

IN THE PRIVY COUNCIL

No. 13 of 1956

ON APPEAL
 FROM THE SUPREME COURT OF CYPRUS

46106

BETWEEN

(1) ANDREAS CHARILAOU ZAKOS
 (2) CHARILAIOS MICHAEL ... Appellants

and

THE QUEEN ... Respondent

CASE FOR THE RESPONDENT

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1. This is an Appeal from a Judgment, dated the 6th April, 1956, of the Supreme Court of Cyprus (Hallinan, C.J., Zekia and Zannetides, J.J.) dismissing an Appeal from a Judgment, dated the 28th February, 1956, of the Special Court of Nicosia (Shaw, J.), whereby the Appellants were convicted of discharging and carrying firearms and were sentenced to death.

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2. The following statutory provisions are relevant to this Appeal:-

Criminal Code (Laws of Cyprus, 1949, Chapter 13).

Sections 2 (a), 4, 20 and 21.

"2. Nothing in this Law shall affect -

(a) the liability, trial or punishment of a person for an offence against any Law in force in the Colony other than this Law;

X X X X

4. In this Law -

X X X X

"offence" is an act, attempt or omission punishable by law;

X X X X

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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 -

- (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; 10
- (c) every person who aids or abets another person in committing the offence;
- (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.

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. 20

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 be charged with himself doing the act or making the omission. 30

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." 40

Interpretation Law (Laws of Cyprus, 1949,
Chapter 1), section 2.

10 "2. In this Law and in every other Law, and
in all public instruments, enacted, made,
issued, kept or in use, before or after the
commencement of this Law, the following
words and expressions shall have the
meanings hereby assigned to them respectively,
unless there is something in the subject or
context inconsistent with such construction
or unless it is therein otherwise expressly
provided -

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20 'Law' means any enactment by the
competent legislative authority of the
Colony but does not include an Act of
Parliament extending expressly or by
implication or applied by a Law to the
Colony nor an Order of Her Majesty in
Council, Royal Charter or Royal Letters
Patent;"

Emergency Powers (Public Safety and Order)
Regulations, 1955, Regulations 2 (2),
52 and 72.

30 "2. (2) The Interpretation Law shall apply
to the interpretation of these Regulations
and of any Order made or direction given
thereunder, 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.

X X X X X

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

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

(b) throw or deposit any bomb or other
explosive or incendiary article,
substance or liquid with intention to

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cause death or injury to any person or damage to any property;

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

(d) carry any explosive or incendiary article, substance or liquid, other than ammunition or a bomb or grenade, with intention to cause death or injury to any person or damage to any property,

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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:

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

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X X X X

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 :-

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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;

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

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(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.

30 (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."

20 3. The Information charged both the Appellants, p.H. in the First Count, with discharging firearms contrary to Regulation 52 (a) of the Regulations and Sections 20 and 21 of the Criminal Code, and in the Second Count, with carrying firearms contrary to Regulation 52 (c) of the Regulations and Sections 20 and 21 of the Criminal Code.

4. The case arose out of an attack made on a military vehicle on the Nicosia to Pyrgos Road on the 15th December, 1955. Evidence for the Crown was given as follows:-

30 (a) Major P.J. Coombe said that on that date he was driving along that road in a vehicle known as a champ accompanied by a soldier named Morun. At about quarter past twelve, just as they were crossing a bridge, there was a burst of machine gun fire from in front of them, and Morun's body fell across Major Coombe. Major Coombe stopped the champ under cover of a bank, and, believing that Morun was dead, got out and walked up the hill taking a Sten gun with him. As
40 he started to climb two grenades went off. When he reached the top of the hill, there was another burst of machine gun fire from below him, so he retired below the ridge and after moving along the slope climbed to the pp.5-13

