

1988 March 17

(A. LOIZOU, DEMETRIADES, PIKIS, JJ.)

DEMETRAKIS HADJISAVVAS,

Appellant,

v.

THE REPUBLIC,

Respondents.

(Criminal Appeal No. 4670).

5 *Evidence — Fundamental rights protected by the Constitution — Action of police should be viewed objectively — Arrest — Absence of constraints of freedom of movement, but intention of police to keep the person in question under control, if the latter attempts to leave or refuses to cooperate — It amounts to arrest without a warrant contrary to Art. 11.2(c) of the Constitution.*

10 *Evidence — Premeditated murder — Premeditation — It cannot be inferred from the fact of killing, but it should be proved as a separate fact — Circumstances surrounding the killing, brutality of the attack, former grudges or previous threats or expressions of ill feeling — May be evidence of premeditation.*

15 *Premeditated murder — Premeditation — Connotes prior planning or contemplation — Interval of time, such as would allow of second thoughts to prevail, must elapse between contemplation and implementation of the plan.*

20 The appellant was convicted of the premeditated murder of Andri Miliotou. The evidence was circumstantial. Andri was the ex mistress of the appellant, a married man of 49. They separated, but the appellant found it impossible to be reconciled with the separation. His persistent efforts to woo her back failed.

On the night of the murder he made a last effort to persuade her to go back to him. He again failed.

25 The killing took place in an isolated spot. Andri was lying dead for three or more hours before her body was discovered. The trial Court arrived at the conclusion of appellant's guilt on consideration of the

opportunity appellant had to murder the deceased, the blood stains on his socks and the bumper of his car matching the blood group of the victim, the hiding or destruction of the clothes he was wearing on the night of the crime, and other circumstantial evidence

Counsel for the appellant confined the appeal to two grounds, i e 5

(a) That between 8 30 a m to 1 30 p m on the day following the murder, the appellant was under effective arrest by the police, whilst the police made it appear that they were simply soliciting his assistance. Consequently, counsel argued, evidence recovered (e g the bloodstained socks) and statements made during that time were, on the authority of *Georghiades v The Police* (1983) 2 C L R 33, inadmissible, as obtained in contravention of Art 11 of the Constitution 10

(b) That the evidence as a whole was equally consistent with a finding that the killing was not premeditated 15

Held, dismissing the appeal

(1) The conduct of the police in pursuing the investigation of a crime must be examined objectively, a position compatible with the effective sustenance of the rights of the citizen and protection from abuse of police power. The fact that the police did not seek to put the appellant under arrest or their claim that they had no intention, at that stage, to arrest him, are not decisive. If, despite formal constraints of appellant's freedom of movement, the police intended to keep him under control, if he attempted to leave or if he refused cooperation, the conclusion would be that he was under arrest without warrant in breach of Art 11 2(c) of the Constitution 20 25

In this case the evidence leaves no doubt that the Police treated the appellant during the said period of time as a free agent

(2) Premeditation connotes prior planning or contemplation of the heinous deed in circumstances permitting cool reflection upon one's acts. To find premeditated murder the killing must be the result of contemplated action conceived and carried out in cold blood. An interval of time must elapse between the contemplation of murder and the implementation of the plan, such as would allow for second thoughts to prevail. If the culprit is in a cool state of mind, the time that elapses between planning and execution could be very short 30 35

No inference about premeditation can be drawn from the fact of killing itself. But the circumstances of the killing may themselves furnish evidence of premeditation to the extent that they illuminate the intentions of the accused before embarking on the homicidal attack 40

Moreover, the evidential value of the brutality of the homicidal attack for proof of premeditation has been judicially accepted. It was, also judicially accepted that «evidence of premeditation can be furnished by former grudges or previous threats and expressions of ill-feelings; ...» (A passage from *Penal Law of India*, 9th Ed., Vol. 3, p. 2299 by Sir Hari Singh Gour cited with approval in *Anastassiades v. The Republic* (1977) 2 C.L.R. 97).

In the light of the aforesaid principles and the evidence adduced, the summing up of the trial Court cannot be faulted.

