1980 August 26

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

VARNAVAS CHRISTOFI FOURRI AND OTHERS,
Appellants,

v.

THE REPUBLIC,
Respondent.

(*Criminal Appeals Nos.* 3879, 3880, 3881).

Constitutional Law—Human rights—Person charged with an offence—Right to have adequate time and facilities for preparation of his defence—And right to defend himself through a lawyer of his own choosing—Articles 12.5(*b*) *and* (*c*), 30.3(*b*) *and* (*d*) *of the Constitution and Article* 6(3)(*b*) *and* (*c*) *of the European Convention on Human Rights of* 1950—*Right to legal assistance of one's own choosing guaranteed only in the case where the fees are to be paid by the individual himself—Appellants declining to be defended by advocates assigned to them by Court by way of free legal aid—Above Articles not violated.*

Criminal Procedure—Count—Addition—Principles applicable—Section 85(4) *of the Criminal Procedure Law, Cap.* 155—*Acquittal on count of robbery and addition of new count of stealing—Appellants not prejudiced in their defence.*

Criminal Law—Joint offenders—Common intention—Robbery and sodomy—Committed by three persons in furtherance of a common intention—Omission to refer expressly in the counts concerned to sections 20 *and* 21 *of the Criminal Code, Cap.* 154—*Not a material irregularity and has not in any way prejudiced the appellants or misled them—Section* 39 *of the Criminal Procedure Law, Cap.* 155.

Criminal Law—Robbery—Ingredients of the offence—Intention to rob—Specific intent—Intoxication.

Criminal Law—Evidence—Sodomy with violence—Corroboration—Whether Court can act on uncorroborated evidence of complainants.

Criminal Law—Parties to offences—Aidors and abettors—Sodomy with violence—Committed by three persons acting in concert—Question of identification, as to which of the three persons actually committed the act, unnecessary—

Criminal Procedure—Charge or information—Statement of offence or its particulars—Error—Effect—Section 39 of the Criminal Procedure Law, Cap. 155.

Evidence—Corroboration—Sexual offences—Sodomy with violence—Whether Court can act on uncorroborated evidence of complainants.

Criminal Law—Sentence—Robbery—Sodomy with violence and stealing—Concurrent sentences of six years' and two years' imprisonment—Nature of offences and personal circumstances of the appellants who were of young age and first offenders—Sentences not manifestly excessive or wrong in principle.

The three appellants were tried at the Assize Court of Larnaca and found guilty on one cout of the offence of robbery ("count 1"), on two counts of the offence of "unnatural offence with violence" ("counts 6 and 7") and on two counts of the offence of stealing ("counts 8 and 9"); they were each sentenced to six years' imprisonment on each of counts 1, 6 and 7 and two years' imprisonment on counts 8 and 9, all sentences to run concurrently. Counts 8 and 9 were added by the Assize Court pursuant to the provisions of section 85(4)* of the Criminal Procedure Law, Cap. 155.

At about 4.30 in the morning of the 7th May, 1978, the appellants, three young men aged about twenty, met the two complainants, two young Austrians in their early twenties serving in the Austrian Contingent of the U.N. peace-keeping force (complainants "Hoffer" and "Muller") at a hotel discoteque near Ayia Napa village. They were all in a merry mood and at about 5.30 in the morning they left the discoteque whereupon the complainants requested a lift from the appellants to the nearby Ayia Napa village. Appellant 1 agreed to give them a lift in his lorry but instead of stopping near complainants' house at Ayia Napa, as requested by them, he drove on in the direction of Paralimni village, despite complainants' protestations and their efforts to stop the car, and stopped in an open

* Quoted at pp. 176-77 *post*.

space between Paralimni and Sotira villages where the complainants were violently pulled out of the lorry. When out of the lorry appellant 2 removed by force from the possession of complainant Hoffer his watch, his wallet and gold ring. Complainant Hoffer tried to run away but appellant 1 caught up with him and knocked him down. The above articles were found hidden at a spot in the house of appellant 2 which was indicated to the police by this appellant. Appellant 3, in his statement to the police, admitted beating up the complainant, at the above stop. After the removal of the aforesaid articles from the possession of complainant Hoffer, which formed the subject-matter of the robbery charge (count 1) the appellants drove away but soon returned and chased the complainants and put them into the lorry by force. The lorry was then driven to and stopped at an isolated spot near Xylophagou river. There complainant Hoffer was violently dragged out of the car his clothes and underclothes were forcefully removed and appellant 1 committed sodomy upon him. Following this, another member of the company committed sodomy upon him whilst one of the appellants held down his legs. Complainant Muller was subjected to a similar treatment and appellant 3 committed sodomy upon this complainant. The appellants then removed the clothes of the complainants, left them virtually naked and drove away. These clothes were found by the Police in the possession of appellant 2. The removal of the clothes of the appellants formed the subject-matter of 2 counts of robbery (counts 2 and 3). The Assize Court acquitted the appellants on these 2 counts and added, under section 85(4) of Cap. 155, 2 counts (8 and 9) for ordinary larceny with regard to the items contained in the particulars of counts 2 and 3, having held that proof of a specific intent was an essential ingredient of the counts of robbery and the presence of such intent viz. use of violence for the purpose of stealing has not been established; and that proof of theft was an ingredient of the offence of robbery and no conceivable prejudice could be occasioned to the appellants by the addition of the new counts.

With regard to the charge of robbery (count 1) the Assize Court found that specific intent, an essential ingredient of the offence of robbery was present because though the appellants were merry because of drink, they were by no means drunk to the point of being incapable to form a specific intent; and

because they acted with cunning and deliberation, planned their movements very carefully, resisted the attempts of the complainants to bring the car to a halt and committed the acts complained of in count 1 at a deserted spot.

With regard to the offence of sodomy the Assize Court, after warning itself about the danger of acting on the uncorroborated evidence of the complainants, held that it was prepared to "act on the evidence of the complainants even in the absence of corroboration"; and that even if it were to search for corroboration there was ample corroborative evidence emanating from the statements of the appellants that sodomy had been committed, from the finding of spermatozoa on the anus and underpants of the complainants, from the fact that appellants were with the complainants at an isolated spot and from the recovery of the belongings of the complainants from the possession of appellant 2.

The appellants were committed for trial on May 24, 1978, and their trial started on June 5, 1978. At the commencement of the trial there appeared defending counsel for appellant 3, but appellants 1 and 2, who had been defended by counsel at the committal stage, appeared in person and stated that due to lack of financial means they could not appoint counsel to defend them.

The trial Court decided to assign an advocate to defend at public expense appellants 1 and 2, pursuant to the provisions of section 64(1)* of the Criminal Procedure Law, Cap. 155.

Appellants 1 and 2 then named six advocates so that one of them could be assigned by the Court to defend them; five of them were contacted but none accepted to do so, and the sixth happened to be abroad at the time.

The trial Court proceeded then to assign as defending counsel of appellants 1 and 2 Mr. G. Nicolaides, who is one of the senior and most experienced advocates in Larnaca, but the appellants did not accept him and, so, he did not appear for them.

The hearing of the case was adjourned on the following day,

* Quoted at p. 186 *post.*

at the request of the appellants, but again none of the advocates indicated by them would accept the brief. Appellants were then asked if they wanted another advocate but they applied for further adjournment so that they would be able to speak with the advocates indicated by them and persuade them to accept.

The trial Court, however, decided, in the circumstances, to proceed to hear the case with appellants 1 and 2 appearing in person and without having the benefit of the services of defending counsel; in doing so the trial Court stated expressly that it would take care to see that appellants 1 and 2 would not be prejudiced because they were not defended by counsel; and, actually, in delivering judgment the trial Court stressed that throughout the trial it was fully conscious of its duty to ensure that the fact that appellants 1 and 2 were not represented by counsel did not operate unfairly against them.

Upon appeal against conviction and sentence Counsel for the appellants contended:

(a) That the Assize Court by proceeding with the trial of the appellants as it did, it did not offer them their minimum right to have adequate time and facilities for the preparation of their defence, contrary to Articles 12.5(b) and 30.3(b) of the Constitution and Article 6(3)(b) of the European Convention on Human Rights of 1950; and did not afford to the appellants the opportunity of defending themselves through a lawyer of their choice, contrary to Articles 12.5(c) and 30.3(d) of the Constitution and Article 6(3)(c) of the said Convention.

(b) That the trial Court erroneously found appellants guilty on the added counts 8 and 9 inasmuch as they were acquitted on counts 2 and 3.

(c) That the addition by the Assize Court of the two new counts 8 and 9 and the finding of appellants guilty on such added counts was contrary to the letter and spirit of section 85(4) of Cap. 155 and moreover such addition was prejudicial to the appellants as two of them were undefended by counsel.

(d) That as section 21 of the Criminal Code, Cap. 154 was

not referred to together with section 20 in the counts of robbery and sodomy with violence on the information (counts 1, 6 and 7) the appellants could not have been found guilty of acting in concert.

