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[THOMAS, SERTSIOS AND FUAD, JJ.]

REX

v.

ALI RIZA MENTESH.

Criminal Law—Conviction—Evidence equally consistent with innocence—Trial Court's findings of fact—Evidence of Police officers—Proof of foot-prints.

The appellant was convicted of the murder of J.B. The principal evidence against him was that of two lines of foot-prints made by native top-boots over a distance of about five miles, one line leading from deceased's mandra to appellant's house, the other in the reverse direction. A comparison made between a plaster cast of one of the foot-prints on the line leading from deceased's mandra, and taken at a spot about half a mile therefrom, with a cast of the impression of the top-boots worn by appellant on the day of the murder showed a number of similarities, which the trial Court held proved (*a*) that the foot-print found half a mile from deceased's mandra was made by the appellant's top-boot; (*b*) that the two lines of foot-prints between deceased's mandra and appellant's house were made by the person who fired the fatal shot, and (*c*) that that person was the appellant.

Held: (1) the finding of the Court that the two lines of foot-prints over a distance of five to six miles separating the two mandras were made by appellant's boots was not justified by the evidence;

(2) a conviction is only justified where the evidence is not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion;

(3) a trial Court's findings of fact may be set aside where they are based upon evidence which is inconsistent with itself, or with indisputable fact;

(4) Police officers are not impartial witnesses and their evidence unsupported by independent testimony should be acted upon with the greatest caution;

(5) the practice of the Police in taking an accused person to the scene of the crime during an investigation is illegal and highly improper;

(6) to establish similarity of foot-prints the original foot-prints should be produced unless it is shown that this cannot be done.

Appeal against conviction. The appellant was tried before the Assize Court, Limassol, consisting of Stronge, C.J., Greene, P.D.C., and Halid, D.J., upon a charge of murdering of Jevdet Bessim. He was found guilty and sentenced to death. The Court's decision rested upon the following findings of fact: (1) that the deceased was shot with a muzzle-loading gun, and on the following day the accused was found in possession of such a gun with one barrel recently fired; (2) that the two lines of foot-prints throughout the five or six miles separating the mandras of accused

and deceased were made by the murderer; (3) that a comparison of a plaster cast of a foot-print taken about half a mile from deceased's mandra (Exh. 6) with an impression made by one of accused's boots showed such a number of peculiarities common to both that it proved beyond any reasonable doubt that the foot-print from which Exh. 6 was taken was made by appellant's boot; (4) that the two lines of foot-prints between the two mandras were made by the appellant. The Court did not believe the only witness called to establish motive, but was of opinion that the motive was probably revenge for information which the accused suspected the murdered man had given in regard to the theft of some goats.

Accused was convicted and appealed to the Supreme Court.

Tornaritis and *Zekia Bey* for the appellant.

Pavlides, Crown Counsel, for the Crown.

Tornaritis: Conviction rested upon three findings:—

(*a*) motive; (*b*) possession of gun recently fired; (*c*) two lines of foot-prints.

(*a*) The only witness as to motive was disbelieved by the trial Court. No evidence at all that deceased and accused were on bad terms. Motive is an essential fact in the chain of circumstantial evidence, and in the present case motive is of the utmost importance. Submit that there is an entire absence of motive in the case.

(*b*) The explanation given by appellant is equally consistent with truth, which is the criterion which the Court should have adopted; see *R.* v. *Schama* (1) and *R.* v. *Abramovitch* (2). Evidence that appellant had a game licence. The criterion is whether the explanation is consistent with accused's story: *R.* v. *Ketteringham* (3); *R.* v. *Bookbinder* (4); *R.* v. *Carter* (5).