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Appeal dismissed.

Cases referred to:

Police v. Georghiades (1983) 2 C.L.R. 33;

Republic v. Pierides (1971) 2 C.L.R. 181;

R. v. Shabban, VII C.L.R. 82;

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Halil v. Republic, 1962 C.L.R. 18;

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

Pavlou v. Republic, 1964 C.L.R. 97;

Koliandris v. Republic (1965) 2 C.L.R. 172;

Aristidou v. Republic (1967) 2 C.L.R. 43;

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Ioannides v. Republic (1968) 2 C.L.R. 169;

Vrakas v. Republic (1973) 2 C.L.R. 134;

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

Anastassiades v. Republic (1977) 2 C.L.R. 97.

Appeal against conviction and sentence.

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Appeal against conviction and sentence by Demetrakis Hadjisavvas who was convicted on the 31st July, 1985 at the Assize Court of Nicosia (Criminal Case No. 20080/84) on one count of the offence of premeditated murder contrary to sections 203 and 204 of the Criminal Code, Cap. 154 (as amended by Law 86/83) and was sentenced by Boyadjis P.D.C., Hji Constantinou, S.D.J., S. Nicolaidis, D.J. to life imprisonment.

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E. Vrahimi (Mrs.), for the appellant.

L. Loucaides, Deputy Attorney-General of the Republic, for the respondents.

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Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by
Pikis, J.

PIKIS J.: The appellant was convicted by the Assize Court of
Nicosia of the premeditated murder of Andrie Miliotou. and was
sentenced to life imprisonment, the sentence prescribed by law. 5

The Assize Court found that appellant killed Andrie, his
exmistress, a pretty bar-girl of 25, following the severance of their
relations and, the failure of his persistent efforts to woo her back.
The appellant, a married man of 49, found it impossible to
reconcile to separation and was not prepared to take «no» for an 10
answer. There was ample evidence before the Assize Court that
the deceased felt she had enough of him and told him as much on
a great number of occasions. Neither his promises to be more
gentle to her in future, nor his threats had any effect on her. On the 15
night of the killing the appellant made a last attempt to persuade
her to go back to him; when it failed he killed her in the dead of
night, between 2 and 3 a.m., at a spot chosen for its isolation and
unlikelihood of attracting passers-by or alerting persons residing
nearby. The murder was committed at a petrol station adjacent to 20
Dem. Severis Avenue at Nicosia, an area that bristles with life
during the day but is very quiet at night. The area is surrounded by
government offices that are closed in the evening; there are no
dwelling houses in the vicinity except for a block of flats. The
precise spot chosen for the perpetration of the crime was the area 25
between the two petrol pumps intended, no doubt, to achieve
maximum privacy, as indeed it achieved. Andrie Miliotou was
lying dead for three or more hours before her body was
discovered by the petrol-station attendant on his arrival to open
the station at 5.50 a.m.

As it is often the case, in cases of this nature there was no direct 30
evidence of the sequence of events that led to the death of Andrie
Miliotou, or the circumstances that preceded it. On consideration
of the circumstantial evidence the Court found that the appellant
was the murderer of Andrie Miliotou. The Court arrived at this 35
conclusion on consideration of the opportunity appellant had to
murder the deceased, the blood stains on his socks and the
bumper of his car, matching the blood group of the victim, the
hiding or destruction of the clothes he was wearing on the night of
the crime, and other circumstantial evidence that left the Court in 40
no doubt about the identity of the killer. Furthermore, they found

that the murder was premeditated

Counsel for the appellant, in her thorough and able address, made no suggestion that the findings of the Court did not warrant the conclusion as to the identity of the culprit. She questioned his conviction exclusively by reference to one finding, the one affecting the legitimacy of the action of the Police vis-a-vis the appellant, between the hours of 8 30 a m - 1 30 p m of the day of the crime. In her submission the accused was effectively under arrest, whereas the Police made it appear that they were simply soliciting the assistance of the appellant in their inquiries disguising the true purpose of their action. If this submission is accepted, counsel argued, evidence obtained during the five-hour interval ought to be excluded on the authority of *Police v Georghiades*.^{*} At that stage of the investigation statements were made by the appellant and Exhibits were recovered, including the bloodstained socks that had an incriminatory effect. The exclusion of this evidence from the chain of circumstantial evidence would undermine the basis of the conviction and render the verdict unsafe, liable to be set aside for having been founded on inadmissible evidence.

