1957
June 17, 18, 21

REGINA
v.
NICOS
SAMPSON
GEORGHIADES
(No. 2).

[BOURKE C.J. ZEKIA AND ZANNETIDES JJ.]

REGINA

v.

NICOS SAMPSON GEORGHIADES (No. 2).

(Criminal Appeal No. 2102).

Criminal Law—Attempt to commit offence—Actus reus—Inference of intention—Onus on prosecution to prove intent—Sentence of death—Form of words—Criminal Procedure Law, Cap. 14, *Section* 3.

Emergency Regulations—Discharging a firearm—Attempt—Carrying a firearm—Emergency Powers (Public Safety and Order) Regulations, 1955 *to* (*No.* 3) 1957, *Regulations* 52 (*a*), 52 (*c*) *and* 72.

Appeal from convictions by the Special Court sitting at Nicosia (Case No. 896/57) before John J. on an information charging the appellant with (1) discharging a firearm, contrary to Regulations 52 (*a*) and 72 of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 3) 1957; and (2) carrying a firearm without lawful authority or excuse contrary to Regulation 52 (*c*) of the aforesaid Regulations. The particulars of the offence relating to the first count were that "the accused on the 30th day of January, 1957, at Dhali, in the District of Nicosia, did without lawful authority or lawful excuse, aim a loaded sten gun at a group of persons, namely John Henry Burge, Gordon Willard, Jeffrey Leach and Joseph Mounsey, with intent to discharge the said sten gun at the said group of persons".

The appellant was convicted on the 1st June, 1957, on both counts and sentenced to death in respect of each count. The facts appear from the judgment of the Court delivered by Zekia J.

Held: (1) (*per Zekia and Zannetides JJ.; Bourke C.J. dissenting*): that on the facts as proved it could be inferred that the appellant intended to discharge the firearm he was holding, but this was not the only reasonable inference that could be drawn from the facts; consequently, having regard to the evidence adduced, the conviction on the offence of discharging a firearm was unreasonable and ought to be quashed;

(2) (*a*) (*Full Bench*): that the evidence established that the appellant was "carrying" a firearm within the meaning of Regulation 52 (*c*) as alleged in the second count; and

(*b*) that there was no statutory form of words in Cyprus which must be used by the trial Court in passing sentence of death; nor were such words necessary for the proper administration of justice. In any event this did not constitute a matter of criminal procedure within the meaning and scope of section 3 of the Criminal Procedure Law, Cap. 14.

Conviction on the first count quashed.

Appeal on the second count dismissed.

Cases referred to :

R. v. *Steane* (1947) K.B. 997 ; *R.* v. *Mentesh* (1934) 14 C.L.R. 232 ; *Kafalos* v. *R.* (1952) 19 C.L.R. 121 ; *R.* v. *Harnet and Casey* (1840) Jebb. 303 ; *R.* v. *Walcott*, 4 Mod. 396 ; 87 E.R. 464.

S. Pavlides, Q.C. (*L. Clerides* with him) for the appellant.

H. Gosling for the Crown.

The judgment of the Court was delivered by :

ZEKIA J. : The reasoning and the decision arrived at with regard to the conviction for the offence charged in the first count of discharging a firearm is that of a majority of the Court, namely Zekia and Zannetides, JJ., while the decision in relation to the conviction for the offence of carrying a firearm, alleged in the second count, is that of the full Court.

The appellant was convicted by the Special Court of Nicosia of the offences of discharging a firearm and carrying a firearm contrary to Regulations 52 (*a*) and (*c*) of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 3) 1957, and was sentenced to death in respect of each count. To establish the commission of the offence of discharging a firearm the prosecution relied upon the provisions of Regulation 72 of the same Regulations, which is referred to in the charge, and made the case that the appellant attempted to discharge the sten gun. The relevant portion of Regulation 72 reads as follows :—

> " (1) For the purposes of any offence against these Regulations each of the following persons shall be deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged and tried with actually committing the offence and may be punished accordingly, that is to say :—
>
> . . . . . .
>
> (*f*) every person who attempts to commit the offence ".

