1980 January 21

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

ELEFTHERIOS K. PAPADOPOULLOS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3823).

Criminal Law—Evidence—Seditious conspiracy, holding an office or position in an unlawful association, preparing war or warlike undertaking, and using armed force against the Government—Sections 47(*a*), 48, 56(2), 62, 63, 40, 41, 20 *and* 21 *of the Criminal Code, Cap.* 154—*Conviction based on oral and documentary evidence which remained uncontradicted and was accepted by the trial Court—No persuasive reasons given that testimony of prosecution witnesses should not have been accepted—Conviction upheld.*

Criminal Law—Conviction—Verdict of guilty—Based on findings of fact and credibility of witnesses—No wrong evaluation of the evidence or misdirection on the factual aspect so as to entitle Court of Appeal the arrive at conclusion that conviction was, having regard to the evidence adduced, unreasonable—And no "lurking doubt" rendering the conviction unsafe or unsatisfactory so as to be treated as being unreasonable having regard to the evidence adduced or as entailing a substantial miscarriage of justice in the sense of section 145(1)(*b*) *of the Criminal Procedure Law, Cap.* 155.

Criminal Procedure—Conspiracy—Indictment for conspiracy—Inclusion in an information containing counts for substantive offences—Principles applicable.

Criminal Procedure—Joinder of offences—Separate trial—Principles applicable—Joinder of counts of possessing arms and explosive substances with counts of seditious conspiracy, holding an office in an unlawful association, preparing war or warlike undertaking

and using armed force against the Republic—No irregularity—Section 40 *of the Criminal Procedure Law, Cap.* 155.

Criminal Law—Evidence—Best evidence—Documentary evidence—Secondary evidence—When admissible—Loss or destruction of the originals—Photocopies rightly admitted.

Criminal Law—Seditious libel—Encouraging violence and promoting ill-will—Section 51(1) *of the Criminal Code, Cap.* 154*—Test of the offence—Mens rea—Editing and publishing book containing comments against President of the Republic and,* inter alia, *imputing toleration of crime to his Ministers—Contents thereof rightly found to be of a seditious nature—Verdict of guilty duly warranted by the evidence—Appellant could not invoke the defences set out in the proviso to the said section* 51(1) *once he failed to discharge the onus cast upon him thereunder—Said section not contrary to Article* 19.1 *of the Constitution which safeguards right to freedom of speech and expression, and to Article* 12.4 *which safeguards the presumption of innocence.*

Criminal Law—Presumption of innocence—Article 12.4 *of the Constitution—Onus of proof—When cast upon the accused same may be discharged by mere preponderance of evidence and not beyond reasonable doubt—Proviso to section* 51(1) *of the Criminal Code Cap.* 154*, casting onus of proof on accused, not contrary to the above Article.*

Constitutional Law—Presumption of innocence—Right to a fair hearing—Articles 12.4 *and* 30.2 *of the Constitution—Proviso to section* 51(1) *of the Criminal Code, Cap.* 154 *not contrary to the above Articles.*

Constitutional Law—Right to freedom of speech and expression under Article 19 *of the Constitution—Not absolute but is subject to the restrictions set out in paragraph* 3 *of this Article—Section* 51(1) *of the Criminal Code, Cap.* 154 *not unconstitutional as being contrary to the above Article.*

Constitutional Law—Constitutionality of legislation—Section 51(1) *of the Criminal Code, Cap.* 154 *not contrary to Articles* 19 *and* 12.4 *of the Constitution.*

Findings of fact—Based on credibility of witnesses—Verdict of guilty—Appeal—Principles applicable.

Criminal Law—Sentence—Encouraging violence and promoting ill-

will, seditious conspiracy, holding an office or position in an unlawful association, preparing war or warlike undertaking, using armed force against the Government, possessing firearms and ammunition and possessing a wireless apparatus—Sentences ranging from twelve months to life imprisonment—Offences arising out of participation of appellant in the activities of the unlawful organization "EOKA B" and in the coup d'etat of July 15, 1974 against the Government of the Republic—Circumstances and tragic consequences resulting therefrom—Sentences not manifestly excessive or wrong in law.

The appellant was convicted by the Assize Court of Nicosia on nine counts of the offences of:

(a) Encouraging violence and promoting ill-will, contrary to section 51(1) of the Criminal Code, Cap. 154 (hereinafter to be referred to as "the Code") (count 1);

(b) Seditious conspiracy, contrary to sections 47(a), 48, 20 and 21 of the Code (count 2);

(c) Holding an office or position in the unlawful association of "EOKA B" or "EOKA" and for acting in such office or position, contrary to sections 56(2), 62, 63, 20 and 21 of the Code (count 3);

(d) Preparing of war or warlike undertaking, contrary to sections 40, 20, and 21 of the Code (count 4);

(e) Using of armed force against the Government, contrary to sections 41, 20 and 21 of the Code (count 5);

(f) Possessing explosive substances, contrary to sections 4(4)(d), 5(a) and (b) of the Explosive Substances Law, Cap. 54 (as amended by Law 21 of 1970), possessing firearms the importation of which is prohibited, contrary to section 3(1)(b)(c), (2)(b), of the Firearms Law, Cap. 57 (as amended by Laws 11 of 1959 and 20 of 1970) and possessing pistols and revolvers, contrary to section 4(1) 2(b), of the Firearms Law, Cap. 57, as above amended (counts 6, 7 and 8); and

(g) Possessing a wireless apparatus, contrary to sections 3(1) and 11(a) of the Wireless Telegraphy Law, Cap. 307 (count 9), and was sentenced to twelve months'

imprisonment on count 1, five years' imprisonment on count 2, three years' imprisonment on count 3, imprisonment for life on counts 4 to 5, ten years' imprisonment on each of counts 6 to 8, and to one year's imprisonment on count 9, all sentences to run concurrently.

The offences in question, with the exception of the offence in count 1, arose out of the participation and the role of the appellant in the unlawful organization "EOKA B" and in the coup d'etat of the 15th July, 1974 against the lawful government of the Republic.

The particulars of the offence of encouraging violence (count 1) were that the appellant, between August and the 16th December, 1976, in Nicosia, edited and published a text* under the title "Political Documents 1971-1974" containing comments of him which were likely to encourage recourse to violence on the part of any of the inhabitants of the Republic or to promote feelings of ill-will between different classes of persons in the Republic; and it was the case for the prosecution that in the circumstances and at the very period at which they were published with so many persons mourning their dead, with the existence of thousands of persons displaced from their homes, the desperate situation of the relatives of missing persons, the fact that the misfortunes that befell this country were attributed to the Coup d'etat which opened the door to the Turkish invasion, the faith and love of the people to its leadership and to the work of His Beatitude the Archbishop Makarios, his government and his collaborators and supporters, they were likely to encourage recourse to violence and to promote feelings of ill-will as set out in this count.

The prosecution evidence with regard to counts 2, 3, 4, and 5 consisted of the oral testimony of 33 prosecution witnesses, which remained uncontradicted and was believed by the Assize Court, and of documentary evidence. With regard to counts 6 to 9, which referred to arms, explosive substances and a wireless set, all found in the course of a search by the police in flat No. 20 in "Gardenia" block of flats, Nicosia, the main prosecution evidence came from police officer, Ioannis Ktorides,

* See extracts of this text at p. 45 *post*.

fingerprint and photography expert, who found fingerprints of the appellant on a number of items seized from the said flat and his evidence remained throughout uncontradicted. The Assize Court in its judgment, relating to counts 6 to 9, said that even only from the evidence of Ktorides it would be sufficient for it to come to the conclusion beyond reasonable doubt that the appellant was at the time in the said flat, knew about the existence of the objects, subject-matter of the above counts, otherwise the existence of his finger prints on such items as the coffee glass jar and a bottle of brandy could not be justified.

Upon appeal against conviction and sentence counsel for the appellant contended:

(1) That, with regard to the conviction on counts 2–5, the evidence of all prosecution witnesses should not have been accepted because they all had lied.

(2) That, with regard to the conviction on counts 6–9, the Assize Court made a wrong evaluation of the evidence or misdirected itself on the factual aspect of the case.

(3) That the trial Court wrongly dismissed the objections of the defence to the effect that in cases where accused persons are charged in several counts setting out the completed offences, the addition of a charge of conspiracy (count 2) in respect of the same circumstances was undesirable.

(4) That the inclusion of counts 6–9 on the information was wrongly made because they related to offences of a different type than the rest of the offences contained in the other counts and therefore the cross-examination of witnesses on these counts might adversely affect the defence of the appellant with regard to the other counts.

(5) That the Assize Court wrongly admitted as evidence the documents, *exhibits* 12 to 32 and 41 and 42, which were only copies and not the originals, because it had not been sufficiently and beyond reasonable doubt established that the production of the originals was not possible.

(6) That, taking into consideration the evidence adduced, the trial Court wrongly found the appellant guilty on the first count because:

(a) The verdict was unreasonable;

(b) It wrongly decided that the appellant was not entitled to invoke the defences which are provided by section 51(1)* of the Code;

(c) It wrongly decided that the defences which are set out in section 51(1) of the Code could only be invoked by the appellant if the text in question was published exclusively for the purpose of achieving any of the objects provided therein;

(d) The aforesaid construction was unconstitutional.

(7) That the sentences were manifestly excessive and wrong in law.

With regard to contention 5 above the trial Court found that the originals of the documents in question were no longer in the possession or control of the prosecution; and in view of the fact that the photocopies produced were made by the witness who produced them from the originals, they were admissible and could be produced unless on other grounds they were not admissible.

Held, per A. Loizou J., Triantafyllides P., L. Loizou, Hadjianastassiou and Malachtos, JJ. concurring, (1) that no persuasive reasons were given that the testimony of the prosecution witnesses, with regard to counts 2–5, should not have been accepted and the perusal of the record shows nothing in their testimony that would cast any shadow on their veracity; that, on the contrary, on the totality of the testimony of all these witnesses, and the documents and other material, including the evidence connected with counts 6–9, which cannot be isolated or viewed separately from the rest of the evidence, the appellant was rightly found guilty on counts 2 to 5; and that, accordingly, contention No. (1), relating to counts 2 to 5, must be dismissed.

(2) That there is no reason to interfere with the findings and conclusions of the Assize Court, with regard to counts 6 to 9, based as they are on the credibility of witnesses, whose demeanour in the witness-box it had the opportunity to watch; that, in fact, apart from the mere denial of the appellant of certain parts of the evidence, the long arguments of his counsel,

* Section 51(1) is quoted in full at pp. 41–42 *post*.

both in this Court and the Assize Court, there was nothing to suggest that the Assize Court in any way made a wrong evaluation of the evidence or misdirected itself on any factual aspect of the case justifying interference on appeal, with such findings and conclusions so as to entitle this Court now to arrive at the conclusion that the conviction on all these counts or in respect of anyone of them should be set aside on the ground that same was having regard to the evidence adduced unreasonable; that there does not exist any "lurking doubt" which renders the conviction on all or anyone of them unsafe or unsatisfactory so as to be treated as being unreasonable having regard to the evidence adduced or as entailing a substantial miscarriage of justice in the sense of section 145(1)(b) of the Criminal Procedure Law, Cap. 155 (see, *inter alia, Zisimides* v. *The Republic* (1978) 2 C.L.R. p. 382 at p. 432); and that, accordingly, contention (2), relating to counts 6 to 9, must be dismissed.

(3)(a) (*After stating the principles governing joinder of offences—vide pp.* 36–7 *post*) that though the joining of a count of conspiracy with a count or counts for substantive offences is an undesirable practice and can in some cases work hardship on the accused, the inclusion of such a count in an indictment charging the accused with other counts cannot by itself lead to unfairness, because the circumstances of a case may be such as to warrant the inclusion of such a count and to call for it in the public interest for the due administration of justice; and that the question whether a conspiracy count is properly included in an indictment cannot be answered by the application of any rigid rules and each case must be considered on its own facts (see, also, Loizou and Pikis, Criminal Procedure in Cyprus, 1975, p. 58).

(3)(b) That there was no irregularity in the joinder of all these counts in the information, nor any injustice or unfairness in the conduct of the proceedings, or that any prejudice has been caused to the appellant on account of such joinder; that on the totality of the evidence adduced and the conduct of the proceedings this was not a case where a separate trial should have been ordered for any of the counts or that anyone or more of them should not have been included on the same information; and that, accordingly, contentions (3) and (4) above must fail.

