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

KYRIACOS NICOLA KOUPPIS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3793)

Criminal Law—Premeditated murder—Appeal against conviction—Discrepancy between evidence of vital prosecution witness, before Coroner and trial Court—Expert evidence not safe or satisfactory—Reasonable or lurking doubt that conviction unsafe or unsatisfactory—Appeal allowed.

Evidence—Expert evidence—Approach to—Court not bound to adopt views of an expert even if uncontradicted.

Constitutional Law—Human rights—Rights of person charged with an offence—Article 12.5 *of the Constitution.*

Constitutional Law—Death penalty—Constitutionality of—Articles 7 *and* 8 *of the Constitution.*

The appellant was tried at the Assize Court of Larnaca of the offence of premeditated murder. The case for the prosecution was that on the night of April 5, 1973, in Larnaca, the appellant, acting in concert with two companions of his, namely Kakis and Neocleous, killed Georghios Fotiou, by firing repeatedly with firearms at him in perpetration of a premeditated plan to murder him.

It was the case for the prosecution that the appellant and his accomplices waylaid the victim at a spot at Thessaloniki avenue and killed him in perpetration of a plan, conceived long before the appellant found the opportunity to execute the victim; and that the details of the plan were worked out after extensive shadowing over a period of time designed to elicit the movements of the victim day and night.

On the night of the murder the deceased was travelling in a

convoy of three cars for safety reasons; and whilst so travelling he accelerated and overtook the car of the convoy which was in front of him at the precise moment when the car of the appellant was seen travelling ahead of them and having done so to follow the appellant into Thessaloniki street.

The trial Court reached the following conclusions, on the basis of which it convicted the appellant of premeditated murder and sentenced him to death.

"1. The accused kept a watch on the movements of the deceased prior to 5th April, 1973. This watch enabled the accused to acquaint himself about the movements of the deceased.

2. On 5th April, 1973, the accused kept a watch on the movements of the deceased, mainly in order to ascertain the hour at which he left work.

3. The accused and his companions emerged in front of the convoy of cars, including the car of the deceased, with the sure knowledge that the deceased was on his way home, expecting him to follow, as it was the deceased's habit, a route via Thessaloniki avenue.

4. The accused, acting in anticipation of the movements of the deceased, turned into Thessaloniki avenue in order to waylay him. The choice of the entrance of Thessaloniki avenue was such as to enable the accused to cause the deceased to bring his car to a standstill without much difficulty, considering that the speed of the deceased could reasonably be expected to be low at the time as he was at the entrance of the street.

5. Having entered Thessaloniki avenue, the accused emerged immediately into the middle of the street with a pistol in his hand in order to compel the deceased to stop.

6. The accused approached the deceased and demanded that he should alight. In the meantime his companions alighted, dangerously armed, taking positions round the car of the deceased making his escape impossible. At the same time they immobilized the companion of the deceased, Neofytos Andreou. The accused kept banging on the window pane of the deceased with his pistol and when the deceased persisted in his refusal to alight, locking his windows at the same time, the accused fired twice at

the deceased from close range, giving thereby a clear indication of what he intended to do with the deceased.

When the deceased made a vain effort to escape, the companion of the accused, Kakis, and probably Clavdhios as well, fired at the deceased riddling his body with bullet wounds.

7. When the car of the deceased ended on the left side of the road in the circumstances we have described, the accused fired two more shots at the deceased, indicating thereby that he wanted to eliminate every possibility of the deceased surviving the injuries already inflicted upon him. The range from which the accused fired at the deceased and the circumstances under which he did so are indicative of his determination to kill the deceased. The wounds caused by the two contact shots referred to in evidence were inflicted upon the deceased by the accused."

One of the eye-witnesses, whose evidence was of vital significance in relation to conclusion No. 7 above, was prosecution witness 7, (Georghiades) who stated before the Assize Court that after the car of the deceased came to a standstill on the left side of the road he saw the appellant firing two or three shots at the deceased, who was still sitting in the driver's seat of his car, almost from point blank range. This same witness when giving evidence at the inquest almost twenty months earlier said nothing about seeing the appellant firing the contact shots or any shots at all. What he said with regard to the appellant was that he saw him holding a pistol in his hand.

The trial Court stated that this witness "told the Assize Court the truth about what he witnessed that night" and that his evidence was also supported in material respects by the evidence of the ballistics' expert (prosecution witness 39, Christofides).

The ballistics' expert was shown for the first time the jacket that the deceased was wearing on the night of the murder in the course of the hearing before the Assize Court and was asked whether in his opinion, two of the holes in the jacket had been caused by the contact shots. The jacket had been in the possession of the Police for almost four years and the witness himself stated in evidence that if he were to give an expert opinion scientifically the *exhibit* should have been submitted to him the

earliest possible. He further admitted that in some cases it was necessary to ascertain the existence of gun-powder but where there was a tearing of the cloth and the signs of gun-powder residue were evident a chemical analysis might not be necessary. Asked whether by looking at the two holes on the *exhibit* jacket he could say that there was residue of gun-powder or evident signs that they had been caused by shots the witness replied that there was blackening round the holes "which resembles very much with signs of gun-powder" but he could not say with the naked eye whether there was unburnt gun-powder. As regards the nature of the wound caused by a contact shot the witness stated that it is the laceration of the wound which is a characteristic of a contact shot but he admitted that he was never given a detailed description of the wounds which corresponded to the two holes on the jacket which were allegedly caused by contact shots but that he had the opportunity to see once a booklet of photographs which showed the wounds on the dead body but he never had a detailed description such as the diameter of the entry and exit wounds and their details. The trial Court accepted that the ballistics' expert was a witness of truth and a reliable witness.

Another witness (Andreou) in his testimony before the Coroner and the preliminary inquiry testified that the appellant had fired the shots after the deceased started off from his stationary position. In his evidence before the Assize Court, however, he stated that the appellant fired twice at the victim and then after the two shots the latter tried to leave the scene.

During the trial and before the ballistics' expert had given evidence counsel for the appellant sought the directions of the Court on the possibility of the costs of expert witnesses, in relation to firearms, who would be consulted and probably called by the defence being paid by the State. The trial Court held that the relevant provisions of the Constitution (see Article 12.5) safeguarding fundamental defence rights do not confer power to authorise the payment of the expenses that may be incurred for the consultation and calling of expert witnesses out of public funds; and reached the conclusion that it had no power to give directions in relation to a matter beyond its competence.

Upon appeal against conviction counsel for the appellant mainly argued:

(a) That the conviction was, having regard to the evidence

adduced unreasonable or unsafe because in the absence of scientific tests, the Court wrongly relied on the evidence of the ballistics' expert as regards the contact shots.

(b) That the judgment of the Court should be set aside on the ground of a wrong decision on a point of Law, viz. that there was sufficient circumstantial evidence against the appellant that he planned the murder and because the finding of premeditation had not been proved beyond reasonable doubt (i.e. that appellant took the decision to kill the victim at Grivas Digenis Avenue at a time prior to the events at Thessaloniki Avenue)

(c) That the Court was wrong in turning down the appellant's application for funds to call expert evidence.

(d) That the sentence of death was contrary to Article 7.1 of the Constitution, which provides that "every person has the right to life and corporal integrity" and that the imposition and execution of such sentence constituted a harsh, inhuman and degrading treatment.

In this respect counsel argued that Article 7.2 of the Constitution, which authorises a Court of Law to impose the sentence of death in cases of premeditated murder, is unconstitutional because it contravenes Articles 7.1 and 8 of the Constitution and both the International Convention on Human Rights and the European Convention on Human Rights.

(I) *On the question whether the murder was committed with premeditation*:

Held, (Triantafyllides, P. and A. Loizou, J. dissenting) that having regard to the nature and quality of the evidence it is not possible to say that the trial Court's verdict on the issue of premeditation was either safe or satisfactory.

(A) *Per Hadjianastassiou, J., L. Loizou and Malachtos, JJ. concurring:*

(a) That as the conclusion of the trial Court that the appellant kept watch on the movements of the victim prior to April 5, 1973, cannot be sustained, simply because even the companions of the victim admitted, when meeting the appellant on the road, that it was a mere suspicion that he was following them and nothing more;

(b) that as it is difficult to know on what evidence the trial Court drew the inference that the appellant kept a watch on the movements of the victim in order to ascertain the hour at which he used to leave work, because the only evidence was that he was seen passing outside the petrol station 10 minutes before closing time, but no evidence was forthcoming that he was seen watching the movements of the persons at the petrol station to realize the exact closing time;

(c) that as there are questions which have not been answered regarding the above third conclusion of the trial Court and it is unsafe for any one to draw the inference that the emerging of the appellant at Thessaloniki Avenue as described by the Court was in those circumstances planned with a view to killing the victim;

(d) that as the question whether the victim was carrying a pistol on the fatal night remained unanswered and the finding of a leather pistol case in his car and the rounds of ammunition in his possession is equally consistent with both carrying and the non-carrying of a pistol and there being grave doubts they go to the benefit of the appellant;

(e) (*After dealing with the law of premeditation vide pp.* 420–425 *post*) that as the evidence of key prosecution witnesses (Andreou and Georghiades) is unsafe and unsatisfactory in view of the discrepancy between what they stated before the Coroner and the Assize Court;

(f) that as the evidence of the ballistics' expert regarding his examination of the jacket of the victim, though uncontradicted, is not safe, not only because of the long passage of time, but also because his observations being the result of an examination with the naked eye, do not give that certainty required in a capital case, in the absence of being also tested in a laboratory (statement of Lord President Cooper in *Davie* v. *Edinburgh Magistrates* (1953) S.C. 34 to the effect that the duty of experts "is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence" adopted and followed);

(g) that as the trial Court, though correctly applying the scientific criteria for testing the accuracy of their conclusions,

they went wrong and reached unsafe conclusions and this is the reason why a retrial has not been ordered in this case (cf. judgment of Hadjianastassiou J. in *Anastassiades* v. *Republic*, reported in this Part at p. 97 *ante*);

(h) that as there are grave doubts that one could or might reach with certainty the conclusion reached by the trial Court viz. that the range at which the appellant had fired at the victim and the circumstances under which he did so are indicative of his determination to kill the deceased having regard to the evidence as a whole on the issue of premeditation;

(i) that as the question of premeditation is a question of fact, not of Law, and as great doubts are entertained as to what has actually happened when the victim was stopped by the appellant on the road, which made him kill the victim in such a brutal manner, and one may be driven to think in all those circumstances, viz. that because the killer did not fire at the victim immediately he stopped him on the road, that it was a killing committed more after the refusal of the victim to alight after a continuous shouting and banging on the window and/or apart from any other conceivable reason, his dashing away to leave the scene, rather than pursuant to a cool preconceived plan (Dicta in *Rex* v. *Cooper* [1969] 1 All E.R. 32 at pp. 33–34, *Stafford* v. *D.P.P.* [1973] 3 All E.R. 762 (H.L.) at pp. 764, 768, 769, regarding the principle of "lurking doubt" that the conviction may be unsafe or unsatisfactory adopted and followed; see also *Koutras* v. *Republic* (1976) 2 C.L.R. 13) this Court (*Hadjianastassiou J., L. Loizou and Malachtos, JJ. concurring*) has reached the conclusion that the Judgment of the trial Court should be set aside on the ground that under the circumstances of the case it is unsafe or unsatisfactory, (having a reasonable doubt or a "lurking doubt"); and that, accordingly, notwithstanding the fact that the trial Judges had every advantage, the appeal will be allowed and both the conviction and the death sentence will be quashed.

(j) That in the circumstances the appellant should be convicted of homicide only, under the provisions of section 205 of the Criminal Code, Cap. 154 and sentenced to life imprisonment.

(B) *Per L. Loizou, J.*

(1) That the evidence of the main prosecution witnesses upon which the Court relied in finding premeditation leaves much to be desired; and that, therefore, the findings and inferences based thereon are unsafe.

(2) That the evidence did not warrant the conclusion that the appellant was shadowing the victim or that he and his companions waylaid him at the scene of the crime in Thessaloniki Street; and that the latter finding especially is quite inconsistent with the behaviour of the deceased who, whilst travelling with his companion in a convoy of three cars for safety reasons, as it was stated, saw fit all of a sudden to accelerate and overtake the car of the convoy which was in front of him at the precise moment when the car of the appellant was seen travelling ahead of them and having done so to follow the appellant into Thessaloniki street.

(3) That as witness Georghiades in his evidence before the Assize Court stated that he saw the appellant firing two or three shots at the deceased from point blank range but at the inquest he never stated that he saw the appellant firing at all, it is difficult to comprehend how a discrepancy of this nature in a case such as the present did not raise, at least a suspicion in the mind of the Court that the evidence of the witness might not have been as reliable or accurate as they found it to be.

(4) (*After dealing with the evidence of the ballistics' expert–vide* pp. 395–396 *post*) that one would have thought that the witness would have been in a much better position to give an accurate and correct answer to the question whether the wounds on the victim were caused by contact shots had he been given the opportunity to carry out a scientific examination in his laboratory at an early stage rather than having to rely on what he could perceive with a naked eye and from material hardly sufficient for the purpose; and that although the witness concluded that in his opinion the holes on the jacket of the deceased had been caused by contact shots one is, in the circumstances, left wondering about the correctness of his conclusion.

(5) That the state of the evidence in this case on the issue of premeditation is a matter of grave concern; that having regard to its nature and quality it is not possible to say that the verdict of the Assize Court on this issue was either safe or satisfactory; and that the least that can be said is that there is room for grave doubt whether the killing was premeditated and the appellant is by law entitled to the benefit of such doubt.

(C) *Per Malachtos, J.*

(1) That the Assize Court arrived at the wrong conclusions as regards the shadowing of the movements of the victim by the

appellant and, in particular, in finding that the car of the appellant emerged in front of the car of the victim shortly before the commission of the offence, because the evidence on this point, according to the prosecution witnesses, is that the victim overtook the car which was preceding and which was driven by his employee P.W. 5, Neofytos Andreou, when obviously he noticed the car of the appellant and followed it when it turned left and entered into Thessaloniki Avenue.

(2) That the evidence of Georghiades, the main point of which is that after the first shots he saw the appellant next to the driver's door of the car of the victim at its resultant position firing two or three times in the direction of the driver's seat, ought not to be accepted by the Assize Court or at least should have created doubts in their minds as to whether this witness was telling the truth on this point, since at the inquest before the Coroner, did not testify anything of the kind, and the explanation given by this witness as to why he did not mention the above fact at the inquest is a very poor one; and that though a witness in giving evidence before a Court of law may not relate facts of minor importance which he witnessed in a given incident surely he cannot be excused for omitting to state such facts which constitute the main and the most important part of his evidence.

(3) That it can reasonably be inferred from the evidence adduced at the trial that the victim was also armed at the time with an automatic pistol or revolver and the possibility that the appellant took no chances when he realised this fact and that it was there and then that he formed the intention to kill, cannot be excluded.

(II) *On the question whether Article* 7.2 *of the Constitution, which authorises a Court to impose the sentence of death in cases of premeditated murder, is unconstitutional because it contravenes Article* 7.1 *of the Constitution:*

Held, that Article 7.2 *of the Constitution is not unconstitutional.*

(A) *Per Hadjianastassiou, J., L. Loizou and Malachtos, JJ. concurring:*

That one cannot attack the constitutionality of one paragraph of Article 7 of the Constitution as contravening another, once the framers of the Constitution thought fit to include in the Constitution that a law may provide for such penalty of depriving a

person of his life only in cases of premeditated murder; and that, accordingly, the contention of counsel will be dismissed.

(B) *Per Triantafyllides, P.*

That it cannot be held that Article 7.2 is not properly in force because it, allegedly, conflicts with Article 7.1 and 8 of the Constitution; that what is expressly provided for in the Constitution can never be treated, as being inoperative on the ground that its application is excluded by some other provision of the Constitution; that the death sentence which was imposed in the present instance in full conformity with the provisions of Article 7.2 of the Constitution on the basis of the findings of the trial Court, could not be treated as being vitiated because of any provision to the contrary in any international convention or declaration; and that this Court, when sitting on appeal in a case such as the present one, is exercising territorial jurisdiction within the Republic of Cyprus and, for this purpose, it has to apply the Constitution as the supreme law.

(C) *Per A. Loizou, J.*

That the wording of Article 7.2 of the Constitution is so clear and explicit and there is no contradiction in it with paragraph (1) thereof which must be read subject to the provisions of paragraph 2; and that there is no contradiction with the provisions of Article 8 which prohibits torture or inhuman or degrading punishment or treatment and which has nothing to do with the death sentence permitted in certain cases to be imposed under paragraph 2 of Article 7 of the Constitution.

(III) *On the question whether the trial Court dealt correctly with the appellant's application for funds to call expert evidence:*

Held, (*Triantafyllides, P. dissenting*)

A. Per Hadjianastassiou, J., L. Loizou and Malachtos, JJ. concurring:

That the trial Court reached a correct view of Article 12.5 of the Constitution that in the absence of any legislation it could not authorise at that stage payment of funds for legal assistance to the appellant.

(B) *Per A. Loizou, J.*

That under sections 166 and 167 of the Criminal Procedure Law, Cap. 155 and rules 20–23 of the Criminal Procedure Rules, funds are under certain conditions which do not affect the case

in hand, available to defray the costs of witnesses for the defence; and that the proper course that should have been followed in this case was not to inquire with the Court in such general terms about the availability of funds, but to take advantage of the procedural steps open to an accused person and make the best of it for his benefit (pp. 488–452 *post*).

Cases referred to:

In re Ktimatias (reported in this Part at p. 296 *ante*);

The Republic v. *Demetriades and Another* (1973) 2 C.L.R. 289 at p. 293;

Christou v. *Christou,* 1964 C.L.R. 336 at p. 346;

Kanna v. *The Police* (1968) 2 C.L.R. 29 at p. 35;

Georghadji and Another v. *The Republic* (1971) 2 C.L.R. 229 at p. 238;

HjiNicolaou v. *The Police* (1976) 2 C.L.R. 63;

Nielsen v. *Denmark* (Application No. 343/57), Yearbook of the European Convention on Human Rights, 1961 Vol. 4, pp. 548, 550;

Decisions of the European Court of Human Rights;

Neumeister case, delivered on 27.6.1968, para. 22 at p. 43;

Delcourt case, delivered on 17.1.1970, para. 28 at p. 15;

Decisions of the European Commission of Human Rights:

X. v. *The Federal Republic of Germany* (Application No. 1169/61) Yearbook of 1963, Vol. 6, p. 520 at p. 574;

X. v. *The Federal Republic of Germany* (Application No. 3197/67) Collections of the Decisions of the Commission, Part 26, p. 77 at p. 79;

X. v. *The United Kingdom* (Application No. 5871/72) Decisions and Reports of the Commission, Part 1, p. 54;

X. v. *Sweden* (Application No. 434/58) Yearbook of 1958–1959, Vol. 2 p. 354 at p. 370;

Ofner and Hopfinger v. *Austria* (Applications Nos. 524/59 and 617/59) Yearbook of 1963, Vol. 6 p. 676 at p. 696;

Austria v. *Italy* (Application No. 788/60) Yearbook of 1963, Vol. 6 p. 772 at p. 794;

X. v. *Belgium* (Application No. 1134/61) Yearbook of 1961, Vol. 4 p. 378 at p. 382;

Huber v. *Austria* (Application No. 5523/72) Yearbook of 1974, Vol. 17 p. 314 at p. 328;

X. and The German Association of Z v. *The Federal Republic of Germany* (Application No. 1167/61) Yearbook of 1963 Vol. 6 p. 204 at p. 216;

X. v. *The Federal Republic of Germany* (Application No. 852/60) Yearbook of 1961 Vol. 4 p. 346 at p. 354;

X. and Y. v. *The Federal Republic of Germany* (Application No. 1013/61) Yearbook of 1962, Vol. 5 p. 158 at p. 164;

X. v. *Austria* (Application No. 1418/62) Yearbook of 1963 Vol. 6 p. 222 at p. 250;

R. v. *Wallwork*, 42 Cr. App. R. 153 at p. 159;

R. v. *Merry*, 54 Cr. App. R. 274 at p. 279;

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

Peacock v. *The King*, 13 C.L.R. 619 (Australian case);

R. v. *Chakoli*, 8 C.L.R. 93;

Pieris v. *The Republic* (1963) 1 C.L.R. 87;

Vouniotis v. *The Republic* (1975) 2 C.L.R. 34 at pp. 60–61;

Anastassiades v. *The Republic* (reported in this Part at p. 97);

De Freitas v. *Benny* [1975] 3 W.L.R. 388;

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

HjiSavva alias Koutras v. *The Republic* (1976) 2 C.L.R. 13;

Republic and Loftis, 1 R.S.C. C. 30 at pp. 33–34;

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

Aristidou v. *The Republic* (1967) 2 C.L.R. 43 at p. 99;

Davie v. *Edinburgh Magistrates* (1953) S.C. 34;

Rex v. *Lanfear* [1968] 1 All E.R. 683;

Aitken v. *McMeckan* [1895] A.C. 310;

Perera v. *Perera* [1901] A.C. 354 at p. 359;

Papaphilippou v. *The Republic*, 1 R.S.C.C. 61 at p. 64;

Rex v. *Cooper* [1969] 1 All E.R. 32 at pp. 33–34;

Stafford v. *D.P.P.* [1973] 3 All E.R. 762 at pp. 764, 768–769;

R. v. *Sparrow* [1973] 2 All E.R. 129;

R. v. *Mutch* [1973] 1 All E.R. 178;

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

Aristidou v. *The Police* (1973) 2 C.L.R. 244;

R. v. *Shaban*, 8 C.L.R. 82;

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

Appeal against conviction.

