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

PANTELIS VRAKAS AND ANOTHER,

Appellants,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeals Nos.* 3440, 3442).

Premeditated murder—Joint charge and joint trial of Appellants and conviction of the premeditated murder of Appellant's 1 *wife—Circumstantial evidence—Guilt of Appellant* 1 *established by taking into account his whole conduct before, at the time of, and after the murder—Plus presence of Appellant* 2 *at the scene of the crime—Moreover killing by Appellant* 1 *of his wife a premeditated one because it was committed on the basis of a pre-arranged plan—Which was duly implemented though in relation thereto Appellant had had plenty of time to reflect and to decide to desist therefrom—Premeditation and guilt of Appellant* 2*—Established through his having agreed three days before the murder to assist Appellant* 1 *in a scheme for the killing of the latter's wife—And by other evidence regarding his conduct prior to, at the time, and after the crime—Presence of Appellant* 2 *at the scene of the crime by pre-arrangement—In order to tie Appellant* 1 *on to a tree immediately after the latter would have murdered his wife—And thus help to render credible his version that he and his wife have been attacked by persons unknown—Which Appellant* 2 *actually did as arranged—All this amounts to wilful encouragement and constitutes aiding and abetting in the commission of the murder—Section* 20 *of the Criminal Code Cap.* 154*—Section* 203 *of the Criminal Code Cap.* 154, *as amended by section* 5 *of the Criminal Code (Amendment) Law,* 1962 *(Law* 3/62)*—See further immediately herebelow.*

Premeditated murder—Conviction—Evidence—Circumstantial evidence —Charge depending wholly or substantially on circumstantial evidence—Standard of proof—Facts proved beyond reasonable doubt should not only be consistent with guilt but altogether inconsistent with any other rational conclusion—Cf. supra; *cf. further immediately herebelow.*

Premeditated murder—Premeditation is a question of fact to be determined in the light of the circumstances in each particular case—Joint charge and trial—Killing taking place on the basis of a pre-arranged plan between the two accused (now Appellants) it was only natural for the trial Court to deal with the issue of premeditation by reference to both accused together—Cf. infra under: Criminal Procedure—Joint trial.

Motive—Premeditated murder—Evidence of motive not necessary—Findings made by the trial Court as to possible alternative motives—Part of the whole chain of circumstantial evidence—Proper and permissible such findings.

Aiding and abetting—In the commission of the crime—Presence of Appellant 2, by pre-arrangement, at the scene of the murder—In order to tie Appellant 1 on to a tree immediately after the latter would have murdered his wife—And thus help render credible his version that he and his wife have been attacked by persons unknown—Which Appellant 2 did as agreed—Constitutes aiding and abetting in the commission of the murder—Section 20 of the Criminal Code—Cf. immediately herebelow.

Parties to offences—Premeditated murder—Committed by Appellant 1 assisted by Appellant 2 on basis of pre-arranged plan—Both convicted under section 203 of the Criminal Code (as amended, supra) *and section 20 thereof—Reference to section 21 in the count upon which they were convicted irrelevant.*

Criminal Procedure—Joint charge—A joint charge is also a several one—Consequently, the trial Court trying two persons jointly charged of murder may in a proper case acquit the one and convict the other—Cf. immediately herebelow.

Criminal Procedure—Joint trial—Joint trial of Appellants on a joint charge for premeditated murder—Conviction of both—Appellant 1 not prejudiced by the joint trial, in the circumstances of this case—Cf. immediately hereabove; see further immediately herebelow.

Evidence in criminal cases—Joint charge and trial—Common purpose—Acts and declarations of one accused in pursuance of that common purpose—Are admissible against the other.

Joint charge—Joint trial—See supra, passim.

Evidence in criminal cases—Circumstantial evidence—Standard of proof—Facts proved beyond reasonable doubt should not only be

consistent with guilt—But also inconsistent with any other rational conclusion—Cf. also supra.

Circumstantial evidence—See immediately hereabove.

Evidence in criminal cases—Statement made by accused whilst in custody to a medical adviser (the Government Psychiatrist)—Statement not privileged—Admissible in evidence.

Evidence in criminal cases—Confessions and statements made by accused.—Absence of caution—Incriminating statement admissible nevertheless, there being no doubt that it was a voluntary one—Cf. further immediately herebelow.

Evidence in criminal cases—Confessions and statements made by accused—And adduced in evidence by the prosecution—The position is as in the case of all other evidence—The whole should be left to the trial Court to say whether the facts asserted by the accused in his favour be true or not—Cf. supra.

Confessions and statements made by accused—See supra, passim.

Evidence in criminal cases—Failure of accused to give sworn evidence in his own defence—A factor related to the issue of his guilt.

Trial in criminal cases—Bias—Participation in the trial Court of a Judge who held the preliminary inquiry and committed the accused for trial—Allegation that said Judge was thus disqualified from sitting on the Bench as member of the Assize Court trying accused—Objection on that ground not taken at the trial but for the first time on appeal—The relevant facts however were fully known to the accused (now Appellants) and their counsel at the trial—Waiver of any complaint in this respect—Consequently Appellants cannot pursue such a complaint on appeal—But even if they could, their convictions cannot be set aside on this ground for the reasons set out immediately herebelow.

Trial in criminal cases—Bias—Participation in the trial Court of a Judge who held the preliminary inquiry and committed the accused for trial—Cannot properly lead to the conclusion that any real likelihood of bias could be said to exist or that justice was not seen to be done, or even that it was undesirable for such a course to have been adopted—Long and beneficial practice in Cyprus—Basic difference and clear distinction between the preliminary inquiry and the trial by an Assize Court—Cf. section 93(c) *of the Criminal Procedure Law, Cap.* 155.—

Trial in criminal cases—Joint trial—See supra, passim.

Words and Phrases—And famous judicial dicta—" Justice should not only be done, but should manifestly and undoubtedly be seen to be done" (The King *v.* Sussex Justices Ex Parte McCarthy [1924] 1 *K.B.* 256, *at p.* 258, *per Lord Hewart, C.J.)—See* supra *under Trial in criminal cases—Bias.*

The Appellants in these two consolidated appeals have been convicted by an Assize Court in Kyrenia of the premeditated murder of Paradisa Panteli Vraka, the wife of Appellant 1, under section 203 of the Criminal Code, Cap. 154, as amended by section 5 of the Criminal Code (Amendment) Law, 1962 (Law 3/62); and they were both sentenced to death. They now appealed against their said conviction. The trial Court held that on the night of August 29, 1972, the Appellants met at the scene of the crime (in the forest somewhere near the Morphou-Diorios road) according to a pre-arranged plan for the sole purpose of killing Appellant's 1 said wife, and that they in fact did kill her. It was also found that Appellant 2 tied on to a tree Appellant 1, in order to make it appear that he had been the victim of an attack by unknown persons, as he alleged on being found by the police.

Counsel for the Appellants argued that the trial Court erred in convicting the Appellants of the murder of the deceased because there was no evidence connecting either of them beyond reasonable doubt with the death of the deceased; and, in the alternative, that, in any event, there had not been established beyond reasonable doubt, against either of them, that the murder was a premeditated one. Before touching the general issue, counsel raised a number of specific points which are dealt with *seriatim* in the head-note hereafter. The first such point relates to the allegedly improper composition of the trial Court in circumstances making it to appear that justice could not be seen to be done. There followed submissions regarding the joint trial (and joint charge) of the Appellants and the Appellant's 1 objection thereto; the alternative findings made by the trial Court as to motive; the failure of the Appellants to give sworn evidence at the trial and the effect of such failure on the weight of the prosecution evidence; the admissibility of Appellant's 2 statement to the psychiatrist Dr. Matsas; the alleged principle of indivisibility of a statement made to the police or otherwise and adduced in evidence by the prosecution; the admissibility of

declarations and actions of one Appellant as evidence against the other.

Counsel for the Appellants raised for the first time on appeal the point that the composition of the Assize Court was defective, in that one of the three Judges of the said Court was disqualified from sitting as a trial Judge, as he was the Judge who had held in this case the preliminary inquiry and committed the Appellants (then accused) for trial; and counsel asked that the appeal be allowed on that ground and a new trial ordered. It was argued in this respect that the Judge in question in committing the Appellants for trial at the preliminary inquiry, had made up his mind under section 93(c) of the Criminal Procedure Law, Cap. 155, that there were "sufficient grounds" for committing the accused (now Appellants) for trial and, therefore, he was disqualified from sitting as a trial Judge because "he was not capable of bringing an entirely impartial mind to the hearing" of the case at the trial; and reference was made in this respect to a passage in the judgment of Lord Wright on an appeal to the Privy Council (England) in *Vassiliades* v. *Vassiliades*, 18 C.L.R. 10, at p. 21. It was particularly stressed by counsel for the Appellants that it became necessary to be decided during the trial at the Assize Court whether a *prima facie* case had been made out against the accused (Appellants) "sufficiently" to require them to make a defence; and that, moreover, during the preliminary inquiry the Judge concerned had ruled that a very material statement made by Appellant 2 to a psychiatrist Dr. Matsas, was admissible, and that, later, at the trial, the admissibility of such statement having been contested the Assize Court (the same Judge being then one of its members) decided that it was receivable in evidence.

Counsel for the Appellants have argued that, in the circumstances, though the impartiality of the Judge in question was not to be doubted in the least, nevertheless a cardinal principle of law had been violated, as it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (see *The King* v. *Sussex Justices Ex Parte McCarthy* [1924] 1 K.B. 256, at p. 258, per Lord Hewart, C.J.).

The Supreme Court, after disposing of this objection, proceeded to deal with the other points raised in this case and eventually

upholding the convictions of the Appellants dismissed the appeals.

Held, I: *Regarding the said preliminary objections as to the composition of the Assize Court:*

(1) There can be no doubt that the Appellants and their counsel were fully cognizant of the fact that the Judge who committed the Appellants for trial was one of the members of the trial Court; but no objection was raised to his presence on the bench; therefore, they must be taken to have waived any complaint in this connection and for this reason they cannot now pursue such a complaint on appeal.

(2) Anyhow, even if they could do so, we do not think that their convictions should be set aside on this ground, because the functions of the Judge concerned at the preliminary inquiry and at the trial were distinctly different. In the former instance he did not have to evaluate the evidence as regards credibility (see section 94 of the Criminal Procedure Law, Cap. 155), whereas at the trial credibility of witnesses was a primary consideration. There is, indeed, a basic difference between a preliminary inquiry and trial by an Assize Court (see section 93(c) of Cap. 155, *supra*).

(3) On the other hand, objection cannot be taken to everything which might raise a suspicion in somebody's mind. There must appear to be a real likelihood of bias. Surmise and conjecture is not enough.

(4) (a) In the light of the authorities and the foregoing we think that the *"coram non judice"* raised by counsel for the Appellants cannot be decided in their favour. In our opinion the preliminary inquiry cannot properly lead to the conclusion that any real likelihood of bias could be said to exist or that justice was not seen to be done, or even that it was undesirable for such a course to have been adopted; it is a well-known established practice in Cyprus for Judges who have committed persons for trial by an Assize Court to take part in the trial by such Assize Court, as Judges in the District Court are relied on, due to their training, to be fully capable of keeping entirely separate in their minds the difference between the function of a Judge holding a preliminary inquiry and the function of a Judge trying a case.

(b) Regarding, in particular, the question of the ruling by the committing Judge, at the preliminary inquiry, about the admissibility in evidence, at that stage, of the statement made to the psychiatrist Dr. Matsas by Appellant 2, we would like to stress that we cannot accept that such Judge, when the issue of admissibility of the said statement had to be decided by the Assize Court at the trial in a definite manner, and not merely provisionally for the purpose of recording all apparently relevant evidence at the preliminary inquiry, would be inclined "to fight for his own hand", just as the trial Judge was not regarded by Darling, J., as being inclined to do so on appeal in the *Bennett and Newton* case, 9 Cr. App. R. 146, at p. 157.

Held, II: *Regarding the Appellants' joint trial (and joint charge) and Appellant's* 1 *objection thereto:*

(1) (a) In relation to the joint trial of the Appellants it is necessary to deal with the submission of counsel for Appellant 1 that his client was prejudiced by the joint trial, because though, according to counsel, the evidence admissible in law against Appellant 1 was not sufficient to establish his guilt beyond reasonable doubt, the trial Court in examining such evidence was influenced by the contents of statements made, prior to the trial, by Appellant 2, which incriminated Appellant 1 but were not in law evidence against him, and thus the trial Court came to feel certain about the guilt of Appellant 1. It follows, counsel went on, that a retrial should be ordered in the present case; and reference was made in this respect to the case of *Nestoros* v. *The Republic*, 1961 C.L.R. 217.

(b) We do not consider the *Nestoros* case (*supra*) as a precedent which binds us to order a retrial in the instant case as well; each case has to be decided on its own merits and in the present case not only it is absolutely clear from the reasoning set out in the very careful judgment of the trial Judges that they were not affected by the statements of Appellant 2 in convicting Appellant 1, but that they went further and they convicted Appellant 2 without relying on his own statements, as there was, in their opinion other overwhelming evidence warranting his conviction. (Cf. *D.P.P.* v. *Merriman* [1972] 3 All E.R. 42, at p. 46 per Lord Morris of Borth-Y-Gest.)

(c) It is to be noted that counsel for Appellant 1 did not object to the joint trial at the Assize Court, although the said

statements made by Appellant 2, being part of the record of the preliminary inquiry, were known to him.

(2) Related to the matter of the joint trial is the submission of counsel for the Appellants that it was wrong for the trial Court to deal, to a great extent, with the issue of premeditation by referring in this connection to both Appellants together. But in the present case it was natural, as the case for the prosecution was that the killing of the deceased took place on the basis of a pre-arranged plan between the Appellants, that the trial Court, in dealing with the issue of premeditation as a question of fact—as, indeed, it is—, would have to deal with such issue as regards both Appellants together in so far as there was evidence tending to establish the said pre-arranged plan, from the existence of which premeditation could be inferred in relation to each one of the Appellants; we do not, therefore, think that the trial Court erred in this respect in any way.

