[JACKSON, C.J., AND HALID, J.]

(Sept. 26, 27, 30, Oct. 3, 4, 11, 1946)

DJEMAL MEHMED MITAS, *Appellant*,

v.

REX, *Respondent*.

(*Criminal Appeal No.* 1821.)

Criminal Law—Murder—Finding of trial Court—Further evidence called by Court of Appeal—Conclusions of fact by Court of Appeal—Common design—Expert medical evidence—Police record—Inadmissible evidence.

The appellant was convicted of the murder of K.H. The dead man's body had four bullet wounds and Dr. R., an expert medical witness, was called by the defence and asked to give his opinion on the conclusions that ought to be drawn from the facts observed by Dr. E., the Government Medical Officer, who carried out a post-mortem examination of the dead man's body. Dr. R., who at no time saw the body and his opinions had therefore to be based solely on the evidence of Dr. E., stated in his evidence to the trial Court that in his opinion the dead man must have been shot by more than two persons ; probably by four, and he gave reasons for his opinion. While rejecting much of Dr. R's evidence, the trial Court did not exclude the possibility that the shots were fired by more than one person. The Court's acceptance of that possibility raised the question of common design and whether or not there was evidence from which common design could properly be inferred. The Appeal Court having heard fresh evidence,

Held, that, (1) there was no reliable evidence to support the view of the trial Court that more than one person may have taken part in the shooting. That conclusion made it unnecessary for the Appeal Court to examine any question of common design.

(2) On a trial for homicide, the evidence of an expert medical witness, who has not seen the dead body but has heard its condition described in the witnesses' evidence in Court, must clearly be received with the greatest caution.

(3) A police record, kept by an officer as part of his official duty, recording statements made to him by telephone is not admissible as evidence.

Appeal from the Assize Court of Nicosia.

M. Fuad Bey for the appellant.

P. N. Paschalis, Acting Solicitor-General, for the respondent.

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The facts of the case are fully set out in the judgment of the Court which was delivered by :

JACKSON, C.J. : This is an appeal against the verdict of the Assize Court at Nicosia by which the appellant was convicted of murder in July of this year and sentenced to death.

On the 11th October, 1941, five years ago to-day, Kara Hassan, the Mukhtar of Ayios Epiphanios, set out from his village at about sunrise to attend the Police Court at Lefka, about two and a half miles away to the North. He was alone, riding his donkey and travelled by a footpath which, for the greater part of its length, was at a considerable distance from any village or main road. At about 9 o'clock that morning a woman, returning from Lefka along the same path, found Kara Hassan's dead body lying upon the path at a point roughly half way between his village and Lefka. The dead body of a donkey lay about six feet away. The medical evidence placed the death between 6 o'clock and 8 o'clock that morning. The dead man's body had four wounds ; one through the head, entering under the left ear and passing out above the right ear ; one through the thorax, entering on the right side below the armpit and passing out on the left side below the lowest rib ; one across the abdomen, from right to left, passing just below the skin ; and one through the left thigh, entering from behind, through the lower part of the buttock and passing out through the forward part of the inside of the same thigh. The cause of death was the wound through the head, which must have been immediately fatal. The donkey's body had one wound ; the entrance was a short distance below the spine on the left side, about midway along the back, and the exit was through the right eye. Close to the man's body, a foot or two away, three brass cartridge cases of 936 mm. in calibre were found. These cases lay close to one another, about a foot or eighteen inches apart. About 4 or 5 yards away from the body a fourth cartridge case of the same kind was found. It lay at the foot of a rock about 12 feet high. We shall refer to that rock later. These cartridge cases were of a kind used in Italian carbines, a weapon supplied to the troops of certain Commando units which were mobilised at the time of the crime. One of these units was stationed at that time in the neighbourhood of Lefka. The doctor who examined the dead body was shown a live cartridge of the same kind as the spent cases found near the body and he said that all the wounds might have been caused by a bullet of that kind. He described all the entrance wounds on the deceased as of the same size and gave this size as that of a chick pea.