(*c*) Distinction between proof of finger-prints and foot-prints; *Phipson on Evidence* (7th Ed.), p. 133; Archbold's *Criminal Pleading* (28th Ed.), p. 363. Police did not make proper investigation; numbers of people allowed to come to the scene and so prevent foot-prints being seen. Investigation of the foot-prints not carried out with requisite care; delay of 24 hours during which two sets of persons had passed along the line of foot-prints which became confused

(1) 24 Cox C.C. 594.
(2) 24 Cox C.C. 594.
(3) 19 Cr. App. R. 160.
(4) 23 Cr. App. R. 59.
(5) Ibidem 101.

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with those of the investigators. Foot-prints not guarded. Appellant's boots not put in sealed packet; not kept in proper custody; but were in possession of the Police 24 hours before the finding of the foot-print shown in Exh. 6. Casts of the impression found half a mile from deceased's mandra and that of appellant's boot were not taken under the same conditions. Cites *Wills on Circumstantial Evidence* (6th Ed.), p. 220.

There is no evidence before the Court as to what was the size and shape of all the remaining foot-prints throughout the two lines of tracks over a distance of ten miles and no evidence to establish that they were made by the accused. From this great number of foot-prints only one cast was taken; may have been fabricated.

From the impression shown in Exh. 6 no safe conclusion can be drawn that it was made by appellant's boot, the cast of which is Exh. 7.

With an entire absence of motive, the only evidence remaining is that of Exh. 6. Submit that the evidence does not exclude the possibility that some one else has committed the offence, and this is the criterion to be adopted in a case like the present where the evidence is entirely circumstantial. The finding must be not only consistent with guilt but must be inconsistent with any other rational conclusion. Cites *R.* v. *Hodge*, 2 Lew. C.C. 227 cited in 14 English and Empire Digest, p. 358; from this case right down to the case of *R.* v. *Wallace* (1) the same criterion has been followed.

Pavlides: The whole case turns on questions of fact which were properly found by the Court below. The cases cited refer to elementary principles which the trial Court was eminently capable of keeping in mind. If the Court of Appeal holds that the trial Judge has correctly directed the jury it cannot interfere.

As to the improprieties in the investigation by the Police, the Court in its judgment expressed appreciation of the work done by the Police.

The two tracks of foot-prints played an important part in the case. The first question the Court had to answer was "are those tracks the tracks of the murderer?" and if yes "were they those of the accused?" As to the first the Court found that the fatal shot was fired from the pile of stones, and that the tracks approaching were of a person walking cautiously; those going away were of a person running. Submit that the Court rightly found the tracks to be those of the murderer.

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(1) 23 Cr. App. R. 23.

The tracks leading away lead to a place where appellant was that day, and without a shadow of doubt they lead to appellant's mandra. Further the tracks coming and going to deceased's mandra were made by one and the same person, with a peculiarity in his walk, a peculiarity which was observed by Inspector Jemal.

The Court finds that without any doubt the cast of the foot-print going away from deceased's mandra (Exh. 6) corresponds with the cast of the impression of one of accused's boots. The Court considered the possibility of any one else having produced the impression from which Exh. 6 was made. There was ample material on which the trial Court could base its finding, viz., that the foot-prints were those of the accused. Submit that this Court as a Court of Appeal must see whether there were facts upon which the Court below could come to its conclusion. In the submission of the Crown the facts were such that the Court below could not have come to any other material conclusion.

Tornaritis in reply :

This appeal does not only raise questions of fact, but what are the reasonable inferences to be drawn from the circumstances.

In *R.* v. *Wallace* the Court of Criminal Appeal found the direction to the jury was quite correct, and yet they set aside the conviction.

Assuming that the impression shown in Exh. 6 was made by the accused, where is the evidence that the impression was made by accused and by no one else? It was not for the accused to prove his innocence.

The judgment of the Court was delivered by Thomas, J.

