

IN THE PRIVY COUNCIL

No. 13 of 1956 FEB 1957

ON APPEAL

FROM THE SUPREME COURT OF CYPRUS

46105

B E T W E E N :-

1. ANDREAS CHARILAOU ZAKOS	
2. CHARILAOS MICHAEL ...	<u>Appellants</u>
- and -	
T H E Q U E E N ...	<u>Respondent</u>

CASE FOR THE APPELLANTS

1. This is an appeal by Special Leave granted from the Judgment of the Supreme Court of Cyprus (Hallinan, C.J., Zekia and Zannetides, JJ.) dated the 6th April, 1956, dismissing the Appellants' appeals from the Judgment of the Special Court of Nicosia (Shaw, J. sitting without a jury) delivered on the 28th February, 1956, whereby both the Appellants were convicted of (1) discharging firearms contrary to Regulation 52 (a) of the Emergency Powers (Public Safety and Order) Regulations, 1955, and Sections 20 and 21 of the Cyprus Criminal Code, and (2) of carrying firearms contrary to Regulation 52 (c) of the said Regulations and of the said Sections 20 and 21.	<u>RECORD</u> pp. 80-84
A	pp. 58-73
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2. The first point raised in this Appeal is whether the said Sections 20 and 21 have any application to the said Regulations. The Appellants submit that the said sections have no application to the said Regulations and that therefore they have been convicted of offences which are unknown to the law of Cyprus.	
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3. The said Sections 20 and 21 come under the heading in the said Code entitled "Parties to Offences" and provide as follows :-	

RECORD

" PARTIES TO OFFENCES

"20. When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -

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(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

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(c) every person who aids or abets another person in committing the offence;

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(d) any person who counsels or procures any other person to commit the offence.

"In the fourth case he may be charged either with himself committing the offence or with counselling or procuring its commission

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"A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence

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"Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission; and he may

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be charged with himself doing the act or making the omission.

A "21. When two or more persons form a common intention to prosecute an unlawful purpose in connection with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

4. "Offence" is defined by Section 4 of the Code as "an act attempt or omission punishable by law".

5. The relevant parts of the said Regulation 52 read as follows :-

C " 52. Any person who shall without lawful authority, the burden of proof of which shall lie upon him -

(a) discharge any firearm at any person or any group or body of persons, or at any place where persons may be;

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(c) carry any firearm or ammunition or any bomb or grenade;

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E shall be guilty of an offence and shall on conviction be liable to be sentenced to death or to imprisonment for life or for such lesser term as the Court may see fit to impose:

F "Provided that in the case of offences specified in paragraph (c) hereof where the Court is satisfied that the accused person had a reasonable excuse, the burden of proof

RECORD

of which shall lie upon him, it shall take the circumstances into account in mitigation of the penalty it shall impose".

6. The learned Trial Judge in his judgment did not find that either of the Appellants had in fact discharged or carried a firearm but relied as the basis of his decision to convict them on the provisions of sections 20 and 21. In the final paragraph of his judgment he said :-

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p. 73 l. 22

" I may not have dealt with every point it (sic) has been brought out by Mr. Pavlides and Mr. Markides, but I can assure them that I have given every point the most careful consideration, and the conclusion I have reached is that the statements which accused 1 and 2 have made from the dock are not true, and that they were present there, aiding in this attack on Major Coombe. It may well be that they were not the two most important persons in that attacking party, and that they played a minor part as compared with the other men, but what they did brings them quite clearly within the scope of sections 20 and 21 of the Criminal Code. They shared in the common object and they were there present and aiding the attack. In the result I find both of the accused guilty on each count".

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7. Further it is clear from the judgment of the Supreme Court that on appeal the Supreme Court also relied on the provisions of the said sections 20 and 21 as the ground for upholding the conviction and dismissing the appeals. In support of this contention the Appellants will rely on the following (among other) passages in the said judgment.

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p. 80 l. 17

" In this case the Appellants were convicted

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under Regulation 52 (a) and (c) of the Emergency Powers (Public Safety and Order) Regulations, 1955. They were found guilty both of discharging firearms at Major Coombe under Regulation 52 (a) and of carrying firearms under Regulation 52 (c). The trial Court applied the provisions of section# 20 and 21 of the Criminal Code which relate to the aiding, abetting, counselling or procuring of an offence and to the criminal liability of those who form a common intent to prosecute an unlawful purpose and commit an offence in the prosecution of that purpose. Regulation 52 provides that any one found guilty of an offence under that Regulation is liable to be sentenced to death or imprisonment for life or for such lesser term as the Court think fit to impose. Both the Appellants were sentenced to death.

