1986 June 16

[A. LOIZOU, DEMETRIADES, PIKIS, JJ.]

DEMOS FOURNIDES,

Appellant,

v.

THE REPUBLIC,

Respondent.

(Criminal Appeal No. 4610).

Evidence—Criminal Evidence—Confessions—Admissibility of—Voluntariness is the test of admissibility—Judges' Rules—They are not rules of law, but important aids to determining voluntariness—Meaning of voluntariness—Voluntariness is a question of fact—Absence of objection relating to the admissibility of a confession—Effect—Rules relating to voluntariness are confined to confessions—Definition of confession.

Evidence—Witnesses—Re-examination of—Purpose of re-examination—Matters admissible in re-examination—Discretion of Court to allow evidence of new facts elucidating the testimony of a witness, provided opportunity is afforded to the defence to cross-examine on the new facts.

Credibility of witnesses—Finding as to—Heavy onus on appellant to persuade this Court to interfere with such a finding.

Evidence—Criminal Evidence—Motive—Admissible as circumstantial evidence of accused's intention.

Evidence—Criminal Evidence—Lies told by appellant in his evidence to the police—Whether they may lead to inference of guilt—Test applicable.

Evidence—Criminal Evidence—Circumstantial evidence—Conviction based on such evidence—The cumulative effect of

such evidence should be incompatible with any basis other than that of guilt of the accused.

Sentence—Arson of a building contrary to s. 315 of The Criminal Code, Cap. 154 and Arson of its contents contrary to s. 319 of the same code—Five years' imprisonment on each count to run concurrently—In the light of the material before the Assize Court perfectly warranted—Appellant's state of health by far poorer than what the Assize Court was given to understand—Certainty that if the Assize Court had been acquainted with appellant's real state of health, it would have imposed a lesser sentence— Sentence reduced to four years' imprisonment.

The appellant was found guilty on two counts of arson of the premises at 14 Kyriacou Matsi Street, Nicosia and their content, merchandise, furniture and fittings and was sentenced to concurrent terms of five years' imprisonment.

The building was in the possession of appellant's family company and was used for the storage and sale of drugs for human consumption in one section and another for animal use.

There was ample evidence that the appellant was in a hopeless financial position, daily embarrassed by his inability to meet his obligations. The merchandise, furniture and fittings were insured for £25,000, a sum which bore no true relationship to the value of the insured articles. It represented twice or more their value. Soon after the fire the appellant sought the benefits of the policy, stating that the value of the said articles was £30,000.

On the night of the fire the appellant was seen at the scene. According to testimony of prosecution witnesses he stayed there for about 20 minutes. In two statements made to the police, one an open statement made a short while after the extinguishment of the fire and one made subsequently under caution the appellant alleged that the purpose of his visit to the pharmacy was to switch off a fluorescent sign that illuminated the window of the pharmacy. This professed aim remained unfulfilled as the relevant plug was found on the "on" position.

There was nothing whatever to suggest that anyone gained entrance to the pharmacy surreptitiously or interfered with the outside of the building. Expert evidence established that the pharmacy had been sprayed with inflamable substance or substances before fire was set thereto, ruling out accident as a cause of fire.

The trial Court rejected appellant's version as untrue, a fabrication intended to exculpate him from the consequences of his conduct. This falsehood afforded, in the opinion of the trial Court, of itself evidence of guilt. The trial Court also found that appellant gave a false explanation about the cause of a cut on his hand allegedly suffered when he assisted the firemen summoned to the scene. It originated from some other doing of the appellant which he hid from the police. The trial Court further accepted the evidence of a prosecution witness that during a Court break appellant approached him and suggested to him to tell a lie with a view to making credible the possibility of the fire having started accidentally.

The specific grounds on which the appeal against conviction was based are as follows: (a) Improper admission or failure to disregard the said first open statement made to the Police by the appellant, (b) Misreception of evidence about the results of experiments carried out by P. W. 100 introduced at the stage of his re-examination and, allegedly, contradicting the testimony given earlier by the witness, (c) Ill judged reliance on the evidence of a fire expert, namely Georghios Karides, P. W. 98, (d) Misappreciation of the effect of the evidence relevant to the appellant's financial position, which led the trial Court to attribute to the appellant a motive he did not have, (e) Misdirection about the effect of the lies found to have been told by the appellant respecting his presence and doings at the scene on the night of the fire, and (f) Misconception of the effect of evidence credited by the Court as reliable. The case for the appellant is that it did not inevitably lead to an inference of appellant's guilt.

Held, dismissing the appeal against conviction and allowing the appeal against sentence by reducing it to four years' imprisonment:

(A) As regards the conviction:

(1) The case for the appellant in support of ground (a) above is that notwithstanding absence of objection as to the admissibility of the open statement, it ought to have been rejected or in any event disregarded when the facts surrounding its taking became known in their entirety. The statement was allegedly obtained in circumstances amounting to oppression in that the Police failed to give the appellant a chance to change his wet clothes and did not heed a request for the pills he was taking to be brought to him.

A body of Cyprus caselaw acknowledges wide discretion to a trial Court to reject a statement, if obtained in what the authorities term "suspicious circumstances". But none of such cases aims to alter the basic principle that voluntariness is the test of admissibility. The Judges Rules are not rules of law, breach of which renders a statement inadmissible, but important aids to determining its voluntariness. A statement is voluntary as the word is understood in ordinary parlance, namely, if made "of one's own free will" (Lord Samner's test in *Ibrahim* v. *R.* [1914] A.C. 599 adopted). Voluntariness is basically a question of fact. The Court must not advert to the admissibility of a statement unless the question is raised by the defence, especially in a case, and the present is of that kind, where the defence has foreknowledge of the content of the statement and the accused is represented by counsel. In this case not only there was no objection as to the admissibility of the statement, but on the contrary it provided the spring-board of the defence.

