1982 February 2

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

KLAVDIOS A. NEOCLEOUS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3855).

Criminal Law—Sentence—Homicide—Committed by three persons in furtherance of a common design—Distinction should be made in sentencing according to the role of each offender as regards instigation or commission of the homicide—Accomplice who fired at victim received life imprisonment—And appellant who did not, received 15 *years' imprisonment—This fact not very decisive as far as sentence was concerned because appellant's role as regards instigation or commission of the homicide not secondary —Sentence not wrong in principle or manifestly excessive—Upheld.*

The appellant was found guilty by the Assize Court of the offence of homicide and was sentenced to fifteen years' imprisonment. The offence was committed together with two other persons by firing on the victim in furtherance of a common design; and the appellant, who was armed with an automatic firearm, did not take part in killing the victim by firing at him because at that time he was engaged in neutralizing a companion of the victim who might have opposed the fulfilment of the homicidal common design. One of the two persons was sentenced to imprisonment for life and the other one has not been tried because he managed to flee abroad.

Upon appeal against sentence it was mainly contended that the appellant did not actually fire at all at the victim and that this was a strong mitigating factor.

Held, that the fact that the appellant did not fire at the victim

is, perhaps, the reason why, though the other accomplice was sentenced to imprisonment for life, the appellant was sentenced only to fifteen years' imprisonment; but, in a case such as the present one, and in view of the way in which the common design to kill the victim was carried out, the fact that the appellant did not actually fire at the victim is not very decisive as far as sentence is concerned; that though a distinction should be made in sentencing those who have planned or initiated offences and those who have followed their lead or joined in existing criminal enterprises in this case, irrespective of the role played by the appellant in the course of the commission of the offence in furtherance of the common design of his accomplices and of himself, it is quite clear that all three of them were equally responsible for planning or initiating the homicide, of which the appellant was found guilty and, therefore, there was not good enough reason for much differentiation as regards the sentences passed upon the appellant and his accomplice; that it cannot be said that the appellant played really a secondary role as regards the instigation or commission of the homicide because he clearly undertook the role of depriving the victim of any assistance from his companions and fending off any interference from any other source in order to allow his two accomplices to kill the victim in furtherance of a criminal purpose which was common to all three of them, and in respect of the formation of which all three of them appear to share equal responsibility; and that, therefore, this appeal has to be dismissed because the sentence passed on the appellant is not wrong in principle or manifestly excessive (*Wheeler* v. *Police*, 1964 C.L.R. 83 at pp. 86, 87 distinguished).

Appeal dismissed.

Cases referred to:

Kouppis v. *Republic* (1977) 2 C.L.R. 361;

R. v. *O'Brien*, 61 Cr. App. R. 177 at pp. 180, 181;

Wheeler v. *Police*, 1964 C.L.R. 83 at pp. 86, 87.

Appeal against sentence.

Appeal against sentence by Klavdios A. Neocleous who was convicted on the 9th February, 1978 at the Assize Court of

Larnaca (Criminal Case No. 9194/77) on one count of the offence of homicide contrary to section 205 of the Criminal Code Cap. 154 (as amended by Law 3/62) and was sentenced by Stylianides, P.D.C., Boyadjis, S.D.J. and Laoutas, D.J. to fifteen years' imprisonment.

G. Georghiou, for the appellant.

R. Gavrielides, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant was found guilty by an Assize Court in Larnaca of the offence of homicide, contrary to section 205 of the Criminal Code, Cap. 154, as amended by the Criminal Code (Amendment) Law, 1962 (Law 3/62).

According to the particulars of the count on which he was convicted, the appellant on 5th April 1973, in Larnaca, caused by an unlawful act, with other persons, the death of Georghios Photiou, late of Larnaca.

The appellant was sentenced to fifteen years' imprisonment as from the 9th February 1978.

He has not appealed against conviction, but only against sentence, on the ground that it is manifestly excessive; and in the course of his argument counsel appearing for him stated that he should have been sentenced to not more than eight to ten years' imprisonment.

The other persons, with whom the appellant committed the aforementioned offence of homicide, are Kyriacos Kouppis who, having, eventually, been found guilty of homicide, on appeal (see *Kouppis* v. *The Republic*, (1977) 2 C.L.R. 361), was sentenced to imprisonment for life, and Kyriacos Kakis who has not been tried for the offence in question because he managed to flee abroad.

