THE

# MADRAS WEEKLY NOTES

## (CRIMINAL)

## REPORTS



EDITOR-IN-CHARGE
N. R. K. TATACHARIAR, B.A.B.L.

ASSOCIATE EDITORS
R. GOPALASWAMI IYENGAR. B. A. B. L.
N. R. GOVINDACHARI M. A. B. L.
N. T. RAGHUNATHAN M. A. B. L.
S. KRISHNAMURTHI, BAR-AT-LAW.

**Mode of Citation: (1940) M.W.N. Cr.**

# TABLE OF CASES

## PRIVY COUNCIL



## FULL BENCH



## OTHER CASES.

THE

# MADRAS WEEKLY NOTES

# (CRIMINAL)

1940 ] [ 1940

FULL BENCH

R. T. No. 119 of 1939
Cr. App. No. 508 of 1939.
*December* 1, 1939.

SIR LIONEL LEACH, C. J, LAKSHMANA RAO & KRISHNASWAMI AYYANGAR JJ.

Guruswami Thevar & others
v.
Emperor

*Criminal trial—Dying declaration—Conviction if can be based on.*

*It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the court after taking everything into consideration is convinced that the statement is true it is its duty to convict notwithstanding that there is no corroboration in the true sense. The court must be fully convinced of the truth of the statement and it would not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.*

Trial referred by the court of Session of the Tinnevelly Division for confirmation of the sentences of death passed upon the said prisoners in S. C. No. 60 of 1939 and appeal by the said prisoners.

*E. R. Balakrishnan*, for accused.
*Public Prosecutor*, for Crown.

## ORDER OF REFERENCE.

(BURN & MOCKETT) (21-11-39)

The appellants have been convicted of murder by the learned sessions judge of Tinnevelly and the first, second and fourth appellants have been sentenced to death. The third and fifth appellants have been sentenced to transportation for life.

The case is one of a simple nature but there is an important question of law involved. There is no doubt about the fact that, on the early morning of the 31st of March 1939, Nammalwar Naicker, a resident of the village of Kalugachalapuram, was attacked while he was on his way to the village of Mannogopalanaickenpatti. He was stabbed in 38 places and he died soon after midnight. The sub assistant surgeon (P. W. 1) who was in charge of the hospital at Ettiyapuram saw him at 1 p. m. and found 32 injuries on him, of which seven were penetrating wounds into the abdomen and one was a penetrating wound in the chest. This sub assistant surgeon was not able to do anything for the man beyond rendering first aid and then he sent him on to the headquarters hospital at Palamcottah. Another sub assistant surgeon (P. W. 2) made a post-mortem examination on the 1st of April and then he found that there were in all 38 injuries. P. W. 1 expressed an opinion that the abdominal injuries inflicted upon Nammalwar Naicker would only prove fatal in the absence of medical or surgical treat-

ment but that, if treated properly, there was "every chance" of the injured man escaping death. This is a very remarkable opinion and, in our opinion, it is worthless. The post-mertem certificate shows that two of the stabs not only penetrated the abdomen but punctured the intestines, so that faeces escaped into the peritoneal cavity. It is quite clear that Nammalwar Naicker was fatally wounded by persons who meant to kill him, and that he never had any chance of recovery.

There are no eye-witnesses in the case, the assasins having been careful to choose a time when there was nobody in sight. The case against the appellants rests almost entirely on statements said to have been made by Nammalwar Naicker himself before he died. Three witnesses, P. Ws. 6, 7 and 8, say that they were in the vicinity and that they were attracted to the spot by the cries of Nammalwar Naicker but they do not corroborate him any further than by saying that the number of persons whom they saw running away was five. As the learned sessions judge has said, there are four statements of Nammalwar Naicker to be considered. In the first place, P. Ws. 6, 7 and 8 say that as soon as they reached him he told them the names and fathers' names of the five persons who had attacked him. Those are the names of the present five accused persons. P. W. 6 ran to the village and informed P. W. 12 the brother-in-law of the deceased. P. Ws. 12, 13 and others went to the place where Nammalwar Naicker was lying stabbed. Nammalwar Naicker is said to have told those witnesses also the names and fathers' names of these five appellants. P. W. 12 went and fetched the village munsif P. W. 21. He reached the scene of the murder at about 8 O'clock in the morning and he took down a statement from Nammalwar Naicker which is Ex. K. In that also the names and the fathers' names of the five appellants are found. Finally at about 2-30 p. m. on the same day in the hospital at Ettiyapuram a dying declaration (Ex. A) was recorded by a special magistrate (P. W. 4). In that again the deceased has stated that these five persons attacked him and stabbed him.

Learned counsel for the appellants has attempted to show that the statement (Ex. K) recorded by the village munsif was a concoction but he has not adduced any convincing arguments in support of that proposition. It was proved that there was enmity between Nammalwar Naicker and the accused, but the accused were not the only members of the Marava caste with whom the deceased was at enmity. P. Ws. 6, 7 and 8 belong to a different village, Mannagopalanaickenpatti, and no enmity whatever was even suggested between them and any of the accused. There is therefore no reason why these witnesses should say falsely that Nammalwar Naicker named these five persons as his assailants. We can see no reason to believe that Ex. K was concocted.

The next contention of learned counsel for the appellants is that Ex. K and Ex. A are widely discrepant. This contention is based upon the fact that in Ex. K Nammalwar Naicker is recorded as having said that when the five appellants approached him, the 1st appellant came and gave him a stab with a *soori* (dagger) in the abdomen and afterwards the four persons joined together and stabbed him in the body. In Ex. A, however, he has given a much more detailed account in which he says that Guruswami Tevar (the 1st accused) stabbed him not only in the abdomen but in several other places before any of the other accused stabbed him at all. He also says that the 3rd and 5th accused held his legs while the other three accused 1, 2 and 4 were stabbing him. We are not able to see that there is any discrepancy in these statements. In Ex. K the wounded man has stated that all the five persons joined together and stabbed him. This cannot be said to be an inaccurate description of the occurrence. If five persons jointly attack a man and two of them hold him while the others stab him, he cannot be considered to be an untruthful person if he says that they all five stabbed him. The only real inconsistency that is apparent between Ex. K and Ex. A is with regard to a knife. In Ex. K Nammalwar Naicker said, "When I warded off the soori which Kandiah Thevan had, it fell down." In

Ex. A he said, "When they stabbed me I wrested the soori from Krishna Thevan." Now, Krishna Thevan is the name of the 2nd accused and Kandia Thevan is the name of the 4th accused. In Ex. K. Nammalwar Naicker does not mention that he wrested a knife from the 2nd accused and in Ex. A he does not mention that, while he was warding off a blow aimed at him by the 4th accused, the 4th accused's knife fell down. These however cannot be considered as contradictions. The learned Public Prosecutor points out that at the scene of offence two knives were actually found, one in a sheath and one bare. Apart from this, there is no discrepancy, and both these statements show that Nammalwar Naicker charged these five persons with the attack upon him. We cannot find also as already stated, any reason to disbelieve P.Ws. 6, 7 and 8 and P.Ws. 12 and 13, and their evidence makes it clear that from the very beginning, within a few seconds after he was attacked, Nammalwar Naicker has been alleging that these five appellants are responsible for his death.

We agree with the learned sessions judge therefore that the statements of Nammalwar Naicker have been truthfully described by the witnesses and in the documents Exs. K and A. The next question, as the learned sessions judge has pointed out, is whether Nammalwar Naicker's statements are true. As to this, the plea of the accused was that the whole case was a concoction against them by P.W. 12 and the village munsif on account of the enmity due to faction between the Thevars (Maravars) and the Naickers. The 3rd accused alleged that he had been sick for the last eight months and therefore confined to his house. He repeats this statement in his appeal petition from jail. None of the accused offered any explanation beyond this bare denial and allegation that the case was concocted on account of faction and none of them cited any witnesses. As already observed, there was enmity between the deceased and the Maravars of Kalugachalapuram, but there was no special enmity between the deceased and these five appellants and, as the learned sessions judge has observed, there was not the slightest reason shown why Nammalwar Naicker, within a few seconds of being stabbed, should have made up his mind to exculpate the persons who really attacked him, and to accuse falsely five persons who had nothing whatever to do with the matter. It was sunrise when this attack on Nammalwar Naicker took place. He was stabbed in 38 places, which must have taken some time, so that he had ample opportunity to see who were the persons who were stabbing him. We can find no reason for doubting the truth of the statements made by Nammalwar Naicker. If they are believed, the appellants are clearly guilty of his murder.

The point of law which arises is whether, on the statements of a deceased person such as these, uncorroborated, (except as to the number of the assailants), the appellants can be convicted of murder. The weight of authority appears to be in favour of the view that a conviction based wholly upon the statements of a deceased person is not illegal. This was assumed in the case of *Sanjappa* (R.T. 112 of 1937) in which the judgment was pronounced by one of us, but in that case the judgment in Crl. Appl. 653 of 1935 and 148 of 1936 was not brought to our notice. Those appeals were heard by Sir Owen Beasley C. J. and Gentle J. and the judgment contains passages indicating that a dying declaration uncorroborated by other evidence could not justify a conviction. The learned judge says:

> "Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents, it is clear from the authorities and the text-books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

In the case in question the learned judge showed that the dying declaration upon which the prosecution relied was unreliable; but the observations are of a general nature. And in another place the learned judge has said:

> "Apart from the dangerous practice of relying upon the uncorroborated contents of a dying declaration alone..."

Referring to these passages my learned brothers Mockett and Horwill JJ. have stated in Referred Trial No. 5 of 1937:

> "Even a dying declaration, as has been held by this High Court, is very dangerous material by itself on which to found a conviction."

These dicta are clearly at variance with the principle on which Referred Trial No. 112 of

1937 was decided. The learned Public Prosecutor has stated that so far as he is aware there has not been any case in which it has been held that a dying declaration proved to have been made and with no reason shown for distrusting its truth, was insufficient to warrant a conviction. Such a case as *Gula Ella Reddi* v. *Emperor* [1] is no exception to this rule, for there the dying declaration was found to be unsatisfactory in itself. On the other hand there are many cases in which dying declarations alone have been relied upon as justifying conviction. The learned Public Prosecutor brought to our notice the views expressed in the cases of *Emperor* v. *Akbarali Karimbhai* [2], *Nai Muddin Biswas* v. *Emperor* [3] and *The King* v. *Maung Po Thi* [4].

It is clear that by the provisions of S. 32 (1) of the Evidence Act the statements made by Nammalwar Naicker in this case are evidence. There are very good reasons for believing them to be true, and none for disbelieving them. With respect, we do not think we should be acting dangerously or imprudently, if relying on these statements we confirmed the convictions of the appellants in this case.

As however there is a conflict between the decision in R. T. 112 of 1937 and the observations in Cr. Appls. 653 of 1935 and 148 of 1936 with regard to the question whether statements made by a person who is dead uncorroborated by any other evidence can support a conviction, we order, under R. 2 of the Appellate Side Rules, that this matter be referred to a Full Bench.

The records will be laid before his Lordship the Chief Justice.

OPINION.

Sir Lionel Leach C. J. :—In order to appreciate the question which has been referred it is necessary to state certain of the facts. The appellants have been convicted of murder. The first, second and fourth appellants have been sentenced to death and third and fifth appellants to transportation for life. Between 5 and 6 O'clock on the morning of the 31st March 1939 one Nammalwar Naicker was attacked by a band of men and received 38 injuries from which he died shortly after midnight. As the result of his cries three persons who were in the vicinity were attracted to the spot where the deceased was lying. They had not seen the assault, but they said that they had seen five persons running away. When these witnesses reached the deceased he told them that he had been attacked by five men and gave their names, and the names of their fathers. The names given were the names of the five appellants. One of these witnesses went and called the deceased's brother-in-law and another person, both of whom also gave evidence. These two witnesses went to the spot and the deceased informed them that the appellants were his assailants. The Village Munsif was called to the scene of the crime at about 8 A. M. and recorded a statement made by the deceased. In that statement also the deceased implicated the appellants. The deceased was removed to the hospital at Ettiyapuram and at about 2-30 p. m. his dying declaration was recorded by a magistrate. In that statement the deceased again said that his assailants were the appellants. It was proved that there was enmity between the deceased and the appellants who are of the Marava caste, but they were not the only members of that caste with whom he was at enmity. The question of law which arises is whether on the statements of a deceased person of the nature of those indicated without other testimony, except as to the number of the assailants, the appellants can be convicted of murder. The question has been referred to a Full Bench because the judgments of two division benches of this court are in conflict. Neither of these judgments has been reported.

The first of the two cases which have given rise to this reference is Cr. A. No. 653 of 1935, which was decided by Beasley C. J. and Gentle J. The judgment was delivered by Gentle J., who after quoting from Taylor on Evidence and referring to the *King Emperor* v. *Akbarali Karim Bhai* [2], *In re Dabbukota* [5] and *Gula Ella Reddi* v. *King Emperor* [1], observed:

> "Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents it is clear from the authorities and text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms, can be levelled against the declaration."

1. [1935] M.W.N. 1089 : Cr. 193
2. [1934] 58 Bom. 31
3. [1937] I.L.R. 1 Cal. 475
4. [1938] A.I.R. Rang. 282
5. 2 weir 753

The judgment which is in conflict is the judgment in R. T. No. 112 of 1937, which was delivered by Burn J. and in which I concurred. In that case, there was no corroboration of a dying declaration, but the facts were such that my learned brother and I had no hesitation in accepting it as reliable evidence and upheld the conviction of the accused. The question at issue has been fully argued before this Full Bench and I am unable to accept the observations which I have just quoted from the judgment of Gentle J. as correctly stating the position. With great respect I regard the statement as being far too wide.

S. 32 of the Indian Evidence Act says that statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in certain specified cases. The first case specified is when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, where the cause of death comes into question. The section declares that such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Therefore a statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it.

There are two other sections of the Evidence Act which may have important bearing in a case of this nature, namely, Ss. 157 and 158. S. 157 says :

> "In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

S. 158 is in these words :

> "Whenever any statement, relevant under S. 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

There may not be corroboration of the nature contemplated by S. 157 or matters provable under S. 158, and the only direct evidence may be a statement by the deceased made admissible by S. 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and S. 114 of the Evidence Act (illustration b) says that the court may presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance.

The reference which Gentle J. made to Taylor on Evidence consisted of a quotatian from S. 722 of the Eleventh Edition. This section deals with dying declarations and the quotation was as follows:

> "It should always be recollected that the accused has not the power of cross examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be; and that where a witness has not a deep sense of accountability to his maker, feelings of anger or revenge, or in the case of mutual conflict the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction."

This, of course, may be the case but I should regard a statement by a person who has received a mortal wound, made immediately after the injury was caused, as being of high probative value when it relates to the cause of the injury, unless there is some reason shown to doubt its truth. The probative value of a statement of a person who has been mortally injured, but made after a considerable interval, during which time he has been surrounded by his relatives and friends, is certainly much less, but here againitseems to me it may be accepted if it fits in with earlier statements made when he could not have been influenced and they are otherwise unimpeachable.

In *King Emperor* v. *Akbarali Karim Bhai* (2),

Beaumont C. J. observed:

"Generally speaking, and as a rule of prudence, I am of opinion that a declaration, relevant under S. 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration."

The learned Chief Justice, however, agreed that there is no rule which requires that a dying declaration should not be acted upon unless it is corroborated and he pointed out that the evidential value of a declaration relevant under S. 32 varies very much in accordance with the circumstances in which it is made. Here I respectfully agree but I am not prepared to go so far as to say that a declaration relevant under S. 32 though not made in immediate expection of death, and not made in the presence of the accused, necessarily requires corroboration.

In *In re Dabbukota* (5) it was said:

"It is to be remembered that though dying declarations are in some respects deserving of a degree of consideration and credence to which ordinary statements are not, they are not subject to the test of cross-examination, and if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing."

By this I presume is meant there must be corroboration before a dying declaration can be accepted. I have said sufficient to indicate that this statement is far too sweeping and it is open to the further objection that it offends against the law of evidence in India.

With regard to the case of *Gula Ella Reddi* v. *King Emperor* (1), all that need to be said is that the circumstances showed that it was unsafe to convict the accused on the bare dying declaration put in evidence in that case and naturally it was not accepted as being sufficient to prove the case for the Crown.

In my judgment it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the court after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The court must of course be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.

I would answer the reference in this sense.

LAKSHMANA RAO J.: I agree.

KRISHNASWAMI AYYANGAR J.:—I agree.

## JUDGMENT.

(Burn & Mockett, JJ.) (4-12-39.)

In view of the decision of the Full Bench, we confirm the conviction of the appellants for murder. Since the evidence is that the third and fifth accused took part in the murder by holding the legs of the victim while the others stabbed him, they are directly responsible for the murder. There was no reason to invoke S. 149 Indian Penal Code, and we do not quite understand what the learned sessions judge means by saying "the Public Prosecutor preferred to frame a charge against them under S. 302 read with S. 149." The duty of framing the proper charge is thrown on the court.

The sentences of death passed upon the first, second and fourth accused are the only possible sentences in this case, where five assassins have attacked a single man and killed him by stabbing him in 38 places. We confirm the sentences of death passed on the first, second and fourth accused. The third and fifth accused have been fortunate to escape the extreme sentence on the ground that they did not actually stab Nammalwar Naicker but only held his legs. We confirm the sentences of transportation for life passed upon the third and fifth accused. All the appeals are dismissed.

N.T.R. — *Appeals dismissed.*

R. T. No. 114 of 1939.
Cr. App. Nos. 469 & 470 of 1939
*November 7, 1939.*
BURN & MOCKETT JJ.

Kattameedi Chenna Reddi & another
v.
Emperor.

*Evidence Act (I of 1872), S. 27—Statement to police—Recording— Medical evidence—Evidence of identification—Value of.*

*The duty of the police is, if they desire to record a statement to record it as given and to leave it to the court to decide what evidence is admissible.*

*It is the first statement of the accused to whomsoever made that leads to the discovery of the fact if a fact is discovered. Where what was stated by the accused was a repetition of something that he has previously said to a police officer, the later statement is not admissible under S. 27.*

*The evidence of identification might by itself be unreliable. But taken with other substantial evidence (such as the identified persons being found dealing with the jewels of the murdered person) the evidence of identification can be relied on.*

*Theoretical medical evidence is not of value unless it is exhaustive with regard to all possible circumstances.*

Trial referred by the court of the session of the Cuddapha division for confirmation of the sentences of death passed upon the said prisoners in C.C. No. 24 of 1939 on 22-8-1939, and appeals by the said prisoners, accused 1 and 2 against the said sentences of death passed upon them on 22-8-1939 in the said Cuddapah division S. C. No. 24 of 1939.

*C. Narasimhachariar & M. Ranganatha Sastri*, for Accused.

*Public Prosecutor*, for Crown.

## JUDGMENT

(MOCKETT J.)

The first and the second accused together with one Guddi Peeran were charged before the learned sessions judge of Cuddapah with the murder on the 12th March 1939 of a woman Golla Nagamma. Guddi Peeran who was the third accused was acquitted; the first and the second accused were convicted and sentenced to death and they now appeal.

The plan Ex. P. indicates roughly the scene of Nagamma's death. She lives at Venkatapuram which is 2 1/2 miles from Prodattur. On the 12th March, sometime before midday she was alive. P.W. 3, her husband, said that she gave him his food before he left for Prodattur, and P. W. 2, her sister, was with her in her house on that morning. Sometime that afternoon she was found dead, having been throttled. There is no doubt whatever that she met her death at about midday on the 12th. No cross examination was addressed to her sister P. W. 2 or to her husband P. W. 3 to suggest that the deceased had in fact met her death long before noon on the 12th, even so early as late on the previous night. This aspect requires a passing reference because the lady sub assistant surgeon, relying largely on statements in text-books, was inclined to say that from the appearance of blisters on the body death must have taken place from 22 to 35 hours prior to her examination which was at 7 A. M. on the 13th. Even 22 hours before 7 A.M. when blisters were seen on the body would mean, if the doctor's premises are correct, that the woman was alive in the early hours of the 12th; and 36 hours before would mean that she met her death on the 11th. Theoretical evidence of this description is not of value unless it is exhaustive with regard to all possible circumstances. This body had been left in a March sun from about noon to sun down on the 12th if the prosecution story is correct and all night in the open air. The text-books do not deal with circumstances such as these, but ordinary experience shows that in those cicumstances decomposition sets in with great rapidity. It is notorious that bodies are burnt or buried in this country within a few hours of death. We should require the clearest possible evidence of the time when blisters appear under circumstances such as those before us in order to prefer the deductions based on such theories to the clearest evidence of the fact that this woman was alive late in the morning of the 12th. There is no question in our minds that she met her death at about noon on that day. It is clear also from the medical evidence that she was strangled. P. W. 2 Sayamma claims to have witnessed Nagamma's death. She bears out P. W. 3, the husband, who says that he had gone to Prodattur on the morning of the 12th for work. P. W. 2's story proceeds as follows. The deceased was wearing as was her custom on her body gold katlu, gold kantini gundulu, gold thalakulu, gold rettakadiyam, gold bondu kamalu; gold upper ear-rings and silver kala kadiyalu. P.W. 2 took the buffaloes out leaving her sister in the house. She grazed the buffaloes, brought them back, collected the buffalo-dung and stacked it. A little before noon she returned home and told her sister that she had stacked the collected buffalo dung near the palmyrah tope. The deceased left, bidding P. W. 2 to follow after she had her food. When she left the deceased was wearing the jewels mentioned. After her meal P. W. 2 went to the scene and states that she saw the first accused "accompanied by two strangers" throttling her sister. Her conduct was then just what one would expect of a little girl,

namely, she became afraid and ran home and reported the matter to her aunt and three other persons who have not been examined. There is however ample evidence on the record that this little girl at once reported to her aunt and told her what she had seen. P.W. 6, Chinna Bali bears out the latter part of P.W. 2's statement. He says that P.W. 2 came crying and told P.W. 5 that the 1st accused and two strangers were throttling and killing her sister. It is convenient to mention here that the examination in-chief in this case does not appear to have been very satisfactory. The statement of P.W.-2 that she saw the accused accompanied by two strangers throttling her sister was obviously not an adequate recording of her evidence, but it is plain beyond doubt that she at once reported to her aunt in the hearing of others that all three were throttling her sister deceased, and no cross-examination was directed to suggest that the two strangers were not taking part. It is obvious from the learned judge's judgment who after all recorded the evidence that, in the words of his judgment, "there she (P. W. 2) saw the three accused in the act of throttling the deceased." P. W. 6 and others went to the scene and P. W. 6 at the request of P. W. 2 went to Prodattur to tell P. W. 3 and he found P.W. 3, told him and brought him back to the village. P. W. 2 identified two of the jewels kantini guntulu and bondu kammalu—after the accused's arrest. She says she was able to identify the bondu kammalu especially because there was a dent on one side of it due to her niece (the deceased's daughter) treading on it. There remained on the body the gold thalakulu, gold upper ear-rings and the silver kala kediyalu, and the other jewels were missing. It does not seem to us that any cross-examination was addressed to P. W. 2 to suggest that her identification of the jewels was faulty. It may be said that the cross-examination in the case of the 1st accused was especially directed to suggest that she was swearing falsely owing to enmity against the first accused and naturally her identification of the 2nd accused and 3rd accused was questioned. It should be stated here that there was material on the record brought out by the defence suggesting that the 1st accused had previously been involved in a case of theft, for it appears, according to Ex. VI that the deceased had given information regarding this to the authorities and that as a result the village elders ordered the accused to pay Rs. 80 to Kondayya, the man from whom the jewels had been stolen. The defence relies on this incident to suggest that it was for this reason that the first accused has been implicated in this case. This was put directly to P. W. 3 in cross-examination. P. W. 3 received the news at about 4 P. M. from P. W. 6—it may be stated that some of the times are vague in this case—and he (P. W. 3) returned at once to Venkatapuram. He sent P. W. 11 to fetch the village munsif who resides in Prodattur. P. W. 3 has been much criticised. His conduct is said to be remarkable. Why did he not when he received the news at Prodattur at once complain in Prodattur? And why did he go first to his village? The answer to all this is, that it is unsafe to say what any man might or might not do on receiving the news that his wife had been strangled. It is at least safe to say that there is nothing remarkable in his at once going to where the body of his wife lay. The village munsif states that he was informed (and it must have been at about 5 O'clock) by P.W. 5, whereupon he proceeded to the spot and examined P. W. 3 at the scene. He states that he recorded P. W. 3's statement but did not take his thumb-impression. The reports Exs. D and D-1 were sent to the sub magistrate and the police. That by the police was received at 10-20 P. M. and by the sub magistrate at 1 A.M. P. W. 3 stated in his evidence that he gave a dhava—or complaint—to the village munsif and that it was attested by five persons including P.W. 11, but the village munsif states that no written complaint was given and P. W. 11 states he knows nothing about this dhava. On this the defence build the theory that a written dhava was given stating probably that persons other than the accused had committed the murder or that persons unknown had done it, that it has been destroyed after it was decided to foist this case on the first accused. We entirely reject this theory. Exs. D and D-1 were sent by 8 in the evening. They are consistent with the prosecution case as they name the first accused and mention two strangers and give in detail the stolen jewels and that P. W. 2 saw what happened. It is extremely unlikely that the village munsif was participating in the concoction of a false case. The evidence for the prosecution of

many different people had been consistent throughout that this little girl at once identified the first accused together with two strangers as the murderers. The real question in this case is whether the identification of P.W.2 and that of other witnesses, to whom reference will be made, taken with further evidence relating to dealings with these jewels by the accused, is sufficient as a whole to bring home the guilt for this crime. We accept the position that P.W.2 reported in the manner she says she reported. We think there is no ground for supposing that this is a foisted case. It is quite possible that P.W. 3 has confused the statement he made to the magistrate with the dhava. It must be remembered that at the time he must have been suffering from great mental distress and his memory may not be accurate. But we think the evidence of the munsif P.W. 13 entirely disposes of a wholly concocted case. There is no cross examination addressed to him, a munsif of 23 years standing, on which it can be said that he was a party, as he must presumably have been, to such a conspiracy. The criticism that before sending his report he preferred to go to the spot does not, in our view, affect his credibility in any manner whatever. The report of the murder was second-hand hearsay and there was nothing unreasonable under the circumstances in his deciding to verify the fact. That P.W. 2 immediately reported that she had seen the first accused and two strangers murdering the deceased is borne out by P.Ws. 4, 5 and 6. P.W. 2 is the only eye-witness who claims to have witnessed the murder, but other witnesses say they saw the first accused and two strangers nearby at or about the time. Those witnesses are P.Ws. 7, 8, 9, and 10, all villagers of Venkatapuram. They all claim to have seen the accused and two strangers, in the neighbourhood of the scene of the crime shortly after about midday. P.W. 7 was in his mango tope. The first accused and two strangers, according to him, were going towards Prodattur coming from the west. Nagamma was murdered a little away to the west of this mango-tope. At 1 P.M. the witness went home and learnt from P. Ws. 4 and 6 what had happened, whereupon the witness stated that accused 1 and two strangers had been seen by him going towards Prodattur. P. W. 4 was not asked whether P. W. 7 spoke to him and therefore P. W. 7's statement to P. W. 4 should not have been admitted in evidence. This witness also claims to identify the jewels of the deceased. The witness states that he identified the three accused at an identification parade. It may be mentioned that this witness together with the other Venkatapuram witnesses was examined on the morning of the 13th of March. The identification of the accused and of the jewels by this witness was attacked by the defence. As to the jewels neither by the prosecution nor by the defence was the question as to how he was able to identify the jewels fully investigated. P.W. 8 was looking after his buffaloes in the neighbourhood and he tells the same story. Here again, the inadequacy of the examination-in-chief is apparent. This witness was allowed to give the effect of conversations between him and the villagers on his return, but the villagers were not asked about those conversations. P.W. 9 had gone to plough up the onions in his field. He too states that he saw the accused in Kalamalla Vanka shown on the plan. He describes how they were occupied. P.W. 10 says he was grazing goats and actually saw the first accused and two strangers. The evidence of these witnesses can be dealt with together. On the assumption that they are giving honest evidence, it is difficult to criticise the identification of the first accused who belonged to the same village, but their identification of the 2nd and the 3rd accused is naturally vulnerable because they were strangers. The identification parade was held on the 17th of March in the morning. The conventional mahazar Ex. Q was taken and signed by P.Ws. 21 and 22. This identification parade was attacked as identification parades invariably are. P.W. 21 says that the identifying witnesses had no opportunity to see the 2nd and the 3rd accused before identifying them when they were mixed up with about 40 persons. In cross-examination he said that the lock-up doors provided with iron bars had no shutters and that persons inside the lock-up can be seen from the verandah. Apparently a number of persons interested in the case had come to Prodattur on the 16th and at that time accused 2 and 3 were in the lock-up. The learned judge on this says, "It is seen from the evidence of P.W. 21 that persons from Venkatapuram had ample opportunities to see the 2nd and the 3rd accused in the

police lock-up. No reliance can therefore be placed on the evidence of the identification". It seems to us that that finding is not wholly justified, and does not accurately represent the evidence of P.W. 21. It would appear that, if his view is to be accepted, the only lock-up in which persons intended for identification can be safely put is one without any bars or windows, which would hardly be possible in the climate of Madras. It does not follow that, because the witnesses might have seen the accused, they did in fact see them. However, the learned judge took the view that the identification of the third accused was unsatisfactory in the absence of further evidence and acquitted the third accused.

Reviewing the evidence so far as it stands, the position is that P.W. 2 claims to have seen the murder and she at once reported it to her aunt. P.Ws. 7 to 10 claim to have seen the accused in the neighbourhood of the scene of murder at about the time of the murder. So far as the third accused was concerned, that is all the evidence, and the learned sessions judge thought that that evidence was insufficient to convict the third accused. There was however in the case of the first and the second accused further evidence. It is obvious that, if that evidence was accepted, the evidence of P.W. 2 must obviously be true and it is probable that the evidence of P.Ws. 7 to 10 was also true although, if they were untruthfully reinforcing the case, it does not follow that the evidence of P.W. 2 is untrue.

It will be remembered that two of the jewels missing from the body of the deceased woman were katta kadiyam and bendu kammalu, both of gold. P.W. 18, a shroff in Prodattur Town, says that the first accused came to his shop at about 3 o'clock on the 12th of March giving the name of Ganga Reddi and sold the above jewels for which he was paid Rs. 59-1-0 and his thumb impression taken in the account book. Ex. F is the entry in the book and Ex. F-1 is the thumb impression. It is not denied that this thumb impression is that of the first accused. P.W. 18 says he melted the katlu and kadayam, but retained the kammalu and that he sold the gold of the katlu and kadayam to one Venkatasami who was not examined. The police four days later came with panchayatdars. The first accused pointed out P.W. 18 to the police and at the request of the police P.W. 18 produced the kammalu, M.O. 2. The date of Ex. F appears at the top of the page above another entry. It is mistakenly written as Sunday 6th Bahula when it should be Sunday 7th Bahula. The correct date is the 6th, being the 11th of March, but an examination of the account-book shows that this mistake is a continuation of the same mistake which has been made earlier in the book and no significance can be attached to it. This witness was vehemently attacked by the defence and the reasons for the attack may best be stated by the accused's answer to his evidence. It is a complete denial that he ever went to the shop. He states that the thumb impression was obtained from him under pressure at the police station by the police who had taken the book of P. W. 18 for the purpose. The kammalu M.O. 2 is stated not to be that of the deceased at all but one bought from D.W. 1, a Prodattur shroff, who said that he himself sold this jewel to P.W. 18 on the 15th. It is a fact that Ex. XXIII, D.W. 1's book, shows a sale of bendu kammalu, corresponding precisely in weight to M.O. 2. It must be remembered that M.O. 2 was identified by P.W. 2 because it had a dent caused by a child treading on it. P.W.3 also identified it. It has in fact got such a dent. It appears, and it is obviously a fact, that the accused made a statement to the police which might well be admissible under S. 27 of the Evidence Act, and the statement was admitted by the magistrate. The statement was made in the presence of panchayatdars, but it is obvious that this was not the first statement that had been made. A statement had been made to the police which P.W. 20 had thought it wise to get repeated in the presence of panchayatdars. It is obvious that the statement cannot be complete. It is remotely improbable that the accused said simply, "I and the 2nd and 3rd accused removed the jewels from the person of the deceased" without any sort of initial narrative as to how he came to be where the deceased was, or whether the woman was alive or dead at the time. This is an example of the mutilation of a statement made by the accused person, due apparently to the Circle Inspector supposing that it was his duty to decide what evidence was admissible and what was not. The duty of the police is, if they desire to record a statement, to record it as given and to leave it to the court to decide what evidence is admissible. In *Public Prosecutor* v. *Subba Reddi* (1)

1. (1938) M.W.N. 1118 : Cr. 198

this court has condemned the practice of police officers giving not statements made to them in the first instance in evidence but statements made obviously for the second time before panchayatdars. Such statements have been held to be inadmissible. The result of the handling of this statement by the police is that what probably was a simple and admissible statement under S. 27 must, in our opinion, be ruled out entirely for reasons which may be re-stated as follows: (1) that the statement is obviously incomplete and (2) that obviously what was stated by the accused was a repetition of something that he had previously said to a police officer. It is the first statement of the accused to whomsoever made, that leads to the discovery of the fact, if a fact is discovered. The attention of the trial judge may usefully be directed to the Full Bench decision of this High Court in *Athappa Goundan In re* [2]. Excluding any statement by the first accused, there remains the fact, if true, that he pointed out P. W. 18 to the police and that P. W. 18 stated that on the afternoon of the murder the accused sold to him M. O. 2 said to be the property of the deceased. It is most important to remember, when considering whether this story can be accepted, that on the 15th of March, the date of Ex. XXIII, the police had no idea that the first accused was supposed to have sold the kammalu to P. W. 18 because it was not until the next day, the 16th, that he was brought to Prodattur having been arrested at Tumulur and on that day took the police to P. W. 18. It is therefore incredible that the police should be attempting to identify the accused with a jewel procured from D. W. 1 on the 15th of March when they did not know until the 16th of any connection between P. W. 18 and the accused. Evidence of this is based largely on the book of D. W. 1 and it is unquestionably remarkable that kammalu of precisely the same weight as that said to have been taken from the deceased's body is shown to have been sold on the 15th. But it is curious that D. W. 1 was never asked in chief to identify the kammalu at all; he was only asked by the court. The book of D. W. 1 is not above suspicion. The explanation about the sheet corresponding to Ex. XXIII being blank that it was the last day of the financial year is not very convincing. So far as the time of these events is concerned Ex. XXIII is the first entry of the day on the 15th and the accused was arrested at 4-30 on that day at Tumulur. The theory of this jewel being foisted must, in our opinion, be rejected. The question arises, was M. O. 2 the property of the deceased? Its identification by those who are familiar with it, especially of the description of the dent on the side by P. W. 2, seems to us entirely satisfactory. P. W. 3's identification of both M. O. 1 and M. O. 2 was attacked.

The defence were driven to such criticisms as that P. W. 3 hesitated in his identification of M. O. 1 in the magistrate's court, a circumstance satisfactorily explained by him by the statement that he was much overcome with being confronted by his murdered wife's jewel, because that this woman was murdered there is no doubt. Another criticism was that P. W. 3 said that he did not know where his wife got the kammalu from and that she had told him that she bought it. But these criticisms entirely disappear in the face of the fact that the accused took the police to P. W. 18, that there was a kammalu and that in P.W. 18's books was the thumb impression of the accused and that as will later be shown accused 2 revealed where M. O. 1 was hidden. The alternative, accepting those facts, is to suppose that the police by some mysterious manner, having heard that a kammalu was in the possession of P. W. 18, thought fit to invent the story that the accused had taken it there, and having invented it obtained by force a thumb impression of the accused in the book of P. W. 18. If the police had descended to this method surely it may be supposed that they would have ascertained the source of the foisted jewel and arranged that that source should be amenable to their wishes as well.

It is impossible for the defence in this case to avoid the argument that, beginning with the villagers and ending with the police, there has been a conspiracy to convict the first accused of a crime of which at least there is no evidence. The villagers are supposed to have selected him because he had been concerned in a robbery before and therefore he was the likely person to have committed the murder. This is a theory which at least requires consideration, but the learned counsel for the defence has been quite unable to suggest any explanation as to why,

2. [1937] M.W.N. 442: Cr. 74: I.L.R. 1937 Mad. 695 F.B.

having selected the first accused as the victim, the villagers have elected to, complicate what would have been a relatively simple case by attaching to him two unidentified strangers. The only explanation suggested was that, as the first accused was no more than seventeen, it was safer to associate others with him lest it be said that he was physically incapable alone of murdering the deceased. But, why two other men should be introduced has never been explained especially as the third accused was a Muhammadan. The defence have argued, and rightly argued, that the combination of the first accused, a Reddi, with the second accused, a Hindu of totally different caste and the 3rd accused, a Muhammadan, is remarkable and improbable. It is certainly remarkable; but when considering the hypothesis of a carefully thought out false case the introduction of three such different persons as acting together is equally unlikely.

Then, so far as the foisting of the jewels is concerned, why should the police, who could quite easily have 'planted' these jewels on the accused in a simple manner, involve themselves in a much more complicated transaction involving the assistance of a bazaar shroff?