The rules relevant to the voluntariness of statements are confined to statements amounting to confession of guilt of the crime with which the accused is charged. A confession, as *Stephen* defined it, is "an admission made by a person charged with a crime or suggesting the inference that he committed the crime". Appellant's case collapses altogether as the statement in question was the opposite of a confession. The ultimate incriminatory effect of the statement does not change its nature.

Even supposing that it amounted to a confession and that a caution ought to have been administered, failure

to caution was not of itself fatal to its admissibility. In the circumstances of this case there is no doubt as to the voluntariness of the statement in question.

(2) The evidence of P.W. 100 as to the results of experiments carried out with regard to possible causes of fire is challenged solely as inadmissible at the stage it was given, that is re-examination.

Re-examination must, as a rule, be confined to testimony explanatory or supplementary of evidence given in cross-examination for the sake of completing or clarifying the picture of a given matter. It also affords an opportunity to the party calling a witness to seek redress of his credit shaken in cross-examination. The Court has discretion to admit new facts necessary for the elucidation of the testimony of a witness, provided proper opportunity is afforded to the defence to cross-examine on the new facts.

In this case the evidence in question was made relevant by the questions and generally the tenor of cross-examination and, moreover, opportunity was afforded to the defence to cross-examine the witness on the new evidence given.

(3) The trial Court is, under our legal system, the natural forum for the sifting of evidence and assessment of its effect. A great onus lay on an appellant to persuade this Court to interfere with findings of credibility of witnesses. The appellant in this case failed to discharge such burden. At the least it was open to the trial Court to accept the evidence of Georghios Karides.

(4) The unavoidable inference of the evidence is the one drawn by the Assize Court to the effect that appellant's financial position was steadily deteriorating reaching a point of hopelessness by 18.6.84. Equally valid is the finding as to the over-insurance of the goods in the pharmacy. Juxtaposition of the said two findings led the trial Court to discern the existence of motive. Motive is admissible as circumstantial evidence relevant to the intention of the appellant. Though it cannot of itself support a charge, its relevance cannot be doubted. The finding of

the trial Court as to motive, was not only open to it, but virtually unavoidable in the light of the evidence before it.

(5) The lies of the appellant in his statement respecting his presence at the scene, the duration of his stay thereat and the injury on his hand led, according to the direction of the Court, to an inference of guilt.

Recourse to falsehood in material respects may lead to an inference of guilt. This is a rule dictated by reason and common sense deriving from human experience at to the motivating force behind lies.

The incriminating inferences that may be drawn from recourse to falsehood depend on (a) Whether the lies were deliberately told, (b) the subject-matter of the lies, particularly the facts intended to be hidden or obscured thereby, and (c) the motive behind the lies (*R.* v. *Lucas* [1981] 2 All E.R. 1008). Application of this test to the lies told by the appellant leads to the conclusion that neither the direction of the trial Court nor its inferences can be faulted on any account.

(6) The conviction of the appellant was based on circumstantial evidence. The feature that distinguishes such evidence from direct evidence is that though individual parts of it are not in themselves conclusive of the guilt of the accused, this may be the cumulative effect of pieces of circumstantial evidence strung together; provided always its causative effect is incompatible with any basis other than that of guilt of the accused.

The circumstantial evidence in this case leads inexorably to the guilt of the appellant.

(B) *As regards the sentence:* (1) Wilfully and unlawfully setting fire to a building (s. 315 of Cap. 154) and its content (section 319 of Cap. 154) are grave crimes punishable with life imprisonment and 14 years' imprisonment respectively. It is next to impossible to predict the consequences of fire once it breaks out. The culprit necessarily takes, as indeed did the appellant, a calculated risk with the safety of neighbours and their property. The

Assize Court addressed itself correctly to the seriousness of the offence and castigated appellant's conduct as cold-blooded pursued regardless of consequences, embarked upon with a view to profiting thereby. On the basis of the material before the trial Court the sentence imposed was perfectly warranted.

(2) However, material was placed before this Court indicating that the state of appellant's health is far poorer than what the trial Court was given to understand.

(3) The dilemma is to weigh the implications of allowing the sentence to stand in the absence of any error in the judgment imposing it, on the one hand, and the duty of the Court to see that justice is done in the particular case, on the other. This Court decided to follow the latter course only because it feels that it is certain that the Assize Court, had they been acquainted with the appellant's true state of health, they would have imposed a somewhat lesser sentence. In the result the sentence would be reduced to one of four years' imprisonment.

Appeal as regards the conviction dismissed. Sentence reduced to four years' imprisonment.

Cases referred to:

Koukounides v. *The Police* (1967) 2 C.L.R. 167;

Liatsos v. *The Police* (1968) 2 C.L.R. 15;

Pierides v. *Republic* (1971) 2 C.L.R. 263;

Vouniotis v. *Republic* (1975) 2 C.L.R. 34;

Khadar and Another v. *Republic* (1978) 2 C.L.R. 132;

Zissimides v. *Republic* (1978) 2 C.L.R. 382;

Kokkinos v. *Police* (1967) 2 C.L.R. 217;

Petri v. *Police* (1968) 2 C.L.R. 40;

Ioannides v. *Republic* (1968) 2 C.L.R. 169;

Azinas and Another v. *The Police* (1981) 2 C.L.R. 9;

R. v. *Watson* [1980] 2 All E.R. 293;

Ibrahim v. *R.* [1914] A.C. 599;

R. v. *Rennie* [1982] 1 All E.R. 385;

D.P.P. v. *Ping Lin* [1975] 3 All E.R. 175;

Adjodha v. *State* [1981] 2 All E.R. 153;

R. v. *Heseltine,* 12 Cox. 404;

Papadopoulos v. *Stavrou* (1982) 1 C.L.R. 321;

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

Anastassiades v. *The Republic* (1977) 2 C.L.R. 97;

Mawary Khan v. *Reginam* [1967] 1 All E.R. 80;

Philotas v. *Republic* (1967) 2 C.L.R. 13;

Regina v. *Knight* [1966] 1 W.L.R. 230;

R. v. *Lucas* [1981] 2 All E.R. 1008;

R. v. *Chapman* [1973] 2 All E.R. 624;

Polycarpou and Another v. *Republic* (1967) 2 C.L.R. 198;

Papas v. *Republic* (1970) 2 C.L.R. 89;

Philippou v. *Republic* (1983) 2 C.L.R. 245.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Demos Fournides who was convicted on the 14th January, 1985 at the Assize Court of Nicosia (Criminal Case No. 15987/84) on two counts of the offence of arson contrary to sections 315(a) and 319 of the Criminal Code, Cap. 154 and was sentenced by Nikitas, P.D.C., Laoutas, S.D.J. and Aristodemou, D.J. to concurrent terms of five years' imprisonment.