JUDGMENT :—

THOMAS, J. : Ali Riza Mentesh was convicted by the Assize Court of Limassol of the murder of Jevdet Bessim and sentenced to death and now applies for leave to appeal against this conviction. The deceased was shot on the evening of 20th January while having dinner with his family at his mandra near the road from Prastio to Pakhna. Evidence was called by the prosecution to establish that the murderer had fired a shot from a muzzle-loading gun from a pile of stones placed by him behind a brushwood fence a few yards distant from deceased's door ; that on the following day a line of foot-prints made by villagers top-boots was discovered leading from deceased's mandra to that of accused, and also another line which went in an uninterrupted course to the door of accused's mandra, and that a comparison of a plaster cast of one of these foot-prints with the impression made by one of the accused's boots established that they were

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both made by the same boot. Further that the accused was found in possession of a muzzle-loading gun recently fired. The trial Court came to the conclusion that these two lines of foot-prints were made by the person who fired the shot that killed the deceased. Upon comparing the plaster cast of one of the foot-prints leading away from deceased's mandra (Exh. 6), and about half a mile distant therefrom, with the cast made from accused's boot (Exh. 7) and with the boot itself, the Court held that the impression shown in Exh. 6 was made by the accused's boot. Having found that the foot-print discovered by Inspector Jemal half a mile from deceased's mandra (Exh. 6) was made by accused's boot, and believing merely the Police evidence, which should be accepted with the greatest caution especially in a case involving capital punishment and one where it is sought to establish the prisoner's guilt solely by circumstantial evidence, the Court then concluded that all the remaining foot-prints throughout the ten to twelve mile trail were identical with that shown in Exh. 6, and therefore made by the accused's boots, and that therefore he was the murderer.

L/Cpl. Agapios went to deceased's mandra early on the following morning, and made a careful examination of the mandra and of the foot-prints there. From the pile of stones near deceased's living room he found a line of foot-prints leading away which he followed with the witness Bairam Tahir for a mile to locality " Yerokarka." He was following this line of foot-prints in the belief that he was on the trail of the murderer, and his stopping at " Yerokarka " and returning to deceased's mandra with Bairam, without any reason being assigned anywhere in the record as to why they returned from following the clear trail of the murderer, can only mean that the foot-prints they were following did not go beyond that locality. If this is a correct deduction—and there is no other explanation of it—then the evidence of Trooper Sotiri, Bairam and the Rural Constable Karletti is untrue. The least one can say is that the line of foot-prints could not have been as continuous, uninterrupted and distinct as they are made out to be by Trooper Sotiri, but, if the foot-prints were as Inspector Jemal says they were, *i.e.*, distinct and continuous on the following day, then the only possible explanation is that they were tampered with between the time of Agapios leaving them and the others coming upon the scene.

On the same day, but later, after the Police had discovered a recently-fired muzzle-loading gun in accused's possession, Trooper Sotiri found a line of foot-prints leading from deceased's mandra to accused's mandra. Agapios says that in the neighbourhood of deceased's mandra there were various foot-prints caused by numerous villagers who had

come to the scene of the murder. This witness, on the following day, 22nd January, went with Inspector Jemal and his party following the line of foot-prints leading away from the pile of stones at deceased's. He states that the marks were in exactly the same condition as when he followed them the day before. Here we would observe that it certainly was a vital point in the case for the prosecution to prove that the foot-prints and their condition were on the 22nd January exactly the same as when they were first seen immediately following the discovery of the murder, and for this reason Counsel for the Crown asked every witness who was there on both these days whether that were so, and in every case the answer was in the affirmative. In our view such a vital point essential to be proved, if any conviction was to be based on the foot-prints, should have been established not merely by the recollection of Police and other witnesses of what they saw the day before, but by positive evidence that there could have been no opportunity for anyone to tamper with the existing foot-prints or conveniently add others to connect and improve the chain. In his re-examination he says that at Asproyi Inspector Jemal made a cast of one of the foot-prints that was there on the previous day. Unless he specially noted and marked this particular foot-print—and there is no evidence that he did—he could not possibly say whether the foot-print from which Exh. 6 was taken was there the day before, or whether its condition on the two days was the same.