The evidence against the second accused consists very largely of his conduct after arrest in relation to a jewel (M. O. 1) identified as the property of the deceased. It is not illogical to say that the evidence of identification by itself might be unreliable, but that, when substantial evidence is added to it, the identification evidence assumes a totally different aspect. When P. Ws. 7 to 10 identified two unknown persons whom they had no particular reason to notice, it is permissible to doubt whether that identification can be trusted; but when those very people are found dealing with the jewels of the murdered person, it is reasonable to hold that they were making no mistake when they picked out the accused as the culprits. The third accused has of course been acquitted, but in the case of the second accused there is evidence of the precise nature which we have indicated. After his arrest the second accused told P. W. 23, the sub inspector that the kantini gundulu which came to the shares of the second and the third accused was concealed by him in the cattle shed of his uncle and that he would show it. Here again, his statement is obviously shorn of much of its context, but there is no reason to suppose that any part of a statement made by the second accused would have assisted the accused's case nor is it suggested that this was the case. The second accused thereupon took the police officer and the panchayatdars to his uncle and removed M. O. 1 from under a slab in the cattle-shed. We have been asked to say that what might have happened was that, after the murder, the second accused in some way became possessed of this jewel and that no hostile conclusion can be drawn from the statement. But, when a man is identified as being one of three persons engaged in a murder and when that person states that a jewel produced by him from a hiding place came to his share, it is, to put it no higher, reasonable to hold that he was concerned in the murder in the absence of any explanation. What explanation has been given by the accused? The first accused completely denied the offence and said that he was at a jathra in Kothapallee, Cuddappah taluk, where he had gone to stay in his maternal uncle's house three days prior to the occurrence, that after the jathara he went to Tummalur to his relation's house where he was arrested, and that this revelation of P. W. 18 and his thumb impression in the witness's book were induced by police coercion. If that is so, he could have called witnesses to establish an impregnable alibi, but no witnesses were called from his maternal uncle's house to say that he was at Kothapallee three days before the murder or from the other relation's house in Tummulur to say that he was there on the day of the murder itself. As to the second accused, he denies entirely that he ever produced the jewel at all or that he even knows (Muganna) Mugavadu at whose house the kantini gundulu was alleged to have been recovered. Here again we see according to the second accused, that the police chose for the scene of foisting this jewel on the second accused the house of a stranger. With regard to this jewel it is true that it is of a sort commonly worn by women, but there is nothing in the evidence of identification to suppose that it was not the property of the deceased. In the case of the second accused we are invited to say that the whole of the evidence against him is false.

This is a remarkable case because of the difference in caste and creed of the three accused and we have already noticed the curious fact

that the book entry of D.W. 1 purports to deal with a jewel identical with M. O. 2. But in spite of these matters we are satisfied that the inferences of guilt to be drawn from the evidence are overwhelming and we reject entirely the theory that the charge arising from this combination of facts owes its inception to the hasty—for it must have been hasty—agreement among the villagers of Venkatapuram and that the police gladly and enthusiastically cooperated from the moment the matter came into their hands. The learned sessions judge was satisfied, and we are satisfied, that the evidence brought home beyond all reasonable doubt the guilt of this murder to the first and the second accused. We therefore confirm the convictions. With regard to the sentence, the second accused is 25 years old and the first accused is stated to be 17 although before the court of sessions his age was given as 19. In the case of the first accused, as we have frequently had occasion to remark before, youth by itself is not a reason why the court should evade its duty of sentencing the accused to death especially in the case of a cruel murder such as this. We think that the sentences of death were rightly passed and we confirm them. The appeals of the accused are dismissed.

N.T.R. — *Appeals dismissed.*

R. T. No. 140 of 1939

*December* 15, 1939

BURN & MOCKETT, JJ.

Annamalai Mudali
v.
Emperor.

*Cr. P. C. (V of* 1898*), Ss.* 342 *&* 537*—Failure to put questions under S.* 342*—Effect.*

*Every failure to comply strictly with the letter of S.* 342 *does not render the conviction of an accused person illegal. No omission to comply strictly with S.* 342 *can render a conviction liable to be set aside unless it has in fact occasioned failure of justice. It is not possible to lay down a more general rule than that it is the duty of the court to be satisfied either by his statements or by his answers to questions or by both that the accused explains or has an opportunity to explain the circumstances from which hostile inference may be drawn against him. When an accused person in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications and attempts to explain them, the judge may be going beyond his province if he questions him further in detail, particularly when the accused is represented by his own counsel.*

*Evidence of identification taken in conjunction with other evidence is reliable evidence.*

Trial referred by the court of session of the South Arcot division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 34 of 1939 on 9th October 1939.

*Nugent Grant, K. S. Jayarama Aiyar & G. Gopalaswami*, for Accused.

*Public Prosecutor*, for Crown.

JUDGMENT

The accused, Annamalai Mudali has been convicted of murder by the learned sessions judge of South Arcot, and has been sentenced to death. The case against him was that he murdered his wife Dhanabagiam on the 12th February 1939.

With the exception of an extra judicial confession which the accused is said to have made to his father-in-law's brother (P. W. 20) the evidence against the accused was entirely circumstantial. The body of Dhanabagiam (wife of the accused) was found on the morning of the 13th February in a field within the limits of the village of Eriyur in Kallakurichi taluk. It was about one mile from the railway station of Pukkiravari on the Salem-Vridhachalam line. Information was given at first to the V. M. of Ulagianallur who was dead before the trial took place. He apparently discovered that the corpse was not lying within the limits of the village, and therefore he sent a yadast (Ex. F) to P. W. 19 the V. M. of Eriyur. P.W. 19 received Ex. F at about 2-30 p.m. and sent reports Exs. G and G 1 to the police at Varanjaram and the sub-magistrate of Kallakurichi. The Inspector of Police (P. W. 22) heard of this case when he went to the police station at Varanjaram at 8 P.M. The inspector went to Kallakurichi the same night and next morning proceeded partly by road and partly by rail to Pukkiravari, taking with him the assistant surgeon from the hospital at Kallakurichi and also a photographer. The inspector reached Pukkiravari at 9-45 and proceeded on foot to the place where the body lay one mile south of the railway station. He held an inquest during the forenoon and it was con-

cluded by 2 P.M. The body was photographed, and then the assistant surgeon made the post-mortem examination. This disclosed that the woman had been strangled to death. There is no dispute about the manner of her death, and the case is clearly one of murder.

At the inquest it was not known who the deceased was. Enquiries were set on foot and the accused was arrested at Sattanur at 2-30 A.M. on the 18th February. After he had been arrested he made a statement to the police and produced from the house of one Periasami Mudali where he was staying, three jewels (M.Os. 1, 2 and 4), which according to the prosecution belonged to the deceased Dhanabagiam, and which she was wearing when she was last seen alive.

A large number of witnesses were examined to prove that the accused was with his wife on the 12th February from about morning meal time until shortly before sun set. P. W. 4 who was a farm servant in the house of the father of the accused at Naduvalur, said that on the morning of the 12th February the accused took his wife away from his father's house. Naduvalur is to the south of the Salem-Vridhachalam railway line and according to the prosecution the accused took his wife to Kattukottai the nearest railway station. He was seen at the station at 1 P.M. on the 12th February in company with a woman. The station master (P. W. 5) said that the accused bought two tickets for himself and the woman from Kattukottai to Pukkiravari, and got into the 2-30 P.M. train with the woman. That he got into the train was spoken to by three other witnesses P. Ws. 6, 7 and 8, and they also said that at Pukkiravari the accused and the woman alighted. This was the evidence also of the station master of Pukkiravari (P. W. 9) and the pointsman (P. W. 10). P. W. 11 is a man who keeps a little shop for light refreshments just outside railway station at Pukkirivari. He said that on the afternoon of the 12th February the accused and a woman passed near his shop, and that the woman sat down under a tamarind tree quite close to his house while the accussed went into the toddy shop also close by. P.W. 12 was a witness who said that he saw the accused in the toddy shop. Finally P.W. 13 a man of Ulagaiyanallur said that at about two naligais before sunset he saw the accused and a woman sitting close to each other very near to the place where the body of Dhanabagiam was found strangled next morning. The evidence of P.Ws. 9, 10, 11 and 13 is important because they were all examined at the inquest on the 14th February. They saw the body of Dhanabhagiam and they say that that was the body of the woman with whom they had seen the accused on the afternoon of the 12th.

Finally there was the evidence of P. W. 20 a brother of Dhanabagiam's father. He said that on Friday the 17th February when he met the accused at 11 A.M. the accused made a statement as follows "I got on the train with her at Kattukottai on Sunday. We got down at Pukkiravari. I took her beyond the river and told her to go to her aunt's house at Ammanathur, which is half a mile from Olagainallur. I went back on Wednesday. There was a crowd there and a corpse. I got afraid and ran away. On Wednesday night I came to Mangalur. On Thursday morning with a companion I went to Ariyalur and caught a bus and went to Athur. I took a bullock cart that night at Athur and have now come here to Sathanur." P. W. 20 then says that he confronted the accused with some information which he had received from his own sister, and accused him of having murdered his wife, and he says the accused then confessed in these words :—"It is true. I did it. If you are going to inform the police, I and my son will go now and die." P. W. 20 says that he was moved by this appeal and this threat, and that he said that he would not give information to the authorities about the murder. Later on he alleges that he did go to the police lines at Perambalur, and told a constable about it, but the constable directed him to make a complaint at the Chinnasalem police station. Curiously enough, the inspector of police says that he did not attempt to check this statement of P. W. 20. P.W. 20 however addressed a letter to the police at Chinnasalem, which he says is Ex. K. Ex. K-I is the envelope in which it was sent. He says he posted this letter on the morning of the eighteenth in the railway train at Ariyalur. His statement appears to be to some extent confirmed by the fact that the postal cover bears a stamp indicating that it was held back because late fee had not been paid.

All this evidence has been criticised on behalf

of the appellant, but after carefully examining it we find ourselves in agreement with the assessors and the learned sessions judge that it must be accepted. The story of P.W.4 was confirmed by an item of circumstantial evidence. He said that when the accused took his wife away from his mother's house, the mother of the accused told him (P.W.4) to run after them with their child aged 4, and a bundle of sarees which Dhanabagiam had left behind. P. W. 4 says that he did so and caught up with the accused and his wife and gave them the mother's message. Thereupon he says that Dhanabagiam told her husband to tear up and burn these old clothes, and the accused accordingly set fire to the clothes with a match and burnt them. He says that they also told him to take the little boy back and he did so. In confirmation of this story the sub-inspector of Athur (P.W.18) says that P.W.4 took him to the place where he said the clothes had been burnt, and the sub inspector picked up there some ashes (M.O.10) which are clearly the ashes of burnt clothing. The evidence of the witnesses who say that they saw the accused on the railway between Kattukottai and Pukkiravari and from the railway station at Pukkiravari to the place where the body was found, it was suggested was not evidence that the court could rely upon. The witnesses admitted that they had never seen the accused before, and the suggestion was that it would be very unsafe in such circumstances to rely upon their identification of him. Reference was made to the case of *Adolph Beck*.* It is however to be borne in mind that all these witnesses picked out the accused at identification parades held by the sub magistrate at Kallakurichi on the 19th February and subsequent dates. It has not been suggested that any of them has any motive to give false evidence against the accused.

Mr. Nugent Grant in criticising the evidence of P.W.4 laid special stress upon that part of his evidence in which he describes the jewels of the deceased woman. The witness said, "The sari in court (M.O.8) is the one which Dhanabagiam was wearing when she left home. She wore gold bangles on her hand (M.O.4), silver bangles on her feet (M.O.3), an addigai or saradu (M.O.2). These are the jewels now in court. I did not notice M.O.1 the ruby ear ornaments nor the nose screw (M.O.5)". From the difference in tense which the learned judge has used in referring to the wearing of the saree and the wearing of the jewels, learned counsel wishes us to say that this boy was not testifying that Dhanabagiam on the morning of the 12th February was wearing the gold bangles (M.O.4) or the saradu (M.O.2) which her husband produced from Periaswami Mudali's cow shed on the 18th February. We do not think there is any justification for this distinction. We think the boy in his reference to the jewels was referring as far as he could remember to the jewels which she was wearing at that time. P. Ws. 9, 10, 11 and 13 were examined, as already mentioned, at the inquest; P. Ws. 6, 7, and 8 were examined by the inspector on the 15th February, and P. Ws. 7 and 8 identified the accused on the 19th February the day after he had been arrested. If this evidence of identification stood alone, it might be difficult to rely upon it but it does not stand alone. Taken in conjunction with the other evidence we think that it is reliable evidence.

Learned counsel for the accused is not able to contend that if this evidence is accepted as true the conviction of the accused is wrong. There was some evidence with regard to motive but we do not think it necessary to discuss it any further than to say that Dhanabagiam was not looked upon with favour by the accused's mother, and that her presence in the family as his wife was inconvenient. That, we think, is clearly established, to say the least. But evidence regarding the motive is not important. When it is shown that the accused took his wife away from his home on the morning of the 12th February, that he took her by train from Kattukottai to Pukkiravari and afterwards was seen with her near the time of sunset on the 12th at the place where her strangled body was found next morning, when it is proved that the accused on being questioned about his dead wife's jewels produced M. Os. 1, 2 and 4, which Dhanabagiam was wearing according to the evidence of P. W. 4 when she left Naduvalur with the accused, the only possible inference that can be drawn is that the accused is responsible for the murder of his wife.

Learned counsel has addressed to us a legal argument suggesting that the case must be sent back for re-trial. Learned counsel points out that practically the whole of the evidence is circumstantial and that the learned sessions judge

*Notable British Trial Series.

did not explicitly put to the accused, when questioning him under S. 342, Cr. P. C., all the items of evidence leading up to the inference that he murdered his wife, and did not ask him to explain them. Learned counsel has drawn our attention to the case of *In re Sangamma Naicker* [1] and the Privy Council case of *Dwarakanath Varma* v. *The King Emperor* [2]. In the case in *In re Sangamma Naicker* [1] reference was made to three other cases in which re-trial was ordered because the sessions judge had not put to the accused under S. 342, Cr. P. C., the items of circumstantial evidence from which he had drawn the inference that the accused was guilty of murder. We think it is necessary to say that their Lordships of the Privy Council in the case of *Dwarakanath Varma* [2] were dealing with very exceptional facts. The passage in the judgment of Lord Atkin in which S. 342, Cr. P. C. is referred to is as follows :

> "The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under S. 342 of the Code it was the duty of the examining judge to call the accused's attention to this point and ask for an explanation."

There was no reference in the statement of the accused to the absence of blood in the abdominal cavity and Lord Atkin was pointing out that S. 342 of the Code ought to be observed not only in the letter but also in the spirit. It is clearly very unfair to draw an inference of guilt from a fact which an accused person has not had an opportunity of explaining. There is however nothing in the judgment of their Lordships of the Privy Council to indicate that every failure to comply strictly with the letter of S. 342 renders the conviction of an accused person illegal. S. 537, Cr. P. C. has a bearing upon this point. No omission to comply strictly with S. 342 can render a conviction liable to be set aside, unless it has in fact occassioned a failure of justice. In the present case learned counsel for appellant has not attempted to suggest that the omission of the learned sessions judge to put every point to the accused in the form of questions, has led in this case to a failure of justice. He has not for instance suggested that the accused if he had been questioned specifically on every point, would have been able to offer a satisfactory explanation, and the reason why learned counsel has not been able to make any suggestion of this kind is found in the statements made by the accused in answer to questions put to him by the learned sessions judge. In the magistrate's court he was simply asked the question "you now heard it said that you murdered your wife Dhanabagiam. What do you say?" and his reply was "I have not committed any crime." When asked by the learned sessions judge "Have you anything further to say?": he replied with a very long and detailed statement in which he denied the facts alleged on behalf of the prosecution that were supposed to show his motive for murdering Dhanabagiam. With regard to the jewels he said that when the police asked him for his wife's jewels, he thought that they were referring to jewels belonging to a second wife from whom he had been divorced. He went on to say, "Kolandavelu (P. W. 20) is enjoying my father-in-law's property. I asked him for a share on behalf of my wife. Hence his enmity to me. I did not meet him, nor did he come to Sathanur. I did not tell him anything." He continues: "I did not see Doraswami Padayachi (P.W.4). On my father's instigation he is giving evidence against me. I was in Sathanur on Sunday. I did not come here. I did not burn the saree." The learned sessions judge then questioned him about Ex. J. a letter which he had written to P. W. 20 and which the learned judge thought indicated that he was displeased with or had some grievance against his wife. He answered that by saying that he had no dissatisfaction with his wife. The learned judge then questioned him about the jewels of his first wife (M. Os. 1, 2 and 4) and he again said, "I thought that they were referring to my second wife's jewels, and informed them it was with Periaswami Mudali, I did not produce it myself. Periaswami Mudali produced it." And finally when the learned judge asked him, "Do you want to say anything more?' the accused said: "The witnesses had opportunities of observing me at Kallakurichi jail. My younger brother resembles me much. Possibly they saw him and are mistaking me for him." It is clear therefore that either in answer to the general question put by the learned judge, or in answer to specific

1. [1936] M.W.N. 613: Cr. 97: 59 Mad. 622
2. [1933] M.W.N. 409; Cr. 57 P.C.

questions, the accused has dealt in his statement with all the points appearing in evidence against him and has offered such explanation as he had to offer. This case therefore has no resemblance to the case of *Dwarakanath Varma* (2) or the case reported in *In re Sangama Naicker* (1) (the record in which we have examined and which reveals that the accused gave no explanation of the circumstances hostile to them, nor were given an opportunity to do so), or the other cases mentioned in that judgment. In the case reported in *In re Sangama Naicker* (1) and in all the cases referred to in that judgment, it was particularly noticed that the facts unexplained by the accused were *vital* facts, i.e. facts from which an inference of guilt almost necessarily followed. We think it is clear that when an accused person in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications, and attempts to explain them, the sessions judge may be going beyond his province if he questions him further in detail. He may be open to the criticism of cross examining the accused, and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own counsel, and in this case the accused was represented by two experienced advocates. It is not possible to lay down a more general rule than that it is the duty of the court to be satisfied either by his statements or by his answers to questions or by both, that the accused explains or has an opportunity to explain circumstances from which hostile inference may be drawn against him. We can find no ground whatever for sending back this case for a retrial. There was no defect of any kind in the proceeding before the learned sessions judge.

Agreeing with the assessors and the learned judge we confirm the conviction of the accused for the murder of his wife. There is no question of the appropriateness of the sentence. We confirm the sentence of death also.

N.T.R. —

Cr. App. No. 265 of 1938
*January*, 20. 1939.
PANDRANG ROW, J.

Balan Pateyya & others*
v.
Emperor

*Cr. P. C.* (*V of* 1898), *Ss.* 235 *&* 297—*Joint trial—Propriety—Trial lasting for over a month containing several counts of charges—Charge to jury.*

*There was a clash between the Kammas and Edigas in a village which was provoked by the action of some of the members of the Kamma community going to the hamlet of the Edigas and searching a house there. A number of Edigas collected and made a rush to the village in which the Kammas' houses were situate and there were clashes at several places in the village.*

**Held**, *all the events that took place in the village that day could not be regarded as parts of the same transaction and that it was not right to try the cases in respect of all these occurrences in one trial.*

*Unless all offences are parts of the same transaction there could be no joint trial in respect of all the offences.*

*A joint trial in respect of a very large number of counts is very much to be deprecated even though the law may not prohibit it. No doubt joint trials would be legal in certain circumstances but the general rule is that there should be a separate trial in respect of every separate charge. It is the exceptional cases which contemplate joint trials in respect of a number of charges and there is no rule of law which compels a judge to hold a joint trial, even where a joint trial is permitted by law. It is open to him, and it may be expedient in certain cases, to hold separate trials. The usual course adopted in such circumstances is for the Public Prosecutor to be asked to select what he considers to be the best case from his point of view and to try that case first and leave other charges to be tried if necessary later on after the result of the first trial is known.*

*Where the accused were tried on counts numbering* 66, *and the trial spread over a month and a half, the jury acted as assessors in respect of some of the counts, and the judge excluded material evidence by disallowance of relevant and material questions and in the charge to the jury failed to put points which were favourable to the accused and the case against each of the accused*

*was not separately considered and the jurymen as assessors gave opinions inconsistent with their verdict as jury and the judge accepted the same,*

Held, *that the trial and the charge were irregular and the convictions must be set aside.*

*Failure on the part of the judge in his charge to the jury to lay sufficient stress on the fact that all the witnesses for the prosecution were interested, failure to warn the jury against acting on the uncorroborated testimony of such interested witnesses, failure to indicate to the jury what was the evidence against each particular accused and in respect of each particular count, failure to point out the difference between vandalism and dacoity or theft in case of dacoity and theft, and failure to tell the jury of the non-mention of certain facts in the first report of the occurrence and in the charge sheet, are all defects in the charge which vitiate the convictions.*

Appeal against the order of the court of session of the West Godavari Division in C. C. No. 6 of 1938.

*K. S. Jayarama Ayyar & G. Gopalaswami*, for Applts.

*K. Venkataraghavachari*, for Crown.

JUDGMENT

This is an appeal from the judgment of the sessions judge of West Godavari dated the 7th May, 1938, in S. C. 6 of 1938 on his file. The case related to certain occurrences which took place in the village of Mukkamala on the 15th August, 1937. The trial in the sessions court began only on the 21st March 1938 and went on for nearly a month and a half. There were 24 accused and the number of witnesses examined for the prosecution were 51 and a fairly large number of exhibits were filed on both sides. To add to the complexity and the difficulty which the case must have presented to the jury who in respect of some of the counts acted as assessors and also to the trial judge, the charges against the accused were on no less than 66 counts and the occurrences related to about fifteen different places, the first occurrence being at the hamlet of the Edigas in the village known as the Edigagudam; the next being the gingelly fields near it, the third occurrence being between the washerman's hut and Edigagudam and the remaining occurrences having taken place in various houses belonging to the Kammas in the village, the houses being twelve in number. The first count was in respect of rioting with deadly weapons against all the twenty four accused; counts 2 to 7 related to offences of causing grievous hurt with dangerous weapons, i, e., offences under S. 326 I. P. C., some of the counts being against a few of the accused and the others being against the rest constructively by the operation of S. 149 I. P. C.; counts 8 to 29 related to hurt with a dangerous weapon—an offence under S. 324 I. P. C.—some of the counts being under that section alone against some of the accused and the others being against the remaining accused constructively by the operation of S. 149 I. P. C.: counts 30 to 44 were in respect of the offence of mischief punishable under S. 440, I. P. C. against all the accused in the various houses in which mischief is said to have been committed. So far as this offence is concerned, it must be mentioned that there was no charge under S. 149, I. P. C. Counts 45 to 56 were counts relating to the offence of house-breaking punishable under S. 455 I. P. C against all the accused in the respective houses referred to in the counts; counts 57 to 62 related to the offences of dacoity punishable under S. 398, I. P. C. against all the accused in respect of the various houses referred to in the counts; the remaining four counts 63 to 66 related to the offence of theft in a building against all the accused in the respective houses referred to in the counts. Counts 45 to 66 were tried with the aid of a jury and the jurymen acted as assessors in respect of the other charges which were triable with the aid of assessors. The entire trial was held jointly and there was no separate trial in respect of any count. In the result thirteen out of the twenty four accused were convicted on various counts—six Edigas and seven Malas, and these are the appellants in this appeal. Most of the appellants have been convicted under a very large number of counts ranging from 13 to 24. The sentences have, however, been ordered to run concurrently in all cases and the longest sentence was only three years on the ground, as stated in the judgment that though the offences were grave, the rioters had behaved with moderation and they had been on remand for several months and also because most of the offences were practically parts of one transaction. This observation of the learned judge that most of the offences were practically parts of one transaction shows that the learned judge himself was not quite sure that all the offences were actually parts of the same

transaction. It is obvious that unless all the offences were parts of the same transaction, there could have been no joint trial held according to law in respect of all the offences. This point will have to be considered at greater length later on after giving a brief description of the facts of the case.

It is not disputed that there had been trouble between the Kamma community on the one hand and the Ediga and Mala communities on the other in the village for some time before the occurrence. The trouble was mainly due to a dispute about wages, the Kammas being, generally speaking, employers, and the Edigas and the Malas being generally labourers employed by the Kammas. A fairly accurate account of the state of affairs about a week or so before the occurrence is to be found in the special report sent by the sub-inspector to the joint magistrate (Ex. B.) on the 8th August 1937. As observed by him, the fight by the labourers against their employers had already begun and there were complaints made to the authorities by both parties. The sub-inspector warned both parties and asked for instructions. The sub-divisional magistrate appears to have been of the opinion that the state of affairs did not warrant any action on his part. To this effect he made an endorsement on the report on the 13th August 1937. On the same date the inspector of police appears to have sent a report to the joint magistrate (Ex. E-1) praying for action to be taken under S. 107, Cr. P. C. against ten members each of the two parties on the following grounds: "The strike is formed about one and a half months ago and is getting from bad to worse day by day. The Sub-inspector, Tanuku, enquired into this and tried his best to arrange a compromise but in vain. The Kammas are rich and obstinate. The Edigas are poor but desperate. Their feelings are highly strained and they are trying to avenge each other. Even in my enquiry both parties abused each other and the situation is serious. Unless both parties are bound over they are determined to commit a breach of the peace." Unfortunately for reasons which are not discoverable on the record, the joint magistrate does not appear to have taken any action in the matter as requested by the inspector of police, and two days after the date of the report the trouble came to a head, and there was undoubtedly a serious breach of the peace in the village owing to the clash between the warring communities in the village. There can be no doubt that the beginning of the clash was provoked by the unwarranted action of some of the Kamma community in going to the hamlet of the Edigas and searching the house of one of the Edigas on the pretext that certain hay had been stolen and was secreted in the house. No attempt has been made before me on behalf of the crown to justify this action on the part of the village munsif and there is no doubt that it was this raid into the house of one of the Edigas by the village munsif and some of the Kammas that was the immediate cause of the clash. The clash was thus sudden and was not the result of any previously concerted action on the part of the appellants, and it is impossible to say that the events that took place at Edigagudam and even the events that took place in the gingelly fields immediately afterwards in which two or three people were beaten are parts of the same transaction as the events that followed after a large number of Edigas and Malas had collected subsequent to these events and made a rush to the village in which the Kamma houses were situated. There was in my opinion no justification for regarding all the events that took place on that day in the village as parts of the same transaction, and it was not right to try the cases in respect of all these occurrences in one trial. The danger of the joint trial in this case is indeed apparent on the most cursory examination of the judgment itself. The large number of the counts on which the trial was held led to a lengthy trial spread over nearly a month and a half and must have necessarily confused the minds of the jury, the members of which also acted as assessors in respect of some of the counts. The result of such confusion is apparent, for it is clear from a mere perusal of the verdict of the Jury on some counts and the opinions of the jurymen as assessors in respect of the connected counts arising out of the same occurrences, that they are absolutely inconsistent. To put it in other words, even where the occurrence is one and the same in the sense that it took place in the same house and the evidence regarding the occurrence was the same but different offences were committed, for instance, hurt, mischief and house-breaking and dacoity, the members of the jury gave a verdict

which is inconsistent with their opinions as assessors in respect of the counts on which the trial was with the aid of assessors. This is absolutely inexplicable except on the supposition that their minds were so confused by reason of the length of the trial, the volume of the evidence and, if one may say so without meaning any disrespect to the learned sessions judge, the very lengthy and not very clear charge which he delivered to the jury. The summing up appears to have lasted from 11 in the forenoon till about 7 in the evening, an ordeal which most people would find it difficult to stand without some untoward reaction in their minds. It is very difficult in a case where the trial has lasted for more than a month and a number of witnesses were examined, for the members of the jury to carry in their minds any clear idea either of the demeanour of the witnesses or of the particular charges to which the evidence of a particular witness relates and this inability to remember is not removed by the long charge—a charge so long that before one got to the end of it, one must necessarily have forgotton something of the beginning or the middle. The difficulty was increased by reason of the fact that the ordinary precaution of stating to the jury the evidence as against each of the accused was not followed in this case. The evidence was undoubtedly marshalled, and ably marshalled, by the learned judge as regards each particular count or connected sets of counts, but unfortunately no attempt was made either at the beginning or at the end to indicate to the jury what was the evidence against each particular accused and in respect of each particular count. It is not known whether the members of the jury were furnished with a copy of the counts or whether a translation was furnished to them, and one can very well imagine the state in which their minds were at the end of the charge, and the clearest indication of that state is furnished by the inconsistency between the verdict of the jury and the opinions of the same gentlemen as assessors in respect of the same occurrence backed by the same evidence. A joint trial in respect of a very large number of counts is very much to be deprecated even though the law may not prohibit it. It is one thing to say that a joint trial was legal but quite another to say that it was proper in the circumstances. No doubt joint trials would be legal in certain circumstances, but the general rule is that there should be a separate trial in respect of every separate charge. It is the exceptional cases which contemplate joint trials in respect of a number of charges, and there is no rule of law which compels a judge to hold a joint trial. Even where a joint trial is permitted by law, it is open to him, and in a case like this it would have been expedient also, to have held separate trials. The usual course adopted in such circumstances is for the Public Prosecutor to be asked to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial is known. This practice is in accordance with common sense and does justice to the accused and does not result in the confusion that we find in the present case as a result of the joint trial held in respect of so many as sixty-six counts.

After going through the charge to the jury I am of opinion that it has not been fair to the accused and that it contains several misdirections. There has also been an improper exclusion of relevant evidence which was attempted to be let in on behalf of the accused. The learned judge did not lay sufficient stress on the fact that all the witnesses for the prosecution were interested, when he was charging the jury as to the evidence on particular counts. I wish to mention an instance or two as examples, as there are several such instances to be found in the charge. For instance, in dealing with counts 33, 47 and 60 in paragraphs 65 to 67 of the charge, the learned judge first of all points out that the witnesses who speak to those counts are P.Ws. 18 and 47. Towards the end of paragraph 67 he points out that P.W. 47 does not speak with any personal knowledge as to what happened. It was thus clear that there was only the evidence of P.W. 18 in respect of these counts. He has pointed out at the same time that according to the evidence of P.W. 18 the events in the house were witnessed not only by himself but also by his wife, his daughter, his brother's wife and his brother's daughter who were in the house at the time of the occurrence. None of these have been examined. The witness also spoke to the commission of dacoity in his house, the dacoity consisting in the fact that

a sum of Rs. 100 is said to have been demanded by the accused under threats and that actually he was beaten thereafter. Fortunately for the accused so far as the count of dacoity was concerned, the learned Public Prosecutor stated that the accused were entitled to the benefit of the doubt; otherwise I should have not been surprised if the jury had returned a verdict of guilty in respect of this count also. The verdict of the jury was (by a majority of one) a verdict of guilty in respect of count 47, and in respect of count 33 they gave their opinions as assessors, as follows: four of them to the effect that none of the accused was guilty and one to the effect that accused 6 and 13 were guilty. This verdict and these opinions are, in my opinion, directly attributable to the failure on the part of the learned judge to have warned the jury against acting on the uncorroborated testimony of an interested witness like P. W. 18, whose evidence about a part of the same occurrence, namely, the dacoity, was such that the Crown itself was prepared to advise that the accused were entitled to the benefit of the doubt. On the same evidence it is impossible to justify the verdict of guilty by 3 to 2, while in respect of another part of the same occurrence backed by the same evidence the majority was 4 to 1 to the effect that none of the accused was guilty. It is impossible to my mind to account for these extraordinary aberrations, so to speak, of judicial opinion delivered by members of the jury in their dual capacity, except on the ground that they did not know what they were doing because of the length of the trial and the length of the charge and the complexity of the case occassioned by the joint trial on a large number of counts. Such a trial not only prejudices the accused but also works havoc in the minds of the jury and makes it very difficult if not impossible for them to express any rational opinion on the matters remitted to them for judgment. On the other hand instead of warning the jury in respect of the remaining counts, namely, 33 and 47, count 60 having been practically abandoned by the Crown, that it was not safe to convict in view of the interestedness of the witness and the absence of corroboration, the learned judge thought it fit to dismiss the argument to this effect by the accused's counsel in the following words in paragraph 67 of his judgment: "One of the arguments of the acccused's counsel was that in every case in which there was no corroboration, it would be safer for you to reject the testimony. Such a condemnation of uncorroborated testimony is not correct. There is no principle which debars you as judges of fact from relying upon such testimony. No particular quantum of proof is required to prove any fact. In order to hold any fact proved you require only such evidence as would satisfy a reasonable man that the fact is true." While these observations cannot be said to be erroneous in law, they were undoubtedly not calculated to lead to a correct or just decision in a case of this kind. This was not a case in which these observations should have been made to the jury, which appear to have encouraged instead of discouraging them to accept the uncorroborated testimony of an interested person while the prosecution had given no reason for not examining a number of other witnesses who were available at least for the purpose of corroboration though they were equally interested. Similar observations can be made in regard to a number of other counts dealt with in the charge of the learned judge. It is not as if any particular observation was not in strict accordance with law or with the evidence in the case, but throughout it appears that wrong guidance was given to the jury by the learned judge; where caution ought to have been imposed on the jury encouragement was given to them to accept evidence which was obviously to be treated with considerable caution. According to the learned judge the parties were at bitter enmity and so far as the question of motive was concerned, either of the parties might have started the riot. When such was the position, it was obviously incumbent on the learned judge to have warned the jury not once, but more than once wherever the evidence was very scanty and lacked corroboration, where corroboration was available, to treat the uncorroborated evidence offered on behalf of the Crown with caution and to accept it only after a careful examination thereof. In several places the learned judge himself remarks that even as regards the material portions of the prosecution story the truth had not been placed before the court by the prosecution. For instance, in paragraph 95 of his judgement he says that he has no hesitation in discrediting the story related by the prosecution as regards theft of hay. He did not accept the broad case for the

prosecution that there was an unlawful assembly of the Malas and Edigas from the very beginning whose common object was not only to beat the members of the Kamma community but also to invade their houses, break the doors and windows, cause hurt to the inmates and to commit theft, dacoity etc. So far as the first part of the occurrence is concerned, he appears to have come to the conclusion in paragraph 95 of his judgment that there must have been a free fight between the Malas and Edigas on the one hand and the Kammas on the other in Edigagudam in the course of which both parties sustained injuries and that it was only thereafter that the Edigas and Malas gathered in large numbers and marched into the village and committed several acts of vandalism. Vandalism is one thing and dacoity and theft are quite different, and the learned judge failed to point out the difference between vandalism and dacoity or theft to the jury when he asked them to give their verdict on counts relating to dacoity and theft. In several places in his judgment it is very clear that a good portion of the prosecution evidence was disbelieved by the learned judge. He concedes in paragraph 101 of his judgment that all the material prosecution witnesses are Kammas and that it was possible for the prosecution to obtain the testimony of disinterested witnesses belonging to Brahmin and Vysia communities in the village. He says that while this is a ground for scrutinising the evidence with care, it is not proper to condemn the evidence as a whole. The charge delivered by the learned judge does not however show that the jury were asked to scrutinise the evidence with care, and if there was any scrutiny, the result of the scrutiny by the jury and by the judge shows that scrutiny must have been exceedingly slipshod. Otherwise there would not have been the numerous inconsistencies that are to be found between the opinions of the jury as jurymen and as assessors, and also between what the judge stated in his judgment and the convictions recorded by him. As an instance of the latter, I might mention that while in paragraph 142 the learned judge has recorded the opinion that there was no identification of any of the accused as regards count 43, he has actually convicted a number of accused under that count. He has moreover convicted various accused persons under Ss. 440 and 149 I. P. C. while as a matter of fact there was no charge under S. 149 in respect of any of the counts relating to S. 440 I.P.C. It would also appear that the judgment and the finding are inconsistent so far as count 42 is concerned.