(4) That the rule requiring the production of the original of a

document is subject to exceptions, one of them being the case where the original has been lost or destroyed or that it is in the possession of the opposite party, or its production cannot be enforced (see *R.* v. *Nowaz*, The Times April, 17, 1976 C.A.); that in such a case the prosecution must prove the existence of the original, its destruction positively or presumptively or establish its loss by some way or other and in any event, prove that it cannot be found after diligent search, in other words the non-production of the original must be duly accounted for; that the secondary evidence so admitted—may take any form either by producing a photocopy or true copy or parol evidence of the contents of the original; that the sufficiency of the search necessary to let in secondary evidence is a preliminary question for the Judge, and will vary with the importance of the document and the circumstances of the case (see Phipson on Evidence, 12th ed. p. 760, para. 1820); that in the present case there was clear and unambiguous evidence that the originals were lost or destroyed and that in any event they were not in the possession of the prosecution; that, furthermore, the sufficiency of the search necessary to let in secondary evidence was also established to the satisfaction of the Assize Court; that, therefore, it rightly admitted the production of the photocopies about whose genuineness there was the evidence of Sgt. Kazaphaniotis, who had made these photocopies from the originals, then in his possession; and that, accordingly, contention (5) above must fail.

5(a) (*With regard to the conviction on the count of encouraging violence and promoting ill-will contrary to section* 51(1) *of the Code*) that the test is not either the truth of the language or the innocence of the motive with which it was published but the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of state? (see *Rex* v. *Aldred*, 22 Cox's Criminal Cases, p. 1 at p. 3); that, no doubt, the contents of certain passages in the book were of a seditious nature in the sense of section 51(1) of the Code; that mens rea could clearly be inferred and the verdict of the Court was duly warranted by the evidence adduced; that, furthermore, the Assize Court rightly concluded that the appellant could not invoke the defences set out in the proviso to the section, once he had failed to discharge the onus cast upon him under the said proviso and prove that the said publication was made solely for anyone or more of the said purposes and done in good faith;

that the defences set out in the proviso are indeed exhaustive, and they come into play after the elements of the main part of the section are established and which would have amounted to an offence but for these defences.

5(b) That there is nothing unconstitutional in this section or in its construction by the Court; that the exercise of the right of freedom of speech and expression, which is safeguarded by Article 19.1 of the Constitution is not an absolute one but it is obviously restricted in so far as it is necessary to preserve the values protected by paragraph 3 of this Article, which were found necessary in order to protect the State and its Constitutional order, to prevent seditious, libellous, blasphemous and obscene publications and to ensure the proper administration of justice etc.; that, no doubt, these values on the one hand and the liberty of the subject on the other, are antagonistic extremes; that neither is absolute and in a democratic society the problem is one of striking a proper balance between them; that to the enforcement, however, of such laws which are justified only by the restrictions provided in para. 3, Courts should exhibit the utmost caution (see *HjiNicolaou* v. *The Police* (1976) 2 C.L.R. 63).

5(c) That the fact that the defences opened to an accused person after proof of the seditious nature of a publication, are limited to those set out in the proviso to section 51, does not offend any other Article of the Constitution neither the right to a fair hearing etc.; that the presumption of innocence has always been a fundamental principle of our Criminal Law; that it is now safeguarded also by para. 4 of Article 12 of the Constitution which corresponds to Article 6, para. 2, of the European Convention of Human Rights; that it is not violated by placing on the accused the burden of proving that the seditious publication was made solely for anyone or more of the purposes set out in the said proviso; that, needless to say, when the onus of proof of a particular element in a criminal trial is cast upon an accused person, same may be discharged by mere preponderance of evidence and not beyond reasonable doubt; that such onus of proof is less heavy than that required at the hands of the prosecution in proving its case beyond reasonable doubt and may be discharged by evidence satisfying the Jury of the probability of that which the defendant is called on to establish (see *R.* v.

Carr Briant [1943] 29 Cr. App. R., 76); and that, accordingly, the ground of appeal relating to count 1 must, also, fail.

(6) That in view of the facts of the case, the tragic consequences that resulted therefrom and the price paid by so many people, the sentences imposed are not manifestly excessive or wrong in law; that the totality of the circumstances relevant to the offence and the involvement of the appellant left no room for leniency; that the approach of the Assize Court does not call for interference with their decision on this point of the appeal; and that, accordingly, the appeal against sentence must be dismissed.

Per Triantafyllides P. (on the aspect of the constitutionality of the conviction of the appellant on count 1 *of the offence of encouraging violence and promoting ill-will, contrary to section* 51(1) *of the Code*):

(1) That though there can be no doubt that section 51(1) restricts the right to freedom of speech and expression which is safeguarded by Article 19 of the Constitution, when such section is read as a whole, and there are taken into account the defences afforded to an accused person by means of paragraphs (a) to (d) in the proviso to this section, it has to be held that the restriction, which is imposed by means of it, is necessary in the interests of the security of the Republic and the constitutional order, as well as of the public order and for the protection of the reputation and rights of others; and that, consequently, it is a constitutionally permissible restriction, which comes within the ambit of paragraph 3 of Article 19 above.

(2) That, of course, there is room in a democratic society, such as the one set up by the Constitution of the Republic, for amending section 51(1) of Cap. 154 in order to make it more liberal, but the mere fact that there is room for improvement, in this respect, does not render it, as it stands today, an unconstitutional provision; that, also, for the same reasons, it cannot be regarded as offending against Article 10 of the European Convention on Human Rights; and that, therefore, the conviction of the appellant in relation to an offence committed contrary to it cannot be treated as unconstitutional.

Per Hadjianastassiou J. (on the question whether section 51 *of the Criminal Code, Cap.* 154 *was properly construed by the*

Assize Court and whether the appellant was entitled to invoke the defences set out in this section):

(1) That a prosecution for seditious libel is a necessary one to every civilized Government; it is liable to be abused, and if it is abused, the complainant can turn to the Courts of this country for protection.

(2) That it is equally important to state that every person in Cyprus has a constitutional right to express and/or to publish his opinion on any public matter, however distasteful, however repugnant to others, if of course he avoids defamatory matter; that matters of state, matters of policy, matters even of morals—all these are open to him; that he may state his opinions freely and he may try to persuade others to share his views.

(3) That the liberty of the press is indeed essential to the nature of a free state, but this consists, as the authorities show, in laying no previous restraints upon publications, and not in freedom from censure for seditious matter when published; that, certainly, every man in Cyprus has an undoubted right to lay what sentiments he pleases before the public; that to forbid this, is to destroy the freedom of the press, but if he publishes what is improper, mischievous, illegal or seditious, he must take the consequences of his own acts.

(4) That it is also recognized in all civilized countries that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeller to responsibility for the public offence, as well as for the private injury, are not abolished by the protection extended in the Constitution of the Republic.

(5) That the trial Court rightly came to the conclusion that certain passages of the book in question were of a seditious nature, and that the publications were outside the provisions of the proviso of the said section 51(1); that once the appellant has failed to discharge the onus cast upon him, viz., that the publication was made in good faith, the contentions of counsel, including the contention of unconstitutionality, must fail.

Appeal against conviction and sentence dismissed.

Cases referred to:

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

HjiSavva alias Koutras v. *The Republic* (1976) 2 C.L.R. 13 at pp. 22–28, 40–45, 57–58;

Fournaris v. *The Republic* (1978) 2 C.L.R. 20 at p. 23;

Zisimides v. *The Republic* (1978) 2 C.L.R. 382 at p. 432;

R. v. *Assim*, 50 Cr. App. R. 224;

Akritas v. *P.*, 20 C.L.R. (Part I) p. 110;

R. v. *Dawson, R.* v. *Wenlock* [1960] 1 All E.R. 558;

R. v. *Griffiths* [1965] 2 All E.R. 448;

R. v. *Meyrick*, 21 Cr. App. R. 94;

R. v. *Luberg*, 19 Cr. App. R. 133 at p. 137;

Constantinides v. *Republic* (1978) 2 C.L.R. 337 at pp. 359–360;

R. v. *Jones and Others*, 59 Cr. App. R. 120;

Tattaris v. *The Queen*, 24 C.L.R. 250;

R. v. *Nowaz*, The Times April 17, 1976 C.A.;

R. v. *Burns & Others*, 16 Cox's Criminal Law Cases, 355 at p. 360;

Rex v. *Aldred*, 22 Cox's Criminal Law Cases 1 at p. 3;

HjiNicolaou v. *Police* (1976) 2 C.L.R. 63 at pp. 68, 69;

R. v. *Carr–Briant*, 29 Cr. App. R. 76;

Gendarmerie v. *Zavos*, 4 R.S.C.C. 63;

Kouppis v. *The Republic* (1977) 11 J.S.C. 1860 at p. 1897 (to be reported in (1977) 2 C.L.R.);

De Becker v. *Belgium* (E.C.H.R. Series B, 1962 at p. 126);

X and The German Association of Z. v. *The Federal Republic of Germany* ((Application No. 1167/61), Yearbook of the European Convention on Human Rights, 1963, Vol. 6, p. 204, at p. 218);

Handyside v. *The United Kingdom* (Decision of the European Court of Human Rights—Series A: Judgments and Decisions, Vol. 24 at pp. 22–23);

Geerk v. *Switzerland* ((Application No. 7640/76) Decision of the European Commission of Human Rights—See Decisions and Reports of the Commission, Vol. 12, p. 103, at p. 109);

Fox v. *Washington*, 59 Law. Ed. 573 at pp. 575–576;

Dennis v. *United States*, 95 Law. Ed. 1137 at pp. 1147, 1148, 1149;

New York Times Co. v. *United States*, 29 Law. Ed. 2d. 822 at p. 828;

Near v. *Minnesota ex Rel. Olson*, 75 Law. Ed. 1357 at pp. 1366–1367.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Eleftherios K. Papadopoullos who was convicted on the 10th August, 1977 at the Assize Court of Nicosia (Criminal Case No. 1680/77) on, *inter alia*, one count of the offence of using armed force against the Government contrary to sections 41, 20 and 21 of the Criminal Code, Cap. 154 and on one count of the offence of seditious conspiracy contrary to sections 47(a), 48, 20 and 21 of the Criminal Code, Cap. 154 and was sentenced by Demetriades, P.D.C., Papadopoullos, S.D.J. and Nikitas, D.J. to life imprisonment of the use of armed force count and to five years' imprisonment on the seditious conspiracy count.

A. Eftychiou, for the appellant.

C. Kypridemos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The first judgment will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: The appellant was found guilty and sentenced by the Nicosia Assize Court on the following nine counts:

Count 1—For encouraging violence and promoting ill-will contrary to section 51(1) of the Criminal Code, Cap. 154 (hereinafter to be referred to as "the Code"), to 12 months imprisonment.

Count 2—For seditious conspiracy contrary to sections 47(a), 48, 20 and 21 of the Code, to five years imprisonment.

Count 3—For holding an office or position in the unlawful association of "EOKA B" or "EOKA" and for acting in such office or position, contrary to sections 56(2), 62, 63, 20 and 21 of the Code, to three years imprisonment.

Count 4—For preparation of war or warlike undertaking, contrary to sections 40, 20, and 21 of the Code, to imprisonment for life.

Count 5—For the use of armed force against the Government,

contrary to sections 41, 20 and 21 of the Code, to imprisonment for life.

Counts 6, 7 and 8—For possession of explosive substances, contrary to sections 4(4)(d), 5(a) and (b) of the Explosive Substances Law, Cap. 54 as amended by Law 21 of 1970, possession of firearms the importation of which is prohibited, contrary to section 3(1)(b)(c), (2)(b), of the Firearms Law, Cap. 57, as amended by Laws 11 of 1959 and 20 of 1970, and possession of Pistols and Revolvers, contrary to section 4(1) 2(b), of the Firearms Law, Cap. 57, as above amended; on each of them to ten years imprisonment; and

Count 9—For possession of a wireless apparatus, contrary to sections 3(1) and 11(a) of the Wireless Telegraphy Law, Cap. 307, to one year's imprisonment.

All the aforesaid sentences were ordered to run concurrently.

The present appeal is against both the conviction and the sentence in respect of all counts.

I need not repeat here verbatim the numerous grounds of law set out in the notice of appeal, suffice it to say that as eventually argued before us those against conviction may be grouped under three main headings, namely;

(a) that there have been procedural irregularities at the trial;

(b) that the conviction on all counts was, having regard to the evidence adduced, unreasonable; and

(c) with regard to count 1, the appellant was entitled to invoke the defences which are set out in section 51(1) of the Code, otherwise the section was unconstitutional.