A. Skordis with *M. Papapetrou,* for the appellant.

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

Cur. adv. vult.

A. Loizou J.: Pikis, J. will give the judgment of the Court.

Pikis J.: After a mammoth trial lasting nearly two months, the Assize Court of Nicosia (Nikitas, P.D.C.; Laoutas, S.D.J., Aristodemou, D.J.) found the appellant guilty on two counts of arson and sentenced him to concurrent terms of five years imprisonment. By the verdict of the Court the appellant was found guilty of wilfully and unlawfully setting fire to the premises at 14 Kyriacou Matsi Street, Nicosia, and its content, merchandise, furniture and fittings. The building was in the possession of a family company of the appellant used as a pharmacy for the storage and sale of drugs for human consumption in one section and another for animal use. The actions of the appellant were wholly deliberate, intended to produce the destruction of the merchandise, as well as the premises, so the Court found. His criminal action was motivated by a desire to reap the benefits of an insurance policy that would enable him to ride out of his grave financial difficulties. There was ample evidence that appellant was in a hopeless financial position, daily embarrassed by inability to meet his obligations. The dishonour of cheques issued by the appellant for the company or himself was a routine matter. The prospect of financial recovery looked dim as the appellant and his family had exhausted their creditworthiness having mortgaged the family house at Nicosia and property at Pomos, wherefrom appellant came.

The sum for which the merchandise, furniture and fittings were insured, £25,000.-, bore no true relationship to the value of the insured articles. It represented twice or more their value. The intention of the appellant to seek the benefits of the insurance policy was manifested soon after the destruction, by a letter of his advocate addressed to the insurers. In this letter too a value was placed on the articles and furniture desrtoyed, notably £30.000.-, out of all proportion to their actual value.

The evidence in the case consisting of the testimony of 101 prosecution witnesses, plus the statement of the appellant made from the dock, as well as voluminous docu-

mentary and other evidence, is summed up comprehensively in the judgment of the Court. Succinct reference is made to every material piece of evidence, its significance is duly pondered in the context of the case, and its effect in law. Necessarily our task on appeal is made easier by the thorough definition of the issues of the case, the clarity of the reasoning and the deliberations of the Court.

Appellant denied having anything to do with the fire insisting he was the victim of its effects. In two statements made to the Police, one an open statement made a short while after the extinguishment of the fire at the Police Station (exhibit 71) and a second made subsequently under caution (exhibit 113), he explained his presence at the scene, first noticed by the occupant of the apartment on top of the pharmacy, as wholly fortuitious. His visit to the pharmacy shortly before the break out of the fire was solely intended to enable him to switch off a fluorenscent sign that illuminated the window of the pharmacy. The inference arising from the testimony of prosecution witnesses is that he stayed at the scene for much longer, for about 20 minutes. The occurrence of the sound of an explosion heard immediately before or at the time of the eruption of the fire, was wholly unconnected with his visit. His presence at the scene was, he stated, a mere coincidence, in fact one that aided in the abatement of the fire for he rushed to the nearby Ayios Dhometios Police Station to alert the police to its occurrence.

According to the judgment of the Court, the appellant gave a false explanation about the cause of a cut on his hand allegedly suffered when he assisted the firemen summoned to the scene. It originated from some other doing of appellant that he hid from the police. There was nothing whatever to suggest that anyone gained entrance to the premises surreptitiously or interfered with the outside of the building. This fact, no doubt, gave rise to a strong inference that the fire started either accidentally or deliberately by someone having access to the premises. The trial Court rejected the version of the appellant as untrue, a fabrication intended to exculpate him from the consequences of his criminal conduct. The professed aim of

his visit to the pharmacy remained unfulfilled as the plug wherefrom current was fed to illuminate the window was found on the "on" position. His visit, the Court found, was not accidental but purposeful, designed to prepare the scene of fire and cause its eruption. The falsehood to which respondent had recourse to, established by independent evidence, intended to cast an innocuous complexion on his visit afforded, as the Court found, of itself evidence of guilt.

Survey of the scene of fire by a number of experts established to the satisfaction of the Court that the pharmacy had been sprayed with inflammable substance or substances before fire was set thereto, ruling out accident as the cause of fire. Examination of the ashes suggested the material that had been used for the purpose was inflammable material contained in pharmaceuticals stored in the premises. Their testimony accepted by the trial Court excluded the possibility of the fire starting either from a short circuit or the explosion of a gas cylinder. On the other hand, the presence of the appellant at the scene, the access he had to the premises, the over insurance of the premises, coupled with his straitened financial circumstances, furnished a motive for his action; whereas the falsehood to which he had recourse led likewise to an inference of guilt. Appellant's disbelief in the validity of his defence was evidenced by a significant fact to which the Court attached the importance necessarily due to such evidence. The Court accepted the evidence of a prosecution witness that during a Court break the appellant approached the witness and suggested to him to lie about the state of pharmaceuticals in the premises with a view to making credible the possibility of the fire having started accidentally. He suggested to him to tell the Court that there was leakage from certain pharmaceuticals that contained inflammable substances, which was wholly untrue, as the witness told the Court.

Threaded together the circumstantial evidence made a formidable case against the appellant that led inexorably to his guilt and so the Court adjudged him to be, sentencing him to five years' imprisonment.

Before us the verdict was challenged as unwarranted as a matter of causative effect of the evidence and illfounded because it rested on a number of misdirections, as well as evidence improperly admitted. Further the sentence was questioned as manifestly excessive.

