[WILSON, P. ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

MAHMUT HAFIZ HOUSSEIN FETHI,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2442).

Criminal Law—Constitutional Law—Murder—Premeditated and unpremeditated murder—The Criminal Code, Cap. 154, sections 204, 205 and 207 (as they stood prior to the Criminal Code (Amendment) Law, No.3 of 1962)—Article 7, paragraph 2, of the Constitution—Section 205 provides a mandatory sentence of death for all cases of murder—Article 7, paragraph 2 of the Constitution excludes the death penalty in cases of murder other than cases of premeditated murder—Consequently there is no statutory provision regarding punishment of unpremeditated murder where the conviction rests on section 204—Powers of the Courts under paragraphs 1, 4 and 5 of article 188 of the Constitution to construe and apply the laws in force on the date of the coming into force of the Constitution with such amendments or modifications as may be necessary to bring them into accord with the Constitution—Therefore, pending a new legislation (such new legislation has now been enacted by the Criminal Code (Amendment) Law, No. 3 of 1962, there is power to impose a sentence of life imprisonment in respect of the crime of unpremeditated murder even in cases where the conviction rests on section 204 of the Criminal Code—Ratibe's case (infra) not followed.

The material sections of the Criminal Code, Cap. 154 are sections 204, 205 and 207 as they stood prior to the new amending legislation by Law No. 3 of 1962 (*supra*).

Section 204 provides: "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder". By section 205 "any person convicted of murder shall be sentenced to death".

Section 207 defines "malice aforethought" substantially on the same lines as in English Law. There is no doubt that the term "malice aforethought" covers many instances of "unpremeditated murder" within the meaning of article 7, paragraph 2, of the Constitution, which reads as follows: "No

person shall be deprived of his life except in the execution of a sentence of a competent court following his conviction of an offence for which this penalty is provided by law A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law"

The appellant was charged before the Assize Court under sections 204, 205 and 207 of the Criminal Code, Cap 154 with *the premeditated murder on June 30, 1961 of the deceased* He was found not guilty of premeditated murder and a second count charging him with the unpremeditated murder of the deceased, based on the same sections, was added after a direction by the Assize Court The appellant was then convicted on that count and sentenced to life imprisonment

The accused appealed against the legality and excessiveness of the sentence on the ground that his case stood on the same footing as that of *Ratibe Muti Abdulhamid v The Republic* 1961 C L R. 400

Held (1) The appeal as to the excessiveness of the sentence is unanimously dismissed

(2) The appeal, as to the legality of the sentence, is also dismissed, *ZEKIA and JOSEPHIDES, JJ*, following the reasoning of their previous separate judgments in the case of *Ratibe* (*infra*), *VASSILIADES, J*, distinguishing that case from the present one, *WILSON, P* simply agreeing with the result

Per JOSEPHIDES

For the guidance of Judges expressed his view that it is the duty of every Court in the Republic, exercising criminal or civil jurisdiction, in applying the provisions of any law in force on the date of the coming into operation of the Constitution to amend it, adapt it, or repeal it in such a way as to bring it into conformity with the provisions of the Constitution ; because there is no doubt whatsoever that the Courts are expressly given quasi-legislative powers during a transitional period in respect of the laws in force on the 16/8/60 The provisions of article 188 paragraph 4, are clear and unambiguous and there is no room for any doubt or ambiguity whatsoever. But this power cannot be exercised in respect of any law enacted since the establishment of the Republic ; any question of unconstitutionality of such law has to be reserved

by the Court before which such question is raised for the decision of the Supreme Constitutional Court under the provisions of Article 144 of the Constitution.

Appeal dismissed.

Cases referred to :

Ratibe Muti Abdulhamid v. The Republic, 1961 C.L.R. 400 ; not followed (*VASSILIADES, J., distinguishing*)

Loftis v. The Republic 1961 C.L.R. 108 ;

Pelides and The Republic, 3 R.S.C.C. 13 ;

The Republic and Nicolas Pantoplou Loftis, 1 R.S.C.C. 30.

Appeal against sentence

The appellant was convicted on the 11/11/61 at the Assize Court of Larnaca (Cr. Case No. 2216/61) on one count of the offence of murder contrary to ss. 204, 205 of the Criminal Code, Cap. 154 and art. 7 para. 2 of the Constitution and was sentenced by Dervish P.D.C., Izzet and Zihni D.J.J. to life imprisonment.