We have referred in some detail to the wounds on the deceased and on the donkey and to the cartridge cases found near the dead body because the main discussion in our judgment will relate to the evidence on those matters and to the conclusions to be drawn from it. But we need only mention briefly the rest of the evidence in the case because, in our view, it gives rise to no point of difficulty.

The Assize Court's judgment shows clearly the main evidence on which they relied when they convicted the appellant. He is a shepherd and came originally from the village of Vrecha in the Paphos district. In 1935 he came to live at Kara Hassan's village, having married a woman who lived there. In 1937 he was sentenced to prison for five years for the theft of sheep from the Paphos district and he was released in June, 1941, on ticket of leave, some seventeen months before the full term of his sentence had expired. On his release he returned to Kara Hassan's village and lived in a mandra close by. Three and a half months later Kara Hassan was shot.

There was, in our opinion, very ample evidence which justified the Assize Court in coming to the main conclusions on which they based their conviction of the appellant. The Court found that appellant had borne a long standing grudge against the deceased and believed the deceased to have been responsible for all his troubles. In this connection there was a significant admission which the Assize Court believed the appellant to have made to one of the witnesses while hiding in the forest a year after the crime. When this witness, who was a Greek, asked the appellant why he had killed Kara Hassan, the appellant replied, "Even if your Christ was in my position he would have done the same thing."

The Assize Court also found that, before the crime, the appellant had openly declared, on several occasions, that he would shoot the deceased; that on the night before the crime he had in his possession an Italian carbine and cartridges for it; that he was in his mandra on that night within easy reach of the place where the deceased was shot the next morning; and that he was seen on that morning, later than the time of the shooting, making off towards the mountains from the direction of the place where the deceased was shot and carrying something that looked like a gun. The Assize Court also found that both the appellant and the deceased had been summoned to appear before the Police Court at Lefka on the morning of the crime. The case to be heard that morning was one in which the appellant was charged with having been drunk and disorderly in the deceased's village on a day in the previous July, and the deceased was one of the witnesses in the case,

if not also a complainant. The appellant was at large on *ticket of leave and there was at least a possibility that if* he were convicted he might be sent back to prison to serve the unexpired portion of his sentence. It was while Kara Hassan was on his way to give evidence in that case that he was shot.

In addition to the statement by the appellant that we have already mentioned, made a year after the crime and admitting that he had committed it, there was another admission that the Assize Court believed that the appellant had made. This was a statement made to a different witness in 1945, while the appellant was still hiding in the forest. When questioned by this witness as to why he was in hiding, the appellant replied that he had shot the Mukhtar of Ayios Epiphanios and he added, "I first shot the donkey ; the man fell down and then I shot the man."

The appellant's own answer to all that evidence was a general denial of all the statements of fact in it that were against him. He said that he had left his mandra near Ayios Epiphanios on the day before the crime was committed and had gone to hide in the mountains until the unexpired period of his sentence of imprisonment had passed. He would then have no fear of going to Court for the case that we have already mentioned and for another that was also pending against him. While hiding for the reason given, he heard that Kara Hassan had been murdered and that he himself was suspected of the murder. He had consequently to remain in the forest indefinitely. He denied that he had ever possessed an Italian carbine or any other weapon than the revolver found in his possession when he was arrested in March, 1946.

The Assize Court rejected the appellant's story and we think, having regard to the evidence as a whole, that they were entirely right in doing so. The evidence that the Assize Court believed told a very plain story and on that evidence no other conclusion could have been reached but that the appellant was guilty of the crime with which he was charged.

But the issue was complicated by certain medical evidence called by the defence. Dr. Rose, a highly qualified surgeon, was asked to give his opinion on the conclusions that ought to be drawn from the facts observed by Dr. Economides, the Government Medical Officer, who carried out a post-mortem examination of the dead man's body some eight or ten hours after his death. Dr. Rose at no time saw the body and his opinions had therefore to be based solely on the evidence of Dr. Economides as given in the Assize Court and on what Dr. Rose could himself observe by an inspection of the place at which the shooting occurred.