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top again. He then saw three men by an olive tree on the slope below him about 30 or 40 yards off, each of them with a gun. There was an exchange of fire between Major Coombe and these men, and Major Coombe, having used up all his ammunition, returned down the slope to the champ. He found Morun unconscious, and, thinking that he could not do anything for him, took his (Morun's) Sten gun, hid his own Sten gun in a bush, and climbed the hill again. He paused on the way up the slope, and heard subdued voices on the other side of the ridge and also the sound of movement. On reaching the summit of the ridge he saw a group of men walking up the bottom of the gully in front of him. They fired at him and he fired at them. Three of the men then climbed out of the gully and put up their hands, and one of them (the first Appellant) called out in English, "Stop firing". Major Coombe moved down the slope towards them, exposing himself to fire from anyone in the gully in the position from which the three men had come. As he did so there was a long burst of fire from another man in the gully. Major Coombe at once fired on all four men. The man in the gully pretended to surrender, but in fact ran off and succeeded in making his escape. Of the three men who had surrendered, one (the second Appellant) was lying still on the ground; another (the first Appellant) was lying on his back apparently slightly wounded; the third was a man named Mouskos, who was badly wounded and subsequently died. Major Coombe had a conversation in English with the first Appellant. The first Appellant said he had run away from his employment because the police had wanted him. Major Coombe asked him why he was fighting the British, and the first Appellant replied that he was fighting for his freedom. Major Coombe eventually succeeded in stopping a vehicle in the road and sending a message to Nicosia, and at about 1.30 a party of the Gordon Highlanders arrived. Major Coombe took some of them to search for the fourth man, but could not find him.

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He said that the four men whom he saw all appeared to be working closely together from start to finish.

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- (b) An official of the Cyprus Mining Corporation, named Barnett, said the second Appellant had been employed by the Corporation. He had failed to report for work on the 16th or 17th November, 1955, and had not returned since then. Another official of the Corporation said the first Appellant had been employed there, and had left on the 17th November saying he was going to work for the Armed Services in Nicosia.

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- (c) Corporal Buchan, a member of the party from the Gordon Highlanders on the 15th December, said that when he reached the scene the two Appellants were lying on the side of the gully and Mouskos lower down in the gully. He said the first Appellant told him that the dead man was a cousin of Archbishop Makarios, and his name was Mouskos. Buchan found a loaded automatic pistol lying at the side of the second Appellant, and about 15 yards from him a German sub-machine gun and four magazines.

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- (d) P.C. Antoniou, a member of the party which went to the scene on the 15th December, said that when he reached the scene he spoke to the two Appellants. The second Appellant said he was there cultivating his olive trees and the others had met him there. Near the second Appellant he found a haversack containing 21 sticks of dynamite and a locally made bomb, and 2 gas capes. Near the first Appellant he found a cap, a local bomb and a box containing 22 rounds of ammunition. In one of the pockets of the second Appellant he found a bomb container. Near the olive tree, by which Major Coombe had first seen three men, he found 33 empty cartridge cases and 2 live rounds. He also found 4 piles of stones apparently constructed as shelters, and near them 34 empty cartridge cases. Before leaving for the Police Station he cautioned the second Appellant and asked him whether he wished to make a statement, and the

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second Appellant answered, "I was here cultivating my olive trees when the others came and found me."

- pp.34-35 (e) P.S. Savvides, one of the party who went to the scene on the 15th December, said that on the slope facing the bridge he found a bag containing 122 live rounds, a smaller bag containing 40 live rounds and a magazine containing 30 rounds. He also found two piles each of 17 rounds of used ammunition. He saw the two Appellants sitting on the hillside and asked the first Appellant what he was doing there. The first Appellant replied, "I was caught in with them and fell a victim". Near the first Appellant he found a haversack containing some cheese, and an empty magazine. 10
- pp.39,76 (f) The Deposition of Major Neish was read. He said that at about 2.30 on the 15th December he went underneath the arch of the bridge, and found, in a cavity made by removing some of the stones, an explosive charge. An electric cable led from the charge to a point about 60 yards away on the hillside, but was not connected to anything at that point. 20
- pp.46-47 (g) A man named Toulekkis gave evidence about olive trees near the bridge belonging to the second Appellant. He said he had visited the trees on the 22nd December, and had been able to tell that they had not been pruned or cut within a week of his visit. It was possible, though, that some digging might have been done round the roots. 30
- pp.51-53 5. The first Appellant made an unsworn statement. He said he had left his employment with the Cyprus Mining Corporation in order to apply for employment with the Army. At the beginning of December he received a letter rejecting his application for employment with the Army. On the 15th December he went for a hike to visit an archaeological site. When he was near his destination, he met a stranger (whom he afterwards discovered to be Mouskos), who asked him to follow 40

10 him. Mouskos led him to a hillside where they met two other armed men and Mouskos picked up a gun. Mouskos told the others that he had taken the Appellant to render him harmless as he was afraid that he (the Appellant) might reveal their presence there. The Appellant asked them to let him go, and, while they were discussing this, one of them shouted, "A military truck". Firing started, and the Appellant went to a gully and fell on the ground. He started to crawl up the gully and as he did so met the second Appellant. He then gave an account of the shooting which substantially agreed with that of Major Coombe. He said it was he who had stood up and shouted in English, "Cease fire".