Appeal against conviction by Kyriacos Nicola Kouppis who was convicted on the 3rd March, 1977 at the Assize Court of Larnaca (Criminal Case No. 10213/76) on one count of the offence of premeditated murder, contrary to sections 203, 204, 20 and 21 of the Criminal Code, Cap. 154 (as amended by the Criminal Code (Amendment) Law, 1962 (Law 3/62)) and was sentenced to death by Pikis, Ag. P.D.C., Papadopoulos, S.D.J. and Constantinides, D.J.

M. Christophides with *G. Georghiou*, for the appellant.

S. Nicolaides, Senior Counsel of the Republic, with *R. Gavrielides*, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgments were read:

TRIANTAFYLLIDES, P.: The appellant has appealed against his conviction, on March 3, 1977, by an Assize Court in Larnaca, of the offence of premeditated murder under sections 203, 204, 20 and 21 of the Criminal Code, Cap. 154, as amended by the Criminal Code (Amendment) Law, 1962 (Law 3/62).

As a result of such conviction he was sentenced to death; and, though such sentence was the only one which could have been passed upon the appellant under section 203(2) of Cap. 154, the appellant has, also, appealed in respect of the death sentence on the ground that it is unconstitutional and, also, contrary to the Universal Declaration of Human Rights of the United Nations, of December 10, 1948, and to the European Convention for the Protection of Human Rights and Fundamental Freedoms, of November 4, 1950.

It has been the case for the prosecution that on the night of April 5, 1973, in Larnaca, the appellant, acting in concert with two companions of his, namely Kyriacos Kakis and Klavdhios Neocleous, killed Georghios Fotiou, late of Larnaca, by firing repeatedly with fire-arms at their victim, in perpetration of a premeditated plan to murder him.

The trial Court, at the end of an elaborately reasoned judgment, reached the following conclusions, on the basis of which it convicted the appellant:-

"1. The accused kept a watch on the movements of the deceased prior to 5th April 1973. This watch enabled

the accused to acquaint himself about the movements of the deceased.

2. On 5th April 1973, the accused kept a watch on the movements of the deceased, mainly in order to ascertain the hour at which he left work.

3. The accused and his companions emerged in front of the convoy of cars, including the car of the deceased, with the sure knowledge that the deceased was on his way home, expecting him to follow, as it was the deceased's habit, a route via Thessaloniki avenue.

4. The accused, acting in anticipation of the movements of the deceased, turned into Thessaloniki avenue in order to waylay him. The choice of the entrance of Thessaloniki avenue was such as to enable the accused to cause the deceased to bring his car to a standstill without much difficulty, considering that the speed of the deceased could reasonably be expected to be low at the time as he was at the entrance of the street.

5. Having entered Thessaloniki avenue, the accused emerged immediately into the middle of the street with a pistol in his hand in order to compel the deceased to stop.

6. The accused approached the deceased and demanded that he should alight. In the meantime his companions alighted, dangerously armed, taking positions round the car of the deceased making his escape impossible. At the same time they immobilized the companion of the deceased, Neofytos Andreou. The accused kept banging on the window pane of the deceased with his pistol and when the deceased persisted in his refusal to alight, locking his windows at the same time, the accused fired twice at the deceased from close range, giving thereby a clear indication of what he intended to do with the deceased.

When the deceased made a vain effort to escape, the companion of the accused, Kakis, and probably Clavdhios as well, fired at the deceased riddling his body with bullet wounds.

7. When the car of the deceased ended on the left side of the road in the circumstances we have described, the accused fired two more shots at the deceased, indicating

thereby that he wanted to eliminate every possibility of the deceased surviving the injuries already inflicted upon him. The range from which the accused fired at the deceased and the circumstances under which he did so are indicative of his determination to kill the deceased. The wounds caused by the two contact shots referred to in evidence were inflicted upon the deceased by the accused."

Earlier on in its judgment the trial Court stated the following in relation to the evidence adduced:-

"The evidence relied upon to substantiate the charge may be divided into the following three categories:-

1. Evidence tending to establish motive on the part of the accused and his alleged accomplices, coupled with evidence allegedly establishing a shadowing of the movements of the deceased on the part of the accused for a period of time.

2. Evidence of alleged eye-witnesses.

3. Scientific evidence coming from-

(a) doctors;

(b) the fire-arms and ballistics' expert;

(c) the finger-prints expert; and

(d) the Government analyst.

The scientific evidence and in particular the evidence of the ballistics' expert must be judged in juxtaposition to the finding of pieces of real evidence such as expended cartridge cases, projectiles and broken glass."

One of the eye-witnesses in this case, whose evidence is of vital significance in relation to conclusion No. 7, above, of the trial Court, was Kriton Georghiades, who testified that he saw the appellant standing in the street, outside his house and near the car of the deceased, and firing the two shots referred to in the said conclusion No. 7 of the trial Court.

In relation to his evidence the trial Court stated in its judgment the following:-

"In evaluating the evidence of Kriton Georghiades we have

not overlooked the serious discrepancy between his testimony before the Coroner and the evidence he gave before the Assize Court, a discrepancy of a kind that should make the Court very careful before deciding to act on his evidence. We have indeed approached his evidence with the utmost care. However, having seen and heard him give evidence before us we believe he told the Assize Court the truth about what he witnessed that night. His evidence is also supported in material respects by the findings of the police at the scene, as explained by witnesses Christofides and Kyamides. And their evidence does suggest, contrary to what the accused alleged from the dock, that the deceased had been fired at from a very close range whereas the proximity of the expended cartridge cases 9 m.m. calibre does shed light on the position of the assailant of the deceased corresponding with that given by the eye-witnesses at the scene."

The two prosecution witnesses referred to in the above passage are Acting Police Inspector Andreas Christofides (P.W. 39), a ballistics' expert, and Dr. Andreas Kyamides (P.W. 38), a Government pathologist, who carried out a post mortem examination on the body of the victim.

In connection with the evidence of Inspector Christofides and Dr. Kyamides, as well as with the evidence of defence witness Dr. Demetrios Fessas (D.W.2), the trial Court said the following in its judgment:-

"Perhaps the most significant part of the evidence of this witness is his opinion that the shots that caused two of the holes on the jacket of the deceased (*exhibit* 1A) were caused (a) the hole at the back by a contact shot, that is a shot fired from a maximum range of two inches from the jacket, and (b) the hole by the right shoulder of the jacket was again caused by a contact shot fired from a slightly longer range that is from a maximum distance of six inches from the hole. The witness explained his reasons for coming to this conclusion and testified that the insignia and characteristics of these holes make further examination unnecessary, considering that the holes had been caused by what he described as 'contact' shots. The jacket had been examined by the witness for the first time during the hearing of the case before the Assize Court and subsequently while giving evidence before us. These two holes correspond

with the position of the bullet wounds found by the doctor at the back of the deceased and on the surface of the right shoulder blade of the deceased towards the back pictured in photographs 27 and 26 respectively. Much time was devoted in the cross-examination of Dr. Kyamides as to the precise position of the wound on the shoulder blade. Mr. Kyamides disclaimed any special knowledge of reading photographs and insisted, despite the appearance one is apt to get by viewing photograph 26, that the wound was where he described, a description that we must say fits with the position of the hole on the jacket of the deceased. In the opinion of the photographer this wound was an inch below the shoulder, a view shared by Dr. Fessas, a witness for the defence, who testified that this injury is on the joint between the upper and middle third of the ulna of the right arm.

Mr. Fessas, a general practitioner of long standing, testified, on a consideration of the wounds as they appear on photographs 26 and 27, that the wound in photograph 26 was, to whatever extent he could make out from the photograph, a wound on the right arm and rather surprisingly, we must confess, he went on to express an opinion as to whether this wound as well as that suffered at the back had been caused from a contact shot. Unlike Mr. Kyamides, he did not have the benefit of examining the wounds on the dead body and it was, if we may say without disrespect, rather presumptuous on his part to venture an opinion about the range from which the shots that caused the two wounds in question had been fired. He disclaimed, in his own words, any special knowledge on photography or ballistics. This, however, did not deter him from expressing an opinion. His opinion, to whatever extent it may shed light on the issues under consideration, is that the wound pictured in photograph 26 had not been caused by a contact shot whereas this was more likely the case with reference to the wound pictured in photograph 27. Later in cross-examination he rather inclined to modify his view as to the position of the wound pictured in photograph 26 and indicated its position at a point fitting the corresponding hole on the jacket thus coming round in a way to the view of Dr. Kyamides, who evidently was in a unique position to enlighten us about the position of this bullet wound. It is instructive to note the evidence of

Mr. Kyamides as to the angle at which the bullets that caused the wounds pictured in photograph 26 and 27 at the back of the shoulder of the deceased, hit the deceased. The bullets had struck the deceased virtually vertically. The evidence of Dr. Kyamides on the point, coupled with that of Mr. Christofides as to the range from which these shots had been fired, if accepted, throws considerable light as to the position of the assailant of the deceased at the time and tends to corroborate in a very direct way the evidence of the two eye-witnesses that the accused shot at the deceased from close range. Further, this evidence, if accepted, tends to exclude the possibility that these shots had been fired by any one of the companions of the accused and gives an indication of the person who fired the pistol that discharged the four expended cartridge cases that were found at the scene of the incident.

.....

On the other hand, the evidence of expert witnesses, parti- the testimony of witness Christofides and Dr. Kyamides, have been scrutinized in detail lest their findings are erroneous in any respect or their opinion ill-founded or unjustified. Of course the findings of experts, when accepted as correct, carry the weight of science stripped of human emotion and margins of humán fallibility.

We were extremely well impressed with witness Christofides, the ballistics' expert. We formed the view that he is well trained in the field of ballistics, with long practical experience behind him. He gave us the impression of being both accurate and succinct both in his findings and in the opinion he expressed. He struck us as a witness who would be unwilling to express an opinion unless certain about it and then if uncertain to any extent he would offer his opinion subject to the necessary qualifications. We accept him as a witness of truth and as a reliable witness and feel confident that we can safely act on his evidence. We formed the same impression about Dr. Kyamides and accept without hesitation his findings and opinion. We did not form the same view about the evidence of Dr. Fessas, evidence which we consider as totally unreliable."

Moreover, it is to be borne in mind that the trial Court rejected "without hesitation" an unsworn statement made by the appellant from the dock during the trial, because it was,

inter alia, in conflict with the findings of Inspector Christofides and Dr. Kyamides.

During the trial, and before Inspector Christofides and Dr. Kyamides had given evidence, counsel for the appellant, who had been assigned by the Assize Court, under section 64 of the Criminal Procedure Law, Cap. 155, to defend the appellant at the trial, raised, on February 17, 1977, the question of how the costs of expert witnesses in relation to fire-arms, who would be consulted and probably called by the defence, would be paid; the relevant part of the record of the trial reads as follows:-

"*Time*: 5:30 p.m.

Christofides: Your Honours, the time is about 5:30 p.m. and I understand that the Court will break for to-morrow. Before the Court rises there is one thing I must bring to the notice of the Court and ask directions. In accordance with the provisions of Article 12.5 of the Constitution the accused must be afforded, *inter alia*, sufficient 'diefkolinsis', that is facilities for the preparation of his defence. In this case expert evidence on firearms will be led by the police and the defence will consult and probably adduce expert evidence on the question of fire-arms. The question arises of who shall pay the costs of these experts. It is well known that we were assigned by the Court to defend the accused and surely the directions of the Court on the matter would be most helpful.

Nicolaides: There is no obstacle on the part of the prosecution for any facilities to be afforded to the defence. But unless there is the machinery we cannot improvise the machinery for such facilities. No law has been introduced implementing that paragraph of the Constitution.

DECISION: Learned counsel for the defence raised an interesting and novel point. He sought the directions of the Court on the possibility of the costs of expert witnesses being paid by the State in the event where this Court considered this course necessary for the proper preparation and presentation of the case for the defence before the Court. Mr. Christofides made it clear that there is no provision anywhere in the criminal procedure or regulations made thereunder entitling the Court to authorize the payment of such expenses. He did point out, however, that in Article 12.5 it is laid down that the accused should be afforded adequate

facilities for the preparation of his defence and submitted that the amenity to consult and call expert witnesses is such an essential facility that this facility should be provided by the State where the accused has no funds, especially in a case where defence counsel appear on a Court assignment.

Learned counsel for the prosecution, in his reply, indicated that there is willingness on the part of the State to afford every facility for which there is warrant in the law to the accused for the preparation of his defence but submitted that there is nowhere provision that might entitle the Court to give such directions.

In our judgment, the relevant provisions of the Constitution safeguarding fundamental defence rights do not confer power to authorize the payment of the expense that may be incurred for the consultation and calling of expert witnesses, out of public funds. This Constitutional provision is designed to ensure substantial equality between the prosecution and the defence with regard to the right to choose their witnesses and produce them before the Court without hindrance. Had the Constitutional legislators intended to confer such a right on the accused they would include this right among the minimum fundamental rights, such as the right to have an interpreter. Of course had the State implemented those provisions of the Constitution, making mandatory the setting up of a system of legal aid, surely a law might provide as an aspect of legal aid the payment of the expenses of defence witnesses and the circumstances under which such expenses might be paid. We do not overlook that a citizen may conceivably find himself at a disadvantage on account of inequality of means but in the absence of an organic law we have no power to substitute for the House of Representatives and legislate in effect for some aspects of legal aid. Of course the State must, at the first available opportunity, provide, as it has been repeatedly stressed by the Supreme Court, for a comprehensive system of legal aid though, having in mind the multiple problems the State has had to face so far one cannot be too critical of failure to provide a comprehensive scheme of legal aid. Therefore we have no power to give directions in relation to a matter beyond our competence. Of course, if at the end of the proceedings the

defence applies to the appropriate Governmental Department for the payment of these costs,—and we must say that there is at present nothing in the law providing for such a procedure—and if the views of the Court are asked on the matter, we shall give our views depending on the necessity of incurring the expenditure and its reasonableness.

The case is adjourned for further hearing to-morrow at 9:30 a.m. Accused to remain in custody."

As a result of the above-quoted decision of the trial Court no expert witness in relation to fire-arms was consulted, or called, by the defence at the trial. A medical expert witness, Dr. Fessas, was, however, called by the defence and his costs were, eventually, paid, after the trial, out of public funds.

As it appears, however, from the comments of the trial Court on the evidence of Dr. Fessas, which we have already quoted, his evidence was not treated as expert evidence in relation to ballistics matters and, therefore, the gap in the case of the defence, due to the absence of such expert evidence, was not remedied by the fact that Dr. Fessas gave evidence at the trial as a defence witness.

Counsel for the appellant have complained that, because of the aforesaid decision of the trial Court on February 17, 1977, the appellant was prejudiced in the preparation and presentation of his defence at the trial, in a manner contrary to the relevant provisions of our Constitution.

Paragraphs 2 and 3 of Article 30 of the Constitution provide as follows:-

"2. In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent Court established by law. Judgment shall be reasoned and pronounced in public session, but the press and the public may be excluded from all or any part of the trial upon a decision of the Court where it is in the interest of the security of the Republic or the constitutional order or the public order or the public safety or the public morals or where the interests of juveniles or the protection of the private life of the parties so require or, in special circum-

stances where, in the opinion of the Court, publicity would prejudice the interests of justice.

3. Every person has the right—

(a) to be informed of the reasons why he is required to appear before the Court;

(b) to present his case before the Court and to have sufficient time necessary for its preparation;

(c) to adduce or cause to be adduced his evidence and to examine witnesses according to law;

(d) to have a lawyer of his own choice and to have free legal assistance where the interests of justice so require and as provided by law;

(e) to have free assistance of an interpreter if he cannot understand or speak the language used in Court."

The above provisions relate to proceedings before the Courts generally.

In relation, however, to a trial for an offence paragraph 5 of Article 12 of the Constitution provides, particularly, as follows:-

"5. Every person charged with an offence has the following minimum rights:-

(a) to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through a lawyer of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court."

All the above provisions of the Constitution are formulated in such a manner so as to ensure for, *inter alia*, any person charged with a criminal offence a "fair" trial; and as I have had occasion to observe in *Re Ktimatias*, (*reported in this Part at p. 296 ante*, at pp. 306–307) a trial may still not conform to the general standard of "fair" trial, in the sense of Article 30.2, even if the specific minimum rights of an accused person have been respected, because the enumeration of such minimum rights is not exhaustive.

It is to be noted, furthermore, in this connection, that in *The Republic* v. *Nicos Demetriades and another*, (1973) 2 C.L.R. 289, 293, it was stressed that Article 30 of our Constitution safeguards "the fundamental right of an accused person to have a fair trial in every respect."

Article 30.2 of our Constitution corresponds, very closely, to Article 6(1) of the aforementioned European Convention on Human Rights, which reads as follows:–

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice."

Likewise, Article 12.5 of our Constitution corresponds, equally closely, to Article 6(3) of the said Convention, which reads as follows:–

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court."

It is well settled that the European Convention on Human Rights, which has been ratified by the European Convention on Human Rights (Ratification) Law, 1962 (Law 39/62), is applicable in the Republic of Cyprus, by virtue of Article 169.3 of our Constitution and, therefore, it is of "superior force to any municipal law" (see, in this respect, *inter alia*, *Christou* v. *Christou*, 1964 C.L.R. 336, 346, *Kanna* v. *The Police*, (1968) 2 C.L.R. 29, 35, *Georghadji and another* v. *The Republic*, (1971) 2 C.L.R. 229, 238, *HjiNicolaou* v. *The Police*, (1976) 2 C.L.R. 63 and the *Ktimatias* case, *supra*, at p. 306).

It follows from the foregoing that the interpretation and mode of application of the aforesaid provisions of the European Convention on Human Rights (by the European Commission of Human Rights and the European Court of Human Rights) can provide most useful guidance as regards the interpretation and application of the corresponding provisions of our own Constitution which have, already, been quoted in this judgment.

In *Nielsen* v. *Denmark* (Application No. 343/57) the Commission stated, *inter alia*, the following (see the Yearbook of the European Convention on Human Rights, 1961, vol. 4, pp. 548, 550):-

> "Article 6 of the Convention does not define the notion of 'fair trial' in a criminal case. Paragraph 3 of the Article enumerates certain specific rights which constitute essential elements of that general notion, and paragraph 2 may be considered to add another element. The words 'minimum rights', however clearly indicate that the six rights specifically enumerated in paragraph 3 are not exhaustive, and that a trial may not conform to the general standard of a 'fair trial', even if the minimum rights guaranteed by para-

graph 3—and also the right set forth in paragraph 2—have been respected. The relationship between the general provision of paragraph 1 and the specific provisions of paragraph 3, seem to be as follows:

> In a case where no violation of paragraph 3 is found to have taken place, the question whether the trial conforms to the standard laid down by paragraph 1 must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular aspect of the trial or one particular incident. Admittedly, one particular incident or one particular aspect even if not falling within the provisions of paragraphs 2 or 3, may have been so prominent or may have been of such importance as to be decisive for the general evaluation of the trial as a whole. Nevertheless, even in this contingency, it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether or not there has been a fair trial."

It is well settled that the principle of equality of arms is an inherent element of a fair trial within the meaning of Article 6(1) of the Convention (see, in this respect, Fawcett on The Application of the European Convention of Human Rights, 1969, p. 137 et seq., Castberg on The European Convention of Human Rights, 1974, p. 123 et seq. and Jacobs on The European Convention on Human Rights, 1975, p. 99 et seq., the judgments of the Court in the case of *Neumeister*, delivered on June 27, 1968, para. 22 at p. 43, and in the case of *Delcourt*, delivered on January 17, 1970, para. 28 at p. 15, and the decisions of the Commission in the cases of *X* v. *The Federal Republic of Germany*, application No. 1169/61, Yearbook, 1963, vol. 6, pp. 520, 574, *X* v. *The Federal Republic of Germany*, application No. 3139/67, Collection of the Decisions of the Commission, Part 26, pp. 77, 79 and *X* v. *The United Kingdom*, application No. 5871/72, Decisions and Reports of the Commission, Part 1, p. 54).