(e) That the intention to rob, which is an ingredient of the offence of robbery, had not been established by the prosecution more so since its version was that the intention of the appellants was to satisfy their lust on the complainants.

(f) The trial Court erroneously found appellants guilty on counts 6 and 7 of the offence of sodomy with violence inasmuch as it erroneously acted without corroboration of the complainants' evidence.

(g) That the sentences were manifestly excessive in view of the state of mind in which the appellants were at the material time, their age, their past clean record and their excellent social investigation reports.

Held, (*I*) *on the contention of the appellants that they were not defended by counsel at the trial*:

(A) *Per A. Loizou J., Malachtos J. concurring:*

That Article 6, paragraph 3(c) of the European Convention on Human Rights does not guarantee to an individual legal assistance of his own choosing except only in the case where the fees are to be paid by the individual himself (see the Case-Law of the European Commission of Human Rights at pp. 168-171 post as it is inevitable that for the interpretation of the provisions of the European Convention on Human Rights domestic tribunals would turn to the interpretation given by the international organs entrusted with the supervision of their application, namely the European Court and the European Commission of Human Rights); that, therefore, the fact that the Assize Court went out of the guaranteed rights and tried to secure legal assistance of the appellants' own choosing is a commendable conduct and shows a very high sense of fairness towards the appellants; that the choice of an advocate in that respect by the Court was not in violation of either the Constitution or the Convention; that the trial Court duly warned itself of the risks that a criminal trial of this nature might entail when an accused person is not defended by counsel; that there is nothing in the

record to suggest that that warning which the Court gave itself was not present in its mind throughout the conduct of the proceedings; and that, accordingly, contention (a) must fail.

(B) *Per Triantafyllides P.*:

That the developments which led to appellants 1 and 2 defending themselves at their trial in person, and not through counsel, did not result in any breach of Article 12.5(c) of the Constitution or of Article 6(3)(c) of the European Convention on Human Rights; that though these two appellants had no right to choose the advocate who would be assigned to them, by way of free legal aid, by the trial Court, under Article 12.5(c) of the Constitution and section 64 of Cap. 155, nevertheless the trial Court, in following an established practice, contacted those advocates who had been named by the appellants as counsel of their choice, but it did not prove to be feasible to nominate anyone of them; that looking at the situation of the defence as a whole and bearing in mind, too, that the trial Court was all along aware of the need to pay particular attention so that appellants 1 and 2 would not be prejudiced by the fact that they were not represented by counsel at their trial, in the particular circumstances of the present case, it cannot be said that the said appellants did not have a fair trial or that there has taken place either a breach of Article 12.5(c) of the Constitution and of Article 6(3)(c) of the Convention or any miscarriage of justice (see the Case-Law of the European Commission of Human Rights at pp. 187-190 *post*).

Held, (II) *on the appeal against conviction*:

Per A. Loizou J., Triantafyllides P. and Malachtos J. concurring:

(1) That the ingredients of theft had been established; that there was ample evidence duly warranting the finding of the trial Court that the articles, forming part of the two former counts of robbery, and which formed also the ingredient of the two new counts of stealing, were taken and carried and thrown away in circumstances suggesting an intent to deprive the complainants permanently thereof; and that, accordingly, contention (b) must fail.

(2) That for a Court to act under section 85(4) of Cap. 155 and add new counts to the charge or information the following requisites must be present: (a) It must be established by evid-

ence that the accused has committed an offence not contained in the charge or information; (b) that the accused cannot be convicted without amending the charge or information; (c) that the accused must not upon his conviction on the new offence be liable to a greater punishment than if he were convicted on the charge or information as it stood, in other words that the punishment provided by law for the added offence must not exceed that of the original offence; (d) that the accused would not be prejudiced by the amendment in his defence (principles laid down in *Chrysostomou* v. *Police*, 24 C.L.R. 192 at p. 194 adopted); that counsel for the appellants has conceded that requisites (a), (b) and (c) were satisfied; that no reason has been given by him as to how the two undefended appellants could possibly have been prejudiced in their defence; that, on the totality of the circumstances, the trial Court acted properly and no prejudice was caused to the appellants by the addition of the two new counts for the lesser offence of stealing, contrary to section 266(a) of Cap. 154; and that, accordingly, contention (c) must fail.

(3) That the omission to refer expressly in the counts concerned to sections 20 and 21 of Cap. 154 is not a material irregularity (see *Constantinides* v. *Republic* (1978) 2 C.L.R. 337 at p. 376); that no error in stating an offence or its particulars is to be regarded as non-compliance with the provisions of the Law unless in the opinion of the Court the accused was in fact misled by such error (see s. 39 of Cap. 155); that, considering the evidence adduced and all the circumstances of the case, no prejudice was caused to the appellants and they were not misled by the omissions; that it was obvious that the charges preferred against them were to the effect that they aided and abetted one another in committing both the offences of robbery and sodomy and having formed a common intention to prosecute this unlawful purpose in connection with one another, their commission was a probable consequence of the prosecution of such purpose; that it was not necessary that each act committed in relation to that offence should be committed by all so long as the one was contributing in his own way to the commission of the offence of robbery; that there was ample evidence from which the Court could safely and beyond reasonable doubt conclude that the three appellants committed jointly the offences; and that, accordingly, contention (d) must fail.

(4) *On the contention that the intention to rob, an essential ingredient of the offence of robbery, had not been established by the prosecution the more so since its version was that the intention of the appellants was to commit sodomy on the complainants:*

That the offences of robbery are covered by a conduct at the first stage of this serial of incidents, whereas the offences of sodomy were committed at a much later stage; that there was nothing in the evidence to suggest that the appellants did not have two different intentions at two different times and places when they had the two complainants in their grip; and that, accordingly, contention (e) must fail.

(5) That this Court is in full agreement with the legal approach of the trial Court, regarding the question of corroboration in sexual offences, and adopts its reasoning (pp. 183–85 post); that having found that the appellants were correctly held to have acted in concert and aided and abetted each other of the commission of the offences of robbery and sodomy, the question of the identification as to which of the three actually committed the act of sodomy on each of the two complainants is unnecessary; and that, accordingly, contention (f) must fail.

Held, (III) *on the appeal against sentence:*

(A) *Per A. Loizou J., Malachtos J. concurring:*

That the trial Court directed itself properly both as to the nature of the offences and the personal circumstances of the three offenders; that it was indeed a beastly conduct which offended human dignity; that there was nothing manifestly excessive about these sentences, nor there has been anything wrong in principle so as to justify an interference of this Court with the exercise of a function which in the first instance is entrusted to the trial Courts to perform; and that, accordingly, the appeal against sentence must, also, fail.

(B) *Per Triantafyllides P.:*

That, notwithstanding the need for a lenient approach to be adopted by the Courts in relation to young persons, especially if they are first offenders, the need that sentences have to be individualized, and the contents of the social investigation reports, which show that the appellants are persons who have repented for what they have done and who are likely to reform and become, once again, good citizens, the sentences imposed

in the present case are not wrong in principle or manifestly excessive, because the conduct of the appellants was, indeed, most condemnable and uttertly disgusting and it had to be punished in a manner which would abundantly show that conduct of this nature cannot be tolerated in this country; and that though it might perhaps be said that the sentences which were passed on the appellants, though they were amply warranted in the circumstances of this case, are rather severe, in view of the young age, clean past records and other personal circumstances of the appellants, this is not a consideration entitling this Court to interfere with such sentences, once it has not been shown to the satisfaction of the Court that they are either wrong in principle or manifestly excessive.

Held, further, *by Triantafyllides P.*, that though all three appellants were under the influence of drink while they committed offences in question, drunkenness, except in cases of alcoholism, cannot be accepted by itself as a strong mitigating factor.

Appeals dismissed.