Para (*e*) of the same Regulation goes even further, because it makes liable for the commission of an offence " every person who does any act preparatory to the commission of the offence ". However it was the attempt to discharge the firearm that the prosecution sought to prove and it was upon a finding of the attempt that a conviction was entered for the offence of discharging a firearm alleged in the first count. The particulars of that count are as follows :—

"The accused on the 30th day of January, 1957, at Dhali, in the District of Nicosia, did without lawful authority or lawful excuse, aim a loaded sten gun at a group of persons, namely John Henry Burge, Gordon Willard, Jeffrey Leach and Joseph Mounsey, with intent to discharge the said sten gun, at the said group of persons".

Among others the four police officers mentioned in the particulars just quoted, testified in support of the case for the Crown. The appellant elected to make a brief unsworn statement from the dock, in which he asserted his innocence and said that the charges were untrue.

The circumstances of the case might briefly be stated as follows: Acting upon information a party of Security Forces, dressed in civilian clothes, went to a house at Dhali, at 1 a.m. of the 30th January, 1957. Four officers of the Special Branch, namely, Superintendent Burge and Sgts. Leach, Willard and Mounsey, Willard armed with a sterling gun and the others with pistols, without giving any warning broke through the outdoor of the house in question and having entered into the hall of the house proceeded on and broke into a room opening into the hall. On entering that room they found appellant standing behind a bed, clothed, that is with his pullover on and barefooted, holding a sten gun with his right hand, his left hand on the magazine which contained 27 rounds and was in position on the gun, the gun at the level of his hip; the sten gun although loaded was not cocked. The room in question was a small one and the bed as well as the appellant were opposite the door of the room; there was another person in the room, a young boy sitting in bed. On entering the room Willard fired a burst with his sterling gun over the head and to the left of appellant. The appellant ducked behind the bed and Willard rushed and delivered a blow with his sterling gun across the head of appellant and also struck with the same weapon his arm; appellant staggered to the ground; Mounsey delivered two blows on appellant's head with a chair; Burge stamped the right hand of appellant, while on the ground, and succeeded to wrench from him the sten gun. Leach struck the boy sitting in bed with his pistol on the head and rendered him unconscious and then struck several blows with his fist on the appellant's face and other parts of his body; prisoner's forehead and nose bled. During the struggle the prisoner behaved violently but it appears that none of the four Security Officers was injured. After the prisoner had been disarmed and while he was being restrained in the room and he was in a frantic mood he shouted out according to the evidence of Leach and Mounsey "Damned English, why didn't I shoot you; another moment and you would have all been dead men"

and according to Willard " Kill me, kill me and another moment you would have all been dead " and according to Burge " Kill me, kill me ; if you had given me more time you would have all been dead ". Superintendent Burge then arrested him for being in possession of a sten gun, cautioned him and the prisoner replied " Arrest me, I am guilty but he is innocent " referring to the second person in the room.

The trial Court accepted the evidence of the four security officers and acting mainly on their testimony found prisoner guilty on both counts. The learned trial Judge after dealing with various aspects of the case in connection with the first count continued his judgment as follows (at page 51) :

" He had been taken by surprise, however, and not prepared, and so could not carry his intention to its conclusion. From the demonstrations given by several witnesses as to how the sten gun was being held by the accused, it is quite clear the the aggressive attitude had been adopted of one about to fire a sten gun. Having been taken completely by surprise, and fired at, he had not the necessary time to pull the cocking handle back with his left hand. A stouter-hearted person might not have ducked on the burst having been fired by Sgt. Willard in which case the outcome of the arrest could have been different and given those necessary split seconds in which to cock the sten gun. It is considered Sgt. Willard showed great restraint in the circumstances in not firing directly at this man. Although his action might well have had different results if the accused had not ducked ".

And further down at page 53 :

" Having accepted the prosecution story as true I have no doubt whatever that the accused attempted to discharge a firearm at the persons specified in the particulars of the first count. The prosecution have clearly proved that the accused was aiming, or pointing towards them a fully loaded sten gun. From the demonstrations of how he was holding Exhibit 2, which were not challenged, he was clearly in the attitude of a person about to fire such a gun. This is an act done immediately preparatory to firing and would constitute an attempt when taken in conjunction with the violent resistence offered and the words spoken immediately after being relieved of the gun. It is not believed he took up the gun merely to defend himself against unknown assailants. There is no evidence they were disguised, but merely that they were in civilian clothes. It must have been obvious too that they were armed. To support this belief there is the evidence that shortly after being disarmed he was calling them damned

Englishmen and telling them in English what would have happened to them if they had not been so quick. I am satisfied that by the accused's ducking instead of cocking the sten gun, he gave the police those split seconds which were necessary to close with him and so prevent him from carrying out his intention of killing them all, if possible."