The trial court made the following findings as to the circumstances in which Photiou was killed:

"(a) The late Georghios Photiou was the owner of a petrol

filling station situate at Makarios III Avenue in Larnaca. His house was on the corner of Eleftheria Avenue and Synglitikis Street. Eleftheria Avenue is a side-street of Grivas Dighenis Avenue and it is parallel to Thessaloniki Avenue.

(b) For reasons of safety, after closing the petrol station at about 9.00 p.m.- three cars left together the petrol station, namely, G.L. 691 driven by Photiou, another car of Photiou driven by his employee, Andreou, and a car driven by the brother-in-law of the deceased, Harris Georghiou. They drove in a convoy. Their ultimate destination was the house of the deceased. When they were at the beginning of Grivas Dighenis Avenue near Karkas petrol station, Andreou who was leading the convoy, saw in front of him Kouppis's car Reg. No. B.B.615 with two passengers in it. At that very moment Photiou, who was in the second car, overtook Andreou and led the convoy of the three and thus was driving immediately behind Kouppis's car. The last driver of the convoy, Haris Georghiou, branched into Eleftheria avenue, Kouppis's car turned into Thessaloniki Avenue. Photiou also turned into Thessaloniki Anenue.

(c) When Andreou was in the process of turning into Thessaloniki Avenue, noticed the car of Kouppis stationary on the left side of the avenue and saw Kouppis alighting from his car BK 615. He proceeded towards Photiou's car and he signalled to Photiou to stop. While proceeding towards Photiou, he drew a pistol or revolver from his waist. Photiou stopped almost in the centre of the road, with the engine of his car running. Kouppis proceeded to the right pane of the driver's door and addressing Photiou he ordered him to alight as they wanted him. The witness stopped at the corner. Kouppis was knocking on the pane with the pistol or revolver on the driver's side of Photiou. Two more persons came out of Kouppis's car BK 615, namely, Kyriacos Kakis and the accused, carrying each one of them

an automatic weapon with a double magazine. Kakis proceeded and took position in front of the left part of Photiou's car with his gun pointed towards Photiou. The accused proceeded to the left rear of Photiou's car. He stopped there and shouted out to witness Andreou: 'You alight from your car and raise your hands up'. The accused was pointing his gun at the witness and the witness complied with the accused's order and he was kept at gun point all the way with the hands up. Kouppis tried to draw open the door of Photiou's car but it could not be opened. A movement of the left hand was made by the deceased which we are not in a position to say what actually it was. At this time two successive shots were fired, one by Kouppis and the other by the victim, though in sequence of time we are not in a position to say which shot was the first.

At that moment Photiou tried 'na diafiyi me to aftokiniton tou', that is to say, Photiou's car made a movement forward which is made by a car when the petrol pedal is pressed. Then Kakis fired a burst with his automatic weapon against Photiou. Kakis fired the burst when Photiou's car was doing a forward movement (Poullo). The accused at that moment made a movement to the left. The witness grasped the opportunity to escape from the scene and he ran to the direction of the petrol station of Karkas in Grivas Dighenis Avenue. When he was turning the corner, two or three bullets flew next to him.

(d) Photiou was found unconscious in a very short time, covered with blood, leaning on the steering wheel of his car by two groups of policemen, the first of which on their way to the scene saw Kouppis's car being driven away with two passengers, and shots were coming out of Kouppis' car. The persons in that car were Kouppis, Kakis and the accused.

(e) The victim was conveyed to the hospital where his

death was certified by Dr. Poyiadjis. On the following day a post-mortem examination was performed by Dr. Kyamides, after the body was duly identified to him. It was riddled with bullets causing wounds which were described in detail by Dr. Kyamides. Photiou's death was due to shock and heamorrhage due to multiple bullet wounds.

(f) The wounds were caused by two guns one discharging ammunition of .45 and the other 9 m.m. calibre. His death was the result of the shots fired at him at Thessaloniki Street by Kakis who was using an M.3 Sub-machine-gun and Kouppis using a pistol of 9 m.m. Two of the wounds shown in photographs 26 and 27 correspond to two lacerations on the jacket of the deceased. These wounds were caused by contact shots in the sense that they were fired from a very close distance, as stated by Lovarides. The contact shots must have been fired by the person who was using the 9 m.m. calibre weapon, i.e. Kouppis, and this we conclude from the finding of the two expended cartridges (part of exh. No. 23) on the right side of the victim's car in its resultant position. These contact shots were fired sometime after Kakis fired the burst of shots to which we have referred and before the three men left the scene in Kouppis's car.