Some two hours after L/Cpl. Agapios and Bairam Tahir had followed the foot-prints to "Yerokarka," Trooper Sotiri came to deceased's mandra; he saw a line of foot-prints leading away from the pile of stones, which he followed with Rural Constable Karletti and Bairam Tahir to accused's mandra.

Inspector Jemal arrived at deceased's mandra on the afternoon of the 21st, and alleges he saw not only the line of foot-prints leading away from the pile of stones which were seen and followed earlier in the day by L/Cpl. Agapios and shortly after by Trooper Sotiri, but also a line of foot-prints approaching the pile of stones. The evidence of L/Cpl. Agapios and Trooper Sotiri is that six or eight hours earlier their examination showed only one line of foot-prints, viz., that leading away from the pile of stones. L/Cpl. Agapios says definitely that he did not see any other foot-prints except the line of foot-prints leading away from the mandra. Trooper Sotiri says he saw tracks of a person going away from the pile of stones. "I could follow this trail distinctly and easily", he says, "because this was the only set of prints made after the rain." Two such clear statements by the persons first on the scene, and first to examine the mandra and search for foot-prints, throw

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very great doubt on Inspector Jemal's evidence that on the same afternoon he saw two lines of foot-prints, one leading away from the pile of stones, the other approaching it, except on the supposition that the second line of foot-prints, viz., that approaching deceased's mandra, was made in the six or eight hours interval between the examination of the mandra in the morning by L/Cpl. Agapios and Trooper Sotiri and the arrival of the Inspector about 4 in the afternoon. It is in evidence that on the 21st the accused was taken from his mandra to the Evdhimou Police Station wearing the same boots, and judging from the evidence as to the various localities, the possibility is not excluded of his having passed near deceased's mandra on his way to Evdhimou.

On the following day Inspector Jemal with L/Cpl. Agapios, Trooper Sotiri and the Rural Constable Karletti followed the line of foot-prints leading away from deceased's mandra to accused's mandra. The foot-prints, says the Inspector, were clear and distinct; for 5 or 6 donums "those of a person running, about 6 feet apart, and were from 3 to 4 and up to 6 inches deep according to the softness of the ground." The foot-prints led in a continuous line for between 5 and 6 miles right up to accused's door, except on certain stony places on the route where no foot-prints could be seen. On such places, the Inspector alleges, they found marks of red soil as connecting links between the foot-prints. He had previously stated that the soil south of deceased's mandra was red. Trooper Sotiri says "where the foot-prints touched the stones they left marks of red mud." The Rural Constable says the tracks they were following passed patches of stony ground. "At such places, however, the track could be followed by traces of red clay because the place where the murder was committed was red soil." L/Cpl. Agapios who twice followed this line of foot-prints did not observe this remarkable fact that where the foot-prints ceased from time to time throughout the five or six miles they could be followed by traces of red clay. There was no evidence at all of any traces of red clay being found on accused's boots. The wife of deceased deposed that the soil round her mandra is of three kinds, red, white and black. That small pieces of the kind of red mud at deceased's mandra should conveniently drop off wherever the line of foot-prints passed over stony ground throughout the 5 or 6 miles separating the mandras in preference to the non-red mud through which the boots went for most of the route is to suppose something little removed from impossible.

Inspector Jemal states that the two lines of foot-prints "were those of a person who turned his toes outwards and walked heavily on the outer edges of both heels." This was