Cases referred to:

Ofner v. *Austria* (Application No. 524/59) Year book of the European Commission of Human Rights, 1960, Vol. III p. 322;

X. v. *The Federal Republic of Germany* (Application No. 6501/74) Decisions and Reports of the European Commission of Human Rights, 1975, Vol. 1, p. 80;

X. v. *Austria* (Application No. 6185/73) 2 Decisions and Reports of the European Commission of Human Rights p. 68 at p. 78;

X. v. *The Federal Republic of Germany* (Application No. 6946/75) 6 Decisions and Reports of the European Commission of Human Rights p. 114 at pp. 116, 117;

Chrysostomou v. *The Police*, 24 C.L.R. 192 at p. 194;

Mehmet v. *The Police* (1970) 2 C.L.R. 62 at p. 68;

Constantinides v. *The Republic* (1978) 2 C.L.R. 337 at p. 376;

X. v. *Austria* (Application No. 2676/65) 23 Collection of Decisions of the European Commission of Human Rights p. 31 at p. 35;

X. v. *Norway* (Application No. 5923/72) 3 Decisions and Reports of the European Commission of Human Rights p. 43 at at p. 44;

X. v. *United Kingdom* (Application No. 8295/78) 15 Decisions and Reports of the European Commission of Human Rights p. 242 at p. 244;

Ensslin and Others v. *The Federal Republic of Germany* (Applications Nos. 7572/76, 7586/76 and 7587/76) 14 Decisions and Reports of the European Commission of Human Rights p. 64 at p. 115;

X. v. *The Federal Republic of Germany* (Application No. 646/59) 3 Yearbook of the European Commission of Human Rights p. 272 at pp. 276–278;

X. v. *Austria* (Application No. 4338/69) 36 Collection of Decisions of the European Commission of Human Rights p. 79 at p. 82;

X. v. *United Kingdom* (Application No. 5871/72) 1 Decisions and Reports of the European Commission of Human Rights p. 54 at p. 55;

X. v. *Austria* (Application No. 2645/65) 11 Yearbook of the European Commission of Human Rights p. 322 at p. 348;

Artico v. *Italy* (Application No. 6694/74) 8 Decisions and Reports of the European Commission of Human Rights p. 73 at p. 89;

Meytanis v. *The Police* (1966) 2 C.L.R. 84 at p. 85;

Mina v. *The Police* (1971) 2 C.L.R. 167 at p. 170;

Mavros v. *The Police* (1975) 2 C.L.R. 171 at p. 180.

Appeals against conviction and sentence.

Appeals against conviction and sentence by Varnavas Christofi Fourri and others who were convicted on the 12th June, 1978 at the Assize Court of Famagusta (Criminal case No. 1437/78) on one count of the offence of robbery, contrary to sections 282, 283 and 20 of the Criminal Code, Cap. 154, on two counts of the offence of unnatural offence with violence, contrary to sections 171, 172 and 20 of the Criminal Code and on two counts of the offence of stealing, contrary to sections 255(1), 262(1), 266(a) and 20 of the Criminal Code, Cap. 154 and were sentenced by Pikis, P.D.C., Pitsillides, S.D.J. and Constantinides, D.J. to six years' imprisonment on the robbery and on each of the

unnatural offences counts and to two years' imprisonment on each of the stealing counts, all sentences to run concurrently.

L. N. Clerides, for the appellants.

Cl. Antoniades, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgments were read:

TRIANTAFYLLIDES P.: The first judgment will be delivered by Mr. Justice Andreas Loizou.

A. LOIZOU J.: The three appellants were tried by the Assize Court of Larnaca and found guilty of the following offences:

(a) Count 1—robbery of L/Cpl. Hoffer Karl by stealing from him one wrist watch valued C£20.—, one gold ring valued C£50.—, one purse containing C£2.500 mils, having used actual violence on him and Pte. Floel Muller Karl, both of Austria, now AUSCON Camp, contrary to sections 282, 283 and 20 of the Criminal Code, Cap. 154.

(b) Count 6—Unnatural offence with violence on the aforesaid L/Cpl. Hoffer Karl, contrary to sections 171, 172 and 20 of the Code.

(c) Count 7—Unnatural offence with violence on the aforesaid Pte. Floel Muller Karl, contrary to sections 171, 172 and 20 of the Code.

(d) Count 8—Stealing a pair of shoes, a pair of trousers and one lighter, property of the aforesaid Hoffer Karl, contrary to sections 255(1), 262(1), 266(a) and 20 of the Code.

(e) Count 9—Stealing one pair of shoes, one pair of trousers and one chain with a metal identity, the property of the aforesaid Pte. Floel Muller Karl, contrary to sections 255(1), 262(1), 266(a) and 20 of the Code.

They were acquitted of the remaining counts. In fact, the two counts 8 and 9 were added by their judgment, pursuant to the provisions of section 85(4) of the Criminal Procedure Law, Cap. 155.

The sentence imposed on them was six years imprisonment each on counts 1, 6 and 7, and two years imprisonment on counts 8 and 9; all sentences to run concurrently.

The appellants appealed against conviction and sentence and in so far as conviction is concerned, the grounds may be divided into two groups: (a) those of alleged procedural irregularities, and (b) those that come under the heading, that the verdict of the Assize Court was unreasonable, having regard to the evidence.

The three appellants, who at the time were represented by counsel were committed for trial on the 25th May, 1978, without there having been held a preliminary inquiry as provided for under section 92 of the Criminal Procedure Law, Cap. 155, but the substance of the statement of each prosecution witness whom the prosecution intended to call was served in advance on the accused. This course was adopted under the provisions of section 3 of the Criminal Procedure (Temporary Provisions) Law 1974, (Law No. 42 of 1974).

On the 5th June, 1978, when they first appeared before the Assize Court, appellants 1 and 2 were not represented by counsel and on being asked about it they said that they were poor and they could not engage an advocate. Appellant 3 was duly represented by counsel.

After inquiring about their financial position and having in mind the nature of the offences for which they were to stand trial, the Assize Court decided that it was in the interest of the administration of justice to appoint under section 64 of the Criminal Procedure Law Cap. 155, an advocate or advocates depending on their choice to defend them. The Assize Court then asked them if they had an advocate of their choice whom they would want to be appointed provided, of course, such advocate was prepared to accept the brief. Their choice, eventually, was for counsel appearing before us in this appeal, whose law office is in Nicosia. The Court noted the disruption caused by this delayed application for legal assistance, yet it asked the Registrar of the Court to communicate with counsel and inquire whether he would be prepared to accept the brief. The Assize Court was then informed that not only Mr. Clerides but two other advocates who had been also mentioned by the

two appellants, answered in the negative and so the Assize Court felt that it should face the problem of appointing an advocate to undertake the defence of the two appellants. During the break it invited through the Registrar Mr. G. Nicolaides, an experienced lawyer of Larnaca with long practice and inquired of him if he was prepared to undertake the defence of these appellants. His answer was a positive one as he felt that in that way he would help the administration of justice.

The two appellants were then asked by the Assize Court if they wanted him to defend them. They said they did not know this advocate and that they wanted only anyone of the three advocates that they had named earlier, but as those named made it clear that they were not accepting the brief, the Court felt that the impossibility to satisfy the wishes of the appellants as to their choice of advocate, should not be used as a means to dictate the conduct of the proceedings and in the exercise of its duties under the relevant section of the law, it decided to appoint Mr. G. Nicolaides to undertake the defence of the two appellants as it considered it necessary and in the interest of the administration of justice.

It then had a break so that Mr. Nicolaides would come to the Court and state formally his acceptance of the brief, when, as it said, the Court would examine any application of his for a possible adjournment of the case, so that time would be offered to him to be prepared. It then went on to say that if Mr. Nicolaides was of the opinion that there was any conflict between the defence of the first and the second accused, then the Court would examine the possibility of engaging a second advocate.

After a short break, Mr. Nicolaides appeared in Court and stated that out of respect to it it accepted the brief but he felt that the two appellants were not willing to cooperate with him as they had certain misgivings. He further stated that if the case was to go on with him as defence counsel he would request an adjournment until the following day, so that he would contact the two appellants and receive instructions after going through the record. The Assize Court then remarked that it could not compel them to be defended by counsel whom they did not approve. The two appellants then asked for some time to consider if they would engage another advocate. The case was then adjourned for the following day. It warned the appellants

that by then they should inform the Court which advocate they wanted to defend them, provided he was ready to do so as the Assize Court was not prepared to waste its valuable time with inquiries as to the engagement of an advocate. It then remarked that "undoubtedly we want to secure the rights of the appellants to be defended properly before the Assize Court, that being their fundamental right, but that right cannot be left to lead to the frustration of the proceedings".

On the following day, the Registrar of the Court, who in the meantime communicated with the three ones already named and with two new ones indicated by the appellants, informed the Court that none of them would accept the brief. They were then asked if they wanted another advocate and they said that they wanted a further adjournment so that they would be able to speak with these advocates and persuade them to accept. They asked that they wanted to go personally and see these advocates. The President of the Court then addressed to the appellants the following: "I shall repeat the question which I put to you yesterday. Do you want the Court to find an advocate who is prepared to defend you?". The first appellant said: "I do not recognize the advocate who will be appointed by the Court and who is not competent". Appellant 2 said the same and added that he had no trust in that advocate. The Court then had a short recess and gave its ruling where it speaks of the constitutional right of accused persons to be defended by counsel of their choice or to have legal aid if an accused person has not the means to engage one himself, and went on to say the following:

> "To an inquiry of the Registrar whether they would wish the Court to name any other advocate to defend them they answered in the negative, a stand they adopted to-day before us, seeking a further opportunity to communicate with these advocates for the purpose and in the hope of persuading them to accept. This is a request we cannot satisfy considering that the aforesaid advocates have already declined the brief and secondly this would cause an unjustified delay of the proceedings.
>
> The right of the accused to secure the services of an advocate of their choice, respected as it is, it is not the sole consideration that should guide the Court in the exercise

of its discretion and when the accused, relying on the purported exercise of this right, seek to cause what amounts, in the circumstances, to a disruption of the proceedings, surely it is a stand that will not be countenanced. Had any of the advocates named by the accused expressed willingness to accept the brief we would certainly afford him every reasonable opportunity to prepare the defence. But this is not the case before us.