The victim was encircled by three heavily and dangerously armed persons. He was in his car with the window panes closed. He felt insecurity and imminent danger and his intention as it was manifested by his endeavour to drive away by obviously pressing the petrol pedal is indicative of his agony and intention to escape. His single shot, coupled with the movement of his car forward—and we have already found that he did not fire to the direction of Kakis—amounted, in the circumstances and on the aforesaid judicial pronouncements to an act of self-defence by the victim and it was not an unlawful act. He had

no other way of retreat. He was offering himself an easy target and in our view he reacted reasonably. Neither Kouppis nor Kakis were in danger from any unlawful act of the victim, and act of self-defence does not justify retaliation by the assailants and shots as those fired by Kouppis and Kakis at the victim. They were not at all in danger as the victim manifested his intention to drive away and it is after this manifestation that he received the burst of shots fired by Kakis and the contact shots which caused wounds shown in photographs 26 and 27. The acts of Kakis and Kouppis were unlawful and they resulted to the death of the victim".

The three judges composing the Assize Court were not unanimous as regards the nature of the common design in furtherance of which the victim was killed, but they were unanimous in passing the sentence of fifteen years' imprisonment on the appellant, having stated that the crime in question was the result of unlawful carrying of firearms by, inter alia, the appellant and, also, that the homicide appeared to be politically motivated and, therefore, more serious than it would, otherwise, have been.

According to the majority opinion of two of the judges of the Assize Court, on the strength of which the appellant was found guilty of homicide, the common purpose, in furtherance of which the victim was killed, was as follows:

1. To stop and compel at gun point the victim to alight from his car;

2. To demand from Photiou explanations for the suspected following of Kouppis's car by Photiou and his companions;

3. To frighten, assault and beat Photiou for his having followed Kouppis's car;

4. All the aforesaid (1 - 3) to be made by Kouppis under gun cover whilst Kakis and the accused to remain in the

car in reserve, armed with automatic sub-machine-guns, to guard against any eventualities;

5. If anything goes wrong, all three men to make use of their guns.

Photiou's death was brought about in accused's presence by the guns which Kouppis and Kakis carried with the prior knowledge of the accussed who was himself armed with a dangerous automatic weapon and was at the time engaged in the neutralisation of Neophytos Andreou (P.W.8), a companion of the victim and a probable source of danger or opposition to the prosecution of their common purpose".

The other judge of the Assise Court did not disagree with the finding that the appellant was privy to a common design to kill the victim, but he took a more strict view as regards the sinister nature of such design.

Counsel for the appellant has rightly in our view submitted that the sentence ought to have been assessed by the Assize Court on the basis of the less sinister majority opinion, as to the common design, of the other two judges of the Assize Court.

There is nothing on record to show that this is not what has actually been done; on the contrary, from the fact that the sentence was assessed unanimously and that it is stressed, in the reasons given in passing such sentence, that there was taken into account the role played by the appellant in the commission of the offence it should be inferred that his role was evaluated in a way consistent with the common design as it was found to be by the majority of the judges of the Assize Court.

One of the arguments advanced by counsel for the appellant as to why the sentence passed on the appellant is, allegedly, excessive was that the victim was carrying a firearm, too, and, that, possibly, he fired first before he was fired at by his assailants. It is clear, however, from the already referred to una-

nimous findings of the Assise Court that the victim fired his weapon purely for purposes of self-defence and when facing an imminent danger to his life and, therefore, this cannot really be regarded as an important mitigating factor in favour of the appellant. It was not at all as a result of the shot fired by the victim that the appellant and his companions formed the common design to kill him, but their common purpose was conceived far before the victim fired in self-defence.

It was urged in argument that it appears from the findings made by the Assize Court that the appellant did not actually fire at all at the victim and that this is a strong mitigating factor.

The fact that the appellant did not fire at the victim is, perhaps, the reason why, though the other accomplice, Kouppis was sentenced to imprisonment for life, the appellant was sentenced only to fifteen years' imprisonment; but, in our opinion, in a case such as the present one, and in view of the way in which the common design to kill the victim was carried out, the fact that the appellant did not actually fire at the victim is not very decisive as far as sentence is concerned.

As it appears from the already quoted findings of the trial court it is clear that the appellant, who was armed with an automatic firearm, did not take part in killing the victim by firing at him because at that time he was engaged in neutralising a companion of the victim who might have opposed the fulfilment of the homicidal common design.

