1983 October 31

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

GEORGHIOS YIANNI ROSSIDES,

Appellant.

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 4146).

Homicide—Causation—Medical treatment—Principles applicable—Sections 205 *and* 211 *of the Criminal Code, Cap.* 154.

Criminal Law—Evidence—Identification evidence.

Criminal Law—Homicide—Joint offenders—Common purpose—By group of gunmen to demand from deceased at gun point delivery of arms allegedly in his possession—And if he does not accede to the demand to fire at his direction in order to frighten and terrorize him and thus compel him to deliver any arms that he might possess—Deceased hit by ricochetted bullets that were fired in furtherance of such common purpose—Appellant one of the gunmen who, by his armed presence at scene of the crime, signified his approval of, and intentionally encouraged the unlawful act that caused the death of the deceased—Warranted beyond any reasonable doubt to find, on a proper application of section 21 *of the Criminal Code, Cap.* 154 *to the facts of this case, the appellant guilty of causing by unlawful acts the death of the deceased even though the bullet that caused the death was not fired by him.*

Criminal Procedure—Count—Addition—Section 83 *of the Criminal Procedure Law, Cap.* 155—"*Recall or re-summon any witness* ——— *with reference to such alteration*" *in section* 84(4) *of the Law applies to the added count—Article* 12(5)(*d*) *and* 30(2)(3)(*b*)(*c*) *of the Constitution not contravened by not allowing witnesses recalled for cross-examination to be cross-examined without any limitation.*

Criminal Law—Sentence—Homicide—15 years' imprisonment—Sustained.

On the 17th July, 1974, a group of gunmen, one of them being the appellant, arrested one Costas Mishiaoulis ("the deceased") at his home in Tseri at night-time; and took him by car together with other persons at the locality "Kokkines" in the area of Tseri. The deceased and another person were ordered to descend from the car and were made to stand in the road facing a landrover which had its headlights on. One of the gunmen—the appellant—was sitting on the bonnet of the landrover, another gunman was standing to the left of the landrover and yet another one was standing in a field on the other side. Then the appellant told the deceased that they wanted him to surrender the firearms which he had at his village and when he did not reply the three gunmen fired simultaneously. The appellant fired a burst over the heads of the deceased and of the other person, the gunman on the left fired a burst next to them and the gunman who was in the field fired a burst, too. The deceased was wounded and fell down in the road in a prone position.

At the trial of the appellant for the premeditated murder of the deceased the trial Court found that the bursts which were fired from a close distance by the appellant and by the gunman to the left of the landrover did not hit the deceased and that he was hit by ricochetted bullets which were fired by the gunman in the field.

The trial Court, also, found that the common purpose for which the gunmen took the deceased and other persons to the aforesaid locality—in a Volkswagen car—included the following elements:-

(a) To stop at that lonely locality and force down at random a number of the arrested persons from the Volkswagen;

(b) To force them stand at such a position in front of the landrover and at such a short distance as to exclude the possibility of any possible escape and the three gunmen to take such positions as by their armed presence to cause terror to the mind of these persons;

(c) At gun point to demand from such persons delivery

to them of arms allegedly in the possession of such persons;

(d) If those persons did not accede to their demand to fire simultaneously towards their direction in order to frighten and terrorize them and thus compel them to deliver any arms they might possess.

The trial Court further found that although the death of the victim was not in itself the express or ultimate aim of the gunmen when they fired, his death was brought about by the natural, in the circumstances, flow of events which the three gunmen set in motion and persisted it and that the appellant by his armed presence at the scene of the crime signified his approval of, and intentionally encouraged, the unlawful act that caused the death of the deceased. It was, therefore, held that the appellant was responsible for the homicide of the deceased by virtue of the provisions of section 21 of the Criminal Code, Cap. 154.

