1981 October 9

[A. LOIZOU, MALACHTOS, SAVVIDES, JJ.]

PANTELIS NICOLA KALLISHIS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 4200).

Criminal Law—Defences—Self-defence—Law applicable—Burden of proof—Homicide—Victim firing appellant unsuccessfully—Appellant overpowering him, throwing him on the ground and delivering to him violent blows which resulted in his death—Actions of appellant after overpowering victim offensive and revengeful—Plea a self-defence not applicable.

In the night of the 15th August, 1980 the appellant created a violent and disconcerting scene with his wife in the course of which he dragged her and twisted her hand. Her screams were heard in the neighbourhood and her father who was living next door heard her screams and appeared there holding his shot-gun, which was loaded with two cartridges and carried with him two cartridges in reserve. He made his presence there known in a challenging manner and complained about the illtreatment to which his daughter was subjected by the appellant.

Following the intervention of the father the appellant was enraged and went to confront him. The father fired at him twice unsuccessfully and thereafter the appellant rushed at him, threw him on the ground and delivered to him a series of violent blows with his hands and feet on several parts of the neck, throat and chest which resulted in his death.

The appellant was found guilty of the homicide of his father-in-law by the Assize Court which held that the deceased was alive when he had fallen to the ground and died afterwards as a result of the blows delivered to him by the appellant. The

Assize Court further concluded that the action of the appellant bringing about the death of the victim was not defensive but offensive and that from the moment he overpowered the deceased his action was offensive and revengful of a most violent character, resulting in the death of the deceased.

Upon appeal against conviction counsel for the appellant mainly contended that the Assize Court wrongly came to the conclusion that the acts of the appellant were not defensive but offensive and vindictive and/or that the appellant was not at all material times acting in self-defence.

Held, that though a person who is attacked does not forfeit the advantage of a plea of self-defence if he does not restrain himself to merely wording off the blow but strikes back in return when the attack is all over and no peril remains the employment of force may be by way of revenge or punishment or may be pure aggression; that self-defence is not a defence in the sense that the burden of proof is cast on the accused and that once the issue is raised it is for the prosecution to negative or exclude the possibility that the accused was acting in self-defence beyond reasonable doubt; that the Assize Court properly directed itself on the law of self-defence and its verdict was duly warranted by the evidence before it; and that, therefore, this Court has no reasons to say that the verdict of the Assize Court should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable; accordingly the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Maifoshis v. *Police* (1978) 2 C.L.R. 9;

Deans 2 Cr. App. R. 75;

Miliotis v. *Police* (1971) 2 C.L.R. 392;

R. v. *Julien* [1969] 2 All E.R. 856;

R. v. *McInnes* [1971] 3 All E.R. 296;

Shannon, [1980] 71 Cr. App. R. 192;

Palmer v. *Queen* [1971] A.C. 814 at pp. 831, 832.

Appeal against conviction.

Appeal against conviction by Pantelis Nicola Kallishis who was convicted on the 31st January, 1981 at the Assize Court

of Famagusta (Criminal Case No. 1279/80) on one count of the offence of homicide contrary to section 205 of the Criminal Code Cap. 154 and was sentenced by Pikis, P.D.C. and Constantinides and Michaelides, D.J.J. to five years' imprisonment.

M. Christophides, for the appellant.

A. Angelides, Senior Counsel of the Republic, for the respondents.

A. Loizou J. gave the following judgment of the Court. The appellant, a married man 49 years of age was found guilty of the homicide of his father-in-law Georghios Papageorghiou, late of Paralimni aged 79, contrary to section 205 of the Criminal Code, Cap. 154 and he was sentenced to five years' imprisonment.

As against this conviction the appellant filed this appeal which has been argued on the following grounds:

I. That the Assize Court wrongly:

(A) Came to the conclusion that the acts of the appellant were not defensive but offensive and vindictive and/or that the appellant was not at all material times acting in self-defence;

(B) Accepted that the late Constantinos Papageorghiou died from the wounds which he suffered in the hands of the appellant;

(C) (a) Came to the finding as regards the circumstances under which the death of the victim was caused and as regards the time of the death and its causes;

(b) Accepted that the deceased was alive when he fell to the ground and that he died later as a result of the blows delivered by the appellant;

(D) (a) Arrived at its evaluation of the evidence of the appellant;

(b) Found unreliable the second statement of the appellant.

II. Arrived at the conclusion that the prosecution had proved its case beyond reasonable doubt whereas on the totality of the evidence before it there was lurking doubt as regards the establishment of the various ingredients of the offence with regard to the guilt of the appellant as a whole.