Concerning the principle of equality of arms the following are stated by Fawcett, *supra* (at p. 137):–

> "The principle of the equality of arms (l'égalité des armes; Waffengleichheit) is an expression of the rule audi alteram partem, and implies that each party to the proceedings before a tribunal must be given a full opportunity to present

his case, both on facts and in law, and to comment on the case presented by his opponent. This opportunity must be equal between the parties and limited only by the duty of the tribunal to prevent in any form an undue prolongation or delay of the proceedings."

In this respect the Commission stated the following in its decision in the case of *X* v. *Sweden* application No. 434/58 (Yearbook, 1958–1959, vol. 2, pp. 354, 370, 372):–

> "Whereas, also, the right to a fair hearing guaranteed by Article 6, paragraph 1, of the Convention appears to contemplate that everyone who is a party to civil proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him under a substantial disadvantage vis-a-vis his opponent;"

The same principle of equality of arms applies a fortiori to criminal proceedings; in its decision in the cases of *Ofner and Hopfinger* v. *Austria*, applications Nos. 524/59 and 617/59, Yearbook, 1963, vol. 6 p. 676, 696, the Commission stated the following:–

> "In the present cases the problem is whether the notion of a 'fair trial' embodies any right relating to the defence beyond and above the minimum rights laid down in paragraph (3). The Commission is of the opinion that what is generally called 'the equality of arms', that is the procedural equality of the accused with the public prosecutor, is an inherent element of a 'fair trial'. Whether such equality has its legal basis in paragraph (3) depends upon the interpretation of subparagraphs (b) ('to have adequate time and facilities for the preparation of his defence') and (c) ('to defend himself in person or through legal assistance'). The Commission need not express a definite opinion on this point, since it is beyond doubt that in any case the wider and general provision for a fair trial, contained in paragraph (1) of Article 6, embodies the notion of 'equality of arms'."

In the case of *Austria* v. *Italy*, application No. 788/60, the Commission observed that Articles 6(1) and 6(3) of the Convention, convey to some extent, in their special field, an idea of equality very similar to the principle of non-discrimination laid

down in Article 14 of the Convention (see Yearbook, 1963, vol. 6, p. 794).

An aspect of the principle of equality of arms which is of particular significance is that which relates to the time and facilities for the preparation of the defence of an accused person and, especially, to his right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

In this connection, the Commission, in its decision in the case of *X* v. *Belgium*, application No. 1134/61 (Yearbook, 1961, volume 4, pp. 378, 382) stated:-

> "Whereas in particular, with regard to the alleged violation of paragraph (3)(d) of Article 6, this paragraph provides that every person charged with a criminal offence has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'; whereas the Commission has already pointed out, in pronouncing on the admissibility of Applications No. 617/59 (*Hopfinger* v. *Austria*) and No. 788/60 (*Austria* v. *Italy*), that the text in question is intended to place the indicted, prosecuted or accused person on an equal footing with the prosecution as regards the hearing of witnesses, but not to give him a right to call witnesses without restriction;"

Likewise, in the case of *Austria* v. *Italy*, *supra* (Yearbook, 1963, vol. 6, p. 772), the Commission stated the following in its decision:-

> "Article 6(3)(d) of the Convention, in guaranteeing to everyone charged with a criminal offence the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, aims at ensuring for the defence complete equality of treatment in this respect with the prosecution and the civil plaintiff. On the other hand, it does not imply the right to have witnesses called without restriction. Thus, this provision does not mean that municipal law cannot lay down conditions for the admission and examination of witnesses, provided that such conditions are identical for witnesses on both sides. Similarly, the competent judicial authorities in Contracting States are free, subject to respect for the

terms of the Convention and in particular the principle of equality established by Article 6(3)(d), to decide whether the hearing of a witness for the defence is likely to assist in ascertaining the truth, and if not, to refuse to call that witness."

The same view, as above, is reiterated in more recent decisions of the Commission, such as that in the case of *Huber* v. *Austria*, application No. 5523/72 (Yearbook, 1974, vol. 17, pp. 314, 328).

For the purposes of the relevant provisions of the Convention the term "witness" includes, also, an "expert witness" (see, *inter alia*, Fawcett, *supra*, at p. 174, and the decision of the Commission in application No. 1167/61, *X and the German Association of Z* v. *The Federal Republic of Germany*, Yearbook, 1963, vol. 6, pp. 204, 216).

It has been held by the Commission that it is conceivable that, in certain circumstances, the refusal of a Court to allow a witness to testify may contravene directly the requirement of fair trial in Article 6(1) of the Convention, and not only the specific provision in Article 6(3)(d) of the Convention (see, in this respect, the decision of the Commission in *X* v. *The Federal Republic of Germany*, application No. 852/60, Yearbook, 1961, vol. 4, pp. 346, 354, and our own case of *Christou, supra*, at p. 346, in which the above decision of the Commission has been referred to).

The establishment of a violation of the provisions of Article 6 of the Convention regarding a "fair hearing" cannot be determined in abstracto, but it is a matter which must be considered in the light of the special circumstances of each case (see the decision of the Commission in the case of *X and Y* v. *The Federal Republic of Germany*, application No. 1013/61, Yearbook, 1962, vol. 5, pp. 158, 164); and, for this purpose, the trial of an accused person must be considered as a whole (see the decision of the Commission in *X* v. *Austria*, in application No. 1418/62, Yearbook, 1963, vol. 6, pp. 222, 250).

Also, in its judgment in the *Delcourt* case, *supra*, the European Court of Human Rights has observed the following regarding the interpretation of Article 6(1), (para. 25, p. 15):–

"In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such

a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision".

I am of the opinion that the principle of equality of arms, as expounded above, is an inherent part of all the provisions of Article 30.2 and Article 12.5 of our own Constitution which correspond, respectively, to paragraphs (1) and (3) of Article 6 of the European Convention on Human Rights.

Moreover this principle is directly safeguarded—in a manner not to be found in the Convention—by means of Article 28.1 of our Constitution, which provides that "All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby"; it is to be noted, in this respect, that Article 28.2 of our Constitution corresponds to Article 14 of the Convention but, in the latter Article, there does not exist any provision such as paragraph 1 of our Article 28.

Looking, now, as a whole at the trial of the appellant in the present appeal, and taking duly into account all relevant considerations, I feel bound to come to the conclusion that the deprivation of the appellant of the possibility of consulting a ballistics' expert and of calling him as a witness for the defence operated in such a manner as to place him at a grave disadvantage vis-a-vis the prosecution, at his trial, in a manner which contravened the principle of equality of arms, as safeguarded both by our Constitution and by the said Convention. In this respect I think that it must be stressed that the evidence of the ballistics' expert called by the prosecution, Inspector Christofides (P.W. 39), turned out to be of decisive importance regarding the findings made by the trial Court about the part played by the appellant in bringing about the death of the victim and, also, regarding the existence, on his part, of premeditation to cause such death.

As already pointed out in this judgment, the appellant was being defended by counsel assigned to him by the trial Court, under section 64 of Cap. 155 (as well as under Article 12.5(c) of the Constitution); and it has been common ground, all along, that the appellant had no means of his own enabling him to either engage counsel to defend him or to pay for the expenses of defence witnesses.

I have, consequently, reached the conclusion that the only

proper course open to me is to treat the conviction of the appellant as having been the culmination of a process which evolved in a manner inconsistent with essential constitutional safeguards of an accused person, such as those set out in Articles 12.5, 30.2 and 28 of the Constitution; therefore, his conviction has to be set aside on this ground.

It is obvious from the decision given by the trial Judges on February 17, 1977, during the trial and when the issue of the need by the defence of the services of ballistics' expert was raised, that they appreciated fully that Article 12.5 of the Constitution is designed to ensure substantial equality between the prosecution and the defence, but they, eventually, reached the conclusion—though they clearly expressed their anxious concern about the matter in question and have, undoubtedly, acted with the utmost good faith—that, in the absence of any statutory provision enabling them to order the payment of the expenses of such an expert, they had no competence to give directions in this connection.

Even if that were so, I would, still, have been inclined to hold that, in the particular circumstances of this case, the conviction of the appellant has to be set aside as having been brought about by a process inconsistent with the Constitution, because it is not his fault that the State has not made provision to meet a situation such as the one which has arisen in the present instance.

I am, however, of the opinion that, even in the absence of a specific statutory provision directly authorizing the trial Court to order that the expenses of a ballistics' expert to be called as a witness by the defence should be paid out of public funds, there existed ways by means of which there could have effectively been ensured the availability of such an expert; for example, once counsel appearing for the prosecution had stated that "there is no obstacle, on the part of the prosecution, for any facilities to be afforded to the defence" he could have been asked to make available to the defence a ballistics' expert out of those employed by the police in various parts of Cyprus or to take steps to make available at public expense such an expert even if he was not in Governmental employment but he was, for example, a retired ballistics' expert of the police.

The trial Court could, also, have used its power of calling itself a witness in a criminal trial under section 54 of Cap. 155

(and regarding the extent and the exercise of such power, see, also, Phipson on Evidence, 12th ed., p. 676, para. 1619, and *R.* v. *Wallwork*, 42 Cr. App. R. 153, 159). In this way a second ballistics' expert, in addition to Inspector Christofides (P.W. 39), could have been heard and, thus, both the prosecution and the defence, as well as the trial Court, could have had the opportunity of testing, against the independent evidence of another expert, the correctness of the findings of Inspector Christofides, with the consequence that the disadvantage suffered by the appellant, as an accused person, by not being able to secure the attendance, as his own witness, of a ballistics' expert, would have been minimized to such an extent that it could have been conceivably held, eventually, that there was no substantial contravention of the relevant constitutional provisions safeguarding the principle of equality of arms.

Even another way in which a ballistics' expert could have been made available to the defence at public expense would have been for the trial Court to adjourn the further hearing of the case, on February 17, 1977, for a few days, so as to have an opportunity of exploring administratively, through the Supreme Court, the possibility of the Minister of Justice ensuring that the State would pay the expenses of a ballistics' expert to be consulted and called as a witness by the defence. Of course, it has to be stressed that the requirements of the defence, as regards the services of a ballistics' expert, would have had to be met in a reasonable manner and without any extravagance beyond the limit of what was properly necessary in the circumstances.

Having decided, as already stated in this judgment, that the conviction of the appellant should be set aside, the next issue which I have to consider is whether he should be discharged or whether there should be an order, under section 145(1)(d) of Cap. 155, for his retrial.

I have weighed carefully the advisability of ordering a new trial in a serious case, such as the present one, in which the appellant has been facing a charge of murder; I am not prepared to hold that murder cases should, invariably, be treated as being outside the ambit of the exercise of the powers under section 145(1)(d) of Cap. 155; and, as a matter of fact, in *R.* v. *Merry*, 54 Cr. App. R. 274, the Court of Appeal (Criminal Division) in England ordered a new trial in a case of murder, in the exercise of powers analogous to those of our Supreme Court under

Section 145(1)(d), above; in that case Edmund Davies L.J. stated the following (at p. 279):-

> "We have been reminded of the decision of the Court of Criminal Appeal in JORDAN [1956] 40 Cr. App. R. 153, where a conviction of murder was quashed after the Court had heard fresh medical evidence. But it is to be observed that JORDAN (*supra*) was decided many years before this Court was for the first time vested with the power to order a new trial. We consider that in the interests of justice, this appellant should be retried. The Crown may then call such evidence as it desires to in relation to this fresh matter, or any other matter, just as the defence are equally entitled to present any material which they desire."

In the light of all relevant considerations, and having in mind what has been stated in, *inter alia*, *Pierides* v. *The Republic* (1971) 2 C.L.R. 263, concerning sometimes the need, in the interests of justice, for a new trial after the setting aside of a conviction on appeal, I have reached the conclusion that this is, indeed, a proper case in which an order for a new trial should be made.

It is worth noting that the Australian case of *Peacock* v. *The King*, 13 C.L.R. 619, which has been refered to in the judgment in the *Pierides*, case, *supra*, is an instance in which a new trial was ordered, on appeal, in a capital case, namely in a case of murder.

Having reached the conclusion that the appellant should be retried on the charge of premeditated murder it would not be right for me to pronounce finally on any other issue arising in this case.

In relation, however, to the aspect of premeditation I feel that I have to observe that I am inclined to the view that when a group of heavily armed persons, such as the appellant and his two companions in the present instance, are roaming the streets of a town, in anticipation of a possible encounter with political opponents of theirs, and if in the course of such an encounter they use their arms with the result that there is caused deprivation of life, then, as a matter of general principle, there do exist elements in the light of which, depending on the special circumstances of each individual case, the conclusion might be reached that there existed premeditation to commit murder; one might

describe such premeditation as "conditional premeditation" (see, in this respect, *inter alia*, *R.* v. *Chakoli*, 8 C.L.R. 93, *Pieris* v. *The Republic*, (1963) 1 C.L.R. 87).

Lastly, I would like to deal, briefly, with the contention of counsel for the appellant that the death sentence was invalidly passed upon the appellant in the present case. Of course, since his conviction, has, in my opinion, to be set aside and a retrial should take place, the death sentence passed upon him would no longer be executed, but I wish, nevertheless, to state that I cannot accept the contention of counsel for the appellant that it is possible to pronounce that the death sentence was invalidly imposed in a case which comes within the ambit of Article 7.2 of the Constitution.

It cannot be held that the said Article 7.2 is not properly in force because it, allegedly, conflicts with Articles 7.1 and 8 of the Constitution; what is expressly provided for in the Constitution can never be treated as being inoperative on the ground that its application is excluded by some other provision of the Constitution.

Nor could the death sentence, which was imposed in the present instance in full conformity with the provisions of Article 7.2 of the Constitution on the basis of the findings of the trial Court, be treated as being vitiated because of any provision to the contrary in any international Convention or Declaration; this Court, when sitting on appeal in a case such as the present one, is exercising territorial jurisdiction within the Republic of Cyprus and, for this purpose, it has to apply the Constitution as the supreme law.

I would like, none the less, to reiterate that I still adhere to what I have said about the execution, as contradistinguished from the imposition, of a death sentence, in *Vouniotis* v. *The Republic*, (1975) 2 C.L.R. 34, 60-61 and in *Anastassiades* v. *The Republic*, (reported in this Part at p. 97, 236); I should, further, refer, in this respect, for whatever guidance it might be found to offer, to the decision of the Privy Council in England in *De Freitas* v. *Benny*, [1975] 3 W.L.R. 388.

For all the foregoing reasons, this appeal should, in my opinion, be allowed and a new trial of the appellant, on the charge of premeditated murder, should take place.

L. LOIZOU, J.: I have had the opportunity of reading the judgment of Hadjianastassiou, J. and I agree with the conclusion reached by him and the reasons therefor.

I am clearly of the view that the evidence of the main prosecution witnesses upon which the Court relied in finding premeditation leaves much to be desired and that, therefore, the findings and inferences based thereon are unsafe. I agree in particular that the evidence did not warrant the conclusion that the appellant was shadowing the victim or that he and his companions waylaid him at the scene of the crime in Thessaloniki street. The latter finding especially is, to my mind, quite inconsistent with the behaviour of the deceased, who, whilst travelling with his companions in a convoy of three cars for safety reasons, as it was stated, saw fit all of a sudden to accelerate and overtake the car of the convoy which was in front of him at the precise moment when the car of the appellant was seen travelling ahead of them and having done so to follow the appellant into Thessaloniki street.

One of the most vital prosecution witnesses on this issue was prosecution witness 7, Criton Georghiades, who witnessed the incident through the shutters of the window of his first-storey house which almost overlooks the scene of the crime. This witness in the course of his evidence before the Assize Court, *inter alia*, stated that after the car of the deceased came to a standstill on the left side of the road he saw the appellant firing two or three shots at the deceased who was still sitting in the driver's seat of his car almost from point blank range. This fact the Court concluded was indicative of appellant's determination to kill the deceased. This conclusion of the Court would not be open to any complaint or criticism but for the fact that this same witness when giving evidence at the inquest almost twenty months earlier said nothing about seeing the appellant firing the contact shots or any shots at all. All he said with regard to the appellant was that he saw him holding a pistol in his hand. He explained this discrepancy by saying that the way a statement is elicited before the Coroner is different from the way one's evidence is elicited before the Assize Court and that while giving his testimony before the Coroner at the inquest he gave emphasis to the fact that he identified the person he saw firing and he thought that other questions would follow; and when he finished his testimony before the Coroner, he said, he was left with the impression that he had omitted something. As stated above the witness never stated at the inquest that he saw

the appellant firing at all and I find it difficult to comprehend how a discrepancy of this nature in a case such as the present did not raise, at least, a suspicion in the mind of the Court that the evidence of the witness might not have been as reliable or accurate as they found it to be.

Apart from the evidence of this eye-witness (P.W.7, Georghiades) the prosecution endeavoured to establish the contact shots by the evidence of the ballistics' expert P.W. 39, Inspector Christofides. But the way they went about it was, in my view, hardly fair either to the witness himself or to the case. The witness was shown for the first time the jacket that the deceased was wearing on the night of the 5th April, 1973 when he was killed, in the course of the hearing of the case before the Assize Court and was asked whether in his opinion, two of the holes in the jacket had been caused by contact shots. This jacket had been in the possession of the police for almost four years and the witness himself stated in evidence that if he were to give an expert opinion scientifically the *exhibit* should have been submitted to him the earliest possible. He further admitted that in some cases it was necessary to ascertain the existence of gun-powder but where there was a tearing of the cloth and the signs of gun-powder residue were evident a chemical analysis might not be necessary. Asked whether by looking at the two holes on the *exhibit* jacket he could say that there was residue of gun-powder or evident signs that they had been caused by shots the witness replied that there was blackening round the holes "which resembles very much with signs of gun-powder" but he could not say with the naked eye whether there was unburnt gun-powder. As regards the nature of the wound caused by a contact shot the witness stated that it is the laceration of the wound which is a characteristic of a contact shot but he admitted that he was never given a detailed description of the wounds which corresponded to the two holes on the jacket which were allegedly caused by contact shots but that he had the opportunity to see once a booklet of photographs which showed the wounds on the dead body but he never had a detailed description such as the diameter of the entry and exit wounds and their details. One would have thought that the witness would have been in a much better position to give an accurate and correct answer to the question had he been given the opportunity to carry out a scientific examination in his laboratory at an early stage rather than having to rely on what he could perceive with a naked eye and from material hardly sufficient

for the purpose. And although the witness concluded that, in his opinion, the holes on the jacket had been caused by contact shots one is, in the circumstances, left wondering about the correctness of his conclusion.

The state of the evidence in this case on the issue of premeditation is a matter of grave concern. Having regard to its nature and quality I feel that it is not possible for me to say that the verdict of the Court on this issue was either safe or satisfactory. The least that can be said is that there is room for grave doubt whether the killing was premeditated; and that the appellant is by law entitled to the benefit of such doubt.

In the light of the above I would allow the appeal to this extent, set aside the conviction for premeditated murder and substitute therefor a conviction for Homicide contrary to section 205 of the Criminal Code.

HADJIANASTASSIOU, J.: On March 3, 1977, at the Assize Court of Larnaca, the appellant was convicted of premeditated murder of the late Georghios Fotiou of Larnaca, acting in concert with two accomplices, contrary to ss. 203 and 204 (as amended by Law 3/62) and ss. 20 & 21 of the Criminal Code, Cap. 154. He was sentenced to death. He now appeals against conviction on a number of points of law.

The facts can be put very shortly and are somewhat exceptional. On April 5, 1973, shortly after 9.15 a.m. the murder of the late Fotiou took place, during a very critical period for the Republic of Cyprus regarding law and order. The victim of this terrible murder was the owner of a petrol station situated at Makarios III Avenue in Larnaca. He was residing with his family at his house at Singlitiki Street, not far from Grivas Digenis Avenue, which is a well lighted road. His brother-in-law, Harris Georghiou, resided in a house adjoining that of the victim at Eleftheria Avenue, a side road of Grivas Digenis Avenue. The two aforesaid avenues are perallel to each other, situated not far off the one from the other, at a distance estimated to be in the region of 30-40 meters. It is in evidence that one can reach Maria Singlitiki Street from Thessaloniki Avenue following what may be described as an oblique route.

The victim was a member of EDEK party and on April 1, 1973, an ugly incident took place, viz., a bomb made up from a stick of dynamite was planted at his petrol filling station but fortunately it was discovered before it exploded by Harris

Georghiou and was subsequently disposed of by P.C. Theofanis Efrem. After that incident quite naturally, the victim was feeling worried about the safety of his property and of his person, and according to Vladimiros Charalambous, a friend, Charalambos Georghiou, a brother-in-law, Harris Georghiou, another brother-in-law, and Neofytos Andreou, an employee of Photiou, the discovery of the bomb, as well as that there was shadowing of their movements by the appellant, made them apprehensive about their safety and they decided to move together because they thought they could find safety in numbers, particularly when leaving the petrol station at night time.

According to Vladimiros Charalambous, the following up started after some incidents at the "Corner" cafeteria which took place on March 23 or 24, 1973. It was the case for the prosecution that on April 5, 1973, the appellant repeatedly followed the movements of the victim before the fatal events which took place at Thessaloniki Avenue later on in the evening.