The count for homicide, in respect of which the appellant was convicted, was added by the trial Court, under section 83 of Cap. 155, at the close of the case for the prosecution, after the appellant had been acquitted in relation to a count charging him with premeditated murder. After the appellant had pleaded guilty to the new added count it was ordered by the trial Court, under section 84(4) of Cap. 155, that the evidence already given in the course of the trial should be used without being reheard, but the parties were informed that they were allowed to recall or re-summon any witnesses for examination or cross-examination with reference to the new count.

Regarding the identification of the appellant the trial Court did not attribute in the present case any significance to his identification only in the dock, but it relied on witnesses who knew him before the fateful night of 17th July 1974, on witnesses who did not know him beforehand but who described him by his appearance and each one of whom came to know, for some reason, the name of the appellant on that night or on the following day, on witnesses who described his appearance and identified him at the identification parade held by the police and, lastly, on witnesses who described his appearance but could not identify him at the said parade; and on the totality of this

evidence it reached the conclusion that the appellant was the gunman who was sitting on the bonnet of the landrover at the material time.

Upon appeal against conviction and sentence of 15 years' imprisonment which was imposed on the appellant for the offence of homicide it was contended:

(a) That the bullet wounds of the deceased did not continue to be until the end the operative cause of his death and that his death ensued because the medical treatment which he received was improper and negligent to such an extent as to cause his death, which would not have otherwise occurred. In this respect it was argued that the death of the deceased was in fact caused due to transfusions of blood incompatible with his; or that, to say the least, it could not safely be found, beyond reasonable doubt, what was the exact cause of death in this case.

(b) That the appellant was not properly identified as being one of the three gunmen involved in the incident at which the deceased was wounded and, particularly, he was not properly identified as the gunman who was sitting on the bonnet of the landrover.

(c) That section 84(4) of the Criminal Procedure Law, Cap. 155, was applied, in the present case, by the trial Court in a manner incompatible with Article 12(5)(d) and 30(2)(3)(b)(c) of the Constitution, because when two witnesses were recalled for cross-examination by the defence the trial Court ruled that the expression "with reference to such alteration" in section 84(4), meant "elements of the new offence which were not elements in the original count".

Held, (1) that the findings of the trial Court that the cause of death of the deceased was "acute renal failure and shock with its consequences, uremia, oliguria, anuria, due to the many, extensive and serious injuries of vital vessels and organs of his body caused by gunshots" and that the deceased was treated by the doctors and the other hospital staff in good faith, and, in every respect, with common knowledge and

skill, were duly warranted in the circumstances of the present case and that, therefore, the relevant provisions of section 211 of Cap. 154 cannot be applied in such a manner as to relieve the appellant from his responsibility for the death of the deceased.

(2) *After dealing with the principles governing identification evidence:* That the identification of the appellant as one of the gunmen in question was safe beyond any reasonable doubt; that once the appellant was properly identified as one of the gunmen involved in the incident as a result of which the deceased lost his life this Court is satisfied, in the light of the correct conclusions of the trial Court as regards the common purpose of the gunmen on that night, and the part that the appellant played in furtherance of such common purpose, that it was warranted beyond any reasonable doubt to find, on a proper application of section 21 of Cap. 154 to the facts of the present case, the appellant guilty of causing by unlawful acts the death of the deceased.

(3) That the approach to the meaning and mode of application of section 84(4), which was adopted, as aforesaid, by the trial Court does not offend against Articles 12(5)(d) and 30(2)(3)(b)(c) of the Constitution, because it cannot be accepted that when a charge or information in altered at the close of the case for the prosecution, under section 83 of Cap. 155, then defending counsel is entitled to cross-examine afresh without any limitation all the witnesses who have already testified; that the alteration of the information by the addition of a new count did not render the trial of the appellant from then onwards a new and separate trial, but there followed, after such alteration, a stage of the trial at which the appellant was entitled to the enjoyment of the rights safeguarded by the aforementioned Articles 12(5)(d) and 30(2)(3)(b)(c) of the Constitution only to the extent to which he had to make his defence on the altered information in relation to any elements of the added new count for the offence of homicide which had not been elements of the offence of premeditated murder with which he had been initially charged; accordingly the appeal against conviction must be dismissed.