First, we shall deal with the appeal against conviction. Counsel for the appellant argued at length the verdict was not solely consistent with the commission of the offences by the appellant being, in their contention, on appreciation of its effect in its entirety, not inconsistent with his innocence. Furthemore, the misdirections under which the Assize Court laboured in arriving at its verdict and evidence improperly received or accepted as credible, made the verdict unsafe and unsatisfactory. For the Republic it was submitted that the case for the prosecution was so overwhelming that this Court would be justified to apply the proviso to s. 145(1)(b) of the Criminal Procedure law (Cap. 155) irrespective of the merits of individual complaints(1). The guilt of the appelant was the only reasonable inference that could be drawn as a matter of logic and common sense. Not that this submission betrayed any acknowledgment of the validity of any of the submissions made on behalf of the appellant. They disputed the soundness of each and every ground relied upon in support of the appeal. Reference to the proviso was designed to lay stress on the strength of the case against the appellant, viewed from whatever angle, leaving no realistic alternative to the trial Court but to find him guilty.

The specific grounds of appeal raised before us are listed below in the order in which they will be dealth with:-

(a) Improper admission or failure of the Court to disregard a statement of the appellant (exhibit 71 before the Assize Court) made to the Police in the early hours of 18th June, 1984.

(b) Misreception of evidence about the results of experi-

(1) Koukounides v. Police (1967) 2 C.L.R. 167;
Liatsos v. Police (1968) 2 C.L.R. 15;
Pierides v. Republic (1971) 2 C.L.R. 263;
Vouniotis v. Republic (1975) 2 C.L.R. 34;
Khadar and Another v. Republic (1978) 2 C.L.R. 132;
Zissimides v. Republic (1978) 2 C.L.R. 382.

ments carried out by prosecution witness Costas Michael (P.W. 100). The complaint is that the evidence was inadmissible at the stage of re-examination when it was tendered, and for the additional reason that in certain respects it contradicted the testimony given earlier by the witness.

(c) Ill judged reliance on the testimony of a fire expert, namely, prosecution witness Georghios Karides (P.W. 98), the officer in charge of the Fire Security Department of the Fire Brigade Service. No Court properly directing itself to the effect of his evidence could attach any weight to it at all.

(d) Misappreciation of the effect of the evidence relevant to the financial position of the appellant. Misapprehension about the effect of this evidence led the Court to attribute to the appellant a motive to commit the offence that he did not have.

(e) Misdirection about the effect and consequences of the out of Court lies found to have told by the appellant respecting his presence and doings at the scene on the night of the fire.

(f) Misconception of the effect of the evidence credited by the Court as reliable. The case for the appellant is, as earlier noted, that it did not inevitably lead to an inference of guilt.

The Statement of the Appellant-Admissibility—Reliance on it:

The statement here questioned was an open statement made by the appellant at Ayios Dhometios Police Station some 2½ hours after the fire. The case for the appellant is that the statement ought to have been rejected by the trial Court notwithstanding absence of objection to its admissibility or in any event it ought to have been subsequently disregarded when the facts surrounding its taking became known in their entirety. Not only the Police failed to caution the appellant, whereas a caution was warranted by the facts known to the Police, but obtained the statement

in circumstances amounting to oppression. They failed to give appellant a chance to change his wet clothes and did not heed a request for the pills he was taking to be brought to him.

For the Republic it was supported that the appeal with regard to the admissibility and weight attached to the statement is wholly misconceived. At no stage was objection raised to its admissibility nor was its probative value doubted before the Assize Court. On the contrary, it was admitted without objection despite notice given of its contents to the defence long before the commencement of the trial; whereas the story advanced therein was relied upon as an integral part of the defence of the appellant.

It is true, as suggested, that a body of Cyprus caselaw acknowledges wide discretion to a trial Court to reject a statement if obtained in what the authorities term "suspicious circumstances"(1). The essence of these decisions is that a Court charged to decide the admissibility of a statement must take a broad view of the facts surrounding and accompanying its making and must not hesitate to reject the statement if its provenance is fraught with suspicion. They reflect our commitment to the protection of human rights and the sustenance of the rule of law.

But none of the above cases aims to alter the basic principle that voluntariness is the test of admissibility. This was affirmed in *Azinas and Another* v. *The Police*(2). The Judges Rules too, it was stressed, are not in themselves rules of law breach of which renders inadmissible a statement. They are aids, no doubt important ones, to determining whether a statement is voluntary. English Courts also acknowledge wide discretion to the trial Court to reject a statement if the circumstances of its taking are uncertain and such uncertainty casts doubts on the voluntariness of the statement—*R.* v. *Watson*(3).

Lord Samner's test of voluntariness in *Ibrahim* v. *R.*(4)

(1) See, inter alia, Kokkinos v. Police (1967) 2 C.L.R. 217;
Petri v. Police (1968) 2 C.L.R. 40;
Ioannides v. Republic (1968) 2 C.L.R. 169.
(2) (1981) 2 C.L.R. 9.
(3) [1980] 2 All E.R. 293 (C.A.).
(4) [1914] A.C. 599.

is regarded as containing an authoritative statement of the law. As the Court of Appeal pointed out in *R.* v. *Rennie* (1) the rest of Lord Sumner requires the Court in each case to decide whether a statement is voluntary as the word is understood in ordinary parlance, namely, whether it was made "of one's own free will". The House of Lords re-affirmed the validity of the test of Lord Sumner in *D.P.P.* v. *Ping Lin*(2) reminding the principal task of the Court is to determine whether the statement is voluntary and not to adjudicate as such on the propriety of the acts of those responsible for taking or recording it. As Lord Hailsham, L. C., put it, voluntariness is basically a question of fact. Beside the fact that no objection was taken to the admissibility of the first statement of the appellant, no suggestion was made at any stage of the proceedings that the statement was not voluntary. On the contrary, the whole conduct of the defence indicated adoption of the statement as a true account of the purpose and movements of appellant that night.