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" At the close of the evidence for the prosecution the Appellants undoubtedly had a formidable case to meet. They had apparently been operating with a gang of terrorists who had laid an explosive charge under a bridge and who had made a murderous attack on a passing vehicle, and who had subsequently engaged Major Coombe in a mortal combat.

p. 82 l. 31

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" The evidence of Major Coombe showed that the men who moved up the gully, who attacked him there, and who purported to surrender while one of them opened fire, were acting in close concert as a unit. It was not necessary that each member of the gang should be carrying a

p. 83 l. 24

RECORD

gun, for some might have a different task such as the carrying of explosives. Nor do we know who was carrying the pistol.

p. 83 l. 51

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" In the present case the Appellants were found to be members and operating with the gang of terrorists who had mined the bridge and who had discharged firearms on the security forces. This is such a serious offence in the present state of the country that we cannot say that the trial Judge imposed an excessive sentence when he considered that those who took part in such an operation, whether as leaders or led, should suffer the penalty of death."

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8. The Appellants submit that on the true construction of the said Regulations and the Code, the said sections 20 and 21 have no application to offences created by the said Regulations. The Appellants give three reasons in support of their submission. These reasons are set out in paragraph 9 - 11 below.

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9. The first reason is that the word "offence" in sections 20 and 21 of the Criminal Code must mean an offence as defined by section 4 of the Code, i.e., "an act attempt or omission punishable by law"; and that an offence created by the Regulations is not "punishable by law" because the Regulations do not fall within the definition of "law" as laid down by section 2 of the Interpretation Law (Chapter 1 of the Laws of Cyprus, 1949), as amended by Law No. 30 of 1953. By this definition, "Law" means "any enactment by the competent legislative authority of the Colony, but does not include ... an Order of Her Majesty in Council, Royal Charter, or Royal Letters Patent".

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A It should be mentioned that the Regulations provide by paragraph 2 (2) that "the Interpretation Law shall apply to the interpretation of these Regulations ... as it applies to the interpretation of a Law and, for the purposes of the said Law, these Regulations shall be deemed to be Laws".

B It is submitted that the effect of the above paragraph 2 (2) is solely to provide that the provisions of the Interpretation Law as to the proper interpretation of laws apply to the interpretation of the said Regulations. This paragraph does not make the said Regulations laws for the purpose of any laws in the Colony other than the Interpretation Law.

C 10. The second reason, alternative to the first, is that if the Regulations do fall within the definition of "law" as above stated, then sections 20 and 21 of the Criminal Code do not apply to the case of the Appellants because the Criminal Code, by Section 2 (a), provides that "nothing in the Code shall affect D the liability, trial, or punishment of a person for an offence against any Law in force in the Colony other than the Criminal Code".

E If the said Regulations are held to be laws (contrary to the Appellants' submission in paragraph 9 above), then the offences charged against the Appellants are offences against a "law in force in the Colony other than the Criminal Code". In that case sections 20 and 21 of the Code cannot, by reason of section 2 (2) of the Code, affect the F Appellants' liability trial or punishment for an offence against the said Regulations.

11. The Appellants' third reason is that, if both the first and the second reasons above stated should be rejected, the effect of the Regulations, on their

RECORD

true construction, is to provide that Sections 20 and 21 shall not apply to charges of offences created by the Regulations.

These Regulations, among other things, create a number of new crimes, and shift the onus of proof on many points on to the accused. It is submitted (1) that, unless express provision is made in the Regulations that a person is to be vicariously liable for an offence against the Regulations committed by some other person, he should not be held to be so liable; and (2) that express provision is made in the Regulations for such vicarious liability, in a manner plainly amounting to an implied repeal by the Regulations of Sections 20 and 21 of the Code so far as they might otherwise apply to charges under the Regulations. (And it should be noted that the Regulations, although they are not a law, can nevertheless amend a law, or apply a law with or without modification. This power is given by paragraph 6 (2) (d) of the Emergency Powers Orders in Council, 1939. There is no provision in the Regulations applying the Criminal Code, with or without modification).

This provision for vicarious liability is to be found in paragraph 72 of the Regulations, which reads as follows :-

"Parties to Offences

" OFFENCES AND PENALTIES

"72. (1) For the purposes of any offence against these Regulations each of the following persons shall be deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged and tried with actually committing the offence and may be punished accordingly, that is to say :-

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who procures, aids or abets another person in committing the offence;
- (d) every person who solicits or incites or endeavours to persuade another person to commit the offence;
- (e) every person who does any act preparatory to the commission of the offence;
- (f) every person who attempts to commit the offence.

