[HALLINAN, C.J., AND ZEKIA, J.]

(July 26, 1952)

COSTIS PANAYI KAFALOS, *Appellant,*

v.

THE QUEEN, *Respondent.*

(*Criminal Appeal No.* 1914.)

Murder—Position of Supreme Court as to inference from fact—Meaning of phrase "unreasonable having regard to the evidence".

P.A.M. was murdered in his garden at Platres by a masked man on the morning of 28th February. The appellant boarded a lorry on the Saittas–Limassol road about 2 p.m. in suspicious circumstances. The trial Court found as a fact that the masked man had been seen going from Platres eastwards to a point 1,100 yards as the crow flies from the Saittas–Limassol road. Villagers and shepherds had seen a figure in black at various points going sometimes north-east and sometimes south-east. There was other evidence tending to connect the appellant with the crime.

The appeal was made under section 142 (1) (*b*) of the Criminal Procedure Law, it being submitted that the conviction of the appellant was "unreasonable having regard to the evidence adduced".

Held: (1) The phrase "unreasonable having regard to the evidence" has the same significance as the phrase "unreasonable or cannot be supported having regard to the evidence" in sec. 4 (i) of the Court of Criminal Appeal Act, 1907.

(2) The Supreme Court is very slow to reverse the findings of an Assize Court on fact but is in as good a position as the trial Court to draw inferences from fact.

(3) In the circumstances it was nothing more than a surmise to say that a figure in black seen in one place was the same man as a figure in black seen in another and that this figure was the masked murderer. The inference drawn by the trial Court as to the figure in black was untenable, and since that Court would almost certainly have acquitted the appellant had it not drawn such inference; the conviction must be quashed.

Appeal by accused from the Assize Court of Limassol (Case No. 4847/52).

Z. Rossides, for the appellant.

P. N. Paschalis, Crown Counsel, for the respondent.

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

HALLINAN, C.J.: On 28th February, 1952, at about 10.45 a.m., one Panayis Apostolis Michaelides was murdered while working in his gardens at Platres. It was an audacious crime. It was in the time of Carnival, and the murderer was dressed as if in masquerade. He had a long black coat or cassock, sacking on his feet and a mask on his face. He fired at his victim from close range with a double-barrelled shot gun; death was probably instantaneous.

The brother of the deceased had been murdered in a café at Platres in January, 1951, and the deceased was seeking to avenge his brother's death. He suspected one Frixos I. Demetriou, among others, of the crime. Frixos had asked the police for protection against the deceased. The appellant was a friend and associate of Frixos and the deceased was not on speaking terms with either Frixos or the appellant for some time prior to his death. Both Frixos and the appellant were found together at an hotel in Limassol on the evening of 28th February. This is virtually all the evidence of motive against the appellant. There is however also evidence that the deceased was on bad terms with other people, and some of them were afraid of him.

In December, 1950, the appellant had visited Kazamia, a mechanic, in order to repair a revolver. In February, 1951, he brought the middle part of a double-barrelled breech-loading gun which was given back after three months. In December, 1951, he brought a revolver in order that Kazamia should make ammunition. On 18th February, 1952, the appellant took back part of the revolver left with Kazamia, and told him he had had the gun repaired and had parted with its possession.

About 2 p.m. on the day of the murder, two lorry drivers, Behich and Nearchos, came out from a café in the village area of Saittas in order to get into their lorries and proceed on their way to Limassol. Suddenly the appellant appeared running towards them from a field and asked for a lift to Limassol. He got into Behich's lorry. After a short distance, about the junction of the road to Platres, the appellant stopped the lorry and retrieved an overcoat with a brown lining from behind a myrtle bush beside the road. This coat has never been produced; its colour on the outside is not known. On the way down to Limassol, during a stop, Nearchos of the other lorry had a chat with the appellant; and Behich while travelling also conversed with the appellant. He told both drivers that he had been at Amiandos for the last few days. This statement was false.

The masked murderer walked down from the deceased's garden past the church and hospital at Platres and left the road by climbing over a fence made of dead thorny bushes; he was seen to stumble as he went over and he probably saved himself by putting his hands on the bushes; he held the gun in his right hand. On 1st March (two days after the crime) Dr. Fterakis extracted three thorns from the right hand of the appellant, two from the palm of the right hand and a minute one from the back of the index finger. The ones on the palm were near the base of the thumb and on the opposite side of the palm. The thorns had been there for more than 48 hours. The thorn extracted from near the thumb was analysed by Mr. Merton, an expert,

and identified as of the dead wood of the bush known locally as mosphilia. On the 2nd March, the police took two specimens from the fence over which the murderer had passed; one was identified as a bramble and the other as mosphilia. One of the thorns from the palm of the appellant's hand is an exhibit. It is so tiny that one could easily understand a person getting it into his hand and not remembering where it came from. The appellant alleges that he was working in his garden near Platres on 26th February and might have got it there. The evidence that there was dead mosphilia where he alleged he worked is very slight. The possibility cannot be excluded that he got them in the vicinity between Trimiklini and Saittas on 28th February. The fence might have been interfered with between 28th February and the 2nd March when specimens were taken. Experts are not infallible. In short, the evidence of the thorns was properly considered by the trial Court as evidence against the appellant but not too much weight was attached to it. The judgment puts it this way :—

> "The accused therefore fulfils this further condition that he had mosphilia thorns in his hand such as we would expect to find on the man who had been followed from the scene of the crime and had stumbled crossing the fence at point 4 with a gun in his hand."

