,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeals Nos.* 3814, 3815).

Firearms Law, Cap. 57 (*as amended*)—*Unlawful carrying of firearms—Members of the Forces of the Republic or of the Police Force—Firearms not carried in their capacity as such members—Defence provided by section* 29 *of the Law has to be substantiated by accused on the balance of probabilities.*

Criminal Law—Riot—Nature of—Participation in riot whilst carrying firearms, which went beyond a mere presence there—Conviction for riot sustained—Sections 70, 72, 20 *and* 21 *of the Criminal Code, Cap.* 154.

Criminal Law—Riot—Parties to offences—Joint offenders—Common purpose—Participating in riot in the course of which serious damage was caused to a building—Conviction for unlawfully causing damage to a building in the course of a riot sustained—Sections 70, 78, 20 *and* 21 *of the Criminal Code, Cap.* 154.

Criminal Law—Using a firearm—Section 3 (1) (b) (2) (*a*) *of the Firearms Law, Cap.* 57*—Conviction based on conflicting and self-contradictory evidence—Definitely unsafe to pronounce that it was proved beyond reasonable doubt that appellant was guilty.*

Criminal Law—Sentence—Riot—And causing damage to a building in the course of a riot—One year's and two year's imprisonment, respectively—Riot in question of a very violent nature—Sentence upheld.

Criminal Law—Sentence—Carrying firearms in the course of a riot—Five years' imprisonment—Need to punish with severity offence of

carrying firearms—Riot of a very grave nature and resulted in the death of two persons—Appellants having been acquitted of any complicity in relation to such deaths the offence of carrying firearms cannot be connected with such deaths and they should not be made scapegoats for what has happened—Mitigating factors—Disparity of sentences—Huge and irreconsilable difference between sentence passed on the appellants and sentence passed on co-accused for carrying during the same riot three sticks of dynamite—Sentence reduced.

Criminal Law—Sentence—Disparity of sentences.

The two appellants were seen carrying automatic firearms at the scene of a riot, which took place in the morning of the 19th August, 1974, in the vicinity of the building of the U.S.A. Embassy. Appellant 1 was also seen by three witnesses, who were believed by the trial Court, firing at the Embassy. The testimony of one of these witnesses (Lambrianides) was inconsistent with that of the other two witnesses (Ierides and Tsangaris) regarding the persons who tried to stop this appellant from firing; and the testimony of witness Ierides was inconsistent with that of witness Tsangaris in that the former testified that he saw this appellant in a firing position but he did not see him firing at any time and that he managed to remove him from the scene and the latter witness testified that he saw this appellant firing when witness Ierides was approaching him.

Neither of the two appellants have denied that they were at the scene of the riot, nor did they deny that, whilst there, they were carrying automatic firearms; but appellant 1 has denied that he had used his weapon; and both appellants alleged that they had gone there in their capacity as members of the security forces of the Republic, for the purpose of assisting other members of such forces to disperse the rioters. The trial Court rejected their version and found that they joined the rioters as individuals.

They were convicted of the offence of taking part in a riot and of carrying firearms and they were both sentenced to concurrent terms of imprisonment of one year and five years, respectively. Appellant 1 was also convicted of the offences of damaging a building in the course of a riot and of using a firearm and was sentenced to concurrent terms of imprisonment of two years and seven years, respectively.

In the course of the riot two persons were killed but the appellants were, during their trial, acquitted of the offence of homicide.

They appealed against both their said convictions and sentences.

The only issue which had to be determined in relation to the guilt or innocence of the appellants as regards the carrying of firearms count was whether or not section 29* of the Firearms Law, Cap. 57 was applicable in the particular circumstances of this case.

Held, (I) with regard to the appeals against conviction:

(1) That there is no reason for disagreeing with the finding of the trial Court that the appellants joined the rioters as individuals and not in their capacity as members of the security forces of the Republic; that the defence available under section 29 of Cap. 57 has to be substantiated by the appellants; that it has not been established by them, even on the balance of probabilities in order to discharge the onus cast upon them, that the particular firearms, which they were carrying at the time, had been entrusted to them in their aforementioned capacity; and that, accordingly, they cannot avail themselves of the exemption afforded by section 29 and they were rightly convicted of the offence of carrying firearms.

(2) That in view of their participation in the riot whilst carrying firearms, which went beyond a mere presence there, and in the light of the nature of the offence of riot (See *Katsaronas and Others* v. *The Police* (1973) 2 C.L.R. 17), there is no difficulty in holding that both appellants were rightly convicted of riot.