With regard to the sentences imposed the ground was that they were manifestly excessive and wrong in law.

The facts as found by the trial Court may be summed up as follows:-

In September 1971, the late General Georghios Grivas Dhigenis came ashore at an isolated cove, near Pissouri village and was received by a group of persons, which included the

appellant, Stelios Stylianou, Philippos Ioannides Pippou, advocates, and Costas Papastavrou, a school-master. Grivas, upon his arrival set up the association then known as "EOKA" of which the appellant, as admitted by him in evidence, became a member. This association identified itself some time later as "EOKA B", obviously in order to distinguish itself from the fighters organization that waged the liberation struggle that preceded independence. In order to avoid therefore any confusion I shall be referring to the new association only as "EOKA B", although some of the leaflets and documents circulated were signed at times by "EOKA" only.

This "EOKA B" made its debut on the 16th November, 1972, by means of a leaflet which was circulated in Cyprus. It was addressed to the Cypriot Greek youth. It was insulting to the then President of the Republic, the late Archbishop Makarios, whom it described as the new tyrant. Five more leaflets were circulated up to the 20th November, 1973, in similar tenor, threatening also judicial officers, educationalists and policemen. At the same time through its armed bands it attacked Police Stations, it seized arms, it blew up Police Stations and other Government property and also stole a great quantity of arms from The Recruits Training Centre of the National Guard at Yeroskipou. It also assumed by its leaflet of the 2nd August, 1973, responsibility for the abduction of the then Minister of Justice, Mr. Christos Vakis.

The authorities of the Republic had a list of one hundred and fifty-four persons wanted for interrogation in respect of possible participation in offences for the overthrow of the lawful Government and offences against the State in general, and police carried out operations for the purpose of bringing the culprits to justice and preserving Law and order.

On the 9th August, 1973, in the course of a police operation in Limassol town, two wanted persons, D. Spourgitis and Stavros Georghiou Stavrou "SYROS", were arrested and among the documents seized there was a scorched typed document marked "Top Secret" appearing to have been circulated in five copies and that being Copy Number One was addressed to someone referred to therein by the codename "Ouranos". There was attached thereto an annex entitled again "Top Secret". Both were dated 25th February, 1973. It was entitled "OPERATION

APOLLON" and it contained details for the overthrow of the lawful Government of the Republic and the taking of power by "EOKA B" by the use of armed force. (*Exhibits* 41 and 42).

On the 18th June, 1974, the Nicosia Police acting on information searched flat No. 20 in the block of flats "Gardenia", situate at Poulliou and Kapota Street No. 6, Nicosia, in which they found various documents (*exhibits* 12–27). On the 11th July, 1974, at Dasoupolis, at the house of a certain Mitsingas, the Police arrested the appellant, advocate Saveriades, Captain Papapetrou of the National Guard, Aris Georghiou and the owner of the house. In the brief-case found in the possession of the appellant, there were arms as well as various "EOKA B" documents. (*Exhibits* 28–32). All these documents (*exhibits* 12–32), contained among other matters, instructions to members or section leaders of the association and also dealt with matters relating to its financial administration.

Count 2 relates to happenings between the arrival here of Grivas and the 20th July, 1974 the date of the Turkish invasion of Cyprus. In this respect the particulars for this count given in the information are that the appellant under code-name "Thysefs" "Myron" and "Keravnos",—which he admitted to have been used by him between the months of September 1971 and the 20th July, 1974, in Nicosia, and elsewhere in the Republic, conspired with other persons having the code-names "Enias" and "Navaronis" as well as with persons unknown, to do acts in furtherance of a common seditious intention.

The particulars of counts 3, 4, and 5, cover the period between the 16th November 1972 and the 20th July, 1974. Regarding count 3, the particulars are that the appellant held an office in the "EOKA B" or "EOKA", unlawful organization. For count 4 they were that between the aforesaid dates he made preparations, for carrying on, or aided in, or advised the preparation for war or warlike undertaking, namely the unlawful undertaking and actions of "EOKA B" and the coup d'etat operations which commenced on the 15th July, 1974 with, in favour of, or by the forces of the coup d'etat against the then lawful President of the Republic, Archbishop Makarios and his guard the lawful Government and or the resisting Security Forces of the Republic and or the loyal members of the Security Forces and other citizens supporting the lawful Government in the Republic.

The particulars of count 5 also relate to the same period and refer to the preparation, or attempts, or endeavours, by the use of or the show of armed force, namely the acts referred to in the particulars of count 4, and the undertakings and actions of "EOKA B" and the coup d'etat undertakings, which commenced on the 15th July, 1974, to procure an alteration in the Government of the Republic, or to resist the execution of the laws by the lawful Security Forces of the Republic resisting the coup d'etat, or to compel the lawful President of the Republic, the members of the Council of Ministers and other organs of the State to abstain from performing their public duties, or aided to the preparation or attempt to do them.

The trial Court thought it convenient to leave the examination of the first count last, in view of the chronological sequence of events and I intend to follow that course.

With regard to counts 2-5, the evidence adduced by the prosecution related to the aims and activities of "EOKA B" during the material period, the coup d'etat and the activities of the persons that took part in it between the 15th and the 20th July, 1974, and in particular to the role and participation of the appellant in it. I need not describe in detail the various incidents related by the various witnesses for the prosecution and whose testimony was uncontradicted. They covered a wide range of raids of police stations stealing therefrom arms, blowing up of such stations as well as blowing up other government establishments. In the course of such raids several policemen, national guardsmen and civilians were wounded. Moreover evidence was adduced about the stealing of a large quantity of arms from the Recruits Training Centre of the National Guard, at Yeroskipou.

From the testimony of the various witnesses which the Court accepted as true, and from the contents of the several documents produced, the Assize Court came to the conclusion that "EOKA B" was unquestionably a conspiratorial association set up for the purpose of achieving an unlawful aim, namely the taking over of power and the destruction of the State. The shroud of secrecy that characterised its mode of operation, by the use of emissaries for communication between its officials and members, of code-names, of masks for concealing the identity of its members when engaged in their criminal activities, would not

be necessary if the purpose of this organization was the one alleged by the appellant, namely the prevention of the imposition of an unpatriotic solution to the Cyprus problem and a matter of self-defence of those members of the public favouring union with Greece or the bringing about of a conciliation between the late President Makarios and George Grivas for the purpose of forming a united internal front. The very contents of "OPERATION APOLLON" reveal *inter alia* the real purpose of "EOKA B" which was the one found by the Assize Court to be.

Furthermore from the contents of *exhibits* 12 to 32, the trial Court concluded that the person appearing therein under the code-names of "Myron", "Thysefs" and "Keravnos", held an office in the said unlawful association by acting as financial administrator approving the estimates of the various sectors, the payment of money to sector leaders, to wanted and other persons to cover their needs and the payment of money for the manufacture of bombs. Also that person appeared therein to have the authority to give orders, to reprimand other persons in charge of sectors, who seemed bound to give to him the necessary explanations. Moreover the said person was also responsible for part of the armoury of "EOKA B" and had the authority to name emissaries and change code-names of members.

The appellant admitted, in evidence that he was a member of "EOKA B" a close associate and personal collaborator of Grivas and that in the organization he used at different times the code-names of "Myron", "Thysefs" and "Keravnos". The appellant, was found and rightly so in our view, to be a person acting in an office and exercising substantial authority in this conspiratorial association by handling such matters as finance, equipment and for being responsible for political briefing.

In one of the documents, *exhibit* 20, which the appellant under the code-name of "Thysefs" addressed to the sector-leader of "EOKA B", under the code-name of "Skypion" he said: "I remind you, from the position of the first collaborator of the Leader, in the sector, that you are obliged to take seriously into consideration and respect my opinion which is the outcome of His orders." The allegation of the appellant that he wrote certain documents on instructions, doing mere clerical work in this association was dismissed by the trial Court as naive, in

view of the contents of all those documents from which the leading position held by him in this unlawful association became clear and apparent.

The denial by the appellant that he held an office or position in "EOKA B", or that he performed the duties of such office or position, was pursued on appeal also, a ground which I have no difficulty in dismissing in view of the totality of the circumstances, the contents of all these documents, and the conduct of the appellant, both before and during the coup d'etat. His freedom of movement, escorted by other officers obviously obeying to his commands, at the Central Prisons and at the Headquarters of the National Guard, where he was also seen armed with a "Kalasnikof" machine-gun, as well as his associations with other leading members of "EOKA B" at the time, are further proof of his holding an office in the said association. His leading role will be also seen when I shall be dealing with other parts of the evidence when examining other grounds.

I turn now to the count of seditious conspiracy. It has already been seen that the appellant was holding an office in this unlawful association, that he had admittedly used the code-names of "Myron", "Thysefs" and "Keravnos" and that he communicated with other sector leaders who were also using code-names.

Among the code-names that appear in *exhibits* 12-32 are those of "Navaronis", "Enias", and "Kadmos". The trial Court identified "Navaronis" as the code-name of a certain Vitzileos, who was a member of the Greek Central Information Service and who was at the time attached to the Greek Embassy in Nicosia. Nicos Varnavides, a major in the National Guard was at the time of the coup d'etat attached to the Reserve Force of the Police. He was arrested and kept in custody at the cells of the Military Police near "Hilton". He was interrogated by the aforesaid Vitzileos who boastfully disclosed to him that he was the person with the code-name of "Navaronis".

The code-name of "Enias" was found to have been used by a certain Major Athanassios Sklavenitis from Greece. Chr. Tsangaris, a major in the National Guard, attached also at the Reserve Force of the Police at the time when arrested in the evening of the 15th July, was led to the office of the commander of the National Guard. There he met besides an unknown to

him colonel, major Athanassios Sklavenitis whom he knew as Sklavenitis had served in Cyprus as an A.D.C. to Grivas when the latter was Chief of the National Guard. There he said to him "Are you surprised? Did you know that I was 'Enias' of 'EOKA B', whom you were trying to arrest in Cyprus? You should have known that 'EOKA B' was directed from Greece." He further mentioned to the witness that he had come to Cyprus to organize the coup d' etat.

There was no evidence before the trial Court as to the identity of the person with the code-name "Kadmos", but from the contents of *exhibit* 12, in which repeated reference is made to the National Centre and which was written after the death of Grivas, it was deduced that that person lived in Greece, that he held a high post in the Junta hierarchy and that he had undertaken the obligation to cover the needs of "EOKA B" in equipment, money and suitable command. This *exhibit* 12, though typed and signed by "Thysefs" was denied to have been written by the appellant, but the Assize Court found that he was its author, bearing also corrections in his own hand-writing.

From the evidence of these two witnesses and the contents of *exhibits* 12, 27, and 31 the charge of conspiracy was proved and that its purpose was the promotion of a common seditious intention, that is to bring into hatred, contempt and to excite disaffection against the lawful Government of the Republic and to raise anarchy in the Republic.

The testimony of the aforesaid two witnesses was among that of numerous others, which counsel for the appellant has asked this Court to find that it was wrongly accepted by the Assize Court, being as he argued insufficient, contradictory and not credible. I do not subscribe to this view. I find that there was nothing in the testimony of these witnesses that had shaken their credibility and nothing has been shown entitling me on appeal to interfere with the findings of the Assize Court on this issue either.

The prosecution, in the discharge of its duty to prove beyond reasonable doubt other ingredients of the offences with which the appellant was charged, called evidence and established to the satisfaction of the Assize Court the warlike operations of those taking part in the coup d'etat against the State, the resistance

which the lawful forces put up and the conduct of the participants in the coup d'etat as from the 15th July, until the Turkish invasion. This came from the testimony of 33 witnesses including senior police officers and members of the Reserve Force of the Police.

In the morning of the 15th July, 1974, the coup d'etat commenced in a violent manner against the lawful Government. Its immediate target was the extermination of the then President of the Republic Archbishop Makarios. The Assize Court came to this conclusion from two sets of facts. The indiscriminate bombardment of the Presidential Palace with heavy arms from tanks and armoured cars, whilst to their knowledge the President of the Republic was therein, having been seen to return from his Troodos summer residence where he had spent the week-end, and from the very fact that they announced his death soon after it caught fire, obviously believing that he could not have survived the attack against the Presidential Palace with such force of fire with which they hit it.