not proved by any reproductions of the foot-prints themselves. The accused's boots are exhibits in the case: they are obviously very old from the state of the leather, soles, and nails. An examination of these boots shows no sign of either of the peculiarities alleged—peculiarities which would be obvious if they were as marked as Inspector Jemal endeavoured to make out. Further, that in following the foot-prints 5 to 6 miles he had the accused under observation, and noticed that his walk had the peculiarities exhibited in the foot-prints. The accused had been arrested for the murder of the deceased and cautioned on the previous day. It has long been the regular practice of the Police here to take the accused with some of the witnesses to the scene of the crime, and question the witnesses in his presence. The natural result of such a procedure was that the accused either by his demeanour when witnesses are deposing against him, or by word or action, did or said something to incriminate himself. That is precisely what happened in the present case; a person arrested and cautioned on a charge of murder was made to accompany the Inspector investigating the case, who had him under observation about 2½ hours while following foot-prints for 5 or 6 miles. As a result of his observation the Inspector gave evidence of important facts tending to convict the accused. In other words the accused was being made to convict himself. We desire to point out that such a practice is illegal and highly improper, and that, if it has not already been done, the Chief Commandant of Police should consider the propriety of issuing instructions forbidding the continuation of this most irregular and unfair practice, and at the same time pointing out that a person in custody must not be removed from the place where he is detained, unless for the purpose of taking him before the Court. To return to the peculiarities of the accused's walk, the Inspector says accused when walking turns out his toes to the extent of about 60°, and he adds "all the foot-prints I was trailing whether running or walking showed this peculiarity." Short of serious physical deformity, which is not suggested, it would not be possible for a man in heavy villagers top-boots to run through deep mud with six-foot strides, and keep his feet turned out at an angle of about 60°.

The evidence on which the guilt or innocence of the accused turned was the similarity between the foot-prints found half a mile away from accused's mandra and the impression made by Inspector Jemal a week later of accused's right boot. "Where the character of the soil and the interval of time permit such a thing," says Mr. Justice Wills in his work on *Circumstantial Evidence*, "the most satisfactory mode is to dig out and preserve the original foot-prints; where that cannot be done, casts in plaster of paris should be taken.

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Where neither of these methods are adopted and the identification is sought to be established merely by the Police evidence, juries are apt to pay very little attention to it." Considering the vital importance of this foot-print, the more certain method should have been followed, and the original foot-print produced. It is true the Inspector took a plaster cast, but not on the same earth beside the original foot-print, as the authorities say should be done.

On 22nd January Inspector Jemal took a plaster cast of one of the foot-prints leading away from deceased's mandra and about half a mile distant from it. This is Exh. 6. A week later he made an impression with the accused's boot, and the cast of this impression is Exh. 7. The Inspector admitted that the proper way to have done this would have been to make the impression with accused's boot beside the foot-print alleged to have been made by accused. The right boot of the accused was put in evidence as Exh. 8; on one side of the sole the Inspector marked three nails of different heights and one out of alignment with the other two. On the other side of the sole he marked four nails of varying heights, measured their size and the spaces between them. He alleges that all these peculiarities in these two groups of nails appear in Exhs. 6 and 7.

The one impression taken by Inspector Jemal on which the accused's conviction really rests is a very poor impression of a foot-print, and it presupposes that by a strange coincidence, after walking at least half a mile over muddy ground, in some places the mud being six inches deep, the sole of the boot suddenly divests itself of mud, so as to allow an impression, very detailed in parts, to be made. It shows neither the toe nor the heel, and for this reason it is impossible to say even the approximate length of the boot that made this foot-print. Seven nails can be distinguished in Exh. 6, while the cast of the impression made by accused's boot shows twenty-one well-defined nails. By reason of peculiarities in the shape, height, and alignment of certain nails in accused's boot which are said to appear in the cast of the foot-print found half a mile from deceased's mandra, the trial Court held that this foot-print (Exh. 6) was made by accused's boot. Upon a capital charge we should have considered it unsafe to found a conviction upon the impression of part of a foot-print on which all the details are not clearly distinguishable. But there was evidence before the Court upon which they could reasonably come to that conclusion.