(3) That in view of the participation of appellant 1 in the riot, in the course of which serious damage was caused to the building of the U.S.A. Embassy, and in the light of the provisions of sections 20 and 21 of the Criminal Code Cap. 154, he was rightly convicted of the offence of having unlawfully caused damage to the said building in the course of the riot.

(4) That the evidence on which the trial Court relied in order to convict appellant 1 of the offence of using a firearm was conflicting and self-contradictory; that in the light of the

* Quoted at p. 90 *post*.

flaws of the relevant testimony it was definitely unsafe to pronounce that it was proved beyond reasonable doubt at the trial that this appellant was guilty of this offence; and that, accordingly, his conviction of this offence will be set aside and the seven years' sentence of imprisonment, which was passed on him in relation thereto, will be set aside too.

Held, (II) with regard to the appeals against sentence:

(1) That there is no reason to interfere with the sentence of one year's imprisonment passed on both appellants in respect of their conviction of the offence of riot, especially when it is taken into account that the maximum sentence under the law for this offence is three years and that the riot in question was of a very violent nature; and that for the same considerations the Court is not prepared to intervene in order to reduce the sentence of two years' imprisonment passed on appellant 1 in respect of his conviction of the offence of causing damage to the building of the American Embassy in the course of the riot

(2) That though the unlawful carrying of firearms is an offence which has to be punished with all due severity; and though the riot in the course of which the two appellants were carrying firearms was of a very grave nature and had most regrettable consequences, including the loss of life of two persons, after their acquittal of any complicity in relation to the death of the two victims, the offence of carrying firearms cannot be connected with such deaths and the appellants should not be made scapegoats for what has happened; that during the period in question both appellants were, as members of the Security forces of the Republic, normally allowed to carry firearms on many occasions, in the course of resisting the Turkish invasion of Cyprus; that bearing in mind the principle of disparity of sentence and as there is a huge and irreconcilable difference between the sentences of five years' imprisonment passed on the appellants for carrying arms during the riot, and that of three months' imprisonment passed on accused 4 for carrying during the same riot three sticks of dynamite, the Court has decided to reduce the sentence passed on each appellant to one of three years' imprisonment. (pp. 99–101 *post*).

Appeals partly allowed.

Per curiam: In deciding what a sentence has to be in a particular case this Court cannot be influenced by the fact that

such sentence, when it will be eventually served, will last for a shorter period than it would have otherwise, lasted, because the offender concerned has been granted special remission in addition to the normal remission that may be accorded to him under the relevant provisions.

Cases referred to:

R. v. *Koutchouk*, 22 C.L.R. 61;

Zavos v. *The Police* (1963) 1 C.L.R. 57;

R. v. *Edwards* [1974] 2 All E.R. 1085;

Tarttelin v. *Bowen* [1947] 2 All E.R. 837;

Heritage v. *Claxon*, [1941] 85 Sol. Jo. 323;

Katsaronas and Others v. *The Police* (1973) 2 C.L.R. 17;

HjiSavva v. *The Republic* (1976) 2 J.S.C. 302 at p. 319 (to be reported in (1976) 2 C.L.R.);

Anastassiades v. *The Republic* (1977) 5 J.S.C. 516 at p. 688 (to be reported in (1977) 2 C.L.R.);

Constantinou v. *The Republic* (1977) 9/10 J.S.C. 1527 at p. 1530 (to be reported in (1976) 2 C.L.R.);

Iacovou and Others v. *The Republic* (1977) 9/10 J.S.C. 1554 at p. 1570 (to be reported in (1976) 2 C.L.R.);

Foulias v. *The Police* (1978) 2 C.L.R. 56 at p. 57;

R. v. Milburn, The "Times" of April 3, 1974; [1974] Crim. L.R. 434.

Appeals against conviction and sentence.