The factual background of the case shows the existence of strained relations between the appellant and the victim which prevailed over a long period of time on account of the behaviour of the appellant towards his wife so that considerable animosity grew between them. This was generally known and several witnesses testified about incidents which leave no doubt about it.

The appellant spent the biggest part of the 15th August 1980 at the coffee-shop of Chr. Evagorou playing cards and consumed a bottle of beer. He left the coffee-shop at about 11.00 p.m. with the proffessed hope, communicated to the coffeeshop keeper, to sleep with his wife. As it emerged from the evidence of the daughter of the appellant, his wife had been unwilling to share the same bed with him for a month or two prior to that date. She was sleeping apart in the bed-room of their children.

Upon the wife's refusal to accede to his desires the appellant created a violent and disconcerting scene in the presence of his grown up daughters Maria and Tsikkina, dragged his wife and twisted her hand. Her screams and those of their daughters were heard in the neighbourhood. The arrival of the deceased outside the house of the appellant suggests that he likewise heard the scene, as he was living next door and came there in his underclothes. He then returned to his house and came back to the yard of the house of the appellant carrying his shot-gun which, as it emerged later was loaded with two cartridges and carried with him two live ones in reserve. He made his presence there known in a challenging manner and complained about the illtreatment to which his daughter was subjected by the appellant and he was heard saying "he killed her again", evidently meaning his daughter. His presence there infuriated the appellant, who immediately thereafter tried to go out into the yard and confront his father-in-law threatening to kill him. His daughters pleaded with him and tried unsuccessfully to stop him from going out. They fell on him and tried to drag him back but all in vain, as the appellant, a man of powerful physique, pushed his daughters aside and went out on the veranda closing the door behind him.

About the events that followed the Assize Court had the testimony of a number of witnesses, notably the two daughters of the appellant and a number of persons to whom he made

oral statements about the events as well as two written statements he volunteered to the Police, (*exhibit* 11), the one that he gave later the same day, giving an account of the events that followed and *exhibit* 11 given on the 4th September 1980 with a somehow different version than the one he gave in his first statement. In fact he qualified his first statement, as pointed out by the Assize Court in one important respect, that is with regard to the circumstances preceding his assault of the victim. In this second written statement he maintained, unlike his version in the first one, that he attacked the deceased in order to prevent him from firing a second shot at him, which in the end was fired accidentally whilst struggling with him to take away the shot-gun. Also with regard to the details of his attack on the old man there is one material difference in that he puts himself riding on the victim, something that could, in the opinion of doctor Fessas, produce theoretically, under certain circumstances, cardiac massage, a fact that would account for the spurting of blood that turned eventually to be a very important piece of evidence in this case.

The trial Court did not accept the contents of this statement as presenting a correct account of the events of that night.

Reverting now to the facts as set out in the judgment, we find the Assize Court pointing out the successive oral statements made by the appellant to a number of witnesses whom he met after the incident. To Chr. Psaltis he said: "E kalo na ton afiso na me skotosi?" Whereas to his son-in-law Tsoukkas, whom he met shortly after the incident, he expressed the view that the deceased must have died because of injuries suffered in his hands, a happening about which he evinced no signs of remorse, for as he stated to his son-in-law he ought to have finished off the old man a long time ago. Ten minutes later he told P.C. Kapilla that his father-in-law had fired unsuccessfully twice at him and that he thereafter rushed at him "emoundaren ton" and that by a series of blows delivered with his hands, he must have or might have killed the old man. Later on he made another statement to P.C. Kapillas indicative of the strained relations between him and the old man: "I eyio i djinos eprepen na fyoumen pou tin mesin". To Inspector Herodotou he repeated that the old man fired unsuccessfully

at him and that thereafter he delivered numerous "kamboses" blows with his hands to the deceased and that in consequence thereof the old man must have suffered death. In answer to an observation to Inspector Herodotou that the deceased did not die from hand blows, he made the following statement: "Irten dje epexen me dje en me ivren epofkala ton".

In his first written statement he said that the deceased insulted him and told him "you fool I will fix you up". He said that he did not realize at first that the old man was armed, but as soon as he attempted to step down from the veranda the deceased fired at him unsuccessfully with his shot-gun from a distance of 15 ft. He stepped to the side instictively whereupon a second, also unsuccessful shot, was fired at him. What followed is best narrated by him in this statement as follows. "Immediately I rushed on my father-in-law and when I fell on him he fell on his back and I started hitting him with my right hand in the face and on his head. It was dark and I was hitting him and kicking him wherever I could reach him. I gave him many blows with my hand and my hand was covered with blood. From the blows I gave him my right hand was wounded. My old father-in-law did not manage to hit me. I stopped hitting him when my daughters started calling out, that is I heard my daughters calling out to me 'Holy Mary, he killed him'. After I stopped hitting him I let him there on the ground on his back and he had near him a sporting shot-gun".