It was a well organized operation. A simultaneous action started in all the towns and many villages. The Cyprus Broadcasting station was immediately captured and placed under their control and all announcements had to be approved by a Greek Officer who assumed the role of its overlord; the camp of the Reserve Forces of the Police, the Archbishopric, the Police Headquarters, the Cyprus Telecommunication Authority and the Central Prisons were also attacked. The Police Headquarters were taken over and the Chief of the Police was replaced by another officer; ambushes were laid to the security forces. All these activities were carried out either exclusively by known members of "EOKA B" or mixed groups of Greek officers serving in the National Guard, national guardsmen and members of "EOKA B". As a result, considerable damage to property was caused and many lives were lost.

The defence denied any connection between "EOKA B" and Grivas on the one hand and the military Junta of Anthens, on the other hand, but the trial Court rightly rejected the allegation. There was such close cooperation between disciplined units of the National Guard and ELDYK—the Greek Contingent stationed in Cyprus since Independence under the Treaty of Alliance and the Additional Protocol No. 1 annexed thereto—

and known members of "EOKA B" that left no doubt for such coopération. There was further the evidence of Varnavides and Tsangaris and the contents of *exhibits* 12 and 31 which sealed the conclusion on this point.

The prosecution established the participation of "EOKA B" in the coup d'etat of the 15th July. The appellant took an active part in it. As it was seen he had been arrested on the 11th July, 1974 at Dasoupolis and he was in custody at the Central Prisons when the coup d'etat started. He was released from custody together with all other detainees and convicts and he immediately started his unlawful activities. He was seen and there was clear evidence on this point, visiting arrested police officers, detained at the Central Prisons and talking to them, armed and escorted by other armed persons including a certain Crysos Christodoulou who assumed a responsible position in the administration of the Central Prisons at the coup d'etat and by a Greek Officer named Souli. Among those police officers that he met whilst they were in custody, was police sergeant Nikos Kazaphaniotis. The appellant reminded to him the occasion when he was in custody and his fingerprints were taken by this police sergeant and that since then things had been reversed. Another one was Christakis Ioannou, the Police Constable in the Reserve Force, whom the appellant interrogated regarding arms and the set up of the Police Reserve Force and the armed groups of Dr. Lyssarides and Stavros Kornilios. This witness, was on instructions from the appellant illtreated by an unknown person when he said that he had no knowledge of the matters he was being interrogated about. Also two prison warders, Charalambos Loizou and Charalambos Theodorou, saw the appellant in the afternoon of the 15th July move around in the area of the Central Prisons armed and carrying out a search in the stores in order to discover weapons.

Furthermore the activities of the appellant in the afternoon of the 17th July, were described by witnesses Zavros, Mavrides and Kourtellas. Zavros had his house searched by a group of armed persons headed by and obeying to the commands of, the appellant, who before leaving the house asked the witness to convey a message to doctor Lyssarides that the latter should deliver his arms to the authorities and that the appellant himself would undertake the safety of his life. Being as he said, a leading member with influence he could see that such promise

for the safety of the life of the doctor would be kept. Also Kourtellas, a taxi driver and Mavrides described how they were arrested in the afternoon of the 17th July in Nicosia by a band of armed persons whose leader was the appellant.

The line of the defence was that on account of the illtreatment the appellant received upon his arrest and whilst in custody, he was unable to move and so upon his release from custody he stayed in bed in the house of a friend. He did not, however, deny that he visited the National Guard Headquarters as well as the Presidential Palace a day or two after the coup d'etat. His explanation, however, was that he was searching for his personal belongings that were taken from his whilst in custody at the Central Prisons. It was indeed a flimsy attempt to explain away the intense activity on which he embarked soon upon his release from prison, an activity which was suggestive, not only of an active participation in the coup d'etat and the use of the armed force against the Government, but also his leading position in "EOKA B".

The two doctors, whom the appellant called in support of his version as to his condition, that is, Dr. HadjiCostas and Dr. Argyropoullos, could not help the appellant. Dr. Argyropoullos who X-rayed the appellant could not remember if the appellant had suffered a fracture of the ribs. On the other hand, the testimony of Dr. HadjiCostas to the effect that he had found bruises and lacerations on several parts of his body when he examined him on the 14th July and on account of them he could not have moved for a period of ten days, was defeated by the very admission of the appellant that he did, in fact, visit the National Guard Headquarters and the Presidential Palace, as already stated.

The trial Court further inferred from the contents of one of the documents, i.e. *exhibit* 28 that the appellant also knew the date the coup' d'etat was to take place. *Exhibit* 28 was addressed by the appellant under the code-name "Keravnos" to "Poseidon", it was written on the 9th July, 1974, at 21 hrs. and it contained, *inter alia*, the following:-

"2. Pay great attention to what I am writing to you. You will not submit resignation before the 15th instant under any circumstances.....

4. You cannot write that you resign for family reasons, they will all spit on you, be careful, not include such reasons. Listen to me and you will not suffer any damage and as I stressed to you, until the 15th only, not before that; I request you warmly, I insist on this."

From the totality of the evidence before it, the Assize Court came to the conclusion that the prosecution proved beyond any reasonable doubt counts 2, 3, 4 and 5, and found the appellant guilty thereon.

The appellant by the present appeal asked the Court, as he did at the trial, that the testimony of all witnesses should not have been accepted that all had lied. No persuasive reasons were, however, given and the perusal of the record shows nothing in their testimony that would cast any shadow on the veracity of all these witnesses. On the contrary, I find that on the totality of the testimony of all these witnesses, and the documents and other material, including, of course, the evidence connected with counts 6, 7, 8, and 9, with which I shall be shortly dealing but which cannot be isolated or viewed separately from the rest of the evidence, the appellant was rightly found guilty on counts 2 to 5 and I dismiss the grounds of appeal relating to these counts.

Counts 6 to 9 refer to the arms, explosive substances, ammunition and a wireless set found in the course of a search by the police in flat No. 20 in "Gardenia" block of flats at Poulios and Kapotas street No. 6, Nicosia. A number of policemen and police experts in fingerprints and in firearms and ammunition gave evidence with regard to these counts. Among them was police officer Ioannis Ktorides, fingerprint and photography expert, who examined the various *exhibits* and found on a number of these items seized from the said flat, fingerprints of the appellant. His evidence remained throughout uncontradicted. Police officer Christoforos Georghiou a hand-writing expert found in the documents, *exhibits* 12 to 32 handwriting of the appellant. The findings of this witness have not been disputed by the appellant.

The Assize Court in its judgment said that even only from the evidence of Ktorides it would be sufficient for it to come to the conclusion beyond reasonable doubt that the appellant was at

the time in the said flat, knew about the existence of the aforesaid objects and possessed same, otherwise the existence of his fingerprints on such items as the coffee-glass jar, the bottle of brandy and gymnastic apparatus which were articles of daily use could not be justified. The appellant gave no evidence how these fingerprints were found on these articles. The evidence, however, of Ktorides is supported also by the evidence of police officer Kazafaniotis who testified about his encounter with the appellant on the 17th July at the Central Prisons, to which evidence I have already referred in more details when examining the leading role of the appellant in "EOKA B".

I see no reason to interfere with these findings and conclusions of the Assize Court, based as they are on the credibility of witnesses whose demeanour in the witness-box it had the opportunity to watch. In fact, apart from the mere denial of the appellant of certain parts of the evidence, the long arguments of his counsel, both in this Court and the Assize Court, there was nothing to suggest that the Assize Court in any way made a wrong evaluation of the evidence or misdirected itself on any factual aspect of the case justifying interference on appeal with such findings and conclusions so as to entitle me now to arrive at the conclusion that the conviction on all these counts or in respect of anyone of them should be set aside on the ground that same was having regard to the evidence adduced unreasonable. Nor there exists any "lurking doubt" which renders the conviction on all or anyone of them unsafe or unsatisfactory so as to be treated as being unreasonable having regard to the evidence adduced or as entailing a substantial miscarriage of justice in the sence of section 145(1)(b) of the Criminal Procedure Law Cap. 155. See *Shioukiouroglou* v. *The Police* (1966) 2 C.L.R. 39 at p. 42; *HjiSavva alias Koutras* v. *The Republic* (1976) 2 C.L.R. p. 13 at pp. 22-28, 40-45, 57-58; *Fournaris* v. *The Republic* (1978) 2 C.L.R. p. 20 at p. 23; *Zisimides* v. *The Republic* (1978) 2 C.L.R. p. 382 at p. 432.

The evidence upon which the Assize Court made their findings on all issues was overwhelming and indeed it could make no other findings having accepted such evidence as true and substantially correct.

One of the legal objections raised at the outset of the trial and which was pursued in this Court as one of the grounds of appeal

coming under the heading of procedural irregularities at the trial, hereinabove referred to, is that the trial Court wrongly dismissed the objections of the defence, that in cases where accused persons are charged with several offences setting out the completed offences, the addition of a charge of conspiracy in respect of the same circumstances is undesirable. This objection referred to the inclusion on the information of count 2, the charge of seditious conspiracy, contrary to sections 47(a) and 48 of the Code.

It was argued that the circumstances relating to count 2 were substantially contained in count 4 by which the accused was charged to have committed the completed offences relating to the coup d'etat warlike operations, and in count 5 for the use of armed force against the Government and consequently its inclusion would only embarrass the defence.

Moreover, objection was taken to the inclusion of counts 6 to 9 on the information as they related to offences of a different type than the rest of the offences contained in the other counts and therefore the cross-examination of witnesses on these counts might adversely affect the defence of the appellant with regard to the other counts.

The Assize Court was invited to exercise its power by, either striking out these counts so that the appellant would not be prejudiced in his defence or to order a separate trial for them.

The ruling of the trial Court was as follows:

" We again see no merit in the objection taken by Counsel for the defence. Counts (2), (4) and (5) charge the accused with specific offences that are created by the Criminal Code, Cap. 154 and they do not generally charge the accused with conspiracy.

Counts 6 to 9 are serious offences that are connected with the other counts. Therefore the submission of Counsel cannot stand and we overrule it.

Counsel for the accused has submitted that the accused by having to face counts 6–9 may be prejudiced in his defence. We shall watch out and if necessary exclude evidence that may prejudice the accused in his defence.

Accused is therefore called upon to plead on all counts on the information."

The joining of several offences in the same charge or information against the same person is permitted by our section 40 of the Criminal Procedure Law, Cap. 155. In such a case the Court may either convict or acquit the accused generally upon the whole charge, or convict him upon one or some and acquit him upon other counts. If, however, different counts relate to different facts and if the Court thinks it conducive to the need of justice to do so it may, at any stage of the proceedings, direct that the accused shall be tried separately upon anyone or more of such counts. The factors to be taken into consideration in deciding whether the interest of justice requires a separate trial or not, are whether such joinder of offences would be oppressive for the accused to defend himself as he would be prejudiced thereby in that inadmissible evidence in respect of one count may be admitted in relation to another and so embarass him in the conduct of his defence. This latter ground of course is one of the dangers that should not be exaggerated as Judges more so than Juries can be expected to approach the evidence in the proper manner.

Matters relating to such joinder of offences or offenders are matters of practice on which the Court has, unless restrained by Statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. (See *R.* v. *Assim* 50, Cr. App. R. 224).

In the case of *Akritas* v. *R.* 20 (Part I) C.L.R. 110 the following was stated regarding the need to avoid causing embarassment to the accused by joining in one charge an unreasonably big number of counts:

" The Court has on many occasions pointed out how undesirable it is that a large number of counts should be contained in one indictment. Where prisoners are on trial and have a variety of offences alleged against them, the prosecution ought to be put to their election and compelled to proceed on a certain number only. Quite reasonably a number of counts can be proceeded on, say, three, four, five or six and then if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other counts in the indictment. If there

is a conviction, the other counts can remain in the file and need not necessarily be dealt with, unless the Court should, for any reasons, quash the conviction and order the others to be tried, but it is undesirable that as many counts as were tried together in this case, should be tried together."

That was of course a case where the prosecution had joined in one information 20 counts of conspiracy, a conduct naturally deprecated by the Supreme Court.