Appeals against conviction and sentence by Ioannis Theodorou Ktimatias and Another who were convicted on the 20th June, 1977 at the Assize Court of Nicosia (Criminal Case No. 3115/77) of the offences of taking part in a riot contrary to sections 70, 72, 20 and 21 of the Criminal Code, Cap. 154 and of carrying firearms contrary to section 4 (1) (2) (a) of the Firearms Law, Cap. 57 (as amended by Laws No. 11/59 and 20/70) and were sentenced by Demetriades, P.D.C., Papadopoulos S.D.J., and Nikitas D.J., to concurrent terms of one year's and five years' imprisonment each, on the riot and carrying firearms counts, respectively; appellant 1 was also convicted of the offences of damaging a building in the course of a riot contrary to sections 70, 78, 20 and 21 of the Criminal Code, Cap. 154 and of using a firearm contrary to section 3 (1) (b) (2) (a) of the Firearms

Law, Cap. 57 (as amended by Laws Nos. 11/59 and 20/70) and was sentenced to concurrent terms of 2 years' and 7 years' imprisonment on the damaging a building and using a firearm counts, respectively.

M. Christofides, for appellant 1.

M. Christofides with A. Indianos, for appellant 2.

A. Evangelou and A. M. Angelides, Counsel of the Republic, for respondent.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: The appellants were convicted by an Assize Court in Nicosia, on June 20, 1977, of the offences of taking part in a riot (on count 3 in the information) and of carrying firearms (on count 6); they were both sentenced to concurrent terms of imprisonment of one year and five years, respectively.

Moreover, appellant 1 was convicted of the offences of damaging a building in the course of a riot (on count 4) and of using a firearm (on count 5); he was sentenced to concurrent terms of imprisonment of two years and seven years, respectively.

The events, in relation to which the appellants were charged with the commission of the above offences, are described as follows in the judgment of the trial Court:-

> " In the morning of the 19th August, 1974, a demonstration was organized by the Civil Servants' Trade Union (PA.SY. D.Y.) for the purpose of protesting against the stand that the government of the United States of America took regarding the Turkish Invasion in Cyprus. The decision of the committee of PA.SY.D.Y. was communicated to its members on that same morning and as a result members gathered outside the premises of the union where a procession led by members of the committee was formed. The demonstration peacefully passed through Evagoras and Archbishop Makarios III Avenues but when it reached the point of Archbishop Makarios III Avenue where the shops known as Alpan are situated, the leaders noticed a commotion and saw people throwing stones. Because of this the committee of PA.SY.D.Y. decided not to deliver to the U.S.A. Ambassador a resolution that they intended to hand to him and instead they continued their march to the Presidential Offices as originally planned.

A number of prosecution witnesses described what followed at the area of the U.S.A. Embassy. According to these witnesses, the demonstrators, after they entered Dossitheos Street from Archbishop Makarios III Avenue, were peaceful but when they reached the junction of that street with Therissos Street where the American Embassy is situated, the nature of the demonstration changed. People began shouting anti-American slogans; throwing of stones and bottles with black paint then followed; shouting "Set them on fire" was then heard and demonstrators attempted to overturn Embassy cars that were parked in an open building site situated to the east of the Embassy building. The situation that was then prevailing was described by the witnesses as a pandemonium. The witnesses said that they then heard noises similar to firing coming from inside the Embassy and gas and smoke grenades started falling from the Emgassy. The people started shouting that they were being shot at and they proceeded to pull back and ran into open spaces for cover. As the people were retreating, shooting was heard coming from a number of places. The shooting came mainly from the south of the Embassy. Two employees of the American Embassy, that is to say, P.W. 42, Stella Charalambidou, and Charalambos Evangelides (P.W.46), who were in the building of the Embassy at the time, told us that as a result of shots that were fired from outside, the U.S.A. Ambassador and a Cypriot secretary of the Embassy, Antoinette Varnava, were killed."

The appellants, who at their trial were accused 1 and accused 2, respectively, were tried together, on the same information, with three other persons, who will be referred to hereinafter as accused 3, 4 and 5.

The appellants and accused 3 were charged by counts 1 and 2 with the homicide of the U.S.A. Ambassador to Cyprus, Roger P. Davies, and of his secretary, Antoinette Varnava, respectively.

During the course of the trial the prosecution offered no further evidence against accused 3 in respect of the offences charged in counts 1 and 2, as well as in relation to offences for which he was charged under other counts in the information, with the exception of count 3 to which he pleaded guilty; and

he was sentenced to eight months' imprisonment on such count for having taken part in a riot.

Also, again during the course of the trial, accused 4 pleaded guilty to count 3; also to count 8 charging him with possession of explosive substances during the riot, namely three sticks of dynamite, and he was sentenced to concurrent terms of imprisonment of three months on each of the said two counts; the prosecution offered no evidence against him as regards offences with which he was charged by other counts.