We think that the Assize Court went a little too far in saying that such evidence is generally unreliable. Evidence of that kind must clearly be received with the greatest caution and it is usually given with no less.

Having heard the evidence of Dr. Economides, Dr. Rose told the Assize Court, very positively, that in his opinion the dead man must have been shot by more than two persons; probably by four, and he gave reasons for his opinion. We shall be obliged to consider this evidence in some detail at a later point in our judgment. At the moment we are concerned only with the conclusions of the Assize Court upon it. While rejecting much of Dr. Rose's evidence, they were clearly influenced by it to some extent, for they said in their judgment that they did not exclude the possibility that the shots were fired by more than one person and they finally gave it as their belief that "it was the accused who killed the deceased, with, perhaps, the assistance of one more person."

It was not, of course, the object of the defence to suggest by means of Dr. Rose's evidence that others, in addition to the appellant, had taken part in the crime. The defence was that the appellant was in no way concerned in it. The argument based on Dr. Rose's evidence was that the shooting had occurred in a manner so different from the manner alleged by the prosecution that no faith could be placed in their case. It was also suggested that it was at least possible that the deceased had been shot by a party of 8 or 10 soldiers, members of a Commando Unit, who had been seen carrying rifles near the place of the crime a short time after it had been committed. There was not the slightest foundation for that suggestion and it appears to have been rightly ignored by the Assize Court.

Nevertheless the view of that Court that more than one person might have taken part in the shooting did clearly introduce into the case some considerations which at no time formed part of the case of the prosecution. Up to the end of the trial the prosecution maintained that it was the appellant, and he alone, who had shot the deceased. Moreover there were four wounds, only one of which was declared by the Medical Officer to have caused death. If more than one person had taken part in the shooting it could not be determined which of them had inflicted the fatal wound, and in order to justify the conviction of the appellant as a participant, it would be necessary that the Court should have had evidence entitling them to find that whoever had taken part in the shooting with the appellant had acted in concert with him in the execution of a common design. It was not argued for the defence

at the trial that no such evidence was to be found, but this is one of the grounds of appeal. The judgment of the trial Court does not deal expressly with this particular point except by referring to the possibility that the appellant, when he killed the deceased, had the *assistance* of one other person and there are passages in the record of the trial which indicate that the Assize Court had the point of "common design" in mind.

We must refer here to one point in the Assize Court's judgment. They said that they believed that "it was the accused who killed the deceased with perhaps the assistance of one more person." If by this the Court meant that it was the accused who had fired the fatal shot, we see no evidence upon which that conclusion could be based if another person had also taken part in the shooting. But doubt on that point would not upset the verdict if common design between the two persons were established.

The only evidence from which the existence of such a common design could be inferred was the evidence of the circumstances in which the crime was committed. One possible interpretation of that evidence would be that if two persons had taken part in the shooting, they had both chosen a particular day on which the dead man was to make, alone, a particular journey, and the same spot on a path nearly three miles in length at which to lie in wait for him. When he reached that spot they put four shots into him, almost certainly in rapid succession. The Assize Court may have thought that if any two persons had acted in the way described, the possibility that they had acted independently of one another was so remote as to be negligible.

But there might be other interpretations of the same evidence and we do not know, since the Assize Court has not told us, precisely upon what grounds they based their conclusion that, if two persons took part in the shooting, they acted in pursuance of a common design. We think that the trial Court should have given some indication of their reasons for a conclusion which was essential to their final verdict on the supposition that the Court made, namely, that two persons might have taken part in the shooting.

Nor do we know, for here too the trial Court's judgment is silent, upon what grounds they admitted the possibility that more than one person might have taken part in the crime. This was the possibility that gave rise to the question of common design and without it that question would not have arisen.