The Assize Court indicated that the correctness of the statements of the appellant to the Police to the effect that he had attacked the victim after the latter had fired unsuccessfully at him twice, was also born out by the unchallenged testimony of Psillos and Psaltis and also that two shots were fired unsuccessfully with a maximum gap between them of approximately 30 seconds. The daughter Maria on coming out of the house witnessed her father hitting and kicking and stepping on her grand-father with great ferocity. She pleaded with him to stop but he did not desist. Thereafter she saw him leaning over him but was unable to follow what went on thereafter.

The death of the deceased was diagnosed soon afterwards by Dr. Pantelitsa Erotokritou and later at Larnaca Hospital by Dr. Androulla Tyrmou. As it is put by the Assize Court, the inescapable inference from the evidence before them was

that when the appellant withdrew, Constantinos Papageorghiou was dead, as rightly suspected by the appellant. . .

It is pertinent at this stage to quote from the judgment of the Assize Court, what it had to say with regard to the cause of death, the medical evidence consisting of that of Dr. Stavrinos who carried the post-mortem examination and Dr. Fessas, who was called by the defence as well as its conclusions, as this part of the judgment contains the findings and conclusions that are challenged on appeal before us:

"Dr. Stavrinos, who carried out the post-mortem examination, found crushing injuries on the head, throat and chest of the deceased, anyone of which could have produced death. We need not recount the findings of Dr. Stavrinos as to the injuries suffered by the deceased, that we accept as a true statement of fact, and need only mention that the injuries suffered by the deceased were the result of considerable application of violence that crushed and disfigured the victim. The appalling condition of the deceased is shown in a number of pictures, some of which are hair raising. The injuries suffered by the deceased were caused by a blunt instrument and the hand, the clenched fist, the foot and in fact any instrument without sharp edges qualify as such instruments. The doctor excluded the possibility of the deceased dying from the fall to the ground because of any head injury for there was none at the back of his head. Dr. Fessas (D.W.1), a specialist cardiologist, with impressive medical qualifications, expressed the opinion that although in the absence of any external injuries at the back of the head it is improbable that death may have resulted in consequence of any injury to the back of the head, none the less this is not impossible and cannot be ruled out in the absence of a microscopic or macroscopic examination. Dr. Stavrinos was cross-examined at length with regard to the implications of the chest injuries of the deceased, particularly with a view to ascertaining whether death could have resulted therefrom. In the opinion of Dr. Stavrinos this could not have been the case for the chest injuries could not have produced the spurting that must have followed his fall to the ground and blood spurts only from the arteries of a human being whose heart pulses.

We must also note that in the opinion of Dr. Stavrinos the head injuries were caused by a number of violent blows, a fact attested to by the accused himself in his first statement to the police. In the opinion of Dr. Fessas it was theoretically possible for the chest injuries to cause a stoppage of the heart while its pump kept functioning by artificial means, viz. massage 'malaxy'. And this massage of the heart could be produced by the accused riding over the victim while rhythmically assaulting him. When Dr. Fessas was asked by the Court whether he came accross any such incident in his career the answer was in the negative. Nor was Dr. Stavrinos cross-examined on the subject with a view to ascertaining whether having regard to the injuries of the deceased this was a possibility.

We have examined the evidence before us in its totality and scrutinized closely the medical evidence before us. In our judgment the second statement made by the accused to the police was no more than an attempt to colour the events in order to improve his position in the criminal proceedings that he anticipated with certainty by 4th September 1980. As indicated in the course of this judgment his first written statement tallies not only with the oral statements that preceded it but also with the unchallenged evidence of a number of prosecution witnesses to whose testimony we have referred. Before us the accused elected to make an unsworn statement from the dock wherefrom he adopted the two statements he made to the police. We reject the second statement as an afterthought.

In our judgment, and we so find, the deceased suffered his death in the following circumstances:

Following the intervention of the deceased referred to in detail earlier in our judgment, the accused was enraged and went out in order to confront his father-in-law. The old man fired at him twice unsuccessfully. Thereafter the accused rushed at him, threw him to the ground and thereafter delivered to the deceased a series of violent blows with his hands and feet on several parts of the head, throat and chest, resulting in the death of Constantinos Papageorghiou. It is without any hesitation that we accept both the findings and opinion of Dr. Stavrinos as to the

injuries suffered by the deceased and their implications. We find that the deceased was alive when he had fallen to the ground and died afterwards as a result of the blows delivered to him by the accused. Mr. Stavrinos was both, on account of his specialization and the fact that he examined the deceased, in an ideal position to enlighten the Court on the subject. We find the evidence of Dr. Fessas to be of little, if any, assistance in determining the issues before us".