Also the joining of a count of conspiracy with a count or counts for substantive offences is an undesirable practice and can in some cases work hardship on the defendant. (See *R.* v. *Dawson, R.* v. *Wenlock* [1960] 1 All E.R. 558, *R.* v. *Griffiths and Others* [1965] 2 All E.R. 448). The inclusion, however, of a count for conspiracy in an indictment charging the accused with other counts as well cannot by itself lead to unfairness. The circumstances of a case may be such as to warrant the inclusion of such a count and to call for it in the public interest for the due administration of justice. (See *R.* v. *Meyrick*, 21 Cr. App. R. 94 at p. 103 and also the dictum of Sankey J. from *R.* v. *Luberg*, 19 Cr. App. R. 133 where at p. 137 it reads:

"It is a perfectly admissible and proper course to pursue, and a course which is often pursued but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible and great care is required in the summing-up to keep all the several issues perfectly clear."

In the case of *Constantinides* v. *The Republic* (1978) 2 C.L.R. p. 337 at pp. 359-360 the position of the Law on the inclusion of a count of conspiracy in an information containing counts for related substantive offences was examined. Reference was made therein to the principles on the subject stated in Archbold's Pleading, Evidence and Practice in Criminal Cases, 39th ed., pp. 1686-1687, para. 4073 and the case of *R.* v. *Jones and Others*, 59 Cr. App. R. 120, and the guiding principles as stated by James L.J. at p. 124 thereof which I need not repeat here. Suffice it to give here the opening sentence of that passage, namely that "the question whether a conspiracy charge is properly included in an indictment cannot be answered by the application of any rigid rules. Each case must be considered on its own facts."

If no doubt the joining of a conspiracy count with counts for specific offences is a legitimate course for a trial by Jury, "afortiori it may be adopted with more immunity before a Judge or Judges sitting without a Jury as it can be confidently expected, given their training and experience, to be in a position to draw the line, where such a line should be drawn, in the interests of justice." (See Loizou and Pikis, Criminal Procedure in Cyprus, 1975, p. 58).

In any event the joinder of such counts, even where improper, will be no ground for quashing a conviction where such joinder has caused no prejudice to the accused. (*Sozos Panai Tattaris* v. *The Queen*, 24 C.L.R. 250).

In the present case I find no irregularity in the joinder of all these counts on the information. Nor any injustice or unfairness in the conduct of the proceedings, or that any prejudice has been caused to the appellant on account of such joinder.

Having examined the totality of the evidence adduced and the conduct of the proceedings I unhesitatingly agree with the Assize Court that this was not a case where a separate trial should have been ordered for any of the counts or that anyone or more of them should not have been included on the same information. Considering the situation now in retrospect, I find how justified the Assize Court was to pursue the course it did. Had it adopted any other course, that would only have brought about an undesirable multiplicity of proceedings.

The next ground of appeal which comes also under this heading of procedural irregularities is that the Assize Court wrongly admitted as evidence the documents *exhibits* 12 to 32 and 41 and 42, being only copies and not the originals, inasmuch as it had not been sufficiently and beyond reasonable doubt established that the production of the originals was not possible.

When prosecution witness Kazafaniotis was about to produce photocopies of two sets of documents, an objection was taken by the defence to their production. A trial within trial was directed in order to ascertain certain factual aspects which in Law are prerequisites to the production of copies instead of the originals. In that respect the prosecution called Georghia Antoniadou, acting police sergeant who justified as to how a bundle of documents that had been found in flat No. 20 of the

"Gardenia" block of flats were delivered to her by police officer Kazafaniotis and which she kept in a "roneo" filing cabinet, herself being responsible for their safe keeping. She stated how she took them on the morning of the coup d'etat and together with police woman Zertali placed them in envelopes and took them to a house at Ayios Pavlos quarter for safe keeping. She further related how police officer Rigas, who on the morning of the coup d'etat assumed the post of Divisional Commander of Police for Nicosia, interrogated her about the disappearance of the documents in question and that eventually escorted by Police Inspector Andreas HadjiSavvas and two armed soldiers, she went with her colleague Zertali to the place where they had hidden these documents retrieved them and delivered them to the said HadjiSavvas. These documents according to Police Officer Rigas were on instructions from the Commander of Police handed over by him to the already mentioned in this judgment Vitzileos of the Greek Central Information Service.

The Court in the light of the evidence adduced concluded that the originals of these documents were not any longer in the possession or the control of the prosecution and in view of the fact that witness Kazaphaniotis had himself made the photocopies of these documents from the originals found by him, they were admissible as evidence and could be produced unless on other grounds they were not admissible.

The rule requiring the production of the original of a document is subject to exceptions, one of them being the case where the original has been lost or destroyed or that it is in the possession of the opposite party, or its production cannot be enforced (see *R.* v. *Nowaz*, The Times April, 17, 1976 C.A.). In such a case the prosecution must prove the existence of the original, its destruction positively or presumptively or establish its loss by some way or other and in any event, prove that it cannot be found after diligent search, in other words the non-production of the original must be duly accounted for.

The secondary evidence so admitted may take any form either by producing a photocopy or true copy or parol evidence of the contents of the original.

Furthermore as stated in Phipson on Evidence, 12th Edition, p. 760, para 1820, "The sufficiency of the search necessary to let

in secondary evidence is a preliminary question for the Judge, and will vary with the importance of the document and the circumstances of the case".

In the present case there was clear and unambiguous evidence that the originals were lost or destroyed and that in any event they were not in the possession of the prosecution. Furthermore, the sufficiency of the search necessary to let in secondary evidence was also established to the satisfaction of the Assize Court. In my view it rightly admitted the production of the photocopies about whose genuineness there was the evidence of Sgt. Kazaphaniotis, who had made these photocopies from the originals, then in his possession. This ground therefore also fails.

It remains now to examine the questions raised in this appeal regarding count 1. The appellant was thereby charged that between August and the 16th December, 1976, in Nicosia, he edited and published a text under the title "Political Documents 1971–1974" which contained comments of him which were likely to encourage recourse to violence on the part of any of the inhabitants of the Republic or to promote feelings of ill-will between different classes or persons in the Republic, contrary to section 51(1) of the Code.

The appellant admitted editing and publishing this book (*exhibit* 43) as well as the authorship of its foreword, the introduction, part of the comments to the paragraphs and the introductory notes to the various texts as well as the epilogue. In fact, he admitted having written the passages in pages 9, 11, 13, 14, 17, 37, 38, 89, 119, 120, 121, 145 and 206 of this *exhibit*. Almost all the texts in this publication are either pronouncements and writings of Grivas or leaflets which were circulated by EOKA B from time to time.

It was the case for the prosecution that in the circumstances and at the very period at which they were published with so many persons mourning their dead, with the existence of thousands of persons displaced from their homes, the desperate situation of the relatives of missing persons, the fact that the misfortunes that befell this country were attributed to the coup d'etat which opened the door to the Turkish invasion, the faith and love of the people to its leadership and to the work of His Beatitude the Archbishop Makarios, his government and his

collaborators and supporters, they were likely to encourage recourse to violence and to promote feelings of ill-will as set out in this count.

The grounds of appeal as set out in the notice thereof, are the following:-

"The trial Judge taking into consideration the evidence adduced, wrongly found the appellant guilty on the first count because:

(a) Taking into consideration the evidence adduced, the verdict of the trial Court is unreasonable.

(b) It wrongly decided that the appellant was not entitled to invoke the defences which are provided by section 51(1) of the Code.

(c) The trial Court wrongly decided that the defences which are set out in section 51(1) of the Code could only be invoked by the appellant if the text in question was published exclusively for the purpose of achieving any of the objects provided therein.

(d) That the aforesaid construction is unconstitutional.

(e) It wrongly decided that from the contents of *exhibit* 43 mens rea is established.

(f) It wrongly decided that the contents of *exhibit* 43 are of seditious nature in the sense of section 51(1) of the Code".

Section 51(1) reads as follows:-

"Any person who prints, publishes, or to any assembly makes any statement calculated or likely to—

(i) encourage recourse to violence on the part of any of the inhabitants of the Republic; or

(ii) promote feelings of ill will between different classes or communities or persons in the Republic, is guilty of misdemeanour and is liable to imprisonment for twelve months:

Provided that no person shall be guilty of an offence under

the provisions of this section if such statement was printed, published or made solely for any one or more of the following purposes, the proof whereof shall lie upon him, that is to say:–

(a) to endeavour in good faith to show that the Government of the Republic has been misled or mistaken in any of its measures; or

(b) to point out in good faith errors or defects in the Government, or the policies thereof, or constitution of the Republic as by law established, or any legislation, or in the administration of justice, with a view to the remedying of such errors or defects; or

(c) to persuade in good faith any inhabitants of the Republic to attempt to procure by lawful means the alteration of any matter in the Republic as by law established other than that referred to in paragraph (b) of section 48; or

(d) to point out in good faith with a view to their removal, any matters which are producing or have a tendency to produce discontent amongst any of the inhabitants of the Republic or feelings of ill will and enmity between different communities or classes of persons in the Republic".

The Assize Court compared the aforesaid section to the offence of Common Law sedition as stated in Archbold, 39th Edition, para. 3147, and came to the conclusion that the two offences correspond to each other and that the purposes which constitute a defence to a charge of sedition set out in the proviso to section 51(1) of the Code correspond also to the defences available in England to a person accused of sedition as set out in the case of *R.* v. *Burns & Others*, 16 *Cox's Criminal Law Cases*, p. 355 where Justice Cave at p. 360 adopted the statement of the Law on the subject by Stephen J., in the Digest of the Criminal Law, p. 56 Article 93.

"An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite

Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established or to point out, in order to their removal, matters which are producing or have a tendency to produce, feelings of hatred and ill will between classes of Her Majesty's subjects, is not a seditious intention."

The Assize Court went on to point out that the words "solely for anyone or more of the following purposes" to be found in the opening paragraph of the said proviso do not allow the author of a seditious publication to prove that he had other purposes except those referred to in the said proviso. It also pointed out, for the purpose of this defence to be successfully raised it must be established that the seditious publication or statement was done in good faith.

The test applied as to whether the language used was calculated to produce the results imputed was the one given by Coleridge, J., in the case of *Rex* v. *Aldred*, 22 Cox's Criminal Law Cases, p. 1 at p. 3 where he said:

"The word 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form; but the man who is accused may not plead the truth of the statements that he makes as a defence to the charge, nor may he plead the innocence of his motive; that is not a defence to the charge. The test is not either the truth of the language or the innocence of the motive with which he published it, but the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State?—and I need hardly say that anything in the way of assassination would be comprehended in the definition. That is the test; and that test is not for me or for the prosecution; it is for you, the jury, to decide, having heard all the circumstances connected with the case. In arriving at a decision of this test you are entitled to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of

professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled also to take into account the state of public feeling. Of course there are times when a spark will explode a powder magazine; the effect of language may be very different at one time from what it would be at another. You are entitled also to take into account the place and the mode of publication. All these matters are surrounding circumstances which a jury may take into account in solving the test which is for them, whether the language used is calculated to produce the disorder or crimes or violence imputed."

The explanation of the appellant for the said publication is to be found in the foreword to this book, *exhibit* 3, which reads as follows:

" First out of respect to the historical truth and for immense love to the deceased leader of EOKA the protagonist of the pannational idea of 'Enosis'. Secondly for enlightenment of the panhellenic public opinion which still remains uninformed on account of the non-publication of this text in Greece on account of the then existing preventive censorship on behalf of the dictatorial regime in power which as it is known was friendly to the regime of Makarios and hostile to the struggle for union by Dighenis. Thirdly, for the sake of the new generations as all who were engaged in relating the Cyprus events of the years 1971-1974 belonging to various parties and fractions wrote adversely and some of them with evident enmity and with intention to defame General Grivas. But also others engaged in the aforesaid period more or less dependent or wishing to serve party views, aims and sympathies, but foremostly and mainly relying on newspapers of the politico-economic interest of the publishing groups of Cyprus and Athens, wrote adversely and with lightness. Finally, the collection and publication of the political texts of Dighenis in a volume is intended to help a bona fide and in search of the historical truth historian of the future. In any event the texts set out in the present volume are scattered in the newspapers of the period and become inaccessible, whereas most of them are completely unknown even to his collaborators that they were written by the hand of Dighenis."

The Assize Court then referred to extracts from some of the pages of the book which it thought established the case for the prosecution regarding the seditious nature of the publication and which in English read as follows:

" A sadistic orgy on behalf of certain policemen and other organs, gave the impression of a new Bastile, whilst the reserve force, without a shred of respect for the law, the human rights and in general the human dignity, behaved like an occupation army. The Ministers of Makarios knew all this and approved them and silently tolerated them, whilst in certain cases encouraged by their conduct the continuation of this orgy against those loyal to Greece and opponents of the Cyprus government".