The only evidence which could have led the trial Court to admit that possibility was the evidence of Dr. Rose. There was the evidence of a villager who heard some shots on the morning of the crime while gathering olives in a tree three-quarters of a mile from the place where the shooting occurred. This witness indicated, by tapping on a table in the trial Court, the rapidity with which the shots, which he had heard nearly five years earlier, followed one another, and the suggestion of the defence was that this speed of fire was greater than could have been achieved by one man using a rifle of the type with which the dead man was shot. On the particular point with which we are now concerned, the number of persons taking part in the shooting, the trial Court did not accept this witness's story and we think they were right in rejecting it. The other evidence, in so far as it bore on this point, was against the suggestion of more than one assailant. In each of the two statements which the trial Court believed that the appellant had made, admitting that he had shot the murdered man, the appellant had referred to himself alone. When he was seen by his nephew making off towards the mountains on the morning of the crime, in a direction away from the spot where the crime had occurred, and carrying something that looked like a gun, the nephew did not say that anyone was with him. And there is no evidence that, while he hid in the forest for more than four years, he had any companion hiding with him who was in any way concerned in this crime.

It seems clear, therefore, that it was the evidence of Dr. Rose, and that alone, which led the Assize Court to admit the possibility that more than one person might have taken part in the shooting. The trial Court, as we have said, rejected the main suggestion of this witness's evidence, namely, that there were four assailants. If they rejected the possibility of four, why did they admit the possibility of two? Since they did not tell us, we do not know. But as they appear to have been influenced by Dr. Rose's evidence to that extent, we have been obliged to give it a good deal more attention than we would otherwise have thought necessary.

We are not, of course, bound by the findings of the trial Court even on questions of fact. If we feel doubt about them we are at liberty to call further evidence and to form our own conclusions of fact upon it. We have done so in this case. We have heard further evidence from Dr. Economides, who performed the post-mortem examination and was the only doctor who saw the body, and from Dr. Rose. And we have had an experiment performed by the

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Commissioner of Police, in the presence of counsel for both sides, to test certain effects of cartridges of the same type as those of which four cases were found near the body. We have also visited the scene of the crime, with counsel on both sides, and there it was pointed out to us how and where the dead body of the man and that of the donkey lay and where the cartridge cases were found. Other places referred to in the evidence were also shown to us.

Dr. Rose said, as we have already observed, that in his opinion, more than two persons must have taken part in the shooting. He said he thought that there were four and that they had fired at the deceased simultaneously, two from one side of the path and two from the other, from a range " at least beyond 15 or 20 yards." He was very positive in expressing these opinions and he gave the following reasons for them: The deceased, he said, must have been in an upright position, either riding his donkey or standing, when he received the wounds. The four wounds were all inflicted before death and were " roughly horizontal " and any of the three major wounds, the wound through his left thigh, the wound through his thorax, or the wound through his head, would have knocked him down at once. None of them could have been inflicted while he was lying flat on the ground for, if any of them had been, the bullet must have been found in the ground, under or near the body, and no bullets had been found nor any marks of them. He estimated the range at which the shots were fired from the size of the entrance wounds, as given by Dr. Economides, and said that as the entrance wounds were all the same size the shots must have been fired from the same range.

The first point that we must mention in relation to this evidence is that, though it differed so greatly from the case for the prosecution and was built upon the evidence of Dr. Economides, the only doctor who had examined the dead man's wounds, not a single question was put to Dr. Economides in cross-examination to enable him to express his opinion whether or not these wounds must necessarily have been inflicted by more than one assailant or how they could have been inflicted by one alone. This very remarkable omission can hardly have failed to strike the Assize Court, but Dr. Economides was not recalled when, during the case for the defence, the suggestion that there must have been several assailants was first made through the evidence of Dr. Rose. We had therefore to call Dr. Economides as a witness ourselves and to give Dr. Rose the opportunity to hear this further evidence and to draw any conclusions he liked from it.