Accused 5 was acquitted of all the offences with which he was charged under three of the counts in the information, as the prosecution deemed it fit to offer no further evidence against him in the course of the trial.

So, at the close of the case for the prosecution the only two remaining accused before the trial Court were the two appellants.

At that stage, the trial court did not call upon them to defend themselves in respect of the homicide charged in counts 1 and 2; also, it did not call upon appellant 2 in respect of counts 4 and 5; they were called upon only in relation to the offences in respect of which they were, eventually, convicted and sentenced, as aforesaid.

In its relevant Ruling, on June 3, 1977, the trial court stated, *inter alia*, the following:–

> " There is no evidence before us where the two accused were when the fatal shots were fired and no evidence was given to the effect that the two accused were at any time in the company of any unknown gunmen who participated in the commission of the unlawful events that took place on the 19th August, 1974, at the scene of the crimes charged under the information. The two accused were seen, as it was alleged by P.W.23, Stylianou, at a staircase window of Alpan building that he could not identify. They were not seen carrying any firearms and they were not previously seen in the company of any gunman, nor we have evidence that these two accused in any way participated in the firing of the bursts of the shots or any other shots."

As it is pointed out in the judgment of the trial court neither of the two appellants have denied that they were at the scene

of the riot, nor did they deny that, whilst there, they were carrying automatic firearms; but, appellant 1 has strongly denied the charge that he had used his weapon, and both appellants alleged that they had gone there in their capacity as members of the security forces of the Republic, for the purpose of assisting other members of such forces to disperse the rioters; appellant 1 alleged that he went there on his own initiative, whilst appellant 2 alleged that he went there as a result of a general order given by a superior officer of his.

In defending themselves as regards the offence of unlawfully carrying firearms, with which they were charged under count 6, both appellants relied on section 29 of the Firearms Law, Cap. 57, which, as modified under Article 188.4 of the Constitution, reads as follows:-

> "29. Nothing in this Law shall apply to or affect any person serving in the Forces of the Republic or in the Police Force or any special constable in respect of any firearm entrusted to or used or to be used by such person in his capacity as a member of such forces or as a special constable."

Cap. 57 has been repealed by the Firearms Law, 1974 (Law 38/74), which was promulgated on August 30, 1974, that is after the taking place of the riot in question; consequently, count 6 in the information was rightly based on the relevant provisions of Cap. 57 which were in force at the time of the riot.

Cap. 57 was amended on several occasions between its enactment as Law 31/33 and its repeal in 1974, but section 29 was not affected by such amendments and remained all along in force as originally enacted.

The only issue which had to be determined in relation to the guilt or innocence of the two appellants as regards count 6 was whether or not section 29 was applicable in the particular circumstances of this case. Eventually, the trial court, having rejected in this respect the versions of the two appellants, held that they had gone to the scene of the riot as individuals, for reasons of their own, and it found that they did not carry their weapons in their capacity as members of the "Forces of the Republic" and that, consequently, the provisions of section 29, above, did not apply.

In *Charalambous* v. *The Republic*, (1966) 2 C.L.R. 101, this Court considered the application of section 29 of Cap. 57; the appellant in that case was a member of the National Guard, and while on sentry duty he had the use of a military rifle which was being entrusted to the person on duty at the particular sentry box where the appellant happened to be posted; he deserted his post and, taking with him the said rifle, proceeded to a house in a nearby village, woke up the inmates in the early hours of the morning and terrorized them by pointing at them the loaded rifle, because of a personal grudge of his against them; in delivering judgment in that case one of us, Loizou Ag. J. as he then was, stated the following (at p. 106):–

> " ..... we are of the view that at the time of the commission of this offence the firearm in question was not being used by the appellant in his capacity as a member of the forces of the Republic.
>
> The question remains whether, at the relevant time, the firearm was entrusted to him in his aforementioned capacity.
>
> It is clear from the record of the proceedings that this firearm was the firearm used by the soldier on duty at that particular sentry box for the period of his sentry duty. It was not, therefore, entrusted to him in the sense that it had been issued to him for use during the period of his military service or for any indefinite period of time. It was entrusted to him for the limited purpose of his sentry duty at the sentry box.
>
> It is also abundantly clear that in taking the rifle to Zakaki village he was not carrying it to be used by him in his capacity as a member of the forces of the Republic.
>
> In the circumstances we are of the opinion that the present case is not covered by section 29 of the Firearms Law Cap. 57 ....."