Page 145:

"Dighenis's counter-attacking uncovered Makarios 'as well as his rotten friends and supporters, revealing the guilty role of each one of them against Greek Cyprus."

Page 209:

"The insults, oppressions and the persecution of the spirit yielded nothing. They simply make eternal the existing gap in the soul of the people and they show the existence and mentality of a totalitarian state and persons.

All who in any case loved freedom and fought for it know that it is not an ordinary tree. In order to extend its roots and yield a crop, it needs suitable soil. It needs to be watered with much sweat and more blood. And this holy pray, the unionists of Cyprus expect who have not spared sweat or blood. And they will have it. Because they are ready for every sacrifice for the return of freedom.".

The Assize Court bearing in mind the contents of the comments of the appellant, the descriptions which he used for the then President of the Republic, his Government, the Security Forces of the State and the prevailing conditions at the time of the publication of this book, as described by the prosecution and of which the Court took judicial notice, came to the conclusion that the prosecution proved beyond reasonable doubt this count also and found the appellant guilty thereon.

No doubt the contents of certain passages in *exhibit* 13 were

of a seditious nature in the sense of section 51(1) of the Code. Mens rea could clearly be inferred and the verdict of the Court was duly warranted by the evidence adduced. Furthermore the Assize Court rightly concluded that the appellant could not invoke the defences set out in the proviso to the section, once he had failed to discharge the onus cast upon him under the said proviso and prove that the said publication was made solely for anyone or more of the said purposes and done in good faith. The defences, set out in the proviso are indeed exhaustive, and they come into play after the elements of the main part of the section are established and which would have amounted to an an offence but for these defences.

There is nothing unconstitutional in this section or in its construction by the Court. The exercise of the right to freedom of speech and expression in any form, which is safeguarded by Article 19 paragraph 1 of the Constitution is subject, by paragraph 3 thereof "to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."

This safeguarded freedom of speech and expression is not an absolute one. It is obviously restricted in so far as it is necessary for preserving the values protected in para. 3 of Article 19 hereinabove set out, which were found necessary in order to protect the State and its constitutional order, to prevent seditious, libellous, blasphemous and obscene publications and to ensure the proper administration of justice etc. No doubt these values on the one hand and the liberty of the subject on the other, are antagonistic extremes. Neither is absolute and in a democratic society the problem is one of striking a proper balance between them. To the enforcement, however, of such laws which are justified only by the restrictions provided in para. 3, Courts should *exhibit* the utmost caution.

In the case of *Georghios HjiNicolaou* v. *The Police* (1976) 2 C.L.R., 63, L. Loizou, J., in delivering the judgment of the Supreme Court stressed the special importance which this Court

attaches to cases concerning the right of freedom of expression, one of the fundamental rights of the subject recognized and safeguarded by our Constitution, but pointed out also that such right is subject to the restrictions already mentioned in this judgment which could not be disregarded and this, as he said at p. 68, "for the purpose of preservation of a fair balance between the right of freedom of expression and the resulting duties and responsibilities of the citizen".

In conclusion, I would say that the fact that the defences opened to an accused person after proof of the seditious nature of a publication, are limited to those set out in the proviso to section 51, does not offend any other Article of the Constitution neither the right to a fair hearing etc., nor the presumption of innocence is violated by placing on the accused the burden of proving that the seditious publication was made solely for anyone or more of the purposes set out in the said proviso. Needless to say that when the onus of proof of a particular element in a criminal trial is cast upon an accused person, same may be discharged by mere preponderance of evidence and not beyond reasonable doubt. Such onus of proof is less heavy than that required at the hands of the prosecution in proving its case beyond reasonable doubt and may be discharged by evidence satisfying the Jury of the probability of that which the defendant is called on to establish (see *R.* v. *Carr-Briant* [1943] 29 Cr. App. R., 76).

The presumption of innocence has always been a fundamental principle of our Criminal Law. It is now safeguarded also by para. 4 of Article 12 of the Constitution which corresponds to Article 6, para. 2, of the European Convention of Human Rights. In the case of *Gendarmerie and Zavos*, 4 R.S.C.C., 63, the Supreme Constitutional Court held that a provision such as the one in section 33(3) of the Antiquities Law, Cap. 31, to the effect that the offence of unlawfully possessing antiquities shall not be deemed to have been committed if the person concerned satisfies the Court that he has acquired the antiquities in question lawfully, does not contravene para. 4 of Article 12 of the Constitution because it is not aimed at defeating the presumption of innocence but only makes availabe to the person concerned a defence based on circumstances within his own special knowledge.

It is appropriate also to refer to what is stated in *The Applica-*

tion of the European Convention of Human Rights by J. E. S. Fawcett, 1969, at p. 161:

> "From this it would follow that it is only some act or omission by the Court itself, which can operate as a failure of presumption of innocence. Here it may be remarked that in general the presumption of innocence is a formula to indicate where lies the main burden of proof at the trial of the charge, that is to say, upon the prosecution to prove the guilt of the accused beyond a reasonable doubt. But the presumption of innocence does not necessarily have this function."

For all these reasons this ground of appeal also fails and in the result I would dismiss the appeal against conviction.

It remains, however, and it only needs to say a few words about the appeal against the sentences imposed. I have already outlined the facts and reference has been made to the tragic consequences resulting therefrom and the price paid by so many people. Having gone through the record and having listened carefully to what counsel for the appellant has had to say on this ground, I have not been persuaded that the sentences imposed are either manifestly excessive or wrong in law. The totality of the circumstances relevant to the offence and the involvement of the appellant left no room for leniency; the approach of the Assize Court does not call for interference with their decision on this point of the appeal.

I would, therefore, dismiss the appeal against sentence also.

TRIANTAFYLLIDES P.: I agree with my learned brother Judge Mr. Justice A. Loizou that this appeal should be dismissed as regards both the conviction of the appellant and the sentence passed upon him.

I would like, however, to deal myself, also, with the aspect of the constitutionality of the conviction of the appellant, on count No. 1, of the offence of encouraging violence and promoting ill will, contrary to section 51(1) of the Criminal Code, Cap. 154.

The said provision, modified in the light of Article 188 of the Constitution, reads as follows:-

> " 51.(1) Any person who prints, publishes, or to any assembly makes any statement calculated or likely to—

(i) encourage recourse to violence on the part of any of the inhabitants of the Republic; or

(ii) promote feelings of ill will between different classes or communities or persons in the Republic,

is guilty of misdemeanour and is liable to imprisonment for twelve months:

Provided that no person shall be guilty of an offence under the provisions of this section if such statement was printed, published or made solely for any one or more of the following purposes, the proof whereof shall lie upon him, that is to say:-

(a) to endeavour in good faith to show that the Government of the Republic has been misled or mistaken in any of its measures; or

(b) to point out in good faith errors or defects in the Government, or the policies thereof, or constitution of the Republic as by law established, or any legislation, or in the administration of justice, with a view to the remedying of such errors or defects; or

(c) to persuade in good faith any inhabitants of the Republic to attempt to procure by lawful means the alteration of any matter in the Republic as by law established other than that referred to in paragraph (b) of section 48; or

(d) to point out in good faith with a view to their removal, any matters which are producing or have a tendency to produce discontent amongst any of the inhabitants of the Republic or feelings of ill will and enmity between different communities or classes of persons in the Republic".

There can be no doubt that section 51(1) above restricts the right to freedom of speech and expression which is safeguarded by Article 19 of our Constitution; the said Article reads as follows:-

"ARTICLE 19

1. Every person has the right to freedom of speech and expression in any form.

2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.

3. The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

4. Seizure of newspapers or other printed matter is not allowed without the written permission of the Attorney-General of the Republic, which must be confirmed by the decision of a competent Court within a period not exceeding seventy-two hours, failing which the seizure shall be lifted.

5. Nothing in this Article contained shall prevent the Republic from requiring the licensing of sound and vision broadcasting or cinema enterprises."

It is appropriate, at this stage, to quote the following relevant passage from the judgment of Mr. Justice L. Loizou in *Hji-Nicolaou* v. *The Police*, (1976) 2 C.L.R. 63 (at pp. 68, 69):-

> " It should be stressed that this Court attaches special importance to the present case because it concerns the right of freedom of expression, one of the fundamental rights of the subject which are recognized and safeguarded by article 19 of the Constitution as well as by the European Convention for the protection of Human Rights, which is effective in Cyprus by virtue of the provisions of article 169 of the Constitution, after the enactment, by the House of Representatives, of the European Convention for the protection of Human Rights (Ratification) Law, 1962 (Law 39/62). But even in the provisions of the Constitution and the Convention, there are certain formalities, conditions and restrictions and very rightly so, in our view, because although nobody can doubt that the right of expression is,

we should say, a blessing, and a characteristic of every civilized community and democratic country the reasons for which this right may be placed, by law, under certain restrictions and penalties constituting necessary measures for the protection of the reputation or rights of the citizen, the national security, the promotion of order and prevention of crime, the prevention of the disclosure of information received in confidence and the maintenance of the authority and impartiality of the judiciary should, nevertheless, be not disregarded, and this for the purpose of preservation of a fair balance between the right of freedom of expression and the resulting duties and responsibilities of the citizen.

The relevant provision of the law on which the charge was based in on the one hand restrictive of the right of freedom of expression, but there is, however, on the other hand, no submission or contention that it does not fall within the permitted restrictions."

In the *HjiNicolaou* case, *supra*, there was involved an offence committed against section 51A(1) of Cap. 154, as amended by the Criminal Code (Amendment) Law, 1974 (Law 59/74); the said section 51A(1) is, too, like section 51(1), a provision limiting the right to freedom of expression.

In the present case counsel for the appellant has submitted that the provisions of section 51(1), above, are unconstitutional, because they contravene Article 19 of the Constitution, which has already been quoted in this judgment.

The said Article 19 is modelled, to a great extent, on Article 10 of the European Convention on Human Rights, of 1950, which is applicable in the Republic of Cyprus (see, the *Hji-Nicolaou* case, *supra*, at p. 68, and, also, *inter alia*, *Kouppis* v *The Republic*, (1977)* 11 J.S.C. 1860, at p. 1879).

Article 10 reads as follows:-

"Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without inter-

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

ference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

It should be pointed out that there exists close similarity between paragraphs 1, 2 and 3 of Article 19 of our Constitution and paragraphs 1 and 2 of Article 10, above.

It is, therefore, useful to rely on the interpretation and mode of the application of the said Article 10 in construing and applying our own Article 19:

In its report in the case of *De Becker* v. *Belgium* (E.C.H.R. Series B, 1962, at p. 126) the European Commission of Human Rights has stated:-

" Since these provisions of the Belgian law are incompatible with the right to freedom of expression guaranteed in paragraph 1 of Article 10, their justification, if any, has to be found in one of the exceptions to the right of freedom of expression which are stated in paragraph 2 of that Article.

.....

The authors of this paragraph no doubt had in mind primarily the conditions, restrictions and penalties to which freedom of expression is commonly subject in a democratic society as being necessary to prevent seditious, libellous, blasphemous and obscene publications, to ensure the proper administration of justice, to protect the secrecy of confidential information etc.".

In its decision in the case of *X. and the German Association*

of Z. v. *The Federal Republic of Germany* (Application No. 1167/61, Yearbook of the European Convention on Human Rights, 1963, vol. 6, p. 204, at p. 218) the aforementioned Commision pointed out that "...a State is given a certain margin of appreciation in determining the limits that may be placed on freedom of expression;".

In its judgment in the case of *Handyside* v. *The United Kingdom* (Series A: Judgments and Decisions, vol. 24) the European Court of Human Rights stated the following (at pp. 22–23):–

> " The Court notes at this juncture that, whilst the adjective 'necessary', within the meaning of Article 10 § 2, is not synonymous with 'indispensable' (cf., in Articles 2 § 2 and 6 § 1, the words 'absolutely necessary' and 'strictly necessary' and, in Article 15 § 1, the phrase 'to the extent strict required by the exigencies of the situation'), neither has it the flexibility of such expressions as 'admissible', 'ordinary' (cf. Article 4 § 3), 'useful' (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), 'reasonable' (cf. Articles 5 § 3 and 6 § 1) or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.
>
> Consequently, Article 10 § 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.....
> .....
>
> The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-

mindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.

From another standpoint, whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's 'duties' and 'responsibilities' when it enquires, as in this case, whether 'restrictions' or 'penalties' were conducive to the 'protection of morals' which made them 'necessary' in a 'democratic society' ".