Dr. Economides told us that, in so far as the dead man's wounds were concerned, he saw no reason to think that there had been more than one assailant. Assuming that the wound through the deceased's thigh was the first,—and there are reasons which we shall presently give for thinking that it was, and that the deceased was knocked off his donkey by it—Dr. Economides was of the clear opinion that, after receiving that wound, the deceased could have raised himself into a sitting position on the ground by means of his arms and that while in that position he could have received the wound through the thórax and the fatal wound through the head, one after the other. The minor wound, under the skin of the abdomen, could have been received at any time. Dr. Economides illustrated his opinion with the help of a constable in our Court whom he placed on the floor in the position which he said that the deceased could have assumed. He had attended the deceased professionally before his death and said that he was a man of about 58 and of strong constitution. Moreover, it must be remembered that if the deceased had been knocked off his donkey by the wound through his thigh, it is only natural that he should have tried to raise himself from the ground, even if he did not see his assailant, as we think he did, standing near him with a rifle and clearly intending to finish him off.

If the deceased had been in the position described by Dr. Economides when he received the wound through the thorax, the bullet must have struck the ground somewhere in the neighbourhood of the body, for the wound was in a downward direction. But the angle was acute and it is impossible to tell at what distance from the body the bullet would have struck the ground, nor exactly in what direction, for though the wound was from right to left, it cannot be known at what angle, pivoting on the waist, the dead man's body had turned when this shot was received. We have seen the ground on which the body lay. It is very broken and uneven, with patches of stones and loose sand. It would be extremely difficult to find a bullet in it, particularly if the bullet struck the ground while its velocity was still high, and we cannot consider the fact that no bullet was found as sufficient by itself to disprove what, in our opinion, was the entirely reasonable theory advanced by Dr. Economides.

The wound through the deceased's head was in an upward direction and there is no reason to suppose that the bullet which caused it struck the ground anywhere near where the body was found. If this wound had been inflicted while the deceased was in the position described by Dr. Economides, it would have been necessary, even after all

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allowance had been made for any possible twist of the head, that the direction of fire should have been from a point at any rate no higher than the lobe of the deceased's ear when he was in a sitting position on the ground. There is a marked slope in the surface of the ground at that spot and we see no reason why an assailant, crouching on a level below that at which the deceased was sitting, could not have inflicted that wound.

The wound on the abdomen was horizontal. It could clearly have been inflicted while the deceased was in any position in which his abdomen was exposed, either the position described by Dr. Economides or any other, and there need not necessarily have been any trace of a bullet in the ground anywhere near the deceased.

We come now to the wound through the thigh and to our reasons for thinking that this was probably the first.

In one of the statements which the Assize Court believed that the appellant had made to a witness, admitting that he had shot the deceased, he said, "I shot the donkey first; the man fell down and then I shot the man." Now that is exactly the picture of events that must come to the mind of anyone who visited the spot and tried, while there, to imagine how the shooting had occurred, having regard to the positions in which the dead man and the dead donkey lay, to the wounds on both bodies, to the places at which the cartridges were found.

At the scene of the crime there is a very large rock on the left side of the path along which the deceased travelled. One end of the rock almost touches the edge of the path. Anyone standing against the almost perpendicular side of this rock which faces Lefka would be perfectly concealed from anyone travelling in the direction which the deceased took, until the traveller, suddenly rounding the end of the rock, came level with the man in wait. There would be only a few feet between them. Even then the latter might well escape observation if the traveller was not on the look-out. At the foot of that side of the rock one cartridge case was found. If, according to the appellant's own admission, the donkey was shot first, the most obvious conclusion is that this shot was fired very shortly after the donkey, with the dead man astride it, had rounded the rock behind which the assailant was concealed. The donkey's body was found lying beside the path, with its head in the direction of Lefka, about 7 or 8 yards from the face of the rock where the single cartridge was found. The dead man's body lay on the path, 2 or 3 yards nearer the rock.