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"(2) Where a person convicted of an offence against any of these Regulations is a body corporate, every person, who, at the time of the commission of the offence was a director or officer of the body corporate shall be deemed to be guilty of that offence unless he proves that he exercised all due diligence to prevent the commission of the offence".

12. It is to be noted that this Regulation reproduces with amendments and additions the provisions of Section 20 of the Code, but it does not reproduce those of Section 21. It is submitted that on a proper construction of Regulation 72 the provisions of these Sections do not apply to breaches of the Emergency Regulations.

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RECORD

13. If it be suggested on behalf of the Respondent that the Appellants could have been charged under Regulation 72 read with Regulation 52 with aiding in the commission of an offence, that the learned Trial Judge in the final passage quoted above finds that the Appellants aided in the attack, and that the convictions and sentences should therefore be allowed to stand, the Appellants make the following replies.

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Firstly, the Appellants were not so charged, but were charged and tried only for the alleged offences stated in paragraph 1 of this Case, and cannot either in substance or in form be convicted or held liable on a charge that has never been made.

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Secondly, the learned Trial Judge's finding that the Appellants "aided the attack" is so bound up with his finding that they shared a common purpose, which is a finding based on and applying Section 21, that it would be quite unsafe to assume that the learned Judge would have made the same finding if the charge had been solely that of aiding. Further, if the charge had been solely that of aiding, the learned Judge would have been bound to set out in detail and consider carefully what evidence there was that either of the Appellants aided any person to commit the offences. This the learned Judge failed to do, presumably because, being satisfied that Section 21 applied, he did not think it was necessary to consider in detail the evidence of aiding. If in fact the learned Judge had considered the evidence of aiding he would, the Appellants submit, by reason of the matters set out below, have been bound to conclude that there was no evidence sufficient to justify a conviction.

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14 The facts of this case are that on the 15th

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December, 1955, in Cyprus, Major Coombe of the Royal Engineers, was driving a military vehicle in which a Corporal Morun was a passenger. As the vehicle crossed a bridge on the Nicosia - Pyrgos road there was a burst of gun fire from a hill in front of the vehicle. Corporal Morun was hit and mortally wounded. Major Coombe parked the vehicle at the foot of the hill and, armed with a sten gun and revolver, climbed round the hill so that he came to a point above and behind the place from which the shots had come. The Major then saw three men under an olive tree all of whom were, he said, armed, although he could not identify their weapons. Shots were exchanged between the Major and the men. The Major did not claim to be able to identify either of the Appellants as being among these men. Eventually the Major ran short of ammunition for his sten gun, and he returned to his vehicle and collected the Corporal's sten gun and ammunition. The Major hid his own gun and stopped a passing vehicle to send for reinforcements. The Major then climbed up the hill again but this time he went to a place higher and further back from the road. As he neared the top he heard subdued voices and sounds of movement. When he reached the top he saw some men - he was not able to say how many - in a gully. One of them saw him and they ducked. Again shots were exchanged. Three men put up their hands to surrender. The Major directed them to come out from the gully on to the slope opposite to him. This they did, with their hands raised. Major Coombe moved towards them and as he did he was shot at by another man from the gully. The Major, assuming that the surrender was a trap, immediately shot at the three men who had surrendered. One of these men was mortally wounded; he was a man named Mouskos who was

p. 5 l. 50
p. 6 l. 3
p. 6 l. 4
p. 7 l. 4
p. 7 l. 16
p. 7 l. 23
p. 7 l. 42
p. 8 l. 5
p. 7 l. 51
p.8 ll.31-3
p. 8 l. 47
p. 9 l. 3
p. 9 l. 6
p 9 l. 18
p. 9 l. 20
p.10 l. 50
p.30 l. 7