In the meantime, at about 7.00 p.m. Fotiou drove to the house of his brother-in-law Charalambos Georghiou which is situated in the Kalifadjia area. He was accompanied by Vladimiros Charalambous. According to the latter, on three occasions at three different parts of the town, the appellant was seen following them, having as a passenger in his car a certain Clavdios Neocleous.

In cross-examination, Vladimiros Charalambous was questioned about his failure to indicate at the preliminary inquiry which took place in January, 1976, some of the details of the alleged following up near the premises of the Bishopric, and in particular his omission to state that at some stage the car of the appellant was following them by what has been referred to as "cross-roads". This witness, in his testimony said that he had no explanation to offer for that omission and he admitted that he ought to have mentioned that fact at the preliminary inquiry as well. He further said that on their way back to the petrol station the car of the appellant was seen disappearing inside the premises of the Bishopric of Kitium, and finally, on their return to the petrol filling station at about 8 p.m. he saw the appellant once more driving his car slowly outside the station of the victim; and it appeared to him that the former was watching their movements in the station, whilst in company with two passengers. He identified one, but not the other.

Apparently, the incidents of following up or watching the said station continued, and just before closing down shortly after 9 p.m. witness Harris Georghiou and Neofytos Andreou saw the car of the appellant passing once more outside the station with two passengers in it, heading in the direction of the police station.

There was further evidence by P.C. Kerimis that the car of the appellant was seen by him at 9.00—9.05 p.m. on the fatal night coming from the direction of the premises of EPA Club to Makarios III Avenue and heading in the direction of the petrol station of the victim. That policeman identified the appellant as the driver of the car and also another person alleged to be an accomplice, sitting in the rear passenger's seat.

It was indeed the case for the prosecution that prior to the incidents at Thessaloniki Avenue, the appellant followed the movements of the victim before their encounter, but the appellant, although he admitted that he passed outside the petrol station at times, he denied the allegations that he was shadowing the movements of Fotiou. On the contrary, he alleged that he himself was followed by the deceased on two occasions.

On April 5, 1975, the fatal night at about 9.00 p.m. Harris Georghiou, Neophytos Andreou and the deceased left the station together travelling in a convoy of cars for safety reasons in order to reach their homes. When they came to a point on Grivas Digenis Avenue, the victim, for reasons not known—although he was apparently in the middle of the convoy—overtook the car ahead of him, and that happened, according to Andreou, when the appellant appeared in front of them at the petrol station of Karkas. In the meantime, Georghiou had branched off into Eleftherias Avenue without noticing the presence of the car of the appellant on the road, and when the victim was about to turn into Thessaloniki Avenue. What followed when the victim entered Thessaloniki Avenue has been a matter of controversy between the prosecution witnesses and the appellant.

When Andreou, an employee of the victim, entered Thessaloniki Avenue, he saw the appellant alighting from his car which was parked on the left hand side of the road, armed with a pistol or a revolver in his hand, standing in the middle of the road. The appellant was signalling to the victim to stop. The latter stopped in the middle of the road keeping his engine running. Then the appellant proceeded to the right of the driver

by the window pane, and stood by the driver's door, asking Fotiou to alight, using these words: "Kateva kato re, esi pou to aftokinito", or "kateva kato". At the same time, his companions alighted, also armed with automatic sub-machine guns, and took positions to the left of the car of the victim. The one was standing towards the front and the other, Clavdios, towards the rear of the car.

Apparently, because Fotiou was not alighting from his car, the three culprits took positions round the car of the victim—the two companions of the appellant having their weapons equipped with two magazines each. In the meantime, Clavdios asked witness Andreou to alight, having earlier stopped, and having alighted from his car, kept his hands up as he was ordered. It appears further that the appellant repeated his demand for the victim to alight from his car, and started banging on the driver's window pane with the weapon he had in his hand. At that stage, Andreou saw Photiou locking his door and then extending his arm to the left, giving the impression that he was also locking the passenger's door at the same time, thus evincing a definite disinclination to comply with the insistent demand of the appellant that he should alight.

Immediately afterwards, the witness added, the appellant fired two shots at the victim and as a result of those two shots the latter made an effort to drive forward, and a burst of fire was directed against him by one of the culprits.

Because of that burst, the attention of Clavdios was directed elsewhere, and taking advantage of that momentary inattention, Andreou ran in the direction of Grivas Digenis Avenue and continued running as bullets were flying round him, in order to prevent him from escaping. However, he added that as he was leaving he saw the car of the victim heading towards the left ditch. He finally rang up Georghiou informing him of the events which had happened on that night.

In the meantime, Criton Georghiades, whilst in the study at his home at 2 Thessaloniki Avenue, heard someone shouting "Kateva kato re, exo", then insults, and the noise produced when there was banging on the glass. Apparently, in order to have a better look, he moved from his position to reach his window opening into Thessaloniki Avenue, and on his way to the window he switched off the light. By the time he reached the window, he heard shots and bursts, but he was unable to tell

the sequence in which such shots had been fired. He explained that his experience in the use of weapons was extremely limited. Furthermore, he was unable to say whether the bursts of fire followed shots or vice versa, and added that it was not easy for him to distinguish between a pistol shot and a single shot fired from an automatic submachine gun, as opposed to a burst.

When he reached the window, he saw through the grills a red coloured car with its lights on, moving towards the open space adjacent and to the left of Thessaloniki Avenue. In the meantime, as the car was moving, his attention was diverted to his left by a burst of fire, and when he turned to his right he saw a person standing in the street right outside the driver's seat, firing two or three shots towards the driver's seat. That person, he said, stood at a distance of between half and one foot from the driver's door; and a moment later he identified that person as the appellant who entered a Morris traveller car Reg. No. BK. 615, that was stationary virtually opposite his house, and drove away. He was unable to identify the person standing next to that car, apparently one of the companions of the appellant.

Counsel on behalf of the appellant challenged the version put forward before the trial Court by both witnesses Neofytos Andreou and Criton Georghiades (a member of the political bureau of the Socialist party of EDEK); and the appellant in a statement from the dock gave a different account of what happened at the scene. But to witness Andreou it was suggested that both in his testimony before the Coroner inquiring into the causes of death of the late Fotiou, on July 26, 1975, and before the examining Judge at the preliminary inquiry, he testified that the appellant had fired shots after Fotiou started off from his stationary position. In view of this important allegation put forward by the defence, it is really surprising that the witness said that he had no clear recollection of his testimony before the Coroner when the facts were more fresh in his mind, but he admitted the correctness of the suggestion made to him as to what he said at the preliminary inquiry about the serious discrepancy, but nevertheless, he maintained that the version of events which he gave before the Assize Court was the correct one, viz., that the appellant fired twice at Photiou and then after the two shots the latter tried to leave the scene. There was a further contradiction, because before the Assize Court that witness said that the number of shots fired at Fotiou were

two or three, and at the P.I. he put the number between one and two.

On the other hand, it was suggested to Georghiades that he lied before the Assize Court on the basis of a comparison of his testimony before the Assize Court and the Coroner. Having looked at his testimony before the Coroner, it appears that whereas he identified the appellant at the scene, he said nothing about seeing him shooting at the victim from a close range or at all, and I find myself in agreement with counsel for the defence that a truthful witness could not be expected to forget such an important piece of evidence. When this witness was asked the reason why, he replied that he was always with the impression that he left unwittingly something out from his account of the events given by him before the Coroner. This statement, to say the least, is entirely unacceptable because, in my view, being a member of a political party, he had every justifiable reason to be against the man whom he had seen killing a member of his own party.

On the night of April 5, 1973, Police Constables Theofanis Efrem and Loucas Petrides, in passing along Thessaloniki Avenue, noticed the car of the victim stationary in an oblique position on the left hand side of Thessaloniki Avenue, on their way after dinner to resume their duties at Larnaca Central Police Station. When they were at a distance from the junction of Thessaloniki and Grivas Digenis Avenues, estimated to be in the region on 170–180 meters, they saw a car coming in their direction with headlights on. At the same time they heard shots. When they came closer to the scene, another car started moving in their direction at a great speed.

In cross-examination, P.C. Petrides conceded that at the preliminary inquiry he stated that he had heard bursts only, but maintained before the Assize Court that he had heard both shots and bursts. The two police constables managed to take the registration number of the car BK 615, which admittedly belonged to the appellant. It was further stated that as that car approached their vehicle in which they were driving, and the two vehicles were virtually side by side, bursts were fired in the air from inside the car BK 615.

Then the two police constables approached the scene where the car of the victim was in its resultant position, and parked their car on the left-hand side of the road near the junction of

Thessaloniki Avenue with Grivas Digenis Avenue. They also noticed the car with its lights on and without inspecting the said car, P.C. Petrides telephoned the police from the nearby coffee shop—police constable Efrem remaining on the pavement keeping watch. Within a few minutes a police patrol car arrived headed by P.S. Victor Ioannou, together with P.C. Constantinou. There was another policeman in that police car, but for reasons not known, the prosecution did not call him, and although during the appeal counsel for the appellant was complaining that a witness ought to have been available to him, in my view, the complaint is not justified because once counsel knew it was for him to decide whether it was to the interest of his client to obtain a statement from him, and/or to call him to give evidence.

The police, having parked their car near the car of the victim, on the left side of the road, they alighted immediately and approached the said car. According to P.S. Ioannou, the victim was leaning on the steering wheel and as they opened the driver's door they realized that Fotiou was unconscious and his body began falling outside when the door was opened. P.S. Ioannou, with the help of his police colleagues, Kythreotis, Petrides and Efrem, removed the body of the victim and placed it in their car DM 747. Immediately they carried the victim to the hospital for medical treatment.

Counsel for the appellant cross-examined the police at length as to the circumstances under which they approached the car of the victim, the manner of opening the door of the car and the way they removed the body of the victim. Furthermore, counsel suggested that one of the police constables who assisted in the removal of the victim from his car took possession of a pistol found inside the car and handed it over shortly afterwards to the brother-in-law of the victim Harris Georghiou on his arrival at the scene of the incident shortly after its occurrence.

It is true that Harris Georghiou, having heard the shots and having received a telephone call—apparently from Neofytos Andreou, he drove to the scene, but according to him, he kept at a distance and in no way approached the car of the victim or any of the police constables at the scene of the incident. He denied the allegation that a police constable handed over to him a pistol belonging to the victim. There was a further allegation on behalf of the defence that P.C. Marios Kythreotis was the first to open the door of the car of the victim and had

the opportunity to remove the pistol allegedly in the possession of the victim.

On the other hand, P.S. Ioannou in his testimony before the Assize Court, gives details of how they approached the car of the victim simultaneously with P.C. Kythreotis. He further said that he opened the door, he pulled the deceased slightly upwards in order to facilitate his removal from the car and that subsequently with the help of the police constables Petrides and Kythreotis, they moved the body of the victim to the police car. There was further corroboration by P.C. Efrem of the allegation of Harris Georghiou that his stay at the scene was momentary and that he did not approach P.C. Kythreotis. Furthermore, in spite of the fact that witness Efrem modified the evidence he gave at the preliminary inquiry, when he stated that it was Kythreotis who opened the door, and said that P.S. Ioannou and Kythreotis approached the car simultaneously and that he was unable to say which of the two policemen opened the door, nevertheless, there is no reliable evidence as to what had happened to the pistol, allegedly in the possession of the deceased, having regard particularly to the rest of the articles found in the car of the victim. In any event, one should not forget the tragic situation during that period when the police and a fraction of the people were divided and law and order had suffered a serious blow.

When the victim was removed to the hospital, Sgt. Ioannou and P.C. Efrem remained guarding the scene until the arrival of Chief Inspector Makris, who arrived there at about 21.30 hrs. He gave instructions to a number of policemen who were summoned to the scene including Neofytos Solomonides, a sergeant serving with the CID who was detailed as the investigating officer, and the police photographer P.S. Pavlos Papachristoforou. The investigation began and the photographer took a number of photographs of the car of the victim and the spot where the expended cartridges were found.

On the other hand, the investigating officer found inside the car, two projectiles .45 calibre in the open space between the driver's door and the driver's seat, a third projectile 9 mm. calibre on the floor of the car in front of the driver's seat and an expended cartridge case 9 mm. on the floor of the car behind the driver's seat. In the car and under the mat covering the floor in front of the driver's seat they found a pistol or revolver leather

case adjusted on a waist belt containing four live rounds of ammunition 9 mm. calibre.

There was a search in the street also and on the berm near the car of the victim he found scattered about a number of expended cartridge cases. He also found one live round of ammunition 9 mm. calibre and upon the removal of the car he recovered a projectile from a position near the front left wheel of the car of the victim in its resultant position. According to the investigation officer, he recovered in all eleven cartridge cases .45, two of which were found the following day at points 40 feet and 50 feet away from the car of the victim in its resultant position in the direction of the leper home. He also recovered from the street three cartridge cases 9 mm. calibre in addition to the one recovered under the car. He then prepared a plan to scale on which he sketched the position of the car in its resultant position and indicated the points where the expended cartridge cases were recovered from *exhibit* 11. It appeared from a study of that plan that the expended cartridge cases were found at two separate spots at the scene separated between them at a distance in the region of 70 feet. In fact, P.S. Solomonides explained that the photographer was not able to photograph all the cartridge cases found at the scene as only ten had been recovered by the time he took photographs 14, 21 and 22. The expended cartridge cases found by P.S. Solomonides at the scene as well as the projectiles were submitted to the ballistics' expert for examination and his opinion.

The findings of P.S. Solomonides at the scene are supported in some respects by the testimony of Chief Inspector Makris, particularly as to the calibre of the cartridge cases found at the scene and their number. In fact, it was the testimony of both Chief Inspector Makris and the investigating officer that the expended cartridge cases were photographed in the place they were found excluding of course expended cartridge cases that were recovered from the scene by P.S. Solomonides subsequent to the departure of the photographer from the scene. The photographer photographed also the car and it is apparent from these photographs that the window pane next to the driver's seat had been smashed and had virtually disappeared, whereas the window screen had two big holes and was shattered all over. It appears further that the only two panes that were unaffected were the rear screen and the rear right window pane.

According to Ag. P.S. Sakkadhas, on the following morning

he collected fragments of broken glass from the scene. And on the following morning from the windscreen and the window pane by the driver's seat from a point under the frame of the window, that were subsequently submitted to Mr. Symeou, the Government analyst, for examination and analysis. Ag. P.S. Sakkadhas also recovered from the scene a projectile that he found to be lodged at the rear of the front passenger's seat in the car of the deceased. He had collected also fragments of glass from the floor of the car of the accused earlier, and on that date he submitted them for examination by the Government analyst.

At the hospital, the victim was received by sister Kyriakou, who applied first aid until the arrival of Dr. Poyiadjis, the duty officer for the night. I must add that the doctor arrived at a commendable speed, and within a matter of minutes he diagnosed that Georghios Fotiou was dead. Then sister Kyriakou unclothed the deceased and arranged for the removal of the dead body to the mortuary of the hospital. As she was undressing the victim, a projectile fell from the hand of the deceased, but, neither P.C. Petrides nor sister Kyriakou had a clear recollection from which hand it fell. Sister Kyriakou also recovered from the possession of the deceased a magazine loaded with 10 live rounds of ammunition 9 mm. of which P.C. Petrides took possession for purposes of investigation. In due course the magazine was examined by Ag. Inspector Andreas Christofides, and was found to be of the type that fits on a luger automatic pistol; he also examined the rounds of ammunition which he found to be serviceable and were of 9 mm. calibre. P.C. Petrides received also the clothes of the victim, but apparently, the shirt of the victim was not produced at the trial and no-one was in a position to inform the Court of what had happened to it. The body of the victim was placed in the mortuary under police guard until 10 o'clock on the following day when a post mortem examination was conducted by Dr. Kyamides, the Government pathologist in the presence of Chief Inspector Andreas Makris, who gave directions as to the investigation of this case; Ag. Inspector Neofytos Solomonides (then a police sergeant); the investigating officer of the case and Kyriakos Theodotou Photiou, the brother of the victim, who identified the body.

Dr. Kyamides described in detail the injuries he found on the victim, and according to his opinion as to the cause of death, the deceased met with his death as a result of shock and haemorrhage

produced by the multiple wounds inflicted upon his body, though no single wound in itself produced death, in that none of the wounds had pierced any of the ultra sensitive parts of the body, something that could be expected to cause instantaneous death, such as the brain substance and the heart. The doctor had no difficulty to state that all the wounds had been caused by bullets. He further removed from the body of the victim 2 projectiles (one from the throat by the larynx and the other from the small finger of the left hand). The remaining projectiles that had pierced the body of the deceased had both entry and exit wounds, caused by a bullet, except for a wound in relation to which the projectile had been lodged into the body of the victim and the doctor considered it inappropriate to attempt to recover it.

There has been a lot of criticism by counsel for the appellant, and I think I share the criticism, because I am not convinced that the reasons put forward by the doctor, i.e. that it was inappropriate to attempt to recover it, were justified, and in any event, it deprived both the prosecution and the defence of checking the calibre of that projectile. The two projectiles that had been removed from the body of the victim were submitted for examination. It is significant to state that the two projectiles were of different calibre, a fact indicating that the victim had been hit from bullets fired from more than one firearm. The two projectiles were of .45 and 9 mm. calibre.

Quite rightly, counsel for the appellant cross-examined at length Dr. Kyamides with regard to the bullet wounds found by him at the back of the deceased and on the surface of the right shoulder blade towards the back. The precise position of the wound on the shoulder blade became a very important point in the whole of the cross-examination, but Dr. Kyamides was not in a position to help a lot on this thorny point, because he disclaimed any special knowledge in reading photographs and insisted, irrespective of the impression one is apt to get by viewing photograph 36, that the wound was where he described it to be. In order to resolve this point, the prosecution called for the first time evidence before the Assize Court, and according to the ballistic expert Ag. Inspector Christofides, who also examined the coat of the victim—which was kept at the police station wrapped in paper for a period of 4 years, the shots that caused two of the holes in the jacket, were caused (a) the hole at the back by a contact shot, that is a shot fired from a maxi-

mum range of 2 inches from the jacket; (b) the hole by the right shoulder of the jacket caused by a contact shot fired from a slightly longer range, that is to say, from a maximum distance of 6 inches from the hole.

Then the ballistic expert, having explained his reasons for coming to that conclusion, said that the insignia and characteristics of those holes make further examination unnecessary considering that the holes had been caused by what he described as "contact shots". Furthermore, this ballistic expert examined (a) Eleven expended cartridge cases .45 calibre recovered by the investigating officer at the scene of the incident; (b) four expended cartridge cases 9 m.m. calibre recovered by Inspector Solomonides, two from a point near car GL 691 in its resultant position, one from a position inside the car, and one from a point at the scene by the first bunch of scattered cartridge cases nearer to the right facing the direction of the leper home in comparison to the other cartridge cases 13 feet from the left edge of the road facing in the same direction of the leper home; (c) All the projectiles and live round of ammunition found on the body of the victim and in the car of the accused; (d) Eight expended cartridge cases .45 recovered from the car of the accused; and (e) two expended cartridge cases 9 m.m. calibre recovered from the same car.

The ballistics' expert reached these conclusions:-

(1) That the eleven cartridge cases .45 m.m. had been fired from an automatic machine gun of the M. 3 type; and that it was the same machine gun that discharged the eight cartridge cases .45 that were found in the car of the accused;

(2) The two expended cartridge cases of 9 m.m. found in the car of the accused had been fired from an automatic machine gun known as Marcip. I think I would recall that according to the testimony of Neophytos Andreou, the two companions of the accused carried a sub machine gun each.

(3) That the four expended cartridge cases found at the scene were fired from an automatic pistol, but the expert was unable to say whether they had been fired from one and the same pistol.

With regard to this piece of evidence, one may draw the inference that at the scene of the incident shots were fired not only from an automatic sub machine gun, but from a pistol as well.

The ballistics' expert further explained that the cartridge cases found inside the car of the victim might have been discharged by a weapon held by a person firing at him or from a weapon fired by the deceased. In effect, the testimony of the expert on this point was that the cartridge case had been discharged from a weapon fired inside the car or from a position very near the car, depending on the position of the weapon.

(4) That the cartridges leaving the cases had been fired from an automatic pistol of the Vulter or Luger type, or from a type of Browning pistol; and

(5) That the leather case found in the car of the victim could take a pistol of the Luger type and the rounds of ammunition found in the possession of the victim were of the 9 m.m. calibre.

The ballistics' expert, quite understandably, was unable, because of lack of sufficient material before him, to identify the weapon from which any of the projectiles had been fired, except that he thought that they had been fired from an automatic weapon. He further explained that there are automatic machine guns as well as automatic pistols falling within the description of an automatic weapon. In substance, I think I would reiterate that the most significant part of the evidence of this ballistic expert, who was cross-examined at great length suggesting to him that his examination unless supported by laboratory tests, was not of any weight, was that the shots that caused two of the holes in the jacket of the victim were caused by contact shots.