Examination of the printed record of the proceedings clearly indicates that the first statement (exhibit 71) that was repeated in its most essential aspects in the cautionary statement subsequently made (exhibit 113), provided the spring-board for the defence with the Court invited at the close of the case for the prosecution, as well as at the end of the case, to accept the version of events stated therein as true and accurate. At no stage of the proceedings was the statement retracted as involuntary not even in the unsworn statement of the appellant. For the Court to have rejected the statement as the defence unfolded before the Court would have been arbitrary; had they done so the appellant would have had a legitimate grievance for the uncalled for exclusion of material evidence for the defence.

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(1) [1982] 1 All E R 385

(2) [1975] 3 All E.R 175.

The decision of the Privy Council in *Adjodha* v. *State*(1) suggests that the Court must not advert to the admissibility of a statement unless the question is raised by the defence; especially in a case, and the present is of that kind, where the defence has foreknowledge of the content of the statement and the accused is represented before trial Court. Certainly it would be injudicious on the part of the Court, in the circumstances of this case, to have contemplated the rejection of the statement as inadmissible.

The case for the appellant with regard to the admissibility of the statement (exhibit 71), collapses altogether upon reflection on the fact that the statement is not a confession at all. And reminder that the rules relevant to the voluntariness of statements as a prerequisite for their admissibility are confined to statements amounting to confessions of guilt for the crime for which the accused is charged. *Stephen* defined a confession as "an admission made by a person charged with a crime stating or suggesting the inference that he committed that crime"(1). The statement in this case was the opposite of a confession; it gave an account of the movements of the appellant purporting to negative complicity in the crime. As such it was not subject to the special rules governing the admissibility of confessions.

Even if we were to suppose that the statement should, because of its ultimate incriminatory effect, be treated for the purposes of admissibility as a confession and further suppose that a caution ought to have been administered because of the knowledge the Police had of the case and possible involvement of the appellant, failure to caution the appellant was not of itself fatal to the admissibility of the statement. This was made abundantly clear in *Azinas and Another* v. *Police* (supra). The criterion of admissibility is voluntariness and in the absence of objection to its admission in evidence, the Court had no reason to direct an issue for the determination of the admissibility of the statement. Further examination of the circumstances surrounding the taking of this statement in no way cast doubt

(1) [1981] 2 All E.R. 153.
(2) See Phipson on Evidence, 13th Ed., para. 22-01.

on its voluntariness, more so in view of the espousal of the statement by the appellant as one made "of his own free will". Therefore, this ground of appeal fails.

Evidence of the Results of Experiments given in the course of Re-Examination of prosecution witness Costas Michael (P. W. 100):

Evidence of the results of experiments is admissible in evidence to corroborate, illustrate or rebut an opinion relevant to the issues in the case(1). The testimony of the aforesaid witness disclosing the results of experiments carried out with regard to possible causes of fire, their implications and effects, is not disputed as irrelevant but challenged solely as inadmissible at the stage it was given, that is, in re-examination. Also it is contested as improperly received because intended to contradict other evidence earlier given by the witness.

Six experiments were carried out by the witness after the completion of cross-examination designed to elicit the feasibility and practical implications of a number of suggestions made with a view to exploring the possibility of the fire having started accidentally; from a short-circuit, leakage from pharmaceuticals or the explosion of a gas cylinder.

In the suggestion of counsel for the appellant evidence of the results of experiments was improperly received as it did not arise from the cross-examination of the witness. Counsel for the Republic drew our attention to questions asked in cross-examination that justified the conduct of experiments thereafter to elicit the implications of the theoretical questions raised that warranted in consequence their reception in cross-examinantion. Independently of specific questions, the tenor of the cross-examination was such as to render the evidence admissible in re-examination, a necessary illumination of the practical implications of various suggestions made to explore the possibility of the fire having started accidentally.

Re-examination of witnesses must, as a rule, be con-

(1) Phipson on Evidence, 13th Ed., para. 27-15—R. v. Heseltine, 12 Cox 404.

fined to testimony explanatory or supplementary of evidence given in cross-examination for the sake of completing or clarifying the picture of a given matter, in the interest of ascertainment of the truth. Also it affords forensically an opportunity to the party calling a witness to seek redress of his credit shaken in cross-examination by giving him the chance to complete his story on different aspects of his testimony. In *Criminal Procedure in Cyprus*, p. 110(1), the ambit of re-examination is set in these terms: "In essence, the right to re-examine is meant to afford the witness an opportunity to give a full account of his story and to the party calling him an opportunity thereby to restore his credit to whatever degree it may have been shaken in cross-examination."

Moreover, discretion is acknowledged to the Court to admit in re-examination new facts necessary for the elucidation of the testimony of a witness provided proper opportunity is afforded to the defence to cross-examine on the new facts(2). The trial, it must be stressed, is not merely a forensic battle; it is a contest of truth just as much.

In this case not only the evidence of the results of the experiments was made relevant by the questions raised and generally the tenor of cross-examination, but every opportunity too was afforded to the defence to cross-examine the witness on the new evidence given. Nor is there substance in the suggestion that the witness contradicted other parts of his evidence. The witness gave evidence from the perspective of an expert and was perfectly justified to carry out specific experiments as the safest guide to exploration of the suggestions made by the defence as to possible causes of the fire. This ground fails too.

The Credibility of prosecution witness Georghios Karides (P.W. 98).

A great onus lay on an appellant to persuade an Appellate Bench to interfere with findings of credibility of witnesses. The burden lying on the appellant in relation to

(1) By Loizou and Pikis
(2) Phipson on Evidence, 13th Ed., para 33-99

this part of the appeal, namely, to interfere with the findings of the Court respecting the credibility of Georghios Karides, a fire expert, is as heavy as it could be. For, as often stressed, the trial Court is, under our legal system, the natural forum for the sifting of evidence and assessment of its effect; being in a unique position to evaluate the evidence in its proper perspective(1). The submission is that no reasonable Court would treat as creditworthy the evidence of witness Karides in view of the contradictory testimony of the witness and inconsistency with other testimony accepted by the Court. Rare indeed are the cases when a Court of Appeal would be ready to interfere on this score. To do so, the Court must be persuaded that the finding defies reason and common sense. Unless this is the effect of the testimony of a witness, there is hardly any basis for interference by this Court; this test is objective.