20 6. The second Appellant also made an unsworn statement. He said that after breakfast on the 15th December he set out with a spade to cultivate olive trees. As soon as he started to cultivate his mother's tree, two armed persons came towards him and asked him what he was doing. They told him to leave his spade near the tree and follow them, otherwise they would shoot him. He was frightened and started to follow them across the fields, and one of them said if he tried to escape they would shoot him. As they went through the fields he saw the bomb container, and picked it up thinking he might use it to hold olives. About 10 yards below the top of the hill one of the men told him to sit there, and said he would be shot if he tried to go away. The man then stood at the top of the hill with his gun pointing towards the Appellant. He then gave an account of the shooting.

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(The olive tree which the second Appellant claimed to have been cultivating was in fact about half a mile away from the scene of the shooting to the east.)

40 7. In his judgment, Shaw, J. set out all the evidence very fully. In dealing with the unsworn statements of the Appellants, he said he could quite understand that a man, although innocent, might decide that he could not bear to be cross-examined and so might make an unsworn statement. The learned Judge said it was not clear to him why Mouskos should have taken the

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first Appellant up the hill (as the first Appellant alleged), since he was introducing a possible witness against himself and his companions. For the same reason, he did not see why the second Appellant should have been brought to the scene from a considerable distance away. It was strange that the second Appellant should have come across the bomb container and picked it up. The engagement had not been short, but according to Major Coombe had lasted more than half an hour, and the learned Judge did not believe that during that time the Appellants, if innocent, would have had no opportunity of running away. Major Coombe was a most careful and most honest witness, and he said he had seen nothing to suggest that any of the men whom he saw might be innocent. The learned Judge took the view that when the three men surrendered, they were setting a trap, hoping that Major Coombe would expose himself to the shots of the fourth man. He concluded that the statements made by the Appellants from the dock were not true, and they were present aiding in the attack on Major Coombe. It might be that they played a minor part, but what they did brought them clearly within Sections 20 and 21 of the Criminal Code. They shared in the common object and were present aiding the attack. Consequently the learned Judge convicted both the Appellants and sentenced them to death.

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8. Both Appellants appealed to the Supreme Court of Cyprus. Their Notices of Appeal contained a number of grounds raising matters of fact, but the points of law now taken on their behalf were not taken in either Court in Cyprus. If these points had been raised at the trial, they could have been met by amendment under s.81 of the Criminal Procedure Law. Since they were not raised at the trial, s.150 of that Law would have prevented their being raised at the appeal. Furthermore, under s.142 of the Criminal Procedure Law the Supreme Court could have convicted the Appellants of any offence of which they might have been convicted on the evidence adduced at the trial.

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9. The judgment of the Supreme Court was delivered on the 6th April, 1956. The learned Judges summarised the evidence for the Crown and the statements made by the Appellants. It was significant, they held, that both Appellants had left their employment about the 17th November and both appeared in the company of a terrorist gang on 15th December. Their stories were intrinsically improbable, for it was most improbable that the terrorists would have brought into their company unknown men who might afterwards identify them. Their defences were also inconsistent with the first Appellant's

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remark that he was fighting for freedom, and with the finding of a bomb container on the second Appellant. Having accordingly considered all the evidence, the learned Judges held there was ample evidence to support the convictions. They then discussed the sentences, and dismissed the Appeals against both convictions and sentences.

10 . 10. The Respondent respectfully submits that there was ample evidence to justify a finding that both Appellants were present aiding others in the carrying and discharging of firearms, or participating in an act resulting from a common design or intention to carry or discharge firearms. It is common ground that on the 15th December an attack was made with firearms on Major Coombe's vehicle. Both Appellants were found in the company of men who (as again is common ground) were responsible for that attack. In spite of the Appellants' statements in the dock, Shaw, J. was fully justified upon all the evidence in his findings of fact. The Respondent 20 relies upon the findings of both Courts in Cyprus on the matters of fact, and respectfully submits that there is no justification for interfering with those findings.