It is material to inquire what evidence there was to establish that the two lines of foot-prints between the two mandras were all made by the same boot that made Exh. 6, viz., the accused's?—merely inferences which each

witness drew as a result of his observation. Inspector Jemal says "the prints I and my party were following were perfectly clear and distinct." It depends on what he means by these words—the fact remains that only one foot-print in ten to twelve miles was sufficiently distinct to make a cast. The Inspector says he measured some of the foot-prints leading from deceased's mandra and found the measurements identical with those of the foot-prints approaching. By reason of the rough and ready means employed in making these measurements this evidence is valueless, and owing to varying conditions and nature of the ground between the mandras, not to be relied on.

L/Cpl. Agapios says the foot-prints were clear, and his conception of clearness is well illustrated by the cast of the best foot-print he found, and which is in evidence as Exh. 11. The impression shown in this cast is scarcely recognizable as a foot-print at all, and is so blurred that no inferences can be drawn from it as to the shape or size of the boot that made it.

In the two lines of foot-prints between the two mandras, which are between five and six miles apart, there would be well over 20,000 impressions. The fact that these 20,000 foot-prints, most of them made on soft ground immediately after rain, only yielded one clear plaster cast is phenomenal, and raises suspicions as to the veracity of the evidence as to their being identical throughout the whole distance. There is no evidence of any comparison having been made between the suspected foot-print and the remaining ones throughout the two tracks, except with the naked eye. The formal and detailed examination was no doubt that carried out by Inspector Jemal on the 22nd January, but he told the Court below that, including the taking of one plaster cast and the measurement of some 60 foot-prints, he spent only 2½ hours in following the trail over muddy ground over a distance of six miles, which suggests that even his examination was of a casual nature. With regard to the evidence tending to show that the two lines of foot-prints were made by the accused we observe :—

(1) The foot-prints were discovered after many villagers wearing top-boots had been passing to and from the scene of the murder.

(2) The first Police officer to search for and follow foot-prints found one line only beginning at deceased's mandra going for the distance of a mile and no further. He says he noticed no other foot-prints.

(3) A few hours later another officer is able to distinguish only one set of foot-prints leading from deceased's mandra to that of accused although many other persons had passed along the trail.

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(4) Only in the late afternoon of the same day a second set of foot-prints was found approaching deceased's mandra.

(5) The examination and comparison of the foot-prints was not carried out with sufficient care.

(6) The foot-prints were not guarded to prevent any possibility of interference.

(7) The plaster cast of one foot-print in a twelve-mile trail—the only one that can be identified—was made 24 hours after the accused's boots left the possession of the accused.

(8) No evidence to show that accused's boots were kept by the Police under lock and key, or that Bairam or anyone else could not have had access to them.

(9) The stones alleged to have been put by Trooper Sotiri to mark the impression of which Exh. 6 is the cast, were not seen by Inspector Jemal.

(10) The accused was seen in neighbourhood on the evening of the 20th and the foot-print may have been made while accused was there lawfully.

(11) The line of foot-prints approaching deceased's mandra only begins three donums from accused's.

(12) The accounts given of the following of the trail by Inspector Jemal, L/Cpl. Agapios, Trooper Sotiris, Bairam Tahir, and Rural Constable Karletti are inconsistent. L/Cpl. Agapios and his companion say that he and his companion both walked sometimes on right of the trail, sometimes on the left " as convenience dictated." Jemal says he saw tracks of two persons only, whereas in accordance with the evidence there should have been seven tracks of foot-prints in addition to the track they were trying to trace. Inspector Jemal says the track of the suspected criminal which he was following was throughout the whole distance of 5 to 6 miles in the middle between a track made by military boots, and one made by native boots. If the evidence of L/Cpl. Agapios, and Bairam is correct, Inspector Jemal must have been following the wrong track.

(13) In the mandra to which the foot-prints are alleged to have led there lived others capable of committing the murder.

(14) There were foot-prints leading beyond accused's mandra, but there were not examined or traced by the Police.