In our judgment it would be an abuse of the process of the Court to adjourn the proceedings in the circumstances of this case and this we shall not do. The proceedings shall continue. It is well known that where the accused is unrepresented care must be taken by the Court itself to see that the accused are not prejudiced thereby and this is a duty of the upholding of which we are very much alive and of which we shall observe. Let the accused be charged".

It will be useful also to quote here what was said by the Assize Court in the opening paragraphs of their judgment in the case:

"At the outset of the proceedings an attempt was made by the Court to assign an advocate to defend accused 1 and accused 2 who appeared unrepresented. In fact, the trial of the case was interrupted for virtually two days in order to help in that direction. Much as we wished to assign an advocate this proved impossible owing to the persistent refusal of the accused to be represented by anybody other than the lawyers they named, who were, on enquiry made by the Registrar, unwilling to defend them. They added that they had no confidence in anybody else defending them and refused to be represented by an experienced advocate, namely, G. Nicolaides assigned by the Court to defend them. We could not, of course, oblige any of the lawyers named by the accused to defend them or impose on the accused a lawyer to defend them against their wish. Nor could we adjourn the proceedings indefinitely in the hope of the accused persuading one of the lawyers they wanted to appoint to represent them in these proceedings. Throughout the trial we were fully conscious of our duty to ensure that the fact that accused were not represented did not operate unfairly against them and remained alert throughout to fulfil this task".

The first two grounds of law relied upon on behalf of these two appellants in these appeals are that the Assize Court by proceeding with their trial as it did, it did not offer them their minimum right to have adequate time and facilities for the preparation of their defence, contrary to Articles 12.5(b) and 30.3(b) of the Constitution and Article 6(3)(b) of the European Convention on Human Rights of 1950 which has been ratified by Cyprus by the European Convention on Human Rights (Ratification) Law 1962, Law No. 39 of 1962; also that these two appellants were not afforded the opportunity of defending themselves through a lawyer of their choice, contrary to Article 12.5(c) and 30.3(d) of the Constitution and Article 6(3)(c).

Article 12.5(b) and (c) reads as follows:

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

.....

(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".

Article 6(3)(b) and (c) of the Convention for all intents and purposes is identical to the aforesaid constitutional provision, except that in paragraph (c) of our Constitution reference is made to a lawyer of his own choosing whereas in the Convention reference is made to legal assistance of his own choosing, but we are not concerned with this difference—if it amounts to one—in this case.

It is inevitable that for the interpretation of such provisions, domestic tribunals would turn to the interpretation given by the international organs entrusted with the supervision of their application, namely the European Court and the European Commission of Human Rights.

It is pointed out by *Fawcett* in his book "Application of the European Convention on Human Rights" 1969, p. 167, in

commenting on paragraph 6(3)(b) of the Convention the following:

"The requirement of adequate time is the corollary of that of reasonable time in Article 6(1). Just as the trial of a charge must not be unduly prolonged by postponement or adjournments, so it must not be brought on before the defence is reasonably prepared. No general rule can be stated, since the balance between these differing needs must be struck according to the kind of proceedings involved and the facts of each case".

As stated in the *Digest of Case Law*, relating to the European Convention on Human Rights 1955—1967 by reference to *Ofner Case* (Dec. Adm. Com. 524/59, Ofner Case: III, p. 322):

".....in order to determine whether the right to have adequate time and facilities for the preparation of the defence has been respected, account must be taken of the general situation of the defence and not only of the situation of the accused".

With regard to the right of everyone charged with a criminal offence to defend himself through legal assistance of his own choosing it has been stated the following:

"177. Article 6, paragraph 3(c) of the Convention does not guarantee to an individual legal assistance of his own choosing except in cases where the fees are to be paid by the individual himself.

(Dec. Adm. Com. 646/59: III, p. 272).

178. The fact that an applicant has not succeeded in getting the assistance of a lawyer does not involve the international responsibility of a Contracting Party, unless the refusal of lawyers to act is due, in fact to pressure by public authorities.

(Dec. Adm. Com. 1420, 1477 and 1478/62: VI, p. 590)".

In *X.* v. *The Federal Republic of Germany*, Application No. 6501/74 of the 19th *December*, 1974, the Commission had had this to say:

"According to the Commission's jurisprudence, in order to determine the question whether the right to have ade-

quate time and facilities for the preparation of the defence has been respected, account must be taken of the general situation of the defence, in particular whether such defence is carried out by the accused himself or through a lawyer (see Application No. 2370/64, *C.* v. *Austria*, Collection of Decisions 22, p. 96)".

In the case of X. *v. Austria*, Application No. 6185/73 Decisions and Reports No. 2, p. 68, at p. 70, it was stated:

"Article 6(3)(c) guarantees the right of an accused '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'. The applicant did have the assistance of a counsel of his own choice and was not refused free legal aid; as a matter of fact he has not even filed an application for legal aid".

In the case of *X.* v. *The Federal Republic of Germany*, Application No. 6946/75, in Decisions and Reports, No. 6, p. 114 at p. 116, it was held:

"It is true that Article 6(3) of the Convention guarantees to everyone charged with a criminal offence the right to be defended through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given it free of charge when the interests of justice so require.

However, according to the Commission's case-law Article 6(3)(c) does not guarantee the right to choose an official defence counsel who is appointed by the Court (Dec. on Admissibility of Application No. 646/59, Yearbook 3, p. 272 and No. 4338/69, Coll. 36, p. 79), nor does it guarantee a right to be consulted with regard to the choice of an official defence counsel. (Decision on Admissibility of Application No. 1251/61, unpublished)".

In the present case what is clear and apparent from the lengthy record on this issue which has been set out earlier in this judgment, is that all three appellants were duly represented when committed for trial. Appellants 1 and 2 appeared undefended before the Assize Court and named successfully six advocates

in all that they wished to undertake their defence, all from districts other than the one in which the trial was being held. None of the five advocates contacted through the Registrar accepted the brief; the sixth one was absent abroad. The advocate or advocates to be appointed were to be paid out of public funds. When the efforts of the Assize Court failed to secure for the two appellants free legal assistance out of those counsel who were of the choice of the appellants it decided to appoint an experienced lawyer of Larnaca, whom the appellants turned down by saying that they did not trust him without giving any reason for that.

It may be stated at this stage that in the light of the Case Law of the European Commission on Human Rights, Article 6, Paragraph 3(c) of the Convention does not guarantee to an individual legal assistance of his own choosing except only in the case where the fees are to be paid by the individual himself. The fact, therefore, that the Assize Court went out of the guaranteed rights and tried to secure legal assistance of the appellants' own choosing is a commendable conduct and shows a very high sense of fairness towards the appellants. It is in fact in line with the existing practice in Cyprus, though not strictly within the obligations imposed by the Constitution and those undertaken under the Convention. It was only when all these efforts failed that it appointed an advocate and at that a leading one, to defend the two appellants, leaving him also the option to examine if there was any conflict in the defence of the two appellants, so that the Court would appoint another one, and give the two appellants one each. The choice of an advocate in that respect by the Court was not in violation of either the Constitution or the Convention.

In spite, however, of all these, the Court further adjourned the case for the following day, so that the appellants would have time to consider engaging an advocate of their own. They were explicit when they said finally that they would not recognize an advocate appointed by the Court, and the first appellant said that he did not consider him as competent and the other that he did not trust him. It was in those circumstances that the Assize Court decided to proceed with the case without an advocate. Obviously the tactics of the appellants were in fact nothing but delaying tactics and in the last analysis disrespectful to the whole process of the Court. Under the guise of the

rights guaranteed by the Constitution and the Convention, accused persons should not be allowed to ridicule the judicial process or play with the valuable time of the Courts. I avail myself of this opportunity to point out that applications for free legal representation should, whenever possible, be made before the date fixed for appearance in Court and it will be conducive to that direction if committing Judges, Prison Authorities and other persons involved in these issues, as well as advocates who may originally appear for such persons and then give up the brief, inform such accused persons of these rights.

The question that the appellants were not afforded adequate time and facilities for the preparation of their defence was not pursued in this appeal in any event. When first brought before the Court for trial they were represented by counsel. If they were unable to pay they could apply for the granting to them of free legal assistance. They did not do so, however. Instead they embarked upon those delaying tactics which the Assize Court handled with fairness and firmness befitting the good administration of justice.

Finally, it should be noted that the Court duly warned itself of the risks that a criminal trial of this nature might entail when an accused person is not defended by counsel and there is nothing in the record to suggest that that warning which the Court gave itself was not present in its mind throughout the conduct of the proceedings.