(4) That having in mind the settled principles governing the exercise of the relevant powers of this Court on appeal it has not been persuaded that it would be justified to intervene in favour of the appellant for the purpose of reducing the sentence

which was passed upon him by the trial Court and, thus, his appeal against sentence has to be dismissed, too.

Observations with regard to the existence of elements which merit consideration by the competent organs of the Republic under Article 53.4 of the Constitution with a view to the possibility of remission of sentence at an appropriate time in the future.

Appeal dismissed.

Cases referred to:

R. v. *Smith* [1959] 2 All E.R. 193;

R. v. *Blaue* [1975] 3 All E.R. 446;

R. v. *Malcherek and R.* v. *Steel* [1981] 2 All E.R. 422;

R. v. *Turnbull* [1976] 3 All E.R. 549 at pp. 551-553;

Anastassiades v. *Republic* (1977) 2 C.L.R. 97 at p. 281;

Katsiamalis v. *Republic* (1980) 2 C.L.R. 107 at p. 116;

R. v. *Weeder*, 71 Cr. App. R. 228 at p. 231.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Georghios Yianni Rossides who was convicted on the 23rd May, 1980 at the Assize Court of Nicosia (Criminal Case No. 22915/79) on one count of the offence of homicide contrary to section 205 of the Criminal Code, Cap. 154 and was sentenced by Stylianides, P.D.C., Hji Constantinou, S.D.J. and Fr. Nicolaides, D.J. to fifteen years' imprisonment.

M. Christophides, for the appellant.

V. Aristodemou, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant was convicted, by an Assize Court in Nicosia, of the offence of homicide, contrary to section 205 of the Criminal Code, Cap. 154. He was found guilty of having caused, together with other persons, by an unlawful act, the death of Costas Mishiaoulis, late of Tseri, on the 22nd July 1974, at the locality "Kokkines", in the area of the village of Tseri.

The appellant was sentenced to fifteen years' imprisonment and he has appealed both against conviction and sentence.

The deceased was illegally arrested on the 17th July 1974,

at his home in Tseri, by a group of gunmen and, eventually, he was taken, at night-time, with other persons, to the aforementioned locality where he was wounded when shots were fired by the gunmen. He was then conveyed by them, later on that night, to the Nicosia General Hospital where he died on the 22nd July 1974.

It was found by the trial Court that the appellant was one of the gunmen in question and that their common purpose for which they took the deceased and other persons detained by them to the aforesaid locality—in a Volkswagen car ahead of which were proceeding the gunmen in a landrover—included the following elements:

"(a) To stop at that lonely locality and force down at random a number of the arrested persons from the Volkswagen;

(b) To force them stand at such a position in front of the landrover and at such a short distance as to exclude the possibility of any possible escape and the three gunmen to take such positions as by their armed presence to cause terror to the mind of these persons;

(c) At gun point to demand from such persons delivery to them of arms allegedly in the possession of such persons;

(d) If those persons did not accede to their demand to fire simultaneously towards their direction in order to frighten and terrorize them and thus compel them to deliver any arms they might possess".

According to the evidence of an eyewitness, Georghios Pissis, which the trial Court found to be reliable, the said witness and the deceased were ordered to descend from the car and were made to stand in the road facing the landrover which had its headlights on. One of the gunmen was sitting on the bonnet of the landrover—and it was found by the trial Court that he was the appellant—another gunman was standing to the left of the landrover and yet another one was standing in a field on the other side. All three of them were armed with automatic weapons and they had their guns pointed towards the witness and the deceased. Then the appellant told the deceased that they wanted him to surrender the firearms which

he had at his village and when he did not reply the three gunmen fired simultaneously. The appellant fired a burst over the heads of the deceased and of the witness, the gunman on the left fired a burst next to them and the gunman who was in the field fired a burst, too. The deceased was wounded and fell down in the road in a prone position.

The trial Court found that the bursts which were fired from a close distance by the appellant and by the gunman to the left of the landrover did not hit the deceased and that he was hit by ricochetted bullets which were fired by the gunman in the field.