As regards the extent of differentiation between the sentence passed on Kouppis, who, actually, fired at the victim, and the sentence passed on the appellant, who did not fire at the victim, we have been referred to certain principles which are set out in the textbook by Thomas on Principles of Sentencing; the relevant passage (see 2nd ed., at pp. 66-67) reads as follows:

> "Where each co-defendant is to receive a tariff sentence, the sentencer should take into account differences in their respective responsibilities for the offence. A distinction

should be made between the sentences of those who have planned or initiated offences and those who have followed their lead or joined in existing criminal enterprises. If involvement in the commission of the offence constitutes an abuse of trust by one defendant, this aggravating feature should be reflected in the relationship of his sentence to that of his co-defendant. In more spontaneous offences variations in the degree of immediate participation by different offenders should be marked in their sentences, so that the use of a weapon by one offender in the course of a fight, or the intentional infliction of more serious injury, will attract a longer term. In *Hutchinson and Hutchinson* two brothers were convicted of wounding with intent and attempting to wound with intent respectively. The evidence was that in the course of a disturbance at a drinking club, the younger brother had twice struck a man in the face with a glass, causing injury; the elder brother had subsequently struck the same man with a chair as he lay on the ground. The Court held that the sentence of four years on the younger brother was 'perfectly proper', but the difference between that sentence and the three years imposed on the elder brother for attempting to wound did not reflect the fact 'that the degree of his responsibility is considerably less' or 'the responsibility.. that he was drawn into this by his brother'. His sentence was reduced to eighteen months."

As it appears from the above passage a distinction should be made in sentencing those who have planned or initiated offences and those who have followed their lead or joined in existing criminal enterprises.

But in this case, irrespective of the role played by the appellant in the course of the commission of the offence in furtherance of the common design of his accomplices and of himself, it is quite clear that all three of them were equally responsible for planning or initiating the homicide, of which the appellant was found guilty and, therefore, there was not good enough

reason for much differentiation as regards the sentences passed upon the appellant and Kouppis.

It is useful, also, to refer to the case of *R. v. O'Brien*, 61 Cr. App. R. 177, where Scarman L.J. in delivering the judgment of the Court of Appeal in England stated the following (at pp. 180, 181):

> "Indeed the Court must be very careful not to commit itself to wide-ranging declarations of sentencing policy when facts are as infinitely various, and the range of lawful penalties available to the Court as wide, as they are in manslaughter. The duty of the Court is to look always at the particular circumstances of the offence with which it is concerned and, in an appropriate case, at the personal history and circumstances of the offender; and then, bearing in mind the way in which the Courts usually deal with offences and offenders of this character, to impose a penalty that is just in the case, just not only in the interests of the offender, but just in the interests of society. It is not for the Court to go beyond that or indeed to expose hostages to future fortune; because nobody can tell what may happen tomorrow.
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> We have come to the conclusion that the grave circumstances of the case justify severe penalties, but in no wise severe as above as those imposed. We think that there must be a difference between *O'Brien* and *Nooman* because of the finding by the learned judge that *O'Brien* had planned the robbery, bearing in mind that the manslaughter occurred in the course of the robbery which he planned."

It is to be noted from the last of the two aforequoted passages that the differentiating factor in assessing sentence was the responsibility for the planning of the offence in question; and in the present instance no such differentiation could reasonably be made.

We have been referred by counsel for the appellant to *Wheeler*

v. The Police, 1964 C.L.R. 83, where Vassiliades J. - as he then was - stated the following in delivering the judgment of the Court (at pp. 86, 87):

"It has been submitted on behalf of the appellant that the responsibility for the commission of the offence is not the same for each appellant. The first, has certainly taken a leading part; and, looking at the conduct of these young men on that night, in the light of the character-reports supplied by their Commanding Officer and by the Probation Officer which are before us by consent, there can be no doubt that the other two accused were drawn into this case by the first accused.

Though their guilt is the same - they are all jointly charged with the same offence, and they stand convicted accordingly - as far as sentence is concerned, the position is different; starting, of course, from the punishment provided by law, the sentences must vary to fit each offender's case.

As regards the other two appellants, we all share the view that considering their character as reflected in the reports before us, and considering the secondary part they played in the commission of the offence, on the instigation and leadership of the first appellant, the sentences passed in their case are, we think, manifestly excessive".

In our view the above case is distinguishable from the present one because it cannot be said that the appellant played really a secondary role as regards the instigation or commission of the homicide; he clearly undertook the role of depriving the victim of any assistance from his companions and fending off any interference from any other source in order to allow his two accomplices to kill the victim in furtherance of a criminal purpose which was common to all three of them, and in respect of the formation of which all three of them appear to share equal responsibility.

In the light of all the foregoing considerations this appeal has