Appellant in person.

A. Frangos for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment delivered by VASSILIADES, J. :

ZEKIA, J. : There are two points in this appeal : that is, the legality of the sentence and the excessiveness of the sentence.

As to the legality of the sentence I would express the same opinion as I expressed in an earlier case *i.e. Ratibe's Case* (*Ratibe M. Abdulhamid* v. *The Republic*, reported in 1961 C.L.R. p. 400) and I have nothing to add to the present one, which it applies to the present case as well.

As to the excessiveness of the sentence, what I wish to say is that he is very lucky that he received a sentence of imprisonment.

In the circumstances, I am of the opinion that the appeal should be dismissed.

VASSILIADES, J. : I agree that this appeal must be dismissed. The ground upon which it is made, fails.

The appellant conducting his own case in person, before this Court, seeks to attack the sentence of life imprisonment imposed upon him by the Assize Court, as illegal, on the ground that his case stands on the same footing as that of *Ratibe Muti Abdulhamid* in Criminal Appeal 2420, decided in December last.

This case, however, is quite different from that of Ratibe Abdulhamid's, and is distinguishable both on the facts, and on the legal aspect.

The appellant, in this case, acting under the influence of a strong motive of revenge, ran down the victim with his car, and killed him. He pleaded accident ; but the Assize Court, rejecting his version of the facts as "completely false" (page 64 E, of the typed record) found that—

> "the knocking down of the deceased by the accused was not accidental but that it was intentional and that it amounts to murder". (p.67 E.)

Ratibe Abdulhamid's case, on the other hand, was the case of a young wife of 20, the third wife in the hands of a husband of 36, whose experiences in life included some 30 previous convictions for crimes of violence and who, having procured himself with a knife and an axe, in the couple's bedroom, was threatening to kill his wife. When she hit him with the blunt part of the axe, he tried to seize it from her saying that she was quicker than he had been, whereupon she managed to deliver a second blow with the cutting edge of the axe, and killed him.

The difference between the two cases, on the facts, is so large and obvious that it needs no further comment.

Going now to the legal aspect of the two cases, one is faced with the position that in both of them the Assize Court, acting under the influence of the decision of the Supreme Constitutional Court in *Loftis'* case, (1 R.S.C.C. p.30) misapplied the criminal law as it stood at that time, in a similar manner ; but the course followed in the two cases was quite different.

In Ratibe Abdulhamid's case, the accused was charged in the Assizes with "premeditated murder contrary to sections 204 and 205 of the Criminal Code, Cap. 154, and art. 7 of the Constitution". She pleaded not guilty to that charge ; and the trial commenced on that plea.

After the opening, however, and after hearing a statement made by counsel for the defence, the Court, addressing the prosecution, said :

> "We want to know, Mr. Munir, whether the statement of the accused, and the evidence of her brother, are the only two statements tending to prove what actually happened or the circumstances under which this offence was committed?" (page 4 C. of the record).

Prosecuting counsel replied that in fact that was so. After hearing a further statement by counsel for the defence, to the effect that :—

> ".....this woman was not under a misapprehension, she was not merely conscious of a danger, but was in real danger (page 5 B.)

the Court, addressing again counsel conducting the prosecution said this :—

> "In view of what you stated what the evidence for the Republic would be, and in view of the submissions made by Mr. Denktash, don't you feel that it would be more proper if a second charge be added against the accused of having committed this offence without premeditation? (page 5 E.)

Counsel for the prosecution agreeing that that would be "the proper course", the Court again remarked :—

> "You intend adding a second count Mr. Munir, of causing the death of one Djemil Mehmet Ali, by an unlawful act without premeditation". (Page 6 A).

Thereupon a second count was added by leave of the Court ; the President of which addressing the accused now said :—

> "Tell the accused that the Republic has added a second count against her and that she will now be charged and asked to plead".

And the record at this point reads :—

"Accused charged pleads guilty to count 2".

"*Court :* Do you offer any evidecne on Count 1?"

"*Mr. Munir :* No."

"*Court :* Count 1 dismissed".