The appellant had said that when the donkey was shot the man fell down, and that statement receives added significance from evidence which indicates very strongly that the shot which entered the donkey's body passed first through the rider's thigh. The assailant, of course, may not have known that the rider had been hit.

The wound in the dead man's thigh entered the lower part of his left buttock from behind and it came out at point inside his thigh. Allowing for the slight inclination of a man's thigh when sitting astride a donkey, the direction of the wound was approximately horizontal and it travelled from back to front, slightly across the direction in which the deceased was travelling. The entrance wound on the donkey corresponded with the position of the exit wound on the dead man's thigh, assuming that he was astride the donkey at the time. It was about three inches below the donkey's spine and on the left side. The exit wound on the donkey was through the right eye. Dr. Economides did not see this exit wound but he was firmly of opinion that the donkey had been killed by the same shot that had traversed the man's thigh. He based that opinion on the correspondence between the exit wound on the man's thigh and the entrance wound on the donkey and between the direction of the wound through the man's thigh and the direction of the first four inches of the course of the wound in the donkey. He saw the course of the wound in the donkey for that distance when a police officer, before seeing the exit wound, had begun to cut the donkey open to find the bullet. When Dr. Economides learned that the exit wound was in the donkey's right eye, he found nothing in that fact which conflicted with the opinion that he had already formed. Nor can we.

Now the evidence that we have reviewed concerning the wounds on the dead man's thigh and on the donkey, coupled with the appellant's own admission that we have quoted, seems to us to be entirely in accord with the opinions expressed by Dr. Economides as to the manner in which the dead man's wounds could have been received. Those opinions were based on the assumption that the wound in the thigh was the first and, in our opinion, there is very strong support for that assumption.

What then becomes of the opinions of Dr. Rose? What reason is there to conclude that the deceased must have been upright, either standing or riding his donkey, when *all* four wounds were received? Dr. Rose thought so because any of the three major wounds must have knocked him down at once and, in the doctor's opinion, neither of the other two major wounds, could have been inflicted while he was on the ground, at any rate without leaving

plain marks of bullets. But Dr. Rose was obviously picturing the man as lying *flat*. If the wound in the thigh was the first, there is no reason to suppose that he was lying flat and every reason to suppose that he was not. Dr. Rose did not appear to us to have even considered the possibility that the man might have been in a sitting position after having received the wound in his thigh. He admitted that possibility, with obvious reluctance, when questioned by us, though he had never seen the wound and had in fact been badly mistaken about it throughout his evidence in the Assize Court. There he repeatedly referred to the thigh bone as having been "shattered" and based his opinions on that assumption. In fact the thigh bone had not been shattered. One small splinter had been chipped off it. That was a bad mistake, because Dr. Rose, not having seen the wounds himself, could only base his conclusions on what Dr. Economides had said about them. But in this instance, as well as in another that we need not mention, he based his conclusions on something that Dr. Economides had not said and on something that was very different from what he had said.

Further, Dr. Rose said that all four wounds were "roughly horizontal." Two of them, the wound through the thorax and the one through the head, were certainly not horizontal, even roughly.

If the deceased was in the position described by Dr. Economides when he received the three wounds on his body, the question of bullet marks on the ground would arise only in the case of the downward wound, the wound through the thorax. We have already referred to the nature of the ground and to the difficulty of deducing from this wound the locality at which the bullet would have struck, and, in our opinion, the fact that no bullet mark was found gives no sufficient reason to think that Dr. Economides was wrong in his opinion as to the way in which this wound could have been inflicted.

In our opinion, there is no reason whatever to think that the dead man must have been in an upright position, either standing or on his donkey, when all four wounds were received. There is strong reason to think that he was not in that position when he received two of them, the wound through the thorax and the wound through the head. Holding that view, we can see no foundation for Dr. Rose's opinion that all four wounds must have been received simultaneously, and consequently no foundation for his view that four men, or even more than two, as he said, must have taken part in the shooting. In our opinion there was nothing in the evidence to suggest that there were more than one. All the wounds were said by Dr. Economides to have

been inflicted before death. But only one was immediately fatal and we see no reason why the other three could not have been inflicted first or why all four could not have been inflicted within a time in which one man could have loaded and fired four times with a rifle of the type used.