For all the above reasons I have come to the conclution that there is no merit in these two grounds of appeal which therefore fail.

I have not dealt with Article 30, paragraphs 3(b)(c) and (e) as counsel very rightly said that it does not take the case of his clients any further and therefore I need not embark on an analysis of its nature and its application.

I turn now to the facts of the case as found by the Assize Court and the conclusions drawn thereon for the purpose of examining the remaining grounds of appeal.

The complainants are two young Austrians in their early twenties, serving in the Austrian Contingent of the U.N. peace-keeping force in Cyprus. The one is L/Cpl. Hoffer Karl who

will be referred to as "Hoffer" and the other Pte Floel Muller Karl, of the Austrian Contingent of the United Nations peace keeping force in Cyprus, who will be referred as "Muller". They spent the evening of the 6th to the 7th May, 1978, at the discoteque of Nissi Beach Hotel and they were in a merry mood having consumed some quantity of alcohol. At about 4.30 in the morning of the 7th, the three appellants who are also in their twenties, visited the same discoteque, being also in a merry mood after having visited several places of entertainment during that evening.

At about 5.30 in the morning, the complainants and the appellants left the discoteque. The complainants requested a lift from the appellants to Ayia Napa village nearby. Appellant 1 agreed to give them a lift and the two complainants occupied the passenger's seat in the driver's cabin of the lorry which was driven by him and the two other appellants got at the back in the body of the lorry. Before reaching Ayia Napa, appellants 2 and 3 stepped down from the body of the lorry and stood on the door-step outside the passenger's door, so making any attempt on the part of the complainants to escape impossible. The two complainants requested appellant 1 to stop at Ayia Napa when the lorry approached a convenient spot near their house but he refused and instead drove on in the direction of Paralimni village despite the protestations of the complainants and their concerted attempts to cause the vehicle to stop.

Whilst on this point it may be mentioned that the Assize Court acquitted the appellants on counts 4 and 5 which charged them with the kidnapping of the two complainants respectively in order to subject them to their unnatural lust, contrary to sections 251 and 20 of the Criminal Code. It did so inasmuch as it could not, as it said, discern the reason why the appellants refused to stop the lorry at Ayia Napa. It felt that it was equally possible that they refused to do so because they intended to rob them and not because they wanted to satisfy their unnatural lust and as the intent attributed in the said two counts, namely, to subject the two complainants to their unnatural lust could not be inferred positively and to the exclusion of any other intent.

As the efforts of the complainants to stop the car by pressing the switches in front of them and by trying to get hold of the steering-wheel failed, because their attempts were warded off

by appellant 1, a powerful man, the lorry proceeded until it stopped in an open space between Paralimni and Sotera villages where the complainants were violently pulled out of the lorry.

The complainants could not give details regarding the participation of each of the three appellants. Witness Hoffer could not say whether appellant 3 took part in this violent act. When out of the lorry appellant 2 removed by force from the possession of complainant Hoffer his watch, his wallet, and gold ring. Hoffer tried to run away but appellant 1 caught up with him and knocked him down. Complainant Muller also tried to run away but he was overwhelmed by appellants 1 and 2, also of powerful physique as described by the Assize Court.

On the 9th May, 1978, appellant 2, whilst in custody led the Police to his house and indicated to them the stolen articles at the place where he had hidden them, under a cage; they were seized by the Police and made *exhibits* at the trial.

Appellant 3, in his statement to the Police, to which more reference will be made later in this judgment, admitted beating up the complainants at their first stage stop having felt, as he alleged, angry because of their behaviour.

These events surrounding the removal of the aforesaid articles from the possession of complainant Hoffer at the first stop formed the subject-matter of count 1, a charge of robbery. The Assize Court in finding the appellants guilty on count 1 had this to say in its judgment:

> "We have carefully examined the evidence before us and had the opportunity to see the witness testifying before us. Learned counsel for accused 3 in his final address invited us to find as a fact that throughout the incident accused 3 was so drunk as to be incapable of forming a specific intent. Thus he submitted we should acquit the accused, even if we accept the evidence of the complainants on all charges proof of which is dependent from the presence of specific intent. The charges of robbery presuppose specific intent in that violence must be applied for the specific purpose of achieving the theft or enabling the culprit to carry away the fruits of theft. .....

It is obvious from the evidence before us and we so find, that the three accused acted in concert throughout this venture. This is the reason why, shortly before arriving at Ayia Napa, accused 2 and 3 descended on the side doorstep in order to make a possible escape of the complainants impossible. At their first stop the three accused again acted in concert and used violence in order to rob the complainants.

In deciding whether the prosecution proved beyond reasonable doubt the commission of the offence set out in count 1, we have given serious consideration to the state of mind of the accused at the time. From the evidence looked at in its totality, it appears that the accused were merry because of drink but by no means drunk to the point of being incapable to form a specific intent. The accused acted with cunning and deliberation and planned their movements very carefully. They resisted the attempts of the complainants to bring the car to a halt, committed the acts complained of on count 1 in a deserted spot and then returned to the scene .....".

Before dealing with the events that followed and the commission of the offence of sodomy which is the subject of counts 6 and 7, reference may be made to the acquittal of the three appellants on counts 2 and 3 on the information for robbery, contrary to sections 282, 283 and 20 of the Code. The particulars of these offences were that they stole a pair of shoes, a pair of underpants and one lighter, property of complainant Hoffer and a pair of shoes, underpants and one chain with a metal identity disc, property of complainant Muller.

The Assize Court acquitted the three appellants on these two counts and added under section 85(4) of the Criminal Procedure Law two new counts, counts 8 and 9, for ordinary larceny with regard to the items contained in the particulars of counts 2 and 3 and found them guilty thereon. It said that it did so as it was a proper case for that course, and as proof of theft is an ingredient of the offence of robbery and "no conceivable prejudice could be occasioned to the accused", by that addition, as stated by the Assize Court in its judgment.

In arriving at that conclusion the Assize Court had this to say:

"It is not altogether clear why the accused carried away the clothes of the complainants after committing sodomy upon them. It is equally possible that they carried their clothes away for the purpose of making the escape of the complainants harder than it might otherwise be; and inasmuch as proof of specific intent is an essential ingredient of counts 2 and 3 and the presence of such intent, viz. use of violence for the purpose of stealing has not been conclusively established and it has not been proved that violence was exerted for removing the remaining belongings of the complainants referred to on counts 4 and 5, we shall acquit and discharge the accused on counts 2 and 3".

I have dealt with this point as one of the arguments advanced by counsel for the appellants was that the Court erroneously found appellants guilty on the added counts 8 and 9 inasmuch as they were acquitted on counts 2 and 3.

I do not subscribe to that argument and the reason is obvious. The ingredients of theft had been established; there was ample evidence duly warranting the finding of the trial Court that the items forming part of the two counts and which formed also the ingredient of the two new counts of stealing were taken and carried and thrown away in circumstances suggesting an intent to deprive the complainants permanently thereof. What the Assize Court found was that it was not altogether clear that the violence used by the appellants was directed at the taking away of the articles in question exclusively and not used for the purpose of satisfying their lust and commit sodomy with which offence I shall be dealing later in this judgment.

Whilst on this point I find it convenient to deal with the ground of appeal that the addition by the Assize Court of the two new counts, counts 8 and 9 and the finding of appellants guilty on such added counts was contrary to the letter and spirit of section 85(4) of the Criminal Procedure Law, Cap. 155, and moreover such addition was prejudicial to the appellants as two of them, namely appellants 1 and 2, were undefended by counsel at the trial. Section 85(4) reads as follows:

"If at the conclusion of the trial the Court is of opinion

that it has been established by evidence that the accused has committed an offence or offences not contained in the charge or information and of which he cannot be convicted without amending the charge or information, and upon his conviction for which he would not be liable to a greater punishment than he would be liable to if he were convicted on the charge or information, and that the accused would not be prejudiced thereby in his defence, the Court may direct a count or counts to be added to the charge or information charging the accused with such offence or offences, and the Court shall give their judgment thereon as if such count or counts had formed a part of the original charge or information".

As it appears from its text and pointed out also in the case of *Panayiotis Chrysostomou* v. *The Police*, 24 C.L.R., p. 192, at p. 194, for a Court to act under the said sub-section the following requisites must be present:

"(a) It must be established by evidence that the accused has committed an offence not contained in the charge or information.

(b) That the accused cannot be convicted without amending the charge or information.

(c) That the accused must not upon his conviction on the new offence be liable to a greater punishment than if he were convicted on the charge or information as it stood, in other words that the punishment provided by law for the added offence must not exceed that of the original offence.

(d) That the accused would not be prejudiced by the amendment in his defence".