RECORD

p. 25.1. 30 wanted by the Police. Evidence was given that he had
previously run away from the Police to avoid
p.10 1. 45 detention. The second man who was shot by Major
Coombe was the first Appellant. He was shot through
the chest and was also wounded in the head. The A
third man (the second Appellant) fell down (as did
the other two) when Major Coombe fired and although
he was in fact uninjured he remained lying on his
face until the Police arrived. After shooting at
these three men the Major turned his fire towards B
the man who had fired from the gully. This man
seemed to be wounded and the Major who was again
running short of ammunition gave him an opportunity
of surrendering. He either attempted or pretended to
p. 10 1. 14 do so, but eventually escaped up the gully carrying a
sten gun. Major Coombe said in evidence that from C
p. 13 1. 5 photographs shown to him by the Police he recognised
this man as one Dracos, a man wanted by the Police.
After Dracos' escape there was some desultory
conversation between the first Appellant and Major D
p. 11 1. 2 Coombe. According to the Major the first Appellant
said "Why did you shoot us, we had surrendered", and
p.11 11.5-6 then complained that he and his friend were wounded
and another friend was dead, and asked that the Major
p. 11 1. 20 should get help quickly. The Major said he asked the
first Appellant "Why he was fighting us" and the E
p. 11 1. 21 Appellant replied that he was fighting for freedom.
The Major also said that the first Appellant told
p. 11 1. 18 him that he had left his employment because he was
wanted by the Police. In fact the first Appellant F
was a man of perfectly good character, as indeed was
the second Appellant. This indicates the danger of
placing too much reliance on the Major's recollection
of what the first Appellant said. The first Appellant
was speaking in a foreign tongue at some distance from G
the Major and was wounded.

15. Eventually army and Police reinforcements arrived. The first Appellant said to the Police "I was caught in with them and fell a victim". The second Appellant said words to the effect that he was cultivating his olive trees when the others came and found him. The Appellants were both searched. Neither was carrying arms or ammunition. In the second Appellant's trouser pocket there was found an empty paper container which was identified as the container for an American anti-personnel bomb.

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RECORD
p. 35 l. 22
p. 32 l. 23
p. 31 l. 23

16. A thorough search of the whole area was made by the Police. A quantity of explosive material, some inside a haversack and some loose on the ground, was found near to where the Appellants had been lying, but the learned Trial Judge did not find that any part of the material had been carried by either of the Appellants. It was clearly not impossible that Mouskos had been carrying all the articles found. Further Major Coombe did not say that he had seen either of the Appellants carrying any explosive or any other weapon. Indeed the Major said that he could not associate either of the Appellants with any weapon at all.

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pp. 30 & 31
p. 13 l. 23

In fact two weapons were found in the area. One was a "Schmeisser" machine-gun which fired 9 mm. cartridges. This and several magazines suitable for it, both full and empty, were found in the gully. The second weapon was a pistol. This was said to be found about one foot to eighteen inches from the second Appellant. However the learned Judge made no finding that the second Appellant had actually carried this pistol. The pistol was loaded with 10 rounds of 7.65 mm. ammunition and was in working order. No evidence was given to suggest that it had recently been fired and in fact no empty cases of 7.65 mm.

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p. 27 l. 21
29 l. 26

RECORD

calibre were found. The only proper inference from such evidence must be (it is submitted) that the pistol had been in the possession of some person who did not want to fire it because he was armed with a better weapon, for instance the Schmeisser gun. In fact it was fairly clear that Mouskos had carried the Schmeisser because unused 9 mm. cartridges were found in his pocket and an empty Schmeisser magazine was found at the place where he fell when he was shot. There were also some empty sten magazines, which supported Major Coombe's evidence that Dracos had used a sten gun.

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17. An examination of the place from where the shots had been fired at Major Coombe's vehicle showed that

p. 32 l. 3 there were four small heaps of stones. Behind two
p.32 ll.41,44 there were a number of spent 9 mm. cases which could
p. 36 l.14 have been fired by a sten and the Schmeisser gun.
Ex. 43 & 44 Near another heap there were two bags containing in
Ex. 45 all 162 rounds of 7.92 mm. calibre and also a curved magazine.

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Evidence was given by the Prosecution that these rounds and the magazine fitted a "Sturmgewehr" machine gun. No such gun was found, nor were any empty cartridges found. It is submitted that the

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only reasonable inference is that during the first attack there was a person who had such a gun but for

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p. 52 l.45 some reason it did not fire. Both the Appellants
p.57 l.15 stated that at some stage a man ran away with a gun,
p. 52 l.45 and the first Appellant stated that, as he went, he shouted that his gun would not work. It is submitted that this is clearly true. Nothing was found behind the fourth heap of stones.

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p. 31 l.39 18. Near the olive tree empty cases of 9 mm. calibre were found which indicated that the shooting could have been done with the Schmeisser and Sten guns.

19. It was also found that an explosive charge had been placed under the bridge.

RECORD
p.76 Ex.54

A 20. It is submitted that, on that evidence, there was no evidence that either of the Appellants had aided the assailants in carrying or discharging any weapon. The Prosecution produced no evidence that either Appellant aided the first firing at the vehicle on the bridge. Further the Prosecution's evidence about the second engagement was quite consistent with neither B of the Appellants being present. There were only three men under the olive tree and these could have been, and indeed probably were, Mouskos, Dracos and the man with the Sturmgewehr. As to the third incident, the only thing the Appellants were seen to C do was to surrender.