(15) A plan showing the various localities, and the lines of various footprints, would have been of great help to the Court, but none was produced before the trial Court. In the absence of a proper plan the possibility is not excluded of the foot-prints under suspicion having been

made when accused was going about in that neighbourhood or at the time he was being taken under arrest on 21st to Evdhimou, when he could have passed near deceased's mandra.

The case turns entirely upon the evidence of foot-prints, and its value varies according to the care with which the identity of the foot-prints is established. "Nor must it be overlooked," says Mr. Justice Wills, in his treatise cited above, "that, even where the identity of foot-marks has been established beyond all doubt, they may have been fabricated with the intention of diverting suspicion from the real offender, and fixing it upon an innocent party." (6th Ed., p. 220). He cites a remarkable case where a young man was convicted of attempted murder upon the evidence that his shoes corresponded exactly with the foot-prints left at the scene. The accused was not on bad terms with his accuser, while his father had had two violent quarrels with him. It was later established that the father had taken his son's boots and committed the offence.

In the present case the evidence on which the conviction rests is that of Police Officers, who are nowhere regarded as independent witnesses. "With respect to policemen, constables, and others employed in the suppression and detection of crime, their testimony should usually be watched with care, not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives, and give a colouring of guilt to facts and conversations, which are, perhaps, in themselves consistent with perfect rectitude. 'That all men are guilty, till they are proved to be innocent,' is naturally the creed of the police; but it is a creed which finds no sanction in a court of justice." *Taylor on Evidence*, 11th Edition, Vol. 1, p. 66. "Constables and Police officers" says the same learned author at p. 74 "are immediately on the alert, and with professional zeal ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their determination or skill, and with something like the feeling of a keen sportsman, they determine, if possible, to bag their game. Innocent actions may thus be misinterpreted—innocent words misunderstood, and as men readily believe what they anxiously desire, facts the most harmless may be construed into strong confirmation of preconceived opinions." These observations apply here with much greater force owing to the habitual untruthfulness of witnesses in Cyprus. In our opinion—in the case of two

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members of the Court the result of nearly twenty-five years experience in the Courts of the Colony—Courts here should exercise the greatest caution before acting upon the evidence of members of the Police Force, where it is unsupported by independent testimony and particularly in cases of serious crime sought to be proved by circumstantial evidence.

The motive put forward by the prosecution was to use the words of counsel in opening the case that "accused killed deceased because accused was afraid that, if he did not dispose of deceased, deceased might have killed accused." One witness was called to prove this allegation, but entirely disbelieved by the Court. The Court's finding that the motive for the crime did "not emerge clearly, but in all probability was revenge for information which accused suspected the murdered man had given" is pure conjecture unsupported by evidence. The case as it stands on the record is one in which no motive is shown.

With regard to being in possession of a gun with one barrel recently discharged accused stated, as he did when first questioned, that he had fired at a partridge the day before. The Court found such explanation "unconvincing." If the explanation were true, it is difficult to see how the accused could convince the Court otherwise than in the way he tried. The Court further commented on the fact that accused did not call any of the inmates of his house to corroborate his story that he retired to bed at sunset. The burden lay not upon the accused to establish his innocence, but upon the prosecution to establish his guilt. The burden resting upon the prosecutuon is to prove the accused's guilt beyond any reasonable doubt. The evidence in the present case is consistent with (1) the accused having made the foot-print in Exh. 6 on the night of the murder; (2) with his having made it on a lawful occasion while going about as a shepherd in that vicinity; (3) with his having made it while being taken by Trooper Sotiri from his mandra to Evdhimou Police Station on the morning of the 21st January; (4) with the foot-print in question having been made by anyone having possession of the accused's boot during the twenty-four hours preceding its alleged discovery by Inspector Jemal; and (5) with it having been made by some other member of accused's household.