30 11. Counsel for the Appellants having made it clear at the hearing of the Petition for special leave to appeal that he is not relying on any technical defect in the charge, it is necessary to consider only whether the trial of the Appellants was unfairly affected by the application of statutory provisions or common law rules not properly applicable to their trial. The Respondent respectfully submits that, even if any statutory provisions or common law rules were wrongly applied, the Appellants were not thereby unfairly affected. In any event regulation 72 of the Regulations, dealing with aiders and abettors, was applicable. That 40 regulation reproduces and enlarges section 20 of the Criminal Code. That being so, the Respondent submits that the application of section 20 caused no failure of justice.

12. Thus, the Respondent respectfully submits that if section 21 of the Criminal Code was not applicable there was ample evidence on which the

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Appellants could be convicted of being aiders and abettors. Therefore the introduction of section 21, even if that section was not properly applicable, did not unfairly affect the Appellants' trial. The Respondent further submits that the Special Court was entitled to apply the common law rule that a participation in the result of a concerted design to commit a specific offence is sufficient to render the participant a principal in the second degree.

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13. The Respondent respectfully submits, however, that sections 20 and 21 of the Criminal Code did apply to this case. It is argued that section 20 applies only when "an offence is committed", "offence", under section 4, is an act "punishable by law", and the Regulations, under which alone the discharging and carrying of firearms are punishable, are not "law" as defined by the Interpretation Law. The Respondent respectfully submits that there are three answers to this argument. First, the effect of regulation 2(2) is that, irrespective of the terms of the Interpretation Law, the Regulations must be treated as "Laws" for the purposes of the Interpretation Law. Secondly, a distinction must be drawn in all Cyprus legislation between "Laws" and "law". "Laws" are the actual enactments. "law" is the general body of law from all sources. Consequently, "law" must on any view include the Regulations, so that the discharge and carrying of firearms are "offences" within the meaning of section 4 of the Criminal Code. Thirdly, the Regulations fall within the definition of "Law" in the Interpretation Law.

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14. It is also argued on behalf of the Appellants that the effect of section 2 (a) of the Criminal Code is to prevent sections 20 and 21 from applying to offences under the Regulations. The Respondent respectfully submits that section 2(a) should not be so interpreted. When the Criminal Code came into operation in 1928, certain other pieces of legislation creating offences remained in force. Section 2(a) was included in the Code in order to provide an answer to the argument that the Code was a comprehensive enactment and impliedly repealed any other enactment creating offences. It

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cannot, in the Respondent's submission, have been intended that provisions beneficial to accused persons, such as sections 16 and 17 of the Code, should not apply to persons charged with offences under other enactments. The Respondent respectfully submits that section 2(a) should be construed in the light of its legislative purpose, and its operation should be circumscribed accordingly.

10 15. It is also argued on the Appellants' behalf that the Regulations have impliedly repealed sections 20 and 21 in so far as those sections might otherwise apply to the Regulations. Regulation 72 reproduces section 20 of the Criminal Code with additions, covers acts preparatory to the commission of the offence, with which the Criminal Code does not deal at all, and also covers attempts, with which the
20 Criminal Code deals in section 360. The Regulation thus covers a number of matters, some appearing in different parts of the Criminal Code and some not appearing in that Code at all. The Respondent respectfully submits that it is not possible to regard such a regulation as dealing comprehensively with any one subject. The effect of the Regulation is to make the application of section 20 to cases under the Regulations unnecessary, but the Respondent
30 submits that there is no implied repeal either of section 20 or of section 21.

16. The Respondent respectfully submits that the judgment of the Supreme Court of Cyprus was right and ought to be affirmed, and this Appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the evidence showed the Appellants to have committed the offences with which they were charged:
- 40 2. BECAUSE there are concurrent findings of fact to this effect:

3. BECAUSE the trial of the Appellants was not affected by any inapplicable rules of law:
4. BECAUSE sections 20 and 21 of the Criminal Code were applicable to the trial of the Appellants.

GERALD HOWARD

J.G. Le QUESNE.

No. 13 of 1956

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C A S E FOR THE RESPONDENT

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