The position was further complicated when the expert witness was questioned as to the hole above the left side of the pocket of the jacket in question, and his reply was that he could not tell the distance from which the shots were fired because it was different from the previous cases, due to the absence of signs of tearing or gun powder residue around the hole or due to the fact that there was no feasible gun powder residue. The same version was given by him with regard to another hole under the left upper pocket of the jacket. Then, the said witness, having agreed that for investigation purposes the holes on the jacket of the victim ought to have been examined the earliest possible, he was questioned in these terms:-

"*Q.* Do you agree with me that in order to determine the distance from which the shot had been fired we had

to have a laboratory analysis of the gun powder if there was gun powder?

A. In some cases we make this analysis; where, however, there is a tearing of the cloth and the signs of gun powder residue are evident, we avoid the chemical analysis.

Q. Can you tell by looking at the two holes above referred to that there is a residue of gun powder or evident signs that they have been caused by a shot?

A. There is a blackening round the hole which is very similar to traces of gun powder.

Q. Can you say whether there is unburned gun powder?

A. No, not with the naked eye.

Q. If we have a contact shot do you agree that we shall have a bursting of the flesh?

A. It is the laceration of a wound which is characteristic of a contact shot.

Q. Can you tell us in relation to the jacket before you regarding the first two holes... the type of the projectile that had caused them and the quantity of gun powder that the round of ammunition contained?

A. I cannot tell the calibre of the projectile. In the case of the first hole I noticed that the gun powder is limited to the diameter of one inch approximately which is an indication of the fact that the shot had been a contact shot. I cannot say the quantity of the gun powder that the round of ammunition in question contained.

Q. Looking at the first hole which you described on the jacket, if the shot had been fired vertically, i.e. the barrel of the weapon was in a vertical position in relation to the jacket, would you expect it to cause the hole you see in front of you?

A. Yes.

Q. Assuming that the victim of this shot was a driver sitting inside the car with the window pane closed and assuming that the shot came from someone firing outside the car while the windows were closed, would

you expect to find these results speaking about the first hole?

A. No, under no circumstances".

In fact, laboratory tests were carried out only by the Government analyst, Dr. Symeou, regarding the fragments of glass submitted to him by the police and came to the conclusion that all the fragments had emanated from the same pieces of glass.

There is no doubt that it was all along the case for the prosecution that the appellant and his accomplices waylaid the victim at a spot at Thessaloniki Avenue and killed him in perpetration of a plan conceived long before the appellant found the opportunity to execute the victim; and that the details of which were worked out after extensive shadowing over a period of time designed to elicit the movements of the victim during day and night. On the contrary, the appellant, after the incident at Thessaloniki Avenue, abandoned his car on the way to Meneou and disappeared. He appeared again on July 15, 1974,—on the same day of the Cyprus Coup—and took possession of his car in September, 1974 on the instructions of the then Divisional Police Commander of Larnaca. This indeed presents another deplorable situation which, pieced together with the failure of the police to keep, or indeed examine the windscreen of the car of the victim, deprived once again the responsible authorities to check whether the broken pieces of the windscreen came from inside the car and/or from the outside. Although a warrant for the arrest of the appellant had been issued, it was not executed until November 21, 1976. Finally, when the appellant was arrested by the police, and having been cautioned, he replied "Take me to Evdokas". Then in answer to the formal charge, the appellant denied that he had committed the crime he now faces.

The appellant, as I said earlier, called only one witness. He did not go into the witness box himself, but elected to make an unsworn statement from the dock. In the course of the statement he denied firing at the victim and said:-

> "I was carrying a gun years before the 4th April, 1973, and so were many of my friends and acquaintances. In that year before 4th April, 1973 the situation in Cyprus amongst the Greeks was abnormal, and the same position was prevailing in Larnaca. We were divided in supporters of Makarios, Grivas, Lyssarides, Leftists and others. We,

the supporters of Grivas who constituted the unionist party, were the victims of many oppressions by the state and the parastate. Many incidents took place, and there followed destruction of property, beatings, murders of unionist fighters, and also the blowing up of houses of unionist fighters. Among the properties destroyed in Larnaca, were the blowing up of the 'Corner' cafe, the cars of Yiannaki Soteraki, of Kyriakos Difros the book seller, and many others. The incidents at the 'Corner' cafe reached the District Court of Larnaca and the Supreme Court. I and my friends who were with me were among those who volunteered for protecting the ex Bishop of Kitium who was a supporter of the unionist party. Among the other disputes was also the ecclesiastical problem.

Moreover, as I was residing in an isolate place, in fact in an almost desolate place in a farm house near the by-pass of Larnaca, and because my house was also close to an area inhabited by Turks, I was carrying arms almost continuously. Furthermore, the Turks, by an announcement of Bayrack radio station had promised to pay an amount of five thousand pounds to any one who would kill me. I participated actively in all armed struggles which took place in this country.

It is a fact that neither myself nor my party trusted the security of the State in the hands of the Government because many policemen had been seen planting bombs at various places. I was acquainted with Fotiou for many years. I was on good terms both with Fotiou, his brother Kyriacos and his father.

I was a self-employed person at that time and I kept a farm. I was delivering milk to various houses within Larnaca with my car BK 615. Among those areas was Drosia and the area opposite the petrol station of Fotiou. The distribution was taking place at different times because the cows were milked very early in the morning and in the afternoon as well. During the deliveries of milk I was passing almost every time from the petrol station of Fotiou because it was on my way and near my house.

I am left handed and I and my friends who were with me late in the afternoon of 5th April, 1973, were armed as always. Because my friend Kakis was keeping his car—

which was his only property—in a garage exactly opposite the petrol station of Fotiou, we passed from that area to check his car, as we were worried due to the abnormal situation. In fact that very same night Kakis' car was destroyed maliciously from an explosion.

Whilst we were on the way to Grivas Digenis Avenue, I turned into Thessalonikis Avenue, but I was compelled to stop behind a stationary driver in order to allow a car coming from the opposite direction to pass. At that time, I noticed that Fotiou had stopped abruptly behind me. Because on the same day in the afternoon we had noticed Fotiou with Vladimiros coming close behind us from the police station up to the Pallas square, and because we got the impression that they were following us, I considered it right to alight from my car and ask Fotiou with whom we were on good terms, why he was following us.

We were exactly outside an open cafe in an illuminated area on the highway, and people and cars were coming and going. I did not signal to Fotiou to stop, I only noticed him stopping behind me and then I alighted from my car. I went and stood next to the window of the car of Fotiou, and I saw that he had a pistol on the seat next to him. He tried to take it. Then I drew my gun also for protection and knocked on his window, and because it was closed I shouted to him loudly and repeatedly why he was following us. Since he did not reply, I continued knocking at the window and shouting and asking why he was following us, telling him to alight from the car so as to have a talk.

Whilst I was standing next to the window of Fotiou I noticed his employee arriving at the scene. At that time, I also noticed my friends, having alighted from the car, coming towards me. I continued shouting to Fotiou and I heard my friends shouting to Fotiou's employee to put his hands up Later on I heard the loud voice of a woman coming from the direction of the avenue. I turned towards her, I saw a woman and I told her not to be afraid and to be on her way. At the time I turned left in order to see that woman, I had to turn completely towards my left because I cannot see with my left eye which is damaged. At the same time I was forced to take one or two steps. At that moment when I had turned comple-

tely, Fotiou who had not switched off the engine of his car accelerated suddenly and took off. I turned to see him leaving, and I saw him firing his pistol in the direction of my friend. I heard bursts of an automatic weapon and I saw the car of Fotiou turning abruptly to the left of the road. I did not approach the car of Fotiou where it stopped. I got into my car and immediately drove away. Whilst on our way, we came across the car of P.C. Phanos, while shots were being fired from the left side towards the car of Fotiou and into the air. I did not fire any shots and I did not have any such intention. We had never planned or ever thought of killing Fotiou. We had nothing against the man. Had we had the intention of killing him, I would not have stayed for ten minutes in the avenue and particularly outside the open cafe shouting at him, particularly when I knew that he was carrying a pistol. P.C. Marios Kythreotis admitted to me that he had taken the pistol of Fotiou and had given it to Harris Georghiou. This happened in the Immigration Office Larnaca Police Station after the coup and also in the presence of Sergeant Kyrkinis and another policeman. I have nothing else to say".

After a long and detailed judgment by the Assize Court, they accepted the evidence for the prosecution—not overlooking that key witnesses were connected with the victim or indeed that they were his friends or relatives, and reached a verdict of murder by premeditation against the appellant. In reaching that conclusion the Court said:-

"They showed total disregard about the implications of any one seeing them moving armed and took up such positions round the car of the deceased consistent only with an intention on their part to kill him. And they did kill him shortly afterwards in cold blood, showing brutal determination not to take any chances with the deceased surviving their criminal assault. We find as a fact that when the accused emerged in front of the convoy of cars, including that of the deceased, at Digenis Avenue, he intended to kill the deceased. This intention was in the light of our findings, executed the earlier within five minutes and the latest within ten minutes subsequently".

Then, in resolving the question as to whether there was, during

that space of time the opportunity for reflection necessary in order to establish premeditation, the Court said:-

> "The earlier shadowing of the movements of the deceased, though it gave the opportunity to the accused and his companions to gain knowledge of the movements of the deceased, are not inevitably consistent with a decision to kill him. Our finding is that the accused took the decision to kill the deceased at a time prior to emerging in front of the convoy of cars at Grivas Digenis Avenue. We further find that the accused emerged in front of the convoy of cars in perpetration of a decision already thought of and planned to kill the deceased."

Finally, the Court—having properly addressed its mind that a finding of premeditation must be made independently of a finding of an intention on the part of the appellant to kill the deceased, continued in these terms:-

> "Between the conception of the plan to kill the deceased and its execution nothing happened that might cause anything in the nature of an emotional upheaval on the part of the accused or anything that might cloud his mind. The accused had a proper opportunity to meditate upon his decision to kill the deceased and instead of withdrawing from the plan, the accused chose, along with his companions, the accused giving the lead, to finish off the deceased in the brutal circumstances earlier referred to. In these circumstances we can safely conclude that the accused killed the deceased in furtherance of a premeditated decision. We find that the prosecution proved its case against the accused beyond any reasonable doubt and find the accused guilty as charged".

On appeal to the Supreme Court the principal points argued on behalf of the appellant appear to have been (a) that the Court was wrong in convicting the appellant; and that the conviction was, having regard to the evidence adduced as a whole against him, unreasonable or unsafe; and that particularly because of the evidence of the ballistic expert—in the absence of scientific tests, the Court was wrong in relying on such unacceptable evidence as regards the question of the contact shots; (b) that the judgment of the Court should be set aside on the ground of a wrong decision on a point of law, viz., that there was sufficient circumstantial evidence against the appellant that he planned the

murder; and that because the finding of premeditation—which should be made independently of a finding of an intention on the part of the appellant to kill the victim, had not been proved beyond reasonable doubt, viz., that he took the decision to kill the victim at Grivas Digenis Avenue at a time prior to the events at Thessaloniki Avenue; (c) that the Court was wrong in turning down his application for funds to call expert evidence—once counsel was appointed by the Court to defend the appellant; and because of the need to challenge the evidence of the ballistic expert as to the point regarding the contact shots; and the evidence as to the firearms in general.

Furthermore, during the argument in the Court of Appeal, leave was given to include further grounds and reliance was placed on a submission that the sentence of death is contrary to the constitutional right that "every person has the right to life and corporal integrity" (Article 7.1 of the Constitution) and because the imposition and the execution of such sentence constitutes a harsh, inhuman and degrading treatment. Therefore, counsel argued, Article 7.2 of the Constitution authorising a Court of law to impose the sentence of death in cases of premeditated murder, is unconstitutional because it contravenes the safeguard of life provided by the aforesaid Article 7.1 and Article 8 which says that "no person shall be subjected to torture.."; and that it also contravenes both the International Convention on Human Rights and the European Convention on Human Rights.

Before dealing with the grounds of appeal, I think that I should have added that, from the facts I have fully presented, it emanates that, in spite of the allegation that the movements of the victim and his friends and/or his relatives were closely watched and followed by the appellant and his companions, nevertheless, no one reported the matter to the police: either because nothing concrete was taking place beyond the shadow of suspicion at that stage, or because in fact—which unfortunately supports the view that no one trusted the members of the police force during those critical days of division and hatred and groups had to rely on their own means of protection for their safety. Furthermore, it is equally clear that Fotiou and his companions, for safety reasons—after a bomb was planted at the petrol filling station, in leaving the station during the evening they had to travel together in separate cars, as it was considered as a safer means of travelling. Yet, in spite of their

plan to travel together for safety reasons—and Fotiou had to remain either at the end of the line of cars or in the middle, he suddenly accelerated and overtook his companions in order to follow the appellant whom he saw ahead of him. This was really a most surprising move and regretfully, no one has given either an explanation or a reason for such dashing. What is equally surprising, however, is the fact that Georghiou, who had seen the car of the appellant passing outside the petrol station heading towards the central police station, ten minutes before closing time, he did not even see that car en route on their way home. And still unaware of the presence of the appellant and in spite of the fact that Fotiou dashed ahead of them, he had branched into Eleftheria Avenue, leaving the latter with one escort only.

As to the appellant, he was content to say, both in his statement from the dock and on the line of questioning the witnesses, that he neither fired at the victim, nor did he intend to fire at him. He denied the existence, of any plan to kill the man whom he called his acquaintance but he never explained the reason why he ran way and remained in hiding for some time. However, in analysing his whole version it could be said that both he himself and his companions were carrying arms along with so many others for their own protection and that his companions when they had fired at the victim did so in self defence.

With those observations in mind, I turn to consider the long argument of counsel for the appellant in trying to persuade this Court to interfere with the judgment of the trial Court.

The powers of our Court to interfere with the judgment of the trial Court, are principally embodied in the provisions of section 145 of the Criminal Procedure Law, Cap. 155, but these powers must be read and applied since the year 1960, in conjunction with section 25(3) of the Courts of Justice Law, 1960, and in particular the power conferred to make any order which the circumstances of the case may justify, including an order for the retrial of the case. Cf. *Vouniotis* v. *The Republic*, (1975) 2 C.L.R. 34, where a number of cases are cited regarding the powers of the Supreme Court to order a retrial. Cf. also *Anastassiades* v. *The Republic*, (reported in this Part at p. 97 *ante*, at p. 288) where retrial was ordered.

In view particularly of the mandatory language of that section, the Supreme Court has interfered with the judgment of the trial

Courts in a number of cases, even on factual issues, and on a consideration of the authorities, the emphasis is throughout on the evidence as accepted by the Court and not on the weight of evidence. A verdict resting, of course, on a finding of fact will not be quashed unless this Court is persuaded that the verdict is obviously and palpably wrong.

It is interesting also to mention that by virtue of the provisions of s. 2(1)(a) of the English Criminal Appeal Act, 1968, additional powers are vested in the English Court of Appeal to interfere with the judgment of the trial Court in circumstances where it is of the opinion that the verdict is unsafe or unsatisfactory. These powers are not dissimilar to those vested in the Supreme Court by virtue of the provisions of s. 25(3) of the Courts of Justice Law, 1960. But I lay stress that the conviction can be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence adduced.

Let me say at once that it is desirable that criminals should be detected and to that end, all available admissible evidence should be used, but it is for the prosecution to prove the case beyond reasonable doubt, and any doubts the Court may entertain about any matters must inevitably be resolved in favour of the accused. In a number of cases the Supreme Court has stressed time after time that the trial Courts, must at all times, strive to ensure that no one is convicted unless the Court feels certain beyond reasonable doubt that the accused is guilty (*Adamos Charitonos and Others* v. *The Republic*, (1971) 2 C.L.R. 40; and *Hjisavva alias Koutras* v. *The Republic*, (1976) 2 C.L.R. 13—majority judgment).

The first question in this appeal is whether it was safe on the evidence adduced to draw with certainty the incriminating inferences and conclusions that had been drawn by the trial Court.

The trial Court, having dealt with both the evidence of the eye witnesses, the findings of the police and the opinion of the experts as to those findings, and having considered the circumstantial evidence along with the rest of the evidence, reached the following conclusions:

(1) That the accused kept a watch on the movements of the deceased prior to the 5th April, 1973, and that that watch enabled the accused to acquaint himself with the movements

of the deceased; (2) that on the same date the accused kept a watch on the movements of the victim mainly in order to ascertain the hour at which he left work; (3) that the accused and his companions emerged in front of the convoy of cars including the car of the deceased, with the sure knowledge that the deceased was on his way home, expecting him to follow—as it was the deceased's habit—a route via Thessaloniki Avenue; (4) that the accused, acting in anticipation of the movements of the deceased, turned into Thessaloniki Avenue in order to waylay him. The choice of the entrance of Thessaloniki Avenue was such as to enable the accused to cause the deceased to bring his car to a standstill without much difficulty, considering that the speed of the deceased could reasonably be expected to be low at the time, as he was at the entrance of the street; (5) that having entered Thessaloniki Avenue, the accused emerged immediately into the middle of the street with a pistol in his hand in order to compel the deceased to stop; (6) the accused approached the deceased and demanded that he should alight. When the accused kept banging on the window pane of the deceased with his pistol and when he refused to alight, the appellant fired twice at the deceased from close range giving thereby a clear indication of what he intended to do with the deceased. When the deceased made a vain effort to escape, the companion of the accused, and probably Clavdios as well, fired at the deceased, riddling his body with bullet wounds; and (7) when the car of the deceased ended on the left side of the road, the accused fired two more shots at the deceased indicating thereby that he wanted to eliminate every possibility of the deceased surviving the injuries already inflicted upon him. The range at which the accused fired at the deceased and the circumstances under which he did so, are indicative of his determination to kill the deceased; and that the wounds caused by the two contact shots referred to in evidence were inflicted upon the deceased by the accused.

Now, the whole of the material evidence has been closely and critically examined before us during a number of days by counsel on both sides, and indeed we have gone through the evidence with the assistance of counsel who have materially helped us by directing our attention to the various important passages in the evidence. I must confess, however, that I have felt all along that this case is eminently one of difficulty and doubt, because of the prevailing circumstances at the time of the com-

mission of the crime, and particularly regarding the oral and circumstantial evidence.

I think on the first finding I must state that I find myself unable to agree with the conclusion of the trial Court that the appellant kept watch on the movements of the victim prior to April 5, 1973, for the simple reason that even the companions of the latter admitted when meeting the appellant on the road that it was a mere suspicion that he was following them and nothing more. But even that suspicion apparently was not taken seriously by Fotiou who, as I have said earlier, never reported the matter to the police, and in fact on April 5—the fatal night—he drove to the house of his brother-in-law, accompanied by Charalambous only, at about 7.00 p.m.

As to the finding that the appellant kept a watch on the movements of the victim in order to ascertain the hour at which he used to leave work, I find it difficult to know on what evidence the trial Court drew that inference, because the only evidence was to the effect that he was seen passing outside the petrol station 10 minutes before closing time, but no evidence was forthcoming that he was seen watching the movements of the persons at the petrol station to realize the exact closing time. It is, of course, true, irrespective of any knowledge as to the exact time the station was closing, that at some stage en route, the appellant was seen by Fotiou at least driving ahead of them.

Turning now to the third finding, with respect to the trial Court, we have not been told by anyone why it became necessary for Fotiou to break the safety belt and dash after the appellant, fully knowing that he and his companions were armed, particularly when there has been an effort on behalf of the prosecution witnesses to impress the trial Court that they were trying to avoid meeting the appellant on the road. Is, therefore, the dash to follow the appellant consistent with the system invented for his own protection (safety in numbers), or is it because Fotiou was feeling confident that nothing could have happened to him in following the appellant. These are questions which have not been answered, and in my view, it is unsafe for anyone to draw the inference that the emerging of the appellant at Thessaloniki Avenue—as described by the Court —was in those circumstances planned with a view to killing the victim.

But there is a further question which remains unanswered.

Although the Court rejected the suggestion put forward that on the fatal night the victim was carrying a pistol, probably as it was put, inspired by the finding in the car of the deceased of the leather pistol case and the rounds of ammunition in his possession, nevertheless, as I said earlier, the victim, being afraid for his safety and having to travel during the evening, he had to provide his own means of safety and no explanation was forthcoming on behalf of the prosecution witnesses why on that fatal night Fotiou was carrying with him the articles referred to earlier. But, the finding of those articles, is it not equally consistent with both the carrying and the noncarrying of a pistol? In my opinion, it is equally consistent, and that is why I have grave doubts which go to the benefit of appellant.

In view of the fact that the last two conclusions reached by the trial Court may justify the inference of premeditated murder, I propose dealing first with those principles. The crime of premeditated murder was known from earlier times in the law of Cyprus, but was unknown to the common law and was introduced once again in 1960 when Cyprus became an independent state by Article 7 of the Constitution which says that:-

"1. Every person has the right to life and corporal integrity.