I shall go on to indicate briefly the various other defects which are to be found in the charge. The learned judge omitted to tell the jury that there was no mention of the commission of any house breaking or dacoity in the first report of the occurrence Ex. F. He also omitted to mention to the jury that even in the charge sheet only one dacoity was mentioned whereas in the evidence no less than six dacoities were spoken to. The result of this is seen in the fact that in the case of two dacoities (counts 57 and 58) the jury returned a verdict of guilty by a majority. The inconsistencies between the verdict of the jury as a jury and the opinions of the members of the jury as assessors are to be seen in the following instance. On counts 57 and 58 by a majority of three to two the jury returned a verdict of guilty against accused 1 to 4, 7, 13, 14, 17 and 18. On the connected count 34, that is to say the count relating to the occurrence in the same place regarding which the evidence is the same, the opinion of the asssessors was in the case of two not guilty and in the case of two other assessors, that accused 1 to 3 and 13 were guilty and in the case of the remaining assessor that accused 1 to 3 were guilty. These opinions and the verdict are not reconcilable. In respect of these very counts also the learned judge omitted to direct the jury that the accused implicated by the witnesses were only accused 1 to 3, 13, 14 and 17. If this had been pointed out, it is not likely that the jury would have returned a verdict even by a majority against accused 4, 7 and 18 who were not implicated by the witnesses in the dacoity. Then again in respect of count 45 which relates to house-breaking, the jury found by a majority of three to two that all the appellants were guilty, while in respect of the same incident dealt with in count 31 which relates to mischief three out of the five assessors expressed the opinion that none of the accused was guilty, the evidence being the same. In respect of the same count 45 the only eye-witness who speaks to it, namely, P. W. 41, mentioned only accused 1, 3, 4, 14 to 16, but this was not specifically men-

tioned to the jury in the charge. The result was that accused 15 and 16 who were mentioned by the sole witness were acquitted, whereas several others who were not mentioned, namely, 2, 7, 13, 17 and 18 were found guilty by the jury. This again is an inconsistency which deprives, in my judgment, the verdict of the jury of any real value as a judicial verdict. It is impossible really to treat a verdict of this kind with any respect when the same gentlemen in their capacity as assessors on the same evidence have expressed absolutely different and inconsistent opinions. Verdicts of this kind were really not entitled to acceptance, and unless the learned judge who tried the case was himself in the same boat so to speak, with the jury, it is impossible to account for his acceptance of such verdicts in the face of the opinions of the jurymen as assessors given at the same time. A mere comparison of the opinions with the verdicts would have indicated to him the necessity of expressing his disagreement with the verdict of the jury and making a reference to the High Court. The acceptance of the verdicts in these circumstances shows that there has been a disregard of the duty of the judge to consider the verdicts carefully, before he expresses his agreement with them or decides not to express his disagreement. Instances of this kind may be multiplied, and they are all found in the memorandum of appeal, vide particularly paragraphs 13, 14, 15 and 16 of the grounds of appeal. I may here mention that the learned Public Prosecutor has not attempted any explanation of these inconsistencies when the appeal was argued before me and indeed no explanation seems to be possible. The inconsistencies are so gross and so glaring that the only explanation would be—though it would hardly be a satisfactory explanation—that all those who were connected with the trial were so confused at the end of it that they did not know what they were doing. Such an explanation would certainly not be very useful from the point of view of the prosecution.

I come next to the contention that relevant evidence was excluded by the learned judge during the trial. In the case of P. Ws. 23 and 24 there is specific proof that certain evidence was excluded—*see* pages 96 and 100 of the printed record. P. W. 23 who speaks to the commission of various offences in his house in respect of which convictions have been recorded, was asked in cross-examination, "when you went and reported to the sub-inspector at 1 o'clock, you did not mention the names of any of the culprits?" This obviously relevant and important question was objected to and was actually disallowed by the learned judge. It must be remembered in this connection that in his evidence in the case P. W. 23 had implicated a number of accused and the case for the defence was that as a matter of fact the witness had not mentioned any of these accused to the police when questioned immediately after the occurrence. It was certainly relevant and important to elicit the fact whether as a matter of the fact the witness had mentioned the names of any of the culprits to the sub inspector at 1 o'clock, that is to say, almost immediately after the occurrence. There was in my opinion no justification for exclusion of evidence of this kind; the question was overruled and the evidence was excluded by the learned judge. A somewhat similar question was put to P. W. 24, namely, "Did you tell the sub-inspector that your brother paid Rs. 50 and your wife paid Rs. 15?" This was in connection with the allegation made in the evidence of the witness that these sums of money had been extorted from these people under threat of instant hurt. It is difficult to understand the reason for the objections to a question like this. S. 162, Cr.P.C. does not certainly stand in the way of such evidence being given. Apparently by reason of the objection being sustained in reference to this question by the learned judge, similar questions were not asked of the other witnesses for the prosecution. I may mention, however, in this connection that similar questions appear to have been asked of P.W. 27 and disallowed—*vide* Page 107 of the printed record. It is apparent, therefore, that there has been a serious exclusion of evidence which was perfectly relevant and which might have materially helped the defence in throwing doubt on the veracity of important prosecution witnesses.

I have said enough to show that the convictions of the appellants in this case cannot stand. There has been no proper trial; the trial that was held was not according to law; there was a wrongful exclusion of material evidence by wrongful disallowance of relevant and material questions which must have prejudiced the appellants' defence and there was throughout

in the charge a failure to put points which were favourable to the accused before the jury. The judgment itself apart from the record of the case, clearly establishes the fact that in this case there has been no attempt to consider the case as against each of the accused, and the jury must have been considerably confused and misled by the defects in the charge. I am therefore of opinion that the appeal must be allowed. The convictions and the sentences on the appellants are hereby set aside and in view of the fact that the appellants have been in jail pending trial, some for six months or thereabouts and others for so long as ten months or so, it is in my opinion unnecessary to direct a re-trial. Even otherwise I am of opinion after considering the evidence myself that it is hopelessly lacking in quality and it is not likely that there would be a conviction if a retrial is held according to law. I there acquit the appellants and direct that the bail bonds executed by them be discharged.

N.T.R. *Accused acquitted.*

---

Cr. R. C, Nos. 799 & 800 of 1938

Cr. R. P. Nos. 759 & 760 of 1938

*December* 9, 1938.

LAKSHMANA RAO, J.

South Indian General Assurance Co., Ltd. & others
v.
The Registrar of Life Insurance Companies, Madras.

*Cr. P. C. (V of 1898), S. 248—Withdrawal against some accused—Effect.*

*There is nothing in S. 248 Cr. P. C. which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against some of the accused.*

FACTS: Complaint was laid by the Registrar of Life Assurance Companies, against seven accused for failure of the accused company and its directors to make good the default in regard to the deposit of the securities under S. 4 (1) of the Life Assurance Companies Act. The further facts appear from the order of the lower court which was as follows:—

"The complainant withdrew his complaint in regard to some of the accused. They were acquitted. It is now contended that there can be no partial withdrawal of a complaint in a summons case and the withdrawal is a bar to the further prosecution of the other accused.

"The withdrawal against some of the accused was necessitated by those being residents of an Indian State (Travancore) and no process could issue to them, the offences with which they are charged not being extraditable offences. The complainant had no intention of relinquishing his relief or to forego his remedy against these persons but for the circumstances stated above; still less had he any idea of relinquishing his relief nor of foregoing his remedy against the rest. The complaint really amounted to seven complaints against seven accused, committed simultaneously by seven different persons. It constitutes seven separate offences by each one of the accused. The withdrawal of a complaint against one or more does not amount to a withdrawal against every one of them. There is nothing in S. 248, Cr. P. C. which would warrant such a conclusion. I dismiss the petition and the cases will be proceeded with against the rest of the accused."

The revision petition was filed against this order.

Petition under Ss. 435 and 439 Cr.P.C. 1898, praying the High Court to revise the order of the 2nd Presidency Magistrate, G. T. Madras, dated 13-10-1938 and made in C. C. Nos. 1129 and 1130 of 1938.

*V. Rajagopalachari & A. S. Mannadi Nair*, for Petitioner.

*Crown Prosecutor*, for Crown.

ORDER.

The complaints were sought to be withdrawn against some of the accused and the magistrate acquitted them. There was no formal withdrawal of the complaint and as pointed out in *Annantia* v. *Crown* (1), in which all the decisions were considered, there is nothing in S. 248 which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against some of the accused. There is therefore no substance in these petitions and they are dismissed.

N.T.R. *Petitions dismissed.*

---

1. (1924) 5 Lah. 239 (251)

FULL BENCH

*December 5, 1939*

SIR LIONEL LEACH, C.J., GENTLE & KRISHNASWAMI AYYANGAR, JJ.

In the matter of Sri K. Srinivasa Rao
First Grade Pleader, Coimbatore,
G. Thimmappa

*Legal Practitioners Act (XXI of 1926), S. 13 — Inquiry ordered to be conducted by district judge—Delegation to additional district judge—Validity.*

*Where the High Court directs the district judge to hold an inquiry under the Legal Practitioners Act, the district judge cannot delegate this duty to the additional district judge, without receiving the sanction of the High Court. S. 3-A Madras Civil Courts Act does not empower him to make such delegation.*

*Where the additional district judge holds the inquiry, it is unlawful, and the High Court will not act upon it.*

*Failure to object to the inquiry by the additional district judge and acquiescence in the proceedings would not turn it into a lawful enquiry.*

*Advocate-General* in support of the notice.

*T. R. Venkatrama Sastri & M. Krishna Bharathi*, for Pleader.

Complainant not represented.

ORDER

SIR LIONEL LEACH, C.J.: The respondent is a pleader practising in the Coimbatore district. In February 1937 one G. Thimmappa, a merchant residing and carrying on business in Bellary, presented a petition to this court in which he charged the respondent with professional misconduct. The court considered that the charges made called for inquiry and passed an order directing the district judge of Coimbatore to hold the inquiry, the case falling within s. 13 of the Legal Practitioners Act. When the matter came before the district judge, the petitioner filed a statement in which he said that he was satisfied that the respondent, who had been his pleader for a considerable time, had not acted *mala fide*; and that his claim had been settled by the respondent and he wished to withdraw the petition. In the circumstances the district judge thought it unnecessary to proceed with the inquiry and submitted the record to this court with his remarks. This court considered that the district judge should have proceeded with the inquiry, notwithstanding that the petitioner had expressed a desire to withdraw the petition. Where the court has reason to believe that a practitioner may have been guilty of professional misconduct, it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner or even if the complainant without any agreement does not wish to proceed with the matter.

By an order dated 7th March 1939 the court remanded the case to the district judge with directions to proceed. Without reference to this Court the district judge directed the additional district judge to hold the enquiry, which he did and his report is now before us. Mr. Venkatarama Sastri on behalf of the respondent has raised a preliminary objection. He says that in as much as the enquiry has been conducted not by the district judge who was directed to hold the enquiry but by the additional district judge, it is unlawful and the court cannot take action on it. In other words, he says that the district judge, having been ordered to hold the enquiry, could not delegate his power to the additional district judge and that this court is precluded from giving approval *ex post facto* to the enquiry conducted by the additional district judge. The learned Advocate General has contended that if the court is satisfied with the report it can take action on it. He has also contended that the district judge had full power by reason of s. 3-A of the Madras Civil Courts Act, 1873, to transfer the matter to the additional district judge. Further he has said inasmuch as the respondent did not take

objection to the additional district judge holding the enquiry (when the matter was in the district court) but appeared and took part in the proceedings throughout, he cannot now be allowed to raise the objection.

I will deal first with the argument advanced by the learned Advocate General that the finding of a tribunal of enquiry can be accepted notwithstanding that the tribunal was not appointed by the court for the purpose. The opening clause of s. 13 of the Legal Practitioners Act is in these words:

> "The High Court may also, after such enquiry as it thinks fit, suspend or dismiss any pleader or mukhtear holding a certificate as aforesaid."

It is said that the words "after such enquiry as it thinks fit" leave it open to the court to give approval *ex post facto*. I am unable to accept this argument. The Act contemplates the High Court directing an enquiry before action is taken. The court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the enquiry into the alleged misconduct. Unless the tribunal is constituted beforehand the enquiry, in my opinion cannot be lawful. I regard the suggestion that approval of a tribunal may be given *ex post facto*, as being repugnant to the spirit of the Act and the wording of s. 13.

The argument that because no objection was raised in the district court to the additional judge conducting the enquiry he cannot be allowed to raise the objection now is also one which I cannot accept. If the tribunal which conducted the enquiry was not validly constituted acquiescence in the proceeding would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain.

The only argument which calls for serious consideration is the argument that s. 3 A of the Madras Civil Courts Act gives the district judge power to direct the additional district judge to conduct the enquiry. That section reads as follows:

> "When in the opinion of the High Court, the state of business pending before the judge of any district court (hereinafter called the district judge) so requires, the local Government may appoint one or more additional district judges to that court for such period as they may deem necessary. The additional district judges so appointed shall discharge all or any of the functions of the district judge under this Act or any other law for the time being in force which the district judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the district judge."

Therefore the additional district judge may lawfully deal with matters which come within the province of the district judge under the Act or any other law for the time being in force. The Civil Courts Act only refers to civil suits and appeals from judges subordinate to the district judge. The matter now before us is neither a suit nor an appeal. The learned Advocate-General has, however, said that the present case falls within the words "or any other law for the time being in force." I consider that the legislature had here in mind Acts such as the Indian Companies Act, the Indian Divorce Act and the Succession Act, which confers upon a district judge jurisdiction in specified matters. If there were a clause in the Legal Practitioners Act which directed the district judge to hold the enquiry in a case like the present one, he certainly would have power under S. 3-A of the Madras Civil Courts Act to assign the enquiry to the additional district judge, but there is nothing in the Legal Practitioners Act which directs the district Judge to hold the inquiry. The Act leaves the matter entirely in the hands of the High Court. The High Court and not the Act nominates the tribunal. Therefore when the High Court directs a district judge to hold an enquiry into a charge of professional misconduct the district judge does not hold the enquiry under the Act but under the order of the High Court. Before a district judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. Certainly the Madras Civil Courts Act does not provide it. In my opinion, the district judge having been directed by this Court to hold the enquiry he had no power of delegation. No doubt he thought that he had authority under S. 3-A of the Madras Civil Courts Act to transfer the duty to the additional judge, but I consider that in so doing he erred. It would have been a different matter if he had received the sanction of this Court beforehand, but he directed the additional district judge to hold the enquiry without making any reference to this Court.

It follows from what I have said that I am not prepared to read s. 3-A of the Madras Civil Courts Act in the way suggested by the learned Advocate General and I feel bound to uphold the preliminary objection raised on behalf of the respondent. The findings of the additional district judge will be set aside and the district judge directed to hold a fresh enquiry into the allegations made against the respondent and present his own report to this court in due course. In order to prevent any misunderstanding I would add that this court has not considered the findings of the additional district judge and will deal with the charges against the respondent merely on the report of the district judge when it is submitted.

GENTLE, J. I agree.

KRISHNASWAMI AYYANGAR, J. I agree.

N.T.R. — *Case remanded.*

R. T. No. 45 of 1939

Cr. App. No. 212 of 1939

*June* 16, 1939

MOCKETT & KRISHNASWAMI AYYANGAR, JJ.

Ravupalli RAMAMURTY

v.

EMPEROR

*Evidence Act (I of 1872), S. 27—Statement by accused that he threw knife at a particular spot—Evidence of witness of having seen the knife and removed from that spot—Admissibility.*

*The accused stated that he would show the spot where he had thrown the knife with which he stabbed the deceased, but at that spot no knife was found. A witness, P.W. 13 deposed to have seen the knife being thrown away; also that he found it at the spot, which was the same as the accused had indicated, and that he later picked up the knife but had thrown it away; and the knife was recovered from where he had thrown it.*

Held, *the fact that a knife had been seen to be thrown away and was later found by P.W. 13 at the spot indicated and the knife itself were discoveries directly in consequence of the statement of the accused and this statement was admissible under S. 27 of the Evidence Act.*

*11 L. W. 8* not followed.

*It is a well accepted practice that dying declarations should be corroborated in material particulars and by independent testimony.*

Trial referred by the court of session of the Vizagapatam division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 8 of 1939 on 10-3-1939, and appeal by the prisoner against the said sentence.

*A. Gopalacharlu*, for accused.

*Public Prosecutor*, for Crown.

JUDGMENT.

[ MOCKETT, J. ]

The accused has been convicted and sentenced to death for the murder of two women, Annapurna and Savitri. Savitri was his wife, and she was the daughter of Annapurna who had two sons, P. Ws. 15 and 16. The learned trial judge has described at some length the history of Annapurna, and it is not necessary for us to repeat it. She apparently was at one time the concubine of P. W. 17, and Savitri and P W. 16 were children of that union. Annapurna left P. W. 17 fourteen years before her death and appears to have become a prostitute, as a result of which habit P.W 15 and another child were born. P.W. 17 married P. W. 9. The accused who was employed in the Bengal Nagpur Railway Workshop at Vizagapatam, married Savitri, with the approval of P. W. 17 and Annapurna. That was about three years before Savitri's death Annapurna was the tenant of a house at Viziangaram at the time of her death, of which P. W. 17 was the owner. There are many allegations against the character of Annapurna in the evidence, it being alleged that she was attempting to lead Savitri into a life of prostitution. The learned judge, as we have indicated, has dealt fully with this aspect of the case.

So far as the facts in this appeal, which are material are concerned, they may be shortly stated. A few weeks before the 18th October, 1938 Annapurna and P. W. 15 visited the accused at Vizagapatam Annapurna was receiving treatment for her eyes from the King George Hospital at Vizagapatam. She returned to Vizianagaram taking Savitri with the consent of the accused On Saturday October the 15th the accused came to Annapurna's house and according to the evidence asked for Savitri to return with him but was put off on the ground that her clothes were with the washerman, Annapurna, saying that she would return on Tuesday the 18th. The accused it is stated left for Vizagapatam. He is supported to this extent by D. W. 5, who says that he was there on

Monday the 17th. An examination of the plan Ex. M. shows that the deceased's house is next door to P. Ws. 17 and 9, but a little to the north is the house of P. Ws. 11 and 18. It leads to the house in the south of P.W. 19, and further to the south is the house of P. Ws. 7 and 13. At about 1 a. m. both these women were stabbed to death, Savitri dying almost instantaneously, Annapurna surviving until next day. Their wounds, the doctor says, could have been caused with the dagger M. O. 1.

As to the actual event, the evidence is as follows: P. W. 15, who is ten years old, says that Annapurna and Savitri were sleeping on the same cot and he too was sleeping nearby. He was awakened by hearing Annapurna cry out 'ammo' and he says he saw the accused, his brother-in-law, running away. His mother told him, "Your brother-in-law has stabbed us and run away,' to which he replied "I too saw him run away." In answer to a question from P. W. 16, Annapurna said he stabbed her with a dagger P. W. 17 and other persons came. We disregard as inadmissible evidence of this witness and elsewhere where it appears that Savitri had shown M. O. 1 to Annapurna stating that the accused was threatening to kill her with it. These we do not consider as within s. 32 of the Evidence Act as they do not relate to the circumstances of the transaction which resulted in her death. P. W. 15 said that there was some moonlight which enabled him to identify the accused. It appears from the calendar that the moon was new then and just rising. It certainly was not 'round-shaped' as P. W. 15 said in cross examination. P. W. 15 said that on the Saturday and Sunday before the murder the accused and Savitri were talking together 'lovingly'. P. W. 16 who was also sleeping near him gives much the same evidence but does not claim to identify the accused, He says there was slight moonlight the moon having risen. To him Annapurna said that the accused stabbed both her and Savitri and ran away, and P. W. 15, said, "Yes, I too saw him run away". standing by itself we should be reluctant to act on this identification of P. W. 15. It may well be that having been told by his mother who had been stabbed he thought he recognised him. But that there was any deliberate attempt dishonestly to implicate the accused seems to be negatived by the fact that P. W. 16 does not pretend to have seen him, and his evidence with regard to the moonlight is no doubt true.

It has been stated in the evidence that a great hubhub arose and it can well be understood that that would be so. Other people came to the spot. Some of them have been called. P.W. 9 the wife of P.W. 17, describes how she was sleeping in her house, her husband having gone to a *bhajana* in a dancing girl's house. She says that when the night was well advanced she heard a cry, saw a number of people near the cot where Annapurna and Savitri were, and that Annapurna told her "My son-in-law came here, stabbed us and ran away." We see no reason to suppose that P.W. 9 had any animosity towards Annapurna. Her husband's relationship with Annapurna ceased long before. She says also that there was a little moonlight. It appears from the evidence that the corpse of the deceased was in the shade. P.W. 17 can tell us no more than that he came back between 1 and 2 and discovered what had happened and that Annapurna also told him that the accused stabbed them both and ran away.

It is convenient here to mention that both P.W. 15 and P.W. 9 say that the immates of the deceased's house took their food together just before the lamps were lit, but P.W. 16 states that they took their evening meal at 9 o'clock. It must be remembered that P.W. 15 was a little boy of ten years age and was likely to have had his meal earlier and gone to bed before his elders. This difference in the evidence was made much of by the defence because it was suggested that if the food was last taken by the deceased Savitri at 7 o'clock, the evidence of the doctor would go to show that she must have been killed at about 9 or 10 o'clock, when the accused was at Vizagapatam; in other words, that the murder did not take place after midnight at all. This argument may be dealt with at once. It is founded on a statement in text books that rice takes 2 to 3 hours to digest and P.W. 3 appears to accept that in cross-examination. But P. Ws. 4 and 5 who are doctors used to rice diet are not prepared from their experience to accept this limited time for digestion. There are much more potent reasons however for us being satisfied beyond any doubt that these women were stabbed at about 1 o'clock. The body was still warm at 2–30, says P.W. 3 and death had only occurred within half to one hour before. It must

be remembered too that all the witnesses who were upon the spot immediately after the occurrence are all unanimous that the time was after midnight. The moon did not rise till after 1 O'clock according to the calender. P. W. 11 speaks to the event being after midnight; and so does P. W. 18, P. W. 3 describes how Annapurna and the dead body of Savitri were brought to him at 2-30 a.m. We have already given his view on examination then and there as to when death had occurred in the case of Savitri. P. W. 19 describes how the *bhajana* finished at 1 a.m. He went to the house of Annapurna hearing a noise and found Annapurna wounded. To him also Annapurna told what she told the others. And it must be added that P. W. 13 also said that it was the accused whom he had seen running away. This aspect of the case presents no difficulty whatever. We are satisfied, and we agree with the learned judge, that these murders took place at the time these witnesses say they took place, at about 1 a.m. on the 18th October. It must be remembered that among these people watches do not figure very frequently and midnight is a wide term. So it is established beyond any doubt that at 1 o'clock or thereabouts these women were stabbed by some one and that, immediately after the stabbing, to several people Annapurna stated that it was the accused who had stabbed her and Savitri. P. W. 3, the doctor, took so serious a view of Annapurna's case that he thought it his duty, and we think rightly, to record a dying declaration, that is, Ex. B. It clearly implicates the accused.

Before proceeding futher with the history of this case we will go back to the time of the occurrence and consider the evidence of two other witnesses, P. Ws. 13 and 20. Their house is indicated in the plan. According to P.W. 13, he and P.W. 20 were sitting at his house preparing Deepavali sparklers or crackers. He describes the time as midnight. P.W. 13 heard a cry and coming into the street he says he saw the accused running west to east He gave chase but after running ten yards stopped. Then he says the accused threw something backwards and the thing fell with a metallic sound. He did not see what it was then. He and P.W. 20 went to Annapurna's house and he confirms the evidence of the other witnesses that she said that her son-in-law stabbed her and Savitri. P. W. 13 says he said, "I too saw him." Here again if it were a matter of identification alone, while accepting generally the facts as given by P.W. 13 and as borne out by P.W. 20, we are unable to accept the identification of the accused by P.W. 13 because he subsequently told the police that he could not identify the runner. We do not attach much importance to whether the accused threw the knife away or threw it at him, or whether he searched for the knife then and there. It must be remembered that he must have been in a state of excitement. We are, however, satisfied that he did chase somebody and, as will later appear, that somebody threw away what subsequently was shown to be a knife. P.W. 20's evidence seems to negative the argument put forward with force that the whole of this case is the result of a conspiracy against the accused. This contention so far as it concerns P.W. 20 may be rejected as groundless. P.W. 20 does not pretend to identify the runner. Next morning at 6 a m. these two persons, P.Ws. 13 and 20, got up and went out for purposes of nature, and P. W. 13 corroborated by P.W 20, states that he took up M.O. 1, the knife, lying some six yards to the east of his house. His conduct thereafter, although much criticised, is not really so surprising when viewed with any experience of the manner in which this class of person behaves when a crime has been committed. He picked the knife up, but then thinking that it might lead to trouble for him threw it into a bush. He says then there was blood on the blade from the tip. He threw away some 200 yards to the west of his house. The subsequent history of this knife and the part played by P.W. 13 will be dealt with later.

Annapurna was taken to the hospital after some little delay. She died the next day at Vizagapatam where she had been taken in an ambulance after an operation which failed to save her life. But in the meanwhile she had made a further dying declaration to P. W. 6, the stationary sub magistrate, of Vizianagaram, Ex. F. That too implicates the accused very clearly. It will be noticed that both in Ex. F, and in Ex. B Annapurna states that the accused did not return to Vizagapatam at all but lurked at the station. In answer to a question 'what sort of a knife was it?' she says "It is a curved knife admitting of easy handling." In

fact that is a description of M.O.I. So in addition to the statements of those who gathered at her house after the stabbing, in two more formal declarations to P. W. 3 and P.W. 6 respectively this woman declared that the murderer was the accused. It is a well accepted practice that dying declarations should be corroborated in material particulars and by independent testimony. We have therefore to see to what extent this woman's statement is corroborated. We have already dealt with the events earlier in the evening and have indicated that from them alone we should be reluctant to hold that the statements have been corroborated. There were however events of great importance next day. An inquest was held on the body of Savitri by P. W. 21, the sub inspector of police. It is well to remember that at 3-30 on that morning he was aware of the nature of the declarations of Annapurna. The inquest report Ex. H dealing with the cause of death is a formal document entered on a form. It will be observed that the duration of the inquest is stated to be three hours commencing at 7 a.m. According to P.W. 21, at 7-15, that is a quarter of an hour after the inquest started, the accused came and appeared anxious to come in He was brought in. When he stated that his name was Ramamurthi and that he was the son-in-law of Annapurna and the husband of Savitri. P.W. 21 arrested him and searched him but found no bloodstained weapons on him or blood marks on his clothes. In this connection P. W. 3 stated that blood need not have spurted out when these women were stabbed. Then according to P.W. 21, the accused stated that he would show the knife with which he had stabbed Annapurna and Savitri which he had thrown away. The sub inspector, the accused, and P.W. 12, who was requested to go with the sub inspector, proceeded to a spot 8 yards east of P.W. 13's house but no knife was found. The sub inspector, one may say, broadcast that whoever had taken the knife away should return it or search would be made of the houses. Then P.W. 13 came forward and stated, the accused being present be it remembered, that he had picked up the knife from that very spot. He took the party to the easing ground some 40 or 50 yards to the west of his house and showed the knife, the blade sticking in the earth. A panchayatnama Ex. J. was made out and signed, one of the signatories being P.W. 12. P.W. 12 entirely bears out this story. Blood was not found on the knife, but as it was sticking in the ground and had been out all night this is not very strange. Here again the vagueness of these people about time is striking and has rightly been made much of by the defence. P.W. 12 said the knife was recovered between 10 and 11 a.m. In Ex. N, a list made out on the 20th, that is two days after, the time is put down as 10 and it is signed by the sub inspector. But it must be remembered that the inquest report signed on the 18th by the sub inspector says that the inquest closed at 9. P.W. 8 was one of the panchayatdars at the inquest. He says that the accused came at 7-15. It appears that a long statement was made by the accused to the sub inspector, a greater part of which was rightly rejected by the learned sessions judge although there are parts of it which might well have been received under S. 27, Evidence Act, because we do not quite understand why the fact that he was arrested by the sub inspector and that the accused told him and showed him the spot where he had thrown the knife with which he had murdered his wife and Annapurna could be receivable in evidence rightly, and yet the actual statement taken down should be rejected. It is obviously of importance to ascertain whether in fact the officer recorded the statement from the accused because it will be extremely dangerous to accept the fact when so important a statement was made if it was not recorded. We have therefore thought it right to exercise our powers in the interests of justice under S. 172, Cr. P. C. and look at the case diary. It is enough for us to say we are satisfied beyond any doubt that the learned judge rightly believed the sub Inspector when he said that the accused told him that he would show the spot where he had thrown the knife with which he had stabbed Annapurna and Savitri. The portions of the case diary printed are of little assistance to us being only parts of the original. It must be remembered the accused made a very long staement taking 20 minutes or more to record. We must observe that the learned judge has overlooked the decision of a Full Benh of this High Court in *In re Athappa Goundan* [1] where the learned Chief Justice

1. (1937) M.W.N. 442: Cr. 74; I.L.R. 1937 Mad. 695 (728)

emphasizes that these statements under S. 27 of the Evidence Act should be recorded in the first person, that is to say, as far as possible in the actual words of the accused; they should not be paraphrased. But that is what has been done in this case. The statements made by the accused are given in the third person, that is, it is recorded in the sub-inspector's evidence in this form: "He stated that he would show me the knife with which he had stabbed etc." and then later on in cross-examination, "I went with the accused as he offered to show the spot where he threw the knife." We have no doubt what the effect of the accused's statement was, namely, that he said that he would show the sub inspector the spot where he had thrown the knife with which he had stabbed these women. In this case there has been no cross-examination to suggest that the statement was in some other form. The defence is that no such statement was made at all. We feel no anxiety with regard to this part of the case. But in all these cases the exact words of the accused should be recorded in the first person and the learned judge should admit those parts which he considers admissible but leave some record for the consideration of the appellate court of any other words which the prosecution claimed should be received in evidence. It has however been contended by the defence that this statement is not admissible under S. 27 of the Evidence Act as no discovery was made in consequence of information received from the accused. We do not agree. S, 27 refers to a fact being discovered and S, 3 defines 'fact' as meaning and including "anything, state of things capable of being perceived by the senses." It seems to us that these facts were discovered : (1) the fact that a knife had been seen to be thrown away and was later found by P.W. 13 at the spot indicated, and (2) the knife itself. It was the statement of the accused that led the party to the scene and we consider that the subsequent discoveries were directly in consequence of the information received from him. It would be strange if, for example, an accused person stated that the body of a person murdered by him would be found in a certain spot and on the police going to that spot not finding it there but in a mortuary to which it had by then been removed by, e.g., the village officers, it could be held that the ultimate finding of the body was not in consequence of the information received from the accused. A decision in *In re Ramaswami Boyan* (2) has been brought to our notice. With all respect to the learned judges, we find some little difficulty in following the reasoning therein and are unable to follow it It does not appear that there was any sort of discussion as to the meaning of the word 'fact'. This High Court in *King Emperor* v. *Ramanujam* (3) have stressed the comprehensive meaning of the word 'fact'. Thus far we have considered the admissibility of the accused's statement under S. 27 of the Evidence Act. So far as a consideration of whether the accused's statement is corroborated is concerned, and Annapurna's statements, it is established that the accused having made a statement that at a certain spot he had thrown away a knife, that statement is shown to be true by the appearance of a man who saw him throw a knife away, because the accused's case is that it was he himself who threw it away. Moreover a knife was picked up at the very spot indicated by the accused. On these facts the prosecution claim that they have established the guilt of the accused.

It is necessary to consider his own statements. It appears that at his request a statement was recorded from him under S. 164, Cr. P. C. In that statement he admits that he was questioned at the inquest at 8-30 but states that he was arrested at 11 A.M. This is wholly incredible. The police, of course, would at once—and we are satisfied that they did—arrest a man of whom it had been stated on all sides that he had murdered two women. He then proceeds, "On the morning of the 18th October 1935 I came to Vizianagaram from Waltair by the 6 A.M. train to take my wife back. I heard about this murder at the clock tower. By the time I arrived at the Municipal Hospital my wife's corpse was lying at the gate. I saw this and asked the police there to open the gate. They opend it. I went inside. They asked me who I was. I told them that I was the husband of the deceased. They said, "All right. Sit down I accordingly sait down." Then questions followed obviously put on the supposition that the accused desired to make a confession, which he definitely negatived. Before us two main points have been

2. (1920) 11 L.W. 8
3. (1934) M.W.N. 1479: Cr.266:58 Mad.642 F.B.

argued. First that these women were in fact murdered at 9 o'clock on the Monday night. We have already dealt with this. We think there is no basis whatever for it. We entirely accept the prosecution story that these women were murdered at 1 o'clock. It is then argued, although it is a little difficult to follow, that because of the variance in the times with regard to the discovery of the knife and the closing of the inquest, no statement at all was made by the accused and therefore no discovery was made. We wholly decline to accept this position. We find no room in this case for supporting any suggestion of what is commonly known as a foisted case Several witnesses were well disposed towards the accused. We wholly decline to believe that the police have been a party to an elaborate conspiracy to victimise an obscure worker on the railway. Our view is that this inquest started and ended at the time indicated in the inquest report and that thereafter no one was paying any great attention to actual times. We think that the sub inspector's version is substantially true and that he signed Ex. G. two days after carelessly. It is not the time of the end of this inquest so much as the beginning of it that is important. Obviously after it had started there was a long interval in which the statement was written down. The parties repaired to the spot where the knife was found and it seems possible that no particular record of actual times was made. The safest guide is the inquest report written at the time with the times recorded. Any argument based on the accused's statement in Ex. IV that he was not arrested until 11 A. M. and that therefore he was not under arrest at the time of his statement to the police, can be summarily rejected for the reasons we have already indicated namely, that he must have been arrested immediately the police saw him. In the Magistrate's court the accused contented himself by saying that he was not guilty and would call witnesses at the sessions. No application was made, says the learned trial judge for the summoning of any defence witnesses until the case was taken up for trial. Then D. Ws. 2, 3 and 4 were called for proving uniform alibis at Vizagapatam late on the evening of Monday and his presence there early on Tuesday morning. We observe that everybody at the original trial being conversant with such local conditions as the times of trains no formal proof of the relevant time-table hes been made. We have directed that a time-table shall be attached to this record and received in evidence. The following times are however accepted by both prosecution and defence before us. The evening train leaves Waltair at 9-50 p.m. and reaches Vizianagaram at 11-21 p.m. and the morning train leaves Waltair at 6-5 a.m. reaching Vizianagaram at 7-55 a.m. It was therefore possible for the accused to have caught the morning train provided that he did in fact go back to Vizagapatam on Sunday, in which case he could have been on the spot in time at the time of the murder. If however he was in Vizagapatam at 5 a.m. catching the early morning train and reaching Vizianagaram at 7-55 he could not have been at the inquest much before 8-30, the station being about 1½ miles from the hospital. Therefore he could not have been at the inquest at 7-15 a.m. as alleged by the prosecution. His alibi therefore at Vizagapatam is of importance. We do not propose to discuss, although we have examined, the alibi in full. It is enough for us to say that we have considered and wholly agree with the estimate of its value given by the learned sessions judge. We agree with him in rejecting it and do not consider that it is necessary to repeat the criticisms which he has directed towards it. There is however one striking feature regarding this alibi and that is that the detailed story told by the witnesses is not so much as mentioned by the accused in any of his statements. It is true that he states at the sessions and in Ex. IV that he was at Vizagapatam, but there is no reference at all to any of the defence witnesses or any of the events spoken to by them. The learned sessions judge has reviewed the evidence at great length. This is one of the those cases where the evidence as a whole must be considered and weighed. There is ample material on the record to show that the accused might well have desired the death of his mother-in-law and wife. We have the fact that on this night Annapurna stated not once but many times that it was the accused who stabbed them. She is supported by P. Ws. 13 and 15, although standing alone we have indicated we should hesitate to accept their evidence as to the identity of the accused. We have the fact also that this man so far from being at Vizagapatam was at Vizianagaram (they are 34 miles apart) soon after 7 o'clock on the morn-

ing of the 18th. In the course of a statement to the police he told them that the knife with which he had murdered these women was at a certain spot and he took the police there. At that very spot immediately after the murder the night before a man had been seen running and throwing away a knife. That knife was picked up from that spot by P. W. 13. Immediately these facts are known, we consider that by the accused's own conduct and words the statements of Annapurana and his own retracted statement are amply corroborated and the statements of P.Ws. 13 and 15 receive added strength; and it must be remembered with regard to P.W. 15 that he had repeatedly said to all the persons that had assembled the night before that he had seen his brother-in-law running. All these matters have received from the learned judge the fullest consideration Agreeing with him we are satisfied that the facts lead to one conclusion only, namely, that it was the accused that committed this act. We therefore confirm his conviction. It was a deliberate murder of two defenceless women and the learned judge did his duty in passing the sentence of death. We accordingly also confirm the sentence and dismiss the appeal.

N.T.R. —— *Appeal dismissed.*

R. T. No. 135 of 1939

Cr. App. No. 548 of 1939

*December*, 6, 1939

BURN & MOCKETT, JJ,

EMPEROR
v.
DOYYAM CHINNAYYA

*Criminal trial—Confession by accused—Should be considered along with other evidence.*

*The proposition that a confession must be accepted as it is, is contrary to practice and authority. The circumstances must be taken as a whole.*

*Where a person confesses to have caused the death of a woman and admits having robbed her after death, but during the confession introduces into it circumstances with a view to excuse himself from a conviction for murder, the confession should be considered and accepted in the light of the other evidence in the case.*

TRIL referred by the court of session of the Vizagapatam division for confirmation of the sentence of death passed upon the said prisoner in C.C. No 39 of 1939 on 29-9-39, and appeal by the prisoner against the said sentence passed upon him in the said case.

*Public Prosecutor*, for Crown.

*D. Narasaraju*, for accused.

JUDGMENT.

(MOCKETT, I.)

The accused has been convicted and sentenced to death by the learned sessions judge of Vizagapatam for the murder of a woman Lakshmikantam described by some witnesses as a dancing girl, by her uncle as a prostitute. There is no doubt that on the 29th of May 1939 she was alive. She met her death by violence unquestionably and the only point we have to consider in this case is whether it is proved that, that violence which unquesnably came from the hands of the accused was such that it can be said that Lakshmikantham was murdered by the accused.