Counsel for the appellants has conceded that requisites (a), (b) and (c) were satisfied. What he complains is that the appellants were prejudiced by the amendment in their defence. The main argument on this point being that they were undefended by counsel at the time. No reason, however, has been given as to how the two undefended appellants could possibly have been prejudiced in their defence and to use the approach

of the Court in *Chrysostomou* case (*supra*) "I am indeed at a loss to see how in such a clear case with such simple and clear facts could the appellants possibly be prejudiced in their defence".

The Court in the present case has obviously directed its mind to the possibility of prejudice and was eliminated before recourse was made to the provisions of the section.

On the totality of the circumstances and in the light of the aforesaid statement of the Law, I have no difficulty in holding that the Court acted properly in the circumstances and that no prejudice was caused to the appellants by the addition of these two new counts for the lesser offence of stealing from the person, contrary to section 266(a) of the Code.

As pointed out in the case of *Fatma Mehmet* v. *The Police* (1970) 2 C.L.R., p. 62, at p. 68:

> "..... the provisions in this part of the Criminal Procedure Law (sections 83, 84 and 85) were the result of statutory amendments to enable the Courts to do justice in a case where technicalities might lead to acquittal notwithstanding proof of sufficient particulars to support a count; as happened in several cases prior to the amendment of the statute".

Grounds 3 and 4 cover the factual issues and legal points raised in connection with count 1 which covers a charge of robbery and counts 6 and 7, those of sodomy with violence.

It has been argued on behalf of the appellants that as section 21 of the Criminal Code was not referred to together with section 20 in the three aforesaid counts on the information, the appellants could not have been found guilty of acting in concert. This point was considered and decided upon in the case of *Constantinides* v. *The Republic* (1978) 2 C.L.R., p. 337, at p. 376, where it was stated that ".... the omission to refer expressly in the counts concerned to sections 20 and 21 of Cap. 154 is not at all a material irregularity, nor had it prejudiced in any way the defence of the appellant". Moreover reference is made in the aforesaid case to section 39 of Cap. 155 which

provides that no error in stating an offence or its particulars is to be regarded as non-compliance with the provisions of the Law unless in the opinion of the Court the accused was in fact misled by such error.

Considering the evidence adduced and all the circumstances of the case, I find that neither prejudice was caused to the appellants nor were they misled by the omissions. It was obvious that the charges preferred against them were to the effect that they aided and abetted one another in committing both the offences of robbery and sodomy and having formed a common intention to prosecute this unlawful purpose in connection with one another, their commission was a probable consequence of the prosecution of such purpose. It was not necessary that each act committed in relation to that offence should be committed by all so long as the one was contributing in his own way to the commission of the offence of robbery so they have been found guilty of the offence found to have been committed there and then.

In fact, there was ample evidence from which the Court could safely and beyond reasonable doubt conclude that the three appellants committed jointly the offences. The argument advanced that at certain stages one of them or the other was a mere bystander, merely watching and therefore not liable as an aidor or abettor, is in direct conflict with the evidence adduced, including what can be deducted from the statements of the three appellants.

At this stage reference may also be made to the argument that the intention to rob, which is an ingredient of the offence in count 1, had not been established by the prosecution, more so since its version was that the intention of the appellants was to satisfy their lust on the complainants. I do not agree with this contention as the offences of robbery are covered by a conduct at the first stage of this serial of incidents, whereas the offences of sodomy were committed at a much later stage and there was nothing in the evidence to suggest that the appellants did not have two different intentions at two different times and places when they had the two complainants in their grip. In fact, until the moment of stopping the lorry and stealing from complainant Muller the items contained in count 1, nothing

showed that the three appellants had any intention of committing the offences of sodomy which they were found to have committed later.

I shall deal now with the circumstances which were referred to as the second incident and which make up the facts for the offences contained in counts 6 and 7.

The appellants after committing the offence contained in count 1, drove away but soon returned and chased the complainants who made an effort to run away but unsuccessfully as they were overwhelmed and put back into the lorry by force. They were seated next to the driver, appellant 3, whilst appellant 2 was the fourth passenger in the driver's cabin and appellant 1 stood on the sidestep. The lorry was then driven to and stopped at an isolated spot near Xylophagou river which appears in a number of photographs produced to the Court as *exhibit* 2.

Complainant Hoffer was violently dragged out of the car, he was put down on the ground, his clothes and under-clothes were forcefully removed and appellant 1, first tried to kiss him and thereafter committed sodomy upon him. Following this, another member of the company committed sodomy upon him, whilst one of the appellants held down his legs. Between the first and second incident of solomy one of the appellants put a finger in the anus of this complainant. The second person who committed sodomy on him, as well as the person who put his finger in his anus could not be identified by the complainant. Throughout the incident the complainant was lying prostrate on the ground.

Complainant Muller was subjected to a similar treatment in the hands of the appellants. Appellant 2, first caused him to masturbate him ejaculating on his vest, then he tried but unsuccessfully to commit sodomy upon him. His failure was attributed by the complainant to his resistance. Appellant 3, then committed sodomy upon this complainant who felt by then quite exhausted through the ill-treatment he suffered and the drink he had consumed earlier. The appellants removed the clothes of the complainants and left them virtually naked and drove away. These clothes were eventually found by the Police in the possession of appellant 2 and produced as *exhibits*.

A passing car took them to their home at Ayia Napa and the case was then reported to the Police which took up investigations immediately.

The three appellants were arrested on the 8th May, 1978, and on the 10th May an identification parade was held at Paralimni Police Station where the two complainants without any difficulty identified the three appellants. With regard to this identification parade, the Assize Court commented that it was conducted in a most fair manner, as shown not only by the evidence of the Police Officers involved, but also by a pictorial account of it through a number of photographs which were produced before them.

The complainants and the appellants were medically examined. The findings of Captain Leopold Koschatzki, at the UNFICYP Famagusta, Medical Centre, are that both complainants appeared to him to be frightened and depressed. His findings regarding complainant Hoffer are as follows: (a) Swelling on the left part of the forehead; (b) abrasion on left side of the chest; (c) other abrasions on the chest; (d) abrasions on the right side of the neck; (e) haematoma on the anus; he experienced pain during finger examination of the anus. The doctor found the following on complainant Muller: (a) left nostril—dried up blood and abrasions; (b) anus—trauma of an extent of 5 mm.; (c) cutting of the anus. The witness felt pain in the anus and intestines. The doctor took from the complainants hair from the anus, internally and externally, hair from the head and a swab from the anus of the complainant that he sealed in eight sterilized glass containers that were submitted to the Government pathologist, Dr. Stavrinos, for examination and comparison with other *exhibits* before us. (See *exhibits* 9(a)–9(h)).

On the 9th May, 1978, the accused were medically examined with their consent by Dr. Christodoulides, a medical officer at Larnaca hospital. He found the following on them: On accused 1: (a) an abrasion on the right cheek bone suffered within the preceding three to four days; (b) a small bruise on the outer part of the right shin-bone. On accused 2: (a) superficial scratches on the upper part of the elbow; (b) a small bruise on the outer part of the right thigh. On accused 3: small abrasion on the penis due either to trauma or infection.

The doctor took hair from the genitals of the accused that were submitted for examination to Dr. Stavrinos (*exhibits* 19(a), 19(b) and 19(c)). The examination of the *exhibits* by Dr. Stavrinos revealed the following: "There were human spermatozoa on the underpants of both Hoffer and Muller as well as on the vest of Muller. Human spermatozoa were also found on the swab taken from the external part of the anus of both complainants. The remaining *exhibits* submitted for examination were negative in the sense that no spermatozoa were traced on them".

The appellants made statements to the Police that were received in evidence as voluntary and admissible. Their contents may be summed up as follows: "Appellant 1 admitted in his statement (*exhibit* 3) most of the facts narrated by the complainants in their evidence but gave a different story as to their motive and the circumstances under which they drove the complainants beyond Ayia Napa and committed sodomy upon them. I need not recount the details of his statement regarding acts of sodomy, sufficient to say that his allegation is that they committed sodomy upon the complainants at their request and with their encouragement, and not only that, in their contention one of the complainants drew a knife and made a suggestive gesture implying thereby that they were invited to commit sodomy on the complainants. In his contention the knife was disposed of at a point subsequently shown to the investigating officer but nothing was found at the alleged spot. He admitted beating up the complainants after committing sodomy upon them for the alleged reason that they drew a knife on him. He admitted that they tore up the underpants in order to leave them naked at the scene.

Appellant 2 made, broadly speaking, a similar statement (*exhibit* 4) to that of appellant 1 admitting lewd acts at the alleged scene of the crime as well as beating up the complainants, repeating the alleged incident with the knife. Like appellant 1 he maintained that he was the worse for drink. He admitted removing a number of articles from the possession of the complainants, that he hid at his house. The correctness of this part of his statement is borne out by the finding of a number of articles at the house of this appellant. Like appellant 1 he

maintained that the complainants stripped off their clothes voluntarily and invited them to commit sodomy upon them.