(3) Though the Appellants were jointly charged and tried, in dealing with their appeals we have, of course, not lost sight of the fact that the conviction of one of them might be set aside while that of the other might be affirmed (see *Mandis and Another* v. *The Queen*, 19 C.L.R. 155), or that it might be found—in relation to the issue of premeditation or otherwise—that the killing of the deceased totally or substantially varied from any common design of the Appellants (see *Loftis* v. *The Republic*, 1961 C.L.R. 108). Because "a joint charge is also a several charge" (see *D.P.P.* v. *Merriman* [1972] 3 All E.R. 42, at p. 46 and at p. 48, per Lord Morris of Borth-Y-Gest).

Held, III: *Regarding the finding made by the trial Court of alternative possible motives:*

(1) Facts which supply motive for a particular act are items of circumstantial evidence; and they belong to the category of circumstantial evidence which is described by Cross on Evidence 3rd ed. p. 30, as *prospectant evidence.* It is well settled that it is not necessary for the prosecution to adduce any evidence as to why the murder was committed (see *R.* v. *Treacy* [1944] 2 All E.R. 229, at p. 332 per Humphreys, J.).

(2) It was not, therefore, necessary, that the trial Court should have reached absolutely definite conclusions regarding the motive of each of Appellants; and it was open to the Assize Court to make findings about possible alternative motives, constituting circumstantial evidence which tended, together with

the rest of the evidence, to establish the guilt of each one of the Appellants.

Held, IV: *Regarding the Appellant's 1 failure to give sworn evidence at the trial:*

(1) In this respect it is to be noted that at his trial Appellant 1 chose, as it was his right to do, not to give evidence on oath, but to make an unsworn statement from the dock; he stated, *inter alia,* that he was innocent and that he had no reason to kill his wife.

(2) We are of the view that the failure of Appellant 1, as an accused, to give evidence in his own defence is a factor related, in the circumstances of the present case, to the issue of his guilt (see *R.* v. *Jackson,* 37 Cr. App. R. 43, at p. 50 per Lord Goddard, C.J.; *R.* v. *Sparrow* [1973] 2 All E.R. 124, at p. 135, per Lawton, C.J.; see also Cross on Evidence 3rd ed. at p. 41 and the authorities referred to therein).

Held, V: *As to the admissibility in evidence of an oral statement made by Appellant 2 to the Government Psychiatrist Dr. Matsas on the first occasion when he was examined by him:*

(1) It was not contended before us that the said statement was a privileged communication, but it has been submitted that it was not proper for the Assize Court to receive it in evidence as it was made by Appellant 2 to Dr. Matsas in confidence in view of their relationship as patient and doctor and without, therefore, Appellant 2 anticipating that it would ever be given in evidence against him.

(2) That a statement made to a medical adviser is not privileged is well established, as it appears from Archbold's Criminal Pleadings, Evidence and Practice, 37th ed. at paragraph 1337. Useful reference may also be made to Taylor's Principles and Practice of Medical Jurisprudence, 12th ed. vol. 1, where at p. 23 a passage is cited from the case *Nuttall* v. *Nuttall and Twyman,* 108 Sol. J. 605 (*see* this passage *post* in the judgment).

(3) As in *Nuttal* case (*supra*) we think that it is not a ground of non-admissibility of the statement to Dr. Matsas, the fact that its maker, Appellant 2, may have thought that it was made in confidence. What really matters is that it was undoubtedly a voluntary statement; the Appellant was not in any way made

to divulge anything to Dr. Matsas; and there does not arise any question about Appellant 2 having had to be told by Dr. Matsas that whatever was said by him might be given in evidence, because Dr. Matsas was not a person in authority investigating into this case. The purpose for which he was, at the time, with Appellant 2 was a totally different one, namely to examine the mental state of the Appellant. Anyhow, it appears that even where a statement which should otherwise have been made under caution has been made without its maker having been cautioned it may still be admitted in evidence if there is no doubt that it is a voluntary statement (*see R.* v. *Voisin* [1918] 1 K.B. 531, at p. 538).

Held, VI: *Regarding the alleged indivisibility of statements made to the Police or otherwise and adduced in evidence by the prosecution:*

(1) It should be observed that neither the trial Court nor this Court is bound in law to accept as true the version given by Appellant 2 to Dr. Matsas (*supra*) regarding the "Anemones" incident (see *post* in the judgment), merely because such version is contained in a statement by him which has been adduced as evidence by the prosecution. In the case of *McGregor,* 51 Cr. App. R. 338, Lord Parker C.J. stated the following (at p. 241): "... *Jones and Jones* [1827] 2 C. and P. 629 is no longer authority... and as stated in paragraph 1128 of Archbold's Criminal Pleadings etc. (36th ed.) 'the better opinion seems to be that as in the case of all other evidence the whole should be left to the jury to say whether the facts asserted by the prisoner in his favour be true'. The Court is satisfied that that passage in Archbold sets out the true position".

(2) The statement of Appellant 2 to Dr. Matsas as well as his statements to the Police should be taken into account as a whole, including any parts favourable to the Appellant; but whether such parts are to be accepted as true is an issue which is governed by the principle of the *McGregor* case, *supra.*

Held, VII: *Regarding declarations and actions of one Appellant as evidence against the other:*

We are of the view that the behaviour of Appellant 1 after he had noticed the injuries on his wife on August 21, 1972 (*viz.* about a week before her murder) could be treated by the trial Court as indicative of knowledge on his part of what had

happened at the "Anemones" incident;* also it is conduct constituting circumstantial evidence which could be properly taken into account regarding the existence of a common design of the Appellants with very sinister implications as regards the fate of the wife of Appellant 1(*viz.* the deceased). In Phipson on Evidence 11th ed. p. 119, paragraph 263, it is stated that:

> " Where two persons are engaged in a common enterprise, the acts and declarations of one in pursuance of that common purpose are admissible against the other. This rule applies in both civil and criminal cases and in the latter whether there is a charge of conspiracy or not. It is immaterial whether the existence of the common purpose or the participation of the person therein be proved first although either element is nugatory without the other". (*See* also *Reg.* v. *Chapple and Bolingbroke*, 17 Cox C.C. 455; *R.* v. *Pridmore*, 29 T.L.R. 330).

Held, VIII: *Regarding the verdict and the adequacy of the circumstantial evidence:*

(1) (a) Counsel for the Appellants have argued that the trial Court erred in convicting the Appellants of the murder of the

* *Note:* This incident is as follows: Shortly after midnight, in the night of August 20 to August 21, 1972, prosecution witnesses, who were travelling by car on the Nicosia to Myrtou road and were passing by a restaurant known as "Anemones", noticed a woman, who turned out to be the wife of Appellant 1, running towards the road and signalling to them to stop. She was being followed by a man who was, subsequently identified to be Appellant 2; the woman (now the deceased) was barefooted, crying, her hair was dishevelled, there was earth on her, she was panting, trembling and upset; there were scratches and other injuries on her throat. She said, in the presence and within the hearing of Appellant 2, that he had tried to kill her, but he denied this allegation. When interrogated by the Police on September 2, 1972, Appellant 1 said when he returned to his village on the 21st August, 1972, he noticed a bruise on the face of his wife and abrasions on her throat and that, when he asked her what had happened, she replied that she had quarelled with her mother and her sisters. Appellant 1 told the Police, however, that he did not go to his mother-in-law or sisters-in-law in order to ask what had happened.

deceased because there was no evidence connecting either of them beyond reasonable doubt with the death of the deceased; and in any event, there had been no evidence establishing beyond reasonable doubt that the killing was a premeditated one.

(b) (*After reviewing the facts*, the learned President went on):

Taking into account the conduct of the Appellant 1 before, at the time of, and after the murder of his wife, plus the presence, as above, of Appellant 2 at the scene of the crime, we have to conclude, as the trial Court did, that Appellant 1 not only is guilty of the murder of his wife, but, also, that such murder was a premeditated one, having been committed on the basis of a pre-arranged plan which was duly implemented though in relation thereto Appellant 1 had plenty of time to reflect and to decide to desist therefrom.

(c) Premeditation on the part and guilt of Appellant 2 has been established through his having agreed, three days before the murder, to assist Appellant 1 in a scheme for the killing of the latter's wife and by other evidence regarding his conduct prior to, at the time and after the murder. Particularly, the presence of Appellant 2 at the scene of the murder by pre-arrangement in order to tie Appellant 1 on to a tree immediately after the latter would have murdered his wife and thus help to render credible his version that he and his wife have been attacked by persons unknown—which Appellant 2 did as arranged—amounts to wilful encouragement and constitutes aiding and abetting in the commission of the murder under section 20 of the Criminal Code Cap. 154.

(d) Premeditation is a question of fact to be determined in the light of the circumstances of each particular case. The Appellants being jointly tried (and charged) for a premeditated murder on the basis of a pre-arranged plan, it was only natural for the trial Court to deal with the issue of premeditation by reference to both accused together.

(2) The case-law relevant to the principle that guilt in a criminal case has to be proved "beyond reasonable doubt" has been amply reviewed in the judgment of this Court in *Charitonos and Others* v. *The Republic* (1971) 2 C.L.R. 40; in this respect it is useful to refer to the subsequent recent decision of the House of Lords in *McGreevy* v. *D.P.P.* [1973] 1 W.L.R. 276, at p. 285. As regards particularly the required standard of the

circumstantial evidence this case at p. 279, *supra*, restates the well settled principle that there must be an express direction to the jury to the effect that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved beyond reasonable doubt are such as to be inconsistent with any other rational conclusion (cf. also *R.* v. *Mentesh*, 14 C.L.R. 232; *R.* v. *Hodge*, 2 Lew. 227).

Appeals dismissed.

Cases referred to:

Vassiliades v. *Vassiliades*, 18 C.L.R. 10, at p. 21, P.C.;

The King v. *Sussex Justices, Ex Parte McCarthy* [1924] 1 K.B. 256, at p. 258, per Lord Hewart, C.J.;

Allinson v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750, at p. 758, per Lord Esher, M.R.;

Franklin and Others v. *Minister of Town and Country Planning* [1947] 2 All E.R. 289, at p. 296, H.L.;

Metropolitan Properties Co. (F.G.C.) Ltd. v. *Lannon and Others* [1968] 3 All E.R. 304, at pp. 309–310, per Lord Denning, M.R.;

R. v. *Camborne Justices, Ex Parte Pearce* [1954] 2 All E.R. 850, at p. 855, per Slade, J.;

R. v. *Nailsworth Licensing Justices, Ex Parte Bird* [1953] 2 All E.R. 652, at p. 654, per Lord Goddard, C.J.;

R. v. *Consett Justices, Ex Parte Postal Bingo Ltd.* [1967] 2 Q.B.9, at p. 19, per Lord Parker, C.J.;

The King v. *Essex Justices (Sizer and Others), Ex Parte Perkins* [1927] 2 K.B. 475, at p. 489, per Avory, J.;

R. v. *Kara Mehmed*, 16 C.L.R. 46, at p. 49;

The Queen v. *Sir Robert Carden*, 5 Q.B.D. 1, at p. 6 per Cockburn, C.J.;

Powell case, 37 Cr. App. R. 185, at p. 186, per Lord Goddard, C.J.;

R. v. *Rand,* L.R. 1 Q.B. 233;

Sharman case, 9 Cr. App. R. 130;

Bennett and Newton case, 9 Cr. App. R. 146, at p. 157;

Lovegrove case, 35 Cr. App. R. 30, at p. 32, per Lord Goddard, C.J.;

R. v. *Sparrow* [1973] 2 All E.R. 129, at p. 135, per Lawton, L.J.;

The Republic v. *Vassiliades* [1967] 3 C.L.R. 82;

Morgan v. *Bowker* [1964] 1 Q.B. 507;

Charitonos and Others v. *The Republic* (1971) 2 C.L.R. 40;

McGreevy v. *D.P.P.* [1973] 1 W.L.R. 276, at pp. 279, 282, 285 per Lord Morris of Borth-Y-Gest;

R. v. *Mentesh,* 14 C.L.R. 232, at p. 245;

R. v. *Hodge,* 2 Lew. C.C. 227;

Mandis and Another v. *The Queen,* 19 C.L.R. 155;

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

D.P.P. v. *Merriman* [1972] 3 All E.R. 42, at pp. 46 and 48, per Lord Morris of Borth-Y-Gest; at p. 55, per Viscount Dilhorne; at pp. 59-60 per Lord Diplock;

Nestoros v. *The Republic,* 1961 C.L.R. 217;

R. v. *Assim* [1966] 2 All E.R. 881; [1966] 2 Q.B. 249;

R. v. *Shaban,* 8 C.L.R. 82, at p. 84;

Halil v. *The Republic,* 1961 C.L.R. 432, at p. 434 per Zekia, J.;

Koliandris v. *The Republic* (1965) 2 C.L.R. 72;

Aristidou v. *The Republic* (1967) 2 C.L.R. 43;

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

R. v. *Treacy* [1944] 2 All E.R. 229, at p. 232, per Humphreys, J.;

Reg. v. *Chapple and Bolingbroke,* 17 Cox. C.C. 455;

R. v. *Pridmore,* 29 T.L.R. 330;

R. v. *Jackson,* 37 Cr. App. R. 43, at p. 50, per Lord Goddard, C.J.;

See also the cases cited in Cross on Evidence, 3rd ed. at p. 41;

Nuttall v. *Nuttall and Twyman,* 108 Sol. J. 605;

R. v. *Phaedonos and Others,* 22 C.L.R. 21, at p. 26;

McGregor case, 51 Cr. App. R. 338, at p. 341, per Lord Parker, C.J.;

R. v. *Clarkson and Others* [1971] 3 All E.R. 344;

R. v. *Lovesey* [1969] 2 All E.R. 1077.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Pantelis Vrakas and Elias Tryphonos who were convicted on the 14th April, 1973 at the Assize Court of Kyrenia (Criminal Case No. 1404/72) on one count of the offence of premeditated murder contrary to section 203 of the Criminal Code, Cap. 154, as amended by section 5 of the Criminal Code (Amendment) Law, 1962 (3/62) and were sentenced to death by Stavrinakis, P.D.C., Kourris and Pitsillides, S.D.JJ.