The evidence can be very shortly summarised. On the discovery of the murder the local police who obviously had information took steps to trace the suspected person who had gone in the direction of Narasannapet. P. W. 9 a jutka driver gave evidence to the following effect. He said that he heard of the death of the dancing girl on Tuesday at about noon and that the accused had come to him on the previous Sunday. He came to hire his jutka to take him to Narasannapet. He was to start on Monday, i e, the 29th May, the date on which this woman lost her life. But he did not come on that day. P. W. 9 met him in the bazaar and complained that he had lost engagements by waiting for him. The accused said he would start at 3 a.m. on Tuesday and in fact he came to P. W. 9 at 5 a.m. on Tuesday. They started at 5 o'clock and drove to Satyavaram which is 20 miles from Tekkali, reaching that place at 7-30 a.m. At Satyavaram the accused after making excuses went into the village, without making an immediate payment of his fare Then P.W. 9 becoming apprehensive followed him and the accused had to concede that he had no money. But he gave to P.W. 9 as security a bangle, which has been marked M.O. II-a in this case aud which has been identified as belonging to the deceased. P. W. 9 drove back to Tekkali but at Narasannapet he learnt that the police were making inquiries for a red jutka and white horse which

was the description of his own. He found the police and learnt that they were investigating a case of murder of a dancing girl. He handed over the bangle to someone in the police station at Narasannapet. There is a slight discrepancy as to whether he handed it over in the presence of the Circle Inspector or the sub inspector as he said at the sessions or whether when he handed it over they were not present as he said in the lower court. In our opinion in this case this discrepancy is totally immaterial. But he did hand over the bangle and went with the police towards Urlam which is 8 miles off. There they saw the Narasannapet police chasing a man who was caught at the village of Mathalapuvanipeta which is near Urlam and when he was caught he had on him M. Os. II, III and III-a and IV, which are jewellery and ornaments belonging to the deceased. Now in this case we have not to inquire whether there is any question as to whether these jewels did belong to the deceased and as we have already indicated we have not to inquire as to whether the deceased met her death at the hands of anyone else other than the accused, because both these matters are set beyond all doubt by a confession made before the magistrate by the accused and which has been marked Ex. D. After the most elaborate warning the accused made the following statement:

> "A week back on a Sunday night I went to the house of the dancing girl Nelluru Lakshmikantham at Tekkali. As per the condition of the night's engagement I paid her Rs. 4. When I woke up at day-break at 4 O'clock and when I was ready to come out, she demanded a rupee alleging that I owed her previously. Thereupon we both quarrelled. She beat me with a fan when I was coming out She caught hold of my waist cloth. I put my hand on her shoulder and pushed her saying. "Do you leave it or not?" She caught hold of my testicles. Thereupon after putting my hand upon her neck I pressed her hard against the cot and pushed her. The frame of the cot struck against her neck and she appeared like a person dying The mouth was opened I removed from her person all the jewels, i.e., three pairs of gold bangles, a garland of gold miryalu (gold balls), a gold puducheri nanu with jigini and put them in my pocket and came out. I went to the house of the jutkawala, engaged the jet and reached Satyavaram by 7'O clock in the morning. I got down there. I went to Dukalapadu from there. The Circle Inspector of Police of Chicacole and some others caught hold of me on the way."

The taluk magistrate was satisfied that that confession was voluntary and made with due appreciation of what was said and of the consequences. So it will be seen that the accused admits possession of the jewels which has been also proved by the evidence of other witnesses, for instance P.W. 20 who describes how they were in the accused's possession. P. W. 2 identifies the jewels as belonging to the deceased. It will be seen also that the accused describes how he used violence to the deceased. He has before the learned sessions judge repudiated this confession. Before the magis rate he said that he did not commit the offence, that the Circle Inspector and others "caught hold of him unnecessarily" on the Urlam road, that somebody put these jewels in his hand and that he confessed owing to the Circle Inspector threatening to beat him. Before the learned sessions judge he stated as follows:

> "I came on 29—5—1939. Tuesday, in a Chicacole bus from Ranasthalam to Chicacole. I engaged a jutka at Chicacole and went to Dukkalapadu and other places to purchase yarn. I went to Bhadrayya's house at Dukkalapadu and asked him for fresh water and stood there after drinking the water. The police came, thrust the jewels into my pocket and beat me in order that I should confess the crime. The sub inspector and others told me to make a confession of the crime before the magistrate also. In the interval the magistrate gave me time to think the matter; Head constable and others came to me and said that if I did not make a confession I would be beaten. While I was making the confession two constables watched at me through a window with sticks in their hands. I made the confessional statement for fear that they would beat me. I know nothing about the offence."

He was asked why the Circle Inspector should have met him in the neighbourhood and thrust the jewels into his pocket to which he relied, 'I cannot give any reason, But a purse containing Rs. 30 was taken from my pocket and

these jewels tied in a cloth were put into my pocket," The evidence of the deputy tahsildar, who was the magistrate for the purpose of this confession, was clear that he kept the accused in a separate cell after being warned and in cross-examination no attempt was made to put to the witness the case for the defence. It may be said that there is a bare hint that the accused might have been accessible, but the suggestion that between the warning by the magistrate and the actual confession he was under police influence was never pressed home, no doubt for the reason that as we are quite satisfied, the suggestion is wholly baseless.

We are asked by the learned counsel for the appellant to say that this confession as it stands is not a confession of murder, that it must be accepted as it is and that therefore on the evidence before us it is not possible to convict this man of murder. That is a proposition which is wholly unacceptable and is contrary to practice and authority. The circumstances must be taken as a whole What are the circumstances here? A man confesses to having caused the death of a woman and admits having robbed her after death. But during that confession he introduces into it circumstances with a view no doubt to excuse himself from a conviction for murder. Now in those circumstances it is obvious that the most vital evidence in the case is the evidence of the medical witness P.W. 1. He is the medical officer in charge of the Tekkali hospital. He received the body for the purpose of a post-morten examination at 2-30 on the 30th and he gave a post mortem certificate. Before dealing with this evidence it will be convenient to examine that certificate Ex. A. He found injuries on this woman. There were a nail mark on the right side of the neck four nail marks or marks resembling nail mark on the left side of the neck, bruises on the left side of the neck, bruises on the left side of the upper lip and the right leg near the knee but the most significant of all perhaps was that in this woman's mouth between the teeth and against the tongue was thrust a small shirt which was firmly caught between her teeth and was removed with difficulty, It had been pressed in such a way that the tongue was depressed and pushed back. The cloth was stained red and on removal there was a discharged of reddish froth It is not surprising perhaps in these circumstances and having regard also to the condition of the lungs, to see that the opinion as given in the post-mortem certificate was that "the deceased would appear to have died of syncope probably the result of throttling" In his evidence the doctor is quite definite. He says. "In my opinion the deceased died of syncope, the result of throttling". And he again describes, as he did in his post-mortem certificate, what he found. Now, in cross-examination certain questions were asked to suggest apparently that this cloth could have been put into this woman's mouth when she was asleep, though what the relevance of these questions is we find it difficult to understand. In re-examination he stated "If the victim was seized by the throat first she would be powerless to resist the introduction of the cloth into the mouth," So possibly questions were put in order to suggest that the cloth was inserted into this woman's mouth when she was asleep. It will be observed that in the confessional statement of the accused there is no mention whatever of the cloth. The accused says: "Thereupon after putting my hand upon her neck I pressed her hard against the cot and pushed her. The frame of the cot struck against her neck and she appeared like a person dying" the suggestion apparently being that in this struggle she lost her life from a blow on the back of the neck. There is nothing in the cross-examination of the doctor to suggest that explanation and the evidence of the doctor is wholly inconsistent with it. It is clear from the evidence and we are quite satisfied that this woman lost her life not the least in the manner described by the accused but that she was throttled, that a cloth was stuffed into her mouth and from those causes, violence to the neck and this pushing of the cloth into her mouth, she died and there can be no doubt whatever that that violence was done in circumstances that must amount to murder. If there had been any doubt, which there is not, the fact that this man afterwards robbed her of her jewellery is of the utmost significance. The learned judge came to this conclusion and with that conclusion we entirely agree. The appellant was guilty of murder and nothing else and in the circumstances the sentence passed upon him could be the only sentence. We confirm both the conviction and sentence and dismiss the appeal.

Before parting with this case we should like to express our appreciation of the detection work in this case by the police officers responsible. It will be noticed that this murder occurred during midnight of 29th-30th and that early in the morning of the 30th the police were engaged in making investigations at a long distance from Tekkali and successfully arrested the accused a little further off on the same day. We have no doubt that our observations will be brought to the notice of the superior officer of the officers concerned.

N.T.R. *Appeal dismissed.*

---

Cr. R. C. No. 407 of 1939

Cr. R. P. No. 376 of 1939

*October* 10, 1939

LAKSHMANA RAO, J.

THANAMMAL

v.

ALAMELU AMMAL

*Cr. P. C. (V of 1898), S. 403—Conviction under S. 75, Madras City Police Act, no bar to trial under Ss. 323 and 352 I.P.C.*

*A conviction under S. 75 of the Madras City Police Act is no bar to a trial for an offence under Ss. 323 and 352 I.P.C.*

FACTS: Complainant P. W. 1 charged accused under S. 352, I.P.C., for assaulting P. W. 1 and accused 2 under S. 323 I.P.C., for causing hurt to P.W. 1. The occurrence took place on 26-9-38. The police who came upon the scene, took six persons including accused 1 and 2 and P. W. 1 and charged them all under S. 75, City Police Act. In that case accused 1, 2 and 3 were convicted and P.W. 1. and others were acquitted. The trial magistrate found the accused guilty in the present complaint under S. 352 I.P.C., A revision was filed on the ground that the accused having been convicted under S. 75 of the Police Act with reference to the same occurrence, they should not have been convicted over again on a private complaint for an offence under the I.P.C.

Petition under Ss. 435 and 439 Cr.P.C.1898 praying the High Court to revise the judgment of the Special Honorary Presidency Magistrate of the court of the Presidency Magistrates. Egmore Madras in C. C. No. 1637 of 1938.

*K. V. Rajagopalan & S. V. Rama Iyengar*, for Petrs

*K. M. Balasubramaniam*, for Respts.

*Crown Prosecutor*, for Crown.

ORDER

The conviction under S. 75 of the City Police Act is no bar to the trial for an offence under Ss. 323 and 352 of the Indian Penal Code and the evidence justifies the conviction of the petitioners. The fines are not excessive and the revision is dismissed.

N.T.R. — *Petition dismissed.*

**Cr. R. C. No. 966 of 1939**

**Cr. R. P. No. 913 of 1939**

*January 24, 1940*

BURN & LAKSHMANA RAO, JJ.

**Penubala Muni Krishnayya**
**v.**
**Penubala Akullamma**

*Cr.P.C. (V of 1898), Ss. 488 (3) & 489 (2)—Failure to pay maintenance—Imprisonment for—Nature of—Subsequent adjudication in insolvency and protection order—Effect of.*

*Under S. 488 (3), Cr.P.C., it is the duty of the magistrate to find out in every case whether the person ordered to pay maintenance under S. 488 has or has not failed without sufficient cause to comply with the order. Neither a protection order nor the adjudication order in insolvency would be conclusive on the point.*

*The orders referred to in S. 489 (2) which the magistrate can cancel or vary are orders relating to the amount of maintenance payable. A magistrate who has passed a sentence of imprisonment under S. 488 (3) cannot cancel the sentence, merely because the insolvency court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It is not an 'imprisonment in execution of the decree of any court for the payment of money' within S. 23, Provincial Insolvency Act.*

PETITION under Ss. 435 and 439 Cr. P. C., 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of Chandragiri division dated 29-10-1930 and made in M. C. No. 104 of 1938.

*N. Rangachari*, for Petr.

Respondent not represented

*Public Prosecutor*, for Crown.

ORDER

**(Burn, J.)**

This is an application to revise the order passed by the learned subdivisional magistrate of Chandragiri on the 29th October, 1939, on an application made to him on the 28th October, 1939, on behalf of the petitioner. The petitioner is the husband of a woman named Akkulamma in whose favour the learned joint magistrate passed an order in M. C. No. 104 of 1938 on the 7th February, 1939, directing this petitioner to pay his wife Rs. 3—8—0 per mensem as maintenance under S. 488, Cr.P.C. The petitioner did not pay in accordance with that order. Before she could enforce the order the petitioner filed a suit O.S. No. 128 of 1939 in the court of the district, munsif of Tirupati and obtained an interim injunction restraining his wife from enforcing the order for maintenance. The injunction was in force until 21st July, 1939. On that date the interim injunction was vacated and the petitioner's wife on the 24th July, 1939, applied to the joint magistrate to direct this petitioner to pay Rs. 17-8-0 being the arrears for five months. The learned joint magistrate issued a distress warrant and as the money was not realised, he gave notice to the petitioner who appeared before him. The magistrate found that he had without sufficient cause failed to pay the money due to his wife under the maintenance order. The magistrate, therefore, sentenced him to suffer rigorous imprisonment for one month or until the amount of the arrears should sooner be paid. This order was passed on the 23rd October, 1939. On the 24th October, the petitioner filed an insolvency petition in the court of the district munsif and obtained from him an order for his release under S. 23 (1) of the Provincial Insolvency Act. The district munsif communicated a copy of this order to the joint magistrate with a letter dated 25th October and the petitioner made an application on the 28th October for his release. The learned joint magistrate dismissed his application for release and this revision petition has consequently been brought.

The contention on behalf of the petitioner is that the protection order passed by the insolvency court is a decision of a competent civil court within the meaning of S. 489(2), Cr.P.C. in consequnce of which tha joint magistrate is compelled to cancel the sentence of imprison-

ment passed upon this petitioner. There is no authority for this contention. Learned counsel for the petitioner has referred us to the cases reported in *Tokee Bibi* v. *Abdool Khan* (1) and *Halphede* v. *Halphede* (2). But we do not think that they have any application. In the earlier case there was no sentence of imprisonment passed at all. In the second case, the protection order had been issued before the sentence of imprisonment was passed, and after the sentence of imprisonment was passed, an adjudication order had been passed and the protection order continued until discharge. Their Lordships of the Calcutta High Court said:

> "In our opinion, the fact that he has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that the petitioner is unable to pay his debts. There is also the order of protection. It follows, therefore, that the petitioner being unable to pay his debts, is not guilty of wilful neglect within the meaning of S. 488, Cr.P.C."

It is noticeable that there was also no finding by the magistrate of wilful neglect in that case. The terms of S. 488 (3) have since been altered. There is no question now of wilful neglect. The section reads:

> "If any person so ordered *fails without sufficient cause* to comply with the order, any such magistrate may, for every breach of the order, . . . . sentence such person . . . to imprisoment."

The wording shows that in every case it is the duty of the magistrate to find out whether the person ordered to pay maintenance under S. 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on the point. The question is one of fact which the magistrate has to decide for himself. *Prima facie*, of course, it would appear to a magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with an order to pay maintenance had not been without sufficient cause, but it cannot be said that the magistrate's hands would be tied by the order of the insolvency court. Learned counsel for the petitioner has referred us to the decision of Mr. Justice Wadsworth reported in *Yahia in re* (3). That has no bearing upon the point before us. The learned judge has held that arrears of maintenance payable in respect of magisterial order under S. 488, Cr. P.C., constituted a 'debt or liability provable in insolvency' within the meaning of S. 46 (3) of the Presidency Towns Insolvency Act. The learned judge has not anywhere suggested that a protection order issued by an insolvency court would necessarily be conclusive for a magistrate making an inquiry under S. 488 (3), Cr. P.C. The matter has been dealt with very clearly by Mr. Justice Allsop of the Allahbad High Court in the case reported in *Shyama Charan* v *Angwi Devi* (4). The learned judge has said "It has also been urged that the mere fact that the applicant has been adjudicated an insolvent shows that he is unable to pay for the maintenance of his wife and that that constitutes sufficient cause for non-payment. Here again I am unable to agree. Learned counsel had suggested that the whole of the insolvent's property vests in the receiver and there is nothing left out of which he can maintain his wife. This argument overlooks the fact that the property of the insolvent which vests in the receiver does not include any property which is exempted by the Code of Civil Procedure from liability to attachment and sale in execution of a decree. Under the provisions of S. 60, C P.C, as now enacted the salary to the extent of the first hundred rupees and one half of the remainder of such salary is exempt from such attachment. The applicant would therefore, if he is prepared to do work and earn a salary, be in a position to support his wife." The learned judge has also pointed out that 'an order passed by a magistrate under S. 488 (3), Cr. P.C. for the imprisonment of a person who fails to pay a maintenance allowance is a sentence of imprisonment" That is the word used in the Code itself. The learned Public Prosecutor has contended with much force that the magistrate who has passed such a sentence has no power to cancel his own order. Learned counsel for the petitioner has discussed the question whether a proceeding under S. 488 is 'a criminal case' or not. But we think that is not a relevant discussion. It appears to us us that the orders referred to in S. 489 (2) which the magistrate can cancel or

1. (1878) 5 cal. 536
2. (1903) 30 cal. 869
3. (1936) M.W.N. 1024 : Cr. 188
4. (1938) I.L R. All. 486

vary are orders relating to the amount of maintenance payable. We do not think that it is possible for a magistrate who has passed a sentence of imprisonment under S. 488 (3) to cancel the sentence merely because the insolvency court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of S. 23 of the Provincial Insolvency Act, that a person who has been sentenced under S. 488 (3) is under imprisonment in execution of the decree of any court for the payment of money.' This view derives support from the decision in *Mehr Khan* v. *Mst. Bakht Bhari* (5), *Maung Tin* v. *Mahmin* (6) and *Mahomed Ali Mithabai* in re (5). In the last case, it was held that a wife could make an application for maintenance under S. 488, Cr. P. C. in spite of the fact that she had already obtained a decree in the civil court for maintenance, payments under which were suspended by her husband who had filed an insolvency petition. Moreover even discharge of an insolvent does not free him from liability to stay an order under S. 488 Cr. P. C. (vide S. 44 (1) (d) of the Provincial Insolvency Act).

For these reasons, we think that the order of the learned magistrate is correct and this revision petition is dismissed. The petitioner must surrender to his bail to serve out the remainder of the period of imprisonment to which he has been sentenced.

N.T.R. *Petition dismissed.*

---

**Ref. No. 6 of 1939**

*January* 3, 1940

PANDRANG ROW & HORWILL JJ.

**Emperor**
**v.**
**Boya Lingadu alias Dubbodu**

*Cr. P. C. (V of* 1898), *S.* 233—*Theft in two separate houses—Single charge—If legal.*

*Where two distinct offences of theft in two separate houses were tried at one and the same trial and there were also alternative charges under S.* 411 *I.P.C. in respect of each of these transactions.*

Held, *the trial was not according to law because the charges were wrongly joined.*

REFERENCE under S. 307 of Cr.P.C., 1898, by the sessions judge of the Anantapur division in C.C. No. 28 of 1939.

*Public Prosecutor* for Crown.

JUDGMENT

PANDRANG ROW, J.—This is a reference made by the sessions judge of Anantapur in respect of a verdict of not guilty returned by the jury on a charge of theft and in the alternative of retention of stolen property knowing it to be stolen. The case was a very simple one. The only evidence incriminating the accused was that certain articles were produced by the accused before the police officer who investigated the case and another witness. The ownership of the articles was proved by the persons in whose houses the thefts had taken place. The suggestion in the cross-examination of the police officer was that the articles said to have been produced by the accused were really handed over to the police by the complainants themselves, and it is possible that the jury thought there was some truth in this suggestion. The jury's verdict was unanimous, and it cannot be said that simply because there is no reason to be found in the record for disbelieving the evidence of these two witnesses the jury's verdict must be regarded as perverse or unreasonable. The jury were entitled to form and express their own opinion as regards the reliability of these two witnesses, and one cannot exclude the possibility that they might have formed an adverse opinion on account of the demeanour of the witnesses or some other cause which does not find any mention in the record. It can hardly be urged that the jury was not competent to decide the simple question whether the evidence regarding the production of these properties by the accused was reliable or not, and the mere fact that the opinion is one with which the learned trial judge does not agree, does not make the jury's opinion a perverse or unreasonable one. Apart from this, there is the fact that the trial itself was not according to law because the charges were wrongly joined. Two distinct offences of theft in two separate houses were tried at one and the same trial, and the alternative charges under S. 411, Indian Penal Code, were also in respect of each of these transactions. In other words, there were two charges under S. 411 in

5. (1929) 10 Lah. 406
6. (1933) 11 Rang. 226
7. (1930) A.I.R. Bom. 144

respect of the properties stolen from the two houses. We see no reason to accept the reference. The records are therefore returned to the sessions judge. The accused is acquitted and he should be set at liberty unless liable to be detained for some other cause.

N.T.R. *Accused acquitted.*

---

Cr. R. C. No. 879 of 1939
Cr. R. P. No. 827 of 1939

*October* 26, 1939

LAKSHMANA RAO, J.

**Ayancheri Kovilagath Sankara Varma Rajah**
**v.**
**Emperor**

*Cr. P. C. (V of* 1898), *S.* 482—*Order by sub court to produce documents—Not complied with—Application under S.* 476—*Sub court abolished—Application transferred to district court—Complaint by district court under S.* 482—*Competency.*

*An order to produce certain records made by the subordinate judge in a suit was not complied with by the defendant and the plaintiff made an application under S.* 476, *Cr. P. C. to file a complaint against defendant for an offence under S.* 175 *I. P. C. Subsequently the sub court was abolished and the application under S.* 476, *Cr. P. C. was transferred to the district court, which dismissed the application on the ground that S.* 476 *Cr. P. C. was not applicable but made a complaint under S.* 482, *Cr. P. C.*

Held, *the complaint was not competent. The district court did not order the production of any document nor could the alleged offence under S.* 175 *I.P.C. be said to have been committed in the view or presence of the district court.*

PETITION under Ss. 435 and 439, Cr. P. C., 1898 praying the High Court to revise the order of the district court of North Malabar dated 15—4—1939 initiating proceedings under S. 482 Cr. P. C. against the petitioner-1st defendant in O. S. No. 5 of 1938, on its file.

*D. A. Krishna Variar & M. C. Sridharan*, for Petr.

*Public Prosecutor*, for Crown.

ORDER

The petitioner was the first defendant in O. S. No. 12 of 1937 on the file of the sub court of Tellicherry and on the application of the plaintiff an order was passed by the subordinate judge on 15th October 1938 directing the defendants to produce certain records by 21—10—1938 or file an affidavit if they were not available. The order was not complied with, the subordinate judge closed the application with the following order, "It is to be regretted that the defendants have not complied with the order and the plaintiff may take such steps as he may find necessary." An application under S 476, Cr. P. C was made to the subordinate judge on 8th November to file a complaint against the defendants for an offence under S. 175 I.P.C. and some documents were filed by the petitioner on 18th November with an application to excuse his failure to produce them earlier. The documents were ordered to be received on 26th November after notice to the plaintiff, and the sub court was abolished on 23rd December. 1938. The application under S. 476, Cr. P. C. was transferred to the district court and it was dismissed on 15th April 1939 on the ground that S. 476, Cr. P. C. was not applicable. But a complaint was made under S. 482, of the Code of Criminal Procedure and the question is whether this complaint is competent. The district court did not order the production of any document nor, as pointed out in *Queen Emperor* v. *Seshayya* (1) can the alleged offence under S. 175 I.P.C be said to have been committed in the view or presence of the district court. The revision petition is therefore allowed and the complaint will be withdrawn.

N.T.R. *Petition allowed.*

---

Cr. R. C. No. 851 of 1939
Cr. R. P. No. 800 of 1939

*January* 4, 1940

LAKSHMANA RAO, J.

**Ponuswami Pillai**
**v.**
**Emperor**

*Madras Motor Vehicles Rules, R.* 236—*Central Traffic Board if can impose conditions on extension of permit.*

*Where a lorry is registered in a particular district the Central Road Traffic Board can extend the permit to another district and can impose conditions on such extension.*

1. (1890) 13 Mad. 24

THE FACTS appear from the judgment of the lower appellate court, which was as follows:

"The appellant who is a driver of a motor lorry has been convicted by the sub magistrate of Thiruthuraipundi for an offence of driving the lorry with a weight exceeding the laden weight permitted for lorries in Tanjore district and has been sentenced to pay a fine of Rs. 15.

The lorry driven by the appellant is one that is registered in Trichinopoly district. Permit in Form G-1 has also been issued by the Road Traffic Board, Trichinopoly. Under R. 238 of the Madras Motor Vehicles Rules, 1938, the Central Road Traffic Board, Madras has extended the validity of the permit to Tanjore district also. This extension of validity has been granted 'subject to the conditions and restrictions imposed by the Road Traffic Board in whose districts the vehicle is operating,' and it has also been specifically stated in this extension permit that the laden weight of the lorry should not exceed the maximum fixed by the transport authority of the district in which the vehicle is operating. The unladen weight of the lorry is 2 tons. The maximum laden weight fixed in the G-1 permit issued by the Trichinopoly Road Traffic Board is 5½ tons. The carrying capacity is also shown in the registration certificate as 3½ tons. But the Tanjore District Road Traffic Board has restricted the maximum laden weight of any lorry running in the district as 4½ tons. On 5—2—1939 the appellant was found driving the lorry in Tanjore district with a laden weight of 5½ tons. Hence the appellant was charged for having exceeded the weight prescribed by the Tanjore Road Traffic Board.

The appellant has not raised any contention about the facts of the case. But it was contended that the restriction imposed by the Tanjore Road Traffic Board is *ultra vires* and illegal. In support of the contention the vakil for the appellant cited three authorities, two of which are cited to show that it has been held that the statutory bodies should not exercise their powers arbitrarily or capriciously but in a reasonable manner. A.I.R. 1925 Sind. 90 is the authority cited in this connection. A.I.R. 1924 Mad. 46 is also cited because it is mentioned therein that rules and bye laws made by statutory bodies should be reasonable, otherwise they would be *ultra vires* and void. I do not see how the restrictions imposed by the Road Traffic Board Tanjore with regard to the maximum weight of lorries running in the district is unreasonable. It is well-known that maintenance of roads in the Tanjore District is comparatively very costly; and obviously such considerations as this led the Road Traffic Board, Tanjore to fix a lower maximum weight for lorries in this district than the weight fixed in the Trichinopoly district. Simply because the difference in maximum for the two districts differ, which might cause some inconvenience to lorries running in both districts, it cannot be said that the Tanjore Road Traffic Board has been so unreasonable that the rule made by it should be considered *ultra vires* and void. I do not therefore agree with his contention.

The other contention raised is that the rule made by the Tanjore Road Traffic Board cannot apply to the appellant's lorry which was registered in Trichinopoly District. In support of this contention A.I.R. 1930 All. 34 has been cited. This judgment relates to a motor car registered in Bengal and which was taken into the United Provinces. The owner was charged for non-production of the Registration certificate, Considering Rr. 3 and 11 of U.P. Motor Vehicles Act Rules, the Allahabad High Court held that the wording of those two sections did not apply to a vehicle not registered in U.P. This rule cannot certainly be applied to this case. The present case concerns two districts in the same Presidency both the districts coming under the operation of Motor Vehicles Rules, 1938. According to these rules the Central Road Traffic Board, Madras, which has jurisdiction over the whole province of Madras, has issued a permit in which it has clearly specified that the lorry should operate in each district subject to the conditions and restrictions imposed by the Road Traffic Board in each district. If the appellant disobeyed the restrictions imposed by a certain Road Traffic Board of a district he has certainly committed an offence."

PETITION under Ss. 435 and 439 of the Cr.P.C., 1898, praying the High Court to revise the judgment of the court of the 1st class subdivisional magistrate, Mannargudi dated 15-6-1939 and passed in Crl. App. No. 15 of 1939 (C. C. No. 145 of 1939 2nd Class magistrate's court, Tiruthuraipundi).

*G Gopalaswami*, for Petr.

*Public Prosecutor*, for Crown.

ORDER

The lorry was registered in Trichinopoly and the permit was extended by the Central Board to Tanjore subject to the condition that the laden weight should not exceed the maximum fixed by the Tanjore Road Traffic Board. This condition was admittedly violated and the power of the Central Board to extend or refuse extension of the permit necessarily includes a power to impose conditions which may be imposed by the transport authorities under Part V of the rules. Further R 236 of the Madras Road Traffic Code empowers the Central Board to exercise the powers and functions specified in Part V of the Rules in respect of these roads and the contention that the condition imposed is invalid cannot be accepted. There is therefore no ground for interference with the conviction and the revision petition is dismissed.

N.T.R. *Petition dismissed.*

—

**Cr. App. No. 336 of 1938**

*January 26, 1939*

PANDRANG ROW, J.

**Manikyam Kondayya & others**

**v.**

**Emperor**

*Criminal Tribes Act (VI of 1924), S. 23 (1) —Date of membership – Penal Code, S. 149— Scope of.*

*S. 23 (1) Criminal Tribes Act relates to the time of conviction and to the time of occurrence which is the subject matter of the case which ends in his conviction. Hence a person who was not a member of the criminal tribe at the time of his conviction but was a member at the time of the occurrence cannot be convicted under S. 23 (1).*

*Where the common object of a charge under S. 140 I.P.C., was stated to have been to beat and grievous hurt was actually caused.*

Held, *the word 'beating' must be held to have been used in the sense of causing hurt and if in the prosecution of that common intention to cause hurt one of the assembly happened to cause grievous hurt with a dangerous weapon the others would be liable for the grivous hurt so caused.*

APPEAL against the judgment of the court of session of the East Godavari division at Rajahmundry in C.C. No. 17 of 1938 passed on 20-7-1938.

*B. Jagannadha Das*, for Applts.

*Public Prosecutor*, for Crown.

JUDGMENT

The appellants have been convicted after a trial with the aid of assessors by the sessions judge of East Godavari on various charges and sentenced to undergo various terms of imprisonment which are to run concurrently.

The charge against them was that they formed themselves into an unlawful assembly with the common object of causing hurt to the village munsif of Anur, to which place the appellants belong, and in prosecution of that common object, one of the accused, namely, the first accused, caused grievous hurt to the village munsif with a knife. The other accused were charged under the same section, namely, S. 326 I.P.C. under the provisions of S. 149. I P.C. There was also a further charge against the first accused under S. 23 (1) of the Criminal Tribes Act. There is some doubt as to whether this charge was justified or not, as he was not a member of the criminal tribe at the time of his conviction though he was a member at the time of the occurrence. The section seems to relate to the time of conviction and not the time of the occurrence which is the subject matter of the case which ends in his conviction. The conviction of the first accused under S. 23 (1) of the Criminal Tribes Act will be set aside and the sentence thereunder also and he is acquitted of that offence. But this will not make any material difference because there are convictions of the first accused under Ss. 148 and 326 I P.C. and sentences of the same description under those sections as the sentence under S. 23 (1) of the Criminal Tribes Act. I shall therefore go on with the merits of the appeal.

As observed by the sessions judge, the evidence against the accused is straightforward and simple. The village munsif is P. W. 2. He has been the village munsif for a period of 25 years and the accused have been living in that village for about 16 years. These can be no doubt therefore that the accused are all wellknown to him and there can be no question of mistaken identity arising in the case. The evidence also establishes the fact that there has been ill feeling borne by the appellants against the village munsif for some years past the ill feeling having arisen out of nothing else than the discharge by the village munsif of his duties as a village munsif. Apparently the zeal displayed by the village munsif against the appellants, who are members of a criminal tribe, goaded them to take revenge on him and they took the opportunity when the village munsif was returning home after inspecting his fields. On the 16th of February 1938, they waylaid him when he was alone, and felled him down with stick blows and when he had fallen down accused 2 and 3 made him sit up while the first accused deliberately cut the village munsif's upper lip with a pen knife, and in the course of this operation, the lower part of the nose was also cut. The village munsif became unconscious and he, was later on taken to his house and finally to the hospital where he had to remain as an inpatient till 10th March There is no doubt that as a result of the injury inflicted on him with a knife, the village munsif's face has become permanently disfigured, and even otherwise the hurt caused to him was undoubtedly grievous hurt and it was caused with a sharp instrument. The offence therefore under S. 326 is established beyond doubt so far as accused 1, 2 and 3 are concerned because there is no doubt that accused 2 and 3 at the time were jointly participating in the act by which the injury was inflicted by the first accused. Besides the village munsif who speaks to the attack on himself and the participation of all the appellants therein, there is the evidence of his nephew, P. W. 3, who saw the occurrence and went to the rescue of his uncle and ran away only after he was himself injured and also the evidence of P.W. 4, who went to the rescue of the village munsif P.W. 3 implicates all the appellants. P.W. 4 no doubt says that he did not see the 5th accused but saw the other 4 accused. His not seeing the 5th accused does not mean that the 5th accused was not there. The positive evidence about the 5th accused's presence is of P.Ws. 2 and 3 and it is sufficient to show that the omission of P.W. 4 to see the 5th accused is due to one of those unaccountable aberrations which occur when one is taken by surprise by a sudden or unexpected occurrence and is not able to take in anything that is feasible to him. In any case, the participation of all the accused in the attack on the village munsif is, in my opinion, established beyond all doubt.

There is also some other evidence of persons who saw the appellants running away from the scene of occurrence. I have no doubt that the case is one in which the evidence has clearly established the participation of all the accused in the joint attack on the village munsif and the offence charged under Ss. 147 and 148 are established beyond doubt.

It has been argued with some vehemence so far as accused 4 and 5 are concerned, that they could not be held responsible for an offence under S. 326, I.P.C., by the operation of S. 149 I.P.C., because the common object is stated in the charge to have been to beat the village munsif whereas grievous hurt is said to have been caused to him with a knife. I presume that what was meant was that the common intention was to cause hurt and the word 'beating' was used in this sense in a somewhat careless manner in the charge. There can be no doubt that the accused knew perfectly what they had been charged with, namely, that their common object was not merely to beat but also to cause hurt; and if in prosecution of that common object to cause hurt to the village munsif, one of them happens to cause grievous hurt and that too with a dangerous weapon, the others would certainly be liable for the grievous hurt so caused;

else it would make the provisions of S. 149 entirely otiose. I am therefore of opinion that the conviction of accused 4 and 5 also of an offence punishable under S. 336 I.P.C. by reason of S. 149, I P.C. are right. The sentences are really not excessive in view of the circumstances of the case. The learned judge observed that the crime was cruelly conceived and ruthlessly carried out and that the object of the appellants in cutting away the upper portion of the lip and a part of the nose was not merely to disfigure the village munsif but also to dishonour him. He also gives other reasons for imposing, what he calls a detterent sentence. Ths sentences do not certainly err, on the side of severity and do not require any interference in appeal. The appeal is therefore dismissed under S. 423 Cr.P.C.

N.T.R. *Appeal dismissed.*

---

**Cr. R. C. No. 967 of 1939**

Case Ref. No. 46 of 1939

*January* 3, 1946

LAKSHMANA RAO, J.

**Maila Gowda**

**v.**

**Emperor**

*Cr.P.C., (V of 1898), S. 380—Procedure on a reference under.*

*Where proceedings are submitted to a sub divisional magistrate under S. 380 Cr.P.C., the sub divisional magistrate can only dispose of the case in the manner provided by S. 380, Cr.P.C., and cannot make a reference to the district magistrate under S. 435, Cr.P.C., on the ground that there is no evidence to sustain the conviction.*

FACTS: The sub magistrate, Puthur, on convicting the accused under S. 380, I.P.C., in C C. No. 540 of 1939 on his file, submitted the proceedings to the sub divisional first class magistrate, Puthur, for dealing with the accused under S. 562, Cr.P.C. The sub divisional magistrate being of opinion that there is no direct evidence of theft against the accused submitted the records to the district magistrate under S. 435, Cr P.C. The district magistrate agreeing with the sub divisional magistrate, referred the case under S. 438 to the High Court recommending that the order of the sub divisional magistrate may be reversed.

CASE referred for the orders of the High Court under S. 438 Cr. P. C., by the district magistrate, South Kanara in his letter No. 3504 M-39 dated 3—11—1939.

*A. S. Sivakaminathan*, for Crown.

ORDER

The proceedings were submitted to the sub divisional magistrate under S. 380 of Cr.P.C. and as held in *Public Prosecutor* v. *Gurappa Naidu* (1), the sub divisional magistrate can only dispose of the case in the manner provided by S. 380, Cr. P. C. The reference to the district magistrate under S. 435 Cr. P. C. was therefore incompetent, nor is this a proper case for submission to the High Court under S. 438 of the Cr. P. C. The records are therefore returned and the sub divisional magistrate is directed to deal with the case as required by S. 380 of the Cr. P. C.

N.T.R. *Reference returned.*

---

1. (1933) M.W.N. 716 : Cr. 104;57 Mad 58

Cr. R. C. Nos. 813 & 814 of 1938.
Cr. R. P. Nos. 772 & 773 of 1938.

*January*, 27, 1939.

PANDRANG ROW, J.