Counsel for the appellant drew our attention to passages in the evidence of Georghios Karides respecting the location of the seats of fire that allegedly revealed serious inconsistencies in his evidence, while he suggested that the opinion of the witness that the fire could not have been caused accidentally is fraught with bias. Comparison of his testimony with the evidence of P. W. 95, it was contended, drives to that conclusion. His evidence became more unsatisfactory still in view of obvious lack of elementary knowledge of electrology. The witness, counsel stated, was all too ready to offer opinions he was unable to support because of lack of adequate expertise or absence of factual substratum. Counsel for the Republic submitted alongside with reference to the evidence of the witness that his testimony was neither self-contradictory nor coloured with bias. Having carefully examined the printed record of the evidence of the witness, we cannot sustain the submissions for the appellant. Necessarily, an expert pondering alternative possibilities of how a fire started, must contemplate a variety of hypothetical circumstances, a process apt to convey an impression of lack of consistency. Nonetheless, the evidence of prosecution witness Karides examined in its correct perspective is neither contradictory nor at va-

(1) Papadopoulos v. Stavrou (1982) 1 C.L.R. 321—the analysis made in this appeal applies equally to criminal cases as well.

riance with the testimony of other witnesses; on the whole it fits into the pattern of the expert testimony given to explore and explain the circumstances of fire. At the least it was open to the trial Court to accept his evidence.

Therefore, this ground of appeal cannot be sustained either.

Findings on the Financial Position of the Appellant—Motive:

The case for the appellant is that the finding of the Court that the financial position of the appellant was as bad as it found it to be, was erroneous as well as the inference drawn, in conjunction with the expectation of collection of the insurance money, that he had a motive to commit the offence. The finding respecting his financial position was challenged on appeal, notwithstanding a mass of evidence that appellant was heavily indebted and perpetually faced difficulties in meeting his financial obligations, even small sums for his day-to-day expenses, such as, paying for petrol for his car. The case on appeal was solely founded on the implications of interim accounts prepared for the first months of 1984 on information furnished by the appellant, showing profit. Whatever may have been the trading position of the company in the first months of 1984, it in no way improved the ability of the appellant to meet his financial obligations, nor did it help him reduce his considerable debts. On the contrary, the unavoidable inference on any view of the evidence is the one drawn by the Assize Court to the effect that his financial position was steadily deteriorating reaching a point of hopelessness by 18th June, 1984. His debts and those of the Company totalled no less than £27,000; he was systematically defaulting in the discharge of his obligations, while the bouncing of his cheques was a routine matter. Civil actions against him reflected the exasperation of his creditors and loss of confidence in his ability to repay them. His financial position could appropriately be described as desperate having no real hope of raising additional loans to meet his obligations. Personal and family properties at Nicosia and Pomos were mortgaged, leaving no margin to raise more loans.

Equally valid is the finding of the trial Court to the over-insurance of the goods, furniture and fittings in the pharmacy of the appellant. The sum of the insurance policy represented twice their value.

Juxtaposition of the two findings, that is, straitened financial position and over-insurance of the content of the pharmacy led the Court to discern the existence of motive on the part of the appellant to commit the offence. Motive, though not an ingredient of the offence, is nonetheless admissible as circumstantial evidence relevant to the intention of the appellant. Its cogency depends on the influence it is apt to exert as motivating force for the actions of the accused. Though motive cannot of itself support a charge, its relevance cannot be doubted; it is primarily evidence of corroborative value(1). The following passage(2) from the judgment of A. Loizou, J., in *Anastassiades* v. *The Republic*(3) accurately depicts the relevance and value of motive evidence. It reads:

> "In addition to all other circumstances, there was evidence of motive which, as such is immaterial so far as regards criminal responsibilty in cases like the present one, as expressly provided by section 9 of our Criminal Code, Cap. 154, yet, facts which supply a motive for a particular act 'are among the items of circumstantial evidence which are most often admitted'. (See *Cross* (supra) p. 34): 'It is always a satisfactory circumstance of corroboration when in connection with convincing facts of conduct an apparent motive can be assigned' *Wills* on Circumstantial Evidence, 7th Ed. p. 64) though it is not necessary for the prosecution to adduce any evidence as to why an offence, and in particular a murder, was committed."

Motive evidence may sap protestations of innocence of credence as well as explain conduct that would otherwise appear to be inexplicable. One does not ordinarily set his property on fire but the existence of motive and the expectation of profit being reaped therefrom cast a different

(1) Vrakas and Another v The Republic (1973) 2 C.L.R. 139.
(2) Cited in the judgment of the Assize Court.
(3) (1977) 2 C.L.R. 97.

light on the logic of a situation. The finding of the Assize Court that appellant had a motive to commit the offence because of the hopelessness of his financial position and the expectation of benefit from the collection of the insurance money, was not only open to it but virtually unavoidable in the light of the evidence before the Court.

Lies by the Appellant—Their Significance and Implications:

The Assize Court attached considerable importance on the lies told by the appellant in his statement respecting his presence at the scene, the injury on his hand and the duration of his stay thereat. Such evidence led, according to the direction of the Court, fairly to an inference of guilt. In so ruling they derived support from the decision of the Privy Council in *Mawary Khan* v. *Reginam*(1), where the following statement was approved as an accurate legal proposition: "The recourse to falsehood leads fairly to an inference of guilt". To the same effect is the decision of the Supreme Court in *Philotas* v. *The Republic*(2). Deliberate lies in relation to material aspects of the case lead, according to the judgment of the Supreme Court, "... to one and only inference, that he is guilty of the offence charged" (3). The specific implications of lies told about the presence of the accused at the scene were debated in the earlier English case *Regina* v. *Knight*(4). They constitute cogent evidence capable of offering corroboration.