The learned Trial Judge expressed his views on their surrender in the following passage :-

D " My own view of what happened just before the last burst of fire took place at Major Coombe is that that was a trap, and that it was hoped that if those three men, accused 1 and 2 and Mouskos, went up the hill, apparently surrendering, Major Coombe would expose himself to the shots of the fourth man. Fortunately E those shots missed Major Coombe and he, with perfect justification, fired then on all the four men. At the time those three men walked up on to the hillside it must be remembered that there were two machine guns - a Sten gun and a F Schmeisser - and plenty of 9 mm. ammunition, and a pistol in the gully, and there was no apparent reason why those men should have decided to surrender. They did not, it is true, know that Major Coombe was at that time practically at the G end of his ammunition".

p.72 l. 37

RECORD

It is submitted that although Major Coombe might well have been justified in the heat of the battle in acting on the assumption that the persons who surrendered had attempted to set a trap for him, there was no evidence on which a Court on a criminal charge could come to a conclusion against an accused that this was the only possible inference to be drawn from the facts. There was in fact no evidence that this was a trap other than the action of the fourth man who fired at Major Coombe, and there was certainly no evidence that either of the Appellants were parties to the setting of a trap. The fact that they surrendered while there was plenty of ammunition in the gully (which the learned Judge seems to hold against them) was a strong indication that they were not willing participants in the fight and is therefore more consistent with their innocence than their guilt.

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pp. 51 & 56

21. The Appellants both made statements from the Dock. The effect of their statements was that they were innocently in the neighbourhood and the terrorists had seen them and, no doubt afraid that they (the Appellants) had seen the terrorists' preparations for the ambush, had taken them prisoner. Both the Appellants were (they said) in the gully when Mouskos and Dracos came up after them as Major Coombe appeared over the brow of the hill

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p. 35 l. 37

22. The first Appellant claimed that he was on a walking excursion, and a haversack in which there was a piece of cheese was found near him. The second Appellant said that he had been cultivating his mother's olive trees. The Prosecution called evidence that there were olive trees belonging to the second Appellant's mother in the neighbourhood. According

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p. 47

p. 49 l. 26

to the Prosecution's witness it was some 700 - 800 yards from the bridge.

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23. It is submitted that not merely was there nothing in these statements to show that either of the Appellants aided in the commission of either of the offences charged, but that - even apart from the points raised in paragraphs 9 to 12 hereof - it would be unsafe to maintain the convictions in the face of the explanations given in the statements as to the presence of the Appellants at the scene of the battle and of their actions.

These explanations were, it is submitted, not unreasonable or improbable in themselves, and were not inconsistent with, or contradicted by, the facts established by the prosecution.

The explanations were, moreover, corroborated in a substantial degree by other evidence. The first Appellant was shown by evidence to be in the habit of taking walking excursions, and the haversack with cheese in it gave some further support to his explanation. As to the second Appellant, his statement that he was in the neighbourhood to cultivate olive trees was confirmed by the proof that olive trees belonging to his mother were in the neighbourhood.

24. The Trial Judge on the 28th February, 1956, gave judgment convicting the Appellants. The essential part of his reasoning has already been set out in paragraph 6 of this Case. Notwithstanding the minor part which, in his view, the Appellants had taken in the offences, he sentenced them both to death.

p. 58

25. The Appellants appealed to the Supreme Court of Cyprus, which on the 6th April, 1956, dismissed their appeals against convictions and sentences.

26. The Appellants pray that their appeals should be allowed and their convictions quashed for the following (among other)

RECORD

REASONS

- (1) Because they were tried for, and convicted of, offences unknown to the law of Cyprus.
- (2) Because there was no or no sufficient evidence to justify the conviction of either of the Appellants of being a party to either of the said offences charged against them as defined by the said Section 20 or the said Regulation 72. A
- (3) Because neither the Trial Judge nor the Supreme Court on appeal set out or considered what evidence there was that either of the Appellants was a party to either of the said offences as defined by the said Section 20 or the said Regulation 72. B
- (4) Because there was no or no sufficient evidence to justify a finding that either of the Appellants had formed a common intention with each other or with any other person to prosecute an unlawful purpose in connection with each other or that the said offences or either of them were of such a nature that their commission was a probable consequence of the prosecution of any such purpose. C D

D.N. PRITT

D.A. GRANT

No. 13 of 1956

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF CYPRUS

B E T W E E N :-

1. ZAKOS
2. MICHAEL Appellants

- and -

T H E Q U E E N Respondent

CASE FOR THE APPELLANTS

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