V. K. SUBRAMANIA MUDALI
v.
EMPEROR

*Local Boards Act (Mad. Act XIV of 1920), S. 227A—Charge of continuing in office after termination and failure to hand over funds and abetment against others—Sanction.*

*Where the charge was that a person appointed temporary president for the purpose of election continued to exercise the functions of temporary president even after the election of the president and for failure to hand over panchayat funds to the newly elected president,*

Held, *the complaint could not be entertained without sanction for the prosecution under S. 227A Local Boards Act.*

*Where the complaint was that the accused who was the member of a panchayat board exercised the functions of the president knowing that he was not entitled to do so by doing certain acts and other persons, both members and non members of the panchayat, were charged with abetting the offence,*

Held, *that sanction under S. 227-A Local Boards Act was necessary to prosecute those accused who were members of the panchayat board*

FACTS. In C.C. No. 727 of 1938 the President Panchayat Board Kaveripakkam charged the accused with having committed an offence under S. 208 (2) and (3) of the Local Boards Act. The accused was a member of the Panchayat Board, Kaveripakkam and he was appointed as the temporary president of the board by the president, District Board, North Arcot and he (the accused) conducted the election of the president on 15—7—1938. Devaraja Mudaliar was elected as the president on that date and this has also been notified in the North Arcot District Gazette dated 5—8—38. The new president is deemed to have assumed office as soon as he is elected according to S. 227 A of the Act. The temporary president should at once cease to exercise functions and he will thereon be only a member of the Board. The case against the accused was that he continued to exercise the functions of the temporary president even after the election of Devaraja Mudaliar as president and that he did not hand over one pie being the panchayat fund to the newly elected president.

In C. C. No. 728 of 1938 the President panchayat Board Kaveripakkam charged the accused with having committed offences punishable under S. 208 (2) (3) and S. 210 of the Local Boards Act read with Ss. 341 and 114 I.P.C. Of the seven accused A-1 to A-4 alone are members of the panchayat board Kaveripakkam. Devaraja Mudaliar the complainant has been elected as president of the Panchayat board on 15—7—1938 and this has also been notified in the North Arcot District Gazette dated 5—8—38. The case against A-1 is that he on 30—7—38 exercised the functions of the president knowing that he is not entitled to do so viz, (1) by closing and locking the doors of the various rooms of the office and thereby wrongfully restraining the clerk and others lawfully engaged in the office from discharing their duties by entering into the office room, (2) writing to the postal authorities not to deliver letters to the duly elected president but deliver them to himself, (3) directing the clerk to obey him and not the duly elected president, (4) taking away the minute book of the panchayat board, (5) taking away the key of the meeting room not telling the matter either to the clerk or to the duly elected president and (6) affixing notice in the notice board of the office unauthorisedly. The case against the other accused is that they abetted the offence committed by A-1.

The accused filed petitions saying that the sanction of government was necessary for their prosecution under S. 227A of the Local Boards Act and praying that the complaints may be dismissed as having been filed without the sanction of the Government.

The order thereon was as follows :

"With the election of the new president, accused 1 could be deemed to be only a member of the board. According to S. 227A, the sanction of Government is necessary if the president or any member is accused of any offence alleged to have been committed by him when acting in the discharge of his official duty. The rights of the members are detailed in S. 26 of the Act. If a member is accused of any offence in respect of an act alleged to have been committed by him and which he had a right to do, the sanction of government will be necessary. If a member exceeds his powers and does any act

which he is not competent to do the sanction of government does not seem to be necessary in such cases. The present case is one in which the first accused has exceeded his powers and I do not therefore consider that the sanction of Government is necessary. The petition is dismissed."

PETITIONS under Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the orders of the 2nd class magistrate, Arkonam dated 11—10—1938 in C. C. Nos. 727 and 728 of 1938 respectively.

*V. T. Rangaswamy Ayyangar & K. Ramaswami Ayyangar*, for Petrs.

*Public Prosecutor*, for Crown.

ORDER

This is a case in which the petitioner who was a member of the Panchayat Board of Kaveripakkam and who was appointed temporary president for the purpose of election was charged before the sub magistrate of Arkonam for offences punishable under S. 208 (2) and (3) of the Local Boards Act in that he continued to exercise the functions of temporary president even after the election of the president and for failure to hand over one pie being the panchayat fund to the newly elected president. It is extraordinary to find that such a complaint was entertained by the magistrate without any sanction for the prosecution being given by the local Government as required by law; even an application by the accused to the magistrate to drop the proceedings in view of the absence of sanction of the Government was dismissed. The magistrate's view is, in my opinion, wrong as this is a case in which the sanction of the government was absolutely necessary as a prerequisite of taking cognisance of the alleged offence. The acts or omissions alleged against the petitioner in this case were with reference to something intimately related to his position as a member of the panchayat board or as sometime temporary president of the board. The sub magistrate should not have taken cognisance of the alleged offences in the absence of government sanction. The proceedings before him in C. C. No. 727 of 1938 are therefore quashed.

Cr. R. C. No. 814 of 1938: This is in a way connected with Cr. R. C. No. 813 of 1938. In the present case, no less than seven persons were charged with the offences punishable under Ss. 208 (2) and (3) and 210 of the Local Boards Act. The petitioners, 1 to 4, who are accused 1 to 4 in the court below are members of the Panchayat Board of Kaveripakkam and the acts which are alleged to constitute the offences are acts which were performed by them while purporting to act in discharge of their duties as members of the board. As the nature of the acts themselves clearly show this so far as they are concerned, they are clearly protected by the provisions of S. 227A of the Madras Local Boards Act. As there was no sanction of the local Government for their prosecution, the magistrate should not have taken cognisance of the offences so far as they are concerned. The proceedings so far as these persons, accused 1 to 4 before the magistrate are concerned, are quashed.

As regards the remaining petitioners, *i. e.* accused 5 to 7 in the court below are concerned, it has not been shown that they are entitled to any protection or that the prosecution against them requires the previous sanction of any authority. It cannot therefore be said that the magistrate was wrong in dismissing their application to drop the proceedings so far as they were concerned, and there can be no interference so far as accused 5 to 7 in the court below are concerned. It will be open to them to contend before the magistrate that the abetment alleged against them is no offence at all, and indeed to put forward any other defence that may be available to them.

N.T.R.

---

PRIVY COUNCIL

(Appeal from West Africa)

*December* 11, 1939

LORD CHANCELLOR, LORD THANKERTON LORD ALNESS, LORD ROMER & SIR GEORGE RANKIN

Isaac Theophilus AKKUNNA WALLACE JOHNSON

v.

KING

*Sedition — Gold Coast Criminal Code — Seditious words and seditious intention—Incitement to violence if a necessary ingredient—If intention should be proved by extrinsic evidence—How far Scottish and English cases relevant to interpret the Colony Criminal Code.*

*The Criminal Code of Gold Coast defines 'seditious words' as words expressive of seditious*

*intention and 'seditious intention' as an intention* inter alia *to bring into hatred or contempt the Government of the Gold Coast as by law established.*

*The appellant was prosecuted under this law and was charged with 'unlawfully publishing and concerning the Government of Gold Coast of seditious writing with intent to bring the said Government into hatred or contempt' and 'being in possession of a document containing seditious writing', and was convicted. It was contended for the appellant that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence and unless there was also positive extrinsic evidence of seditious intention.*

Held, *that the Code and its elaborate structure suggests that it was intended to contain as far as possible a full and complete statement of law on sedition in the Colony and that the law must therefore be construed in its application to the facts of the case free from any glosses or interpolation derived from any expositions however authoritiative of the Law of England and Scotland.*

*R. v. Burns*, referred to.

Held *also that nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well and no doubt often is the result of wild and ill considered words but the Code does not require proof from the words themselves of any intention to produce such a result.*

Held *further that there need be no extrinsic evidence of intention outside the words themselves before seditious intention can exist.*

*D. N. Pritt, K. C. & N. Wiggens*, for Applt.

*T. J. O'Connor, K. C. & Kenelm Preedy*, for Respt.

## JUDGMENT.

THE LORD CHANCELLOR:—This is an appeal by special leave from a judgment of the West African Court of Appeal (Gold Coast Session) dismissing an appeal by the appellant against his conviction on the 13th October, 1936, by the Supreme Court of the Gold Coast at the Assizes held at Victoriabork, Accra. The appellant was tried upon an information containing two counts charging him with offences against S. 330 of the Criminal Code of the Gold Coast Colony (Chapter 29). The first count charged the appellant with unlawfully publishing a seditious writing of and concerning the Government of the Gold Coast contrary to S. 330 (2) (b) of the Criminal Code. The second count charged him with unlawfully having in his possession documents containing seditious writing of and concerning the Government of the Gold Coast contrary to S. 330 (2) (e). The trial took place before the Chief Justice of the Gold Coast Colony sitting with three assessors on the 7th, 8th, 9th, 10th, 12th and 13th October, 1936. The appellant was convicted by the Chief Justice on both counts, and was sentenced to pay a fine of £ 50 on the first count and, in default of payment within 14 days, to be imprisoned for three months. No punishment was inflicted on the second count.

The appellant appealed to the West African Court of Appeal against his conviction. The appeal was heard on the 17th and 18th November and the 1st December, 1936, and was then dismissed.

The appellant petitioned His Majesty in Council for special leave to appeal, and this was granted on the 28th July, 1938.

The writing which was the subject matter of the charges was part of an article signed 'Effective' and published in a newspaper circulating in the Gold Coast Colony. The material words as set out in the information, together with allegations as to the meaning attributable to certain words and phrases, were as follows :

"Personally, I believe the European has a God in whom he believes and whom he is representing in his Churches all over Africa. He believes in the God whose name is spelt Deceit. He believes in the God whose law is 'Ye strong, you must weaken the weak, Ye 'civilised' Europeans, you must 'civilise' the 'barbarous' Africans with machine guns. Ye 'christian' Europeans, you must 'christianise' the 'pagans' Africans with bombs, poison gases, etc'.

"In the Colonies, the Europeans believe in the God that commands 'Ye administrators' (meaning to include therein the Government of the Gold Coast) 'make Sedition Bill' (meaning to include therein the Criminal Code Amendment Ordinance No. 21 of 1934 of the Gold Coast) ' to keep the African gagged. Make Forced Labour Bill' (meaning to include therein the Labour Ordinance of the Gold Coast)

'to work the Africans as slaves. Make Deportation Ordinance (meaning to include therein the Kofi Sechere Detention and Removal Ordinance No. 1 of 1936) 'to send the Africans to exile whenever they dare to question your authority."

"Make an Ordinance to grab his money so that he cannot stand economically. Make Levy Bill (meaning to include therein the Native Administration Ordinance No. 25 of 1936 of the Gold Coast Colony) 'to force him to pay taxes for the importation of unemployed Europeans to serve as Stool Treasurers. Send detectives to stay around the house of any African who is nationally conscious and who is agitating for national independence and if possible to round him up in a "criminal frame up" (meaning thereby a criminal charge in which the evidence is fabricated) 'so that he could be kept behind the bars' (meaning thereby prison)."

S. 333 of the Criminal Code (now S. 326 of the Criminal Code 1936 Revision) is as follows :

Sub-sec. (2) :

"Any person who

(b) prints or publishes by any such act as is specified in Title 18 any seditious words or writing or

* * *

(e) being found in possession of any newspaper, book or document or any part thereof or extract therefrom containing seditious words or writing does not prove to the satisfaction of the court that at the time he was found in such possession he did not know the nature of its contents

* * *

shall be liable—

(i) for a first offence under paragraphs (a), (b), (c) and (d) to imprisonment for two years or to a fine not exceeding one hundred pounds.....

(ii) for a first offence under paragraphs (e) and (f) to imprisonment for one year or to a fine not exceeding fifty pounds...

Sub-sec. (8) :

'"A seditious intention' is an intention—

(1) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors or the Government of the Gold Coast as by law established : or

(2) to bring about a change in the sovereignty of the Gold Coast; or

(3) to excite His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Gold Coast as by law established; or

(4) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Gold Coast; or

(5) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Gold Coast; or

(6) to promote feelings of ill-will and hostility between different classes of the population of the Gold Coast.

It is not a seditious intention—

(a) to show that His Majesty has been misled or mistaken in any of his measures; or

(b) to point out errors or defects in the government or constitution of the Gold Coast as by law established or in legislation or in the administration of justice with a view to the reformation of such errors or defects; or

(c) to persuade His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure by lawful means the alteration of any matter in the Gold Coast as by law established other than that referred to in paragraph (2) of this sub-section; or

(d) to point out with a view to their removal, any matters, which are producing or having a tendency to produce feelings of ill-will and enmity between different classes of the population of the Gold Coast.

Provided that none of the acts or things mentioned in provisos (a), (b), (c), and (d) shall be deemed to be lawful if they are done in such a manner as to effect or be likely to effect any of the purposes (1) to (6) which are declared in this section to be a seditious intention.

'Seditious words' are words expressive of a seditious intention.

'Seditious writing' includes anything intended to be read and any sign or visible representation which is expressive of a seditious intention."

At the trial a plea of not guilty was entered. The appellant admitted the writing and publication of the article. His defence was that the article was not seditious and that it was not calculated

to bring the Government of the Gold Coast Colony into hatred and contempt. A great deal of evidence was called as to the application of the article to the affairs of the Colony. Notwithstanding the statements of witnesses for the defence that they did not read the article as having reference to the Gold Coast Colony, it was not really in dispute that that appellant had the Government of the Colony in view when he wrote the article and that it referred to legislation and events generally in the Colony. There was no evidence of any outbreak of violence or of any manifestation of hostility to the Government of the Colony as a result of the article.

The case presented by Counsel for the appellant for their Lordships' consideration was that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention. The foundation for these submissions was sought in the summing up by Cave J., in *R.* v. *Burns* [1] quoted at length in Russell on Crime (9th Edn.), pp. 89-96. Reference was also made to a number of cases on the law of sedition in English and Scottish Courts, which, it was said, supported the statement of the law by Cave J. Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case, however, arose in the Gold Coast Colony and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly, the language of the section, under which the appellant was charged, lends some colour to this suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law of sedition by Stephen J., in the Digest of Criminal Law (7th Edn.), Arts. 123-126, quoted with approval by Cave, J., in his summing up in *R.* v. *Burns* [1]. The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony and not in English or Scottish cases that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of S. 330 suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions however authoritative of the law of England or of Scotland.

In these circumstances, their Lordships turn to the Code, and they find nothing in the section under consideration to support the appellant's contentions. "Seditious words," in the terms of sub-sec. [8], "are words expressive of a seditious intention." By an earlier definition in the same sub-section, "A seditious intention' is an intention to bring into hatred or contempt...the Government of the Gold Coast as by law established."

Their Lordships find these words clear and unambiguous. Questions will necessarily arise in every case as in this case as to the facts to which it is sought to apply these definitions. Fine distinctions may have to be drawn between facts which justify the conclusion that the intention of the person charged was to "bring into hatred or contempt.....the Government of the Gold Coast," and facts which are consistent only with the view that the intention was no more than, in the words of a later part of sub-sec. (8), "to point out errors or defects in the Government of the Gold Coast." It is quite another thing to add words which are not in the Code and are not necessary to give a plain meaning to the section. Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words. but the Code does not require proof from the words themselvs of any intention to produce such a result, and their Lordships are unable to import words into S. 330 which would be necessary to support the appellant's argument.

The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist must also fail and for the same reason. If the words are seditious by reason of their

1. [1886] 16 Cox. C. C. 355.

expression of a seditious intention as defined in the section the seditious intention appears without any extrinsic evidence. The legislature of the Colony might have defined "seditious words" by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so.'

For the reasons indicated this appeal should be dismissed and their Lordships will humbly advise His Majesty accordingly.

— *Appeal dismissed*

R. T. No. 116 of 1939
Cr. App. No. 498 of 1939
*October* 24, 1939

LAKSHMANA RAO & STODART, JJ.

## EMPEROR
v.
## PERUMAL KUDUMBAN

*Cr. P. C. (V of* 1898*), S.* 164 (3)—*Requisites under.*

*A magistrate recording a confession under S.* 26 *Evidence Act when he knows that the confession relates to some definite crime which has been committed and which is being investigated at the time acts under S.* 164, *Cr. P. C. has to observe the rule laid down in sub sec.* 3 *of S.* 164, *that is to say, he shall, before recording the statement explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. Merely saying that he should think over the matter and state what really happened as otherwise the statement would be used against him does not satisfy S.* 164 (3).

Trial referred by the court of session of the Ramnad division at Madura for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 53 of 1939 on 2—9—1939 and appeal by the prisoner against the said sentence and the sentence of simple imprisonment for one year under S. 309, I. P. C. passed upon him in the said case.

*Public Prosecutor*, for Crown.
*R. Sadasivam Pillai*, for accused.

### JUDGMENT.

[STODART, J.)

The appellant has been convicted and sentenced to the death by the learned sessions judge of Ramnad for the murder of his wife by cutting her throat with a razor in the early hours of the morning of 13th March last. He was also convicted of having at the same time and place attempted to commit suicide an offence under S. 309, I. P. C.

The facts of the case, that is to say, the circumstances of the crime are not in dispute. The parties are Pallas by caste and of an humble station in life earning their life by agricultural labour. The appellant is aged 24 or 25. His wife was aged 20. On the night of the 12th the appellant and his wife lay down to sleep in the house of the appellant's mother P. W. 6. About 4-40 in the early morning P. W. 6 heard a gurgling sound and went into the room where the appellant and his wife had gone to bed. She saw that the deceased was dead from a great wound in her throat and the appellant was lying beside her with a wound in his throat and unable to speak. P. W. 6 was closely followed by her eldest daughter P. W. 3 a girl of 18 and is corroborated by her. The deceased's mother P. W. 4 who lives in another house a few yards away and P. W. 7 the uncle of the appellant, P. W. 5 a near neighbour and many others immediately came on the scene. P. W. 7 went and told the village munsif what had happened and he at once came to the place and remained there until on receipt of his report the sub inspector P. W. 9 arrived. The sub inspector found that the body of the deceased had not been disturbed. He found that the appellant was not able to speak and he sent immediately to Sathur which is only three miles away to summon the doctor P. W. 1 who came to the scene and attended to the injured man. At 7-15 the appellant produced from underneath the mat on which he was lying a razor and delivered it up to the sub inspector, P. W. 9. That razor was stained with blood. The sub inspector P. W. 9 and the village munsif P. W. 8 testify to the production of this blood-stained razor by the appellant. The deceased's mother P. W. 4 says that she was present and saw it being produced and given to the inspector by the appellant. This evidence has not been rebutted or in any way shaken in cross-examination and there is no evidence to the contrary effect. The conclusion to be drawn from these facts is that the appellant killed his wife by cutting her throat with this razor M. O. 1 and then cut his own neck.

Learned counsel for the appellant has been

able to put before us three arguments. First that the door from the street into the room in which the deceased and the appellant were sleeping was open and therefore there is some ground for the statement of the appellant made in the magistrate's court and in the sessions court that the offence was committed by some person unknown and that he himself only woke up when he was actually being attacked by the murderer. The evidence on this point is discrepant. The mother of the appellant and his sister (P. Ws. 6 and 3) do say that the southern door was open. The southern door is the door that leads into the street directly from the room where the deceased and the appellant were sleeping. On the other hand P. W. 4 the mother of the deceased and P. W. 5 a neighbour who came along with P. W. 4 say that that door was closed and fastened from inside when they arrived at the house hearing the noise and they say moreover that it was opened for them by P. W. 3 the appellant's sister. In our opinion it is not very important whether this door was open or closed because all the circumstances point to the appellant being the culprit and to nobody else. The allegation that there were other people who might have committed this aweful crime rests on the slenderest of foundations. The appellant says that his wife's maternal uncle resented his being married to his wife thinking that the choice should have fallen upon that uncle's brother. And the appellant again says that he incurred hostility of another relative because he opposed the marriage of that relative to his sister P. W. 3. It is quite clear in our opinion that even if these causes of friction did exist they could not for a moment be regarded as furnishing a motive for the muder of the unfortunate girl, the wife of the appellant. Another argument of learned counsel is that the appellant was not likely to have had a razor as razors are not generally kept by people of the appellant's caste. But we do not see much force in this argument because after all the evidence is that the appellant did have a razor which of course if he did not already possess he must have got from some place before committing the crime. It only makes the crime more heinous if we are to suppose that in order to commit it the appellant had to secure a weapon which was not easily available in his own house or in the house of his friends. Learned counsel also takes some objection to the evidence of the production of the razor and has carefully explained the evidence on that point to us but as we have said we do not find any flaw in that evidence. Lastly learned counsel has animadverted and quite properly we think on some of the statements made by the appellant, which were for all practical purposes allowed in evidence against him. It will be remembered that in the morning when the crime was discovered the appellant was not able to articulate. Later in the day that is to say about 7 O'clock in the evening when he was lying in the hospital at Sathur he became able to speak and the magistrate was sent for to take his statement not as a person accused of the crime but as a dying declaration it being feared that at the time the appellant might die. As the magistrate knew that what the appellant was going to say was likely to be of an incriminating nature he warned the appellant. But the fact remains that the statement given by the appellant to the magistrate that evening was not taken under the conditions prescribed by S. 164, Cr.P.C. It was a statement made after the appellant had been arrested and it was presumably made in the presence of a police officer because even in the hospital an accused person is always in the immediate custody of a police officer. Under S. 26 of the Indian Evidence Act therefore no such confession can be proved against the person making it unless it is made in the immediate presence of a magistrate. The magistrate recording a confession under S. 26 when he knows that the confession relates to some definite crime which has been committed and which is being investigated at the time acts under S. 164, Cr. P. C. and has to observe the rule laid down in sub-sec. (3) of S. 164, that is to say, he shall before recording the statement explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. Here it appears that the magistrate said to the appellant that he should think over the matter and state what really happened as otherwise the statement would be used against him. This of course did not satisfy the rule in sub-sec. (3) of S. 164. The learned sessions judge has allowed the sub magistrate who was examined in the case as P.W.10 to give evidence of what the appellant said when he made this statement and also the

statement was exhibited and presumbly was read out and came to the knowledge of the learned judge and of the assessors. The learned judge when he came to the stage of pronouncing his judgment said that he did not place much value on the dying declaration Ex. E. It is obvious that he was aware of the rules relating to the recording of confessions by magistrates and it would have been better if, instead of admitting this irrelevant document and the evidence of what the appellant said to the magistrate while in police custody, he had disallowed that part of the evidence altogether. But apart from any incriminating statement made by the appellant shortly after the crime the evidence is conclusive in our opinion that he did cut his wife's throat and afterwards attempted to cut his own. This crime is one that has certain singular features about it. The evidence is that the appellant and the deceased were on the best of terms. They had only been married a few months and their married life had been made unhappy by the quarrels between their respective families, the mother of the deceased on the one hand and the mother of the appellant on the other. The crime must have been committed by the appellant when he was in an abnormal frame of mind induced by unhappy domestic circumstances. It looks as if he wanted to end his wife's life and his own at the same time. In these circumstances we think the lesser penalty will meet the ends of justice.

We confirm the conviction of the appellant for murder and his conviction for the offence of attempt to commit suicide. We do not confirm the sentence of death but we sentence the appellant for the offence of murder to transportation for life. The separate sentence under S. 309 I.P.C. will stand but will run concurrently.

N.T.R.

—

## PRIVY COUNCIL

(Appeal from Federal Court)

*January* 18, 1940

VISCOUNT MAUGHAM LORD PORTER & SIR GEORGE RANKIN

## HORI RAM SINGH

v.

## KING EMPEROR

*Government of India Act*, 1935 *S.* 205 — *Privy Council—Appeal from Federal Court when admitted.*

*An appeal from the Federal Court should not lightly be admitted by the Privy Council unless it arises in a really substantial case.*

*Where the matter is one concerned with the construction of a very exceptional section which will have no application in the future, and it is only a technical point, no leave should be given.*

### JUDGMENT.

VISCOUNT MAUGHAM: Their Lordships do not require to hear counsel for the Crown.

This is an application for special leave to appeal in forma pauperis from a judgment of the Federal Court of India, and it has the distinction of being the first application for such leave from that court.

The question which arises is as to the true construction of S. 270, sub-sec. 1, of the Government of India Act, 1935. It is in these terms; "No proceedings, civil or criminal, shall be instituted against any person in respect of any act done or purporting to be done in execution of his duty as a servant of the Crown in India or Burma before the relevant date", which is the 1st April, 1937, 'except with the consent', putting it shortly as applying to this particular case, "of the Governor" of the province in which the petitioner was employed. It is perfectly clear, therefore, that this section is in the nature of an exceptional section which is intended to afford some measure of protection to certain public servants in relation to acts done or purported to be done in execution of their duty, being acts done before the date in question.

Their Lordships ought not to forget the fact that the matter has been before the Federal Court and that an appeal from the Federal Court should not lightly be admitted by this Board, and should only be admitted if it arises in a really substantial case.

In this case it does not seem to their Lordships that the matter is anything but one concerned with the construction of a very exceptional section which will have no application in the future, and it is a technical point. They have had the view of the Federal Court with regard to it and, having regard to all the circumstances of the case and bearing in mind the ingenious argument which has been presented to them, they do not think that this a case in which their Lordships should advise His Majesty to grant leave to appeal. In those circumstances, the application for leave must be dismissed. The Council office fees will be remitted as it is a petition in *forma pauperis* but otherwise there will be no order as to costs.

*Application dismissed.*

Cr. App. No. 173 of 1939
*March* 14, 1939
LAKSHMANA RAO, J.

K. C. PANDALAI, representing South Indian General Assurance Co., Ltd. & others.
v.
EMPEROR

*Life Assurance Companies Act (II of 1912), S. 34—Who can be punished under.*

*It is not correct to say that under S. 34, Life Assurance Companies Act, besides the company only one of the persons falling under the specified categories of officers mentioned therein can be punished.*

THE FACTS appear from the order of the lower court which was as follows:

"Failure to deposit Rs. 12490 with the comptroller, a third of the income derived in 1935 is a serious default.

Mr. Pandalai represents the company itself, is a director and also represents the company which is the managing agent. He is liable to be punished with fine in each of the capacities under S. 34 as knowingly a party to the default. He will be fined Rs. 200 in each of his capacities."

The revision was filed on the following among other grounds:

"4. Under S. 34 of the Act the company as such and one or other of the office bearers mentioned in the section are liable to be fined and not the same individual in different capacities."

"5. The lower court failed to note that the section contemplates the liability of the company and one or other of the office-bearers mentioned in the section."

"6 The lower court has failed to give due weight to the word 'or' occurring after 'and' in the section."

APPEAL against the order of the Second Presidency Magistrate of the Court of Presidency Magistrates, George Town, Madras in C. C. No. 1129 of 1938.

*K S. Jayarama Ayyar*, for Applts.

*K. V. Ramaseshan*, for Crown.

JUDGMENT

The appellants are the South Indian General Assurance Co., Ltd., Mr. K. C. Pandalai, a director of the company, and K. C. Pandalai & Co., the managing agents of the company, though all were represented by the second appellant, and they pleaded guilty to the charge under S. 4 (1) of the Indian Life Assurance Companies Act (II of 1912). S. 34 of the Act provides that any life assurance company which makes default in complying with any of the requirements of the Act and every director, manager or secretary or other officer or agent of the company who is knowingly a party to the default shall be punishable with fine, and there is no force in the contention that besides the company only persons falling under any one of the specified categories can be punished. The punishment of the appellants is therefore legal and having regard to the period of default the fine cannot be said to be excessive. The appeal therefore fails and is dismissed.

N.T.R. — *Appeal dismissed*

Cr. App. No 240 of 1938
*March* 14, 1939
LAKSHMANA RAO, J.

THE PUBLIC PROSECUTOR, MADRAS.
v.
D. S. RAJU GUPTA & others

*Provident Insurance Societies Act (V of 1912), S. 22—Who can be convicted under.*

*Where the directors, the secretary, the accountant and the auditor were all charged under S. 22 Provident Insurance Societies Act with manipulating the revenue account and balance sheet to conceal from the share holders the fact that the company worked at a deficit,*

Held, *only such of the accused as were aware of the true facts would be guilty under S. 22 and they would be guilty though they might have acted with the best of intentions.*

APPEAL under S. 417, Cr. P. C., 1898, against the acquittal of the aforesaid respondents (accused Nos. 1 to 4 and 6 to 8) by the sub divisional magistrate of Vizagapatam in C. C. No. 258 of 1936.

*K. Venkataraghavachari*, for Applt.

*Kasturi Seshagiri Rao, J. Krishnamurthi & S. Vepa*, for Accused.

JUDGMENT.

This is an appeal by the Provincial Government against the acquittal of the respondents of an offence under S. 22 of the Provident Insurance Societies Act (V of 1912).

The 1st respondent was the managing director of the Bharathamatha Commonwealth Insurance Bank Ltd., Vizagapatam and the 2nd respondent was the secretary. The third respondent was the accountant and respondents 4 to 6 were directors. The 7th respondent was the auditor and Exs. C and B, the revenue account and balance sheet for the period for 1-11-1934 to 31-12-1935 were prepared by the Bank and audited by the 7th respondent. The revenue account was signed by respondents 1 to 5 and the balance sheet bears the signatures of respondents 1 and 4 to 6. Both were signed by the 7th respondent in token of his audit, and they were filed with the registrar of Provident Insurance Societies as required by S. 14 of the Act on 15th April 1936. They make it appear that the bank worked at a profit of Rs. 260-11-8 and were printed and circulated to the share holders of the bank.

There was in fact a deficit and the prosecution case is that in order to conceal it from the share holders the revenue accounts and balance sheet were manipulated. A sum of Rs. 15000 was shown on the assets side of the balance sheet as 'goodwill' and a like sum was included in Rs. 15271-13-6 shown on the credit side of the revenue account under the head 'revival annual fees and other items'. A sum of Rs. 13986-4-9 was shown in the balance sheet as cash at branches though that amount had been spent by the branches before 31st December 1935 and a sum of Rs. 2350 payable to the managing agents towards remuneration was entered on both sides of the balance sheet. The statements were false to the knowledge of respondents 1 to 6 and they were certified to be correct by the 7th respondent.

The entry relating to the remuneration of the managing agent might have been made on both sides of the balance sheet under a mistaken notion as to the correct method of accounting and it might be that the sum of Rs. 13986-4-9 was shown as cash at branches since it so appeared in the books of the head office and the accounts submitted by the agents had not been passed. That such amounts have to be shown as branch or agent balances was admitted by P. W. 3, the liquidator and these statements cannot be said to be false to the knowledge of any of the respondents. But the inclusion of Rs. 15000 in the revenue account under the head 'revival, annual fees and other items' is patently false, and the explanation offered, *viz.*, that by Ex. R-1, the resolution of 30th December 1935, a good will account was created by the directors for Rs. 15000 out of the organisation expenditure of Rs. 24875-12-6 is neither acceptable nor helpful. The resolution does not advert to the organisation expenditure and even otherwise the good will account must have been created in order to conceal the actual organisation expenditure from the share holders. The entry of Rs. 9875—12—6 under the head organisation expenditure on the assets side of the balance sheet is otherwise inexplicable and such of the respondents as were aware of the true facts would be guilty under S. 22 of the Provident Insurance Societies Act.

The second respondent entered service on 3rd January 1936 and third respondent became the accountant about that time. Under the circumstances it was not seriously contended that they knew or must have known the real facts, and the evidence of P. W. 5 shows that respondents 4 and 5 had no personal knowledge of the affairs of the company. The 6th respondent signed the balance sheet on the assurance of the 1st and 7th respondents, and there is no ground for interference with the acquittal of respondents 2 to 6. But it is clear from the evidence that the 1st and 7th respondents knew the real facts and they would be guilty under S 22 of the Provident Insurance Societies Act, though they might have acted with the best of intentions. The acquittal of respondents 2 to 6 is therefore confirmed and the acquittal of respondents 1 and 7 is set aside. They are convicted under S. 22 of the Provident Insurance Societies Act and having regard to all the circumstances, sentenced to pay a fine of Rs. 100 each with regard to imprisonment in default for one month.

N.T.R. —

Cr. R. C. No. 1100 of 1939
Cr. R. P. No. 1035 of 1939
*February* 15, 1940

LAKSHMANA RAO, J.

## S. RAMASWAMI AYYAR
v.
## COMMISSIONER, CHITTOOR MUNICIPALITY

*Criminal trial—Admission of irrelevant document —Retrial.*

*The marking of an irrelevant document in evidence is not a ground for ordering retrial.*

THE FACTS appear from the Judgment of the Lower Court, which was as follows:

"The appellant has been convicted and sentenced to pay a fine of Rs. 50 and in default to suffer simple imprisonment for six weeks under S. 5 (1) (b) of the Prevention of Adulteration Act 1918 by the Stationary Sub Magistrate, Chittoor on a charge sheet laid by the Commissioner of Chittoor Municipality that the accused on 22—6—1939 stored ghee in his coffee hotel for sale which was found on experiment to contain 90 per cent of fat not derived from milk or cream."

"The chief among the many grounds of appeal is that the stationary sub magistrate, while examining P. W. 1, marked an irrelevant document i.e., the letter of the Government Analyst which runs as follows: "To impose the

maximum penalty as a small fine of Rs. 20 or Rs. 30 will be absolutely useless as a deterrent", as Ex. "D' and that therefore the magistrate was prejudiced from the beginning. It is seen that this document is really irrelevant and certainly must have prejudiced the learned magistrate.

"I therefore set aside the conviction and sentence and order a re-trial only against the appellant by the taluk magistrate Palmaner."

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the sub divisional first class magistrate of Chittoor dated 25—10—1939 and passed in C. A. No. 44 of 1939 preferred against the judgment of the court of the stationary sub-magistrate of Chittoor in C. C. No. 875 of 1939.

*V. T. Rangaswami Iyengar & K. Kalyanasundaram Iyer* for Petr.

*Public Prosecutor*, for Crown.

ORDER.

The marking of an irrelevant document in evidence is not a ground for ordering retrial and the order of the sub divisional magistrate cannot be sustained. It is therefore set aside and the sub divisional magistrate will dispose of the appeal in accordance with law.

N.T.R.

—

Cr. R. C. No. 199 of 1939.
Cr. R. P. No. 183 of 1939.

*February* 22, 1939

LAKSHMANA RAO, J.

V. BALAKRISHNA NADAR

v.

EMPEROR

*Cr. P. C. (V of 1898)—Summons for production of document.*

*Where the complainant applied for the issue of summons to the assistant commissioner of salt revenue for the production of a document to cross-examine defence witnesses and the magistrate refused to issue summons,*

Held *the refusal was improper and summons being at the cost of the applicant should be issued.*

Facts : Accused were charged under S. 403 I. P. C. with misappropriating 250 grosses of match boxes.

Complainant put in a petition to summon certain documents which was as follows :

"The petitioner submits that the case now stands posted to 23—2—1939 for the examination of the defence witneses. Some of the defence witnesses, cited are said to be the partners and joint owners of match factories and they are all interested in the accused also. The accused also is said to be the joint owner with those witnesses, of the mach factories. The document mentioned herein is necessary to prove the interested nature of the witnesses on the side of the defence. The document is the order or proceedings of the assistant commissioner of Salt Revenue, Southern division Negapatam dated 3—11—38, which mentions a finding that the accused is jointly owning the match factories with witnesses Veerappa Nadar, Dharma Raja Nadar, V. Annamalai Nadar (brother of witness V. Rajamony Nadar) and on that ground the rebate appears to have been cancelled by the assistant commissioner. The said document is important for the purpose of cross examining the witnesses for the defence. An application was presented to this Honourable court praying for sending for the document. The attempt by the complainant to get certified copy of the said document was futile. An application for certified copy was sent by registered post to the assistant commissioner Negapatam on 2—2—39 with copy stamps required, and it was not granted and the copy stamps were returned to the complainant (herewith the postal receipts and petition copy). In these circumstances it is humbly prayed that your honour may be pleased to send for the document, mentioned herein for the cross examination of the defence witnesses and thus render justice."

The order thereon was :

"The complainant has not produced an endorsement from the officer concerned that his petition for public copies has been rejected. In these circumstances no summons can be issued to the assistant commissioner for the production of the records."

Petition under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the stationary sub magistrate of Sattur dated 14—2—39 and made in C. C. No. 1006 of 1938.

*T. M. Kasturi*, for Petr.

*Public Prosecutor*, for Crown.

ORDER.

The summons is to issue at the cost of the petitioner and the refusal of the magistrate to send for the document is unsupportable. The order of the magistrate is therefore set aside and the document will be sent for before proceeding with the case further.

N.T.R.

—

Cr. R. C. No. 937 of 1938
Case Referred No. 30 of 1938.
*February* 22, 1939.
LAKSHMANA RAO, J.

KUNJU
v.
EMPEROR.

*Borstal Schools Act (Mad. Act. V of 1898), S. 8—Detention for failure to furnish security —Period.*

*Where proceedings were taken under S. 109 Cr. P. C. against an adolescent offender and on his failure to produce sureties the magistrate directed his detention in a Borstal School for one year, unless he furnished surety earlier,*

Held, *that the minimum period of detention under S 8 was two years and accordingly the period of detention should be altered.*

Facts: In M. C 31-38, sub divisional magistrate, Mannargudi, one Kunju, aged about 17 years was on 10—10—38 directed to produce two sureties to execute a bond of Rs. 100 each for his good behaviour for a period of one year (the proceedings having been one under S. 109 Cr. P. C.) The counter-petitioner did not produce the sureties and the sub divisional magistrate directed his detention in the Borstal School, Palamcotta, as the counter petitioner was an "adolescent offender", for a period of one year, unless the surety was sooner furnished.

The district magistrate, Tanjore, referred the case to the High Court to revise the order of the sub divisional magistrate, Mannargudi in M. C. 31-38 and alter the period of detention to two years. As the minimum period of detention prescribed in S. 8 of the Borstal Schools Act is two years, the order of detention for one year by the sub divisional Magistrate was incorrect.