Counsel for the appellant suggested the above cases do not embody a principle of general application submitting that the comments made therein were solely related to the facts of the particular cases. An authoritative statement on the implications of lies appears, they argued, in the decision of English Court of Appeal in *R.* v. *Lucas*(5). Having carefully read the decision in *Lucas* we fail to see in what way it qualifies the proposition espoused in *Khan* (supra). On the contrary it reinforces the validity of the proposi-

(1) [1967] 1 All E.R. 80.
(2) (1967) 2 C.L.R. 13.
(3) Page 19.
(4) [1966]) 1 W.L.R. 230.
(5) [1981] 2 All E.R. 1008.

tion that recourse to falsehood in material respects may lead to an inference of guilt. It is a rule dictated by reason and common sense deriving from human experience as to the motivating force behind lies. It is common place that people ordinarily lie in order to hide an unpalatable truth from their interlocutors, or those charged with a duty to investigate the true facts of a case. And when accused or suspected of committing a crime they lie to avoid the consequences of their acts.

In *Lucas* (supra) the Court of Appeal was concerned to define the force and implications of lies as corroborative evidence. Out of Court lies can, in a proper case, provide corroboration, as well as lies told in Court proven by independent evidence. The decision in *R.* v. *Chapman*(1) suggesting that lies told in Court cannot furnish a basis for corroboration was distinguished and explained by reference to its particular facts.

The incriminating inference that may be drawn from recourse to falsehood, it was observed in *Lucas* (supra), depend on (a) whether the lies were deliberately told, (b) the subject-matter of the lies, particularly the facts intended to be hidden or obscured thereby, and (c) the motive behind the lies.

Applying this test to the lies to which appellant had recourse, as proved by independent evidence before the Assize Court, the following picture emerges: Appellant lied about the reason of his presence at the scene. He stated that his object was to turn off the electric sign illuminating the window, whereas that was proven not to have been the purpose of his visit. A fair inference is that he wanted to disguise the true purpose of his visit.

Secondly, he lied about the duration of his stay, a lie intended to belittle the opportunity he had to prepare the scene of fire and cause its occurrence.

Thirdly, he lied about the cause of the injury on his hand, falsely attributing it to a legitimate cause, namely, assistance rendered to firemen to open the door of the

(1) [1973] 2 All E.R. 624.

pharmacy, whereas it had another origin he chose to hide from the Police. This lie too conforms to the pattern of conduct of the appellant after the fire to cast an innocent complexion on his presence and doings at the scene of crime.

Neither the direction of the Court nor the inferences derived from its application to the facts of the case can be faulted on any account. On the contrary, the direction was correct and the inferences drawn therefrom perfectly warranted.

This ground of appeal cannot, therefore, succeed either.

Circumstantial Evidence—Its Effect:

The last ground of appeal is a general one turning on the assessment by the trial Court of the circumstantial evidence in the case. There is no doubt that the conviction is founded on circumstantial evidence. No one saw the appellant set fire to the goods and furniture in his pharmacy. It was inferred from circumstantial evidence. Nor was there direct evidence as to who set the stage for the commission of the offence by spraying goods, furniture and fittings with inflammable substances. An inescapable inference from the combination of the two, that is, the spraying of the pharmacy with inflammables and the subsequent ignition of fire therein, is that the fire was started deliberately. Equally certain, we can also be from the analysis of the ashes, that inflammables stored in the pharmacy were used for the purpose of preparing the scene of arson. The spraying of articles and furniture and fittings in the pharmacy with inflammables, is wholly inconsistent with the fire having started accidentally. This possibility was convincingly ruled out by the expert testimony of a number of witnesses who explored every possibility of the fire having started accidentally and rejected any such possibility as remote in the extreme.

The next vital question is whether the circumstantial evidence in the case is solely consistent with appellant being the arsonist. It is the case for the appellant that it is not, and that the evidence does not rule out his innocence. It has been suggested it is just as consistent with it. No

complaint was made that the direction in law was defective. As we can indeed confirm the trial Court made a correct analysis of the significance and value of circumstantial evidence.

Guided by Cyprus and English precedent(1), they noted that circumstantial evidence, like other species of evidence, must be judged on its merits. There is, indeed, no judicial predisposition against circumstantial evidence. The feature that distinguishes it from direct evidence is that though individual parts of it are not in themselves conclusive of the guilt of the accused, this may be the cumulative effect of pieces of circumstantial evidence strung together; provided always its causative effect is incompatible with any basis other than that of guilt of the accused.

Where cogent, it must be stressed, circumstantial evidence may provide a basis for the conviction of the accused that eliminates the possibility of a conviction founded on human error.

In agreement with the Assize Court, we hold the circumstantial evidence in this case leads inexorably to the guilt of the appellant. The evidence before the Assize Court conclusively established that the fire did not start accidentally, nor were its destructive effects left to chance. The testimony of experts before the trial Court established convincingly that goods, furniture and fittings in the premises were sprayed with inflammables, evidence revelatory of the twofold intention of the culprit: That is, (a) to prepare the scene of arson and (b) ensure that the fire would have widespread destructive effects. The fire that followed was an expression of that intent. The occurrence of the fire and its destructive effects was the deliberate act of someone intending to start a fire and cause widespread damage. The disbelief of the appellant in the defence of the fire having started accidentally, is evidenced by the invitation to his former employee, a pharmacist, to fabricate evidence that might lend some credence to the defence of accident; while the testimony of expert witnesses made it

(1) Polycarpou and Another v Republic (1967) 2 C L R 198,
Wills on Circumstancial Evidence, p 19
Best on Evidence, 12th Ed., p 267

remote in the extreme that the fire might have started accidentally.

Therefore, the Court was perfectly entitled, in fact bound to draw the inference that the fire started as a result of the deliberate action of someone intending thereby to destroy the goods, furniture and fittings therein. Who that someone was, was the next question the Assize Court had to resolve. They decided it was the appellant. Was it an unavoidable inference? This is what we have to decide.