Section 29 of Cap. 57 makes available to a person accused of an offence contrary to the provisions of Cap. 57 a defence which has to be substantiated by that person; and it is useful to refer, in this connection, to case-law such as *R.* v. *Koutchouk*, 22 C.L.R. 61 and *Zavos* v. *The Police* (1963) 1 C.L.R. 57.

In *R.* v. *Edwards*, [1974] 2 All E.R. 1085, the appellant had been charged with selling by retail intoxicating liquor without

holding a justices' licence authorizing such sale. At the trial the prosecution proved that the appellant had sold intoxicating liquor on the occasion in question but did not adduce any evidence that he was not in possession of a justices' licence. The appellant was convicted and appealed contending that, since the clerk to the licensing justices was required under the relevant legislation to keep a register giving particulars of justices' licences granted in the district, the question whether a licence had been granted to him was not one peculiarly within his own knowledge and, accordingly, the onus was on the prosecution to prove that no licence had been granted to him; the Court of Appeal (Criminal Division), in England, dismissed his appeal, holding that the onus lay on the appellant to prove that a justices' licence had been granted to him.

Lawton L.J. stated the following (at p. 1095):-

"In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception.

In our judgment its application does not depend on either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great treatise on evidence[1] this concept of peculiar knowledge furnishes no working rule. If it did, defendants

1 A treatise on the System of Evidence in Trials at Common Law (1905), vol. 4, p. 3525.

would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.

Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation on an enactment being construed in a particular way, there is no need for the prosecution to prove a *prima facie* case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden.

When the exception as we have adjudged it to be is applied to this case it was for the appellant to prove that he was the holder of a justices' licence, not the prosecution."

A provision which corresponds, though it is not exactly the same, to section 29 of Cap. 57, is section 5 of the Firearms Act, 1937, in England; in relation to the interpretation and application of the said section 5 Lord Goddard C.J. said the following in *Tarttelin* v. *Bowen*, [1947] 2 All E.R. 837-838:-

" This is a Case Stated by justices for the Parts of Lindsey before whom an information was preferred against the respondent that he 'unlawfully did have in his possession a certain firearm to which Pt. I of the Firearms Act, 1937, applied, he not then holding a firearm certificate in force at the time, contrary to s. 1 of the said Act,' and also with unlawfully having in his possession certain ammunition to which the Firearms Act applied and not holding a certificate in force at the time. The respondent was a flight-lieutenant in the Royal Air Force, and the firearm in question had not been issued to him as a member of his Majesty's forces or possessed by him as a member of His Majesty's forces. It had been purchased by him privately.

Section 5 of the Act, which is a little obscurely worded, is in these terms:

> Notwithstanding any rule of law whereunder the provisions of this Act do not bind the Crown, so much of the foregoing provisions of this Act as relates to the purchase and acquisition, but not so much thereof as relates to the possession, of firearms and ammunition to which this part of this Act applies shall apply to persons in the service of His Majesty in their capacity as such .....
>
> The justices have said they were of opinion 'that the exemption under s. 5 permitted the possession of the firearm and ammunition by the respondent as a member of His Majesty's forces without a certificate whether or not held in such a capacity.' That seems entirely to overlook the words 'in their capacity as such.' In the opinion of the court, the justices were clearly wrong. If their attention had been called to *Heritage* v. *Claxon*(1) their decision would, no doubt, have been different. It is just as much an offence for a member of the armed forces to be in possession of a firearm without a certificate as it is for any other subject of the Crown, unless it has been issued to him or acquired by him in his capacity as a member of the armed forces, in other words, unless he is carrying his arms in the way in which an armed soldier ordinarily does carry them."

The full report of the *Heritage* case, which is referred to in the above quoted passage, is not available, but, as it appears from a reference to it in Halsbury's Statutes of England, 2nd ed., vol. 5, p. 1099, it was held therein that the burden of proof was on the defendant to prove that possession of a firearm was enjoyed in his capacity as a member of the Home Guard.

Reverting now to the relevant facts of the present case, it is to be noted, first, that it is not in dispute that at all material times appellant 1 was a police constable. It has been his allegation that some time prior to the date of the riot he had been seconded to the National Guard Headquarters, where, in the course of carrying out his duties, he was always carrying with him an automatic military weapon. He has testified that, while driving past in the vicinity of the area where the riot was taking place, he stopped, on his own initiative, in order to help as a member of the security forces of the Republic to disperse the demonstrators.