The story of appellant 3 revealed in his statement (*exhibit* 1) is more similar to the version of the complainants. He stated that the complainants struggled after Ayia Napa to gain control of the car and further admitted that shortly afterwards they brought the car to a standstill and beat up the complainants. Thereafter they drove off in the direction of Ayios Stathis having covered the complainants with a canvas (*exhibit* 3) that they had in the lorry. His narrative as to what followed subsequently was again strikingly similar to the version of the complainants: The three of them encircled one of the complainants, appellant 2 removed his clothes and subsequently after an act of masturbation he committed sodomy upon one of the complainants whereas appellant 1 proceeded towards the follow complainant of the person upon whom he committed sodomy.

Appellant 3 when called upon to make his defence, made a statement from the dock totally different from that made to the police denying complicity in any acts of sodomy or ill-treatment of the complainants. He alleged that he was sleeping most of the time except when he drove the car from somewhere near Sotera to Ayios Stathis and fell fast asleep at the scene of the alleged commission of the acts of sodomy recovering consciousness when driven home. Neither in his statement to the police nor in his unsworn statement from the dock does he make any reference to the complainants producing a knife.

Of course it is well known that an accused's statement is only evidence against him and not his co-accused.

The Assize Court then examined the principles with regard to the corroboration required as a matter of practice in sexual offences. The position was summed up as follows:

> "Though the participants in the crime of sodomy cannot be regarded in law as participes criminis their evidence must, none the less, because of the nature of the offence be approached with caution and the Court must duly warn itself about the danger of acting on the uncorroborated evidence of the complainants. This is a warning that we

have duly administered to ourselves and had it in mind throughout the case in evaluating the evidence of the complainants. (See *Zacharia* v. *The Republic* (1962) C.L.R. 52—*Georghios Peristianis* v. *The Police* (1969) 2 C.L.R. 137).

What may afford corroboration was discussed in detail in the case of *Lazaris Demetriou* v. *The Republic*, 1961 C.L.R. 309. Two recent decisions of the House of Lords have done much to clarify the position as to what may, in a given case, constitute corroboration. In both cases it is emphasized that the object of the exercise is to ascertain the truth and that the Court should not allow itself to be bogged down by formulae and must at all times strive to make a realistic assessment of the evidence, the question being whether corroborative evidence tends to confirm that a crime has been committed and that the accused is the culprit (see *D.P.P.* v. *Kilbourne* [1973] 1 All E.R. 440 and *D.P.P.* v. *Hester* [1972] 3 All E.R. 1056).

In this case what must be corroborated is the evidence of the complainants that sodomy had been committed upon them. It is the sexual element of the offence that requires corroboration. Of course before any question for corroboration arises the evidence of the complainants must be sufficiently credible to enable the Court to act on it lacking only in the degree of certainty required in a criminal case whereupon corroborative evidence, if forthcoming, fills the gap. In the first place the Court must decide whether it is prepared to act on the uncorroborated evidence of the complainants. And in this case having carefully considered every aspect of the case we are prepared to act on the uncorroborated evidence of the complainants. And in this case having carefully considered every aspect of the case we are prepared to act on the evidence of the complainants even in the absence of corroboration. But even if we were to search for corroboration there is ample corroborative evidence before us. In the first place there are the statements of the accused corroborating the complainants that sodomy had been committed and that the accused had committed it. Other evidence in the case also furnishes corroboration such as the finding of sperma-

tozoa on the anus and underpants of the complainants coupled with opportunity, that is the fact that accused were with the complainants at an isolated spot (See *R.* v. *King* [1967] 1 All E.R. 379). That accused were with the complainants is supported by the independent evidence of Andreas Kondoyiorghis and Demetrios Theodorou Cosmas (P.W.1 and P.W.5), whereas the evidence of Vassilis Kondoyiorghis (P.W.2) as to the hour at which his brother returned home coincides with the hour at which the complainants were found half naked and transported to Ayia Napa by Alexandros Antoniou (P.W.6). Further, the recovery of the belongings of the complainants from the possession of accused 2 is added evidence in the chain of evidence establishing corroboration in law of the testimony of the complainants".

I fully agree with the legal approach of the Court and I adopt its reasoning. Having found that the appellants were correctly held to have acted in concert and aided and abetted each other of the commission of the offences of robbery and sodomy, the question of the identification as to which of the three actually committed the act of sodomy on each of the two complainants is unnecessary. I need not repeat here the sordid details as to the conduct of each one of the three appellants at the time. The issue that the two complainants consented to the commission of sodomy merits nothing but summary dismissal and the reasons for it are apparent in the evidence as accepted by the Assize Court.

For all the above reasons the appeals of the three appellants against their conviction on the counts they have been found guilty are dismissed.

It remains now to consider their appeal against the sentences imposed on them by the Assize Court referred to at the outset of this judgment.

It has been argued that these sentences were manifestly excessive in view of the state of mind in which the appellants were at the material time, their age, their past clean record and their excellent social investigation report. I have given due consideration to the arguments advanced on this ground. No

doubt the Assize Court took all these factors into consideration in meeting out the sentences it did. From the record of the Court it transpires that it directed itself properly both as to the nature of the offences and the personal circumstances of the three offenders. It was indeed a beastly conduct which offended human dignity and as said by it, it marred the civilization of our country; and by its sentence the Assize Court rightly made it clear that such conduct which fortunately was unprecedented in the annuls of our history could not be tolerated. None the less they took into consideration the good character of the appellants and for the robbery which carries life imprisonment and the charge of sodomy which carries 14 years imprisonment they imposed six years imprisonment on them and on the offences for stealing from the person punishable with five years imprisonment they imposed imprisonment for two years, sentences to run concurrently.

I find that there was nothing manifestly excessive about these sentences, nor there has been anything wrong in principle so as to justify an interference of this Court with the exercise of a function which in the first instance is entrusted to the trial Courts to perform.

TRIANTAFYLLIDES P.: I am, generally, in agreement with my brother Judge Mr. Justice A. Loizou that these appeals should be dismissed.

I wish, however, to deal, in this judgment, with two specific aspects of the case, namely the fact that appellants 1 and 2 were not defended by counsel at their trial before the Assize Court in Larnaca which convicted and sentenced them, and the matter of the sentences which were passed upon the appellants.

As regards the first of the aforesaid matters the salient facts are, briefly, as follows:

The appellants were committed for trial on May 24, 1978, and their trial started on June 5, 1978. At the commencement of the trial there appeared defending counsel for appellant 3, but appellants 1 and 2, who had been defended by counsel at the committal stage, appeared in person and stated that due

to lack of financial means they could not appoint counsel to defend them.

The trial Court decided to assign an advocate to defend at public expense appellants 1 and 2, pursuant to the provisions of section 64(1) of the Criminal Procedure Law, Cap. 155, which reads as follows:

> "64.(1) The Court, before which an accused is to be tried upon a charge or information or on the hearing of an appeal from a judgment of an Assize Court, may assign an advocate to defend the accused or the appellant, as the case may be, if the gravity, difficulty or other circumstances of the case make it desirable in the interests of justice; and the Court shall assign an advocate to defend any undefended person to be tried for an offence punishable with death."

Appellants 1 and 2 then named six advocates so that one of them could be assigned by the Court to defend them; five of them were contacted but none accepted to do so, and the sixth happened to be abroad at the time.

The trial Court proceeded then to assign as defending counsel of appellants 1 and 2 Mr. G. Nicolaides, who is one of the senior and most experienced advocates in Larnaca, but the appellants did not accept him and, so, he did not appear for them.

The trial Court decided, in the circumstances, to proceed to hear the case with appellants 1 and 2 appearing in person and without having the benefit of the services of defending counsel; in doing so the trial Court stated expressly that it would take care to see that appellants 1 and 2 would not be prejudiced because they were not defended by counsel; and, actually, in delivering judgment the trial Court stressed that throughout the trial it was fully conscious of its duty to ensure that the fact that appellants 1 and 2 were not represented by counsel did not operate unfairly against them.

It has been contended on behalf of appellants 1 and 2 that there has occurred a contravention of paragraph 5(c) of Article 12 of the Constitution, which reads as follows:

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

.....

(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;

....."

The above constitutional provision is substantially the same as Article 6(3)(c) of the European Convention on Human Rights which has been ratified by Cyprus (see the European Convention on Human Rights (Ratification) Law, 1962—Law 39/62) and which, consequently, forms part of the Law of Cyprus. In applying our own Article 12.5(c) it is, therefore, useful to have in mind how Article 6(3)(c) of the said Convention has been applied.

In *X.* v. *Austria* (Application No. 2676/65, 23 Coll. of Decisions, p. 31, at p. 35) the European Commission of Human Rights decided that Article 6(3)(c) of the European Convention on Human Rights "guarantees to an accused person that the proceedings against him will not take place without an adequate representation of the case for the defence, but does not give an accused person the right to decide himself in what manner his defence should be assured"; and the above view was reaffirmed in *X.* v. *Norway* (Application No. 5923/72, 3 Decisions and Reports, p. 43, at p. 44) and in *X.* v. *The United Kingdom* (Application No. 8295/78, 15 Decisions and Reports, p. 242, at p. 244).