There were two other points in Dr. Rose's evidence which gave us further ground, if any had been needed, for thinking that no reliance could be placed on it. We examined these points with great care, but it is unnecessary for us to deal with them in detail here.

He expressed two opinions concerning the range from which the shots which wounded the deceased were, or could have been, fired. He said that all had been fired from the same range and he gave that range as " at least beyond 15 or 20 yards." That estimate, if correct, would have negatived the suggestion of the prosecution that the assailant, having knocked the deceased off his donkey with the first shot, had come nearer to him to fire the other three. Dr. Rose also said that none of the shots could have been fired from as close as 5 yards or particles of powder would have been found on the dead man's skin and none had been found.

When Dr. Rose gave these estimates of range, he was of course going beyond the limits to which purely medical knowledge could take him. It requires specialised experience to enable a person to make an estimate of that kind and Dr. Rose claimed none. Indeed he told us frankly that his opinion that none of the shots could have been fired from as close as 5 yards was based on his experience of " the odd murder that occurs in a barrack room." Estimates of that kind also require a great deal of data, including exact knowledge of the properties of the firearm and of the cartridge used. None of this was available to Dr. Rose. It was solely on the size of the entrance wounds that he based his opinion of the range from which the shots were fired and his opinion that they had all been fired from the same range. Now anyone with any experience of firearms cases knows that not even an approximate estimate of the range from which a shot was fired can be based *solely* on the size of the entrance wound, no powder marks being present, even when the size of the wound is accurately known. This view was confirmed by the evidence of the Commissioner of Police. But we found, by testing the evidence carefully, that not even an accurate measurement of any of the entrance wounds was in fact available to Dr. Rose. He had not seen them. Dr. Economides, who had seen them but had not measured them, described them as of the size of a chick pea; by no means an accurate

measurement. He was asked, in the Assize Court, to draw on a piece of paper a circle of the same circumference as the wounds which he had seen five years before. He tried to do so and this circle was shown to Dr. Rose. We asked Dr. Economides to draw two more circles for us and these proved to be of different sizes. We were not surprised at that result but, when we had reached this point in our examination of the evidence, we were fully satisfied that no reliance whatever could be placed on Dr. Rose's estimate of the minimum range from which the four shots were fired or on his opinion that they were all fired from the same range.

We came to the same conclusion about his statement that none of the shots could have been fired from as close as five yards without leaving particles of powder on the dead man's skin. We had this statement tested by an experiment performed by the Commissioner of Police in the presence of counsel for both sides and of any expert witnesses whom either side wished to be present. The rifle used was of the same type as one seen in the possession of the appellant on the night before the crime, when he said that he was going to shoot the deceased, but it had a shorter barrel. The cartridges used were of the same type as those of which four cases were found near the deceased. Shots were fired from different ranges at the under-side of a fresh goat skin and at a piece of coarsely woven white cloth. The clothes of the deceased had also been examined and no powder marks had been found on them.

Making full allowance for possibilities of error in that experiment, it clearly showed, at any rate, that there was no foundation whatever for the statement of Dr. Rose on this point. Indeed we think it safe to conclude from this experiment that any of the shots might have been fired from a distance of a few feet. It might not be safe to be more precise.

Having formed, for the reasons that we have given, the very strong opinion that Dr. Rose's evidence must be entirely rejected, we must turn again to the judgment of the Assize Court. Our opinion of that particular evidence affects the judgment at only one point, namely, the Court's acceptance of the possibility that more than one person took part in the shooting. But that point is important for, as we have said, it raises the question of common design and the question whether or not there was evidence from which common design could properly be inferred. Moreover, the acceptance of that possibility involved a conclusion of fact and this required sufficient evidence to justify it.