When the gunmen realized that the deceased had been wounded he was conveyed by them first to a doctor at a nearby village and from there to the Nicosia General Hospital.

The trial Court found that although the death of the victim was not in itself the express or ultimate aim of the gunmen when they fired, his death was brought about by the natural, in the circumstances, flow of events which the three gunmen set in motion and persisted it and that the appellant by his armed presence at the scene of the crime signified his approval of, and intentionally encouraged, the unlawful act that caused the death of the deceased. It was, therefore, held that the appellant was responsible for the homicide of the deceased by virtue of the provisions of section 21 of the Criminal Code, Cap. 154.

According to the statement which was made by the appellant from the dock during his trial, the gunman who was standing in the field to the right of the landrover, and who fired the bullets which ricochetted and hit the deceased, is Antonis Antonas, who after the incident in question left for Greece.

It appears that it has not been possible to secure his extradition to Cyprus in order to try him for the offence in question.

Another person, Sotiris Demetriades, was tried together with the appellant as being allegedly the third gunman, but at the close of the case for the prosecution it was found that no prima facie case had been made against him sufficiently to require him to make his defence and he was discharged because the trial Court could not safely conclude that he was present at

the material time at the locality where the deceased was wounded.

It has been contended by counsel for the appellant that the bullet wounds of the deceased did not continue to be until the end the operative cause of his death and that his death ensued because the medical treatment which he received was improper and negligent to such an extent as to cause his death which would not have otherwise occurred. In this respect it was argued that the death of the deceased was in fact caused due to transfusions of blood incompatible with his; or that, to say the least, it could not safely be found, beyond reasonable doubt, what was the exact cause of death in this case.

The relevant provision of our Criminal Code, Cap. 154, is section 211, which reads as follows:

"211. A person is deemed to have caused the death of another person although his act is not the immediate or not the sole cause of death in any of the following cases:-

(a) if he inflicts bodily injury on another which causes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) if he inflicts a bodily injury on another which would not have caused death if the injured person submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) if by actual violence or threat of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats which under the circumstances would appear natural to the person injured;

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if this act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons".

The above provisions of section 211 are similar to the principles applicable, in this respect, in England and it is pertinent to quote the following passage from Halsbury's Laws of England, 4th ed., vol. 11, para. 1156, pp. 615, 616:

1156. *Causation.* For the purposes of offences of homicide, a person causes the death of another where by any act or omission he accelerates the death of that other. The act or omission need not be the sole or the substantial cause but it must be one of the causes, and one that is more than minimal. It is therefore possible to have two or more independent operative causes of death, and any person whose conduct constitutes a cause may be convicted of an offence in respect of the death.

It is not necessary that the death should have been caused in the way intended or foreseen by the defendant. It is enough that the death was a foreseeable or natural consequence of the defendant's conduct; so if the defendant threatened the victim who accidentally killed himself in trying to make his escape, the defendant is liable for murder or manslaughter according to his men. rea.

If a wound is inflicted and death results, the person who inflicted the wound will be held to have caused the death although the victim may have neglected to use proper remedies, or have refused to undergo a necessary operation. Similarly, where a wound or hurt has necessitated medical treatment and such treatment is improper or negligent so that death ensues, the wound will be regarded as causing the death if it continues to be an operative cause at the time of death; but if the original wound is merely the setting in which another cause operates, or has become merely part of the history of the case, an ensuing death cannot be said to result from the wound and the person who inflicted it cannot be said to have caused the death".

It is useful to refer, too, in addition to the earlier cases of *R.* v. *Smith*, [1959] 2 All E.R. 193, and *R.* v. *Blaue*, [1975] 3 All E.R. 446, to the recent cases of *R.* v. *Malcherek and R.* v. *Steel*, [1981] 2 All E.R. 422, in which, when they were determined

together on appeal, there were referred to with approval the cases of *Smith* and *Blaue*, supra.