2. No person shall be deprived of his life except in the execution of a sentence of a competent Court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law".

I think it is now convenient to look at the first case which was decided by the Supreme Constitutional Court on the meaning of premeditation. In *The Republic and N.P. Loftis*, 1 R.S.C.C. 30, the Court, having dealt with the then section 205 of the Criminal Code Cap. 154, to the extent to which it provided for the death penalty for murder other than premeditated murder, found that it was inconsistent with paragraph 2 of Article 7 of the Constitution. Furthermore, the Court in interpreting the meaning of premeditation said at pp. 33-34:-

> "Such words in their said context limit the imposition of the death penalty to 'premeditated' murder as distinct from murder in general. The use of such words conveys the notion of 'premeditated murder', as understood by

Continental legal systems and in particular by the 'French Code Penal' from which the above notion was adopted by the Ottoman Penal Code which applied in Cyprus until the enactment of the Criminal Code Order-in-Council in 1928.

The Court adopts in this connection the exposition of premeditation as laid down in 1908 by a Cyprus Court in the case of *Rex* v. *Shaban* reported in volume VIII of the Cyprus Law Reports at page 82. The judgment is set out at page 84 and is worth quoting in full:

> '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 carrying 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'.

There can be no doubt that the substantive offence of murder as created by sections 204 and 207 of Cap. 154 is so widely defined as to include categories of murder other than premeditated murder in the above sense. Therefore, section 205, to the extent to which it provides for the death penalty for murder other than premeditated murder, is inconsistent with paragraph 2 of Article 7 of the Constitution.

The consequence of this conclusion of the Court is to render such section 205 of Cap. 154 inapplicable to categories of murder other than premeditated murder and the Court, in compliance with Article 188, is of the opinion, in order to avoid a lacuna in a matter of such grave import-

ance that it should be applied in the case under reference modified as follows:-

> 'Any person convicted of premeditated murder shall be sentenced to death and any person convicted of murder other than premeditated murder shall be liable to imprisonment for life' ".

It is to be added that in the light of this decision the Criminal Code (Amendment Law) 1962 was enacted which, *inter alia*, repealed and substituted sections 203-207 of the Criminal Code Cap. 154 which dealt with murder and manslaughter. The relevant sections of the Criminal Code are now ss. 203 and 204 which read as follows:-

> "203(1) Any person who with premeditation by an unlawful act or omission causes the death of another person is guilty of the felony of premeditated murder.
>
> (2) Any person convicted of premeditated murder shall be sentenced to death.
>
> 204. Premeditation is established by evidence proving expressly or by implication an intention to cause the death of another person whether such person is the person actually killed or not formed before the act or omission causing the death is committed and existing at the time of its commission".

In a series of decisions after the *Loftis* case, the Supreme Court has dealt and analysed the concept of premeditation and its applications to deferring facts.

In *Dervish Halil* v. *The Republic*, 1961 C.L.R. 432, Zekia, J. (as he then was) delivering the judgment of the Court, reached the conclusion that on the facts of that case the trial Court was justified in convicting the prisoner of premeditated murder, and in dismissing the appeal 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.

There is no presumption of law in the case of premeditation but this has to be inferred in each particular case from the surrounding circumstances".

In *Aristidou* v. *The Republic*, (1967) 2 C.L.R. 43, Josephides, J., in dealing with the question of premeditation, said at p. 99:-

"As stated in Bucknill's book entitled 'Ottoman Penal Code' (1913), in the commentary to Article 170 of that Code (at page 125), it is a question of fact in every case whether or not a homicide is premeditated; 'sometimes, as in a case in which a man lies in wait for and shoots another, and in many cases of poisoning, the circumstances surrounding the homicide justify the conclusion of premeditation without difficulty; sometimes as in cases in which in a fit of hasty temper or a tavern brawl a man has killed, a conclusion of premeditation is similarly without difficulty not justifiable; the difficulties lie in the cases falling between the well defined extremes. But much French commentary exists in the mode of ascertainment as to whether premeditation is present or not, and it is generally agreed that it must be clear, in order to find premeditation, that the offender must have had time within which to resolve upon to reflect upon and finally to execute the intention; this period is not accurately measurable in time but must be considered and determined from all the circumstances attendant upon the facts of the case. ".

The trial Court has indeed made reference to other cases as well, and in summarizing the effect of premeditated murder, which I fully endorse and approve, said that that crime contains three distinct elements:- (a) a decision to kill; (b) opportunity to meditate and reflect upon that decision; and (c) implementation of that decision resulting in the death of a human being.

Finally, the Court rightly warned itself that it must be made to appear at the end of the day with the certainty required in a criminal case that those three ingredients have been proved independently the one from the other as distinct facts. I think I should add also that the word "premeditation" suggests that the decision to kill must have been formed prior to the time of killing and must have been the subject of reflection. In practice this has been interpreted as meaning that between the formation of the decision and its execution, there must be an opportunity to reflect on his decision, ruling out rash or intemperate acts

inconsistent with cool thinking and static deliberation. As to the statement of the appellant, I do not think that there is room for complaint now, that the trial Court was wrong in rejecting that statement, viz., that he himself did not fire at the victim and that only his accomplices did so. But I think I would reiterate once again that although from the act of killing one may infer intent to kill, if the circumstances of the killing are such as to give rise to this inference, nevertheless, what the Court must not do is to infer or presume the existence of premeditation.

In *Anastassiades* v. *The Republic* (reported in this Part at p. 97 *ante*) Triantafyllides, P., in delivering a long separate judgment, and having reviewed some of the authorities on the question of premeditation, said at pp. 234–236:–

> "It is, also, not to be forgotten that it was not until some time later on, during the course of the morning, that it became known to the appellant that there would be nobody else at the premises except the charwoman Vartholomeou, whose movements the appellant did not try to control or restrict in any way, except when he remarked to her casually not to forget to clean the basement; I do think that it is not safe at all to infer from such remark of his that it was part of a preconceived plan to get her out of the way at the time of the killing.
>
> Looking at the evidence as a whole, and bearing in mind, too, that the appellant had other opportunities to kill the victim without being detected, for example when going for walks with him in the rather lonely area near their homes, I am left with a lurking doubt regarding what has actually happened in that room on that fateful morning, which made the appellant kill the victim, in such a brutal manner that one is led to think that it was a killing committed more in the heat of violent passion, due to a sudden quarrel, rather than pursuant to a coolly proconceived plan to do away with the victim; I really think that the way in which the appellant kept on chopping at the head and face of the victim, who was lying dead on the floor, indicates a situation in which the appellant was in the grasp of uncontrollable emotion and amounts to conduct which is not reasonably compatible with a premeditated cold-blooded murder.
>
> On the whole, the evidence is in my opinion equally consistent with both the presence and the absence of preme-

ditation; and in such a situation, notwithstanding the existence of grave suspicion that it was a premeditated murder, the appellant is entitled to the benefit of a reasonable doubt in this respect. I, therefore, find that his conviction of premeditated murder ought to be set aside and that he ought to be convicted only of homicide under section 205 of the Criminal Code, Cap. 154. In such a case the death sentence passed upon him ought to be set aside too, and, in my view, the proper sentence, in the circumstances, would be that of life imprisonment".

Having dealt with the law of premeditation, and in view of the observations I have made earlier regarding the evidence of the key witnesses being unsafe or unsatisfactory, I turn now to deal with the findings of the ballistic expert as to the mode in which he carried out his experiments and as to his conclusions about the contact shots. The trial Court, not doubt was impressed with that witness and formed the view that he was well-trained in the field of ballistics with long practical experience behind him; and accepted him as a witness of truth, feeling confident that it could safely act on his evidence.

In *Anastassiades* v. *The Republic*, (reported in this Part at p. 97 ante) speaking about the duties of expert witnesses, at p. 264, I have adopted and followed a statement enunciated in *Davie* v. *Edinburgh Magistrates*, (1953) S.C. 34, where Lord President Cooper said:-

> "Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence".

Furthermore, the Court of Session repudiated the suggestion put forward that the Judge or jury is bound to adopt the views of an expert even if they should be uncontradicted, because, the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.

In *Rex* v. *Lanfear*, [1968] 1 All E.R. 683, it was held that the evidence of a doctor giving medical testimony at a criminal trial should be treated, as regards admissibility and any other matters of that kind, like that of any other independent witness, but, though a doctor may be regarded as giving independent expert

evidence to assist the Court, the jury should not be directed that his evidence ought, therefore, to be accepted by the jury in the absence of reasons for rejecting it.

The matter is also dealt with by Phipson on Evidence, 11th edn. p. 510, para. 1286, where it is stated that "The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will". And in *Aitken* v. *McMeckan*, [1895] A.C. 310, P.C., it was said at pp. 315-316: "Indeed, where the jury accept the mere untested opinion of expert in preference to direct and positive testimony as to facts, a new trial should be granted"; and in Halsbury's Laws of England, 3rd edn., at p. 278, para. 507, there is this criticism, that the evidence of expert witnesses may be of a partisan character, and, therefore, to be regarded with caution. See *Perera* v. *Perera*, [1901] A.C. 354 P.C. at p. 359.

Indeed, counsel on behalf of the appellant in a strong argument was complaining that the evidence of the police ballistic expert—who examined for the first time the coat of the victim which had remained in a police store wrapped in paper for a period of four years—remains uncontradicted because of the ruling of the trial Court dated February 2, 1977. It is true that on that date counsel for the appellant applied to the trial Court for directions in accordance with the provisions of Article 12.5 of the Constitution in order to afford to his client sufficient facilities for the preparation of his defence, in calling expert evidence, and making available to him funds for that purpose.

Counsel for the Republic, no doubt fully aware that every person charged with an offence has the minimum rights under paragraph (d) of Article 12.5 to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, did not object, but he did argue that once there was no machinery in force, nothing could be done because no law has been introduced to implement the constitutional provisions. There is no doubt that Article 12 is one of the fundamental rights and liberties guaranteed to every person in the Republic and under Article 35 "The legislative, executive and judicial authorities...

shall be bound to secure...efficient application of the provisions of this Part (II)".

The trial Court thought that the point raised by counsel was an interesting and novel one, and reached the view that the said fundamental defence rights do not confer power to authorise the payment of the expense that may be incurred for the consolidation and calling of expert witnesses out of public funds. This constitutional provision, the Court added, was designed to ensure a substantial equality between the prosecution and the defence with regard to the right to choose their witnesses and produce them before the Court without hindrance. Had the constitutional legislators intended to confer such a right on the accused, they would include that right among the minimum fundamental rights such as the right to have an interpreter.

Finally, the trial Court reached the view that it had no power to give directions in relation to a matter beyond its competence.

It is true that in accordance with Article 35, the judicial authorities shall be bound to secure the efficient application of the provisions of Part II. The question, therefore which arises in this particular issue, is whether such constitutional provisions constitute substantive constitutional law binding the legislature or are merely directive principles of State policy containing a legislative programme.

Having had the opportunity to consider very carefully this point, I am inclined to the view that from the wording of such provisions, one can not but draw the conclusion that these are binding on the Republic, and its appropriate organs are also bound or have a duty to enact within reasonable time the legislation contemplated. (*Papaphilippou* v. *The Republic*, 1 R.S.C.C. 61 at p. 64). But in the absence of any legislation, I think the trial Court reached a correct view of Article 12.5 of the Constitution, that in the absence of any law it could not authorise at that stage payment of funds for legal assistance to the appellant. Of course, it is equally true—having judicial knowledge—that in a case where the accused has no sufficient means to pay for legal assistance, the Supreme Court has sanctioned the payment of the costs of the advocate assigned by the Court out of the public funds, under section 64 of the Criminal Procedure, but not under Article 12.5.

With this in mind, and although the evidence of the expert, as I have said earlier, remains uncontradicted, and having had

the occasion to go with great care through the whole of his evidence, I have reached the view without hesitation that the evidence regarding his examination of the coat of the victim is not safe, not only because of the long passage of time, but also because his observations, being the result of an examination with the naked eye, do not give that certainty required in a capital case, in the absence of being also tested in a laboratory, as was the case in *Anastassiades* v. *The Republic* (reported in this Part at p. 97 *ante*). Furthermore, I would add that in the *Anastassiades* case *supra*, I have reached the conclusion that the trial Court did not have in mind the warning given by Lord President Cooper in *Davies* case (*supra*), to enable the Judges to form their own independent judgment by the application of these criteria to the facts proved in evidence, and I have felt at the end that they have not formed their own independent judgment and in fact allowed Professor Simpson to decide alone the guilt of the accused. This was the reason why I have ordered a retrial in that case, but in this case, the reason why I have not done so is because the trial Court correctly applied the scientific criteria for testing the accuracy of their conclusions, but went wrong and reached unsafe conclusions.

Reverting now once again to the seventh conclusion of the trial Court, that from the range at which the appellant had fired at the victim when his car ended on the left side of the road—and the surrounding circumstances under which he did so are indicative to his determination to kill the victim—I indeed entertain grave doubts that one could or might reach such a conclusion with certainty, for the reasons I have given earlier in this judgment, having regard to the evidence as a whole on the issue of premeditation. I think I would repeat that the question of premeditation is a question of fact, not of law, and as I have entertained doubts as to what has actually happened when the victim was stopped by the appellant on the road on that fateful night, which made him kill the victim in such a brutal manner, I think one may be driven to think, in all those circumstances, viz., that because the killer did not fire at the victim immediately he stopped him on the road, that it was a killing committed more after the refusal of the victim to alight after a continuous shouting and banging on the window and/or apart from any other conceivable reason, his dashing away to leave the scene, rather than pursuant to a cool preconceived plan.

In reaching this conclusion, I have derived great assistance regarding this case of difficulty and doubt from the judgment of

Widgery L.J. in *Rex* v. *Cooper*, [1969] 1 All E.R. 32. In that case his Lordship was dealing with section 2(1)(a) of the English Criminal Appeal Act, 1968 which vests in the Court of Appeal additional powers to interfere with the judgment of the trial Court in circumstances where it is of the opinion that the verdict is unsafe or unsatisfactory. His Lordship, delivering the unanimous judgment of the Court, said at pp. 33–34:–

> "The important thing about this case is that all the material to which I have referred was put before the jury. No one criticises the summing-up, and indeed, counsel for the appellant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding Judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and accordingly, a case in which this Court would be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere".

With great respect, these are indeed impressive statements, and show beyond doubt what was the position prevailing in England before the enactment of s. 2 of the Criminal Appeal Act, 1968. Then, his Lordship places a strong emphasis on that section and continues his judgment as follows:–

> "Indeed, until the passing of the Criminal Appeal Act 1966[1]—provisions which are now to be found in s. 2 of the Criminal Appeal Act 1968—it was almost unheard of for this Court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which

1. I. e.; s.4(1) of the Act of 1966, which came into force on Oct. 1, 1966, and which amended s. 4(1) of the Criminal Appeal Act, 1907.

may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it. We have given earnest thought in this case to whether it is one in which we ought to set aside the verdict of the jury, notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy. After due consideration, we have decided we do not regard this verdict as safe, and accordingly we shall allow the appeal and quash the conviction".

This new legal trend found support in *Stafford* v. *D.P.P.* [1973] 3 All E.R. 762 H.L. Viscount Dilhorne, in delivering the first speech in the House of Lords, and having dealt with the very same section 2(1) of the Criminal Appeal Act, 1968, reached the conclusion at p. 764 that:-

> "The Act thus gives a wide power to the Court of Appeal and it would, in my opinion, be wrong to place any fetter or restriction on its exercise. The Act does not require the Court, in making up its mind whether or not a verdict is unsafe or unsatisfactory, to apply any particular test. The proper approach to the question they have to decide may vary from case to case and it should be left to the Court, and the Act leaves it to the Court, to decide what approach to make. It would, in my opinion, be wrong to lay down that in a particular type of case a particular approach must be followed. What is the correct approach in a case is not, in my opinion, a question of law and, with respect, I do not think that the question certified in this case involves a question of law".

Lord Kilbrandon, delivering a separate speech, observed that the relevant power of the Court of Appeal is that given by s.2(1)(a) of the Criminal Appeal Act, 1968, and said at pp. 768-769:-

> "The difference between these words and the phrase used in the Criminal Appeal Act 1907, 'unreasonable or incapable of being supported' is important as indicating the erection of a standard for the setting aside of convictions which, until the new phrase was introduced in 1966, it would not have been deemed possible to quash. This is not truly a consequence of a different form of words necessarily and from its own content demanding a standard different from that operative theretofore. It would have been possible for the

Courts, after 1907, to have said that if a verdict was unsafe or unsatisfactory it was not reasonable. But this line was not taken; more emphasis was laid on the concluding part of the phrase, and verdicts which were supported by evidence which in law the jury could accept—and it was for the jury to say whether they would accept—were held to be unassailable. A conviction depending solely on the fleeting identification by a single stranger could, for example, have been upheld, though on a different view of the 1907 Act, it would have been possible to condemn it as unreasonable, just as today it would very probably be thought unsafe or unsatisfactory, and be set aside on those grounds.

The setting aside of a conviction depends on what the appellate Court thinks of it—that is what the Act says. If it were necessary to expand the question which a member of the Court, whose thoughts are in question, must put to himself, it may be, 'Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory? If I have must quash. If I have not, I have no power to do so' ".

See also *Hjisavvas alias Koutras* v. *The Republic*, (1976) 2 C.L.R. 13, where both Justice L. Loizou and myself have adopted and followed the principle enunciated in those two cases; and also the judgment in *Anastassiades* v. *The Republic* (reported in this Part at p. 97 *ante*) where the principle of lurking doubt was adopted and followed by Triantafyllides, P., at p. 235 in quashing the finding of the trial Court as to premeditation.

Having reached the opinion that the judgment of the trial Court should be set aside on the ground that under the circumstances of the case it is unsafe or unsatisfactory, (having a reasonale doubt or a lurking doubt) and notwithstanding the fact that the Judges had every advantage, I shall allow the appeal and quash both the conviction and the death sentence, exercising my additional powers under s. 25(3) to interfere with the judgment of the trial Court on appeal. But in the circumstances the appellant should be convicted of homicide only, under the provisions of s. 205 of the Criminal Code, Cap. 154.

Having heard no further argument by counsel in mitigation, in my view the proper sentence, in all the circumstances of this case is that of life imprisonment.

Before concluding this judgment, I would like to add that it is no disrespect to counsel that I would decide the question of unconstitutionality of Article 7.2 of the Constitution very briefly. I am content to add only that this point was probably raised because of the observations made obiter by the President of the Supreme Court in *Vouniotis* v. *The Republic*, (1975) 2 C.L.R. 34. The learned President said at pp. 60-61:-

> ".....though the death penalty for murder remains statutorily in force in Cyprus, it has, as it can be judicially noticed, not been enforced, irrespective of the gravity of the various murder cases, for more than 10 years, so that it might conceivably have been treated as having been de facto abolished, in the course of the evolution of social progress as in other countries".

This very observation was reiterated in *Anastassiades* v. *The Republic* (*supra*) and at p. 236 the President, without hearing argument, said:-

> "I repeat this observation so that the appropriate authorities of the Republic may, if they deem it fit, enact legislation in respect of this matter, because, irrespective of other aspects of it, the execution now, all of a sudden, of a death sentence might give rise to constitutional problems such as those faced by the Supreme Court of the United States of America in the series of cases commencing with *Furman* v. *State of Georghia*, 33 L. Ed. 2d 346".

But with respect, the argument of counsel is really unacceptable and cannot in any way stand, because one can not attack the constitutionality of one paragraph of Article 7 as contravening another, once the framers of the Constitution thought fit to include in the Constitution that a law may provide for such penalty of depriving a person of his life only in cases of premeditated murder.

Finally, and irrespective of the difficulties which have given rise to constitutional problems on the question of death sentence in the United States, I would dismiss this contention of counsel.

A. LOIZOU, J.: This is an appeal from the judgment of the Assize Court of Larnaca whereby the appellant was found guilty and convicted of the offence of the premeditated murder of Georghios Photiou, contrary to sections 203, 204, 20 and 21 of the Criminal Code, Cap. 154, as amended by section 5 of the

Criminal Code (Amendment) Law, 1962 (Law No. 3 of 1962) and sentenced to death. By it, findings of fact and conclusions drawn therefrom are questioned, as well as a number of legal and constitutional issues are raised.

The facts emanating from the judgment of the Assize Court are briefly the following: The deceased was the owner of a Petrol Station at Makarios III Avenue, Larnaca, and resided on the corner of Maria Synglitiki Street and Eleftheria Avenue. Parallel to it is Thessaloniki Avenue and one may reach from Grivas Dighenis Avenue—to which both Avenues are side-streets—the house of the deceased, though the shortest route is that through Eleftheria Avenue.