Case referred for the orders of the High Court under S. 438, Cr. P. C, 1898, by the district magistrate of Tanjore in his letter dated 28-11-38.

*Public Prosecutor*, for Crown.
Accused not represented.

ORDER

The reference is accepted and the accused will be detained in the Borstal school for two years.

N.T.R.

—

Cr. R. C. No. 1051 of 1939
Cr. R. P. No. 987 of 1939
*February* 22, 1940.
LAKSAMANA RAO, J.

N. GOPALASWAMY RAO, Licence Inspector, Saidapet
v.
Chinna PONNUSWAMY CHETTY.

*Local Boards Act (Mad. Act XIV of 1920), S. 164 (2)—Prosecution for failure to comply with requisition under—Essentials.*

*On a prosecution for failure to comply with a requisition under S. 164, Cl. (2) of the Madras Local Boards Act, it is incumbent on the magistrate to decide the legality or otherwise of the requisition. The local board need not establish its title and possession of the land in a civil court before invoking the provisions of the Madras Local Boards Act.*

The Facts appear from the judgment of the lower court which was as follows :

"The License Inspector of Chingleput district board duly authorised by the president Panchayat district board has charged the three accused with an offence punishable under S. 164 read with S. 207 (1) of the Madras Local Boards Act.

2. "The prosecution version is briefly stated below. The Government in their G. O. No. 548 Rev. D. 22—10—1896, Ex. A,, made over the management of what is called Lala Chatram in S. No. 263, 6. 4. 91 acres along with some other lands in Kunnathur village to the defunct taluk Board and now under the district board. The three accused are alleged to have occupied the choultry lands in Kunnathur village without paying any fees to the district board from 1934-1935 onward. The president district board informed the accused that they should vacate the lands within one month of the date of receipt of the memos, that they should pay Rs. 10 towards fees for the unauthorised occupation and that if they failed to do so, steps would be taken against them under the provi-

sions of the Madras Local Boards Act. These memos are dated 28—11—39 and are Exs. N. series. As these were not heeded to, the district board again issued notices (17—2—29 Ex. O series) to the accused that it had come to the notice of the district board that the accused have put up bunks, huts etc., in the Kunnathur Choultry lands, that they should vacate the encroachments within 30 days of the date of receipt of the notices and that steps would be taken against the encroachments. The accused did not comply with these notices. Hence complaints under S. 164 read with S. 207 (1) of the Madras Local Boards Act have been preferred against the accused.

"4. All the three accused denied that they are occupying the district board land. Their main contention is that the land alleged to have been encroached upon is their private land, that they have been in the possession and enjoyment of themselves and their ancestors for nearly 2 years. They questioned the title of the district board to the land and stated that the dispute was for the civil court to decide. They examined one D. W. who is aged 70 years old. He deposed that the lands in dispute have been under private enjoyment for about 60 years."

"5. Arguments were heard on both sides. The counsel for the accused argued at length. The burden of his arguments was that the matter was one for decision by the civil courts, while the prosecution tried to show that the lands belonged to the district board."

"6. Apart from the legality or otherwise of the notices issued to the accused, I find from the evidence before me that the matter resolves into a question regarding the title to the land. The district board wants to prove that the lands are in its possession while the accused contend that they are private properties. The point for consideration is regarding the possession and ownership of the lands, the decision of which is entirely outside the jurisdiction of this court. The district board cannot be allowed in the circumstances stated above to invoke the provisions of the Madras Local Boards Act and get a decision regarding the possession and enjoyment. The district board should establish its claim in a civil court having jurisdiction in the matter and then eject the accused. I therefore find the accused not guilty and acquit them under S. 245 (1) Cr. P. C."

PETITION under Ss. 435 & 439 Cr. P. C., 1898 praying the High Court to revise the order of the court of the stationary sub magistrate of Poonamallee dated 12—9—1939 and made in C. C. No. 760 of 1939.

*M. Raghupathy Reddi*, for Petr.
*C. R. Krishna Rao*, for Respt.
*Public Prosecutor*, for Crown.

ORDER.

The accused was prosecuted for failure to comply with a requisition under S. 164, Cl. 2 of the Madras Local Boards Act and he has been acquitted on the ground that the local Board should establish its title and possession of the land in the civil court before invoking the provisions of the Madras Local Boards Act. This is obviously erroneous and it is incumbent on the magistrate to decide the legality or otherwise of the requisition. The order of acquittal is therefore set aside and there will be a retrial in accordance with law.

N.T.R. —

Cr. R. C. No. 796 of 1938.
Cr. R. P. No. 757 of 1938.
*February* 21, 1939.
LAKSHMANA RAO, J.

SUGARTHAM AMMAL
v.
C. VEDAVALLI AMMAL.

*Penal Code (XLV of 1860), S. 504—Words constituting insult must be set out.*
*Where the words which constitute the insult are not found or disclosed, a conviction under S. 504 I. P. C. cannot be sustained.*

PETITION under Ss. 435 & 439, Cr.P.C. 1898, praying the High Court to reverse the judgment of the court of the Hony. Presidency Magistrate, George Town, Madras in C. C. No. 529 of 1938.

*A. S. Sivakaminathan*, for Petr.
*E A. Lobo*, for Crown.
*K. Venkataragavachari*, for Complnt.

ORDER.

The words which constitute the insult are not found or disclosed and the conviction under S. 504 of the I. P. C. cannot be substained. The conviction is therefore set aside and the fine if levied will be refunded.

N.T.R. —

Cr. R. C. No. 940 of 1939.
Cr. R. P. No. 888 of 1939.
*February* 22, 1940.
LAKSHMANA RAO, J.

PRESIDENT PANCHAYAT BOARD, MELIYAPUTI
v.
Surapu VEERANNA.

*Local Boards Act (Mad. Act XIV of* 1920), *S.* 159 (1)—*Prosecution for failure to remove an encroachment—Essentials.*

*On a prosecution for failure to remove an encroachment in a public street on a notice under S.* 159 *of the Madras Local Boards Act, the magistrate has to decide the legality or otherwise of the notice. The question is not one of a civil nature*

THE FACTS appear from the judgment of the lower court which was as follows:—

"The president Panchayat Board, Meliyaputti, filed a complaint on 5—11—1938 under S. 159 (1) of the Madras Local Boards Act against Surapu Veeranna of the same Village stating that the accused constructed a shed and encroached on the public street by name Kotta street, and causing obstruction to the free passage. He adds that the accused though served with notice on 25—8—1938 failed to comply with it."

"The accused was called on to show cause why he should not be punished under S. 159 (1), Madras Local Boards Act. He denies the offence and states that the shed has been in existence for the last 20 years."

"In the absence of the recorded evidence it is not possible to locate the encroachments. The decision whether or not the sanction on requisition has been lawfully given are made and whether it has been disobeyed rests on the conclusion that it is an encroachment or not. I consider that the question of establishing the panchayat board's title or claim to the alleged encroachment is purely of civil nature"

"In the circumstances I find that an offence under S. 159 (1) of the Madras Local Boards Act cannot be connected to the accused and I therefore acquit him under S. 245 (1) Cr.P.C."

PETITION under Ss 435 and 439 Cr. P. C., 1898, praying the High Court to revise the order of the court of the Sheristadar Magistrate of Pathampatnam dated 26—7—1939 and passed in C. C. No. 246 of 1939.

*B. Jayannadha Das*, for Petr.
*Public Prosecutor*, for Crown.

ORDER.

The accused was prosecuted for failure to remove an encroachment in a public street and he has been acquitted on the ground that "the question of establishing the panchayat board's title or claim to the alleged encroachment is purely of a civil nature." This is obviously erroneous and the magistrate has to decide the legality or otherwise of the notice under S. 159(1) of the Madras Local Boards Act. The order of acquittal is therefore set aside and there will be a retrial in accordance with law.

N.T.R. —

Cr. R. C. No. 652 of 1939.
Cr. R. P. No. 610 of 1939.
*February* 23, 1940.
LAKSHMANA RAO, J.

PICHAI PILLAI
v.
T. R. RAMASWAMY AYYANGAR.

*Penal Code (XLV of* 1860), *S.* 504—*Abuse, when an offence.*

*The petitioner, a bill collector, went to the complainant to collect amounts due by him. Complainant stated he would pay in a week and during the discussion that followed petitioner shouted "shameless fellow. I will shoe you."*

Held, *it did not amount to an offence under S.* 504 *I. P. C.*

FACTS appear from the judgment of the lower appellate court.

"The appellant has been convicted by the town sub magistrate Trichy for an offence under S. 504 I. P. C. and sentenced to pay a fine of Rs. 35. He appeals.

The appellant is a bill collector under a cloth merchant. The respondent had to pay some money to the appellant's master. He went to collect the dues from the respondent on 7—8—38. The respondent is alleged to have put off payment. This enraged the appellant and he is said to have abused the respondent using the words 'shameless fellow. I will shoe you.'

"Though several grounds have been urged in the appeal memo the only point argued was that even if the appellant had used the words attributed to him they would not amount to an

offence under S. 504 I. P. C. as there was no intention to provoke a breach of peace. But this argument will not hold good. It is sufficient if the appellant knew that there would be a likelihood of a breach of peace. From the circumstances of the case I find the appellant could have known that his abusive language would have provoked a breach of the peace. The fact that no breach of the peace actually took place is no argument against the conviction. In the result I hold that the appellant has been rightly convicted."

Against this judgment the present revision was filed on the grounds *inter alia*:

"The court below ought to have found that the ingredients of an offence of insult had not been made out.

"The court below ought to have found that this is a case of mere abuse which does not constitute an offence of insult."

PETITION under Ss. 435 & 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the court of the sub divisional magistrate of Trichinopoly in C. A. No. 3 of 1939 preferred against the judgment of the court of the town sub magistrate of Trichinopoly in C. C. No. 822 of 1938.

*V T. Rangaswami Ayyangar*, for Petr.

*Public Prosecutor*, for Crown.

ORDER.

The petitioner is a bill collector and he went to the complainant to collect the amount due by him. The complainant stated that he would pay in a week and during the discussion that followed the petitioner shouted "shameless fellow. I will shoe you." This does not amount to an offence under S. 504, I. P C. and the conviction of the petitioner under that section is unsustainable. It is therefore set aside and the fine if levied will be refunded.

N.T.R.

---

Cr. R. C. No. 998 of 1939
Taken up No. 10 of 1939
*February* 21. 1940

LAKSHMANA RAO, J.

NATESA PADAYACHI & others
v.
EMPEROR

*Cr. P. C. (V of 1898), S. 182—Charge under S. 420—Place of trial.*

*A charge under S. 420 can be tried at the place where the complainant was cheated and parted with his money.*

THE FACTS appear from the order of the lower court: "In this case the accused who are five in number were charged before sub divisional magistrate, Trichinopoly for an offence punishable under S. 420 I. P. C. The allegation was that A3 and A4 cheated the complainant by giving spurious gold pieces in return for money. According to the facts disclosed by the first information report the money was paid to A3 and A4 and the spurious coins handed over to the complainant at Rajapalayam in Ramnad District and it is therefore contended on behalf of A2 and A5 that this Court has no jurisdiction to try the case against the accused. The prosecuting sub inspector while admitting the above facts contends that A5 got the amount from the complainant at Trichinopoly and that therefore this court has got jurisdiction. On the admitted facts, the transaction was completed only at Rajapalayam. A5's part in the affair in whatever capacity it may be, does not affect the transaction. I therefore consider that this court has no jurisdiction to try this case against the accused."

CASE taken up in revision by the High Court calling on the accused in C. C. No. 117 of 1939 on the file of the court of the sub divisional magistrate of Trichinopoly to show cause why the order of the sub divisional magistrate of Trichinopoly dated 23—10—1939 in the said C. C. No. 117 of 1939 should not be set aside.

*Public Prosecutor*, for Crown.

ORDER

The complainant was cheated and parted with the money at Trichinopoly and the case can be tried by the sub divisional magistrate of Trichinopoly. *Vide* S. 182, Cr. P. C. The records will therefore be returned and the sub

divisional magistrate will proceed with the case in accordance with law.

N.T.R.

---

Cr. R. C. No 1094 of 1939
Cr. R. P. No. 1029 of 1939
*February* 22, 1940.

LAKSHMANA RAO, J.

Kallumatam GURUBASAYYA
v.
Sanna Setra SIDDALINGAPPA

*Cr. P. C.* (*V of* 1898), *S.* 195 — *Charge of defamation on an allegation in a plaint in a suit—Sanction.*

*Where a complaint of defamation was founded on an allegation in a plaint in a suit,*

Held, *that if the allegation was false the offence would be one under S.* 193, *I. P. C., that a complaint by the court was necessary for a prosecution for the offence and that the parties could not be permitted to evade that provision of law by filing a complaint for defamation.*

THE FACTS appear from the complaint filed under S. 500 I. P. C.

"I. The accused has filed a suit O. S. No. 516 of 1939 on the file of the Bellary district munsif's court against the complainant and others, praying for partition on the strength of a sale deed executed by one D. in his favour. The suit has been filed maliciously and vexatiously at the instance of one S. S. who has misunderstandings against the complaint.

II. In para 4 of the said plaint, the accused has made the following statement—"the second defendant (i. e. the complainant) was incurring reckless debts on account of his drinking and immoral habits, which could not bind the family or its properties." The allegations with regard to drinking and immoral habits as well as the incurring of reckless debts are absolutely false. By alleging drinking and immoral habits, the accued has published an imputation concerning the complainant intending to harm his reputation and has thereby committed the offence of defamation punishable under S. 500 I. P. C.

III. The said defamatory allegations do not come under the purview of any of the exceptions of S. 499 I P. C. as they have been made wantonly, needlessly and in bad faith. The accused has deliberately and maliciously made the aforesaid false defamatory allegations with a view to cause prejudice to the court and harm the reputation of the complainant outside amongst the public.

IV. The accused has published the above statement in para 4 of the plaint, which was presented by his Advocate to the head clerk of the Bellary munsif's court in accordance with the civil rules of Practice. A copy of the plaint has also been served on the first defendant in the suit and the 3rd defendant in the suit. By the aforesaid means, the accused has published the defamatory statement referred to above

V. It is prayed that the accused may be dealt with according to law."

PETITION under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to quash the charge framed against the petitioner herein in C. C. No 60 of 1939 on the file of the court of the sub divisional magistrate of Bellary.

*A. Bhujanga Rao*, for Petr.
*Public Prosecutor*, for Crown.
*A. Gopalacharlu*, for Respt.

ORDER.

The complaint is founded on an allegation in a plaint in a suit for partition and recovery of the share of the vendor of the accused in the family properties and if the allegation is false the offence would be one under S. 193, I. P. C. A complaint by the court is necessary for a prosecution for an offence under S. 193 I. P. C. and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation. In this view it is unnecessary to consider whether a prosecution at this stage is not an abuse of the process of court and the charge is quashed.

N.T.R.

---

FULL BENCH

S. R. Nos. 32601, 32137 & 28253 of 1939

*March* 4, 1940

SIR LIONEL LEACH, C. J.,

KING & KRISHNASWAMI AYYANGAR, JJ.

**E. P. Kumaravel Nadar**

v.

**T. P. Shanmuga Nadar & others**

*Cr.P.C. (V of* 1898), *S.* 439—*Applicable only to proceedings before inferior criminal courts —Sanction under S.* 476 *by civil court—Not covered by S.* 439 *but must be dealt with under S.* 115 *C.P.C.*

*S.* 439, *Cr.P.C., applies only to cases which come before criminal courts within the meaning of the Cr.P.C. Hence on an application for revision of an order of a civil court granting sanction to prosecute under S.* 476, *Cr.P.C. the court's powers of interference are limited to S.* 115 *C.P.C. and S.* 439 *has no application.*

*A civil Court does not cease to be a civil court when it is considering an application made to it under S.* 476 *and if for the purposes of that application it remains a civil court it must be governed by the provisions of the C.P.C. and not by those of the Cr P.C.*

*This position leads to a situation not a satisfactory one—that an application for revision arising out of proceeding in a civil suit must be dealt with with on a different basis from a similar application arising out of criminal proceedings. This is a situation the legislature alone can deal with.*

*I.L.R.* 1939 *Mad.* 439 overruled.

PETITIONS under Ss. 435 & 439, Cr. P. C., praying the High Court to revise the order of of the district court of Tinnevelly dated 30-8-1939 and made in C. M. A. No. 6 of 1939 preferred against the order of the court of the subordinate judge of Tinnevelly dated 1-12-1938 and made in O. P. No. 19 of 1937 etc

*N. Rajagopala Ayyangar, P.S. Raghavarama Sastri, K. S. Rajagopalachari, S. Ramachandran & R. Sundaralingam,* for Petrs.

*Advocate-General,* for Respts.

JUDGMENT

SIR LIONEL LEACH, C. J. Three matters have been placed before this Full Bench and they can be dealt with conveniently in the same judgment as they all involve the same question. The first case arises out of a suit which was tried by the subordinate judge of Tinnevelly. The plaintiff contended that a post card which had been put in evidence by the first and second defendants on the allegation that it had been written by the third defendant to the second defendant was a false document. Subsequently the plaintiff filed an application asking the court to prosecute the three defendants under the provisions of s. 476, Cr. P.C. for offences alleged to have been committed under ss. 463, 467, 471, 473 and 476, I.P.C. The court dismissed the application and the subordinate judge's decision was upheld by the district judge on appeal. The plaintiff has now asked this court to revise the order of the district judge under the provisions of ss. 435 and 439, Cr. P. C. and to direct the prosecution to take place. In the second case an application was made to the court of the district munsif of Tiruvarur by the petitioner, the assignee of a decree, to direct the prosecution of the respondents under ss. 206 and 207, I.P.C. The application was granted by the district munsif, but the respondents appealed to the district judge of East Tanjore, who reversed the order of the district munsif. The petitioner asks that the order of the district munsif be restored by this Court under its powers of revision under ss. 435 and 439, Cr. P. C. The third matter arises out of an application filed by the second defendant in a suit in the court of the subordinate judge of Mayavaram against the respondents. The application was rejected by the subordinate judge and on appeal to the district judge of East Tanjore the decision was upheld. The petitioner asks this court to direct under the provisions of s 115 C.P.C. a complaint to be made.

R. 37 of the Criminal Rules of Practice and Orders of this Court provides that every application made to a criminal court under the provisions ss. 476, 476A or 485, Cr. P. C. and every appeal filed against an order made under these sections, or filed in a court of session against an order of a court of small causes in the mufassal under S. 486, Cr. P.C. shall be registered as a Criminal Miscellaneous Petition and a Criminal Appeal respectively. The rule further directs that such applications or appeals when filed in a civil court shall be registered as Civil Miscellaneous petitions and civil miscellaneous appeals respectively and states that the rule applies to revision petitions also. The question which the court is called upon to decide is whether the petitions now under discussion shall be registered as criminal or civil revision petitions. In the recent case of *In re D.S. Raju Gupta* (*1*), Pandrang Row J. held that the jurisdiction which is exercised by a civil court in filing a complaint under s. 476, Cr. P. C. is a jurisdiction exercised under that Code and that revision petitions to this Court should be filed on the criminal side and not on the civil side. The learned judge was of the opinion that r. 37 was *ultra vires*. The question is one

1. (1939) M. W. N. 343: Cr. 35: I. L. R. 1939 Mad, 439.

of considerable importance because the revisional powers of this Court under the Cr.P.C. are greater than the powers conferred on it by s. 115, C.P.C. Under the latter Code the Court can only interfere when a subordinate court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. Under s. 439, Cr. P. C. the High Court has power to exercise any of the powers conferred on a court of appeal by ss. 423, 426, 427 and 428 and therefore has the power to interfere on a question of fact when in its opinion the finding of a subordinate court is against the weight of evidence. The question now under discussion has been the subject of other decisions of this Court and has also been debated in most of the High Courts of India. I shall in due course refer to the cases which have been quoted to us in argument, but before doing so it is desirable to refer in some detail to the sections of the Cr. P. C. which have bearing on the question.

S. 195 (1) (b) of the Code as it now stands states that no court shall take cognisance of any offence punishable under ss. 194, 195, 196, 199, 200, 205 to 211 and 228, I. P. C. when the offence is alleged to have been committed in or in relation to a proceeding in court, except on complaint in writing of the court or of some other court to which the court is subordinate. Sub-sec. (1) (c) contains a similar provision with regard to an offence described in s. 463 or punishable under ss. 474, 475 or 476, I.P.C. Before the Cr.P.C. was amended the section did not require the court to file the complaint. It only required the court to give its previous sanction to the complaint being filed. Sub-sec. 3 of s. 195 reads as follows:—

> "For the purposes of this section, a court shall be deemed to be subordinate to the court to which appeals ordinarily lie from the appealable decrees or sentences of such former court, or in the case of a civil court from whose decrees no appeal ordinarily lies, to the principal court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such civil court is situate:
>
> Provided that
>
> (a) where appeals lie to more than one court the appellate court of inferior jurisdiction shall be the court to which such court shall be deemed to be subordinate; and
>
> (b) where appeals lie to a civil and also to a revenue court, such court shall be deemed to be subordinate to the civil or revenue court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

S. 476 states that when a civil, revenue or criminal court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in S. 195 sub-sec. (1), Cl. (b) or Cl. (c) which appears to have been committed in or in relation to a proceeding in that court, the court may after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint in writing which shall be forwarded to a magistrate of the first class having jurisdiction, whereupon the magistrate shall proceed according to law and as if upon complaint made under S. 200. S. 476-A permits a superior court to make the complaint where the subordinate court has omitted to do so, and S. 476-B allows appeals from orders made on such matters by the subordinate court. S 476-B reads as follows:—

> "Any person on whose application any civil, revenue or criminal court has refused to make a complaint under S. 476 or S. 476-A, or against whom such a complaint has been made may appeal to the court to which such former court is subordinate within the meaning of S. 195 sub-sec. (3), and the superior court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or as the case may be itself make the complaint which the subordinate court might have made under S. 476 and if it makes such complaint the provisions of that section shall apply accordingly."

I have already referred in general terms to S. 439 of the Code, but it is necessary to examine its provisions more closely in conjunction with the provisions of S. 435. S. 435 states that the High Court or any sessions judge or district magistrate or any sub divisional magistrate empowered by the Local Government in this behalf may call for and examine the record of a proceeding before an inferior criminal court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior court. The section only gives power to call for the record of a proceeding

before an inferior criminal court. S. 439 reads as follows:—

(1) "In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in its discretion, exercise any of the powers conferred on a court of appeal by Ss. 423, 426, 427 and 428 or on a court by S. 338, and may enhance the sentence; and when the judges composing the court of revision are equally divided in opinion, the case shall be disposed of in manner provided by S. 429,

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a magistrate acting otherwise than under S. 34, the court shall not inflict a greater punishment for the offence which, in the opinion of such court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a magistrate of the first class.

(4) Nothing in this section applies to an entry made under S. 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-sec. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled to show cause against his conviction."

Although the section does not in terms say, that the High Court's powers of revision is confined to criminal cases it seems to me to be obvious that the section is not intended to travel beyond cases in criminal courts. Sub-sec. (1) states that when the record has been called for the court may enhance the "sentence." Sub-sec. (2) says that no order under the section shall be made to the prejudice of "the accused" unless he has had an opportunity of being heard. Sub-sec. (3) deals with the matter of "sentence." Sub-sec. (4) provides that nothing in the section applies to an entry made under s. 273 of the Code or be deemed to authorise the court to convert a finding of "acquittal" into one of conviction, and sub-sec. (5) prohibits the court from exercising revisional powers where the Code gives the right of appeal and no appeal has been preferred.

The only other section which calls for mention before proceeding to examine the authorities is s. 478, which is to the effect that when any offence contemplated by s. 195 is committed before a civil or revenue court, or is brought under the notice of a civil or revenue court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or court of session, or the civil or revenue court thinks that it ought to be tried by the High Court or court of session, the civil or revenue court may, instead of sending the case under s. 476 to a magistrate for inquiry, itself complete the enquiry, and commit or hold to bail the accused person to take his trial before the High Court or court of session, as the case may be. For the purpose of an inquiry under this section the civil or revenue court may exercise all the powers of a magistrate and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chap. XVIII and of Chap. XXXIII in cases where that chapter applies, and shall be deemed to have been held by a magistrate. The fact that the legislature considered that in such a case the civil or revenue court should be given the powers of a magistrate is not without significance. The section shows that in holding the inquiry it is still a civil court and it is necessary to give it the authority of a magistrate for the purpose.

R 37 of the Criminal Rules of Practice of this Court is based on the judgment of Bhashyam Ayyangar J. in *In Re Chenanagoud* (2). The learned judge was firmly of the opinion that the High Court cannot under the provisions of ss. 435 and 439, Cr. P. C. revise an order passed by any court other than a criminal court under Cl (b) or (c) of sub-sec. (1) of s. 195 of the Code according sanction for the prosecution of any

2. (1903) 26 Mad. 139

person who is alleged to have committed any of the offences referred to in that section. When the judgment of Bhashyam Ayyangar J. was delivered the C.P.C. 1882 was in force and the corresponding section to s. 115 of the present Code was s 622 While he was of the opinion that the provisions of the Cr. P. C. could not be invoked when there were proceedings in a civil court under ss. 105 and 476 Cr P. C. he recognised that in a proper case the High Court would have powers of revision under the C. P. C.

In *Raghunadha Patro* v. *Govinda Patro* (3) this Court held that it has no power under s. 115 C.P.C. to interfere in revision with the decision of a revenue court, and since that case was decided this court has not revised decisions of revenue courts unless the case was of a nature which justified the issue of a writ of *certiorari*. In *Rajah of Mandasa* v. *Jaganayakulu* (3A), which was decided by a Full Bench, doubts were cast on the correctness of the decision in *Raghunadha Patro* v. *Govinda Patro* (3), except so far as Chapter XI of the Madras Estates Land Act, 1908, was concerned, but that decision has been not overruled and has in fact since been followed. On the other hand, the Calcutta High Court has from early days considered that it had power to revise decisions of revenue courts. In his judgment in *In re Chennanagoud* (2), Bashyam Ayyangar, J., observed that as this court had no power to interfere with the decision of a revenue court under s. 195, Cr. P.C. it was difficult to see on what principle similar proceeding of a civil court could be revised under s. 439, Cr. P. C. It has been suggested in the present case that as this court has no power to interfere with the decision of a revenue court it would mean, if the view of Bashyam Ayyangar J. is to prevail, that an order of a revenue court directing proceedings to be instituted for an offence referred to in s. 195 Cr. P. C. or an order refusing to institute proceedings would not be subject to revision at all. This may very well be the case, but because the legislature has failed to provide for such an eventuality the court cannot step in and remedy the defect. That must be left to the legislature.

It was held by a Bench of three judges of this court (Oldfield, Sadasiva Ayyar and Seshagiri Ayyar JJ.) in *King Emperor* v. *Karri Venkanna Patrudu* (4), that on an applicatian for revision of an order of a civil court granting sanction to prosecute under S. 476, Cr.P.C. the court's powers of interference are limited to S. 115, C.P.C. and therefore the High Court cannot interfere under S. 439, Cr.P.C. It is true that Sadasiva Ayyar J. expressed doubt as to the correcness of the decision of Bashyam Ayyangar J. in *In re Chennana Goud* (2), but as the practice of treating such matters as being of the nature of civil revision petitions had existed for 14 years in this Province he did not wish to reopen the question. This decision must be regarded as expressing the law in this Province unless it is overruled by a Bench of greater strength or the Legislature interferes.

In *Janardana Rao* v. *Lakshmi Narasamma* (5) a Bench composed of Beasley C. J. and Bardswell and Burn JJ. held that in an appeal under S. 476-B, Cr.P.C. in a civil proceeding the appellate court has power under Cls. (c) and (d) of S 423 of that Code to remand the matter to the lower court for proper disposal. The application of the Cr.P.C. is certainly not in keeping with the decision in *King Emperor* v. *Karri Venkanna Patrudu* (4), but as Bardswell J., who delivered the judgment of the Bench in *Janardana Rao* v. *Lakshmi Narasamma* (5), said that it was unnecessary to discuss whether the proceedings of a civil court under S. 476-B, could be revised by a High Court under S. 439, Cr.P.C., and this in spite of the fact that *King Enperor* v. *Karri Venkanna Patrudu* (4) was mentioned in the order of reference, the conclusion is that it was not intended to question the authority of that decision, illogical though this may be. The basis of the decision in *Janardana Rao* v. *Lakshmi Narasamma* (5) was that the matter was of a criminal rather than of a civil character, but if this were the governing factor, the decision in *King Emperor* v *Karri Venkanna Patrudu* (4) would be wrong. The Bench which decided *JanardanaRao* v. *Lakshmi Narsamma* (5), could not overrule the decision in *KingEnperor* v. *Karri Venkanna Patrudu* (4), and did not purport to do so.

In holding in *In re D.S. Raju Gupta* (1), that the jurisdiction which is exercised by a Civil

3. (1928) 55 M.L.J. 798

3A. (1932) M.W.N. 350 F.B.

4. (1917) M.W.N. 130

5. (1933) M.W.N. 1476: Cr. 237: 57 Mad. 177 F.B.

Court in filing a complaint under s. 476, Cr.P.C. is a jurisdiction exercised under that Code and is of a criminal nature Pandrang Row J. also did not consider the ruling of the Full Bench in *King Emperor* v. *Karri Venkanna Patrudu* (4), or the judgment of Bashyam Ayyangar J. in *In re Chennana Goud* (2). His judgment was based on *Janardana Rao* v. *Lakshmi Narasamma* (5), and on the decisioa of the Lahore High Court in *Dhanpat Rai* v. *Balak Ram* (6), and that of the Bombay High Court in *Emperor* v. *Bhalu Sadu* (7).

The opinion of the Calcutta High Court is in agreement with the opinion of the court as expressed in *In re Chennana Goud* (2) and *King Emperor* v. *Karri Venkanna Patrudu* (4). In *Emperor* v. *Har Prasad Das* (8), a Full Bench of five judges (Jenkins C. J , and Harrington, Stephen, Asutosh Mookerjne and Holmwood JJ.) held that where an order has been passed by a civil court under s. 476, Cr. P. C. s. 439 has no application. The High Court can only exercise the revisional powers under s. 115 of the C.P.C. This decision was accepted without question in *Surendranath Malli* v. *Sushikumar Chakrabarti* (9).

The opinion of the Bombay High Court expressed in *Emperor* v. *Bhatu Sadu Mall* (7) was also that of a Full Bench. The court held that the reference in s. 476-B to s. 195 (3), Cr.P.C. only determined the forum and not the character of the court. It was considered that a civil court in passing an order under s. 476-B was exercising jurisdiction in a criminal matter and therefore its order could be revised under s. 439 Cr.P.C.

A Full Bench of three judges of the Allahabad High Court discussed the question in *In the matter of the petition of Bhup Kunwar* (10), two of the learned judges (Stanley C J. and Blair, J) were of the opinion that in a proceeding under s. 476 of the Cr.P.C. arising out of a civil suit the court had no jurisdiction to revise under s. 439 of that Code, but the third learned judge (Banerji, J.) was of the contrary opinion. Banerji J. considered that as s. 439 gave the High Court the right in "any proceeding" to exercise the powers conferred on a court o appeal the section must be deemed to apply to a proceeding in a civil court as well as to a proceeding in a criminal court. He refused to read s. 439 in conjunction with s. 435. I do not consider that s. 439 can be read alone, but even when read alone I consider that there is strong indication that it has reference only to criminal proceedings as I have already pointed out.

The practice of the Lahore High Court has been to treat revision petitions as falling within s. 439, Cr. P. C. irrespective of whether the order under revision was passed by a civil, criminal or revenue court and in *Dhanpat Rai* v. *Balak Ram* (6) a Full Bench decided that the practice should not be departed from.

I have said enough to indicate that there has been a great divergence of opinion on the question, but so far as this Court is concerned it is at present governed by the decision in *King Emperor* v. *Karri Venkanna Patrudu (4)* and this bench has no power to reverse that decision. Nor do I think it should do so, even if it had the power. As I have indicated s. 439 only applies to cases which come before the criminal courts within the meaning of the Cr P.C. In my opinion a civil court does not cease to be a civil court when it is considering an application made to it under S. 476 and if for the purposes of that application it remains a civil court it must be governed by the provisions of the C.P.C. and not by those of the Cr.P.C. The fact that an appeal from an order passed on an application when it has been dealt with by a civil court lies to an appellate civil court emphasizes the civil character of the court dealing with the application. In the wording of the relevant sections of the Cr.P.C. I can find no justfication for regarding the court as being anything but a civil court. The position is not a satisfactary one because an application for revision arising out of proceedings in a civil suit must be dealt with on a different bssis from a similar application arising out of criminal proceedings, but it is a situation which the court cannot remedy, but only regret. It is a situation which the legislature alone can deal with and I trust that in the near future action will be taken.

I hold that the petitions now befor the court should be numbered as civil revision petitions and dealt with on that basis.

6. (1932) 13 Lah. 342 F.B.
7. (1938) I.L.R. Bom. 331 F.B.
8. (1913) 40 Cal. 477 F.B.
9. (1932) 59 Cal. 68
10. (1904) 26 All. 249 F.B.

KING J. :—I agree.

KRISHNASWAMI AYYANGAR J:—I entirely agree, but in as much as it has been suggested in *Dhanpat Rai* v. *Balak Ram* (6), that the reasons given by Bannerji J. in his dissenting judgment, in *In the matter of the petition of Bhup Kunwar* (10), have not been met, I desire to add a few words. So far as that judgment relied on the practice which then obtained in the Allahabad High Court it is enough to say that the practice here has been different. In fact it appears that whichever view found acceptance at the hands of the learned judges who have had to consider the point, it was the result to a large extent of the practice prevalent in the particular court which was also no doubt sought to be supported by a consideration of the language of the statute. To my mind, the dominant consideration however appears to have been furnished in almost every one of the decided cases by the existing practice of the court concerned. It will not altogether be out of place for me to examine the correctness of the opposite view, in so far as it has been sought to be supported by what has been called the wider language employed in s. 439, as compared with s. 435 The suggestion is that whereas the power to call for records, is restricted by S. 435, to the proceedings of an inferior criminal court alone, such a restriction does not find place in S. 439, which confers the power of revision, on the High Court. That power is given it is said in the case of *any* proceeding, not necessarily the proceeding of an inferior criminal court, the record of which has been called for by the High Court, or which has been reported for its orders, or which otherwise comes to its knowledge. In other words the argument is that while the High Court's power to call for records is a limited power under S. 435, limited it is said, to the proceedings of an inferior criminal court, the opening words "In the case of *any* proceedings" in S. 439 standing unqualified by any such limitation, implies a larger power, that is a power to revise the proceedings of all subordinate courts civil as well as criminal I am not however satisfied that there is any substance in this argument. It will be seen on examination, that the whole chapter in which these two sections occur, is concerned with the subject of reference and revision and regulates the relative procedure to be followed with respect to the proceedings of inferior criminal courts only. All the sections in this chapter, except three, namely, ss. 439, 440 and 442, refer expressly to subordinate criminal courts. The two latter sections are purely procedural, relating respectively to the right of audience, and the necessity for certification of the order passed on revision to the subordinate court concerned. If we leave them out of account, S. 439 would, if the argument were sound, remain the solitary exception in a chapter, which but for this exception, is concerned purely with the orders of criminal courts: and I am naturally disinclined to adopt such a construction unless the language is sufficiently express for the purpose

S. 439, posits a situation in which the records have been called for under S. 435 or a report received under S. 438, or a proceeding of a subordinate court *otherwise* comes to the knowledge of the High Court. By these three modes or any of them, information has to reach the High Court, before it can proceed to exercise its power of revision. Plainly here a multiplicity of channels of information is alone contemplated, and not a multiplicity in the nature or character of the information itself in which the High Court is to act. The records of an *inferior criminal court alone* can be called for under S. 435. The report under S. 438 can again only be in respect of the proceedings of such a court. Logically it would seem that it must be the proceedings of a similar court but coming *otherwise* to its knowledge that the High Court is empowered by s. 439 to revise. In other words, the section postulates an identity in the nature and character of the proceedings subjected to its revision though there may be a variety in the means of information. The words 'or otherwise' occur in ss 436 437 and 438 in conection with 'any record' 'any case', and 'any proceedings', respectively, and in these contexts it is impossible to imagine courts other than inferior criminal courts being intended. I am constrained to hold, on a comprehensive consideration of the object and scope of the chapter, and of the wording of the sections themselves taken as a whole and not in isolation, that there is no support for the opposite construction.

T.

Cr. App. No. 685 of 1939

*March 5, 1940*

BURN & LAKSHMANA RAO, JJ.

**The Public Prosecutor**
**v.**
**Ramaswami Nadar**

*Penal Code (XLV of 1860), s. 300—Chopping off person's leg—Offence.*

*Where a person chops off a man's leg with a sword and the injured man dies as a result, the assailant would be guilty of murder. A person who uses a sword or aruval to chop at an arm or a leg, and by so doing severs the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficicent to cause death. Such a case is different from a case of stabbing with a knife or a dagger at an arm or a leg.*

Appeal under s 417, Cr.P.C., 1898 against the acquittal of the aforesaid respondent (accused) by the sessions judge of Ramnad division in S. C. No. 83 of 1939 on his file.