The only other ground of appeal that was pressed before us was the finding of premeditation. The evidence relevant to the facts that preceded the killing was, in the contention of counsel, equally consistent with the absence of premeditation.

Learned counsel for the Republic, the Deputy Attorney-General, supported the verdict of the Court, denying the validity of both grounds of appeal. In his able address, appropriately directed to the issues raised on appeal, he denied that the action of the Police in seeking information from the appellant on the morning of 21 9 84, was in any way fraught with malafides or underscored by any desire on the part of the Police to trap the appellant to the prejudice of his rights. The finding of premeditation, on the other hand, was perfectly open to the Court in view of its primary findings and their evidential value. The brutality of the murder itself, provided evidence of premeditation, as well as the conduct of the appellant before the crime. His conduct after the commission of the offence evinced by the lodgment of two packets of cigarettes on the side of the dead body in order to convey a false picture of what happened betrayed, in the

^{*} (1983) 2 C L R 33

submission of Mr Loucaides, calmness of mind inconsistent with intemperate conduct

Below, we shall deal with the two aspects of the appeal in the order enumerated above

The non-arrest of the appellant:

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The appellant had his residence and his business at Pensterona. The local police were asked to seek information from the appellant relevant to his movements the previous night. They acted on instructions from the team of police officers who took up the investigation of the case. At the time of the issuance of the instructions the police had no evidence or information casting suspicion on the appellant for the commission of the crime. Nor did they pass such information to the policemen who were merely instructed to approach and seek information from the appellant. The decision in *The Republic v Phivos Petrou Piendes** establishes that the conduct of the police in pursuing the investigation of a crime must be examined objectively, a position compatible with the effective sustenance of the rights of the citizen and protection from abuse of police power. Therefore, the professed intention of the police not to put the appellant under arrest and their subjective evaluation of the task they were pursuing is not conclusive. The fact that the police did not seek to put the appellant under arrest or their claim that they had no intention, at that stage, to arrest him, are not decisive. If it is made to appear that despite the absence of formal constraints to the freedom of movement of the appellant the police intended to keep him under their control if he made any attempt in exercise of that freedom to refuse cooperation or leave, the police action would amount to an arrest effected without a warrant in breach of the constitutional rights of the appellant safeguarded by article 11 2(c) of the Constitution.

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Careful examination of the events that followed the encounter of the appellant with the police, leaves no doubt the policemen treated the appellant until 1 30 p m as a free agent placing no constraints whatever on his freedom of movement. Nor did they have information until later that day, such as would justify them to effect an arrest. The appellant, on the other hand, not only he did not find the inquiries of the police unwelcome but all too readily

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* (1971) 2 C L R 181

availed himself of the opportunity to disabuse them of any suspicion they might in due course come to entertain about him. The finding of the Court that no constraints had been placed on the freedom of movement of the appellant until 1.30 p.m., was
 5 perfectly warranted by the evidence. His collaboration with the police inquiries was wholly voluntary and none of his statements or acts between 8.30 a.m. and 1.30 p.m. were induced by coercive action of the police. We find no ground justifying interference with the decision of the Assize Court to admit in
 10 evidence statements made by the appellant and materials recovered at that particular stage of the investigation.

With the collapse of this ground no issue remains on appeal affecting the identity of the person who battered Andrie Miliotou to death.

15 Now, we shall proceed to examine whether the murder was premeditated.

Premeditated Murder:

The crime of premeditated murder is unknown to the common law. The concept of malice aforethought, the mental element
 20 (mens rea) necessary to sustain a charge of murder under English law, is in no sense identical or a notion akin to premeditation under continental law. We shall not debate differences between the two concepts. Attention will be focused on the definition of premeditation with special reference to the evidence wherefrom
 25 the Court may infer its existence.