(1) *Heritage v. Claxon*, [1941] 85 Sol. Jo. 323.

The trial Court rejected his version as regards the purpose for which he was present at the scene of the riot and found that, though according to the evidence of a prosecution witness, Superintendent Rigas, appellant 1 used to be seen by this witness at the National Guard Headquarters, dressed in army uniform, nevertheless there was no official secondment of appellant 1 from the Police to the National Guard.

As regards appellant 2 it does not appear to be disputed that he served in the National Guard as a volunteer, in resisting the Turkish invasion, from July 20, 1974, until August 27, 1974, when he was demobilized. His version has been that he went to the scene of the riot as a result of orders of a superior of his for the purpose of dispersing the demonstrators. The trial Court rejected his version and found, as in the case of appellant 1, that he had joined the rioters as an individual and not as a member of the security forces.

We see no adequate reason for disagreeing with the findings of fact made by the trial Court in this connection and, therefore, we do agree that the true position is that the two appellants joined the rioters as individuals, carrying automatic firearms; consequently, it cannot be accepted that they were present there in their capacity as members of the security forces of the Republic; and it has not been established by them, even on the balance of probabilities in order to discharge the onus cast upon them, that the particular firearms, which they were carrying at the time, had been entrusted to them in their aforementioned capacity; therefore, they cannot avail themselves of the exemption afforded by section 29 of Cap. 57 and they were rightly convicted on count 6 in the information. In the result their appeals against conviction on this count are dismissed.

In view of their participation in the riot whilst carrying firearms, which went beyond a mere presence there, and in the light of the nature of the offence of riot as expounded in, *inter alia*, *Katsaronas and others* v. *The Police*, (1973) 2 C.L.R. 17, we have no difficulty in holding that both appellants were rightly convicted of the offence of taking part in a riot, on count 3; and, furthermore, in view of his participation in the riot, in the course of which, according to the evidence, serious damage was caused to the building of the U.S.A. embassy, and in the light of the provisions of sections 20 and 21 of the Criminal Code, Cap. 154, we do hold that appellant 1 was

rightly convicted, on count 4, of the offence of having unlawfully caused damage to the said building in the course of the riot. Appellant 2 was not convicted on the said count; actually he was not called upon by the trial court to defend himself in respect of this charge. In the result the appeals of both the appellants against their conviction on count 3, and of appellant 1 against his conviction on count 4, are dismissed.

There remains to deal, next, with the appeal of appellant 1 in respect of his conviction on count 5, charging him with having used unlawfully, on the occasion concerned, a firearm.

It has been the case for the prosecution that this appellant used the said firearm in order to fire shots at the building of the U.S.A. embassy.

It must be stressed, whilst on this point, that the shots which this appellant allegedly fired are entirely unconnected with the tragic deaths of the U.S.A. Ambassador and his secretary, because, as already mentioned earlier on in this judgment, this appellant was not even called upon to defend himself at the trial in relation to the counts charging him with causing such deaths.

In order to establish the guilt of appellant 1 on count 5 the prosecution called at the trial three witnesses: Inspector Andreas Ierides (P.W.3), Major Christos Tsangaris (P.W.4) and Christophoros Lambrianides (P.W.17). The trial Court accepted as credible the evidence of all the aforementioned three prosecution witnesses.

There was, also, tendered for cross-examination another prosecution witness, Inspector Avgoustis Efstathiou (P.W.14), but the trial Court chose not to rely on his evidence.

The guilt of this appellant, like that of every accused person, had to be established with the degree of certainty required in criminal proceedings; in other words, it had to be proved, beyond reasonable doubt and not only on the balance of probabilities, that he had fired shots at the building of the U.S.A. embassy.

We are of the view that the evidence on which the trial Court relied in order to convict appellant 1 of this offence was conflicting and self-contradictory; consequently, it was not safe to find him guilty on count 5 (and see in this respect, *inter alia*,

HjiSavva v. *The Republic*, (1976) 2 J.S.C. 302, 319*, and *Anastassiades* v. *The Republic*, (1977) 5 J.S.C. 516, 688)**.

One of the prosecution witnesses, who was relied upon by the trial Court in this connection, Lambrianides, has testified that during the riot in the vicinity of the building of the American embassy, on August 19, 1974, he saw a person firing at the embassy; at the time he did not know who that person was, but he was told there and then that it was Ktimatias, that is appellant 1; he added that he saw, too, Inspector Efstathiou who was trying to prevent this appellant from shooting.