Attempt is defined in section 360 of the Criminal Code, Cap. 13.

Archbold, 33rd Ed. at p. 1489 dealing with attempt to commit crime states :

> " It is submitted that the *actus reus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime".

Glanville Williams in his Criminal Law, Volume 1, page 705, under the heading : " The inference of intention " quotes from the judgment of Lord Goddard, C.J., in the *Steane case* (1947) K.B., at p. 1004, the following passage :—

> " No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction . . . . ".

This Court in the case of *R.* v. *Mentesh*, 14 C.L.R. 245, cited with approval from Taylor on Evidence the following passage :

> " But, admitting the facts sworn to are satisfactorily proved, a further, and a highly difficult duty still remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion ; for it is only on this last hypothesis that they can safely convict the accused. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. Moral certainty and the absence of reasonable doubt are in truth one and the same thing ".

Again this Court in *Kafalos* v. *The Queen*, 19 C.L.R. 121, in dealing with the powers of the Supreme Court held the following at page 125 :

"The ground of appeal upon which this appeal has been argued is that contained in section 142 (1)(*b*) of the Criminal Procedure Law, namely, that the conviction of the appellant was "unreasonable having regard to the evidence adduced". In section 4 (i) of the Court of Criminal Appeal Act, 1907, the phrase used is that the verdict may be set aside if it is unreasonable or "cannot be supported having regard to the evidence". It may be assumed that both these phrases mean the same thing. However, the circumstances in which appeals are heard in Cyprus differ from those in England. A conviction by an Assize Court is not the verdict of a jury—the unanimous decision of 12 men; it is the decision of three judges sitting in banco. Unlike a jury, the trial Court is obliged to give reasons for its decisions and these reasons are part of the proceedings upon an appeal. In these reasons the trial Court states not only its findings of fact but the inferences drawn from the facts. The Supreme Court is very slow to reverse the findings of an Assize Court on fact but this Court is in as good a position as a trial Court to draw inferences from facts".

The statements in the passage quoted apply with greater force to the inferences drawn by a Special Assize Court composed of one judge only.

The intent as a necessary ingredient of attempt cannot be established by positive direct proof. There are of course certain presumptions, such as for instance: a person intends the natural consequences of his act, but in the great majority of cases intent has to be inferred from facts and conduct. When the presence of intent in an attempt to commit a particular offence is sought to be established the nature of the evidence must be such as to rule out all other inferences inconsistent with the presence of such intent. It is not enough in ascertaining whether a particular intent is proved or not to say that this was a reasonable inference to be drawn from the facts but one must go further and be able to say that that was the only reasonable inference which could be drawn from the facts as found; if there be another reasonable view or probability consistent with innocence capable to be taken on the same facts then the onus of proving beyond reasonable doubt the existence of the particular intent has not been discharged.

In the present case one hour after midnight members of the security forces broke and entered the entrance to the house and to the room in which the prisoner was apparently lying in bed. This is borne out by the fact that he was found bare-footed on a winter night and from the condition of the bed appearing in photo Exhibit 1 (D). The officers did not give any warning, they did not disclose their identity and they did not call upon the prisoner at any stage to surrender. No doubt they had their own reason