K. Saveriades with *E. Lemonaris,* for Appellant 1.

L. Clerides with *A. Eftychiou* and *T. Eliades,* for Appellant 2.

M. Kyprianou, Counsel of the Republic with *A. Angelides* and *M. Flourentzos,* for the Respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: The Appellants, in these two consolidated criminal appeals, have been convicted, on the 14th April, 1973, by an Assize Court in Kyrenia, of the premeditated murder of Paradisa Panteli Vraka, the wife of Appellant 1, under section 203 of the Criminal Code, Cap. 154, as amended by section 5 of the Criminal Code (Amendment) Law, 1962 (3/62); and they were both sentenced to death.

Before we deal with the merits of these appeals it is necessary to deal with a legal issue which was not raised before the trial

Court, but was raised for the first time on appeal before us, namely that the coram which tried the Appellants was a coram *non judice*, because allegedly one of the Judges of the Assize Court was disqualified from sitting as a trial Judge, as he was the Judge who had held the preliminary inquiry and had committed the Appellants for trial.

It is correct that one of the three trial Judges was the Judge who held the preliminary inquiry; this is clear from the information—on which the Appellants were tried—where the said Judge is mentioned by name; therefore, right from the beginning the Appellants and their counsel knew about what is now being complained of but no objection in this respect was raised at any stage before the trial Court. It may be observed that three of the counsel who have appeared for the Appellants before us, namely the two counsel appearing for Appellant 1 and one of the two junior counsel appearing for Appellant 2, defended, respectively, the Appellants before the Assize Court.

The Appellants were committed for trial, at the preliminary inquiry, under section 93 of the Criminal Procedure Law, Cap. 155; the opening part of paragraph (c) of section 93 is as follows:–

> "(c) if, after examination of the witnesses called on behalf of the prosecution, the Judge considers that on the evidence as it stands, regard being had to the provisions of section 94 of this Law, there are sufficient grounds for committing the accused for trial..."

and section 94 of the same Law, which is referred to in section 93(c), reads as follows:–

> " Where there is a conflict of evidence, the Judge shall consider the evidence to be sufficient to commit the accused for trial if the evidence against him is such as, if uncontradicted, would raise a probable presumption of his guilt".

During the trial counsel for both Appellants submitted, under section 74 (1) (b) of Cap. 155, that no *prima facie* case had been made out against the Appellants requiring them to make a defence; but their submissions were not sustained by the Assize Court.

Section 74 (1) (b) of Cap. 155 reads as follows:–

"(b) at the close of the case for the prosecution, the accused or his advocate may submit that a *prima facie* case has not been made out against the accused sufficiently to require him to make a defence and, if the Court sustains the submission, it shall acquit the accused;"

It has been the essence of the argument of learned counsel for the Appellants, in relation to the issue of coram *non judice*, that one of the Judges of the Assize Court, in committing the Appellants for trial at the preliminary inquiry, had made up his mind under section 93(c) that there were "sufficient grounds" for committing the Appellants—then the accused—for trial and, therefore, he was disqualified from sitting as a trial Judge because "he was not capable of bringing an entirely impartial mind to the hearing" of the case at the trial; and reference was made in this respect to a passage in the judgment of Lord Wright, on an appeal made to the Privy Council in England, in *Vassiliades* v. *Vassiliades,* 18 C.L.R. 10, at p. 21. It was particularly stressed by counsel for the Appellants that it became necessary, as already mentioned, to be decided during the trial whether a *prima facie* case had been made out against the Appellants "sufficiently" to require them to make a defence; and that, moreover, during the preliminary inquiry the Judge concerned had ruled that a very material statement made by Appellant 2 to a psychiatrist, Dr. Matsas, who had examined him prior to the trial, was admissible, and that, later, at the trial, the admissibility of such statement was contested and the Assize Court decided that it was receivable in evidence, the said Judge having had to participate, as a member of the Assize Court, in deciding so.

Counsel for the Appellants have argued that, in the circumstances, though the impartiality of the Judge in question was not to be doubted in the least and though he must have tried to discharge his duties as a trial Judge in a manner completely unaffected by the preliminary inquiry, nevertheless a cardinal principle of law had been violated, as it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done; and in this respect, reference was made to the judgment of Lord Hewart, C.J., in *The King* v. *Sussex Justices ex parte McCarthy* [1924] 1 K.B. 256; the relevant part of the said judgment is as follows (at p. 258):-

" It is clear that the deputy clerk was a member of the

firm of solicitors engaged in the conduct of proceedings for damages against the Applicant in respect of the same collision as that which gave rise to the charge that the justices were considering. It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".

As it can be seen from the above quoted passage, the situation in the *Sussex Justices* case, regarding alleged appearance of bias, was quite different from the situation regarding the alleged appearance of bias in the case before us; it is none the less useful to refer at this stage to case–law relating to the principle expounded by Lord Hewart, so that its application within the proper limits can be seen:

In the earlier case of *Allinson* v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750, Lord Esher, M.R. had stated (at p. 758):–

" We are bound to act upon the decision of this Court in *Leeson* v. *General Council of Medical Education and Registration*, 43 Ch. D. 366... I think that in that case the majority of the Court decided, that where a person who has taken part in the judicial proceedings, or, you might say, has sat in judgment on the case, has any pecuniary interest in the result, however small, the Court will not inquire whether he was really biassed or likely to be biassed... But *Leeson's* case also decides that there are other

relations to the matter of a person who is to be one of the Judges which may incapacitate him from acting as a Judge, and they held that the crucial question is, as Bowen, L.J., said, whether in substance and in fact one of the Judges has in truth also been an accuser. What is the meaning of that? The question is to be one of substance and fact in the particular case. What is the fact which has to be decided? If his relation is such that by no possibility he can be biassed, then it seems clear that there is no objection to his acting. The question is not, whether in fact he was or was not biassed. The Court cannot inquire into that. There is something between these two propositions. In the administration of justice, whether by a recognised legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biassed. To use the language of Mellor, J., in *Reg.* v. *Allan,* 4 B. & S. 915, at p. 926, 'It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives'. I think that if you take that phrase literally it is somewhat too large, because I know of no case in which a man cannot be suspected. There are some people whose minds are so perverse that they will suspect without any ground whatever. The question of incapacity is to be one 'of substance and fact', and therefore it seems to me that the man's position must be such as that in substance and fact he cannot be suspected. Not that any perversely minded person cannot suspect him, but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed".

In *Franklin and Others* v. *Minister of Town and Country Planning* [1947] 2 All E.R. 289, Lord Thankerton defined "bias" as follows in delivering the judgment of the House of Lords in England (at p. 296):-

"I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded

as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute".

When the *Sussex Justices* case was referred to with approval by Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon and Others* [1968] 3 All E.R. 304, at p. 309, he added (at p. 310):-

"Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: See *R.* v. *Camborne Justices, Ex Parte Pearce* [1954] 2 All E.R. 850; *R.* v. *Nailsworth Justices, Ex Parte Bird* [1953] 2 All E.R. 652".

In the *Nailsworth Justices* case, Lord Goddard C.J., after stressing that "it is most important that justice should be seen to be done", observed (at p. 654):-

"Objection cannot be taken to everything which might raise a suspicion in somebody's mind—As Day, J., said in *R.* v. *Taylor etc. JJ. Laidler Ex p. Vogwill* (14 T.L.R. 185): 'anything at any time which could make fools suspect'. It is not something which raises doubt in somebody's mind that is enough to cause an order or a judgment of justices to be set aside. There must be something in the nature of real bias. The fact that a person has a proprietary or a pecuniary interest in the subject-matter before the Court which he does not disclose, has always been held to be enough to upset the decision of the Court, but merely that a justice may be thought to have formed some opinion beforehand is not, in my opinion, enough to do so".

Next year in the *Camborne Justices* case, Slade J., after making a review of the relevant case-law, during which he referred also to the judgment of Lord Hewart in the *Sussex Justices* case, said the following (at p. 855):-

"In the judgment of this Court the right test is that prescribed by Blackburn, J. (L.R. 1 Q.B. 233) in *R.* v. *Rand* namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the

proceeding, a real likelihood of bias must be shown. This Court is, further, of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. ... While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this Court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done".

The above dictum of Slade J. was referred to with approval by Lord Parker, C.J. in *R.* v. *Consett Justices, Ex Parte Postal Bingo Ltd.* [1967] 2 Q.B. 9, at p. 19.

In any event, "if a party to a cause before justices is aware that a magistrate or the magistrates' clerk is interested in the subject matter of the cause and nevertheless expressly or impliedly assents to his acting therein, that party cannot afterwards object" (see Halsbury's Laws of England, 3rd ed., vol. 11, p. 69, paragraph 123).

In the case of *Sussex Justices, supra,* where a conviction was quashed on the ground of the possibility of bias, Lord Hewart, C.J. ended his judgment as follows (at p. 259):–

"In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the Applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed".

In a later similar case, *The King* v. *Essex Justices* (*Sizer and Others*), *Ex parte Perkins* [1927] 2 K.B. 475, Avory, J., stated the following (at p. 489):–

"The question is whether in these circumstances the Applicant can be said to have waived his right to make the objection. In answering that question we ought, in my view, to act upon the principle laid down by Lord

Romilly M.R. in *Vyvyan* v. *Vyvyan* in these words: ' Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim' ".

Also, in the *Nailsworth Licensing Justices* case, *supra*, one of the reasons given for refusing to make an order of certiorari to bring up and quash a decision was that there was ample opportunity for the relevant objection to have been raised before the decision in question was given.

In the present case there can be no doubt whatsoever that the Appellants, and their counsel, were fully cognizant of the fact that the Judge who committed the Appellants for trial was one of the members of the trial Court and no objection was raised by or on behalf of the Appellants to his presence on the bench; therefore, they must be taken to have waived any complaint in this connection and for this reason they cannot now pursue such a complaint on appeal.

Anyhow, even if they could do so, we do not think that their convictions should be set aside on this ground, because the functions of the Judge concerned at the preliminary inquiry and at the trial were distinctly different. In the former instance he did not have to evaluate the evidence as regards credibility (see section 94 of Cap. 155), whereas at the trial credibility was a primary consideration both for the purpose of deciding whether there had been made out a *prima facie* case by the prosecution (see section 74 (1) (b) of Cap. 155 read in the light of *R.* v. *Kara Mehmed,* 16 C.L.R. 46, at p. 49) and for the purpose of deciding at the end of the trial whether the Appellants were guilty or innocent.

The basic difference between a preliminary inquiry and trial by an Assize Court is amply shown by the prescribed (by section 93(c) of Cap. 155) mode of addressing an accused at a preliminary inquiry, if the Judge holding the inquiry considers, after the examination of the witnesses called on behalf of the prosecution, that there are sufficient grounds for committing him for trial; it is as follows:-

" This is not your trial. You will be tried later before the Assize Court. You will then be able to conduct your

defence and call any witnesses on your behalf: Unless you wish to reserve your defence, which you are at liberty to do, you may now either make a statement not on oath or give evidence on oath and in any case call witnesses on your behalf. If you give evidence on oath you will be liable to cross-examination. Anything you may say whether on oath or not will be taken down and may be used in evidence at your trial before the Assize Court".

That the preliminary inquiry is not in any sense the trial of an accused person has been the view taken in England, too:-

In *The Queen* v. *Sir Robert Carden,* 5 Q.B.D. 1, Cockburn C.J., in dealing with the issue of the province of a magistrate before whom a person is brought, with a view to his being committed for trial or held to bail, said (at p. 6):-

"It is no part of his province to try the case. That being so, in my opinion, unless there is some further statutory duty imposed on the magistrate, the evidence before him must be confined to the question whether the case is such as ought to be sent for trial, and if he exceeds the limits of that inquiry, he transcends the bounds of his jurisdiction".

Counsel for the Appellants, in arguing the issue of the propriety of the composition of the Assize Court, which tried the Appellants, have referred us to the case of *Powell,* 37 Cr. App. R. 185, where Lord Goddard C.J. stated (at p. 186):-

"We cannot say that there is any reason in law why the chairman of committing magistrates who happens to be a Chairman or Deputy-Chairman of Quarter Sessions should not sit to deal with the case at Quarter Sessions in that capacity, though no doubt it is not altogether desirable that that should take place and, as a general rule, if it so happens that a case has been committed by bench on which either the Chairman or the Deputy-Chairman of Quarter Sessions was sitting, it should be arranged that the prisoner when tried on indictment should be brought before one of the Courts in which that magistrate is not presiding. But it is not a ground in law on which we could interfere with the sentence and, in this case, there is no question about the conviction because he pleaded Guilty".

It should be observed that the *Powell* case was decided by the Court of Criminal Appeal in England in 1953, after the *Sussex Justices* case, *supra*, had already been decided in 1924; it follows that if the Court in the *Powell* case had felt that the participation in the trial of the chairman of committing magistrates had resulted in justice not being "seen to be done" then it would not have been held that there existed no ground in law for allowing the appeal in that case. Also, there had already been decided, much earlier, the case of *R.* v. *Rand*—(which is referred to in the above quoted passage from the judgment of Slade J. in the *Camborne Justices* case, *supra*, as having correctly laid down that "a real likelihood of bias must be shown")—and if, in the opinion of the Court of Criminal Appeal, such a likelihood had been shown to exist in the *Powell* case, it would not have been held that in law the appeal in that case could not succeed.

The *Powell* case should not be looked at in isolation but its significance should be examined in the light of other relevant case-law:-

In the case of *Sharman*, 9 Cr. App. R. 130, in relation to an application for leave to appeal against sentence, an adjournment was asked on the ground that the Judge who tried the case was a member of the Court of Criminal Appeal; but the Court refused the adjournment. In the report of the *Sharman* case there appears the following note (at p. 130):-

> " In the preceding case (*Bennett and Newton*, tried by Ridley, J.) the Court granted an adjournment, no reason being stated, and the Crown not objecting".