When, towards the end of the hearing of this appeal, our view of Dr. Rose's evidence had become apparent, counsel for the defence tried to argue that the Assize Court had also rejected it entirely and that it was upon other evidence that the Court had accepted the possibility of more than one assailant. If that argument were sound, our own rejection of Dr. Rose's evidence would be no ground for rejecting the view of the trial Court on this particular point. In our opinion that argument is not sound and there was no evidence, except the evidence of Dr. Rose, on which the trial Court's view on this point could possibly have been based.

It therefore follows, from our opinion of Dr. Rose's evidence, that we must differ from the Assize Court on this particular question of fact. Having heard fresh evidence on this point, we must form our own conclusion of fact upon it. We must hold that there was no reliable evidence to support the view of the Assize Court that more than one person may have taken part in the shooting. That conclusion makes it unnecessary for us to examine any question of common design, but it does not affect the verdict of the Assize Court convicting the appellant. With that verdict we fully agree. There was overwhelming evidence to support it.

Before we conclude we must refer briefly to one point raised in this appeal though it does not affect our conclusion. It was argued for the defence that the evidence of Mr. Viveash, Assistant Superintendent of Police, had been wrongly admitted by the Assize Court. This witness produced a record, kept by him as part of his official duty, recording statements made to him by telephone and purporting to give the time at which air-raid sirens were sounded in different parts of the Island during a period which included the day of the crime. This evidence was of the nature of hearsay and we are unable to bring it within any of the exceptions to the general rule which would exclude it. We think therefore that it was wrongly admitted. This evidence was offered by the prosecution with the apparent object of showing that certain shots heard by a villager on the morning of the crime could not have been the shots that killed the deceased. And this was apparently done because the villager had indicated, by tapping on a table in the Assize Court, that the shots, four or five in number, were almost simultaneous. We have already mentioned the evidence of this witness. The Assize Court referred to this witness in their judgment as having been called to support Dr. Rose and they said that if the shots heard by this villager occurred in the way he described, the Court did not believe that they were the shots

which killed the deceased. It is clear from this statement that the proposition that the Assize Court were really rejecting was the proposition that the shots which killed the deceased were simultaneous or almost simultaneous, that is to say, a proposition advanced by Dr. Rose. Mr. Viveash's evidence had no bearing on that proposition and consequently, though wrongly admitted, could not have affected the Assize Court's verdict. Its wrongful admission accordingly affords no reason why that verdict should be disturbed.

It only remains for us to say that we are fully satisfied that there has been no miscarriage of justice in this case and that this appeal must be dismissed.

1946
Nov. 30

[JACKSON, C.J., AND HALID, J.]

(Nov. 23, 30, 1946)

ALEXANDROS TOFI KAMILARIS AND ANOTHER,

.. *Appellants,*

v.

THE POLICE, *Respondents.*

(*Criminal Appeal No.* 1827.)

Criminal Law—Identification of stolen property—Cyprus Criminal Code, sec. 297—Possession of property reasonably suspected of being stolen—Reasonable suspicion.

Section 297 of the Cyprus Criminal Code provides: " Any person who has in his possession any chattel . . . or other property whatsoever, which is reasonably suspected of being stolen property, is, unless he establishes to the satisfaction of a Court that he acquired the possession of it lawfully, guilty of a misdemeanour . . . "

To support a charge under this section, a reasonable suspicion that the property is stolen must be conceived by somebody while the property is still in the possession of the accused.

Appeal from a conviction by the District Court of Famagusta (Case No. 4932/46).

F. Markides for the appellants.

C. Severis for the respondents.

The facts of the case are fully set out in the judgment of the Court which was delivered by:

JACKSON, C.J.: This is an appeal from the decision of the Magistrate at Famagusta convicting the two appellants, under section 294 of the Criminal Code, of having taken upon themselves the control of a certain quantity of potatoes, the property of a named complainant, knowing them to have been feloniously stolen.