*R. Sadasivam Pillai*, for Respt.

JUDGMENT

**(Burn J.)**

This is an appeal by the Provincial Government from the decision of the learned sessions judge of Ramnad in S.C. No. 83 of 1939. The respondent Ramaswami Nadar was tried on a charge of murder. The learned sessions judge convicted him under s 326, I.P.C. and sentenced him to rigorous imprisonment for 5 years. The learned Public Prosecutor contends that the facts established constitute the offence of murder.

The respondent did not appeal from his conviction under s. 326, I P.C. and the learned counsel who has appeared for him in this court has not attempted to show that the learned sessions judge's findings of fact are wrong. The evidence recorded by the learned sessions judge showed that there was some enmity between the respondent and one Periana Nadar, arising partly out of gambling with cards and partly out of the association of Periana Nadar with the respondent's wife. On the 5th August 1939 about 11-30 A M. the respondent attacked Periana Nadar with a weapon which is described as 'Patta knife' or 'gin knife'. One witness, P.W. 8, says that it was 'something like a sword.' P. W. 7 says that the blade was about two cubits long. The respondent himself in a confession which he made to the taluk magistrate on the 10th August described it as a piece of iron bar. He also used the description 'patta'. With this weapon the respondent inflicted nine wounds on Periana Nadar; (1) an incised wound across the back of the right elbow exposing the bones of the joint; (2) an incised wound on the palm of the right hand; (3) an incised wound on the middle of the right forearm; (4) an incised wound on the back of the left foot (the lower portion, the doctor says, was hanging down); (5) an incised wound over the left heel; (6) an incised wound 4 inches long, 2 inches wide and 2 inches deep across the back of the left knee, cutting all the blood vessels, arteries, veins as well as nerves; (7) the left thumb was cut and was hanging down; (8) the left index finger was split into two, and (9) a contusion on the tip of the left middle finger. The doctor, P. W. 1, who made the postmortem examination, says that the cut cross the back of the knee severed the popliteal arteries and the veins, and he says 'the injuries to such arteries are necessarily fatal.' He goes on to say "It is not a fatal or vital part". The learned sessions judge appears to have been very gravely misled by this remark. The doctor was simply contradicting himself when he said in one breath that the injury was fatal and in the next that it was not an injury in a fatal or vital part. If the injury is necessarily fatal, it is obvious that the part of the body upon which it has been inflicted is a vital part.

The real question for decision is, what was the respondent trying to do when he inflicted all these injuries upon Periana Nadar, or in other words, what was his intention? The learned sessions judge appears to think that his intention was only to maim the man. If by that the learned session judge means that the respondent was trying to chop off the man's leg, that is possibly correct. But if that be so, the respondent must be held to have intended to cause bodily injury which is sufficient in the ordinary course of nature to cause death. Everybody knows that if a man's leg is severed close below the knee the man must die from loss of blood in a very short time unless some skilful person appears, who can stop the arterial bleeding. The cut described by the doctor as the sixth injury was 4 inches long, 2 inches deep, and gaping 2 inches wide.

It is clear that it had cut across practically the whole of the muscular structures of the leg. It is not possible for a person who inflicts an injury like this to say that he did not intend to cut the arteries, or to cause the man to bleed to death. The case is very different from the frequent cases of stabbing with a knife or dagger. If a man armed with a knife or dagger stabs another in the arm or in the leg, it can generally be urged on his behalf that he was not trying to kill, and that he was not trying to inflict such a bodily injury as is sufficient in the ordinary course of nature to cause death. An ordinary person is not presumed to know the precise location of the arteries in the human limbs. If therefore, a stab with a knife or a dagger, aimed at an arm or a leg, severs an artery and the injured man dies as a result, it may be quite reasonable to argue that the offence is not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt, or grievous hurt, with a dangerous weapon. The case is quite different when a weapon like a sword is used in order to chop off or to hack at a limb. The person who uses a sword or aruval, chopping at an arm or a leg and by so doing severs the arteries of the arm or the leg, must know that he is inflicing an injury which in the ordinary course of nature is sufficient to cause death. The offence is clearly one of murder. See illustration (c) to s. 300, IPC.

Accordingly we set aside the conviction for an offence under S. 326, I. P. C. and the sentence of 5 years rigorous imprisonment. We convict the respondent for the offence of murder with which he was charged and we sentence him to transportation for life.

N.T.R.

---

Cr. App. No. 239 of 1939.

*March* 20, 1940

LAKSHMANA RAO, J.

**The Public Prosecutor**

**v.**

**Mahammad Abdullah & another**

*Emigration Act (VII of 1922), Ss. 25 (2)(b) & 30 (3)—Assistance—Meaning of.*

*P.Ws. 1 to 5 who were unskilled labourers and who were bound for Penang and lodging in a rest house run by the respondents were not permitted to embark at Negapatam and their steamer fares were refunded. Then the respondants offered to send them to Penang from Karaikal and secured them steamer tickets, sent them to Karaikal from where they boarded.*

Held, *that the respondent must be held to to have assisted P.Ws. 1 to 5 to depart by land out of British India so as to depart for the purpose of working for hire in a country beyond the sea and were guilty under S. 30 (3) read with S. 25 (2) (b) of the Emigration Act.*

*Assistance does not mean merely financial assistance or entering into an agreement to work for hire.*

Appeal under S. 417, Cr. P.C. 1891, against the acquittal of the aforesaid respondents (accused) by the court of the joint magistrate of Negapatam in C.A. No. 1 of 1939 on his file (C.C. No. 395 of 1938 of the file of the stationary sub magistrate of Negapatam.)

*T. R. Srinivasa Iyer*, for Respts.

JUDGMENT.

This is an appeal by the Provincial Government against the appellate order of acquittal or the respondents of an offence under S. 30 (3) read with S. 25 (2) (b) of the Indian Emigration Act.

The respondents were running a viduthi or rest house at Negapatnam and as found by the courts below, P. Ws 1 to 5 the unskilled labourers who were bound for Penang and lodging in the viduthi were not permitted to embark at Negapatam. Their steamer fares were refunded and the respondents offered to send them to Penang by a French steamer from Karaikal. P Ws. 1 to 5 paid the required amount to the first respondent and he secured the steamer tickets and sent them to Karaikal with the 2nd respondent. The 2nd respondent saw them safely into the boat which took them to the steamer and as urged by the Public Prosecutor the respondents undoubtedly assisted P.Ws. 1 to 5 to depart by land out of British India so as to depart for the purpose of working for hire in a country beyond the sea which is made punishable under S. 30 (3) read with S. 25 (2) (b) of the Indian Emigration Act. The view of the joint magistrate that assistance means either financial assistance or entering into an agreement to work for hire is unwarranted and the order of acquittal is unsustainable.

The order of acquittal is therefore set aside and the respondents are convicted under S. 30 (3) read with S. 25 (2) (b) of the Emigration Act. This offence is serious and the respondents were sentenced to a fine of Rs. 100 each by the trial court. They are therefore sentenced to a fine of Rs. 100 each with simple imprisonment for six weeks in default and one month is allowed for payment.

N.T.R.

---

Cr. R. C. No. 158 of 1940
Cr. R. P. No. 150 of 1940
*February 22, 1940*
LAKSHMANA RAO, J.

**Annapurni Ammal**
**v.**
**Emperor.**

*Prohibition Act (Mad. Act X of 1937), S. 4 (1) (a)—Ignorance—No excuse.*

*Ignorance of a person that prohibition had been introduced is no excuse for a conviction under S. 4 (1) (a), Prohibition Act.*

FACTS: Petitioner was convicted for an offence under s. 4 (1) (a), Prohibition Act and a sentence of fine of Rs. 200. The allegation was that on 21-12-39 at about 1-15 a.m. she was found in possession of a bottle of brandy on the overbridge of the Katpadi Railway station.

The accused explained in her statement that she had been staying in Kolar for the last 5 months, that the bottle of brandy was purchased on medical advice for medicinal purposes for her sick grand child and as the child expired before there was any opportunity to use the liquor she returned to her house in Ariyur with the contraband. The bottle was unopened with seal on it and she made representation to the prohibition police at the earliest opportunity that she was coming from Kolar. On these facts the sub divisional magistrate, Vellore, said:

"This makes me reasonably presume that the appellant was not aware of the enforcement of prohibition in this district with effect from 1-10-37 and that she brought the contraband owing to ignorance of the fact of introduction of prohibition in this district and owing to the fact that she had no opportunity to use the contents of the bottle for the benefit of the grand child...A sentence of fine of Rs. 75, in default simple imprisonment for six weeks will meet the ends of justice."

The revision was filed on the ground that the lower court ought to have acquitted the accused on the ground that she had satisfactorily accounted for the possession as contemplated under s. 4 (2) (a).

PETTION under ss. 435 and 439, Cr. P. C, 1898, praying the High Court to revise the order of the court of the sub divisional magistrate, Vellore, in C.A. No 6 of 1940 preferred against the order of the court of the 2nd class magistrate, Vellore, in C.C. No. 42 of 1940.



*A. Nagarajan & A. Viswanathan*, for Petr.
*Public Prosecutor*, for Crown.

ORDER

The ignorance of the petitioner is no excuse and there is no ground for interference with her conviction under s. 4 (1) (a) of the Madras Prohibition Act. But the fine is excessive and it is reduced to rupees ten. Otherwise this petition is dismissed.

N.T.R. — *Petition dismissed*

Cr. R. C. No. 956 of 1938.
Cr. R. P. No. 906 of 1938.
*July 21, 1939.*
LAKSHMANA RAO, J.

**Manonmani Ammal & another**
**v.**
**Emperor.**

*Suppression of Immoral Traffic Act (Mad. Act V of 1930), Ss. 5 (1) & 8-A (1)—Conviction under—Essentials.*

*Where a lessee of a house was keeping a brothel, his sister who was being used for prostitution cannot be convicted under ss. 5 (1) and 8-A (1) of the Suppression of Immoral Traffic Act, when there is no evidence that she was jointly keeping or managing or acting or assisting in the management of the brothel.*

PETITION under ss. 435 & 439, Cr. P. C. 1898 praying the High Court to revise the judgment of the third Presidency magistrate of the court of the presidency magistrates, Egmore, Madras dated 7th December 1938 and passed in C.C. No. 1169 of 1938.

*V. T. Rangaswami Iyengar & A. B. Viswanathan*, for Petrs.

*K. V. Ramaseshan*, for Crown.

ORDER.

There is no ground for dissent from the conclusion of the magistrate that the house in question was a brothel and it is clear from the evidence of P. W. 2 that the 2nd petitioner, the lessee, was keeping the brothel and was living on the prostitution of the women found there on the night of the raid He would therefore be guilty under ss. 5 (1) and 8-A (1) of the Suppression of Immoral Traffic Act, but the first petitioner, who is his sister, was being used for prostitution and there is no evidence that she was jointly keeping or managing or acting or

assisting in the management of the brothel. She cannot therefore be convicted under s 5 (1) of the Act and as rightly conceded, it cannot be said that she was living on the earnings of the prostitution of another person. Her conviction under s. 8-A (1) is also unsustainable and she is entitled to an acquittal. The conviction and sentence of the 1st petitioner are therefore set aside and she is acquitted.

The conviction of the 2nd petitioner is confirmed but this is his first offence and the sentence is rather excessive. The sentence is, therefore, reduced to rigorous imprisonment for three months under each section to run concurrently and otherwise this petition is dismissed.

N.T.R. —

Cr. R. C. No. 198 of 1939.

Cr. R. P. No. 182 of 1939.

*July 26, 1939.*

LAKSHMANA RAO, J.

**Oonna Mudali & others**
**v.**
**Emperor.**

*Cr.P.C. (V of 1898)—Calendar case—Counter to preliminary register case—conversion into preliminary register case—Not legal.*

*Where the offences disclosed in a case are triable by a second class magistrate which he could adequately deal with, the fact that the case is counter to another preliminaty register case, which has to be committed to the sessions, is not a sufficient reason for treating the calendar case also as a preliminary register case.*

THE FACTS appear from the order of the lower court :

"The two parties fought with each other at the same time and caused injuries to each other. One party consisted of five persons and the other consisted of six persons. The weapons used in assaulting, were a penknife and some sticks. The sticks are heavy and therefore dangerous ones. Each party alleges that the said weapons were brought and used by the other alone. These weapons are marked as M. Os in both cases. It has to be determined who was the aggressor, who acted in self defence and who used the several weapons. The V. M.'s report in both the cases is the same. It seems therefore desirable that both the cases (C. C. No. 1047-38 i. e. P. R. 5-38) and P.R.C. 4-38 are tried by the same court in the interests of justice. The facts of this case are not similar to the one reported in 1932 Mad Cr.C. 197. The High Court has however remarked in that case that the rule that a P.R. case and the counter case arising out of it, should, if practicable, be tried by the same court is a sound one. The facts of the case referred to in 1933 Mad. Cr.C. 221 and 1934 Mad. Cr C. 201 are not mentioned in detail in the report. In his proceedings No. C. M. P. 41 of 1938 dated 5—1—39 the district magistrate has observed that my order converting C.C. 1047 of 38 into P. R. No. 5-38 is not illegal. I see no reason to revise my order."

PETITION under Ss 435 and 439, Cr. P. C. 1898 praying the High Court to revise the order of the court of the 2nd class magistrate, Polur dated 2—2—1939 and made in P. R. No. 5 of 1938.

*A. S. Sivakaminathan*, for Petr.

*K. Venkataraghavachari*, for Crown.

ORDER

The offences disclosed are triable by a 2nd class magistrate and it is not stated that he cannot adequately deal with them. That the case is counter to preliminary register case No. 4 of 1938, which has to be committed to the sessions, is not a sufficient reason for treating it also as a preliminary register case. Vide *In re Mounaguruswami Naicker* (1) and the order of the sub-magistrate converting the case into a preliminary register case cannot be sustained. It is therefore set aside and the case will be dealt with as a calendar case.

N.T.R. —

1. (1938) M.W.N. 98: Cr. I

Cr. R. C. Nos. 423 to 426 of 1939
Cr.R.P. Nos. 393 to 396 of 1939

*May 2, 1939*

LAKSHMANA RAO, J.

**V. Mekala Venkatapa**
**v.**
**Emperor**

*Cr.P.C. (V of 1898), S. 106—Conviction for offence under S. 510—Security.*

*The offence under S. 510 I. P. C. is not an offence involving a breach of the peace and therefore an order under S. 106, I.P.C. cannot be made for an offence under S. 510, I.P.C.*

FACTS: "The accused was charge sheeted by the station house officer, Peapally under S. 510, I.P.C. before the sub magistrate for being found drunk in a public street at D Rangapuram on 3-11-38 and for using filthy abusive language against one J. N. Reddy. The sub magistrate tried the accused and sub mitted his proceedings to this court under S. 349, Cr. P. C. as he was of opinion that the accused required being bound over under S. 106, Cr.P.C."

The accused were found guilty under S. 510 I.P.C. for drunken and riotous behaviour in a public street in front of P. W. 1's house and fined Rs. 5.

The magistrate then said "It is seen from the evidence of P. W. 1 and the cross examination of D W.1 that the accused's behaviour was not due to mere drink, but also due to his enmity with P. W. 1. The enmity is admitted by the accused himself. That rioting took place in the village and that the accused is involved in these is clear from the cross examination of D.W. 1. The constable deposed that P.W. 1 would have been assaulted by the accused and his associates but for the timely interference of the police. The accused threatened violence to P.W. 1. Therefore the offence committed by the accused involves a breach of the peace also. In the interest of the public peace, I order the accused under S. 106, Cr.P.C. to execute a bond for Rs. 100 with one surety for a like amount to keep the peace for a period of one year."

In the revision against this order it was urged *inter alia*:

"Even assuming the petitioner is guilty of the offence of S 510, I P. C. it is not an offence like assault or other offence involving breach of peace within the meaning of S. 106 of the Cr. P. C. and as such, the order of the lower court demanding the petitioner (accused) to execute a bond for one year for Rs. 100 with one surety to keep the peace is without jurisdiction."

PETITION under ss. 435 & 439 Cr. P. C., 1898, praying the High Court to revise the orders of the court of the sub divisional magistrate of Dhone dated 26-1-39 and made in C.C. Nos. 91 to 94 of 1938.

*V. S. Rangasami Iyengar*, for Petr.

*Public Prosecutor*, for Crown.

ORDER

The petitioners have been convicted under s 510 of the I P.C. and it is not an offence involving a breach of the peace. The order for security under s. 106 of the Cr. P. C. is therefore unsustainable and it is set aside. Otherwise these petitions are dismissed.

N.T.R.

—

Cr. R. C. No. 958 of 1938.

Cr. R. P. No. 908 of 1938.

*July 20, 1939.*

LAKSHMANA RAO, J.

**P. Gopalachari**
**v.**
**The Corporation of Madras**

*City Municipal Act (Mad. Act IV of 1919), Ss. 218 & 357, Cl. (1)—Failure to comply with notice under S. 218—Conviction.*

*Where the particulars of the work to be carried out by the person, in respect of a private street, were not specified in the notice issued to him under s. 218 of the City Municipal Act nor the time within which the work was to be carried out,*

Held, *that the person could not be convicted under s. 357, Cl. 1, City Municipal Act for failure to comply with the notice under s. 218.*

FACTS: "The accused is prosecuted by the Corporation of Madras for an offence punishable under s. 357 (1) of the Madras City Municipal Act in that he failed to metal and light the portion of Dandayuthapani Road in front of his house as required by notice under s. 218 (1) of the Act served on him. The notice in question is Ex. E, dated 15-11-1936 and its service on the accused on 23-11-1936 is proved by prosecution witness 2, a lascar in the employ of the corporation. P. W. 1, Supervisor of the Corporation proves the failure on the part of the accused to comply with the notice. The notice

says that the street should be formed, metalled and lighted to the satisfaction of the commissioner, but the period within which it was to be done is not specified, but P. W. 1 files the duplicate copy (Ex. E-2) in which the period is mentioned as 30 days.

"The defence contention is that the street in question is a 'public' and not a 'private' street and that the provisions of s. 218 of the Act do not therefore apply to it. The prosecution has filed the building application (Ex. D), with plan attached (Ex. D-1), put in by the accused for permission to construct his house and in that plan the site of the street in question is described as 'proposed road'. The application is dated 26-8-1935. The permit granted by the corporation in pursuance of the above application is Ex. IV dated 9-10-1935 and in that permit the building is described as being in Ramaswami Street. It is one of the contentions for defence that the accused can have no liability in respect of Dandayuthapani street, but that contention is clearly untenable."

"In conclusion I find that the street in question is a 'private' street and that the corporation was within its right in issuing the notice (Exs. E and E-1) to the accused. Objection is taken by the defence that the notice is vague and indefinite. What the notice states is that the street should be 'formed, metalled and lighted to the satisfaction of the commissioner'. I am unable to agree that this is too vague for compliance. As regards the period within which it was required to be done, the omission to specify it in Ex. E. was noticed by me while about to deliver judgment—no objection having been taken until then by the defence—and the prosecution thereupon filed the office copy of the notice (Ex. E-1) in which the period is specified. There is therefore no reason to assume that the period was not mentioned in the copy served on the accused. I hold that the accused by failing to comply with the notice has committed an offence punishable under s. 357 (1) of the City Municipal Act, and I convict him accordingly and sentence him to pay a fine of Rs. 5 or in default to undergo one week's simple imprisonment."

PETITION under ss. 435 and 439 Cr. P. C. of 1898 praying the High Court to revise the judgment of the third Presidency magistrate of the court of presidency magistrates, Egmore, Madras in M. No. 1380 of 1938

*V. Rajagopal Mudaliar*, for Petr.

*K. V. Ramaseshan*, for Crown.

*A. Suryanaraniah*, for Respt.

ORDER

The evidence justifies the conclusion of the magistrate that the street in question is a private street, but particulars of the work to be carried out by the petitioner were not specified in the notice issued to him under s. 218 of the City Municipal Act nor was it proved that the time within which the work is to be carried out was specified in the notice served on him. The time was not specified in Ex. E, the copy of the notice on which his acknowledgment for service of notice was obtained, and Ex. E-1, the office copy of the notice which was produced and marked in evidence just before delivery of judgment, does not by itself prove that any time was specified in the notice served on the petitioner. The supervisor (P. W. 1) does not say that to his knowledge the time was specified in the copy served on the petitioner and it follows that the conviction under s. 357 Cl (1) of the City Municipal Act for failure to comply with a notice under s. 218 cannot be sustained. The conviction of the petitioner is therefore set aside and the fine if levied will be refunded.

N.T.R. — *Conviction set aside.*

Cr. R. C. No. 576 of 1939
Cr.R.P. No. 535 of 1939

*November 3, 1939*

LAKSHMANA RAO, J.

**Chilukuri Veerabhadra Rao having died by his legal representative and widow Chilukuri Annapurnamma(died):MamidannaSumitramma allowed to continue the proceedings**

v.

**Sreepada Krishnamurthi Sastri**

*Penal Code (XLV of 1860), S. 500—Passages in book defamatory—Destruction of books, if proper.*

*Where certain passages in a book were charged to be defamatory and were so found the proper order is that those passages should be destroyed and an order directing the destruction of the book cannot be sustained.*

THE FACTS appear from the orders of the lower courts which were as follows :

The material portion of the order of the trial

court was: "The 11 defamatory passages in question shall be deleted from the book and other connected papers in which they find place. After this is done, the books and other papers if otherwise unobjectionable, will be returned to the persons from whom they were got in due course. The three copies of the book given to the accused's vakil for reference should be returned to the court."

On appeal the order was as follows:

"The petitioner was the complainant in C.C. No. 1 of 1937 on the file of the special first class magistrate, Rajahmundry. The complaint in that case was in respect of a defamatory book (Ex. A) written in Telugu and called "Mahopadhyaya Brahmasri Kalluri Venkatarama Sastry Garu Jeevita Charitramu". Out of 1000 copies of the book which were printed, 2 copies were seized from accused 3,404 copies from accused 1 and one copy from accused 2, in execution of search warrants issued by the joint magistrate, Rajahmundry. The complaint was that the entire book was defamatory, but for the sake of evidence 32 portions of it were marked as Exs. A-9 to A-40. Of these portions, the lower court held that nine were not defamatory and 12 more were re-publications suitable for a separate complaint. It framed a charge in respect of the remaining 11 passages, found that they were defamatory, and ordered that the books seized should be returned after deleting these portions. The petitioner prays in his application that all the copies of the books should be destroyed on the ground that the deletion of the defamatory passages would be impracticable and ineffective to prevent the mischief.

"2. The accused preferred appeals against their convictions by the lower court, and they were dealt with in C. A. Nos. 2, 3 and 4 of 1939 of this Court. In the judgment of this court dated 20—3—1939, out of the 11 passages, 8 alone were held to be defamatory. Orders regarding the disposal of the property were reserved, with the object of hearing both parties fully on this petition. Learned vakil for accused 1 says that the pages containing the 8 defamatory passages might be torn off and the books then delivered to the respective persons from whom they were seized. On the other hand, the learned vakil for the complainant says that the other pages of the book also contain defamatory matter. He has filed translations of various portions of the book to which he takes objection. No doubt, the translation includes passages which were held to be not defamatory by the lower court and also other passages which I do not consider defamatory. Still, it appears to me that the defamation of the complainant is not confined to the 11 passages which were considered on appeal by this court. The charge was in respect of the whole book. It would be an unnecessary waste of public time for this court to scan every line to determine what pages of the book are not defamatory. Such determination would be embarassing and inequitable because the case, both in the lower court and in this court, has proceeded only on a consideration of the 11 passages. In these circumstances, as I am of opinion that deletion of the 8 passages would be insufficient to make the book innocuos, the proper order is that all the books should be destroyed.

"The order of the lower court with regard to the disposal of the books is set aside. All the copies of the books including those lent to the vakils for the accused for reference, will be destroyed."

PETITION under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of session of the East Godavari division at Rajahmundry dated 10—4—1939 and passed in Cr. R. P. No. 1 of 1939 presented against the order of the court of the special first class magistrate of Rajahmundry in C. C. No. 1 of 1937.

*D. Suryaprakasa Rao*, for Petr.

*K. Ramamurthi & K. Someswara Rao*, for Respt.

*Public Prosecutor* for Crown

ORDER

The order of the sessions judge directing the destruction of the books cannot be sustained, but passages specified in the list appended are objectionable and the pages containing those passages will be destroyed. The petitioner may, if she desires, reprint the unobjectionable portion of those pages and insert them in the book.

N.T.R. —

Cr. R. C. No. 761 of 9938
Cr. R. P. No. 724 of 1938

*July* 25, 1939

LAKSHMANA RAO, J.

**K. K. Kochu Saheb**
**v.**
**Emperor.**

*Government of India Act*, (1935) *s.* 270, *cl.* (1)—*Cheating by deputy inspector of schools in execution of his duty – Prosecution—Sanction.*

*Where the accused, a deputy inspector of schools, was charged with cheating, in that he induced the district educational council to admit a school to aid and recognition by giving false information with regard to the location, staff and maintenance of the school,*

Held, *that the acts constituting the offences were done by him in the execution of his duty as a servant of the Crown and that the prosecution required the consent of the Governor.*

The facts appear from the judgment of the lower appellate court.

"The appellant was convicted by the joint magistrate of Malapuram for offences punishable under s. 417, I.P.C. or in the alternative under ss 417 and 109, I.P.C. The charge-sheet was laid against the appellant as also against one K. Raman Nayar. The latter is absconding and that is why the former alone was tried and convicted.

The appellant was the deputy inspector of schools, Moplah Range, Palghat and the other accused was K. Raman Nayar, alleged to be the manager of the Ambalappara New Moplah School. The prosecution case was that both of them colluded and conspired together and committed the offence of cheating. The alternative charge was framed against the appellant because if his act should be considered not to constitute the substantive offence of cheating, then it would amount at least to abetting the offence of cheating by the other absconding accused by conspiring with and aiding him.

The cheating consisted in inducing the Malabar District Educational Council to admit the Ambalapara New Moplah Elementary School alleged to have been started by the other accused from 1—4—1936 to aid and recognition in the resolution, Ex. PP passed by that council on 12—7—1937. The deception is said to have been practised by giving false information with regard to the location, staff and maintenance of registers in that school in Exs. B-1 and B-2, applications for aid and recognition signed by the other accused and submitted through the appellant and also by the appellant having recommended the school for aid and by making false averments in Exs. D, NN, E, W, F, and A. The deception is said to have been practised with a dishonest intent as the object of the appellant and the other accused was to make the District Educational Council to give a grant to the school which they would not grant if they knew the real facts. It is also the prosecution case that the action of the council in having admitted the school to aid and recognition caused damage and harm to the reputation of the council and was likely to cause loss of property by way of assignment of grant out of the public funds placed at the disposal of the said council.

"It was objected that the prosecution was bad for want of sanction of the local government.

"The next objection raised is that the sanction of the local government had not been obtained It is true that in the charge-sheet laid by the police, the appellant was also charged with an offence punishable under S. 120-A, I.P.C. for which the sanction of the local government is necessary. But the appellant has been charged by the learned district magistrate for an offence punishable under S. 417 or in the alternative, under Ss. 417 and 109 I.P.C. No authority has been cited for the contention that for a prosecution for an offence punishable under the above sections, sanction of the local government is necessary. In spite of the fact that the police charge sheet charged the appellant with an offence under S. 120A the charge was framed only under S. 417 as the conspiracy had gone further and resulted in the commission of the offence of cheating which was the conspiracy. In such cases the accused should be charged for the offences committed in pursuance of the conspiracy and not for mere conspiracy alone, vide in *Re. Venkataramiah* 1937 M.W.N. 996 : Cr. 212. In these circumstances, I find that the prosecution is not bad for want of sanction of the local government."

PETITION under Ss. 435 and 439 Cr. P. C. 1898, praying the High Court to revise the judgment of the court of sessions, South Malabar division at Calicut in Cr. Ap. No. 27 of 1938 preferred against the judgment of the

Court of the joint magistrate of Malapuram in C. C. 132 of 1937.

*B. Pocker*, for Petr.

*N. Somasundaram & A. S. Sivakaminathan*, for Crown.

ORDER

The petitioner was the deputy inspector of schools, Moplah range, Palghat and the acts constituting the offences were done by him in the execution of his duty as a servant of the Crown before the relevant date under s. 270, Cl. (1) of the Government of India Act, 1935. No proceedings can therefore be instituted against him in respect of the acts except with the consent of the Governor of the Province of Madras and the present proceedings were not instituted with the consent of the Governor of Madras The proceedings against the petitioner are therefore quashed and his conviction and sentence are set aside.

N.T.R. —

Cr. R. C. Nos. 740 & 741 of 1939

Cr. R. P. Nos. 697 & 698 of 1939

*November 16, 1939*

LAKSHMANA RAO, J.

**Kollapalli Subramanyam**
v.
**Emperor**

*Penal Code (XLV of 1860), S. 486—Possession—Proof of.*

*Where a parcel of beedies was consigned on a railway and the trade mark on the wrappers were counterfeit and the forwarding note bore the signature of the accused.*

Held, *the signature does not necessarily prove that the accused was in possession of the goods and he could not be convicted under S. 486 I. P. C.*

The Facts appear from the judgment of the lower appellate court:—

"A parcel of 'beedies' M. Os. 3 to 118, bearing invoice No. 607, was consigned on 3-8-38 from Nellore to Ongole The invoice No. 607, Ex. B bears the signature of A-1. On 5-8-38, A-2 and another claimed delivery of the parcel at Ongole, but at the instance of the respondent the Railway Company withheld delivery of the parcel. M. Os. 3-118 were packed in wrappers bearing the counterfeit Baloon Brand trade mark, which has been registered in the name of the respondent's company. The wrappers bearing the genuine trade mark of the respondent were compared with the wrappers on M. Os. 3 to 118 and the latter were found to bear the counterfeit trade mark. That the trade mark found on wrappears M. Os 3 to 118 was counterfeit was neither denied nor even disputed.

It is contended on behalf of the appellants that they could never be said to have been in possession of counterfeit goods, MOs. 3 to 118. A-2 never obtained possession of them. He merely claimed delivery. But the goods were never delivered. The learned sub magistrate however argued that since A-1 consigned them from Nellore and A-2 claimed delivery at Ongole, they must be deemed to be the owners of M. Os 3 to 118, and that therefore they must further be deemed to be in legal possession of them Ownership is not synonymous with possession: it merely implies a right to possession. Possession is a physical act. Ownership is an incorporeal right. They are not necessarily co-existent. Possession may evidence title But there may be title without possession. Ownership of goods bearing counterfeit trade mark is not punishable unless possession co-exists. Indeed, possession alone is punishable under s. 486, I. P. C. whether the possessor be the owner or not. Inasmuch as A-2 merely sought to obtain possession of M. Os. 3 to 118, and was never in possession he is not punishable under s. 486, I.P.C. The conviction of A-2 under s. 486 I.P.C. must therefore be set aside. It may be that he is liable to be punished for abetment to or attempt to commit the offence under s. 486 I.P.C. but the lower court does not seem to have addressed itself to this consideration.

The question remains whether A-1 can be said to have been in possession of M. Os. 3 to 118. The sole piece of circumstantial evidence against A-1 is that the invoice No. 607 bears his signature. In his statement before the lower court, he merely promised to file a written explanation: but he never did. P.W. 6 identified the signature on invoice to be that of A-1. D. W. 2, however denies that the signature on invoice was that of A-1, Under s. 73 of the Indian Evidence Act, the learned sub-magistrate

compared the signature on the invoice with the signatures of A-1 on his statement and bonds executed by him before the lower court and came to the conclusion that the signature on the invoice was that of A-1. I too have compared the signatures and I agree with the learned sub magistrate that the signature on the invoice is that of A-1. There can be no manner of doubt that it was A-1 who consigned M.Os. 3 to 118 from Nellore to Ongole. But M.Os. 3 to 118 were not in fact found in actual possession of A-1. They were found in the possession of the Railway Company. The question then is whether possession of the goods by the railway company should be deemed to be the possession of a servant on account of the consignor A-1, within the meaning of s. 27, I P.C. The term servant is nowhere defined in the Code. Its denotation seems to be pretty wide within s. 27 of the Code. Even a person employed "*in the capacity of servant*" is a servant within the meaning of s. 27. It is not necessary that there should strictly obtain any legal relationship of master and servant between him and his employer. It is enough if he is *defacto* a servant, i. e. engaged for performing any particular service on any particular occasion and subject to any particular condition. There need exist no absolute control over the manner or mode of service. The railway company is no doubt a carrier subject to certain statutory liabilities and privileges. But it is nevertheless, a servant within the meaning of S. 27, I. P. C. in so far as it acquires possession of another's property not with a view to lay any claim to it or enforce any rights in respect thereof, but merely with a view to carry to a place appointed by them. In carrying goods of another from one place to another, according to his directions, the railway company cannot be said to have been employed otherwise than as a servant. A servant within the meaning of S. 27 I P.C. includes a person to whom property had been entrusted without conferring or intending to confer any right to own, use or dispose but solely for purposes of possession, deposit in the appointed place, transport or delivery to the appointed place or person or for exercising any other act which does not involve or entail any right to own, dispose or use it. That railway company was holding possession of M. Os. 3 to 118 not on its own account but on account of the consignor A1 and solely for purposes of transport. I hold therefore that A1 was in possession of M. Os. 3 to 118, within the meaning of s 27, I. P. C.

In the result therefore, I acquit A2 and order that the fine, if paid by him shall be refunded. The appeal is dismissed as regards A1. The order of the lower court under s 545, Cr. P. C. is quashed so far at it relates to the payment of Rs. 25 out of the amount to be collected from A2; it is upheld as regards A1."

PETITION under ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the order of the court of the Joint Magistrate of Ongole dated 28th June 1939 preferred against the order of the court of the stationary sub magistrate of Ongole dated 29th April 1939 and made in C. C. No. 513 of 1938.

*A. S. Sivakaminathan*, for Petr.

*K. Venkataraghavachari*, for Crown.

ORDER

The signature of the petitioner in the forwarding note does not necessarily prove that he was in possession of the goods and his conviction under s. 486, I. P. C. cannot be sustained. It is therefore set aside and the fine it levied will be refunded.

N.T.R.

---

Cr. R. C. No. 277 of 1939.
Cr. R. P. No 255 of 1939.

*September 29, 1939.*

LAKSHMANA RAO, J.

**Patnam Sidda Reddi & others.**
v.
**Ambati Venkata Girianna.**

*Cr. P. C. (V of 1898), S. 436—Direction to frame charge—If valid.*

*In directing further inquiry it is not permissible under s. 436, Cr.P.C. to direct the magistrate to frame a charge and dispose of the case.*

FACTS A complaint was filed under ss. 147 and 323 I.PC. against ten persons and the stationary sub magistrate, holding it difficult to believe the prosecution, discharged the the accused under s. 253 (2) Cr. P. C. The sessions judge in revision setting aside the order said,

"The evidence in the case and the finding of

the magistrate himself justify a charge being framed under s. 147 I.P.C. The case is sent back for a charge being framed under s. 147 and for being disposed of in accordance with law by the district magistrate or any other magistrate subordinate to him, other than the magistrate who made the order under revision." One of the grounds in revision was "The learned sessions judge had no jurisdiction to direct framing of a charge under a particular section but he could only direct further enquiry into the complaint under 436, Cr.P.C.

PETITION under ss. 435 and 439, Cr.P.C., 1898, praying the High Court to revise the order of the court of sessions, Anantapur division dated 6-2-1939 and passed in Cr. R. P. No. 2 of 1939 presented against the order of the court of the stationary sub magistrate of Kadiri in C.C. No. 378 of 1938.

*A. Bhujanga Rao*, for Petrs.

*N. Somasundaram*, for Respts.

*Public Prosecutor*, for Crown.

ORDER

There is no ground for interference with the order directing further inquiry but it is not permissible under s. 436 Cr.P.C. to direct the magistrate to frame a charge and dispose of the case. The direction of the sessions judge to frame a charge under s. 147 is therefore set aside and otherwise this petition is dismissed.

N.T.R.

——

Cr. R. C. No. 1002 of 1936

Cr. R. P. No. 942 of 1939

*February* 2, 1940

LAKSHMANA RAO, J.

**Neelakantan Nambissan**
**v.**
**Emperor**

*Companies Act (VII of* 1913*), S.* 277 *(L)— Default to maintain the requisite cash reserve— Liability of ordinary director.*

*In the case of an ordinary director when the evidence does not warrant the conclusion that he was knowingly and wilfully a party to the default to maintain the requisite cash reserve, a conviction under S.* 277 *(L) of the Companies Act is not sustainable.*

FACTS: Soolapany Moopli Varian, Sankunny Menon, Neelakantan Nambissan, Padmanabha Menon, Radhakrishna Menon, Subramanyan and Achuthan Menon, Directors and Secretary of Union Bank, Ponnani are charged under s. 277 (L), Cl. (1) and (4) of the Companies Act with having on 3-2-39, 10-2-39 and 16-2-39 failed to maintain by way of cash reserve in cash a sum equivalent to at least one and a half per cent of time liabilities and five per cent of the demand liabilities of the company. The accused plead not guilty.