Later, when the case of *Bennett and Newton*, 9 Cr. App. R. 146, was determined, the following was recorded at the end of the judgment (at p. 157):-

> " Darling J. said that on August 15 (see p. 130 n. above) the case was in the list, but defendants wished it to be postponed because the trial Judge was then a member of the Court. There was, of course, no statutory objection to the Judge sitting, and it would almost be impracticable to prohibit this unless there were more Judges in that division. There was always an investigation by a single Judge before a case came into that Court, and there must be at least two other Judges with the trial Judge. It was

a great mistake to suppose that the trial Judge would be inclined to set up his view against the opinions of his brethren or 'to fight for his own hand'. The trial Judge in this case at once assented to the adjournment. Lord Alverstone had always strongly objected to such applications being granted as matters of course".

In the later case of *Lovegrove,* 35 Cr. App. R. 30, the cases of *Bennett and Newton* and *Sharman* were referred to and it was stated by Lord Goddard C.J. (at p. 32):-

" There are cases in which no doubt it would be desirable that the trial Judge should not sit"—(on appeal)—"but in a case where the ground of appeal was nothing but an argument by the Appellant that the verdict was wrong, there was no ground whatever for the trial Judge not sitting; in fact, it might be very useful sometimes that he should".

Even though in England the verdict is a matter for the jury, the Judge has also a very important role, in this respect, by assisting the jury with his summing-up to reach a verdict. As it was stated in *R.* v. *Sparrow* [1973] 2 All E.R. 129, by Lawton L.J. (at p. 135):-

" The object of a summing-up is to help the jury and in our experience a jury is not helped by a colourless reading out of the evidence as recorded by the Judge in his notebook. The Judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his experience as to the significance of the evidence".

We have referred to cases such as those of *Sharman, Bennett and Newton* and *Lovegrove,* not in order to deal with the issue whether a Judge can be involved in the determination of one and the same case both at the trial and on appeal (and in *The Republic* v. *Vassiliades* (1967) 3 C.L.R. 82, it was held that a Judge of the Supreme Court from whose order an appeal was made should not sit on the appeal) but in order to point out that if it was not deemed improper in certain cases, by the Court of Criminal Appeal in England, for the trial Judge to participate in the relevant appeal proceedings, it would a fortiori

be not at all improper—bearing in mind the analogy of the respective relationships between a trial and a subsequent appeal, and a preliminary inquiry and a subsequent trial—for the Judge who has held the preliminary inquiry in a case to be a member of the Assize Court to which he has committed such case for trial.

Before we conclude our references to relevant case-law we think that we should refer, also, to *Morgan* v. *Bowker* [1964] 1 Q.B. 507, the relevant part of the headnote of which reads as follows:-

> "On May 28, 1962, cinematograph films, printed matter and photographs which were found on the premises of the defendant were brought before justices pursuant to section 3(3) of the Obscene Publications Act, 1959. The justices viewed the films and examined the printed matter and photographs with the result that they issued a summons under subsection (3) for the defendant to show cause why a number of the articles should not be forfeited. The same justices sat to hear the summons when objection was taken on behalf of the defendant that the justices could not be expected to approach the matter with open minds and that the case should be heard by different justices. The justices decided they could properly hear the summons. After considering the evidence, the justices came to the conclusion that a great majority of the articles were likely to be published by being sold to anyone who ordered them by post... The justices decided that the effect of the articles was to tend to deprave and corrupt persons who were likely to see them and that they were obscene and, accordingly, ordered the forfeiture of the articles".

It was held that "although the justices had come to a *prima facie* view when considering whether the articles should be the subject of proceedings under section 3(3) of the Obscene Publications Act, 1959, they were not determining the issue at that stage, so that there can be no valid objection to the same justices hearing the summons when it was issued". Lord Parker C.J. said (at p. 515):-

> "For my part, I feel that there is nothing whatsoever in this point, and I would go further and say that it is a point that ought never to have been taken. Justices must come to a *prima facie* view when the articles are brought before

them, as these justices did. They are not determining the matter; they are merely deciding whether a summons should issue. It seems to me quite wrong to suggest that because they have taken a *prima facie* view, they are in some way biased or incapable of approaching with an open mind the hearing of the summons. I feel that there is nothing whatsoever in that objection".

In the light of all the foregoing we think that the "*coram non judice*" issue raised by counsel for the Appellants cannot be decided in their favour. In our opinion the participation in the trial of the Judge who held the preliminary inquiry cannot properly lead to the conclusion that any real likelihood of bias could be said to exist or that justice was not seen to be done, or even that it was undesirable for such a course to have been adopted; it is a well-known established practice in Cyprus for Judges who have committed persons for trial by an Assize Court to take part in the trial by such Assize Court, as Judges in the District Courts are relied on, due to their training, to be fully capable of keeping entirely separate in their minds the difference between the function of a Judge holding a preliminary inquiry and the function of a Judge trying a case.

Regarding, in particular, the question of the ruling by the committing Judge, at the preliminary inquiry, about the receivability as evidence, at that stage, of the statement made to a psychiatrist, Dr. Matsas, by Appellant 2, we would like to stress that we cannot accept that such Judge, when the issue of admissibility of the said statement had to be decided by the Assize Court at the trial in a definitive manner, and not merely provisionally for the purpose of recording all apparently relevant evidence at the preliminary inquiry, would be inclined "to fight for his own hand", just as the trial Judge was not regarded, by Darling J., as being inclined to do so on appeal in the *Bennett and Newton* case, *supra*.

We shall proceed now to deal with the merits of the Appellants' appeals:

It is necessary to mention, at this stage, as briefly as possible certain salient facts of this case:-

On the night of the 29th to the 30th of August, 1972, at about 45 minutes past midnight, an anonymous telephone call was received at Paphos Gate Police Station in Nicosia to the effect

that on the Morphou–Dhiorios road four persons were assaulting another person; the informer, on being asked to give his name, said that he would give a statement to the police later.

Immediately police patrols set off from Morphou and Myrtou searching the road in question. At a place where the road goes through a forest the police found, in the forest and about fifteen feet away from the road, a parked car facing towards the road; the car was not hidden, in any way, in the forest, but it was parked in such a manner as to be easily visible by anybody who would happen to be passing along the road.

After the policemen had alighted from their vehicles and as they were proceeding towards the car they heard groans and, as a result, they found in the forest, at a distance of about fifteen feet away from the car, Appellant 1 lying on the ground and tied on to a tree.

On being asked who he was and what had happened he stated his name and said that he had been stopped by four unknown persons, who had asked him to drive them to Troodos, but he had told them that he could not do so as he had with him his wife who was pregnant.

The police found in the car, on the front passenger's seat, the dead body of the wife of Appellant 1. According to medical evidence the cause of her death was violence which caused a fracture of the skull and intracranial haemorrhage. The doctor who carried out the post-mortem stated that the fracture of the skull could have been caused by hitting her head on hard ground. On the forehead, chin and throat of the deceased there were found small scattered abrasions; also both of her cheeks and her right elbow were bruised and abraded. The deceased was in an advanced state of pregnancy.

Earlier on, in the evening of the 29th August, 1972, Appellant 1 had driven with his wife from their village, Vassilia, to Kato Zodhia, a village near Morphou, in order to join in a celebration with friends; on their way back to Vassilia they would have to drive along the Morphou–Dhiorios road and pass by the scene of the crime; they left Kato Zodhia, on their way home, at about 10 p.m.

Appellant 1 was taken by the police to the Nicosia General Hospital, where he was examined at about 2.30 a.m. of the 30th August, 1972. Nothing serious was detected, his blood–

pressure, pulse and heart-beat were normal, and he appeared to be alert. He was examined again, later, and no external injuries were found on him except four linear scratches on the top part of his right arm near the shoulder and two linear scratches on his chest; according to expert evidence these scratches were most probably caused by human finger nails. The Appellant was complaining of dizziness and stiffness in the neck and so he was kept in the hospital under observation where he was examined again by a specialist; an x-ray examination did not disclose anything wrong.

Next to the asphalted part of the road, and very near to where the car of Appellant 1 had been found parked, there were discovered by the police tyre impressions which expert evidence established that they were of the pattern of the tyres fitted on a car No. ZEC488. This finding has not been disputed at all during the hearing before us, nor has it been disputed that the said car, on that night, was in the possession of Appellant 2. At about 10.25 p.m. of the night of the crime this car was seen parked on the right-hand side of the road, as one drives towards Morphou, and at a short distance away from the place where the car of Appellant 1 was parked. It has been found by the trial Court—and this finding has not been challenged on appeal —that at the material time car ZEC488 was driven to the scene of the crime by Appellant 2 and that it was parked by him where it was seen as aforesaid.

In the light of evidence adduced at the trial—to which we shall refer later on in this judgment—the Assize Court held that the two Appellants had met at the scene of the crime intentionally, according to a pre-arranged plan, for the sole purpose of killing the wife of Appellant 1, and that they in fact did kill her. It was also found that it was Appellant 2 who tied on to a tree Appellant 1, in order to make it appear that he had been the victim of an attack by unknown persons, as he alleged on being found by the police.

Learned counsel, who appeared for the Appellants, have argued, forcefully and with ingenuity, that the trial Court erred in convicting the Appellants of the murder of the deceased because there was no evidence connecting either of them beyond reasonable doubt with the death of the deceased; and, in the alternative, that, in any event, there had not been established beyond reasonable doubt, against either of them, that the murder was a premeditated one.

The case-law relevant to the principle that guilt in a criminal case has to be proved beyond reasonable doubt has been amply reviewed in the judgments delivered in *Charitonos and Others* v. *The Republic* (1971) 2 C.L.R. 40; in this respect it is useful to refer, also, to the subsequent recent decision of the House of Lords in England in *McGreevy* v. *Director of Public Prosecutions* [1973] 1 W.L.R. 276, where Lord Morris of Borth-Y-Gest stated in his judgment the following (at p. 285):-

> " In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary commonsense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt".

What applies, according to the above dictum, to trial by a jury, applies, in our view, with even greater force to a trial by an Assize Court, composed of three Judges, who are much more experienced by training and education in assessing evidence.

The question of law which was submitted for decision to the House of Lords in the *McGreevy* case, *supra*, was as follows (see p. 279 of the report):-

> " ' Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial Judge

not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion' ".

The terms in which the question of law, above, was framed bring inevitably to our minds the case of *R.* v. *Mentesh,* 14 C.L.R. 232, which has been referred to in argument by counsel for the Appellants and where (at p. 245) it is stated that:–

" It was laid down in *R.* v. *Hodge,* 2 Lew. C.C. 227, that 'where a criminal charge depends on circumstantial evidence, it ought not only to be consistent with the prisoner's *guilt but inconsistent with any other rational conclusion'.* The principle embodied in this decision is accepted as sound law by the Editors of the English and Empire Digest, Halsbury's Laws of England, and by the following authorities on the Law of evidence, Taylor, Wills, Phipson, Best and Roscoe".

As it appears from the decision in the *McGreevy* case (at p. 282) the House of Lords took the view that the *Hodge* case did not lay down what could be described a new "rule" of law, but it only furnished a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial.

In the *McGreevy* case the following was stated (at p. 282) regarding circumstantial evidence:–

" In Kenny's Outlines of Criminal Law, 19th ed. (1966), p. 466, paragraph 510, it is said:

' No distrust of circumstantial evidence has been shown by English law. It does not even require that direct evidence shall receive any preference over circumstantial'.

Memorable instances are cited of important capital convictions, whose correctness is unquestioned, that were based solely on indirect evidence. There is a quotation of some words used by Shaw C.J. in the American case of

the trial of Professor Webster for murder in 1850 (*Commonwealth* v. *Webster* (1850) 5 Cushing 295, 320) in reference to the reasonable doubt of a jury:

> 'It is that state of the case, which... leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge... For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances... but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason judgment, ... This we take to be proof beyond reasonable doubt; because if the law, ... should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether' ".

Though the Appellants were jointly charged and convicted, in dealing with their appeals we have, of course, not lost sight of the fact that the conviction of one of them might be set aside while that of the other might be affirmed (see *Mandis and Another* v. *The Queen,* 19 C.L.R. 155), or that it might be found —in relation to the issue of premeditation or otherwise—that the killing of the deceased totally or substantially varied from any common design of the Appellants (see *Loftis* v. *The Republic*, 1961 C.L.R. 108).

The judgments of the House of Lords in *Director of Public Prosecutions* v. *Merriman* [1972] 3 All E.R. 42, are very helpful in appreciating fully the nature of a "joint charge", such as the one on the basis of which the two Appellants were convicted:

Lord Morris of Borth-Y-Gest said in his judgment (at p. 46):-

> " ... it is important to consider what is meant by a 'joint charge'. In my view, it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count. Each person is, however, being charged with having himself committed an offence. All crime is personal and individual though there may be some crimes (cf which conspiracy is an example) which can only be committed in co-operation with others. The offences charged in the present case were individual charges against each of the brothers.. Each is a separate individual who

cannot be found guilty unless he personally is shown to have been guilty. The fact that in one count of an indictment it is set out that A and B wounded C does not warrant the conviction of either A or B unless individual guilt is established. It might be established in different ways. A's guilt might be proved by showing that he wounded C. A's guilt might be proved by showing that though he did not himself touch C he caused and directed B to do so; or it might be shown that A and B joined together with a common purpose of wounding C so that in effecting that common purpose each was but the accepted agent of the other. So, unless there is some special statutory provision, there is no magic in speaking of a joint charge. If the language of the law is to be used then a joint charge is also a several charge".

and later on, he added (at p. 48):-

"In connection with the rule to which I have referred the following question arises. If A and B are charged together with wounding with intent does that mean that the offence charged is a different offence from what it would be if they were separately charged with wounding with intent. In my view, for the reasons which I have already given it is not. Although charged together in one count each one is being separately charged and each is only being charged with the one offence. The guilt of A or of B might be proved by showing that the particular accused himself took direct action or it might be proved by showing that he committed his offence by using the hand of another. But if guilt is proved it is guilt of the offence charged and of no different offence and of no more than of the one offence charged in the count".