On the 1st April, 1973, a bomb made up from a stick of dynamite was discovered at the Petrol Station of the deceased by his brother-in-law, Haris Georghiou. The two of them and Neophytos Andreou, an employee of the deceased, as well as Vladimiros Charalambous, a friend, and Charalambos Georghiou whose sister was the wife of the deceased, all supporters of the then President of the Republic, late Archbishop Makarios, anxious about their safety, both because of this bomb incident and the shadowing of their movements made by the appellant and his friends who were opposing Makarios and were supporters of EOKA B Organization moved together, particularly when closing the Station, at night time and going home.

This shadowing of the movements of the deceased and his friends by the appellant and his friends was shown by the evidence adduced to be more intensive on the evening of the 5th April, 1973. At about 7 p.m. the deceased paid a visit to the house of his brother-in-law Charalambos Georghiou situated at Kalifatzia area. He was accompanied by Vladimiros Charalambous who testified that on three occasions at different parts of the town situated wide apart, the appellant was seen following them, having as a passenger another person. At about 8 p.m. after their return to the Petrol Station, Charalambous saw the appellant once more driving his car slowly passing outside the Petrol Station of the deceased and looking towards their direction. The appellant was accompanied this time by two passengers, the one being the same person who was in the car when they were being following earlier and another person of stout physique. Later that evening just before closing time, Haris Georghiou and Neophytos Andreou saw the car of the appellant passing once more outside the Station of the deceased with the

two passengers in it heading to the direction of the Police Station. On the same night at about 9-9.05 p.m., Police Constable Kerimes saw the appellant coming from the direction of EPA Club premises into Makarios III Avenue and heading to the direction of the Petrol Station of the deceased. Next to him there was a passenger whom the witness did not identify and at the back seat there was another person whom the witness identified and who was constantly looking towards the Police Station.

Soon afterwards, the deceased closed his Petrol Station and with Haris Georghiou and Neophytos Andreou, each one of them driving his own car, proceeded towards his home travelling in a convoy. There is some discrepancy in the evidence as to the order in which the three cars lined up, but what is certain is that the deceased was not leading the convoy, but he was either second or third in it. Whilst so proceeding, and when by Karkas Petrol Station at Grivas Dighenis Avenue, the deceased overtook the other car in front of him and got ahead of the convoy at the time when the appellant, as the Assize Court put it, "had already emerged in front of them by Karkas Petrol Station". The use of the word "emerged" was the subject of long argument to the effect that there was inconsistency with the motion it implies with the evidence, as there was nothing to show that the appellant was not simply there and that he came from a side street on to the main road. Having gone through the record and its repeated therein use, I attribute no significant importance to its repeated use, except that it means nothing more than that the car of the appellant came into view, a situation natural in a much frequented road with cars lined up thereon.

Thereafter, Haris Georghiou turned left into Eleftheria Avenue whilst the deceased proceeded further and was turning into Thessaloniki Avenue, the next parallel to it road. This was not unusual for him to do when going to his house, Thessaloniki Avenue preferred as being a better lighted street in comparison to Eleftheria Avenue.

Neophytos Andreou followed the car of the deceased into Thessaloniki Avenue and on entering it, saw therein the car of the appellant parked on the left side of the road and the appellant alighting therefrom armed with a pistol or revolver in his hand and getting in the middle of the road waving to the deceased to stop. The deceased complied and stopped in the middle of the road, but with the engine of his car running. The appellant

proceeded to the driver's door shouting out to the deceased loudly, "get out from your car", "alight", etc. At the same time the two companions of the appellant alighted from his car armed with automatic sub-machineguns and they took positions to the left of the car of the deceased, the one standing towards the front and the other towards its rear. The one at the rear, at gun point, asked Neophytos Andreou to alight from his car and keep his hands up, which the witness did. The appellant kept repeating his demand that the deceased should alight from his car and added force to it by banging on the driver's window pane with the weapon he held in his hand. Andreou then noticed the driver locking his door and then extending his hand to the left, giving the impression that he was locking the passenger's door as well. Immediately afterwards, the appellant fired two shots to the direction of the deceased who, thereafter, made an effort to drive forward, when a burst of fire was directed against him from the companion of the appellant standing by the front left of the car. This burst of fire attracted the attention of the other companion who had the witness pinned down and who took advantage of not being closely watched for that moment and ran to the direction of Grivas Dighenis Avenue, when shots were fired unsuccessfully at him. Whilst running away, Andreou saw the car of the deceased heading leftwards to the ditch which in fact was the resultant position at which the policemen who arrived at the scene shortly afterwards found it.

The sequence of events at the scene is related by Kriton Georghiades, a neighbour who resides at Thessaloniki Avenue, No. 2. This witness, whilst in his study, heard someone insulting and shouting to get out, alight, or words to that effect, as well as noise produced when one bangs a glass. He switched off the light and moved to the window and by the time he reached it he heard shots and bursts. He then saw through the grills a red coloured car with its lights on, moving towards the open space adjacent and to the left of Thessaloniki Avenue. As the car was so moving, his attention was drawn from a burst of fire to his left which obviously is the burst of fire which Andreou felt as being directed against him when he ran towards Grivas Dighenis Avenue. He then turned to his right and saw a person standing in the street outside the driver's seat of the red car at a distance of between half to one foot from the driver's door firing two or three shots towards the driver's seat. He identified that person as the appellant who then proceeded at a fast pace to a car that was stationary almost opposite the house

of the witness. It was a Morris Traveller car Registration No. BK 615, eventually identified as the car of the appellant into which the appellant entered and drove away.

The scene was approached by Police Constables Theophanis Efrem and Loucas Petrides who happened to be passing by on their way to duty at Larnaca Central Police Station. When at a distance of about 170–180 meters from the junction of Thessaloniki with Grivas Dighenis Avenue, they saw a car coming in their direction with headlights on. At the same time they heard shots. When they got somehow closer to the scene, another car started moving in their direction at a great speed from which, when almost level to their car, bursts were fired in the air from persons inside that car, whose Registration No. BK 615 they managed to obtain. They approached the scene and parked their car on the lefthand side of the road near the junction and they saw the car of the deceased in its resultant position with its lights on, though they appeared to be rather reluctant to approach it. Petrides telephoned from the coffee shop to the Police, whilst Efrem stood on the pavement keeping watch. Some moments later, a Police Patrol car arrived. Its driver and passengers alighted immediately and approached the car of the deceased. This Police party was headed by Police Sgt. Victor Ioannou and included Police Constables Constantinou and Marios Kythreotis who was, however, not called as a witness in the case, as at the time of the preliminary inquiry he was absent from Cyprus. His absence from the trial was the subject of comment by counsel for the appellant with which I shall be dealing later in the course of this judgment.

Police Sgt. Ioannou approached the car of the deceased whom he found leaning on the steering wheel. As they opened the driver's door they realised that that person was unconscious and his body began falling out. Assisted by his colleagues Kythreotis, Petrides and Efrem the body was removed and placed in their car and sent to the Hospital where he was received by one of the sisters and given first aid until the arrival, within a matter of minutes, of Dr. Poyiadjis who immediately ascertained that Georghios Photiou was dead.

The clothes of the deceased were removed from him by sister Kyriacou. Whilst she was undressing him a projectile fell from his hands and a magazine loaded with ten live rounds of ammunition of 9 mm. was recovered from his possession and given to Police Constable Petrides. This magazine was found

by the Police expert Christophides to be of a type that fits to a Luger automatic pistol.

Next morning, Dr. Kyamides carried out a post mortem examination on the dead body of the deceased in the presence of a number of Police Officers and his findings are as follows:

"(a) On the upper part of the chest on the left side, near the left armpit, there was an entry wound caused by a bullet approximately one centimetre in diam. By this wound the bullet penetrated under the skin and was lodged under the skin of the larynx. The bullet was removed by the doctor, scratched with the knife on its base and handed over to the then Sergeant of the police, Neophytos Solomonides.

(b) On the left sub clavicular area there were two wounds caused by a bullet, the one near the other communicating under the skin which was bruised. The outer wound was the entry wound caused by the bullet and the other the exit wound caused by the same bullet.

(c) On the left hand near the outer surface of the small finger there was an entry wound caused by bullet, one cm. long in diameter. Through this wound the bullet passed under the skin of the dorsal of the left hand, it broke the bones and it was lodged near the thumb. This projectile was removed, it was marked by capital 'A' and it was handed to the then P.S. Neophytos Solomonides.

(d) On the left cheek there was a superficial entry wound caused by a bullet.

(e) On the left nostril there was an entry wound caused by bullet which communicated with an exit bullet wound on the right cheek through the facial bones.

(f) On the right side of the throat, lower region, there were two superficial entry wounds caused by bullet.

(g) On the left temporal region of the head, the back region, there was an entry wound caused by bullet communicating with an exit bullet wound with the left occipital region. Through these wounds the corresponding cranial bones of the head were fractured. The brain substance had not been affected.

(h) On the right shoulder there was an entry wound caused by bullet. Through this wound the shoulder bones had been fractured and the entry wound communicated with an exit wound on the right lateral aspect of the chest wall on the outer surface of the right nipple.

(i) On the right shoulder blade, outer surface, there was an entry wound caused by bullet that penetrated the right thoracic cavity. Through this wound the right lung had been injured.

(j) On the right forearm, middle region, there was a superficial entry wound caused by bullet. Internally the right thoracic cavity contained a good quantity of extravasated blood. The stomach contained semi-digested food".

All the wounds had been caused by bullets; two projectiles were removed from the body of the deceased—one from the throat by the larynx and the other from the small finger of the left hand—whereas the remaining projectiles that had hit the body of the deceased had both entry and exit wounds, except for a wound the projectile which had caused it, was lodged into the body of the deceased and the doctor considered it, on moral grounds, inappropriate to attempt to recover it. This has been the subject of comment by the defence, but, in my view, considering the totality of the undisputed aspects of the circumstances, it makes no difference to the outcome of this case, as the conclusion of the doctor was that the deceased came to his death as as a result of shock and haemorrhage produced by the multiple wounds inflicted upon his body, though no single wound in itself produced death. The Assize Court came to the conclusion that "it emerged from the evidence beyond shadow of doubt that Georghios Photiou, late of Larnaca, died on the 5th of April, 1973, as a result of bullet wounds inflicted upon him earlier that evening at an incident at Thessaloniki Avenue". Whilst at this point, it may be mentioned, that the examination of the two projectiles removed from the body of the deceased showed that they were of different calibre, a fact indicating that the deceased had been hit from bullets fired from more than one firearm. The one projectile was of 0.45 and the other of 9 mm. calibre.

Inside the car of the victim, in the open space between the driver's door and the driver's seat, two projectiles

.45 calibre were found. A third projectile 9 mm. calibre, was also found on the floor of the car in front of the driver's seat and an expended cartridge 9 mm. calibre on the floor of the car behind the driver's seat. In the car and under the mat covering the floor in front of the driver's seat they found a pistol or revolver leather case fitted on a waist belt, containing four live rounds of ammunition of 9 mm. calibre. In the street and on the berm near the car of the deceased, GL 691 the investigating officer found a number of expended cartridge cases scattered about. He also found one live round of ammunition 9 mm. calibre and a projectile near the front left wheel of that car.

The various *exhibits* were examined by the Police ballistics' expert Ag. Inspector Christofides and his conclusions were the following:

" (a) The eleven cartridge cases .45 had been fired from an automatic sub-machine-gun of the M3 type. It was the same sub-machine-gun that discharged the eight cartridge cases .45 that were found in the car of the accused.

(b) The two expended cartridge cases of 9 mm. found in the car of the accused had been fired from an automatic sub-machine-gun known as Marcip. The evidence of the witness on this point, if accepted, tends to support the testimony of Neofytos Andrea that the two companions of the accused carried a sub-machine-gun each.

(c) The four expended cartridge cases found at the scene, in the position earlier referred to (*exhibits* 20A and 20B) were fired from an automatic pistol though the witness was unable to say whether they had been fired from one and the same pistol. The evidence of the expert on this point, if accepted, tends to suggest that at the scene of the incident shots were fired not only from an automatic sub-machine-gun but from a pistol as well; whereas the position wherefrom the cartridge cases were collected does tend to support the version of the two eye-witnesses that pistol shots were fired by the accused at the deceased, first at a position near the entrance to Thessaloniki Avenue and further down by the resultant position of the car of the deceased. He further explained that the cartridge case found inside

the car of the deceased might have been discharged by a weapon held by a person firing at him or from a weapon fired by the deceased. The substance of his evidence on the point is that the cartridge case had been discharged from a weapon fired inside the car, or from a position very near the car depending on the position of the weapon.

(d) The cartridge leaving the cases (*exh.* 20) had been fired from an automatic pistol of the Valter or Luger type or from a type of Browning pistols.

(e) The leather case found in the car of the deceased could take a pistol of the Luger type and the rounds of ammunition found in the possession of the deceased were of the 9 mm. calibre.

The witness was unable, on account of lack of sufficient material, to indentify the weapon from which any of the projectiles had been fired beyond saying that they had been fired from an automatic weapon and they explained that there are automatic sub-machine-guns as well as automatic pistols, falling within the description of an automatic weapon".

The significant, however, part of the evidence of this witness, was his opinion that the shots that caused two of the holes on the jacket of the deceased were caused, the one at the back, by a contact shot, that is a shot fired from a maximum range of two inches from the jacket, and the other hole by the right shoulder of the jacket was again caused by a contact shot fired from a slightly longer range, that is, from a maximum distance of 6 inches from the hole. He explained his reasons for coming to this conclusion and testified that the insignia and characteristics of these holes made further examination unnecessary considering that the holes had been caused by what he described as "contact" shots. It may be pointed out that this has been the subject of extensive argument connected directly with one of the legal points raised on appeal that the jacket in question had been examined by the witness for the first time during the hearing of the case before the Assize Court and later whilst giving evidence before it. These two holes corresponded with the position of the bullet wounds found by the doctor at the back of the deceased and on the surface of the right shoulder blade of the deceased towards the back. This wound appears in photo-

graphs 27 and 26 and as pointed out by the Assize Court much time was devoted in the cross-examination of Dr. Kyamides as to the precise position of the wound on the shoulder blade and the trial Court agreed that that wound was where Dr. Kyamides described it to be, which description was found to fit with the position of the hole on the jacket of the deceased. Evidence to the contrary by defence witness Dr. Fessas, a general medical practitioner, was rejected by the Court. The picture would not be complete without reference to the version of the appellant.

The appellant when called upon to make his defence, did not go into the witness box and made a statement from the dock, reading from a set of notes earlier prepared. The Assize Court very cautiously pointed out that though the fact than an accused person elects not to go into the witness box when called upon to make his defence may be the subject of comment by the Court, yet, such failure should not be equated with the guilt of the accused, an attitude totally impermissible. In this respect, it referred to the cases of *R.* v. *Sparrow* [1973] 2 All E.R. 129 and *R.* v. *Mutch* [1973] 1 All E.R. 178, and to the approach of this Court in *Vrakas and Another* v. *The Republic* (1973) 2 C.L.R. 139 and *Aristidou* v. *The Police* (1973) 2 C.L.R. 244. The appellant made no secret that he carried arms for many years and there is no suggestion that that was done with any lawful authority; that this was inevitable in view of the prevailing conditions and the strong conflicts that existed among fractions of the community, that he was residing in a lonely place near the Turkish neighbourhood of Larnaca town and that he had reasons to be so armed for his own protection. He claimed that he was acquainted with the deceased for years and that he had good relations with him and his family, that they belonged to different political parties and that neither himself nor his friends ever shadowed the deceased and his friends; that his passing by the Petrol Station of the deceased was inevitable on account of the situation of his house vis-a-vis the town and also on account of the distribution of milk that he was doing several times a day; that on the 5th April, 1973, he passed by the Petrol Station of the deceased because a friend of his, one of his companions, kept his car in a garage opposite that station.

The trial Court accepted the evidence of the witnesses for the prosecution from whose testimony it concluded that the appellant kept a watch on the movements of the deceased both prior to

the 5th April, 1973, as well as on the 5th of April when the main object of their watch on the movements of the deceased was to ascertain the hour at which the latter would leave his work. It has been argued on behalf of the appellant that that was not correct, and if anything, it was the reverse that was happening and instances were pointed out at which it was the appellant who was going along and the deceased that was following him in his car. It was further argued that the mere fact that the appellant was proceeding to Grivas Dighenis Avenue when the deceased overtook the car of his companion and followed the appellant into Thessaloniki Avenue was enough to accept this contention of the appellant.

Having considered the totality of the evidence on this issue, I have not been persuaded that the findings of the Court and the inferences drawn thereon were unreasonable, having regard to the evidence, nor sufficient reasons have been given for me to disturb such findings and conclusions. The fact that on certain occasions the one was ahead and the other behind or the reverse, does not change the situation. Shadowing one and watching one's movements, does not inevitably mean that one should be at all times following the other. One would reasonably be expected to conceal his tailing of somebody by not making it so conspicuous in remaining always behind the person on whom he keeps watch. These conclusions inevitably and rightly, led the Assize Court to the further conclusion that the appellant and his companions who were seen in front of the convoy of the cars of the deceased and his companions were there, with the sure knowledge, as the trial Court put it, that the deceased was on his way home, expecting him to follow, as it was his habit, a route via Thessaloniki Avenue. In fact, there was evidence to the effect that that Avenue was followed because it was more illuminated than Eleftheria Avenue.

The fact that the deceased overtook his companion when the car of the appellant was visible ahead of them on Grivas Dighenis Avenue and his turning into Thessaloniki Avenue in which the appellant had turned instead of into Eleftheria Avenue, was pointed out by counsel for the appellant as indicating that it was the deceased that was tailing the appellant and not the reverse, and that it was not reasonable for a person in fear of his life to follow his would be assailant. It is true that only the deceased, had he lived, would be in a position to explain his reactions at that moment. In my view, it would not be

unreasonable to think that one might feel safer to follow and keep an eye rather than be followed by one's pursuers. In any event, whatever that unfortunate man's reactions at the time, these facts do not change the situation, as soon afterwards he found himself confronted with the appellant and his two companions who were heavily armed and in a threatening mood.

It was the version of the appellant, again emanating from his statement from the dock, that he stopped his car soon after entering Thessaloniki Avenue before a stationary car, so that he would give way to an oncoming vehicle to pass and that he then noticed the deceased stop suddenly behind him, and because on that afternoon he had noticed the deceased and Vladimiros tailing them near Pallas Cinema, he thought fit to alight from his car and ask the deceased why he was following them and this, he did, because they had "good relations". He denied that he signalled to the deceased to stop and he went and stopped next to the driver's window and saw on the passenger's seat, next to the driver, a pistol which the deceased tried to take. He then drew his gun for protection and knocked on the glass pane which was closed and on account of that he called out loudly and repeatedly why he was following them, but as the deceased did not reply, he continued hitting the glass pane shouting and asking him to alight from the car, so that they would talk about it. Whilst at that position, he saw obviously Neophytos Andreou arrive at the scene and his companions alight from the car and immobilize Andreou, asking him to raise his hands up. The attention then of the appellant was drawn by the shouts of a woman and when he turned to see what was happening, and he had to turn because his left eye cannot see, the deceased who had not switched off the engine of his car, accelerated suddenly and left abruptly. Turning to see where he was going, he saw the pistol of the deceased emitting fire to the direction of his friend. He heard bursts of automatic weapon and saw the car of the deceased turn suddenly to the left of the road. He did not go near the car of the deceased where it stopped. He got immediately into their car and they left. They met then the car of Police Constable Theofanis Efremis, whilst from the car on the left shots were fired towards Photiou and in the air. He did not fire, he had no such intention, he had not premeditated nor did they ever thought of killing Photiou.

The trial Court rejected the version of the appellant. It

found it highly unreal and in conflict with the findings of Mr. Christofides and Dr. Kyamides.

Connected with the version of the appellant is the allegation as to whether the deceased carried a pistol at all and if he did fire a shot at any of the companions of the appellant.

The Assize Court found that the suggestion that the deceased had a pistol in his possession was an afterthought, probably inspired by the finding in the car of the deceased of the leather pistol case and the rounds of ammunition in his possession, and went on to say: "The whole story put forward by the accused that the deceased attempted to pick up a pistol while criminally threatened by three highly armed men that surrounded his car, is an invention on the part of the accused. It would indeed be very difficult for any one in the position of the deceased to pick up a pistol and fire at the companions of the accused while three men had him surrounded with their weapons pointed at him. And all this while the deceased was allegedly trying to drive off".

It is obviously not an unreasonable conclusion. How could the deceased or any other person dare shoot with a pistol to the direction of a man armed with a sub-machine-gun when being himself a sitting target in the hands of three armed people and with the appellant standing next to him with a pistol directed at him. The Police that arrived at the scene found no pistol in the car of the deceased. The non-calling of Police Constable Kythreotis left much to be desired, if it did not at that, support an inference that the pistol which must have been used in that case was concealed. The evidence, however, is that Marios Kythreotis approached the car with Police Sergeant Victor Ioannou and the scene was guarded until the arrival of Chief Inspector Makris. None of these witnesses accepted the suggestion that there was a pistol in the car of the victim, that was somehow concealed or it disappeared. The non-calling of Marios Kythreotis was justified, in the circumstances, and this omission left no gap in the evidence to warrant a different finding on behalf of the Court or create doubts as to the reasonableness of their conclusion. In fact, learned counsel for the appellant has made it clear that their criticism of the non-calling of Marios Kythreotis in no way should be taken as an insinuation that the Prosecution witheld from the Court any evidence which they possessed that might, if Marios Kythreotis was called, be given in favour of the appellant on this issue.