The added count 2, was : "Murder contrary to sec. 204 and 205 of the Criminal Code Cap. 154". And it referred, of course, to the same crime.

The Assize Court convicting the accused on this second count, passed a sentence of ten years imprisonment. Against the legality of this sentence, the accused, Ratibe Abdulhamid appealed.

The Court, by majority, allowed the appeal ; and setting aside the sentence, discharged the appellant.

President O'Briain, in a well considered judgment, if I may say so with respect, took the view that on a conviction for murder under sect. 204 of the criminal code, as it then stood, the Assize Court could not pass a sentence of imprisonment under sect. 205 ; or otherwise. The learned President stated the reasons for which he accepted Fuad Bey's submission for the appellant, that there was a lacuna in the law, and that the observations of the Supreme Constitutional Court in Loftis case (*supra*) regarding this part of the criminal code which had apparently caused the Assize Court to take the course they did, were "mere obiter dicta, not bnding on any Court".

> "In my opinion, the President said at p.3 of his judgment, the observations referred to should be treated as obiter dicta made with the intention of helping in the elucidation of difficulties arising, but not intended to have, and certainly not having, any binding effect upon other courts".

And at p. 5 the learned President referred to the necessity of amending legislation to fill up the admittedly existing lacuna in the criminal code, created by the effect of art. 7 of the Constitution on the provisions of section 205. In the meantime, the President reached the conclusion, that the appeal should be allowed and the appellant be discharged forthwith.

With that result I agreed : not only for the reasons stated in the President's judgment, but mainly because I took the

view that the appellant could not possibly be acquitted of a murder-charge, based on sections 204 and 205 of the Criminal Code, to which she had pleaded not guilty, and in the same proceeding, the same person, be convicted of the same murder upon a count based on the same sections of the Criminal Code, after a plea of guilty made in the circumstances stated earier, in this judgment.

I gave the reasons in my judgment in *Ratibe Abdulhamid's* case, why I thought that such an extraordinary course could have never been adopted in Cyprus, prior to the decision of the Supreme Constitutional Court in *Loftis'* case (*supra*). And I stated why, in my opinion, that decision "was no part of the law of this Republic which its criminal courts have to apply : "and could not, therefore, affect the position arising in that appeal (p.16). In the circumstances, I made it clear, that I was not prepared to support any sentence based on such a conviction. (p. 13). As a result, the sentence was set aside by a majority judgment of this Court, and the appellant was discharged.

The minority view was stated in the judgments of my brothers Mr. Justice Zekia and Mr. Justice Josephides. They both took the view that by "adaptation" of the relative provisions of the Criminal Code, under the powers given to the Courts by art. 188 of the Constitution, the conviction and sentence in Ratibe Abdulhamid's case could be supported.

> "I am content to dispose of this appeal, Zekia J. said at p. 7, by saying that by an adaptation of sect. 205 of the Criminal Code to the provisions of the Constitution, the apparent defect in the law is remedied. By such adaptation it is permissible to read sect. 205 of the Criminal Code, modified as follows :—
>
> > " Any person convicted of premeditated murder shall be sentenced to death, and any person convicted of unpremeditated murder shall be sentenced to life imprisonment".

It may be noted here, that the learned Justice made no reference or comments on the decision of the Constitutional Court in *Loftis'* case.

In the next page of his judgment (p.8) after quoting the relevant sections of the criminal code, Zekia J. had this to say : —

"From the definition of murder and manslaughter given above, it is clear that murder is an aggravated form of manslaughter, the former having an additional element, namely, the malice aforethought. It is always open to the trial court to convict and punish a person who may be found guilty of unpremeditated murder, of the lesser offence of manslaughter and sentence him up to life imprisonment".

And here, one may pause to observe that, but for the decision in *Loftis*' case (*supra*) this is what the Assize Court, following the usual and well established practice of the criminal courts for years, would have done in *Ratibe Abdulhamid's* case.

Concluding his judgment at p.10, Zekia J. made this observation :—

"I need hardly say that it is most undesirable to delay legislation obviating the situation thus arisen".

Mr. Justice Josephides in his judgment, after stating the submissions made in connection with the decision of the Supreme Constitutional Court in Loftis case (*supra*) observed: (at p. 18) —

"It will be appreciated that a number of very important questions are raised in this appeal, but, having regard to the view I take of how the law is to be applied in the present case, I do not consider it necessary to deal with every point raised by learned counsel".