Viscount Dilhorne said in the same case (at p. 55):-

"A similar case, *R.* v. *Fenwick* ((1953) 54 SRNSW 147) had come before the Court of Criminal Appeal, consisting of Street CJ, Owen and Heron JJ, in New South Wales. Unfortunately the attention of the Court in *Holley* ([1969] 53 Cr. App. R. 519) was not drawn to it. There two persons were charged in one count with rape, it being alleged that they had each raped the same girl when driving her home from a dance. The trial Judge told the jury that the Crown's case was presented in two ways, first that 'they acted in concert, they acted in pursuance of a common

design' and, secondly, that each was individually guilty of rape ' independently of whether or not they were acting with a common purpose'. One ground of appeal by each of the accused was that it was not open to the jury, if they found the absence of a common design, to consider the individual cases of the accused as separate charges had not been preferred against each of them. Street CJ (at p. 152) said that the point taken was technical and ' I think it can be dealt with by an equally technical answer. Indictments are to be read jointly and severally...' and after referring to Hale's Pleas of the Crown (Vol. I, p. 46) and *R.* v. *Benfield and Saunders* ((1760) 2 Burr 980), he said:

> ' It is clear, therefore, I think, that an indictment of this nature may be taken—indeed, in my experience that has been the common practice in cases such as this—as being a joint and several indictment of the accused, where the matters arise out of the one transaction...'

Owen and Herron JJ agreed that the appeal should be dismissed, Owen J saying at the end of his judgment (at p. 155) that if the trial Judge —

> ' had made no reference at all to common purpose or the lack of it, but had instead told the jury that the only matter with which they need concern themselves was the issue of consent or not consent—because the parties were in agreement that that was the only matter in contest—no valid objection could have been made to the summing-up'.

In my view, no valid objection can be made to the summing-up of His Honour Judge Steel in this case and the dicta which indicate the contrary in *Scaramanga* ([1963] 2 QB 807) *Parker* ([1967] 2 QB 248) and *Holley* ([1969] 53 Cr. App. R. 519) should be disregarded. In my opinion, a joint charge of an offence against two or more persons, the offence being alleged to have been committed by each on the same and not separate occasions, and when they were together, does not require a direction that the accused must have a common purpose or design, or that one is to be regarded as a principal and the others as aiding and abetting".

Lord Diplock said the following in his judgment (at p. 59):–

" The source of the confusion lies, I believe, in the equivocal use of such expressions as 'joint offence' and 'joint charge of one offence'. It is hornbook law that, as Hawkins put it (Pleas of the Crown (8th Edn. 1824), vol. 2, p. 331): '... the offence of one man cannot be the offence of another, but everyone must answer severally for his own crime' ... But when two men are aiding one another in doing physical acts with criminal intent, though the *mens rea* of the separate offence of each is personal to the individual charged, the physical act of either one of them is in law an *actus reus* of the separate offence of each. A 'joint offence' of two defendants means no more than that there is this connection between the separate offences of each, so that as against each defendant not only his own physical acts but also those of the other defendant may be relied on by the prosecution as an *actus reus* of the offence with which he is charged.

This connection between the separate offences of two defendants has from very early times been treated as the justification for charging two defendants in the same indictment and, after the introduction of separate counts in an indictment, for charging them in the same count. To quote Hale (Pleas of the Crown (1778) vol. 2, p. 173):

> ' If there be several offenders, that commit the same offence, though in law they are several offences in relation to the several offenders, yet they may be joined in one indictment, as if several commit a robbery, or burglary, or murder' ".

and (at p. 60) he added:–

" I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent. This was held to be the law by Street CJ and Owen and Herron

JJ in the Supreme Court of New South Wales in *R.* v. *Fenwick* ((1953) 54 SRNSW 147)—a case of rape. I respectfully agree with their reasoning".

In relation to the joint trial of the Appellants, it is necessary to deal with the submission of counsel for Appellant 1 that his client was prejudiced by the joint trial, because though, according to counsel, the evidence admissible in law against Appellant 1 was not sufficient to establish his guilt beyond reasonable doubt, the trial Court in examining such evidence was influenced by the contents of statements made, prior to the trial, by Appellant 2, which incriminated Appellant 1 but were not in law evidence against him, and thus the trial Court came to feel certain about the guilt of Appellant 1.

We have been referred to *Nestoros* v. *The Republic,* 1961 C.L.R. 217, where a retrial was ordered because, even though the trial Judges in their judgment had stated that statements made by two co-accused of the Appellant were only evidence against their makers, it was thought by the High Court that it was impossible for the minds of the trial Judges not to have been affected. A perusal of the report of the *Nestoros* case shows that there were also other matters which led the High Court to order a retrial on the ground that the " trial was unsatisfactory in the circumstances", such as misreception of evidence regarding what an accomplice told the police in the absence of the accused and the fact that the Appellant, who was illiterate, was left without the services of counsel at various stages of the trial. We do not consider the *Nestoros* case as a precedent which binds us to order a retrial in the present case as well; each case has to be decided on its own merits and in the present case not only it is absolutely clear from the reasoning set out in the very careful judgment of the trial Judges that they were not affected by the statements of Appellant 2 in convicting Appellant 1, but that they went further and they convicted Appellant 2 without relying on his own statements, as there was, in their opinion, other overwhelming evidence warranting his conviction.

In the *Merriman* case, *supra,* Lord Morris of Borth-Y-Gest had this to say in relation to joint trials (at p. 46):-

> " Indeed, if in one count there is a charge that A and B wounded C it is always possible for either A or B to submit that the circumstances are such that each should be

separately tried. The Court would decide what course would in all the circumstances be fair and reasonable and in the interests of justice.

My Lords, as was pointed out in *R.* v. *Assim* ([1966] 2 All E.R. 881, [1966] 2 QB 249), questions of joinder, whether of offences or of offenders, are very considerably matters of practice on which the Court unless restrained by statute has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is essentially a field in which rules of fairness and of convenience should be evolved and where there should be no fetter to the fashioning of such rules. The current rules in regard to indictments are really a reflection of what has been thought to be fair; fair in the interests of the community in the preservation of law and order; fair in the interests of those who are charged and are tried".

It is to be noted that counsel for Appellant 1 did not submit before the trial Court that he should be separately tried; before the commencement of the trial the statements made by Appellant 2, being part of the record of the preliminary inquiry, were known to counsel for Appellant 1 and, therefore, if any prejudice to his client was anticipated because of such statements, it was up to counsel for Appellant 1 to raise the matter before the Assize Court right from the outset.

Related to the matter of the joint trial is the submission of counsel for the Appellants that it was wrong for the trial Court to deal, to a great extent, with the issue of premeditation by referring in this connection to both Appellants together:

In *Rex* v. *Shaban*, 8 C.L.R. 82, it was held (at p. 84) that:-

" The question of premeditation is a question of fact.

A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention, to reflect upon it and relinquish it.

Much must depend on the condition of the person at the time—his calmness of mind, or the reverse.

There might be a case in which a man has an appreciable time between the formation of his intention and the carry-

ing of it into execution, but he might not be in such a condition of mind as to be able to consider it.

On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation".

We might, also, usefully refer to the following passage from *Halil* v. *The Republic*, 1961 C.L.R. 432, where Zekia J., as he then was, said (at p. 434):-

" The phrase premeditated homicide or murder, unlike the phrase 'malice aforethought' is not a term of art and it has to be taken in its ordinary meaning. When a person makes up his mind either by an act or omission to cause the death of another person and notwithstanding that he has time to reflect on such decision and desist from it, if he so desires, goes on and puts into effect his intent and deprives another of his life that person commits a premeditated homicide or murder which entails capital punishment".

That the issue of premeditation is a question of fact, depending on the particular circumstances of each case, is borne out by cases such as *Koliandris* v. *The Republic* (1965) 2 C.L.R. 72, *Aristidou* v. *The Republic* (1967) 2 C.L.R. 43 and *Ioannides* v. *The Republic* (1968) 2 C.L.R. 169.

In the present case it was natural, as the case for the prosecution was that the killing of the deceased took place on the basis of a pre-arranged plan between the Appellants, that the trial Court, in dealing with the issue of premeditation as a question of fact, would have to deal with such issue as regards both Appellants together in so far as there was concerned evidence tending to establish the said pre-arranged plan, from the existence of which premeditation could be inferred in relation to each one of the Appellants; we do not, therefore, think that the trial Judges erred in this respect in any way.

Another matter, which relates to both Appellants, and with which this Court may deal with at this stage, is the question of motive:

It was submitted by counsel for Appellant 2 that it was erroneous on the part of the trial Court to find in relation to

this Appellant alternative motives for committing the crime of which he was convicted. It is correct that the trial Court found that the motive of this Appellant might have been either loyalty towards Appellant 1 who was his friend or the expectation of financial gain.

In relation to Appellant 1 it was submitted that only a "possible" motive was found by the trial Court, namely his relationship with a certain Katia Tsiakkoura coupled with his bad relations with his wife.

Facts which supply a motive for a particular act are items of circumstantial evidence; and they belong to the category of circumstantial evidence which is described by Cross on Evidence, 3rd ed., p. 30, as prospectant evidence.

It is well settled by, *inter alia, R.* v. *Treacy* [1944] 2 All E.R. 229, that, as stated by Humphreys J. (at p. 232):-

> "It is common knowledge nowadays not only to lawyers but probably to most laymen that on a charge of murder it is not necessary for the prosecution to adduce any evidence as to why the murder was committed. The prosecution is there to establish, if they can, by evidence, that it was committed and by the accused person. Why he did it is a matter which they are not called upon to prove at all".

It was not, therefore, necessary that the Assize Court should have reached absolutely definite conclusions regarding the motive of each of the Appellants; and it was open to the Assize Court to make findings about possible or alternative motives, constituting circumstantial evidence which tended, together with the rest of the evidence, to establish the guilt of each one of the Appellants.

In examining whether the conviction of each Appellant has to be interfered with, or be upheld, by this Court, in the exercise of its appellate powers, we do not have to follow necessarily the same pattern of dealing with the evidence as the one which was adopted by the trial Court; our task is to decide, under section 145(1) of the Criminal Procedure Law, Cap. 155, whether or not, having regard to the evidence adduced at the trial, the conviction is unreasonable or whether it should be set aside on the ground of a wrong decision on a question of law or on the ground that there was a substantial miscarriage of justice.

We shall begin with the conviction of Appellant 1:

It has been established by evidence that he was having sexual relations with Katia Tsiakkoura for a period of time which lasted until when the killing of his wife took place; the Appellant admitted these relations to his friend, Savvas Santis, who was a prosecution witness.

It is significant that on the 2nd September, 1972, Appellant 1, on being interrogated by the police after the murder, was asked what were his relations with Katia and he denied the existence of amorous relations with her; however, in a later statement to the police, on the 14th September, 1972, Appellant 1 admitted that he had had regularly sexual relations with her, but he alleged that such relations with her had lasted for only one month and that their amorous relationship had ceased about four months prior to the date of the statement; that was an allegation on his part which we know that it was untrue, in view of the evidence given—as mentioned—by his friend Santis.

At about the same period of time, when Appellant 1 was having regularly sexual relations with Katia, there existed a dispute between the Appellant and his wife's family regarding the share of his wife in some inherited property; the matter was settled shortly before the crime, through the purchase of his wife's share by her sister. Much argument has been advanced as to whether this property dispute was a genuine grievance of Appellant 1 or a mere pretext for estrangement from his wife in view of his relationship with Katia. We do not have to go further into this aspect because the fact remains that, whatever was the true cause of the friction, the Appellant was linking the property dispute to a declared intention of his to leave his wife: It was stated in evidence, again by his aforesaid friend Santis, that Appellant 1 told him in July 1972, that is about a month before the crime, that he did not want his wife and he was going to divorce her, the reason being that he had been promised by her family certain property, which they would not give to him, and that he did not want to be treated in such a manner by them. Evidence has also been given by a brother of the deceased that in August, 1972, Appellant 1 met him and raised the question of the disputed property and that at the end of their discussion Appellant 1 said that he would "send his wife back".

Thus, immediately before the crime Appellant 1 was entangled, and had sexual relations, with another woman and he did

not seem to be attached to his wife.

On the 20th of August, 1972, about just over a week before the crime, Appellant 1 left his village, Vassilia, for Limassol, via Platres. Shortly after midnight, in the night of the 20th to the 21st August, certain prosecution witnesses, while they were travelling by car on the Nicosia to Myrtou road and were passing by a restaurant known as "Anemones", noticed a woman, who turned out to be Paradisa, the wife of Appellant 1, running towards the road and signalling to them to stop. She was being followed by a man who was, subsequently, identified to be Appellant 2. Paradisa was barefooted, crying, her hair was dishevelled, there was earth on her, she was panting, trembling and upset; there were scratches and other injuries on her throat. She said, in the presence and within the hearing of Appellant 2, that he had tried to kill her, but he denied this allegation. When interrogated by the police on the 2nd September, 1972, Appellant 1 said that when he returned to his village on the 21st August, 1972, he noticed a bruise on the face of his wife and abrasions on her throat and that, when he asked her what had happened, she replied that she had quarrelled with her mother and her sisters regarding a dispute about property. Appellant 1 told the police that he did not go to his mother-in-law or sisters-in-law in order to ask what had happened, as he was waiting to meet the brother of Paradisa, Georghios, who was the administrator of the estate of the deceased father of his wife, in order to discuss the matter with him; he admitted, however, during his interrogation by the police on the 2nd September, 1972, that on the 22nd August, 1972, he met his brother-in-law Georghios, at Vassilia, but that he did not mention anything to him about injuries caused to his wife.

On the 23rd August, 1972, Appellant 1 met one of his own brothers, Panayiotis, and, according to the evidence given by him as a prosecution witness, he asked Appellant 1 about a bruise which he had noticed on the cheek of Paradisa and he received the reply that it was due to a beating by Appellant 1 himself. When he asked why Appellant 1 did this, Appellant 1 replied that it was for family reasons and that his brother should not mix in them.

The above behaviour of Appellant 1 immediately after the "Anemones" incident, at which it is obvious from the evidence before us that Appellant 2 had attacked Paradisa in an obviously very sinister, indeed, manner, constitutes very significant

evidence regarding the attitude of Appellant 1 very shortly before the crime.