I have already referred to the testimony of Criton Georghiades which the trial Court accepted as credible and truthful and in doing so it stressed that in evaluating his evidence they did not overlook the serious discrepancy between his testimony before the Coroner and the evidence he gave before the Assize Court "a discrepancy of a kind that should make the Court very careful before deciding to act on his evidence". The trial Court having seen and heard him, believed that this witness told the truth about what he witnessed that night, his evidence found to be supported in material respects by the findings of the Police at the scene, as explained, in particular by witnesses Christofides and Kyamides. The credibility of witness Georghiades was challenged on the basis of a comparison of his testimony before the Coroner who carried out the inquest on the death of the deceased, as compared to that before the Assize Court and in particular to the fact that he said nothing about witnessing the appellant shooting at the deceased from close range or at all, which was, as stressed, a fact which a truthful witness could not be expected to forget. The witness explained the serious discrepancy by testifying that he was always with the impression that he left unwittingly something out from the account of events he gave before the Coroner. The credibility of this witness was also challenged on the ground that whereas at the Assize Court he put the number of shots fired at Photiou between two to three, at the Preliminary Inquiry he put this number between one to two.

As indicated by the Assize Court, the version of this witness as to the two last shots fired by the appellant against the deceased when the latter's car came to a stand-still at its resultant position, is borne out by the exhibits found at the scene as evaluated by the expert witness Christofides who was positive that the two holes found on the jacket of the deceased were caused by contact shots and also by the fact that the 9 mm. cartridge case found inside the car of the deceased might have been discharged by a weapon held by a person firing inside the car or from a position very near the car, depending on the position of the weapon. A further piece of evidence that bears out the veracity of the version of Criton Georghiades about the two last shots being fired at the deceased from close range is the fact that when the first shots were fired, the window pane to his side was intact and that when ultimately the car of the deceased reached its resultant position, it was found smashed and pieces of glass from that smashed window were found in the car of the appellant, a fact

which would only indicate that somebody who approached that glass pane had carried with his clothes and at that his arm, if it was put through that glass pane, broken pieces of glass into the car of the appellant.

The evidence of the ballistics' expert Christofides was also challenged, in particular with regard to his opinion regarding the two contact shots. On this point this witness was positive, it was a matter within his specialization. He formed his opinion from the tearing and the gun powder that was clearly visible around those two holes and he explained that where there is a tearing of the cloth and the signs of gun powder residue are resident, chemical analysis is avoided.

The testimony of the two Police Constables Efrem and Petrides which was invoked in support of the claim that the appellant never approached the car of the victim when it came to its resultant position, as they never saw him there when from a distance of 170 meters from Grivas Dighenis Avenue they heard shots, does not help the case for the appellant, because they saw nobody in the street, according to them, whereas the appellant himself admits that at least he was standing in the road and ran towards his car to get away after the shots were fired.

Having come to the conclusion that the findings of the trial Court and the inferences drawn thereon are correct and duly warranted by the evidence adduced and that in so far as the the evaluation of the credibility of these witnesses was concerned, I have not been persuaded that it is a case to interfere with, I have to examine whether on the facts, as found by the Assize Court, the offence of premeditated murder contrary to sections 203, and 204 of the Criminal Code, as amended by Law 3/62, was warranted.

The Assize Court directed properly its mind to the Law and referred to the leading authorities on the subject, including the cases of *R.* v. *Shaban*, 8 C.L.R. 82, *The Republic* and *Loftis*, 1 R.S.C.C. 30 and *Vouniotis* v. *The Republic* (1975) 2 C.L.R. 34. I had the opportunity of reviewing the authorities on the concept of premeditation in the recent case of *Anastassiades* v. *The Republic* (reported in this Part at p. 97 et seq.). The elements required to be proved beyond reasonable doubt as a matter of fact in order to establish the offence of premeditated murder, are a decision to kill, an opportunity to reflect upon such decision and relinquish it and the implementation of that

decision resulting in the death of a human being. In the case in hand, all ingredients of the offence have been established beyond reasonable doubt and both on account of the conduct of the appellant prior, at and after the killing of the deceased, as well as on account of the nature of the weapon and the cool and calculated manner in which it was used against the deceased.

However, even if the evidence of Criton Georghiades regarding the last two shots fired from close range by the appellant at the deceased when the latter's car came to its resultant position was to be ignored, the circumstances of the killing of the late Georghios Fotiou would still amount to premeditated murder, because, when a person is forced to stop by the threat of arms and surrounded by three armed men is shot dead on account of his refusal to obey a command to alight from his car, the element of premeditation is established. Moreover, in the present case, there is the conduct of the culprit and his companions prior to the incident and the fact that having been so surrounded by the three armed men he was shot dead whilst a sitting target in his car and when he refused to obey the commands of the appellant.

I turn now to the legal and constitutional issues raised by this appeal. The first one is that the addition of a reference to sections 20 and 21 of the Criminal Code, Cap. 154, in the count on which the appellant was convicted, was unconstitutional as contravening Article 7 of the Constitution. This ground is also connected with the next one which is whether the imposition of the death sentence to the appellant is unconstitutional or otherwise invalid, because of Article 7.2 of the Constitution "being unconstitutional due to the conflict with other provisions of the Constitution, such as Article 7.1 and Article 8". Article 7 of the Constitution says:

"1. Every person has the right to life and corporal integrity.

2. No person shall be deprived of his life except in the execution of a sentence of a competent Court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law.

3. ....."

And Article 8 provides that "No person shall be subjected to torture or to inhuman or degrading punishment or treatment".

I find nothing in the aforesaid two Articles to suggest that the death penalty may not be imposed in the case of a person aiding and abetting the commission of a premeditated murder or committing same in furtherance of a common design. This is a pure matter of criminal liability which leads to a conviction for the offence of premeditated murder. Also, the wording of Article 7.2 is so clear and explicit and there is no contradiction in it with paragraph 1 thereof which must be read subject to the provisions of paragraph 2, nor is there any contradiction with the provisions of Article 8 which prohibits torture or inhuman or degrading punishment or treatment and which has nothing to do with the death sentence permitted in certain cases to be imposed under paragraph 2 of Article 7 of the Constitution.

Another ground raised in this appeal is that by giving to the counsel for the prosecution the right to address the Court last, there was a contravention of Article 12 of the Constitution which gives constitutional protection to the presumption of innocence of an accused person. This is a matter of equality of arms or what has been defined roughly, as procedural equality between the defence and the prosecution in a criminal case. This principle contains the right of either side to be heard, but not the order in which they are to be heard, considering that addresses are made on the material that had already been placed before the Court and of which both sides are fully aware and the legal implications of such material, and upon which they make their respective comments.

The last legal ground in this appeal is that the Court was wrong and acted contrary to law, in rejecting the application of the defence to grant to it facilities to secure experts and technical advisers, given that the appellant was a person entitled to and was actually granted legal aid.

In the course of the hearing counsel for the appellant applied for the following directions from the Court: "In accordance with the provisions of Article 12.5 of the Constitution, the accused must be afforded, *inter alia*, sufficient facilities for the preparation of his defence. In this case expert evidence on firearms will be led by the Police and the defence will consult and probably adduce expert evidence on the question of firearms. The question arises who shall pay the costs of these experts. It is well known that we were assigned by the Court to defend the

accused and surely the directions of the Court on the matter will be most helpful".

Counsel of the Republic pointed out that there was no obstacle on the part of the prosecution for any facilities to be afforded to the defence, but was of the view that no law has been enacted giving effect to the provisions of Article 12.5(b) of the Constitution.

The Assize Court took the view that the Constitutional provision invoked was "designed to ensure substantial equality between the prosecution and the defence with regard to the right to choose their witnesses and produce them before the Court without hindrance. Had the constitutional legislators intended to confer such a right on the accused they would include this right among the minimum fundamental rights, such as the right to have an interpreter. Of course, had the State implemented those provisions of the Constitution, making mandatory the setting up of a system of legal aid, surely a law might provide as an aspect of legal aid the payment of the expenses of defence witnesses and the circumstances under which such expenses might be paid". And then went on to say that the Court had no power to give directions in relation to a matter beyond their competence and concluded by saying, "Of course, if at the end of the proceedings the defence applies to the appropriate Governmental Department for the payment of these costs—and we must say that there is at present nothing in the law providing for such a procedure—and if the views of the Court are asked on the matter, we shall give our views depending on the necessity of incurring the expenditure and its reasonableness". I must further say that the appellant called two witnesses for his defence. One of them being an expert medical witness who testified as such on matters within his competence and his expenses were, in fact paid out of public funds.

The statutory authorisation for such payment is to be found in sections 166 and 167 of the Criminal Procedure Law, Cap. 155 and rules 20–23 of the Criminal Procedure Rules. Section 166(1) provides that the costs of every public prosecution shall, in the first instance, be paid out of public revenue and section 167 provides that the Court before which any information is tried, may direct that the costs of such of the witnesses called for the defence as were bound by recognizance to give evidence on the part of the accused, shall be paid out of public revenue.

Rule 23(1) provides that "the foregoing provisions shall also apply to witnesses for the defence in trials on information whose costs are directed by the Court pursuant to section 167 of the Law to be paid out of public revenue". The said "foregoing provisions" are those in rules 21 and 22 with which we are not directly concerned.

Consequently, under the aforesaid statutory provisions, funds are, under certain conditions which do not affect the case in hand, available to defray the costs of witnesses for the defence. It should be further pointed out that the aforesaid laws were in force on the date of the coming into operation of the Constitution, and under its Article 188, they continue in force on or after that date but have to be construed and applied with such modification as may be necessary to bring them into conformity with the Constitution. The overriding provisions of the Constitution which may be considered material to the present case are the notion of fair trial warranted by Article 30, para. 2 of the Constitution, Article 12.5(b), and in particular the words "facilities for the preparation of his defence", if at all relevant—a matter with which I shall be shortly dealing—and Article 12.5(d) which affords to a person charged with an offence, the right "to examine or have examined witnesses against him and *to obtain the attendance and examination of witnesses on his behalf* under the same conditions as witnesses against him", and it is subject in particular to the notion of securing the attendance and examination of witnesses for the defence "under *the same conditions as witnesses against him*" that the payment of costs of such witnesses is provided for, has to be read subject to, and be directed by the Court to be paid out of public revenue. Furthermore, all the aforesaid provisions giving this equality of arms to an accused person are supplemented and reinforced by the machinery provided for compelling the attendance of any witnesses in criminal cases by sections 49 and 50 of the Criminal Procedure Law, Cap. 155. Under these provisions, a summons may be issued and served on a person requiring him to attend before the Court at a time and place to be mentioned therein, to give evidence respecting the case and to bring with him any specified document or thing and any other document or thing relating to the case which may be in his possession or power or under his control. The person served with such summons is bound to obey, and where the prosecutor is a public officer not even his reasonable travelling and subsistence expenses have to be deposited or secured. (See section 49(2)). Moreover, the

obedience to such summons is secured under sections 50, 51 and 52, both by the power of the Court to issue a warrant for his arrest, a power which may be also exercised in the first place, if it is proved that such a person will not attend to give evidence on a summons and by the imposition of sanctions for refusing to attend in the form of imprisonment, fine and an order to pay all costs occasioned by his failure to attend. Once, therefore, there exists in our legal system such a formidable machinery for securing and compelling the attendance of a witness on behalf of the defence and at the same time ample statutory provision for the payment of the costs of defence witnesses, it cannot be said that the absence of any statutory provision making available funds "for consultation with expert witnesses and advice" as suggested by learned counsel for the appellant, places a person charged with an offence on a trial on information at a disadvantage as against the prosecution. Furthermore, such a witness, being an expert may, under the Law on Evidence, be allowed to be in Court and hear so much of the evidence required to form an opinion. Being there, he may advise counsel on the technical aspect of the case and help him cross-examine the opponent witnesses. Also, he will have the opportunity of examining the *exhibits* and be given every facility which in effect will amount to a facility to the person charged for the preparation of his defence.

Counsel for the respondent has invoked in support of his argument, Article 28 of the Constitution which deals with equality before the law, the administration and justice and the right to equal treatment and protection of all persons, as well as Articles 12 and 30 to which I have already referred. Article 12.5 deals with the minimum rights of a person charged with an offence which are not necessarily exhaustive of the demands for fair hearing in Article 30, para. 2 which corresponds to Article 6 para. (1) of the European Convention on Human Rights ratified by the Republic of Cyprus in 1962 by Law 39/62.

Paragraph (b) of Article 12.5 includes, among those minimum rights, "the right to have adequate time and facilities for the preparation of the defence" of such a person. In my view, this expression is satisfactorily complied with by the existing statutory provisions relating to the summoning and compelling the attendance of defence witnesses. With regard to the "facilities" required under this paragraph, it is pointed out by Fawcett in his textbook "The Application of the European Convention

on Human Rights", 1969, p. 168 that they "include access to necessary documents; consultation by writing or conversation with a lawyer chosen or appointed for the defence; and freedom, subject to the rules and good order of the Court, to conduct the defence as the accused or his lawyer sees fit; though the last may belong under the concept of 'fair hearing' in Article 6(1) rather than to the preparation of the defence".

The proper course that should have been followed in this case, was not to inquire with the Court in such general terms about the availability of funds, but to take advantage of the procedural steps open to an accused person and make the best of it for his benefit. In fact, this was done in this case in respect of another witness, Dr. Fesas, a medical expert whose expenses have been paid out of public revenue. This failure, on the part of the defence, therefore, does not, in my view invalidate the proceedings as none of the alternative lines pursued on behalf of the appellant within this ground of appeal, can succeed their being no unequality of arms under the Law.

For all the above reasons I find that this appeal should be dismissed, as it was reasonably open to the Assize Court on the evidence before it to arrive at the verdict it did and convict the appellant on the charge of premeditated murder. The appellant upon whom the burden of proof lay, has failed to persuade me that the conviction should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable or that the judgment of the trial Court should be set aside on the ground of a wrong decision on any of the questions of law raised or on the ground that there was a substantial miscarriage of justice. The Assize Court very carefully, as it appears from their elaborate judgment considered the totality of the evidence before it and assessed the credibility of witnesses having the advantage of watching their demeanour, unlike us who have to do so on the transcribed record. It made its finding of fact based on the credibility of witnesses and drew therefrom conclusions, having given due consideration to the submissions of the defence made at the trial and which, in effect, were those repeated in this Court on appeal. Every issue was before them and they properly directed their mind to the law, and I see no reason to interfere with their findings of fact and the conclusions drawn thereon. We cannot but recognise that trial Courts have the advantage of seeing and hearing the witnesses and we should not lightly interfere with their verdict, unless we are

persuaded that an injustice has been done, which is not the case, or to repeat what was stated in *Shioukiouroglou* v. *The Police* (1966) 2 C.L.R. 39 at 42, "..... these (findings) can only be disturbed on appeal, if this Court is persuaded that they are unsatisfactory to the extent of requiring intervention in order to do justice in the case according to law".

For all the above reasons I would, therefore, dismiss the appeal.

MALACHTOS, J.: In this appeal the facts, as well as the arguments of counsel, sufficiently appear in the other judgments and there is no need for their repetition.

In my view out of the numerous grounds of appeal the only one which stands is that the Assize Court wrongly decided that the appellant was guilty of premeditated murder.

The Assize Court in order to arrive at the above conclusion relied mainly on the evidence concerning the shadowing of the movements of the victim, on the evidence of P.W. 7 Criton Georghiades, and P.W. 39 Police Inspector Andreas Christofides, the ballistics' expert.

In my opinion the Assize Court arrived at the wrong conclusions as regards the shadowing of the movements of the victim by the appellant and, in particular, in finding that the car of the appellant emerged in front of the car of the victim shortly before the commission of the offence. The evidence on this point, according to the prosecution witnesses, is that the victim overtook the car which was preceding and which was driven by his employee P.W. 5, Neofytos Andreou, when obviously he noticed the car of the appellant and followed it when it turned left and entered into Thessaloniki Avenue.

The evidence of P.W. 7 Criton Georghiades, the main point of which is that after the first shots he saw the appellant next to the driver's door of the car of the victim at its resultant position firing two or three times in the direction of the driver's seat, ought not to be accepted by the Court or at least should have created doubts in their minds as to whether this witness was telling the truth on this point, since at the inquest before the Coroner, did not testify anything of the kind. The evidence of this witness before the Coroner appears at page 208 of the record and is as follows:

"I live in the first floor of Thessaloniki street No. 2 at

Larnaca with my family. It is over Drossia coffee shop. On 5.4.73 at about 9–9.15 I was in the study which has a window in Thessaloniki street. I heard shouting 'Kateva kato re' and other insults. I then heard knocking on some glass. I was alarmed and got up to switch off the light and look out of the window. Until I went to the window I heard shots and a burst of firing (ripin). From the window I saw a red car with lights on which crushed into the left side of the road. I heard another 'ripin' to my left. When I looked back again I saw passing by my front on foot Kyriacos Kouppis with a pistol in his hand. Opposite and under the window a grey Morris Traveller was parked in which Kouppis entered in the driver's seat. The car set off at once going towards 'Leprokomion'. I then saw the number of the car as there was just opposite me a light. The number was BK 615. I then went downstairs and saw some people gathered around the red Datsun. I met there P.S. Victor who asked me to phone for an ambulance. I did so".

The explanation given by this witness as to why he did not mention this fact at the inquest appears in his cross-examination at pages 78 to 79 of the record and is as follows:

"*Q.* I suggest to you that what you told the Court today as to the incident of accused firing over the victim from a position close to his car, in the circumstances you described, you did not tell this story to the Coroner.

A. I cannot remember the precise statement I made to the Coroner. The way a statement is elicited before a Coroner is different from the way one's evidence is elicited before the Assize Court. For example I did not say at the Court before the Coroner that I left my desk from my right.

Q. This detail of Kouppis firing over the victim from a position over him, would you have left it from your testimony?

A. What I must mention that whatever happened I mentioned it to the Court and this is the truth and the whole truth.

Q. I shall tell you your testimony on this subject before the Coroner: 'I heard another 'ripin' to my left.

When I looked back again I saw passing by my front, on foot, Kyriacos Kouppis with a pistol in his hand. Opposite and under the window a grey Morris Traveller car was parked in which Kouppis entered in the driver's seat'.

A. I must have said it if it is recorded by the Judge. But while making this statement I believed that other questions would follow at the Inquest but it did not happen. While giving my testimony I gave emphasis to the fact that I identified the person I saw firing. When I finished my testimony before the Coroner I was left with the impression that I had omitted something. (Afisa kati piso). But the proceedings were very short before the Coroner".

I consider the explanation of this witness as a very poor one. No doubt a witness in giving evidence before a Court of law he may not relate facts of minor importance which he witnessed in a given incident but, surely, he cannot be excused for omitting to state such facts which constitute the main and the most important part of his evidence.

P.W. 39 Inspector Andreas Christofides, the ballistics' expert, referred to the contact shots at the trial when the jacket of the victim was for the first time shown to him after the lapse of almost four years from the crime and without carrying out any scientific examination. Even if we assume that contact shots were fired against the victim the possibility that these were fired at the time his car was stationary before proceeding to its resultant position, cannot be excluded.

It can reasonably be inferred from the evidence adduced at the trial that the victim was also armed at the time with an automatic pistol or revolver and the possibility that the appellant took no chances when he realised this fact and that it was there and then that he formed the intention to kill, cannot be excluded.

I, therefore, concur unreservedly in the reasons given and in the result arrived at by my brother Judge Hadjianastassiou in his judgment given in this appeal which I have had the opportunity of reading and fully considering, in that the evidence is equally consistent with both the existence and the absence of premeditation and so the appellant is entitled to the benefit of doubt.

For the above reasons the conviction of the appellant for premeditated murder should be set aside and be convicted only of homicide under section 205 of the Criminal Code, Cap. 154.

TRIANTAFYLLIDES, P.: The appeal is allowed by majority and the conviction of the appellant for premeditated murder is set aside; in the exercise, however, of the powers of this Court under section 145(1)(c) of the Criminal Procedure Law, Cap. 155, the appellant is found, by majority, guilty of homicide, under section 205 of the Criminal Code, Cap. 154, as amended by the Criminal Code (Amendment) Law, 1962 (Law 3/62).

Counsel for the appellant and the respondent are asked whether they wish to say anything regarding the sentence to be passed upon the appellant and they elect to say nothing.

Court: This is a case of homicide of the worst kind. The appellant is, therefore, sentenced to imprisonment for life.

Appeal allowed. Conviction for premeditated murder set aside. Appellant found guilty of homicide.