The force of the argument of learned counsel for the appellant was directed against the aforesaid findings and conclusions of the Assize Court and in particular against the findings as to when and by which blows the death was caused. It was argued that from the evidence, not only of Dr. Fessas, but also from that of Dr. Stavrinos, at least the possibility could not be excluded that the death of the deceased was caused or could have been caused by his fall on the back or by the injuries to the sternum which were inflicted at a time which the Assize Court did not find that it was outside the ambit of the self defence. It was claimed that at least the benefit of doubt as to this issue ought to have been given to the appellant.

We do not intend to refer page by page to the evidence, suffice it to say that the findings of fact of the Assize Court were duly warranted by the evidence and that the conclusions drawn therein were justified in the circumstances. In addition to the medical evidence the Assize Court had before it the remaining facts and circumstances of the case which duly support its final conclusions on this issue.

We find that in the circumstances we are not justified to interfere with such findings and conclusions which the Assize Court summed up as follows:

"In the light of our findings and the principles governing self defence we have unhesitatingly come to the conclusion that the action of the accused, bringing about the death of Constantinos Papageorghiou was not defensive but offensive. Although we disagree with the submission of Mr. Angelides that we must find that accused came out of his house determined, because of his threat to kill the deceased, to match his words with deeds—and in our

judgment we cannot divorce the action of the accused from the shots that were fired at him—we are none the less of the view that from the moment he overpowered the deceased his action was offensive and revengeful, of a most violent character, resulting in the death of Papageorghiou.

That deceased was powerless in his hands is borne out by the statement of accused himself where he acknowledges: ''Ο γέρος ὁ πενθερός μου δὲν μπόρεσε νὰ μοῦ κτυπήσει'. The shots fired at the accused could legitimately make the accused apprehensive about his life. He is not to be faulted for not taking to his heels. And we cannot rule out that his actions up to the moment he overpowered the deceased were of a defensive character. Thereafter neither his life nor safety were in danger. He could remove the gun and turn away. But instead he embarked on a savage attack that had no justification in law. Provocation confers no liberty to counter-attack.

In our judgment, having regard to our findings, the prosecution proved their case against the accused beyond any reasonable doubt and we so find".

We find the aforesaid conclusions as duly warranted by the evidence as accepted by the Assize Court.

The question of self-defence has come up before this Court on a number of occasions and there have been several pronouncements in its judgments by reference to the English authorities on the subject and we need only refer to that of *Maifoshis* v. *The Police* (1978) 2 C.L.R. 9, where the approach adopted in the case of *Deans* 2 *Cr. App. R.* 75 that a person who is attacked does not forfeit the advantage of a plea of self-defence if he does not restrain himself to merely warding off the blow but strikes back in return, everything depending on the circumstances of the individual case, was followed.

Also reference may be made to the case of *Miliotis* v. *The Police* (1971) 2 C.L.R. p. 392, where the question of self-defence was further examined and the reasoning of the decision in *R.* v. *Julien* [1969] 2 All E.R. p. 856 and *R.* v. *McInnes* [1971] 3 All E.R. 296 and particularly the observations to the effect

that a person attacked need not take to his heels, although he must demonstrate that he is prepared to temporize and disengage, if he has an opportunity so to do, where same was adopted. If any further authorities are needed on the question of self-defence the case of *Shannon*, [1980] 71 *Cr. App. R.* 192 and *Palmer* v. *The Queen* [1971] A.C. 814 may be referred to.

In the case of *Palmer* (*supra*) Lord Morris of Borth-Y-Gest in delivering the judgment of the Privy Council had this to say at p. 831:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good Law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances".

And then further down he said:

> "If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence".

And at p. 832 it was said:

> "A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider, in agreement with the approach in the *De Freitas* case [1960] 2 W.L.R. 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in

an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury".

In conclusion on this legal point we would like to say that self-defence is not a defence in the sense that the burden of proof is cast on the accused; once the issue is raised it is for the prosecution to negative or exclude the possiblity that the accused was acting in self-defence beyond any reasonable doubt.

The Assize Court in its elaborate judgment referred to the aforesaid authorities and in our view it directed itself properly on the Law. Guided by the aforesaid principles it arrived at the verdict that the appellant was guilty beyond reasonable doubt for the offences for which he stood trial before them, a verdict duly warranted by the evidence before it and for which this Court had no reasons to say that it should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable.

For all the above reasons we dismiss this appeal.

Appeal dismissed.