The evidence about the behaviour of Appellant 1 in relation to the "Anemones" incident is admissible in order to establish the pursuance of a common purpose.

In Phipson on Evidence, 11th ed., p. 119, paragraph 263, it is stated that:

> " Where two persons are engaged in a common enterprise, the acts and declarations of one in pursuance of that common purpose are admissible against the other. This rule applies in both civil and criminal cases and in the latter whether there is a charge of conspiracy or not. It is immaterial whether the existence of the common purpose or the participation of the person therein be proved first although either element is nugatory without the other".

In *Reg.* v. *Chapple and Bolingbroke*, 17 Cox C.C. 455, the relevant part of the headnote reads as follows:-

> " Upon the trial of an indictment in which two persons were charged, the one, a bankrupt, with disposing of goods with intent to defraud his creditors, and the other, the bankrupt's brother-in-law and manager, with aiding and abetting him therein:
>
> Held, that statements made by the bankrupt at the time he obtained the goods were admissible as evidence against both the prisoners, although such statements were made in the absence of the other prisoner:
>
> Held also, that the jury might infer from the relationship proved to have existed between the parties that the prisoner who had received the goods from the bankrupt, and who was therefore charged with aiding and abetting, was at the time he received such goods aware of the fact that the goods had not been paid for by the bankrupt".

Also, in *R.* v. *Pridmore*, 29 T.L.R. 330, it was held that the jury could infer a common purpose from the actions of two accused persons.

We are of the view that the above described behaviour of Appellant 1, after he had noticed the injuries on his wife on the 21st August, 1972, could be treated, by the trial Court, as

indicative of knowledge on his part of what had happened at the "Anemones" incident; also, it is conduct constituting circumstantial evidence which could be properly taken into account regarding the existence of a common design of the Appellants with very sinister implications as regards the fate of the wife of Appellant 1.

On the 28th August, 1972, which was the eve of the crime, Appellant 1 was seen in the evening driving a car at Kapouti village, which lies on the road from Morphou to Dhiorios. He was proceeding towards Dhiorios and towards also, consequently, what was to be later the scene of the crime. He was identified by a prosecution witness who knew him well; Appellant 1 was at the time with another person whom this witness did not know.

On the 5th September, 1972, the police asked Appellant 1 to give a statement about his movements on the 28th August, 1972, and though he gave a very detailed, indeed, account, he omitted any mention about his presence at Kapouti; on the contrary, in relation to the time when he was seen there he said that he was at his village, Vassilia, many miles away, at the coffee-shop of a friend of his.

Subsequently, when he chose to make a statement from the dock during the trial, he adopted all his previous statements to the police, and he proceeded to add that when he had been asked by the police to give an account of his movements on the 28th August, 1972, he did not recollect what exactly he had done on that day, and that the police had not asked him, in particular, whether or not he had been to Kapouti; he continued his statement from the dock by explaining that having heard the evidence given he had reflected and remembered that he had indeed been to Kapouti on that day, in order to transact some business regarding property.

The initial failure of Appellant 1 to disclose his trip to Kapouti, which is near the scene of the crime, on the 28th August, 1972, which was the eve of the crime, and his unsatisfactory explanation that he had failed to do so due to lack of recollection, though he was asked as early as the 5th September, 1972, to account for his movements on the 28th August, constitute in our view another element which might legitimately be taken into account in deciding whether or not his guilt has been established.

As already mentioned, when on the night of the 29th to the 30th August, 1972—the night of the crime—Appellant 1 was found by the police, he told them that he had been stopped by four unknown persons. He said that he did not recognize any one of these persons; that they were unknown to him; he said that they had with them a black Mercedes car, without number plates; the unknown persons asked him—according to his allegation—to take them to Troodos, but he refused on the ground that his wife was pregnant.

In a statement made to the police on the 30th August, 1972, soon after he had been found at the scene of the crime, he told the police that he was stopped by an unknown man, whom he noticed to be taller than him and wearing military uniform; that he stopped his car on the edge of the road, on his right-hand side; that the said man approached him and asked him to take him and his companions to Troodos because their car had broken down; that he replied that he could not do so as his wife was in an advanced state of pregnancy; that the unknown man insisted and that then there approached another three unknown persons in military uniforms; that the tall man opened the driver's door of the car of Appellant 1, grabbed him from the hair and hit him on the head with the butt of a pistol or revolver and that, then, he dragged him out of the car; that when he was hit he became dizzy and could not recollect what happened next; and that, when the tall man grabbed him from the hair and hit him, his wife, Paradisa, shouted "why are you hitting my husband?".

As already stated, Appellant 1 was found by the police tied on to a tree, near the car in which there was his deceased wife. According to evidence given for the prosecution, a policeman *on two occasions was tied in approximately the same manner* on to that tree, with a piece of string such as the one with which Appellant 1 was found tied, and on both occasions the policeman managed to break loose, after making a few movements; actually, on the occasion when he did this experiment at night he broke loose, breaking the string as well, within less than a minute.

The car of Appellant 1, in which the deceased was found, had all its doors and windows closed, and was no longer parked at the edge of the road—where Appellant 1 was, allegedly, stopped and attacked in a manner which made him so dizzy that he did not know what happened next—but it was found

parked in the forest, facing towards, and at a very short distance from, the road, with the ignition keys in place. The police searched the car and found that its inside was clean.

On the left-hand side of the car of Appellant 1, in line with the middle of the front door, and at a distance of about four feet away, there was noticed by the police an area of the ground which was damp; part of that area smelled of urine and the pine needles there appeared to had been disturbed. On the knickers worn by the deceased there were found fragments of pine needles and urine. Also, there were found pine needles in her hair, as well as on the front seat of the car, under her body. All the above facts taken together lead with certainty to the conclusion that the deceased was killed outside the car, at the place where the urine was found, and was then placed back into the car, and the doors of the car were closed; that is how it came to be that pine needles were found in the car under the body of the deceased.

The trial Court found that the version of Appellant 1 was untrue; and we are, also, of the same view; it is a story which cannot be considered as a reasonably possible account of what happened. What follows hereinafter shows why we have reached such a conclusion:

In a statement to the police, on the 14th September, 1972, Appellant 1 made a quite astounding, but also very significant, allegation, namely that Appellant 2 knew that on the night of the 29th August Appellant 1 would probably have a lot of money with him and that, therefore, Appellant 1 was suspecting that Appellant 2 was one of the four persons who had stopped him as he was returning home on the night of the crime. It is, indeed, unbelievable that Appellant 1 would not have recognized Appellant 2—who was well known to him—if he were one of those said four persons; and he never said that their faces were covered in any way; it is quite impossible to accept that he was telling the truth and yet it took him two weeks to decide to tell the police that he thought that one of the four "unknown" to him persons might have been Appellant 2.

According to Appellant 1 the unknown persons stopped him because they wanted him to take them to Troodos as their car had broken down. They, therefore, were not waiting there in order to attack him or his wife for the purpose of committing

robbery or for any other reason. But, as soon as Appellant 1 refused to comply with their request, giving an obviously valid explanation as to why he could not do so, namely the advanced state of pregnancy of his wife, the unknown persons used, allegedly, violence against Appellant 1 and his wife; and, then, they did not take the car of Appellant 1 in order to go to Troodos, but they seemingly got away in their own car which, apparently, had never really broken down. It is an incredible, in our view, story: Why, as the purpose of the unknown persons was to secure means of transportation, did they not take and drive away the car of Appellant 1, removing from it, if necessary forcibly, Appellant 1 and his wife, without molesting them more than it was inevitable? And, certainly, without killing her in the manner in which she was murdered?

Moreover, though they did not take the car of Appellant 1, they did not leave it where it had stopped, at the edge of the road, but they turned it round and parked it in the forest about fifteen feet away from the road in a position pointing towards the road, with the ignition keys on, and easily visible to any one passing along the road; and they took the trouble to close all its windows. If they had any reason to remove the car of Appellant 1 from its original position, in order to hide their crime, why did they not drive it further into the forest, so as to make its discovery difficult and to avoid detection as far, and as long, as possible?

We fail to see how it can be found to be reasonably consistent with the story of Appellant 1 the manner—already described—in which his wife was murdered: Even assuming that when she saw her husband being attacked she started shouting, and thus invited the wrath of his assailants, one would have expected her to have been hit, on the head or elsewhere, at the place where the car in which she was had been stopped, that is at the edge in the road, and not to have been murdered, in the manner in which this was done, in the forest, on the ground, near the place where the car of Appellant 1 was later found; or, even assuming that she was hit at the place where the car had been stopped, and she appeared to be dead or dying, and the assailants wanted to remove the car from the edge of the road so that she would not be found before they had safely gone very far away, why did they move the car only fifteen feet away from the road and wasted time by turning it round, and then parked it at a place from which it was visible from

the road, instead of driving it, with the woman in it, as far as possible deep into the forest?

As already mentioned, when Appellant 1 was examined after the crime, no injuries were found on him except four linear scratches on the top part of his right arm near the shoulder and two linear scratches on his chest, which were most probably caused by finger nails. It is very significant indeed that no sign at all, from the medical point of view, was noted on his head, which could be treated as an indication that he received the blow allegedly delivered to his head with the butt of a pistol or revolver, by the tall unknown man who stopped him; and that such a sign of some kind had to be found, if the blow was delivered as described by Appellant 1, is clear from the evidence of Dr. Kollitsis, who was called as a witness by the defence. Thus, the one reasonably possible conclusion is that such a blow was never delivered.

The blow on his head is a vital part of the story of Appellant 1, as regards what happened at the scene of, and at the time of, the murder of his wife; and once this event cannot be accepted as having actually occurred we cannot see how his version, as a whole, could be treated as credible; in particular, there collapses, as a result, the allegation that he lost consciousness due to the blow and so was later found, by the police, tied on to a tree without knowing what had intervened; and, since he was not knocked unconscious by a blow, it is a very significant incriminating fact that he did not break loose from the tied up position—as he could have done, according to evidence already referred to, in less than a minute—but he remained in such a position waiting for the arrival of the police; the only reasonably possible view is that he stayed there tied on to a tree, because that was part of a pre-arranged plan to pretend that he was an innocent victim, too, of an attack by others.

In the morning after the murder, on the 30th August, 1972, Appellant 1 was visited in hospital by his friend Santis and Appellant 1 appeared not to know that his wife was dead. He was visited again by Santis on the next day, the 31st August, and on that occasion Appellant 1 told Santis that he had read about the death of his wife in the newspapers. When Appellant 1, being still in hospital, was arrested by the police on the 2nd September, 1972, for the murder of his wife, he stated that he knew nothing and that it was the first time that he was hearing about it.

On the 7th October, 1972, he was formally charged with the murder of his wife and he replied that he did not do it and that neither had he premeditated such a thing.

It has been suggested that the statements made, as above, by Appellant 1 to his friend and to the police while he was in hospital, were due to a state of post concussional confusion caused by the blow on the head, which he allegedly received; and lengthy medical evidence was adduced in this respect; but such evidence is only of theoretical, and not of any actual value, since, as already pointed out, it cannot be true that he received the blow on the head; and, thus, his said statements, not being explainable on the ground of post concussional confusion, are consistent only with a sustained effort by Appellant 1 to keep up his pretence of innocence.

The *right* shoulder strap of the vest of Appellant 1 was found torn; also, the *right* sleeve of his shirt was torn off completely and four of his shirt's buttons were missing, the indications being that they were torn off forcibly. The damage to his clothing corresponds to the linear scratches caused by finger nails on his *right* arm, near his shoulder, and on his chest.

Both the damage to the clothing and the injuries are obviously due to a struggle with some other person or persons. They cannot be attributed to a fight with the four unknown persons, who have been brought into the picture by Appellant 1, because according to his story no such fight took place, as he was knocked out from the start by a blow on his head; but, they constitute evidence very much consistent with a struggle with the deceased, while she was trying to fight off the murderer.

Since the story of Appellant 1 about his encounter with the four unknown persons has to be rejected as a fabricated story the inescapable conclusion is that it was invented by him in order to cover up something; and as such story relates to the place where, and to the time when, his wife was killed, while being with him, the only possible view is that it was fabricated to cover up action of his, regarding the murder of his wife, which he wanted not to be detected.

As mentioned earlier in this judgment, there was seen, at the material time, parked in the forest, not far from the scene of the crime, a car which was in the possession of Appellant 2, and tyre impressions of the same car were found at the scene of the crime. The time at which the car was seen in the forest

was about 10.25 p.m. and the time when the deceased was killed was about 10.30 p.m. The relevant evidence leaves no doubt that Appellant 2 met Appellant 1 at the scene of the crime by previous arrangement, and the fact that Appellant 2 parked the car in the forest, at some distance away, in order to hide his presence there, shows that the purpose of this meeting was anything but an innocent one.

Taking into account the whole conduct of Appellant 1 before, at the time of, and after, the murder of his wife, plus the presence, as above, of Appellant 2 at the scene of the crime, we have to conclude, as the trial Court did, that Appellant 1 not only is guilty of the murder of his wife, but, also, that such murder was a premeditated one, having been committed on the basis of a pre-arranged plan which was duly implemented though in relation thereto Appellant 1 had had plenty of time to reflect and to decide to desist therefrom.

A matter which the trial Court had to consider as relevant to the issue of the existence of premeditation on the part of Appellant 1 was the fact that, according to the evidence of one of his brothers, who was called as a defence witness, Appellant 1, while on his way to Kato Zodhia on the evening prior to the murder, met his said brother and invited him to go with him to Kato Zodhia, but his brother refused because he was busy; the trial Court was asked to draw from this fact the inference that if Appellant 1 had pre-arranged to kill his wife on the way back from Kato Zodhia he would not have asked his brother to go with him there and, presumably, to return with him too. It has been argued that the brother's evidence is supported by the evidence of a prosecution witness, Karros; this witness was called to testify for another purpose and in cross-examination he mentioned that he witnessed the incident of Appellant 1 inviting his brother to go to Kato Zodhia.