In connection with the decision of the Supreme Constitutional Court in *Loftis*' case, the learned Justice said :— (at p. 18).

"It is only in cases of ambiguity in any article of the Constitution that the Supreme Constitutional Court has exclusive jurisdiction to make any interpretation of the Constitution and not of any other statute. (See articles 149 and 180 of the Constitution). Furthermore, the question of the unconstitutionality (and *not* the interpretation) of any law or decision ..... must be reserved for the decision of the Supreme Constitutional Court ; and that Court shall determine the "question so reserved". Such decision is binding on the Court by which the question has been reserved, and

on the parties to the proceedings only ; and is *not* binding on any other court (see articles 144 and 148)".

Mr. Justice Josephides took the view, which, with respect, I fully share, that it is "the duty of every court in the Republic in applying the provisions of any law in force on the date of the coming into operation of the Constitution to amend it, adapt it, or repeal it in such a way as to bring it into conformity with the Constitution".

Upon that view, the learned Justice was of opinion that it was the duty of this Court to adapt sect. 205 of the Criminal Code in such a way as to provide for a punishment for unpremeditated murder other than the death penalty. And by making such adaptation, he considered that the sentence imposed by the Assize Court could be sustained, although the Assize Court did not impose the sentence by making any such adaptation.

But before concluding his judgment, the learned Justice observed at p. 20, that the question reserved for the opinion of the Supreme Constitutional Court in *Loftis*' case (*supra*) was the unconstitutionality of sect. 205 of the Criminal Code "and it may well be that the suggested modification was made *obiter* by that Court, in which case it does not form part of the *ratio decidendi*". (at p. 21).

He, moreover, thought, that the matter having been alluded to in the course of the hearing in Criminal Appeal No. 2293 *Loftis* v. *The Republic*, in April and May, 1961, reported in 1961 C.L.R. p. 108 it was " a very unsatisfactory state of affairs", that the law of the Republic on such a grave matter as homicide "should remain uncertain" until December, 1961, when Ratibe Abdulhamid's case was being considered. And referring to the amending bill published about a month earlier, he "hoped that the legislature would now proceed to make the necessary enactment without any delay".

In fact the amending enactment (Law 3 of 1962) was published on the 8th January, 1962, putting the law relating to homicide in its present form. In my opinion this fact alone, shows beyond all doubt that the relative part of the Criminal Code was in need of amendment ; and that the adaptations suggested in *Loftis*' case, and in *Ratibe Abdulhamid's* case, could not produce a satisfactory position in the law.

I found it necessary to go into the judgments in these two cases at some length, as the latter case was referred to in a subsequent decision of the Supreme Constitutional Court (*Nicos Pelides and The Republic of Cyprus and another* - Case No.70/61) in a manner which could produce further confusion in the application of the Criminal law by the criminal courts of the Republic. And in a manner, the authority and correctness of which, I strongly question. I need say no more at this stage.

Now the present case was decided by the Assize Court, about a month before the appeal in Ratibe Abdulhamid's case ; but under the full effect of the decision of the Supreme Constitutional Court in *Loftis*' case.

> "The law as to the punishment of murder, (the Assize Court say at p.68 A., of the record) as it stands today, was decided by the Supreme Constitutional Court in case No.8/61".

And after citing further from that decision, the Assize Court went on to say that it was, therefore, necessary for them to decide whether "the murder was committed with premeditation or not".

> The Court had already found at p. 63 of the record that:— "On the 29th June, 1961, (the day before the murder) the accused found Salih Zekki, a Welfare Officer ..... and in the course of the conversation he told Zekki that the deceased had seduced his daughter and was now abandoning her and that in order to clear up the honour of both families he would either kill the deceased or run over him with the car".