In its decision in the case of *Geerk* v. *Switzerland* (Application No. 7640/76) the European Commission of Human Rights (see Decisions and Reports of the Commission, vol. 12, p. 103, at p. 109) has stated the following:-

" Paragraph 1 of Article 10 secures the right to freedom of expression, which comprises freedom to communicate ideas without the possibility of interference by the public authorities.

Paragraph 2 of this provision places an obligation on the High Contracting Parties to restrict any interference by the authorities with the exercise of freedom of expression to measures which can be defined as 'formalities, conditions, restrictions or penalties' which are 'prescribed by law' and 'are necessary in a democratic society' for certain purposes specified in the text, regard being had to the 'duties and responsibilities' entailed by the exercise of freedom of expression in a society of this kind."

In the light of the foregoing I revert now to the issue of the constitutionality of the provisions of section 51(1) of Cap. 154:

As already stated by means of the said section there is restricted the right to freedom of speech and expression, which is safeguarded under Article 19 of our Constitution; but when such section is read as a whole, and there are taken into account the defences afforded to an accused person by means of paragraphs (a) to (d) in the proviso to this section, it has to be held that the restriction, which is imposed by means of it, is necessary

in the interests of the security of the Republic and the constitutional order, as well as of the public order and for the protection of the reputation and rights of others; consequently, it is a constitutionally permissible restriction, which comes within the ambit of paragraph 3 of Article 19 above.

Having said this I may add that, of course, there is room in a democratic society, such as the one set up by the Constitution of our Republic, for amending section 51(1) of Cap. 154 in order to make it more liberal, but the mere fact that there is room for improvement, in this respect, does not render it, as it stands today, an unconstitutional provision; therefore, the conviction of the appellant in relation to an offence committed contrary to it cannot be treated as unconstitutional.

Also, for the same reasons. it cannot be regarded as offending against Article 10 of the European Convention on Human Rights.

L. LOIZOU J.: I have had the opportunity of reading in draft the judgment just delivered by my brother A. Loizou J. and as I am in agreement with the result reached by him that this appeal must be dismissed there is nothing that I wish to add.

HADJIANASTASSIOU J.: The appellant, Eleftherios K. Papadopoullos, was convicted at Nicosia Assize Court on each count of an indictment which consisted of 9 counts, viz., (1) for encouraging violence and promoting ill will contrary to s. 51(1) of the Criminal Code Cap. 154; (2) for seditious conspiracy contrary to ss. 47(A) and 48 of the Criminal Code; (3) for holding an office or position in an unlawful association contrary to ss. 56(2), 62 and 63 of the Criminal Code; (4) for preparation of war and warlike undertaking, contrary to s. 40 of the Criminal Code; (5) for the use of armed force against the Government, contrary to s. 41 of the Criminal Code; (6) for possession of explosive substances without a licence contrary to s. 4(4)(d), 5(a) and (b) of the Explosive Substances Law Cap. 54 (as amended by Law 21/70); for possessing firearms contrary to s. 3(1)(b)(c), 2(b), of the Firearms Law Cap. 57 (as amended); and for possession of a wireless apparatus without a licence contrary to ss. 3(1) and 11(a) of the Wireless Telegraphy Law Cap. 307.

The sentence imposed on the appellant was, for counts (4)

and (5), "Imprisonment for life"; for count (1) one year; for count (2), 5 years; for count (3), 3 years; for counts (6), (7) and (8), 10 years; and for count (9) one year's imprisonment. The aforesaid sentences were to run concurrently.. The appeal is against both the conviction and the sentence in respect of each count on which the appellant was found guilty.

Having had the advantage of reading the draft judgment of my brother A. Loizou, I need not repeat the facts of this case as they have already been fully set out in his judgment with whose reasoning and conclusions I agree, that the acts or deeds of the appellant, having regard to the totality of evidence, proved beyond reasonable doubt his guilt on counts 2-9.

The only question with which I feel I ought to deal with in this appeal is whether s. 51 of the Criminal Code Cap. 154, was properly construed by the Assize Court and whether the appellant was entitled to invoke the defences which are set out in this section.

Section 51(1) is in these terms:-

" Any person who prints, publishes, or to any assembly makes any statement calculated or likely to—

(i) encourage recourse to violence on the part of any of the inhabitants of the Republic; or

(ii) promote feelings of ill will between different classes or communities or persons in the Republic, is guilty of misdemeanour and is liable to imprisonment for twelve months:

Provided that no person shall be guilty of an offence under the provisions of this section if such statement was printed, published, or made solely for any one or more of the following purposes, the proof whereof shall lie upon him, that is to say:-

(a) to endeavour in good faith to show that the Government of the Republic has been misled or mistaken in any of its measures; or

(b) to point out in good faith errors or defects in the Government, or the policies thereof, or constitution

of the Republic as by law established, or any legislation, or in the administration of justice, with a view to the remedying of such errors or defects; or

(c) to persuade in good faith any inhabitants of the Republic to attempt to procure by lawful means the alteration of any matter in the Republic as by law established other than that referred to in paragraph (b) of section 48; or

(d) to point out in good faith with a view to their removal, any matters which are producing or have a tendency to produce discontent amongst any of the inhabitants of the Republic or feelings of ill will and enmity between different communities or classes of persons in the Republic."

It appears from the evidence before the trial Court that the appellant was a member of EOKA; he was charged by the police that by the publication of a text under the title "Political Documents 1971-1974", he encouraged violence and promoted ill will among the citizens of the Republic contrary to section 51 of the Criminal Code. The appellant stated that the material in the booklet consists of texts written by General Grivas. He admitted editing and publishing it and that he was the author of the Foreword, the Introduction, the Epilogue and part of the comments to the photographs and the introductory notes to the various texts. He stated that these introductory notes were not comments but writing, giving the picture in a general frame of the text that will follow and under what circumstances and within which frame is to be found. He further added that these introductions give simply a picture of the situation to which the author of the text that follows depicts.

Going through that book, it appears to me that all the texts are those of General Grivas and the leaflets circulated by EOKA B. The reasons given by the appellant in the foreword to the book are these:-

" First out of respect to the historical truth and for immense love to the deceased leader of EOKA the protagonist of the pannational idea of 'Enosis'. Secondly for enlightenment of the panhellenic public opinion which still remains uninformed on account of the non-publication of this text

in Greece on account of the then existing preventive censorship on behalf of the dictatorial regime in power which as it is known was friendly to the regime of Makarios and hostile to the struggle for union by Dighenis. Thirdly, for the sake of the new generations as all who were engaged in relating the Cyprus events of the years 1971–1974 belonging to various parties and fractions wrote adversely and some of them with evident enmity and with intention to defame General Grivas. But also others engaged in the aforesaid period more or less dependent or wishing to serve party views, aims and sympathies, but foremostly and mainly relying on newspapers of the politico–economic interest of the publishing groups of Cyprus and Athens, wrote adversely and with lightness. Finally, the collection and publication of the political texts of Dighenis in a volume is intended to help the bona fide and in search of the historical truth historian of the future. In any event the texts set out in the present volume are scattered in the newspapers of the period and become inaccessible, whereas most of them are completely unknown even to his collaborators that they were written by the hand of Dighenis."

Counsel for the respondent, in a strong and able argument contended that the publication of that text during that period of crisis of Cyprus added to the misfortunes of our country and particularly was likely to promote feelings of ill will between the various classes of people or persons and to encourage acts of violence: (a) because of thousands of displaced persons; (b) the desperate situation of the relatives of missing persons; and because the misfortunes of this country were attributed to the coup d'etat, which opened the door to the Turkish invasion; and (c) that the publication was considered as an insult to the people who believed in and loved his Beatitude Archbishop Makarios who was their leader, and was likely to encourage acts of violence among the people of our country.

Finally, counsel argued that once the intention of the appellant was seditious, and had a tendency to produce feelings of hatred and ill will between different classes of our people, he could not invoke the defences appearing in the proviso to s. 51(1) of our Criminal Code, once he has failed to discharge the onus cast upon him under the proviso to prove that what he did was done in good faith.

On the contrary, counsel for the appellant tried to show that the publication of the book in question did not constitute the offence of sedition and was not made to encourage recourse to violence on the part of any of the inhabitants of the country, because the publication was made in good faith for the purpose of showing that the Government of the country has been misled or mistaken in any of the measures and pointed out errors or defects in the Government regarding its political stand. Finally, counsel argued that the applicant brought himself within the protection of the proviso to s. 51(1) once his intention was to inform the people of what was going on.

The Assize Court, being faced with the same contentions and arguments regarding the defence put forward as in this Court, and having addressed their minds to a number of authorities regarding sedition, and fully aware of the warning given by Coleridge, J. in the case of *R.* v. *Aldred*, 22 Cox's Criminal Law cases, looked into all the circumstances surrounding the publication of that book with a view of seeing whether the language used was calculated to produce the results imputed to the appellant and reached the conclusion that from the declared intentions of the appellant, the latter could not invoke any of the defences set out in s. 51(1) of the Criminal Code and was satisfied that from the comments of the appellant, the descriptions which he used for the President of the Republic, his Government, and security forces, during the prevailing situation in the Republic, the prosecution proved beyond reasonable doubt that the appellant was guilty on this count.

Turning now to section 51(1), and comparing that section with the offence of sedition, the trial Court concluded that the two offences correspond to each other. According to Kenny's outlines of Criminal Law, 18th edn., under the heading "Stephen's Definition of Sedition", p. 397, para. 426, it is stated that:-

> "The law of sedition relates to the uttering of seditious words, the publication of seditious libels and conspiracies to do an act for the furtherance of a seditious intention. Sedition, whether by words spoken or written, or by conduct, is a misdemeanour at common law punishable by fine and imprisonment. Sir James Stephen (Digest of

Criminal Law, 8th ed. art. 114) defined a seditious intention as 'an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom by law established, or either House of Parliament, or the administration of justice, or to excite his Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, ... or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects'. But 'an intention[1] to show that His Majesty has been misled or mistaken in his measures, to point out errors or defects in the government or constitution, as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill will between classes of His Majesty's subjects, is not a seditious intention'. It is the right of every citizen to discuss public affairs fully and freely, but such discussions must not be directed to the incitement of unlawful acts or calculated to excite disaffection[2]".

It appears that a seditious intention is of the essence of the offence and if the acts done or words used were not done or used with such an intention, the offence of sedition has not been committed however defamatory the words may be.

In *Reg.* v. *Burns and Another*, Cox's Criminal Law cases, Vol. XVI 355, Cave, J., dealing with the question of whether or not sedition was proved, said at p. 360:-

" The next question that one asks is this: There are two offences, one is the offence of speaking seditious words, and the other offence is the publication of a seditious libel. It is obviously important to know what is meant by the word sedition, and Stephen, J. proceeds in a subsequent

1. Ibid. art. 95.
2. For illustrations of sedition, see Arch. ch. 13, sect. 7 Russ. 229 et seq. R. v. Burns [1886] 16 Cox 355.

article to give a definition of it. He says 'A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects. (a) Stephen, J. is a Judge of very great accuracy and for every proposition there laid down there is to be found undoubted authority. He goes on to point out what sort of intention is not seditious. It is also important to consider that, because there we get a light thrown upon the subject from another side. 'An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention. (b) So there he gives in these two classes what is and what is not sedition. Now, the seditious intentions which it is alleged existed in the minds of the prisoners in this case are: first, an intention to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of some matters in Church or State by law established; and, secondly, to promote feelings of hostility betwen different classes of Her Majesty's subjects. This is necessarily somewhat vague and general, particularly the second portion, which says it is a seditious intention to intend to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects. I should rather prefer to say that the intention to promote feelings of

(a) Digest of the Criminal Law, p. 56, art. 93.

ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention according to circumstances, and of those circumstances the jury are the Judges—and I put this question to the Attorney-General in the course of the case: 'Suppose a man were to write a letter to the papers attacking bakers or butchers generally with reference to the high prices of bread or meat, and imputing to them that they were in a conspiracy to keep up the high prices, would that be a seditious libel-being written and not spoken?' To which the Attorney-General gave me the only answer, which it was clearly possible to give under the circumstances: 'That must depend upon the circumstances'. I, sitting here as a Judge, cannot go nearer than that. Any intention to excite ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention; whether in a particular case this is a seditious intention or not, you must Judge and decide in your own minds, taking into consideration the whole of the circumstances of the case. You may not unnaturally say that that is a somewhat vague statement of the law, by what principle shall we be governed in deciding when an intention to excite ill-will and hostility is seditious and when it is not. For your guidance, I will read to you what was said by Fitzgerald, J. in the case of *Reg.* v. *Sullivan* (11 Cox C.C. 44), which was a prosecution for a seditious libel, the only difference between the two cases being of course that while seditious speeches are spoken, a seditious libel is written, but in each of them the adjective 'seditious' occurs, and what is a seditious intention in the one case will equally be a seditious intention in the other, he said: 'As such prosecutions are unusual, I think it necessary in the first instance to define sedition, and point out what is a seditious libel. Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval.' It has been said very truly that there is no such offence as sedition itself, but it takes the form of seditious language either written or spoken, and it is in that sense of course that the learned Judge's words are intended to be understood. 'Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the state, and lead ignorant persons to

endeavour to subvert the government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as seditious all those practices which have for their object to excite discontent or disaffection, to create public disturbances, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the Realm, and generally all endeavours to promote public disorder.' Then a little further on he says (p. 46): 'Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effect from writings; Sir Michael Foster said of the latter: 'Seditious writings are permanent things, and if published they scatter the poison far and wide. They are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the Court naked and undisguised, as they came out of the author's hands'. That points to the nature of the proof between seditious writing and words, and also points to a difference in the effect which they have, and the extent to which that effect goes, though of course in regard to seditious words there may be a very great distinction between words uttered to two or three companions in social intercourse and words uttered to a large multitude.' That language the learned Judge spoke when he was charging the grand jury upon the subject."

The test as to whether the language used is calculated to produce the results contemplated is given by Coleridge, J. in the case of *R.* v. *Aldred*, 22 Cox's Criminal Law Cases. He said at pp. 3–4:–

" It is not necessary for me in this case to give you a full, accurate, and comprehensive definition of all that could come under the head of seditious libel, because the prosecution have practically limited their case to one form of seditious libel, and that is, that by a publication for which

the defendant was responsible he used language implying that it was lawful and commendable to employ physical force in any manner or form whatsoever against the government of our Lord the King, or towards and against the British liege subjects of our Lord the King; and the case has all turned upon that form or species of seditious libel. Nothing is clearer than the law on this head—namely, that whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel. The word 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form; but the man who is accused may not plead the truth of the statements that he makes as a defence to the charge, nor may he plead the innocence of his motive; that is not a defence to the charge. The test is not either the truth of the language or the innocence of the motive with which he published it, but the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State?—and I need hardly say that anything in the way of assassination would be comprehended in the definition. That is the test; and that test is not for me or for the prosecution; it is for you, the jury, to decide, having heard all the circumstances connected with the case. In arriving at a decision of this test you are entitled to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled also to take into account the state of public feeling. Of course there are times when a spark will explode a powder magazine; the effect of language may be very different at one time from what it would be at another. You are entitled also to take into account the place and the mode of publication. All these matters are surrounding circumstances which a jury may take into account in solving the test which is for them, whether the

language used is calculated to produce the disorder or crimes or violence imputed. It is quite true, as the defendant has put before you, that a prosecution for seditious libel is somewhat of a rarity. It is a weapon that is not often taken down from the armoury in which it hangs, but it is a necessary accompaniment to every civilised government; it is liable to be abused, and if it is abused there is one wholesome corrective, and that is a jury of Englishmen such as you. Having said this much, I should like to say by way of comment upon a good deal that has fallen from the defendant in the speech that he has addressed to you—that the expression of abstract academic opinion in this country is free. A man may lawfully express his opinion on any public matter, however distasteful, however repugnant to others, if, of course, he avoids defamatory matter, or if he avoids anything that can be characterised either as a blasphemous or as an obscene libel. Matters of State, matters of policy, matters even of morals—all these are open to him. He may state his opinion freely, he may buttress it by argument, he may try to persuade others to share his views. Courts and juries are not the Judges in such matters. For instance, if he thinks that either a despotism, or an oligarchy, or a republic, or even no government at all, is the best way of conducting human affairs, he is at perfect liberty to say so. He may assail politicians, he may attack governments, he may warn the executive of the day against taking a particular course; or he may remonstrate with the executive of the day for not taking a particular course; he may seek to show that rebellions, insurrections, outrages, assassinations, and such-like, are the natural, the deplorable, the inevitable outcome of the policy which he is combating. All that is allowed, because all that is innocuous; but, on the other hand, if he makes use of language, calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then whatever his motives, whatever his intentions, there would be evidence on which a jury might, on which I should think a jury ought, and on which a jury would decide that he was guilty of a seditious publication..."

This being the position, and having taken into account the

state of public feeling, the trial Court had accepted—having regard to the language used, that the appellant could not invoke any of the defences set out in s. 51(1) of the Criminal Code. Counsel for the appellant further argued that the trial Court erred in law in saying that the defences set out in the proviso to the aforesaid section could not be invoked by the appellant if the application was not made for any of the purposes set out thereunder, and that if this interpretation is accepted, it was unconstitutional, viz. that mens rea could be detected from its publication, and that the contents of *exhibit* 43 were of a seditious nature.

Is section 51(1) of the Criminal Code unconstitutional? Article 19 of the Constitution of the Republic of Cyprus lays down that:-

"1. Every person has the right to freedom of speech and expression in any form.

2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.

3. The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."

This question has occupied also the time of the Courts in the United States which also has a written constitution. In *Fox* v. *Washington*, 59 Law Ed. 573, Mr. Justice Holmes, delivering the opinion of the Court said at pp. 575-576:-

" This is an information for editing printed matter tending to encourage and advocate disrespect for law, contrary to a statute of Washington."

Then having quoted the printed matter in question which was an article entitled "The Nude and the Prudes", went on to add:-

" The defendant demurred on the ground that the act was

unconstitutional. The demurrer was overruled and the defendant was tried and convicted."

Mr. Justice Holmes proceeded to say:-

"Thus by indirection, but unmistakably, the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury so found.

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed (United States ex rel. *Atty. Gen.* v. *Delaware & H. Co.* 213 U.S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527); and it is to be presumed that state laws will be construed in that way by the state Courts. We understand the state Court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavourable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it,—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See *Nash* v. *United States*, 229 U.S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853. It lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanour if not an accomplice or a principal in the crime

encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States."

In *Dennis* v. *United States*, 95 Law. Ed. 1137, Mr. Justice Vinson said at pp. 1147, 1148, 1149:-

" The existence of a mens rea is the rule of, rather than the exception to the principles of Anglo-American criminal jurisprudence. See American Communications *Asso* v. *Douds*, 339 US 382, 411, 94 L. ed. 925, 950, 70 S Ct. 674 (1950).....

The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion.....

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. Although we do not agree that the language itself has that significance, we must bear in mind that it is the duty of the federal Courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution.....

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial Judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas'. He further charged that it was not unlawful 'to conduct in an American college and university a course explaining the philosophical theories

set forth in the books which have been placed in evidence.' Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."

In *New York Times Co.* v. *United States*, 29 Law. Ed. 2d. 822, Mr. Justice Black, dealing with the Freedom of Press said at p. 828:-

" The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

'The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government....."

Mr. Justice Douglas, with whom Mr. Justice Black joined in concurring, said at pp. 828, 829, 830:-

" The Government suggests that the word 'communicates' is broad enough to encompass publication.....

These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press.

As stated by Chief Justice Hughes in *Near* v. *Minnesota*, 283 US 697, 719–720, 75 L Ed 1357, 1369, 51 S Ct. 625:

' While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavouring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.'

As we stated only the other day in *Organization* for a *Better Austin* v. *Keefe*, 402 US 415, 419, 29 L Ed 2d 1, 5, 91 S Ct 1575 'any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.'

The Government says that it has inherent powers to go into Court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. *Minnesota*, 283 US 697, 75 L Ed 1357, 51 S Ct. 625, repudiated that expansive doctrine in no uncertain terms."

In a recent case, in *Georghios HjiNicolaou* v. *The Police*, (1976) 2 C.L.R. 63, Mr. Justice L. Loizou, in delivering the judgment of the Supreme Court, had this to say regarding the right to freedom of expression at p. 68:-

" It should be stressed that this Court attaches special importance to the present case because it concerns the right of freedom of expression, one of the fundamental rights

of the subject which are recognized and safeguarded by article 19 of the Constitution as well as by the European Convention for the protection of Human Rights, which is effective in Cyprus by virtue of the provisions of article 169 of the Constitution, after the enactment, by the House of Representatives, of the European Convention for the Protection of Human Rights (Ratification) Law, 1962 (Law 39/62). But even in the provisions of the Constitution and the Convention, there are certain formalities, conditions and restrictions and very rightly so, in our view, because although nobody can doubt that the right of expression is, we should say, a blessing, and a characteristic of every civilized community and democratic country the reasons for which this right may be placed, by law, under certain restrictions and penalties constituting necessary measures for the protection of the reputation or rights of the citizen, the national security, the promotion of order and prevention of crime, the prevention of the disclosure of information received in confidence and the maintenance of the authority and impartiality of the judiciary should, nevertheless, be not disregarded, and this for the purpose of preservation of a fair balance between the right of freedom of expression and the resulting duties and responsibilities of the citizen.

The relevant provision of the law on which the charge was based is on the one hand restrictive of the right of freedom of expression, but there is, however, on the other hand, no submission or contention that it does not fall within the permitted restrictions."

Finally, in *Near* v. *Minnesota ex Rel. Olson*, 75 Law. ed., 1357, Mr. Justice Hughes, delivering the opinion of the Court, said at pp. 1366-1367:-

"The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the

licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity'. 4 Bl. Com. 151, 152; see Story on the Constitution, 1884 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, 'The great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also.' Report on the Virginia Resolutions, Madison's Works, vol. 4, p. 543. This Court said, in *Batterson* v. *Colorado*, 205 U.S. 454, 462, 51 L. ed. 879, 881, 27 S. Ct. 556, 10 Ann. Cas. 689: 'In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practised by other governments', and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Com* v. *Blanding*, 3 Pick. 304, 313, 314, 15 Am. Dec. 214; *Respublica* v. *Oswald*, 1 Dall. 319, 325, 1 L. ed. 155, 158, 1 Am. Dec. 246. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Com.* v. *Blanding*, ubi *supra*; 4 Bl. Com. 150.'

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis,

but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal constitutions. The point of criticism has been 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions;' and that 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-work, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.' 2 Cooley, Const. Lim. 8th ed. p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeller to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. Id. pp. 883, 884. The law of criminal libel rests upon that secure foundation".

Having regard to the weighty pronouncements in the cases quoted earlier in this Judgment, and because the trial Court rightly came to the conclusion that certain passages of the book in question were of a seditious nature, and that the publications were outside the provisions of the proviso of the said section 51(1), I dismiss this contention of counsel, once the appellant has failed to discharge the onus cast upon him, viz., that the publication was made in good faith.

Turning now to the constitutional complaint, I think I would reiterate that a prosecution for seditious libel is a necessary one to every civilized Government; it is liable to be abused, and if it is abused, the complainant can turn to the Courts of this country for protection.

It is equally important to state that every person in Cyprus has a constitutional right to express and/or to publish his opinion on any public matter, however distasteful, however repugnant to others, if of course he avoids defamatory matter. Matters of State, matters of policy, matters even of morals—all these are open to him. He may state his opinions freely and he may try to persuade others to share his views.

The liberty of the press is indeed essential to the nature of a

free state; but this consists, as the authorities show, in laying no previous restraints upon publications, and not in freedom from censure for seditious matter when published. Certainly, every man in Cyprus has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press. But if he publishes what is improper, mischievous, illegal or seditious, he must take the consequences of his own acts.

It is also recognized in all civilized countries that punishment for the abuse of the liberty afforded to the press is essential to the protection of the public, and that the common law rules that subject the libeller to responsibility for the public offences, as well as for the private injury, are not abolished by the protection extended in our Constitution.

For all the reasons I have given at length, and because the appellant has taken the risk of publishing seditious matters, I dismiss this contention of counsel for the appellant also, and declare that the provisions of s. 51(1) are not unconstitutional.

Appeal dismissed; conviction and sentence affirmed.

MALACHTOS J.: I also agree with the judgment just delivered by my brother Judge A. Loizou, which I had the advantage to read in advance and I have nothing useful to add.

TRIANTAFYLLIDES P.: In the result the appeal of the appellant against conviction and sentence is dismissed unanimously.

Appeal dismissed.