The trial Court disbelieved the evidence of the brother of Appellant 1, and, though it did not say so expressly in its judgment, it must have consequently disbelieved the relevant part of the evidence of Karros. As a matter of fact, a comparison of the evidence of the brother of Appellant 1 with that of Karros shows material differences in relation to essential details; so, the evidence of the brother, about the invitation allegedly extended to him by Appellant 1 to accompany Appellant and his wife to Kato Zodhia was not rejected wrongly by the trial Court.

In the light of all the foregoing we have no hesitation in holding that Appellant 1 was rightly convicted of the premeditated murder of his wife.

In this respect it is to be noted that at his trial Appellant 1 chose, as it was his right to do, not to give evidence on oath, but to make an unsworn statement from the dock; he stated, *inter alia,* that he was innocent and that he had no reason to kill his wife.

Without, in the least, departing from, or doubting, the principle that it is not to be expected of an accused person to prove his innocence, but it is up to the prosecution to establish his guilt beyond reasonable doubt, we are of the view that the failure of Appellant 1, as an accused, to give evidence in his own defence is a factor related, in the circumstances of the present case, to the issue of his guilt.

As it was observed in *R.* v. *Jackson,* 37 Cr. App. R. 43, by Lord Goddard C.J. (at p. 50):-

> " Of course, a prisoner is always entitled to say: ' I am going to stand here and say nothing. The evidence against me is so unsatisfactory that it does not call for any answer'; but nowadays, whatever may have been the position very soon after the Criminal Evidence Act, 1898, came into operation—and I regret to say that I have been in the profession long enough to remember the state of affairs when counsel had very great difficulty in deciding whether to call his client or not—everybody now knows that absence from the witness-box requires a very considerable amount of explanation; I need not put it higher than that. In view of the evidence in this case, if the Appellant had any explanation to give, one cannot doubt that he would have given it".

In Cross on Evidence, 3rd ed., there is the following relevant passage (at p. 41):-

> " It is difficult to make a general statement with regard to the effect of a party's failure to give evidence. The indication in an acknowledgement of service or memorandum of appearance of an intention not to defend divorce proceedings founded on adultery is tantamount to an admission (*Pidduck* v. *Pidduck and Limbrick* [1961] 3 All E.R. 481), and, though not proof of adultery something

which may be taken into account with the other evidence (*Fenson* v. *Fenson and Howard* [1964] 2 All E.R. 231). On the other hand, it has been said that the accused admits nothing at a criminal trial by exercising the right which the law gives him of electing not to deny the charge on oath (*Tumahole Bereng* v. *R.* [1949] A.C. 253, at p. 270) and it has been held in the Court of Criminal Appeal that the accused's failure to go into the witness box to deny the testimony against him does not in law amount to corroboration of that testimony (*R.* v. *Jackson* [1953] 1 All E.R. 872).

A party's failure to give evidence ought never to convert insufficient into *prima facie* evidence because, ex hypothesi, the stage at which an explanation is called for has not been reached. But a party's failure to give evidence may render *prima facie* evidence conclusive in the opinion of the tribunal of fact. Whether it will have this effect depends upon the facts of the particular case.

> ' No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction if the conclusion to which the *prima facie* case tends be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? (*R.* v. *Burdett* [1820] 4 B. and Ald. 95, at p. 120)'.

An illustration of the type of case in which failure to give evidence is of great significance is provided by *R.* v. *Corrie and Watson* ([1904] 68 J.P. 294), in which Lord Alverstone, C.J. said, when affirming a conviction for unlawful betting:

> ' I agree that no inference ought to be drawn in support of a weak case on the ground that the defendants were not called to give evidence; but where transactions are proved which are capable of an innocent explanation, and if the defendants could have given it, and there is *prima facie* evidence that the person is carrying on an illegal business, I do not think it improper for the

jury to draw a conclusion from the fact that the defendants were not called' ".

In *R.* v. *Sparrow* [1973] 2 All E.R. 129, the *Jackson* case, *supra,* was referred to with approval. What the Court of Appeal (Criminal Division) in England was examining in the *Sparrow* case was the correctness of the manner in which the trial Judge had, in his summing-up, commented on the failure of the accused to give evidence. Lawton L.J. said (at p. 135):–

> " In our judgment *Waugh* v. *R.* ([1950] A.C. 203) establishes nothing more than this: It is a wrongful exercise of judicial discretion for a Judge to bolster up a weak prosecution case by making comments about the accused's failure to give evidence; and implicit in the report is the concept that failure to give evidence has no evidential value. We can find nothing in it which qualifies the statement of principle in *R.* v. *Rhodes* ([1899] 1 Q.B. 77). Our view of *Waugh* v. *R.* seems to have been that of Lord Goddard C.J. in *R.* v. *Jackson* (37 Cr. App. R. 43, at p. 50) when he said:
>
> > ' I do not want in the least to be whittling down what their Lordships in the Judicial Committee said on this matter, but, of course, each case on such a point as this must depend on its own facts' ".

The judgment of Lawton L.J. in the *Sparrow* case continues as follows (at p. 135):–

> " In the present case, the charge was murder, and the evidence went to establish that when the detective sergeant was shot by Skingle,"—(a co-accused)—"the Appellant was standing close by and after the shooting, the pair of them drove off together and one of them within a short time in the presence of the other reloaded the pistol; and there has to be added to this submission of the Appellant's counsel that the prosecution's evidence was consistent with the possibility that the joint enterprise between Skingle and the Appellant was merely to frighten the police officer with a pistol (which the Appellant knew was loaded) and that Skingle departed from it by pressing the trigger a number of times. In the judgment of this Court, if the trial Judge had not commented in strong terms on the Appellant's absence from the witness box, he would have been failing in his duty".

It is on the basis of the above review of the law that we have formed our already stated view that the failure of Appellant 1, as an accused, to give evidence in his own defence is a factor related, in the light of the circumstances of the present case, to the issue of his guilt.

We shall deal, next, with the conviction of Appellant 2:

A salient feature, in our view, of the case against this Appellant is an oral statement which he made to a Government psychiatrist, Dr. Matsas, who examined him on a number of occasions; such statement was made by Appellant 2 on the first occasion when he was examined by Dr. Matsas, on the 21st September, 1972.

As we shall be referring more than once to the contents of this statement, we think that we should, at this stage, deal with its admissibility in evidence: It has not been contended before us that it was a privileged communication, but it has been submitted that it was not proper for the trial Court to receive it in evidence as it was made by Appellant 2 to Dr. Matsas in confidence in view of their relationship as patient and doctor and without, therefore, Appellant 2 anticipating that it would ever be given in evidence against him.

That a statement made to a medical adviser is not privileged is well established, as it appears from Archbold's Criminal Pleadings, Evidence and Practice, 37th ed., paragraph 1337. Useful reference may also be made to Taylor's Principles and Practice of Medical Jurisprudence 12th ed., vol. 1, where it is stated (at p. 23)—regarding the proceedings in *Nuttall* v. *Nuttall and Twyman* (108 Sol. J. 605)—the following:-

> " In a divorce action heard in July, 1964, a husband sought a decree on the ground of the wife's adultery. Counsel for the husband called as a witness a psychiatrist who had been consulted by the wife and the co-Respondent. The psychiatrist said that he wished not to give evidence.
>
> *The Judge:* I am sorry. The law is that you must.
>
> *The witness:* These parties consulted me professionally in my consulting-room. They entrusted their confidence to me. I accepted their confidence on the basis that everything said between us was privileged.
>
> *The Judge:* It is not privileged.

The witness: If you order me to give this evidence it will really strike at the roots of my profession. How can people consult a psychiatrist if they cannot feel sure their confidence will be protected from disclosure?

The Judge: I cannot alter the law. You must go to your M.P. to do that. I have this very often. The alternative before you is either to give the evidence or to go to prison.

The witness: It is a very nasty choice.

The Judge: Doctors called to give evidence often object to doing so, but they always give the evidence in the end.

The witness: The general practitioner is in a different position from a consultant psychiatrist. Patients believe that what they tell a psychiatrist is secret, like a confession to a priest. All I can do is to register a protest. I do not wish to be in contempt of Court.

The witness then gave evidence".

As in the *Nuttall* case, *supra,* we think that it is not a ground of non-admissibility of the statement to Dr. Matsas, the fact that its maker, Appellant 2, may have thought that it was made in confidence.

What really matters is that it was undoubtedly a voluntary statement; the Appellant was not in any way made to divulge anything to Dr. Matsas; and there does not arise any question about Appellant 2 having had to be told by Dr. Matsas that whatever was said by him might be given in evidence, because Dr. Matsas was not a person in authority investigating into this case; the purpose for which he was, at the time, with Appellant 2 was a totally different one, namely to examine the mental state of the Appellant. Anyhow, it appears that even where a statement which should otherwise have been made under caution has been made without its maker having been cautioned it may still be admitted in evidence if there is no doubt that it is a voluntary statement; because it cannot be said as a matter of law that the absence of caution makes a statement inadmissible (see *R.* v. *Voisin* [1918] 1 K.B. 531, at p. 538).

It has been submitted, also, that the statement made to Dr. Matsas by Appellant 2 ought not to have been admitted in

evidence because of the "principle", as it has been described, of *R.* v. *Phaedonos* and Others, 22 C.L.R. 21, at p. 26; in that case it was held that once one of the Appellants had been induced to confess, and he had thus incriminated himself, he may have felt that it was too late to draw back and so he incriminated himself by a later statement, which was treated, for this reason, as inadmissible. We regard the *Phaedonos* case as one which was decided on the basis of its own particular set of circumstances and which does not lay down a rule of law to the effect that whenever an accused has made an incriminating statement which is held to be inadmissible it follows necessarily that a later statement of his, which is also incriminating but which has been made in circumstances which render it admissible, and which a trial Court in the exercise of its relevant powers is prepared to admit in evidence, has invariably to be excluded merely because the accused has earlier made an incriminating statement which was found to be inadmissible. In the present instance Appellant 2 made, first, certain statements to the police which were found at the trial to be admissible; then, Appellant 2 made an oral statement to Dr. Matsas not, in our view, because he had already incriminated himself by his statements to the police, but in an effort on his part to relieve himself of the psychological burden created by his involvement in the case and, also, in order to mention things to Dr. Matsas which, in his view, would help him to escape responsibility, wholly or to a very large extent; so, we do not think that his statement to Dr. Matsas is related to his previous statements to the police—(irrespective of their admissibility or not)—in such a way that it could be held that it should not have been received in evidence, even assuming that the *Phaedonos* case had to be followed in the circumstances of the present case.

The first issue in relation to which we have found that the statement to Dr. Matsas may be usefully referred to is that of the motive of Appellant 2 to involve himself in the murder of the deceased:

The trial Court, found, on the basis of the expert evidence adduced, that Appellant 2 is a person of below average intelligence and that his motive was either loyalty towards Appellant 1 or expectation of financial gain; in the latter respect, Appellant 2 told Dr. Matsas that he was in a bad financial position and that while Appellant 1 was pressing him and threatening him in order to persuade him to co-operate with him in killing the

deceased he was, also, promising him that his debts would be paid of.

The statement to Dr. Matsas helps, next, to place into its proper context the incident outside the "Anemones" restaurant—about a week before the crime—at which Appellant 2 attacked violently the deceased late at night; Appellant 2 told Dr. Matsas that he had been on more than one occasion pressed by Appellant 1 to kill the deceased (by throwing her down a well or putting pills into something which she was expected to drink) but that, as he was not willing to kill her, he was avoiding to obey Appellant 1, putting forward various excuses; regarding the "Anemones" incident he told Dr. Matsas that it was one of the occasions on which he was expected by Appellant 1 to kill the deceased, in the absence of Appellant 1, and that, to avoid doing so, he attacked the deceased indecently in order to make her get out of the car; and that it was at that moment that other persons came along and rescued her and took her home.

It is clear from other relevant evidence, including the fact that the condition in which the wife of Appellant 1 was found by the persons who rescued her was entirely inconsistent with the version given by Appellant 2 to Dr. Matsas, that Appellant 2 did not tell the actual truth about what happened at the "Anemones" incident; and on the basis of the totality of all relevant circumstances we must regard the conduct of Appellant 2 as being of very sinister significance indeed.

It should be observed that neither the trial Court was, nor is this Court, bound in law to accept as true the version given by Appellant 2 to Dr. Matsas regarding the "Anemones" incident, merely because such version is contained in a statement by him which has been adduced as evidence by the prosecution; in the case of *McGregor*, 51 Cr. App. R. 338, Lord Parker, C.J. stated the following (at p. 341):-

> " As we understand it, Mr. Dovener says and says rightly that, if the prosecution are minded to put in an admission or a confession, they must put in the whole and not merely a part of it. He then goes on from that as the next stage to rely on an old case—not necessarily the worse for that—*Jones* and *Jones* (1827) 2 C. & P. 629. Serjeant Bosanquet ruled in that case in these terms: ' There is no doubt that if a prosecutor uses the declaration of a prisoner, he must

take the whole of it together, and cannot select one part and leave another'. So far that seems quite correct. But he then goes on: 'and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true.' Accordingly, Mr. Dovener submits, as I understand it, that not only must the admission as to possession be taken to be true, the Appellant not having gone into the box and denied it, but also that his explanation must be taken as true. In the opinion of this Court, *Jones* and *Jones* (*supra*) is no longer authority. It was an old case in 1827, long before 1898, and as stated, in paragraph 1128 of Archbold's Criminal Pleadings, etc. (36th ed.) ' the better opinion seems to be that as in the case of all other evidence the whole should be left to the jury to say whether the facts asserted by the prisoner in his favour be true'. The Court is satisfied that that passage in Archbold sets out the true position".

Concerning the murder of the wife of Appellant 1, Appellant 2, in his statement to Dr. Matsas, said that, eventually, he agreed to go to the scene of the crime, on the night of the 29th August, 1972, for the purpose of tying Appellant 1 on to a tree after Appellant 1 would have killed his wife; he said that he witnessed the killing and afterwards, as instructed by Appellant 1, he hit him and tied him on to a tree. It has been submitted by counsel for Appellant 2 that, this being the true position as to what happened, Appellant 2 is not liable for anything more than being an accessory after the fact, under sections 23 and 24 of the Criminal Code, Cap. 154, and, therefore, his conviction cannot be upheld.