After taking their criminal law from the Constitutional Court in *Loftis*' case, the Assize Court say at p.39 D :—

> "Accused himself was worried and had gone to bed in this depressed state. Beyond this, however, we cannot go. We cannot find that the accused that night had made up his mind to kill the deceased on the following morning. And in the face of such evidence as we have, we can only infer that the meeting between the accused and the deceased on that morning of the 30th June, was a chance meeting, and that on seing the deceased, the accused there and then formed the intention to kill him. It is quite clear that the accused could not have been of a

calm mind when he saw the deceased. He had already exhibited the state of his mind to Salih Zekki on the previous morning, and in the evening when he went home, his conversation with his daughter did nothing to alleviate his excitement and worry. Consequently we find that though he made up his mind to kill the deceased when he saw him riding his bicycle on that morning, he was in no condition of mind to reconsider his intention and to reflect upon it for the purpose of relinquishing it

. . . . . .

. . . . . .

For the above reasons, *we find that the accused is not guilty of premeditated murder :* and we direct that a second count be added to the information, charging him with murder other than premeditated murder, *and we find him guilty on that second count*".

Now the confusion created in the Criminal law and its application by the obiter dicta in the decision of the Constitutional Court in Loftis' case, is obvious ; and needs, in my opinion, no further comment. As the present conviction, however, was not challenged, and cannot, therefore, be reopened in this appeal, I prefer to leave it at that. But I wish to make it clear on record, that this is not how I understand the law regarding premeditation. The appellant's desire and intention to kill the deceased, expressed the day before the murder, and worrying the murderer during the night, cannot, in my opinion, be so easily dissociated from the killing at the "chance meeting" of the following morning, as to make the murder "unpremeditated homicide". The point does not fall to be decided in this appeal ; but I do not think that the decision of the Assize Court on such a grave issue, should be allowed to go though this Court without comment.

Moreover, it must, I think, be added that if it were open to the Assize Court to avoid a conviction for premeditated murder under section 204, the proper course to follow was to convict for manslaughter under section 203 (and not for murder under sect.204) for the reasons stated earlier in this judgment.

In conclusion, I take the view that the legal aspect of this case is substantially different from that in *Ratibe Abdulhamid*'s case. And I am not prepared to say, here, that the appeal against sentence, in such circumstances, should succeed.

Taking with considerable hesitation the most favourable view for this unrepresented appellant, I agree that his appeal should be simply dismissed. Reopening the question of sentence, one might have to enter into the conviction as well, which might probably have for the appellant, very serious consequences.

JOSEPHIDES, J. : This is an appeal against sentence on the ground that it is excessive and that it is not warranted by law.

In the circumstances of this case I do not think that the sentence is excessive. On the point of law, I would dismiss the appeal for the reasons given in my judgment in the case of *Ratibe Muti Abdulhamid v. The Republic*, reported in 1961 C.L.R. p. 400, dated 19th December, 1961.

For the guidance of Judges I would, however, take this opportunity of reiterating my views expressed in that judgment with regard to the duty cast on trial Courts in applying the laws saved under article 188 of the Constitution.

Article 188, paragraph 1, of the Constitution provides that all laws in force on the date of the coming into operation of the Constitution shall, until amended or repealed, continue in force and shall be "construed and applied with such modification as may be necessary to bring them into conformity with this Constitution".

Paragraph 4 of the same article reads as follows :

> "Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of this Constitution including the Transitional Provisions thereof".

The expression "modification" is defined in paragraph 5 of the same article as including "amendment, adaptation and repeal".

Consequently, it is the duty of every Court in the Republic, exercising criminal or civil jurisdiction, in applying the provisions of any law in force on the date of the coming into operation of the Constitution to amend it, adapt it or repeal it in such a way as to bring it into conformity with the provi-

sions of the Constitution ; because there is no duobt whatsoever that the Courts are expressly given quasi-legislative powers during a transitional period in respect of the laws in force on the 16th August, 1960. The provisions of article 188 paragraph 4, are clear and unambiguous and there is no room for any doubt or ambiguity whatsoever. But this power cannot be exercised in respect of any law enacted since the establishment of the Republic ; any question of the unconstitutionality of such law has to be reserved by the Court before which such question is raised for the decision of the Supreme Constitutional Court under the provisions of article 144 of the Constitution.

Since the filing of this appeal the law of homicide has, fortunately, been amended by Law 3 of 1962, and, consequently, it is hoped that no difficulty will arise in future so far as this part of the law is concerned.

I would dismiss the appeal.

WILSON, P. : I agree with the result. The appeal is dismissed.

Appeal dismissed.