During his testimony at the trial this witness, Lambrianides, stated that he was positive that he did not notice anybody else trying to stop the appellant from shooting, whereas in his statement to the police he mentioned that in addition to Inspector Efstathiou another police officer was pulling the appellant away and telling him to stop shooting; when this discrepancy was pointed out to him, in cross-examination, the witness insisted that the truth was what he had stated on oath at the trial.

Inspector Efstathiou was a prosecution witness, who was tendered for cross-examination and who has testified that he had known appellant 1 for a number of years, and, though he had gone on duty to the scene of the riot, outside the American embassy, on August 19, 1974, he had not seen at all there on that day appellant 1.

The trial Court did not rely on this witness but, as it was not attempted by the prosecution to treat him as a hostile witness for any reason, the fact remains that there exists on record the evidence of a prosecution witness which is in direct conflict with that of witness Lambrianides.

The testimony of witness Lambrianides is inconsistent with that of two other prosecution witnesses, who were believed by the trial Court, namely Major Tsangaris and Inspector Ierides. It is to be noted that witness Tsangaris said that he saw the appellant firing at the building of the American embassy and Inspector Ierides approaching him and trying to prevent him from doing so. None of them mentions that witness Efstathiou tried to stop appellant 1 from firing, as witness Lambrianides has testified, and the latter witness was positive that he did not

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

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

see any other police officer trying to do the same and, therefore, that he did not see Inspector Ierides trying to do so.

Witness Ierides himself says that he saw appellant 1 in a firing position, but that he did not see him firing at any time and that he managed to remove this appellant from the scene. In this connection his evidence contradicts that of witness Tsangaris who says that he saw appellant 1 firing when witness Ierides was approaching him; and it is inconsistent also with that of witness Lambrianides.

One of the reasons why witness Tsangaris was sure that appellant 1 was firing was that he noticed dispersed around him a number of expended cartridges, but witness Ierides was definite that from the moment he first saw appellant 1 up to the moment appellant 1 went away with him this appellant did not fire at all, nor were any expended cartridges on the ground at the place where he was standing.

Moreover, witness Tsangaris has very frankly conceded that at the time there was teargas and smoke around and that witness Ierides was in a better position to see what was happening as he was nearer to appellant 1.

In the light of the flows of the relevant testimony which we have just pointed out above, and notwithstanding the fact that some of these flaws might conceivably be treated as not being of primary significance if we were prepared to make fine distinctions as regards possible differences in relation to the times or the places when and where appellant 1 was seen by the aforementioned witnesses, we have no hesitation in holding that it was definitely unsafe to pronounce that it was proved beyond reasonable doubt, at the trial, that appellant 1 was guilty of the offence of firing at the building of the American embassy; we have, therefore, decided to set aside his conviction in this respect, on count 5, and, consequently, the seven years' sentence of imprisonment, which was passed on him in relation thereto, has to be set aside, too.

We shall deal, next, with the matter of the other sentences passed upon the appellants:

As regards the sentence of one year's imprisonment passed on both appellants in respect of their conviction of the offence of riot, on count 3, we see no reason to interfere with it, especially when one takes into account that the maximum sentence

under the law for this offence is three years and that the riot in question was of a very violent nature.

For the same considerations we are not prepared to intervene in order to reduce the sentence which was passed on appellant 1 in respect of his conviction, on count 4, of the offence of causing damage to the building of the American embassy in the course of the riot.

As regards the sentences of five years' imprisonment passed on the appellants in respect of their conviction, on count 6, of the offence of carrying firearms during the riot, we have been faced with quite some difficulty in deciding what was the proper course to adopt in the particular circumstances of this case. On the one hand, we cannot lose sight of the fact that the unlawful carrying of firearms is an offence which, as often stressed by this Court, has to be punished with all due severity, and, moreover, as already mentioned, the riot, in the course of which the two appellants were carrying firearms, was of a very grave nature and had most regrettable consequences, including the loss of life of two persons; but, on the other hand, it must be borne in mind that after their acquittal by the Assize Court of any complicity in relation to the deaths of the two victims, the offence of carrying firearms by the appellants during the riot cannot, in any way, be connected with such deaths and the appellants should not be made scapegoats for what has happened once they have already been acquitted, during their trial, of the offence of homicide.