In the *Malcherek and Steel* cases it was held that disconnecting a victim from a life support machine when, by generally accepted medical criteria, he was already dead, could not exonerate the assailant from responsibility for his death.

Having carefully considered all the evidence that was adduced at the trial as regards this particular issue, as well as the arguments which were advanced by counsel during the hearing of the appeal before us, we have reached the conclusion that the findings of the trial Court that the cause of death of the deceased was "acute renal failure and shock with its consequences, uremia, oliguria, anuria, due to the many, extensive and serious injuries of vital vessels and organs of his body caused by gunshots" and that the deceased was treated by the doctors and the other hospital staff in good faith, and, in every respect, with common knowledge and skill, were duly warranted in the circumstances of the present case and that, therefore, the relevant provisions of section 211 of Cap. 154 cannot be applied in such a manner as to relieve the appellant from his responsibility for the death of the deceased.

The next issue with which we have to deal is that of whether the appellant was properly identified as being one of the three gunmen involved in the incident at which the deceased was wounded and, particularly, whether the appellant was the gunman who was sitting on the bonnet of the landrover:

In *R.* v. *Turnbull*, [1976] 3 All E.R. 549, the following guidelines were laid down by Lord Widgery CJ in delivering the judgment of the Court of Appeal, Criminal Division, in England (at pp. 551–553):

> "In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up the juries in the way indicated in this judgment.
>
> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the posibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a

workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the Courts to adjudge otherwise, affronts to justice would frequently occur.

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification. For example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *R. v. Long*[1]. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions, but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence.

1. [1973] 57 Cr. App. Rep. 871.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was".

The above guidelines in the *Turnbull* case, supra, are referred to with approval in Archbold "Pleading, Evidence & Practice in Criminal Cases", 41st ed., p. 897, para. 14–2.

The case of *Turnbull* was relied on by our Supreme Court in *Anastassiades* v. *The Republic*, (1977) 2 C.L.R. 97, 281, and *Katsiamalis* v. *The Republic*, (1980) 2 C.L.R. 107, 116, and was, also, applied in *R.* v. *Weeder*, 71 Cr. App. R. 228, where the following were stated in the judgment (at p. 231):

"In our judgment the position is a simple one and the

guidance provided by this Court in *TURNBULL* (supra) fully covers the position:

(1) When the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The identification evidence can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions, e.g. the occupants of a bus who observed the incident at night as they drove past.

(2) Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even though there is no other evidence to support it, then the trial Judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken".

The trial Court did not attribute in the present case any significance to the identification of the accused only in the dock, but it relied on witnesses who knew the appellant before the fateful night of 17th July 1974, on witnesses who did not know him beforehand but who described him by his appearance and each one of whom came to know, for some reason, the name of the appellant on that night or on the following day, on witnesses who described his appearance and identified him at the identification parade held by the police and, lastly, on witnesses who described his appearance but could not identify him at the said parade; and on the totality of this evidence it reached the conclusion that the appellant was the gunman who was sitting on the bonnet of the landrover at the material time.

Having perused all the relevant evidence ourselves and given due weight to all the arguments of counsel in this connection we have reached the conclusion that the identification of the appellant as one of the gunmen in question was safe beyond any reasonable doubt.

Once we have held that the appellant was properly identified as one of the gunmen involved in the incident as a result of which the deceased lost his life we feel satisfied, in the light of

the correct in our opinion conclusions of the trial Court as regards the common purpose of the gunmen on that night, and the part that the appellant played in furtherance of such common purpose, that it was warranted beyond any reasonable doubt to find, on a proper application of section 21 of Cap. 154 to the facts of the present case, the appellant guilty of causing by unlawful acts the death of the deceased.