An inescapable inference from the evidence before the Court was that the culprit was someone with access to the premises. The absence of any sign of surreptitious entry into the premises, or any sign whatever of forceful entry into the building makes this an inevitable inference. Appellant had unlimited access to the premises; but he was not the only person who had access therein. His employee, and presumably his wife, also had access to the premises. What singles out the appellant is—

(a) the opportunity he had to commit the offence evidenced by his presence at the scene at the time of the break out of the fire, and

(b) the motive he had. earlier explained, to cause the destruction occasioned by the fire.

Further the conduct of the appellant at the scene and subsequent lies, leave no doubt whatever about his guilt. The Court correctly found on the evidence before it that appellant had not gone to the premises to switch off the light illuminating the window of his pharmacy, but for some other reason that he strove hard to hide. The untruth about the purpose of his visit acquires a more sinister connotation still in light of the alleged failure of the appellant to notice anything unusual in the premises. Had he not been the culprit he would not have failed to sense the strong smell exuded by the inflammable substances with which articles, furniture and fittings were sprayed. Perhaps more significant still were the lies about the duration of his stay. As the Court found, he had stayed at the scene long enough to prepare the ground for the commission of the crime of arson that was in his contemplation. In the light of this

evidence, a safe inference could be drawn as to the use he made of the opportunity to commit the crime; his lies amounted to no more than an attempt to extricate himself from the incriminating inference likely to be drawn therefrom. What significance may be attached to lies is, as earlier explained, a matter of fact. In this case his lies pointed, as the Assize Court rightly noted, to his guilt; or more accurately to the betrayal of guilty knowledge that he desperately tried to hide or blur by his lies. The net of circumstantial evidence wholly enveloped the appellant, leaving no loop holes for escape. With the collapse of this ground of appeal, the appeal against conviction fails in its entirety. What remains to ponder is the sentence, manifestly excessive in the contention of the appellant.

SENTENCE:

Wilfully and unlawfully setting fire to building(1) and its content(2), are grave crimes punishable with life and 14 years' imprisonment, respectively. The crime of arson has always been viewed with abhorence because of its destructive effects and, more significant still, because of inability to foresee its destructive consequences. It is next to impossible to predict with precision the consequences of fire once it breaks out. The culprit necessarily takes a calculated risk with the safety of neighbours living nearby and the fate of their property. As indeed did the appellant in this case take a calculated risk, in setting fire to its contents and the building, with the safety of the occupants of the apartment on top of the pharmacy, a couple with two children, and other property in the vicinity. No one can be certain that fire once it breaks out will be confined and its destructive effect limited to those contemplated by the person starting it.

The punishment provided by law, referred to above, reflects today, as in days passed, strong social condemnation of conduct amounting to arson, as well as the high culpability of a person committing the offence.

The Assize Court addressed itself correctly to the seriousness of the offence compounded by the planning involved

(1) Section 315—Cap. 154.
(2) Section 319—Cap. 154.

and the indifference of appellant to the safety of the occupants of the premises on top of the pharmacy in particular. They castigated his conduct as coldblooded pursued regardless of consequences, embarked upon with a view to profiting thereby; a sinister combination of circumstances indeed, as we are bound to observe.

The sentence is not challenged as wrong in principle, but as excessive in view of the personal circumstances of the appellant and clean record. We were referred to *Yiannakis Papas* v. *Republic*(1), as indicative of the impact that personal circumstances may have upon sentence in a case of arson. In that case, a sentence of four years was reduced to eighteen months' imprisonment, coupled with an order of compensation of £640.- (six hundred and forty pounds), or twelve months' imprisonment in case of default, mostly on account of the personal circumstances of the appellant and the fact that he lost his job with the Cyprus Telecommunications Authority as a result of his conviction. As may be gathered from the tenor of the decision the Supreme Court did not aim to establish, by any means, a norm for the punishment of the crime of arson, taking care to confine their decision to the particular facts of the case. And, there are many features distinguishing the present case from that of *Papas* (supra). The damage was far more extensive, while the motive for which the offence was committed and the planning involved, made the conduct of the appellant utterly reprehensible.

In *Philippou* v. *Republic*(2) we depicted, by reference to Cyprus caselaw, the principles upon which the Court may interfere on appeal with sentence. We need not repeat them except state that there is no element of misdirection whatever in the judgment of the Assize Court as to either the gravity of the offence, the seriousness of the facts surrounding its commission, or the appreciation of other factors relevant to sentence. On the basis of the material placed before the Court the sentence of five years' imprisonment was perfectly warranted.

(1) (1970) 2 C.L.R. 89.
(2) (1983) 2 C.L.R. 245.

However, material was placed before us bearing on the state of health of the appellant that indicates that the state of his health is far poorer than what the Assize Court was given to understand by the facts put before it. The proneness of appellant to epilepsy, coupled with the true state of his mental and emotional condition, reveal his state of health to be far gloomier than that presented before the trial Court. We are certain that had the true facts been placed before the trial Court bearing on his state of health, the Assize Court would have made some further allowance on that account and imposed a lesser sentence than five years' imprisonment; in order that the sentence would fit the true circumstances pertaining to the person of the accused.

We are faced with an agonizing dilemma for we have to weigh the implications of allowing the sentence to stand in the absence of any error in the judgment rendering it liable to reduction, on the one hand and, the duty of the Court to see that justice is done in the particular case, on the other. We have, in the end, decided to follow the latter course only because we feel certain by the process of its reasoning that the Assize Court would have imposed a somewhat lesser sentence had it been acquainted with the true facts of the case, taking the view that appellant ought not to be penalised in the particular circumstances of this case for not placing before the Court all facts relevant to his state of health.

The sentence will, therefore, be reduced to concurrent terms of imprisonment of four years and to that extent the appeal is allowed.

In the result the appeal against conviction is dismissed. The appeal against sentence is to the extent indicated above allowed.

Appeal against conviction dismissed. Appeal against sentence allowed. Sentence reduced to four years.