Another consideration which we have to take into account in favour of the appellants is that during the period in question both of them were, as members of the security forces of the Republic, normally allowed to carry firearms on many other occasions, in the course of resisting the Turkish invasion of Cyprus; appellant 1 as a member of the police force, who was unofficially seconded for duty at the National Guard Headquarters, and appellant 2 as a reservist, who had enlisted as a volunteer and was serving, for the time being, once again, in the ranks of the National Guard.

A further feature of this case which we have to bear in mind in relation to the sentences passed on the two appellants in respect of count 6 is the principle of disparity of sentences, as it has been expounded on many occasions, and quite recently by this Court in a number of cases, such as *Constantinou* v. *The*

Republic, (1977) 9/10 J.S.C. 1527, 1530*, *Iacovou and Others* v. *The Republic*, (1977) 9/10 J.S.C. 1554, 1570*, and *Foulias* v. *The Police*, (1978) 2 C.L.R. 56, 57.

As it has already been mentioned at the commencement of this judgment, a co-accused of the appellants, accused 4, who had pleaded guilty to taking part in the riot and who was in possession of three sticks of dynamite during the riot, was sentenced to concurrent terms of imprisonment of three months for each of the said two offences.

Of course, as pointed out by the trial Court in passing such lenient sentences on him, there were strong mitigating factors justifying such a course, but the fact remains that there is a huge and irreconcilable difference, whatever the individual circumstances of the offenders concerned and other relevant considerations were, between the sentences of five years' imprisonment passed on the appellants for carrying arms during the riot, and that of three months' imprisonment passed on accused 4 for carrying during the same riot three sticks of dynamite.

Moreover, the two appellants, as already pointed out, were, at the time, members of the security forces of the Republic, who were authorized to carry firearms on other occasions, whereas accused 4 was a civilian, who was not authorized to carry explosives, such as three sticks of dynamite, on any occasion under any circumstances.

We think it is pertinent to refer, in relation to the aspect of disparity of sentences, to the case of *R.* v. *Milburn*, which was decided by the Court of Appeal in England and is reported in the "Times" of April 3, 1974 (see, also [1974] Crim. L.R. 434); the facts of that case, as they appear from the report in the "Times", were as follows:-

> "Allan Milburn, aged 25, of Easterside, Middlesbrough, pleaded guilty at Teesside Crown Court (Judge Forrester-Paton, QC), last December to causing death by dangerous driving, contrary to section 1 of the Road Traffic Act, 1972, and causing bodily harm to a person by racing, contrary to section 35 of the Offences Against the Person Act, 1861. He was sentenced to two years' imprisonment on each count concurrent and was disqualified for 20 years and until after passing a driving test.

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

His co-accused, John Garcia, aged 25, of Middlesbrough, who pleaded guilty to aiding and abetting the offences and did not appeal, received a nine months' sentence suspended for two years and was disqualified for 10 years."

In the course of delivering the judgment of the Court Roskill L.J. is reported to have observed that:

" The Court could conceive of nothing more calculated to create a sense of grievance in the appellant's mind: that Mr. Garcia, who was nearly as deeply involved as the appellant was, should get away without a prison sentence whereas he should go to prison for two years.

It was for those reasons rather than for any feeling that in the circumstances two years was wrong that their Lordships felt obliged to reduce the sentence to 12 months. To that extent the appellant was fortunate, but none the less the scales had to be held evenly between the two men. The judge has specifically failed to do that."

Bearing all the foregoing in mind we have decided to reduce the sentence passed on each appellant in respect of count 6 to one of three years', instead of five years', imprisonment.

Before concluding, we would like to observe that it has not escaped our attention that, while these appeals were pending, both appellants benefited, in addition to the normal remission of sentence, by partial remissions humanely granted by President Kyprianou to all prisoners on two occasions when he became President of the Republic, first for the unexpired term of the late President Archbishop Makarios and, later, for a new term of office; and the two appellants, no matter how serious their crimes were, could not have been deprived of the benefit of the said two partial remissions granted by President Kyprianou, because this would have glaringly offended against the principle of equality. In our view, however, this Court, in deciding what a sentence has to be in a particular case, cannot be influenced by the fact that such sentence, when it will be eventually served, will last for a shorter period than it would have, otherwise, lasted, because the offender concerned has been granted special remission in addition to the normal remission that may be accorded to him under the relevant provisions.

In the result, these appeals are allowed, in part, as stated in this judgment, and they are dismissed as regards their remainder.

Appeals partly allowed.