for taking such course. However, as the trial Judge found, he was taken by surprise and not prepared. The time taken between the incident of the breaking of the door and the moment the prisoner ducked behind the bed was only a matter of seconds. It is not unnatural and it does not require a particular purpose for an inmate of the house, whether a terrorist or not, out of surprise or fright due to the breaking of the two doors at such time of the night, instinctively to assume a position beside his bed facing the door and holding his gun in the direction of the door waiting to see what will happen next. In a second or two he might not have been able to form an intention as to what to do with his firearm. He might as well have been undecided altogether. In other words he might have been in a state of indecision as to what he would do next and that state of mind might very well have continued until Willard fired a burst and the prisoner ducked behind his bed. He might, on the other hand, have thought that he was in danger and that pending further developments of events he might have felt it necessary to have his gun with him and, if necessary, to make use of it for his protection. It could also be inferred, as the learned trial Judge did, that the prisoner having taken the position described with his gun intended to cock and fire—according to the evidence cocking and pulling the trigger could be achieved by a rapid movement—at the raiding party as soon as they forced their way into his bedroom ; but this is by no means the sole reasonable inference that could be drawn from the facts. As we said, it is indeed questionable whether a person under the circumstances in a second or so could reasonably be expected to form a particular intent. Had the prisoner already decided to discharge his firearm at the party breaking into the house at the time of their entry into his room one would expect him to cover himself in some way or other and not to stand still across the room and provide an easy target to the invaders.

Some importance was attached to the words the prisoner shouted after he was disarmed. In the first place we should point out that the version of the two of the witnesses, namely, that of Leach and Mounsey differ considerably from the version of Burge and Willard as to what the prisoner actually said. The trial Court having believed the evidence of all four in the absence of any reason ought to have accepted the version more favourable to the accused which, in our view, is that of Leach and Mounsey, and which version does not unequivocally indicate an intention on the part of the prisoner to discharge a firearm at the raiding party if he had time to do so. Furthermore, the weight to be attached to such utterances should be considered in relation to the condition in which the prisoner was at the time. Burge said he was like a mad man, shouting ; no doubt from the blows he received he

must have been feeling a good deal of pain and no doubt he was not in proper control of his senses. He might have more than one reason or motive for not speaking the truth in his anger and pain. We do not think that in the circumstances any weight could be attached to this kind of utterances.

Much was said about the aggressive attitude of the prisoner during the struggle and before. Such conduct is not unexpected from a person treated in the way the security men felt necessary to treat him in their effort to disarm him.

The majority of the Court is, therefore, of the opinion that having regard to the evidence adduced the conviction of the appellant on the first count is unreasonable and must be quashed. Conviction and sentence on count 1 is accordingly set aside.

As to the offence of carrying the firearm of which the appellant was found guilty on the second count, it is argued that the appellant did not " carry " the gun within the meaning of Regulation 52 (*c*). The contention is that carrying in the Regulation means transporting or conveying and that the appellant being more or less static in his room when he had the gun in his hands was merely in possession within the meaning of Regulation 52A (*b*). We do not agree with this submission. We think it is plain that the intention of the Legislature was to prevent the actual handling or keeping or retaining upon the person of a firearm—to affix the supreme penalty to what may be regarded in a sense as a more aggravated form of possession enabling instant use of such a weapon to be resorted to by a terrorist. Even if, which we do not accept, the carrying of a firearm within Regulation 52 (*c*) must imply movement while carrying the weapon, we think the learned trial Judge was justified in the conclusion which he reached. In the opinion of this Court the evidence clearly established that the appellant was carrying the sten gun within the meaning of Regulation 52 (*c*) without lawful authority or lawful excuse.

We now turn to the only ground of appeal that remains having regard to the decision setting aside the conviction and sentence under the first count.

It is contended that having regard to the provisions of section 3 of the Criminal Procedure Law (Cap. 14) the proceedings are vitiated because in passing sentence of death the Judge of trial did not use the form of words provided by statutory enactments applicable in England. Reference was made to such old cases as *R.* v. *Harnet and Casey*, (1840) Jebb. 303 (Reserved Cases) and *Walcott*, 87 English Reports (1694) 464. But the judge passed sentence in accordance with law, being the penalty

provided for the offence, and section 27 of the Criminal Code provides for the manner in which the punishment of death shall be inflicted. There is no statutory form of words provided for in the Laws of Cyprus nor are such words necessary for the proper administration of justice. In any event we are of the opinion that this does not constitute a matter of criminal procedure within the meaning and scope of section 3 of the Criminal Procedure Law and we are content to leave it at that.

The appeal against the conviction on the second count fails and is dismissed.

Conviction on first count set aside.
Appeal on second count dismissed.