Our attention has been drawn, in this respect, to *R.* v. *Clarkson and Others* ([1971] 3 All E.R. 344) where it was held that mere presence at the commission of a crime, although not accidental, was insufficient to establish aiding and abetting. The facts of that case, as they appear in the headnote, were as follows:-

" The Appellants were serving soldiers in Germany. One night, after they had all been drinking, they returned to barracks. In the barracks was a German girl who had been to a party there. After the party she had been taken to a room by fellow soldiers of the Appellants and was there raped at least three times between midnight and 3.15 a.m. by different soldiers. The Appellants, hearing the

noise, had entered the room and had been present there for at least some of the time during which the rapes occurred watching what took place. They were charged with aiding and abetting the rapes. There was no evidence on which the prosecution sought to rely that either Appellant had done any physical act or uttered any word which involved direct physical participation or verbal encouragement. There was no evidence that either man had touched the victim, helped to hold her down, done anything to her, done anything to prevent others from assisting her or to prevent her from escaping, or from trying to ward off her attackers, or that they had said anything which gave encouragement to the others to commit crime or to participate in committing crime".

Megaw L.J. in delivering judgment on appeal said (at p. 347):-

"*R.* v. *Coney* ([1882] 8 Q.B.D. 534) decided that non-accidental presence at the scene of the crime is not conclusive of aiding and abetting. The jury has to be told by the Judge, or as in this case the Court-Martial has to be told by the Judge-advocate, in clear terms what it is that has to be proved before they can convict of aiding and abetting; what it is of which the jury or the Court-Martial, as the case may be, must be sure as matters of inference before they can convict of aiding and abetting in such a case where the evidence adduced by the prosecution is limited to non-accidental presence. What has to be proved is stated by Hawkins J. in a well-known passage in his judgment in *R.* v. *Coney* (at p. 557) where he said:

'In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-inter-

ference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.'

It is not enough, then, that the presence of the accused has, in fact, given encouragement. It must be proved that the accused intended to give encouragement; that he wilfully encouraged. In a case such as the present, more than in many other cases where aiding and abetting is alleged, it was essential that that element should be stressed; for there was here at least the possibility that a drunken man with his self-discipline loosened by drink, being aware that a woman was being raped, might be attracted to the scene and might stay on the scene in the capacity of what is known as a voyeur; and, while his presence and the presence of others might in fact encourage the rapers or discourage the victim, he himself, enjoying the scene or at least standing by assenting, might not intend that his presence should offer encouragement to rapers and would-be rapers or discouragement to the victim; he might not realise that he was giving encouragement; so that, while encouragement there might be, it would not be a case in which, to use the words of Hawkins J. the accused person (at p. 558) wilfully encouraged".

In the present case—even assuming that the story told by Appellant 2 to Dr. Matsas is true—it cannot be said that he was merely present, though not accidentally, at the killing by Appellant 1 of his wife; Appellant 2 went there, by pre-arrangement, to be present at the commission of the crime, in order to tie Appellant 1 on to a tree immediately after the latter would have murdered his wife, and, thus, help render credible the false story of Appellant 1 about an encounter with unknown persons. In our view this conduct of Appellant 2 amounted to "wilful encouragement" by Appellant 2 of Appellant 1 to kill his wife and, therefore, it constituted aiding and abetting in the commission of murder by Appellant 1, with the result that

Appellant 2 has, under section 20 of the Criminal Code, to be deemed to have taken part in the commission of the murder and to be guilty thereof as a principal offender.

Counsel for Appellant 2 had submitted that, even if his client has aided and abetted Appellant 1 in committing the murder, it has not been established beyond doubt that he did so with premeditation and, therefore, he ought not to have been convicted of premeditated murder.

Appellant 2 told Dr. Matsas that as from the 26th August, 1972, that is three days before the murder, he had agreed to assist Appellant 1 in a scheme for the killing of the wife of such Appellant; this constitutes, in our opinion, overwhelming evidence of premeditation on the part of Appellant 2; and all the other evidence, regarding his conduct prior to, and after, the crime, clearly establishes the existence of premeditation on his part; and we shall refer, in this respect, to certain salient matters:

Appellant 2, two days before the murder, ordered a hired car to be available for him on the night when the crime was to be committed, so as to be able to drive to the scene of the crime. This car was driven by Appellant 2 on the edge of the road just next to the place where the deceased was killed and was, also, seen parked, near the road, in the forest, not very far away from that place. It is plainly obvious that he parked the car in the forest, away from the scene of the crime, before the crime was committed and after he had already driven up to the place where the crime was to be committed; it would be absolutely unreasonable to assume the opposite—namely that Appellant 2 parked his car at the scene of the crime, met there Appellant 1 and his wife, remained there while the killing was taking place, tied up afterwards Appellant 1 on to a tree and then proceeded to park his car elsewhere, in the forest, where it was seen at about 10.25 p.m.—because, as soon as he had finished tying up Appellant 1 on to the tree there was nothing else for Appellant 2 to do but to get away from that area as quickly as possible. The whole, as above, conduct of Appellant 2 in relation to the hired by him car shows that he was acting on the basis of a pre-arranged plan.

Appellant 2 told Dr. Matsas that after the crime he telephoned the police without revealing his identity and without telling the police the truth about what had happened. According to

evidence given by the police the anonymous call was to the effect that the caller had seen on the road, at the place where the crime was committed, four persons assaulting another person; it is clear, therefore, that Appellant 2 soon after the crime gave out the false story which was to be told by Appellant 1 when found, later, by the police. It is a really inevitable conclusion that in doing so Appellant 2 was acting on the basis of an arrangement with Appellant 1.

At his trial Appellant 2 was given an opportunity to explain what had happened on that night at the scene of the crime, either on oath or without oath; in an unsworn statement he said that he was neither present at the murder of the wife of Appellant 1, nor did he see anything, nor did he know how she was killed, nor did he have any reason to kill her; and he repudiated the statements which he had made to the police and he had told Dr. Matsas.

What we have said earlier, in the light of the circumstances of this case, regarding the failure of Appellant 1 to give evidence on oath, applies, also, to the failure of Appellant 2 to do so.

The trial Court in reaching the conclusion that Appellant 2 was guilty as charged did not rely on the statements which he had made to the police or on his statement to Dr. Matsas, because it considered that there was evidence to establish otherwise Appellant's guilt beyond reasonable doubt; and, indeed, from a perusal of all the other evidence adduced we are of the view that the conclusion that Appellant 2 was guilty could be safely reached by the trial Court on the basis of such evidence. We have proceeded to include in our consideration, as above, of the case against Appellant 2, the statement to Dr. Matsas, because during the hearing of this appeal counsel on both sides relied on it as a very material part of the case: Counsel for Appellant 2 treated such statement as containing elements establishing that his client ought to have been convicted only of a lesser offence and counsel for the Respondent argued that the said statement supplemented the already overwhelming evidence against the Appellant.

The trial Court, though in convicting Appellant 2 did not rely—as stated already—on the statements of Appellant 2 to the police and to Dr. Matsas, it nevertheless referred to these statements as being part of the evidence adduced. In relation to one of these statements, which was given to the police on

the 30th August, 1972, counsel for Appellant 2 submitted that it was wrongly admitted in evidence because in the process of the taking of such statement there occurred more than one contraventions of the Judges' rules, which were adopted in England in 1964 and which, as submitted by counsel for Appellant 2, are in force in Cyprus under section 8 of Cap. 155; there no longer being in force, according to him, the Judges' rules which were applied in England prior to 1964. The admissibility of this statement was contested before the trial Court on the ground that it was not a voluntary statement, but the trial Court, after trying this issue, held that it was voluntary. Even assuming, without deciding so, that there has taken place some contravention of the Judges' rules of 1964, and that the trial Court ought not, in the circumstances, to have admitted in evidence the said statement, we think that this could not, in the particular circumstances, render inadmissible his subsequent statements, which were made to the police in a manner which was in full conformity with the Judges' rules and which, when tested at the trial as to their voluntariness, were found by the trial Court to be voluntary beyond any reasonable doubt. Moreover, the aforesaid statement of the 30th August, 1972, was not, in essence, an incriminating one; so no question could arise of following in the present case, in relation to the later statements of Appellant 2 to the police, the *Phaedonos* case, *supra*, and, in any event, the circumstances relevant to such statements are such as to render the present case distinguishable, otherwise also, from the *Phaedonos* case.

We agree with counsel for Appellant 2 that his statements to the police—(and we have dealt, earlier, in this respect, with his statement to Dr. Matsas)—should be taken into account as a whole, including any parts favourable to Appellant 2, but whether such parts are to be accepted as true is an issue which is governed by the principle of the *McGregor* case, *supra*.

We shall not refer to all his statements to the police, but only, in particular, to certain parts of such statements which seem to merit specific comment:

On the 5th September, 1972, Appellant 2 made a statement to the police, commencing as follows: " In relation to this case in which we have killed Paradisa ..."; in that statement he admitted that on the day previous to the crime he went with Appellant 1 via Kapouti, on the Dhiorios-Morphou road, to the scene of the crime, where on the next night they were

to kill the wife of Appellant 1. This is, indeed, a fact which militates with practically overwhelming force, in addition to other evidence, in favour of a finding that there existed premeditation on the part of Appellant 2.

In a statement made to the police on the 31st August, 1972, Appellant 2 stated that at the last moment, at the time of the killing by Appellant 1 of his wife, Appellant 2 tried to dissuade him from doing so and to pull him away from her, with the result that the sleeve of the shirt of Appellant 1 was torn; he added that Appellant 1 threatened him in order to make him stop interfering. It is correct that the shirt of Appellant 1 was somehow torn but this is not enough to create a reasonable doubt that the allegation of Appellant 2, in this respect, might possibly be a correct one, because the subsequent conduct of Appellant 2 is entirely inconsistent with his allegation that at the last moment he decided to desist from assisting Appellant 1 in relation to the killing of his wife:

If the above allegation were a valid one we fail to see why Appellant 2 had to go on with the pre-arranged plan and tie Appellant 1 on to a tree, instead of running away immediately to take his car and proceed to report the matter to the police; but, even if it were to be said that Appellant 2, being scared, had to tie Appellant 1 on to a tree as instructed by him, it is not reasonably acceptable that Appellant 2—assuming that he had, on reflection, decided, even at the last moment, to desist from the killing of Paradisa, and had tried to prevent Appellant 1 from killing her—would not have reacted by informing the police immediately after he had tied Appellant 1 on to the tree, by contacting them as soon as possible, instead of making, as he did, an anonymous call to the police in the course of which he gave out the false story which was to be put forward by Appellant 1 when found by the police. Moreover, Appellant 2 pretended next day—and there is a lot of evidence in this respect to which we need not refer in detail—that all he knew about the killing of Paradisa was what he had read about it in the newspapers.

A passage at the end of the judgment of the trial Court was much criticized, by learned counsel for Appellant 2, as containing a misdirection on the part of the trial Court; in such passage it has been stated that Appellant 2 " admits previous attempts on the life of the deceased such as his attempt to throw her in a well and his attempt at "Anemones"... These attempts are

in themselves indicative of his intention to kill her". We think that the proper view as to the meaning of this passage, when read in the context of the whole judgment, is that the Assize Court Judges formed the impression that Appellant 2 had admitted occasions in the past on which he was involved in plans relating to attempts to kill the deceased; and that impression was justified by the evidence adduce, including his statement to Dr. Matsas. So, there is really no material misdirection contained in the passage in question of the judgment of the trial Court.

On the basis of the whole material placed before us we can find no reason for interfering with the conviction of Appellant 2.

Before concluding, we would like to observe that counsel for the Appellants, and in particular counsel for Appellant 2, have argued that the convictions of Appellants are bad in law because the trial Court did not specify whether the Appellants were found guilty under section 203 of the Criminal Code, Cap. 154, in conjunction only with section 20 of Cap. 154, or in conjunction with section 21 only, but convicted them of the offence under section 203 in conjunction with *both* sections 20 and 21 of Cap. 154.

As the trial Court found the Appellants guilty of premeditated murder, committed on the basis of a pre-arranged plan, there can be no doubt that the Appellants were convicted under section 203—which creates the offence concerned—in conjunction with section 20, which provides about participation in a crime as a principal offender.

Section 21 of Cap. 154 reads as follows:-

> " When two or more persons form a common intention to prosecute an unlawful purpose in connection with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

Once the Appellants were convicted under section 203 in conjunction with section 20 of Cap. 154, the reference, too, to section 21, in the count on which they were convicted, became irrelevant, but we are of the opinion that the fact that the trial Court did not proceed to order the erasure from such count of the said reference—as it might have done—is of no material importance and it cannot be held that as a result the convictions

of the Appellants are bad in law or that any miscarriage of justice at all has occurred.

We have been referred in relation to this point to *R.* v. *Lovecey* [1969] 2 All E.R. 1077; in that case the Appellants were charged with robbery with violence and murder, arising out of an incident in which a jeweller was found handcuffed to a railing in the basement of his shop, suffering from severe head injuries from which he died. Blood was found on the stairs and ground floor of the shop which was in disorder, and valuables were found to have been stolen. There was no direct evidence of how many men had been involved in the crime or of their individual roles. The Appellants denied all knowledge of the crime but there was certain circumstantial evidence connecting them to it. The jury were correctly directed on the ingredients of both offences and on the guilt of participants in a common purpose, but they were told that the two offences stood or fell together. The Appellants were convicted on both counts. On appeal it was held that the offences did not necessarily stand together: Since neither Appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party; there was clearly a common design to rob, but that was not sufficient to convict of murder unless the common design involved the use of such force (including killing, or the infliction of grievous bodily harm) as was necessary to achieve the robbers' object or to permit escape without fear of subsequent identification.

It is plainly obvious that the situation in the *Lovecey* case was different from that in the present case, because in the present instance the Appellants were found guilty—and rightly so as already stated in this judgment—of having committed murder according to a pre-arranged plan to do so; and there could not arise any question of either of them having done anything which went beyond any common design to commit any less serious offence because, as found, their common design was to commit murder and nothing else.

For all the reasons set out hereinbefore we have decided that the appeals of both Appellants have to be dismissed

Appeals dismissed.