The crime of premeditated murder first found its way into Cyprus law through the Ottoman Penal Code; fashioned, as it was, on the continental law wherefrom it originated. It was abolished with the enactment of the *Criminal Code* in 1929, and re-
 30 introduced as part of the law of the country in 1962.*

The decision in *R. v. Shaban*** is often cited as containing a succinct but accurate analysis of the concept of premeditation. The direction in that case was adopted and expounded in a great

* (See, Law 3/62, introduced in order to reconcile the provisions of the *Criminal Code*, for the imposition of capital punishment, with Article 7.2 of the Constitution).

** VIII C.L.R. 82.

number of decisions of the Supreme Court * The following propositions emerge from the caselaw

Premeditation connotes prior planning or contemplation of the heinous deed in circumstances permitting cool reflection upon one's acts To find premeditated murder the killing must be the result of contemplated action conceived and carried out in cold blood Consequently, no premeditation can be inferred from the instantaneous reaction to events because the element of prior contemplation is missing 5

An interval of time must elapse between the contemplation of murder and the implementation of the plan, such as would allow for second thoughts to prevail Taking the life of another is abhorrent to the human conscience and people ordinarily desist from giving effect to such thought if they have the chance to reflect upon the consequences of their acts To render murder premeditated the culprit must have had that chance to desist and dismissed it In those circumstances his action amounts to planned murder in cold blood premeditated murder If the culprit is in a cool state of mind the time that elapses between planning and execution could be very short 10 15 20

The significant element of the crime of premeditated murder, the one that primarily distinguishes it from the crime of murder with malice aforethought, known to English law, is that no inference about premeditation can be drawn from the fact of killing itself In other words the Court cannot infer premeditation from the fact that the accused killed the victim Premeditation must be proved as a separate fact 25

On the other hand the circumstances of the killing may themselves furnish evidence of premeditation to the extent that they illuminate the intentions of the accused before embarking on the homicidal attack 30

The Assize Court treated the circumstances in which the appellant murdered the deceased as providing evidence of premeditation The weapon used for the crime, a meat-cleaver, considered in conjunction with the brutality of the blows, no less 35

* (See, *inter alia*, *Mustafa Halil v Republic*, 1962 C.L.R. 18, *Prens v Republic* (1963) 1 C.L.R. 87, *Pavlou v Republic*, 1964 C.L.R. 97, *Koliandns v Republic* (1965) 2 C.L.R. 172, *Aristidou v Republic* (1967) 2 C.L.R. 43, *Ioannides v Republic* (1968) 2 C.L.R. 169, *Vrakas v Republic* (1973) 2 C.L.R. 134 *Kyriacos Nicola Kouppis v Republic* (1977) 2 C.L.R. 361)

than eight administered to sensitive parts of the body designed to bring about death, and the relentless pursuit of the victim over a distance of 30ft., disclosed a settled intent to kill the victim, existent at the outset of the assault.

5 The evidential value of the brutality of the homicidal attack for proof of premeditation, was extensively debated by the Supreme Court in *Andreas Anastasiades v. Republic*.* The following passage from the judgment of A. Loizou, J., at p. 151, lines 8-18, puts the matter in perspective:

10 «That there was premeditation is apparent from the brutality of the blows they started when the victim was standing in the room, as suggested by the locks of hair found on the floor and continued whilst the victim was lying on the floor with his face and head already severely wounded, which is indicative of the
15 determination of the appellant to finish him off. Connected with this, is the instrument used and the fact that it could not have been found there, unless it had been intentionally brought in. The nature of the instrument used and the circumstances under which it came to the scene of the crime,
20 are most significant factors with regard to the issue of premeditation.»