The facts so far stated constitute the Crown's case against the appellant except for one crucial matter which must now be discussed. A long procession of witnesses (from 10th to 25th) were called to establish the fact that a man dressed in black (whom the Crown alleges was none other than the murderer) was seen going from Platres after the crime southward to near the village of Perapedhi and then eastward to a point (referred to as point 52) some 1,100 yards as the crow flies from the main Saittas-Limassol road in the vicinity of milestone 22. From there to the café where the appellant boarded the lorry is only $\frac{3}{4}$ of a mile. The purpose of this evidence is to show that the appellant who appeared at the café is none other than the masked murderer from Platres. The judgment of the trial Court puts it this way : "In order to connect the accused with the perpetrator of this crime, it is necessary to be satisfied beyond reasonable doubt that he and the man in black who was last seen at point 52 are one and the same person." The evidence, which the judgment had already summed up on this aspect of the case, is again briefly reviewed and on this matter the judgment concludes : "It therefore amounts almost to a certainty that the masked man of Platres and the man seen by the witnesses up to point 52 were identical."

We have very carefully gone through the evidence of the 10th to 25th witnesses and we find it impossible to say that there is sufficient evidence to support this crucial finding of the trial Court.

It is convenient to divide the attempt to follow the fugitive murderer into three stages. In the first stage the murderer, dressed in black, masked and carrying a gun is watched until he goes over the fence and up and over the hill above it (point 14 on plan B). The evidence of the 10th to 17th witnesses establishes this beyond a shadow of doubt. In the second stage, two policemen, summoned by the hospital telephone pursue the fugitive and some four minutes after the summons see from a hill-top a man dressed in black going down along the path leading from point 14 to the village of Perapedhi. One constable lost sight of the man soon after a bridge on the path to Perapedhi but the other constable and a shepherd saw him at points 44 and 42 respectively which are nearer that village. These witnesses do not appear to have come within less than 2,000 feet of the man they were observing. They cannot say whether he was masked or was carrying a gun. If he was not carrying a gun and was the murderer, he must have got rid of it within four minutes after reaching point 14—a remarkable performance. Nevertheless, this Court would not consider unreasonable or unsupported by sufficient evidence a finding that the man under observation during the second stage was the masked murderer. It is during the third stage that the evidence becomes insufficient to support the inference which is deduced from it.

The first witness in this third stage (22nd witness) was in his vineyard at Perapedhi and saw a man dressed in black going up a hill (point 46) north-east of the village. From his vineyard to point 46 is some 3,000 feet. This was about 11.45 a.m. Many persons go up this hill. There is a water-tank on it. People might be going to the water-tank or elsewhere. After that a man dressed in black was seen further to the east approaching to and on the hill Mouti-tou-Xilimbou. One shepherd north-west of the hill saw the man in black actually on the hill; while another who was on the hill saw a man in black approaching it but did not see him on it. Finally at point 52 a considerable distance to the south-east of Mouti-tou-Xilimbou, another shepherd saw a man in black about 900 feet away going in the direction of Saittas.

Now it was obviously the aim of the prosecution to connect the appellant (known to be at Saittas at 2 p.m. on 28th February) with the masked murderer at Platres. So shepherds and others are asked if they had seen a man dressed in black in the area between Perapedhi and Saittas. A man so dressed is seen by an observer more than half a mile away going up a hill north-east of Perapedhi; he may or may not have been the man last seen by one of the policemen at point 44. A man also dressed in black is seen going east at Mouti-tou-Xilimbou and again such a man is seen (much further south) going down a gully apparently, in a

south-easterly direction. One cannot but wonder, if enquiries had been made to the west or south of Perapedhi, whether men dressed in black might not have been seen travelling here and there on their lawful or unlawful occasions. The country people are commonly dressed in black in the winter. One of the witnesses thought the man in black might be her husband but he did not approach her, so presumably was not. No figure in black came nearer than 900 feet to a witness, so that any kind of detailed observation was impossible. Nor is there any reliable evidence that that man seen at Mouti-tou-Xilimbou was seen before or after the man seen at the final point 52. In these circumstances it is nothing more than surmise to say that a figure in black seen in one place was the same man as a figure in black seen in another, and that this figure was none other than the murderer from Platres.