Can the burden upon the prosecution be said to have been discharged by evidence equally consistent with the acts from which accused's guilt was inferred having been done by him on a lawful occasion; and equally consistent with their having been done by other persons? In our opinion the answer is emphatically: No. Where the evidence does not exclude the possibility of the offence having been committed by other persons it raises a suspicion only, strong

or weak, as the case may be, which fails to satisfy the principle that in a criminal case the guilt of the accused must be proved beyond any reasonable doubt. It was laid down in *R.* v. *Hodge* (1) that " where a criminal charge depends on circumstantial evidence, it ought not only to be consistent with the prisoner's guilt but inconsistent with any other rational conclusion." The principle embodied in this decision is accepted as sound law by the Editors of the English and Empire Digest, Halsbury's Laws of England, and by the following authorities on the law of evidence, Taylor, Wills, Phipson, Best and Roscoe. Two Canadian cases are cited in the English and Empire Digest, the first *R.* v. *Turnbull*, where it was laid down as follows :— " When circumstantial evidence is relied upon to prove the guilt of any person accused of a criminal offence the circumstances and facts proved to the satisfaction of a jury must be not only such as are consistent with the guilt of that accused person, but must be such as are inconsistent with any other reasonable conclusion except the guilt of that accused person " (2). The second case is *R.* v. *Tymko* (3) which decides that: " It is not admissible to convict a person on circumstantial evidence if such evidence can be interpreted to give any other explanation than the accused person's guilt." (E. and E. Dig., Supplementary No. 9, referring to Vol. 14, p. 358). Taylor says in this connection : " But, admitting the facts sworn to are satisfactorily proved, a further, and a highly difficult duty still remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion ; for it is only on this last hypothesis that they can safely convict the accused. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. Moral certainty and the absence of reasonable doubt are in truth one and the same thing." Vol. 1, p. 74. There can be no doubt that this principle of law is accepted and applied by the highest Courts in England. In *R.* v. *Wallace* (4), the headnote is " The Court will quash a conviction founded on mere suspicion." And in *R.* v. *Bookbinder*, reported at p. 59 of the same volume the headnote runs : " There ought not to be a conviction when the evidence is equally consistent with innocence and guilt."

In considering findings of fact an Appellate Court treats with great respect the opinion of the trial Court and will be very slow to differ from it where the findings in any way

(1) 2 Lew. C.C. 227.
(2) 14 E. & E. Dig. p. 358.
(3) (1924) 42 Can. Crim. Cases 147.
(4) 23 Cr. App. R. 32.

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turn upon the credibility of witnesses. It will hesitate long, says the judgment of the Privy Council in *Khoo Sit Hoo* v. *Lim Thean Tong* (1), before it disturbs the findings of a trial Judge based upon verbal testimony, except where the trial Court has already failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on a more careful analysis to be substantially inconsistent with itself, or with indisputable fact. A careful examination of the evidence, which is almost entirely that of Police officers, discloses many serious inconsistencies and contradictions, and therefore shows that some of the evidence on which the trial Court based its conviction must be manifestly false, and for these reasons the findings under review come within the precise terms of the judgment just cited.

In concluding our judgment we would like to cite a passage from the judgment of the Court of Criminal Appeal delivered by the Lord Chief Justice in *R.* v. *William Herbert Wallace* (2), as it so well expresses the views of each member of this Court upon the present appeal. After stating that the evidence had been critically examined before them for two days by experienced counsel the judgment proceeds: "Suffice it to say that we are not concerned here with suspicion, however grave, or with theories, however ingenious. Section 4 of the Criminal Appeal Act, 1907, provides that the Court shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence . . . The conclusion at which we have arrived is that the case against the appellant, which we have carefully and anxiously considered and discussed, was not proved with that certainty which is necessary in order to justify a verdict of guilty, and, therefore, that it is our duty to take the course indicated by the section of the statute to which I have referred. The result is that the appeal will be allowed and this conviction quashed."

The application, which is treated as an appeal, is allowed and the conviction of the Assize Court quashed.

Appeal allowed; conviction quashed.

(1) (1912) A.C. 325.
(2) 23 Cr. App. R. 23.