Learned counsel for the appellant suggested that the medical evidence connected with the nature and severity of the injuries of the victim, coupled with the distance that separated the first from
25 the last assault - 30ft. - could not rule out the occurrence of a struggle between the appellant and the deceased. To begin, it is difficult to contemplate such a struggle between a man of the powerful physique of the appellant - 5ft. 10 1/2 in. tall - and the victim, a person of slight and slender stature - 1m. 60cm. in height.
30 The visualisation of such a struggle having taken place becomes remoter still upon reflection that appellant was armed with a lethal weapon whereas his victim was unarmed. Contrary to the submission of counsel the medical evidence did not suggest a struggle between the assailant and the victim. All it established was
35 that some of the wounds of the deceased were the result of defensive action on her part suffered, no doubt, in an attempt, while she still had life in her, to shield sensitive parts of her body from the assault.

In reviewing the inferences drawn by the Assize Court from the

* (1977) 2 C.L.R. 97.

circumstances of the killing, we have not overlooked the medical evidence coming from Dr. Vanezis and Dr. Stavrinou, particularly the passage from the evidence of the former, to the effect that the injuries were consistent with their having been inflicted in a state of frenzy. Earlier, Dr. Vanezis had said that he was unhappy with the use of the word «frenzy» in the context of contemplation of the mental state of the assailant. What emerges upon careful examination of the medical evidence is that the blows were delivered with unabated determination to finish off Andrie Miliotou. As indeed the Assize Court found.

The relations between the appellant and the victim, the violence occasionally used by the appellant against her and, more significantly, his threats taking at times the form of threats to kill her unless she reconciled to his wishes, also provided, according to the judgment of the Assize Court, evidence of premeditation. The direction of the Assize Court on this aspect of the case cannot be faulted in law either.

L. Loizou, J., in *Anastassiades*, supra, cited with approval passages from *Sir Hari Singh Gour's Penal Law of India*,* indicating that «... Evidence of premeditation can be furnished by former grudges or previous threats and expressions of ill-feelings; ...»

Counsel for the appellant submitted that the threats of the appellant could not be isolated from the relationship of two lovers who fell apart and the inevitable wrangling attendant on such occasions. We disagree. The appellant, as the Assize Court rightly found, was obsessed with Andrie Miliotou and could not suffer and found it impossible to reconcile to her estrangement from him. On the other hand, Andrie Miliotou had enough of him and told him so. Though she resigned to the repeated entreaties of the appellant to win her back, she used every occasion to tell him «no» and repeated her determination to keep apart for good from him. Thus she agreed on the night of the murder to join the appellant for a drink, comforted by the presence of his friend Tsangarides and the latter's girlfriend. But she expressed surprise at the fact that she was not driven home, her intended destination, by Tsangarides after their outing. The appellant, on the other hand, had contrived to find himself alone with the victim at the end of the evening. He removed his car from where it was safely parked and drove it

* (9th ed., Vol. 3, p.2299).

outside the house of Tsangarides in the sure expectation that Andrie would have little option but to agree to be driven home by the appellant. We cannot speculate on what went on between them at that stage of the evening. But we know as a fact, 5 appropriately noticed and evaluated by the Assize Court, that he did not drive her home but to an isolated spot of the town where he butchered her to death.

The inescapable inference appropriately drawn by the Assize Court is that he isolated her in order to carry out his plan to kill her. 10 Very possibly he made one more attempt to persuade her to go back and then gave vent to his plans in face of her continued refusal to agree to his wishes. Even if we were to make that supposition in favour of the appellant, it would matter not for the existence of premeditation is not negated as the case of *Mustafa Halil v. Republic** established, by the fastening of the plan to kill on 15 the prior elicitation of certain facts.

The existence of the lethal weapon in the car of the appellant, as the Assize Court rightly concluded, also provided evidence of premeditation. Counsel for the defence correctly pointed out that 20 the meat-cleaver might have been, on account of the fact that the appellant was running a restaurant and a butchery, in the car for some considerable time. However, the significance of this piece of evidence lies mostly in the knowledge of the appellant as to the availability of the lethal weapon when he contrived to seclude the victim first and then isolate her at the petrol station. The appellant 25 acted in the sure knowledge that he had the means to finish her off quickly.

The Assize Court rightly directed itself in law and summed up adequately the evidence on the subject of premeditation. Its 30 findings were perfectly warranted by the evidence and its conclusions inevitable. We find no ground for interference.

The appeal is dismissed.

* 1962 C.L.R. 18