In *Ensslin and others* v. *The Federal Republic of Germany* (Applications Nos. 7572/76, 7586/76, and 7587/76, 14 Decisions and Reports, p. 64, at p. 115) the Commission observed that "Under Article 6(3)(c), a criminal trial may not take place without the defence having the opportunity to present its arguments adequately ..... In both the English and French versions, the Convention clearly defines the right guaranteed by this provision as an alternative between two arrangements designed to ensure that both sides of the case are heard."

In the decision of the Commission in *X.* v. *Norway* (Application No. 5923/72, *supra*) the following are stated (at p. 44):

> "The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the Court, depends upon the applicable legislation or rules of Court."

In *X.* v. *The Federal Republic of Germany* (Application No. 646/59, 3 Yearbook, p. 272, at pp. 276–278) it was held by the Commission "that Article 6, paragraph (3)(c) of the Convention does not guarantee to an individual legal assistance of his own choosing except in cases where the fees are to be paid by the individual himself."

In *X.* v. *Austria* (Application No. 4338/69, 36 Coll. of Decisions, p. 79, at p. 82) it was pointed out by the Commission in relation to Article 6(3)(c) that "it results from this text that the Convention secures the right for an accused person freely to choose a lawyer only in cases where he has sufficient means to pay the lawyer and that, otherwise, the right of the accused is limited to the grant of free legal aid if the interests of justice so require".

In *X.* v. *The Federal Republic of Germany* (Application No. 6946/75, 6 Decisions and Reports, p. 114, at pp. 116–117) it was held by the Commission that "according to the Commission's case-law Article 6(3)(c) does not guarantee the right to choose an official defence counsel who is appointed by the Court ....., nor does it guarantee a right to be consulted with regard to the choise of an official defence counsel....."

It is observed, however, by Fawcett in his textbook "The Application of the European Convention on Human Rights", 1969, p. 172, that "while the avocat d' office need not be known to the accused, the principle that he must be one in whom the accused may, in all the circumstances of the case, have confidence seems to be implied in Article 6."

It is perhaps useful to point out, at this stage, that free legal

aid to an accused person may in a proper case be refused altogether without contravening Article 6(3)(c) of the Convention (see *X.* v. *The United Kingdom*, Application No. 5871/72, 1 Decisions and Reports, p. 54, at p. 55).

In *X.* v. *Austria* (Application No. 2645/65, 11 Yearbook, p. 322, at p. 348) it was stated by the Commission that in considering whether the right under Article 6(3)(c) has been observed "account must be taken of the treatment of the defence as a whole rather than the position of the accused taken in isolation"; and, in this respect, particular regard must be had for "the principle of equality of arms as included in the concept of a fair hearing (see, *X.* v. *Norway*, Application No. 5923/72, *supra*). This approach has been reaffirmed in *X.* v. *The United Kingdom* (Application No. 8295/78, *supra*).

Before concluding the review of relevant case-law of the European Commission of Human Rights reference must be made to the case of *Artico* v. *Italy* (Application No. 6694/74, 8 Decisions and Reports, p. 73). In declaring the *Artico* case admissible the Commission stated the following (at p. 89):

> "The applicant also complains that he was not assisted by a lawyer during the proceedings before the Court of Cassation for the consideration of his appeals, dismissed on 12 November 1973, despite the fact that he had previously been granted legal aid by the same Court. He alleges that Article 6(3)(c), was violated thereby.
>
> .....
>
> The Commission therefore has to decide whether the interests of justice did not make it imperative for the judicial authorities to do everything to ensure that the applicant was assisted by defence counsel, having regard to the legal questions raised by his appeals, particularly with reference to the expunging of the offences by limitation."

After having examined the merits of the *Artico* case, *supra*, the Commission held (see its Report dated March 8, 1979) that there had taken place a breach of Article 6(3)(c) and this view was confirmed by the European Court of Human Rights (see its Judgment dated May 13, 1980), the Court stated, *inter alia*, the following in the *Artico* case:

"32. Paragraph 3 of Article 6 contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article. The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings (see paragraph 87 of the Commission's report; Deweer judgment of 27 February 1980, Series A no. 35, p. 30, 56). When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots.

33. As the Commission observed in paragraphs 87 to 89 of its report, sub-paragraph (c) guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases.

.....

The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society of the right to a fair trial, from which they derive (see the Airey judgment of 9 October 1979, Series A no. 32, pp. 12-13, 24, and paragraph 32 above). As the Commission's Delegates correctly emphasised, Article 6 3(c) speaks of 'assistance' and not of 'nomination'. Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations....."

In the present instance I am of the opinion that the developments which led to appellants 1 and 2 defending themselves at their trial in person, and not through counsel, did not result in any breach of Article 12.5(c) of the Constitution or of Article 6(3)(c) of the European Convention on Human Rights.

Though these two appellants had no right to choose the advocate who would be assigned to them, by way of free legal aid, by the trial Court, under Article 12.5(c) of the Constitution

and section 64 of Cap. 155, nevertheless the trial Court, in following an established practice, contacted those advocates who had been named by the appellants as counsel of their choice, but it did not prove to be feasible to nominate anyone of them, as five of them refused the assignment and the other was abroad; and appellants 1 and 2 did not accept the advocate whom the trial Court itself nominated to defend them and who accepted to do so; consequently the two appellants were tried without being defended by counsel.

I would like to observe that perhaps a better course than the one adopted, as aforesaid, by the trial Court, would have been for the trial Court to have remained uninfluenced by the refusal of the appellants to accept the defending counsel who was nominated by it and to have assigned him to appellants 1 and 2, even without their consent. In any case, looking at the situation of the defence as a whole and bearing in mind, too, that the trial Court was all along aware of the need to pay particular attention so that appellants 1 and 2 would not be prejudiced by the fact that they were not represented by counsel at their trial, I am of the opinion that, in the particular circumstances of the present case, it cannot be said that the said appellants did not have a fair trial or that there has taken place either a breach of Article 12.5(c) of the Constitution and of Article 6(3)(c) of the Convention or any miscarriage of justice.

The other matter with which I propose to deal in this judgment is the question of the sentences which were passed upon the appellants, namely concurrent sentences of six years' imprisonment for robbery and sodomy with violence, and of two years' imprisonment for theft from the person of another.

The maximum sentence provided by law for robbery is life imprisonment, for sodomy with violence fourteen years' imprisonment and for theft from the person of another five years' imprisonment.

It is correct that all appellants are young persons, between nineteen and twenty-two years old; and they all have clean past records.

In this connection I have borne duly in mind the need for a lenient approach to be adopted by our Courts in relation to

young persons, especially if they are first offenders (see, *inter alia*, *Meytanis* v. *The Police*, (1966) 2 C.L.R. 84, 85, *Mina* v. *The Police*, (1971) 2 C.L.R. 167, 170, and *Mavros* v. *The Police*, (1975) 2 C.L.R. 171, 180).

It is, also, correct that sentences have, as far as possible, to be individualized, even in cases of serious offences (see, *inter alia*, the *Mina* and *Mavros* cases *supra*).

Furthermore, I have paid due regard to the contents of the social investigation reports regarding all the appellants which were produced at the trial and which show that the appellants are persons who have repented for what they have done and who are likely to reform and become, once again, good citizens.

But, notwithstanding all the above, I am still not persuaded that the sentences imposed in the present case are wrong in principle or manifestly excessive, because the conduct of the appellants was, indeed, most condemnable and utterly disgusting and it had to be punished in a manner which would abundantly show that conduct of this nature cannot be tolerated in our country.

It might perhaps be said that the sentences which were passed on the appellants, though they were amply warranted in the circumstances of this case, are rather severe, in view of the young age, clean past records and other personal circumstances of the appellants; but this is not a consideration entitling this Court to interfere with such sentences, once it has not been shown to the satisfaction of the Court that they are either wrong in principle or manifestly excessive. Their possible reduction at an appropriate time in future is a question of executive clemency to be dealt with in the exercise of the powers under Article 53 of the Constitution.

Lastly, before concluding, I would like to observe that, in agreeing that the appeals of the appellants against the sentences imposed on them should be dismissed, I have not lost sight of the fact that all three appellants were under the influence of drink while they committed the offences in question; but drunkenness, except in cases of alcoholism, cannot be accepted by itself as a strong mitigating factor (see, *inter alia*, Thomas on Principles of Sentencing, 2nd ed., pp. 209–220).

MALACHTOS J.: I also agree that the appeals should be dismissed both as against conviction and sentence for the reasons given in the judgment just delivered by my brother Judge A. Loizou, which judgment I had the advantage to read in advance and I have nothing useful to add.

TRIANTAFYLLIDES P.: In the result these appeals are dismissed unanimously.

Appeals dismissed.