The ground of appeal upon which this appeal has been argued is that contained in section 142 (1) (*b*) of the Criminal Procedure Law namely that the conviction of the appellant was " unreasonable having regard to the evidence adduced ". In section 4 (i) of the Court of Criminal Appeal Act, 1907, the phrase used is that the verdict may be set aside if it is unreasonable or " cannot be supported having regard to the evidence." It may be assumed that both these phrases mean the same thing. However, the circumstances in which appeals are heard in Cyprus differ from those in England. A conviction by an Assize Court is not the verdict of a jury—the unanimous decision of 12 men ; it is the decision of three judges sitting in banco. Unlike a jury, the trial Court is obliged to give reasons for its decisions and these reasons are part of the proceedings upon an appeal. In these reasons the trial Court states not only its findings of fact but the inferences drawn from the facts. The Supreme Court is very slow to reverse the findings of an Assize Court on fact but this Court is in as good a position as a trial Court to draw inferences from fact. Now the trial Court in reaching the conclusion that " it therefore amounts almost to a certainty that the masked man of Platres and the man seen by the witnesses up to point 52 were identical ", reached a conclusion which was an inference from facts, an inference which cannot be supported having regard to the evidence adduced.

The appellant made a statement from the dock and he called three witnesses. The appellant endeavoured to establish three things through his statement and his witnesses. That he had got thorns in his hand while working in his garden—this has already been discusssed in this judgment ; secondly, that he slept the night of the 27th to 28th February with his aunt Eftychia Pericleous in Limassol and had his morning meal in that town and, thirdly, that he was in the vicinity of Saittas on the 28th

February because he was helping the owner of a stolen motor cycle to recover it. The allegation of his being in Limassol on the night previous and morning of the murder was not an *alibi* having regard to the time factor; the Court on sufficient evidence rejected this part of his story.

There is however one matter on this part of the evidence on which this Court must comment. A statement was taken from the appellant's aunt by the police. It must have appeared at once that she was a witness for the defence and should have been left severely alone. Instead of this, the police arrested the woman and kept her in custody for some twelve days during which time another statement was taken from her which contradicted the first in some minor particulars. The prosecution were unable to tell this Court the charge upon which this woman was arrested without warrant; no proceedings have been taken against her. The spectacle of this frightened woman being cross-examined on statements taken in such irregular circumstances is the only blot on a trial which was otherwise scrupulously fair. It is hoped that the police authorities will take note of this Court's comment on the arrest and treatment of the appellant's aunt, so that such an incident may not again occur.

These remarks are not intended to disparage the efforts of the police in this case to unmask the murderer who so cunningly planned this appalling crime. The prosecution called 70 witnesses and nothing but praise is due to a force who tries so unremittingly to protect the lives and property of the people and who often receives such poor support from the public.

There is no need to consider in detail the appellant's excuse that he was searching for a motor cycle. It is sufficient to say that the trial Court was fully justified in refusing to believe his story.

The position then at the close of the defence was that the accused had failed to prove an *alibi* and had been unable to give any reason which the Court could accept as to why he was at Saittas on the day of the murder. But the failure of a defence is only fatal to an accused person if the case for the prosecution which remains unshaken by the defence is strong enough in itself to convict the accused.

This Court holds that the inference drawn by the trial Court concerning the evidence of a man or men dressed in black is invalid. Is the rest of the evidence for the prosecution sufficient to support a conviction?

There is some evidence of motive; some transactions concerning a revolver and a shot-gun; the unexplained appearance of the appellant at Saittas some six miles east of Platres on the day of the murder; his taking of an overcoat (not produced by him) from behind a myrtle bush,

and the fact that the murderer may have been wearing a black overcoat; a false statement by the appellant that he had been for some days previous to the 28th February at Amiandos; the appellant had mosphilia thorns in his hand such as one would expect to find in the hands of the murderer who had stumbled over the fence at Platres. This in brief is the case against the appellant. This is not evidence of such weight as to support a conviction for murder. The trial Court itself almost certainly would have acquitted the appellant if it had not drawn that crucial inference which this Court on appeal considers wholly untenable.

For these reasons this appeal must be allowed and the conviction and sentence set aside.

[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]

(September 25, 1952)

NIAZI AHMED, *Appellant*,

v.

THE POLICE, *Respondents*.

(*Criminal Appeal No.* 1920.)

Criminal Procedure Law, section 87—*Trial of accused in his absence—Presence of accused desirable when charge serious.*

In the opinion of the Supreme Court where a charge involves the stigma of dishonesty and would normally be punishable by imprisonment accused should be brought up on a warrant and should not be tried in his absence.

Appeal allowed.

Appeal by the accused from the judgment of the District Court, Nicosia (Case No. 8700/52).

Umit Suleyman, for the appellant.

P. N. Paschalis, Crown Counsel, for the respondents.

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

HALLINAN, C.J.: This was a case where the accused was charged with being in possession of property reasonably suspected of having been stolen or unlawfully obtained,