We shall deal next with the submission of counsel for the appellant that section 84(4) of the Criminal Procedure Law, Cap. 155, was applied, in the present case, by the trial Court in a manner incompatible with Articles 12.5(d) and 30.2, 3(b)(c) of the Constitution:

The count for homicide, in respect of which the appellant was convicted, was added by the trial Court, under section 83 of Cap. 155, at the close of the case for the prosecution, after the appellant had been acquitted in relation to a count charging him with premeditated murder. After the appellant had pleaded guilty to the new added count it was ordered by the trial Court, under section 84(4) of Cap. 155, that the evidence already given in the course of the trial should be used without being reheard, but the parties were informed that they were allowed to recall or re-summon any witnesses for examination or cross-examination with reference to the new count. The said section 84(4) of Cap. 155 reads as follows:

> "(4) When a charge or information is altered by the Court after the commencement of the trial the evidence already given in the course of the trial may be used without being reheard but the parties shall be allowed to recall or re-summon any witness who may have been examined and examine or cross-examine such witness with reference to such alteration".

When two witnesses were recalled for cross-examination by the defence the trial Court ruled that the expression "with reference to such alteration" in section 84(4), above, meant "elements of the new offence which were not elements in the original count"; and it is this interpretation and application in the present case of section 84(4) which has been challenged as being incompatible with Articles 12.5(d) and 30.2, 3(b)(c) of the Constitution.

We do not think that the approach to the meaning and mode

of application of section 84(4), which was adopted, as aforesaid, by the trial Court offends against the aforementioned Articles of the Constitution, because we cannot accept that when a charge or information is altered at the close of the case for the prosecution, under section 83 of Cap. 155, then defending counsel is entitled to cross-examine afresh without any limitation all the witnesses who have already testified. In our opinion the alteration of the information by the addition of a new count did not render the trial of the appellant from then onwards a new and separate trial, but there followed, after such alteration, a stage of the trial at which the appellant was entitled to the enjoyment of the rights safeguarded by the aforementioned Articles 12.5(d) and 30.2, 3(b)(c) of the Constitution only to the extent to which he had to make his defence on the altered information in relation to any elements of the added new count for the offence of homicide which had not been elements of the offence of premeditated murder with which he had been initially charged.

For all the foregoing reasons the appeal against conviction of the appellant fails and has to be dismissed accordingly.

We shall deal next with his appeal against sentence:

Counsel for the appellant has submitted that the sentence of fifteen years' imprisonment is manifestly excessive.

The appellant was, at the time of the homicide of which he was convicted, a thirty-eight years old shopkeeper with a clean past.

It was stressed by the trial Court in passing sentence upon the appellant that the incident in which the death of the deceased was caused was part of the criminal activities which occurred in the course of the abortive coup d'etat in July 1974; but the trial Court has, also, rightly pointed out that the appellant was to be punished only for the crime in which he was found to have participated and not for the heinous crime against this country which was committed by means of the said coup d'etat.

Having in mind the settled principles governing the exercise of our relevant powers on appeal we have not been persuaded that we would be justified to intervene in favour of the appellant for the purpose of reducing the sentence which was passed upon

him by the trial Court and, thus, his appeal against sentence has to be dismissed, too.

On the other hand, we think that there are in this case elements which merit consideration by the competent organs of the Republic under Article 53.4 of the Constitution with a view to the possibility of remission of sentence at an appropriate time in the future.

The aforesaid elements are the fact that the death of the deceased was not caused by shots fired by the appellant but by shots fired by another person who has gone abroad to avoid the consequences of his acts and whose extradition until now has not been achieved, whereas the appellant, even though he was only prosecuted about five years after the commission of the crime in question, has made no attempt to evade justice; moreover, as was found by the trial Court, the leader, on that night, of the group of gunmen was not the appellant but his co-accused Demetriades, who had to be discharged because it was not possible to establish that he was guilty of actual participation in the incident in which the deceased lost his life; furthermore, as was also found by the trial Court, the appellant had no personal interest at all to take part in the commission of the crime in question; and, lastly, there could be taken into account, too, the fact that, as soon as it was realized that the deceased had been wounded, the appellant was instrumental in taking him first to the nearby home of a doctor and then to the Nicosia General Hospital so as to secure medical treatment for him.

In the result this appeal, against both conviction and sentence, is dismissed in the light of all the foregoing.

Appeal dismissed.