One witness was examined for the prosecution, P. W. 1 the clerk in the joint registrar's office, stated that A-1 to A- are the directors of the Union Bank of Malabar Ltd. Ponnani and that A-7 is the Secretary of the Bank. He filed Ex A the statement sent by the company to the registrar under s. 277 (L) (1) of the Companies Act according to which the cash reserve on 3-2-39, 10-2-39 and 16-2-39 fell far short of the limit prescribed. One witness was examined for A-4 and A-7 and the other accused had no witnesses to offer. D. W. 1 a clerk of the bank deposes that nearly 10 months prior to the liquidation of the Bank on 28-6-39 the joint registrar had warned the Bank that there was no sufficient cash reserve According to Ex. D the minutes book of the Directors there was a meeting of the directors on 11-12-38 at which the Bank's financial position was discussed and it was decided to raise a loan. A-2 to A-5 were present at the meeting Ex. C is the attendance register of the Directors. No meeting of the Bank was held subsequently.

The directors were fully aware as early as 11-12-38 that the bank was in bad financial condition and apart from authorising a loan of Rs. 30,000 no further steps were taken by the directors. In fact none of them attended the subsequent meetings of the directors called for." The lower court held: "This is negligence and I must hold that A-2 to A-5 were knowingly and wilfully parties to the default for which they stand charged, A-7 is the Secretary and he also does not seem to have taken any steps to increase the cash reserve of the Bank, D. W. 2 has admitted that A-6 has resigned his directorship on 29-12-38. Ex. II is the resignation letter. A-1 does not seem to have attended the meeting on 10-12-38 and he must be deemed to have had no knowledge of the deficit referred to in Ex. A. I find A-1 and A-6 not guilty and acquit them. I find A-2 to A-5 and A-7 guilty of the offence charged and convict them. I

sentence each of them to pay a fine of Rs. 25 each or in default simple imprisonment for a month each."

A-3 and A-5 filed revisions against their conviction on grounds inter alia:

"The lower court should have held that in order to attract the provisions of s. 277 L of the Companies Act the director should know that there was no cash reserve on a particular date and also that he was wilfully a party to the existence of such a situation and in the absence of any evidence to that effect the conviction is unsustainable.

"The circumstance that the financial position of the bank was alleged to have been made known to the directors at the meeting held on 11-12-38 will not bring home to them the knowledge that there would have been no reserve on 3-2-39, 10-2-39 and 16-2-39."

"The lower court ought to have held that in order to attract the provisions of s. 277 (L) the director should know that there was no cash reserve on a particular date and also that he was wilfully a party to the existence of such a situation and in the absence of any evidence to that effect the conviction is unsustainable."

"The mere fact that the petitioner was negligent, even if it is correct will not make him knowingly and wilfully a party to the default and in the absence of any meeting of the directors subsequent to 11-12-38 the petitioners cannot be held guilty."

PETITION under ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the sub divisional magistrate of Palghat dated 31-8-1939 in C. C. No. 71 of 1939.

*T. K. Raman Nambissan*, for Petr.

*Public Prosecutor*, for Crown.

ORDER

The petitioner was an ordinary director and the evidence does not warrant the conclusion that he was knowingly and wilfully a party to the default to maintain requisite cash reserve. The conviction under s. 277 (L) of the Indian Companies Act is therefore set aside and the fine if levied will be refunded.

T. — *Conviction set aside.*

Cr. App. No. 653 of 1939

*March* 6, 1940

LAKSHMANA RAO, J.

**T. Palaniswami Gonndan & others**

v.

**Emperor**

*Penal Code (XLV of* 1860), *Ss.* 300, 323 & 325—*Throwing a stone falling on the forehead and causing fatal injury—Offence committed—Two injuries one grievous committed in the course of the disturbance—Person committing the grievons injury not identifiable—Both must be convicted only under S.* 323.

*When a number of people create a disturbance and one of them threw a stone which hit one S in the forehead and caused a fatal injury and the lower court held that the act came within the mischief of Cl.* (4) *of S.* 300 *and would amount to murder.*

Held, *that the accused could at best be guilty only of voluntarily causing grievous hurt under S.* 325, *I.P.C.*

*In the course of the disturbance two injuries were caused to a person, one of them grievous, and it was not possible to say which of the accused caused that injury,* Held, *neither of them can be convicted under S.* 325 *I.P.C. and both of them should be convicted only under S.* 323 *I.P.C.*

FACTS: The relevant portions of the judgment of the lower courts are produced below.

"The nine accused stand charged with having committed offences of rioting armed with deadly weapons and mischief punishable under ss. 148 and 427, I.P.C. in connection with an occurrence that took place on the night of the 19th of January last at Vengipalayam, Dharapuram taluk.

Accused 1 and 5 stand further charged with the murder of one Sami Goundan at the same time and place, an offence punishable under s. 302, I.P.C.

Accused 1, 2 and 3 stand further charged with having, at the same time and place, attempted to murder one Ramaswami Goundan (P.W. 6) an offence punishable under s. 307 I.P.C.

Accused 3 and 7 stand further charged with having voluntarily caused grievous hurt to one Krishnaswami Goundan (P.W. 7) with dangerous weapons, an offence punishable under s, 307 I.P.C.

Out of the nine accused, all except accused 2 and 5 stand further charged with having, at

the same time and place caused hurt with dangerous weapons to a number of prosecution witnesses, namely P. Ws. 5 and 8 to 16, offences punishable under s. 324 I P. C. There are altogether 16 charges against these accused.

* * *

At about 8 o'clock in the night, all the nine accused turned up, in a body, armed with sticks and stones and began to pelt stones at P.W. 4's house, challenging P.W. 4 and his brother to come out of their house. They then threw stones on the houses of some of the prosecution witnesses, including the house of P. W. 5. At that time, P. Ws. 5, 6, 9 and the deceased were sitting on the pial of P. W. 5's house. The nine accused then appeared in front of P. W. 5's house and commenced pelting stones at the house, remarking that those who wished to espouse the cause of P. W. 4 and his brother Subbaraya were at liberty to come out for a fight. Seeing stones falling on the roof, door and pial of P. W. 5's house, P. W. 5's uncle (P. W. 6) and the deceased went towards the place where the accused were standing and the deceased asked the accused to desist from creating a disturbance and to leave the place quietly. The 1st accused hit the deceased on the head with a stick and the 5th accused struck the deceased on the forehead with a big stone. The deceased fell sprawling on the floor. When P. W. 6 protested against the iniquity, accused 2 and 3 beat him on his head with sticks and the 1st accused flung a stone at him. P. W. 6 also dropped down. When P. W. 5 expostulated at the accused's conduct, he was beaten with a stick by the 1st accused and hit with a stone by the 7th accused. P. W. 5 got frightened and bolted away from the place. When P. W. 7 came running out of his house, the 3rd accused beat him on the left arm with a stick and broke his arm and the 7th accused hit him twice with stones on his head and right foot. P.W. 7 also retreated on being thus assaulted. P. Ws. 8 and 9, who are husband and wife respectively, came out hearing the noise of a commotion outside the compound and seeing stones falling on the houses in the compound. P. W. 9 was beaten by the 4th accused with a stick on the chest. When P.W. 8 protested the 3rd accused hit her with a stone on her leg. Before he was beaten, P. W. 9 picked up a stick and beat accused 2 and 5 with it on the head. When P. W. 10, a nephew of P. W. 9, who also lives in the same compound as P. W. 9, came out, the 6th accused hit him with a stone on his nose and also gave him two blows with a stick on receipt of which P. W. 6 felt giddy and sat on the pial of P. W. 5's house. P. W. 11, the younger brother of P. W. 10, who also came out hearing the noise of the commotion outside the house, was also hit with a stone by the 6th accused, on receipt of which he retraced his steps and receded into the front yard P. W. 12, the son of P. Ws. 8 and 9, rushed out, with a stick in his hand, and reached the scene just in time to see the 3rd accused beating P.W. 7 with a stick. P.W. 12 thereupon gave two blows to the 3rd accused with his stick. Seeing this, the 1st accused came running. P. W. 12 dealt a blow with his stick on the 1st accused. The 8th accused then hit P. W. 12 with a stone on the forehead. P. W. 12 lost his nerve and decamped from the scene. P.W. 13, the son of P.W. 6, heard people shouting outside the compound and ran thither, reaching the place just as the 8th acccused hit P.W. 12 with a stone. P.W. 13 called out to the 8th accused to refrain from throwing stones, whereupon the 8th accused flung a stone at P. W. 13 which landed on the left side of his head. P. W. 14 the wife of P. W. 6 and the mother of P. W. 13 who went out to see what was happening and who interfered when her husband was being beaten, was hit with a stone by the 9th accused on her right side. P. W. 15, a young lad and a son of P. Ws. 6 and 14 who came out, attracted by the noise, was also hit by the 9th accused with a stone. P. W. 16 who lives about half a furlong away from the scene of occurrence and who also came running to the scene, was beaten with sticks on his head by accused 4 and 9. As he was trying to leave the place, accused 7 and 8 also hit him with stones, on his left shoulder and side. The accused then left the place.

* * *

I am satisfied beyond all reasonable doubt that all the nine accused participated in the occurrence and that they were all actuated by a common object, namely to cause hurt to P. W. 4 and his adherents and to cause mischief or damage to their houses.

* * *

There is no satisfactory evidence, however, to

prove what kind of sticks the accused were armed with and who had sticks and who had stones. In the absence of such evidence, it would be unsafe to find the accused guilty under s. 148 I.P.C. I, therefore find all the accused guilty only under s. 147 I. P. C. on the first charge, beating armed with deadly weapon.

I am satisfied on the evidence, that it was the 5th accused who struck the deceased with a stone on the forehead and caused the fatal injury. Even conceding in the 5th accused's favour that he did not actually strike the deceased with the stone but that he flung it at him, the medical evidence unmistakably indicates that the 5th accused must have flung the stone from close quarters and with some degree of violence. It is difficult to accept the argument that the 5th accused must have aimed the stone at some other part of the body and that it accidentally came in contact with the head. The intention of a person has to be gathered from the surrounding circumstances. If the 5th accused intended to hit the deceased with a stone on some other less vulnerable and less vital part of the body than the forehead, it is for him to say so; but he chooses to deny his participation in the occurrence altogther. When he flung such a big stone at the deceased or struck him with it with such force or violence, the 5th accused must have known that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death. His act would, therefore come within the mischief of cl. 4 of s. 300 I.P.C. and would amount to murder.

As far as the 1st accused is concerned, P. Ws. 6 and 9 say that he beat the deceased on the head with a stick. The blow with the stick did not cause any fracture at the skull and there is no evidence to show whether the stick used by the 1st accused was a deadly or dangerous weapon. The 1st accused is therefore liable to be convicted only under s. 323 I.P.C., on the second charge.

Accused 2 and 3 who beat P. W. 6 on the head with sticks are liable to be convicted under s. 325 I. P. C., and not under s. 307 I. P. C. and the 1st accused is liable to be convicted only under s. 323 I. P. C. on that charge. We have no evidence regarding the dimensions or size of the sticks used by accused 2 and 3 when assaulting P. W. 6 on the head and the 1st accused used only a stone and not a stick.

The fourth charge pertains to the grievous hurt alleged to have been caused to P.W. 7 by accused 3 and 7.....Since, however, there is no satisfactory evidence about the kind of stick with which the 3rd accused was armed, I find him guilty under s 325 I.P.C., and not under s. 326 I.P.C.

The fifth charge seeks to impose constructive liability on accused 1, 2, 4, 5, 6, 8 and 9 for the grievous hurt caused to P.W. 7 by the 3rd accused. Although the common object of the unlawful assembly appears to have been only to cause hurt, yet when a number of persons go armed with sticks and stones, each of them is presumed to know that one or other or some of them are likely to cause grievous hurt in prosecution of the common object and if grievous hurt is so caused by any member of an unlawful assembly, the other members of the unlawful assembly become constructively liable for the grievous hurt caused. I therefore, find accused 1, 2, 4, 5, 6. 7, 8 and 9 guilty under s. 149 read with s. 325 I.P.C.

Only the last charge remains to be considered. The prosecution witnesses are unable to say which of these accused pelted stones. A general statement to the effect that the accused threw stones on the houses is not sufficient to form the basis of a conviction under s. 427 or 426 I.P.C. Moreover, the damage caused to the houses was trifling. All the accused are therefore acquitted on that charge.

On the first charge, I sentence the 3rd accused to nine months' rigorous imprisonment under s. 147 I.P.C. As I am imposing a separate sentence on the others under ss. 149 and 325 I.P.C., no sentence is passed on them in respect of this charge.

On the second charge, I sentence the 5th accused to transportation for life under s. 302 I.P.C. As the attack made by the 5th accused on the deceased was not premeditated but sudden and on the spur of the moment and as the 5th accused had no particular cause for enmity or rancour towards the deceased, the lesser sentence is the more appropriate of the two penalties provided by law for murder. The 1st accused is sentenced to six months rigorous imprisonment under s 323 I.P.C. on this charge.

On the third charge, I sentence accused 2 and 3 to two years' rigorous imprisonment each under s. 325 I.P.C. and the 1st accused to six

month's rigorous imprisonment under s. 323 I.P.C.

On the fourth charge, I sentence 3rd accused to two years' rigorous imprisonment under s. 325 I.P.C. and the 7th accused to 18 months' rigorous imprisonment under ss. 149 and 325 I.P.C,

On the fifth charge, I sentence accused 1, 2, 4, 5, 6, 8 and 9 to 18 months' rigorous imprisonment under ss. 149 and 325 I P.C.

On the eighth charge, I sentence the 4th accused to six months' rigorous imprisonment under s. 323 I.P.C.

On the twelfth charge, I sentence the 8th accused to six months' rigorous imprisonment under s. 323 I P.C.

The accused are acquitted on the other charges."

Appeal against the order of the court of session of the Coimbatore division in C. C. No. 133 or 1939.

*K. S. Jayarama Ayyar & K. Periaswami Goundar*, for Applts.

*Public Prosecutor*, for Crown.

JUDGMENT

There was a disturbance near the house of P Ws. 5 to 15 at Vengipalayam about 8 P.M. on 29th January, 1939 and one Swami Goundan who intervened was fatally wounded. Grievous hurt was caused to P.Ws. 6 and 7 and simple hurt was caused to P.Ws. 5 and 8 to 15. The occurrence was reported to P.W. 18, the village munsif, without delay, and Swami Goundan died next morning of coma due to a depressed fracture of the frontal bone caused by a stone. He had also another injury on the head due to beating with a stick and P.W. 6 had two injuries on the head due to beating with sticks. The frontal bone at the base of one of these injuries was fractured and P.W. 7 had a contusion covering the outer side of the lower third of the left arm and elbow, with simple fracture of the left humerus.

The appellants are stated to have gone in a body and created the disturbance and all of them have been convicted under s. 147, I.P.C. The 5th appellant is alleged to have caused the fatal injury of the deceased by striking with a stone picked up from the scene of crime, and he has been sentenced to transportation for life under s. 302 I.P.C. for the murder of Swami Goundan. The first appellant is stated to have beaten him on the head with a stick and he has been sentenced to rigorous imprisonment for 6 months under s. 323 I. P. C. The second and third appellants are alleged to have beaten P.W. 6 on the head with sticks and they have been sentenced to rigorous imprisonment for two years under s. 325 I.P.C. for voluntarily causing grievous hurt to him. The first appellant is also alleged to have beaten P. W. 6 on the body with a stick and he has been sentenced to rigorous imprisonment for 6 months under s. 323, I.P.C. for causing hurt. The third appellant is also stated to have caused the fracture of the left humerus of P. W. 7 by beating with a stick and he has been sentenced to rigorous imprisonment for 2 years under s 325 I. P. C. for voluntarily causing grievous hurt to P. W. 7. The other appellants have been sentenced to rigorous imprisonment for 18 months under ss. 149 and 325 I.P.C. for the grievous hurt caused to P. W. 7 and the 4th appellant has been sentenced to rigorous imprisonment for 6 months under s. 323 I.P.C. for causing hurt to P. W. 9. The 8th appellant has been sentenced to rigorous imprison ment for 6 months under s. 323 I.P.C. for causing hurt to P. W. 12 and the sentences have been directed to run concurrently.

That the appellants created the disturbance and are guilty of rioting under s. 147 I.P.C. was not disputed in this Court, nor were the findings of the additional sessions judge regarding the beating of P. W. 6 on the head by the second and third appellants, and on the body by the first appellant, the assault of P. W. 7 on the left arm with a stick by the third appellant and the beating of P. Ws. 9 and 12 by the 4th and 8th appellants, seriously questioned. There is also no reason to doubt the beating of the deceased on the head with a stick by the first appellant but the story of P. W. 5, 6, 9 and 10 that the fatal injury on the deceased was caused by the 5th appellant by beating with a stone in his hand is belated and considering that the 5th appellant had given evidence against these witnesses previously it would be unsafe to accept their statements. He must have thrown a stone at Swami Goundan and as rightly conceded he would at best be guilty of voluntarily causing grievous hurt under s. 325 I. P. C.

The first appellant would unquestionably be guilty under s 323 I.P C., for causing hurt to the deceased and P.W. 6 and the 4th and 8th

appellants would be guilty under s. 323 I.P.C for causing hurt to P.W. 7 as he must have known that beating with a stick on the left fore arm is likely to fracture the humerus and the rest would be guilty of that offence under s. 149 I. P. C. But of the two injuries on the head of P.W. 6 only one was grievous and it is not possible to say whether the second or the third appellant caused that injury. Neither of them can therefore be convicted under s. 325 I. P. C. and the conviction of both can only be under s. 323 I. P. C.

The conviction of the 5th appellant under s. 302 I. P. C. is therefore set aside and he is convicted under s. 325 I. P. C. for the assault of the deceased. The conviction of the 2nd and 3rd appellants under s. 325 I.P.C. for the assault of P.W. 6 is set aside and they are convicted under s. 323 I. P. C. The other convictions of all the appellants are confirmed and considering that he was not even armed the 5th appellant is sentenced to rigorous imprisonment for 18 months under s. 325 I. P. C. for the assault of the deceased The second and third appellants are sentenced to rigorous imprisonment for 6 months under s. 323 I. P. C. for the assault of P.W. 6 and the sentence of the third appellant under s. 325 I. P. C. for the assault of P. W. 7 is reduced to rigorous imprisonment for 18 months. The other sentences are confirmed and all the sentences will run concurrently.

T.

---

**R. T. No. 7 of 1940**

Cr. App. No. 12 of 1940

*February* 27, 1940

KING & LAKSHMANA RAO, JJ.

**Emperor**

v.

**Nandivada Ganganna Dhora**

*Evidence Act (I of* 1872), *Ss.* 26 & 27 — *Statement to police by one accused not leading to discovery but discoverred by a co-accused— Statement not within s.* 27 *and inadmissible under s.* 26.

*Three accused were charged with murder and the 3rd accused, the appellant, made a statement in which he promised to take the police to the place where the first accused had buried a spear with which he had stabbed the deceased. That accused took the police to the place and after he had himself unsuccessfully searched for the spear, 1st accused took it out and produced it. The 3rd accused was convicted almost entirely on this statement which was admitted in full as one made under S. 27 of the Evidence Act.*

Held, *that this statement did not fall within S. 27 but under S. 26 and was inadmissible in evidence. The discovery of the spear was not in the essential sense of the word due to the information given by the 3rd accused but was simply and solely due to the action of the 1st accused.*

Trial referred by the court of session of the Vizagapatam division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 52 of 1939 on 15-12-1939 and appeal by the prisoner against the said sentence of death and the sentence of three years R.I. passed upon him in the said case.

*P. Basi Reddi* for Accused.

*Public Prosecutor*, for Crown.

JUDGMENT

(KING, J.)

The appellant was the 3rd accused in S. C. 52 of 1909 before the learned sessions judge of Vizagapatam. The three accused in that case were charged with the murder of one Pendyala Ramalingam, village munsif of Kondasekharapalli and with the murder of Pantala Appayya, a bandy driver and with causing hurt with a dangerous weapon to two of the witnesses in the case. P.Ws. 14 and 15. The evidence in the case established the fact that the deceased Ramalingam and the two witnesses started in Appayya's bandy from Kondasekharapalli on the night of the 20th June last to go to Parvatipur and that they were attacked by three men about half way on their journey. Ramalingam was killed immediately, but Appayya survived until the 22nd when he died in hospital and the two witnesses received minor injuries. The evidence in the case was twofold; firstly, the evidence of identification and secondly the evidence based upon the confession made by the appellant. The evidence of identification was not considered by the learned sessions judee sufficiently safe to act upon. He accepted neither the evidence of the two witnesses who were travelling in the bandy nor that of the two other witnesses who say that they saw the three accused near the scene of offence shortly before the offence must have been committed, and in

consequence acquitted the first and second accused.

The accused were arrested on the 24th June and the appellant made a long statement which was recorded as Ex. Y. At the conclusion of that statement the appellant promised the police to take them to the place where the first accused had buried the spear with which he had stabbed the occupants of the bandy. The next day the 25th June, the 3rd accused accordingly took the police to a gedda and, after he had himself unsuccessfully searched for the spear, the 1st accused took it out and produced it. The evidence upon which the 3rd accused has been convicted by the learned sessions judge consists almost entirely of this statement. The statement has been admitted in full as one made under s. 27 of the Indian Evidence Act. It seems however to us very doubtful whether this is a statement admissible under s. 27 at all. No doubt, in one sense of the word, if the evidence is believed—and we see no reason why it should not be—it was the information given by the appellant which actually led to the fact that the police officer came to this particular gedda. But if the events of that morning be more closely analysed, it will be seen that the discovery of the spear was not in the essential sense of the word due to the information given by the 3rd accused but was due simply and solely to the action of the first accused who, according to the prosecution case, had himself hidden the spear in that particular spot. No doubt it is not necessary that the informant himself should personally recover any property, about which he gives information. But when the informant has tried unsuccessfully to recover such property, it must we think, be conceded that the effect of his information has become completely exhausted. No doubt if one of the police officers themselves or any third party acting on the information of the 3rd accused had recovered this spear, S. 27 would have been applicable. But, as it is, we are of opinion that this spear was recovered not because of any information given by the appellant, though that may have been the proximate cause of the presence of the party at the gedda but by the action of the 1st accused himself. We would accordingly hold that Ex. Y does not fall within s. 27 but within s. 26 and is inadmissible in evidence. That being so, there is no evidence upon which the appellant could possibly be convicted. This appeal must be allowed and the conviction set aside and he will be set unconditionally at liberty.

N.T.R. — *Petitions allowed*

**R. T. No, 2 of 1940**

Cr. App. No. 7 of 1940

*February* 5, 1940

BURN & LAKSHMANA RAO, JJ.

**Emperor**

v.

**Bangaru Reddi**

*Criminal trial—Charge of murder—Confession by accused that he committed the murder in a particular way—Medical evidence pointing a different way—Conviction of accused.*

*Where the accused confessed to having throttled the deceased by his hand and medical evidence showed that the woman might have been killed by strangulation with a piece of rope.*

Held, *that the mere fact that the accused had given a wrong or an incomplete description of the way in which he brought about the woman's death was not a reason for finding him not guilty.*

TRIAL referred by the court of session of the South Arcot division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 44 of 1939 on 13-12-1939 and appeal by the prisoner against the said sentence.

*T. R. Tyagarajan*, for Accused.

*Public Prosecutor*, for Crown.

JUDGMENT

(BURN, J.)

The appellant Bangaru Reddi has been convicted of murder by the learned sessions judge of South Arcot and sentenced to death.

The case for the prosecution was that on the early morning of the 15th September 1939, the appellant killed a woman named Mangathayi Ammal by throttling her. Mangathayi's corpse was found just before day light on the morning of the 15th September, when her little daughter, P. W. 5, a child of 8, came in after going outside to answer calls of nature. This child on her return called to her mother and getting no answer she went about the house trying to find her mother and at last her foot came in contact with her mother's head and then she discovered that her mother was motionless. It was found that jewels which Mangathayi was in the habit

of wearing had been taken from her body but no one had any idea who the murderer was. Information was given to the police by the karnam of the village (P.W. 10) who took action in the absence of the village munsif. The karnam saw a crowd near the house of P.W. 4 who is the husband of the deceased and when he went there, he saw the corpse of Mangathayi. P.W. 4 himself was not there. He had gone away very early in the morning to Tindivanam. The police came and held the inquest but the panchayatdars could only express the opinion that the woman had been strangled to death by some person unknown.

The evidence against the appellant was furnished almost entirely by himself. He was in the village and was questioned by the police on 16th September and he was arrested on the evening of the 17th September at about 7-30 and after he had been arrested, he made a statement about the jewels that were missing from the corpse of the deceased woman and about a pair of brass bangles which he said, he had taken from the person of the child (P. W. 5). The inspector (P. W. 12), sub inspector (P. W. 11), the karnam (P. W. 10) and the village munsif Muthumalla Reddiar, were taken by the appellant to the hayrick belonging to his brother-in-law and there from a spot outside the fence on the north, the appellant is stated to have produced jewels, M.Os. 1 to 5. All these M.Os. 1 to 4 belong to Mangathayi which according to her husband were always worn by her. M.O. 5 is the pair of brass bangles which belong to the little girl, P.W. 5.

The appellant was sent to the sub magistrate of Tindivanam for remand with a requisition that his confession might be recorded. The sub magistrate received him on the 18th September and gave him time for reflection until the 19th and then recorded his confession (Ex. B). In that, the appellant has given a very long story about his illicit intrigue with Mangathayi and about the way in which he killed her in the early morning of the 15th September. In the court of the sub magistrate of Gingee who held the preliminary inquiry and also before the learned sessions judge, the appellant denied that he had made any confession at all He went so far as to tell the sub magistrate of Gingee that he had not even seen the face of the sub-magistrate of Tindivanam. He offered no explanation of his conduct in producing the jewels or the statements that he made which led to their discovery. He denied having given any information about the jewels and alleged that the case had been concocted against him by Muthumalla Reddi, the village munsif who, he said, is a person of great influence in Brahmadesam.

No facts were proved from which it could be inferred that Muthumalla Reddi had any enmity against the appellant. There is in fact, nothing to indicate that any one had any reason to charge him falsely with this crime. The confession of the accused, although he denied it was corroborated in important particulars by the evidence of P. W. 4, the husband of the murdered women, and P. Ws. 8 and 9. P. W. 4 said that his wife had complained to him about the illicit overtures made to her by the appellant P. W. 8 said that on one occasion some months before he had accidentally discovered the appellant while he was returning from the house of P. W. 4. P. W. 9 said that he had been informed by the appellant of his visits to Mangathayi and that he had reproached the appellant for his extravagance.

Learned counsel who has appeared for the appellant in this Court has suggested that the confession ought to be entirely rejected because the evidence of the doctor makes it clear that the woman might very well have been killed by strangulation with a piece of rope. The doctor found a continuous ecchymosed mark all round the woman's neck below the thyroid cartilege. Such a mark would not be likely to be produced by strangulation with the fingers and thumbs. In sach cases it is generally possible to distinguish marks of the thumbs and fingers separately. This, however, is not a sufficient reason for acquitting the appellant. The mere fact that he has given a wrong or an incomplete description of the way in which he brought about the woman's death is not a reason for finding him not guilty. The evidence of the doctor was that there were marks of fingers and thumbs on the woman's neck and to that extent, his evidence does agree with the confession of the accused. The production of the women's jewels from the hiding place near his brother-in-law's haystack is also, as the learned sessions judge observes, a fact of the greatest possible importance. All the assessors were of opinion that the appellant was guilty. The learned sessions judge was undoubtedly right in agreeing with them and in convicting the appellant for the murder of Mangathayi. Confirming the conviction for murder and the sentence of death we dismiss this appeal.

N.T.R. — *Conviction confirmed.*

R. T. No. 78 of 1939

Cr. App. No. 384 of 1939

*September* 20, 1939

BURN & STODART, JJ.

BALIJA PULLAYYA

v.

EMPEROR

*Evidence—Foot print expert—Value of.*

*It is not proper for a judge considering a question of identity of foot-prints, to be guided entirely by the evidence of an expert. The expert's opinion is valuable, but it must be supported by statements of fact, the accuracy of which can be verified by the judge.*

Trial referred by the court of Sessions of the Kurnool division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 23 of 1939 on 20–7–1939 and appeal by the prisoner against the said sentence under s. 302 I.P.C.

*P. C. Parthasarathy*, for Applt.
*K. Venkataraghavachari*, for Crown.

JUDGMENT

(BURN, J.)

The appellant has been convicted by the learned sessions judge of Kurnool of abducting a woman with intent that she might be murdered (S. 364, I.P.C.) and also of murdering the same woman (S. 302). He has sentenced the appellant to death for the offence of murder and to transportation for life for abduction.

The woman whom the appellant is said to have abducted and murdered was a Kapa Gouramma, a widow who lived in Rajoli in the Nizam's Dominions and also had a house in Kurnool. She had two daughters (P.Ws. 4 and 5) who were apparently living by prostitution, though P.W. 5 at the time of the murder of Gouramma was said to be in poor state of health. The appellant was on terms of illicit intimacy with the younger daughter, P.W. 4. It is alleged that he was supposed to be paying her Rs. 6 a month but that his payments were irregular and P. W. 4's mother objected to her association with the appellant on account of his meanness. It was alleged that he had once given her a pair of Kammals and that on the pretext of being in want of money he had taken them back from her and pledged them. The mother therefore according to the prosecution was trying to break off the association between P. W. 4 and the appellant, and this is supposed to have been the appellant's principal motive for the murder. The learned sessions judge thinks that he had another motive in that he was badly in need of money and that Gouramma had some cash and also some jewels.

Gouramma's corpse was found on the front verandah of her house in Kurnool on the morning of the 20th February. Her throat had been cut and her ear-lobes also had been cut. There is no reasonable doubt about the fact that she was murdered by somebody who wanted to steal her jewels and whatever else she had. The doctor who made the post-mortem examination of Gouramma's body on the afternoon of the 20th February was not able to fix the time of death. He said that in his opinion death would have occurred between 20 and 40 hours before he made the post-mortem examination which was at 5–10 p. m. on the 20th February. According to this opinion Gouramma must have died some time between 1 a. m. and 9 p. m. on the 19th of February. The doctor's evidence does not fix the time nearer than that.

The evidence against the accused went to show that on the afternoon of the 18th February he took Gouramma with him by bus from Rajoli to Kurnool. There was evidence to show that Gouramma came to her house at Kurnool on the evening of that day about evening meal time, and that the appellant came to her house about an hour later. There was

also evidence that the appellant was heard talking to the deceased in her house at about 10 p. m. on the 18th February. One witness (P. W. 11) says that they were talking angrily and quarrelling. Nobody appears to have seen the appellant leave the house of the deceased and according to the prosecution he was next seen on the morning of the 19th plying his trade as a tailor in the Main Bazaar. The appellant was arrested on the evening of the 21st February in his own house in Kurnool. The only other evidence of any importance is that on the Cuddappah slabs with which the veranda of the deceased's house is floored foot-prints in blood were found near the corpse. A foot-print expert (P. W. 6) took impressions of the appellant's feet in goat's blood on Cuddappah slabs of a somewhat similar degree of smoothness. He said that he was satisfied that the foot prints found on the Cuddappah slabs near the corpse were the foot prints of the appellant. This is briefly the substance of the evidence for the prosecution. All the assessors expressed the opinion that the appellant had not been proved to be guilty either of abduction or of murder. The learned sessions judge disagreeing with them has convicted him for both the offences.

So far as abduction is concerned, there is no evidence upon which the appellant could be convicted. A person is said to abduct another person if he 'by force compels or by any deceitful means induces any person to go from any place', (S. 362 I. P. C). In the present case there is nothing to show that the appellant compelled Gouramma by force to accompany him on the 18th February from Rajoli to Kurnool. There is nothing to show that by deceitful means he induced her to go. On the contrary P. W. 4 the younger daughter of the deceased said quite clearly that it was *she* who had asked her mother to go with the appellant to Kurnool 'for redeeming the kammals and buying sari and ravikkai'. The other daughter (P. W. 5) does not say anything about the accused offering any deceitful inducement to her mother to persuade her to go with him to Kurnool. The conviction for abduction is therefore without any foundation in the evidence and it must be set aside.

The conviction for murder also, we think, must be set aside. The evidence of the prosecution witnesses is gravely discrepant with regard to the date on which the appellant and the deceased left Rajoli together to go to Kurnool. In the complaint (Ex. E) which was given at the police station in Kurnool by P. W. 4 after the discovery of the corpse, P. W. 4 has stated that appellant came to Rajoli "the day before yesterday (Saturday)". That was of course the 18th of February. P. W. 5 in her statement under s. 164, Cr. P. C. (Ex. G) recorded on the 24th February also said that the appellant had come to them 'last Saturday'. The evidence of Masamma, a woman of Rajoli who said that she was the discoverer of the corpse, is to the same effect. But this does not fit in with the theory of the prosecution. According to P. Ws. 4 and 5 when the appellant came to them at Rajoli he wanted to persuade Gouramma to allow him to continue his intimacy with P. W. 4. The appellant, they say, professed repentence and a purpose of mending his ways. According to P. W. 4, "accused then told my mother not to be angry with him and said that he would redeem the kammals and buy me a new sari and would treat me well." It was in order to redeem the jewels and to buy a new sari that the appellant was going form Rajoli to Kurnool. But both P. W. 4 and P. W. 5 say that the new sari was to be bought *for the festival*, i. e., the festival of Sivarathri. They both say that the date on which the appellant arrived at Rajoli was two days before the Sivarathri festival. They both say that the festival was still to come off. They both say that their mother went away promising to return *for the festival*. Both of them, and P. W. 7 also, say that when P. W. 7 started for Kurnool a few hours after Gouramma had gone, the daughters begged her to see their mother at Kurnool and to remind her to come back *for the festival*. Unfortunately for this theory Sivarathri was over on the 17th of February. The same blunder appears in the evidence of P. Ws. 10 and 11 two young prostitutes who use one half of Gouramma's house in Kurnool as their place of business though they sleep elsewhere. Both these girls said that the accused and Gouramma came back on "*Saturday preceding Sivarathiri*." That Saturday was of course the 11th of February and not the 18th February. The whole theory upon which the prosecution case is based is therefore groundless.

The learned Public Prosecutor, when we heard arguments in this case conceded that unless the circumstantial evidence connected

with the bloody foot prints could be relied upon, there was really no substantial case against the appellant. We thought that the judgment of the learned sessions judge with regard to these foot prints was not satisfactory because he had taken the opinion of the foot print expert as conclusive. His judgment shows that he did not form any opinion of his own with regard to the identity of the foot prints found near thecorpse with the foot prints of the appellant. The Cuddappah slabs and the specimen foot prints had not been sent up to this court when the appeal first came on for hearing and we thought it necessary to send for them and to examine them ourselves. It is not proper for a judge to be guided in such matters as this entirely by the evidence of an expert. The expert's opinion is valuable but it must be supported by statements of fact, the accuracy or otherwise of which can be verified by the judge. The result of our examination of the foot-prints, taken with the evidence of P. W. 6, is that we are not ourselves satisfied that the foot-prints found near the corpse were made by this appellant. There were five prints altogether, one of them being a fairly complete print of a left foot and four being partial prints of a right foot. The expert took for comparison two prints each of the right and left foot of the appellant. The expert says that he had ten reasons for coming to the conclusion that the left foot impression which was found near the corpse must have been made by the appellant. He says that it corresponded to the specimens in general size and shape and in the shape and size of the heals. He says that the pad and toe impressions are similarly identical, that the distance between one toe and the others was the same in both sets, that the relative position of each toe with the others was the same on both sets of impressions and so forth. Now this is not strictly accurate. The pad and toe impressions are not identical. In both the specimens made by the appellant after treading in the blood of a goat the marks made by the toes are very much smaller in area than the toe marks found on M.O. 5. But our principal reason for refusing to follow the opinion of the expert is concerned with the partial prints of the right foot. These are M. Os. 4, 6, 7 and 8 and the specimens are M. Os. 9 and 10. In M. Os. 9 and 10 there are clearly marked the prints of all the five toes of the appellant's right foot. But in none of the prints on M. Os. 4, 6, 7 and 8 is there any mark of a little toe. The expert has not been properly cross examined with regard to this. He says that the impression of the little toe in M.O. 6 is missing. That is quite true, but he does not say that the impression of the little toe is missing also from the other three prints of the right foot nor why in spite of this difference he still calls the impressions 'identical'. We find ourselves unable to say with any confidence that the foot prints found near the corpse have been made by this appellant. The learned sessions judge in paragraph 17 of his judgment has stated that "the foot impressions found on the slabs are shown to be impressions in human blood". This is not, strictly speaking, accurate. It is highly probable that they were marks of human blood, but these Cuddapah slabs were not submitted to the Chemical Examiner and there is no certificate either of the Chemical Examiner or the Imperial Serologist to show that the stains in M.Os. 4, 5, 6, 7 and 8 are stains of human blood.

There is nothing we think in the conduct of the appellant from which it can be fairly inferred that he was the murderer of Gouramma. The learned judge's views on this point are derived mainly from the evidence of P. W. 7. This woman lives in Rajoli and as already noticed, she says that she went to Kurnool a few hours after Gouramma. She travelled by bandy and arrived at Kurnool on the next morning and she says that she went to the house of the deceased and found it was locked. She inquired of the shop keeper who lives opposite (P. W. 9) but he could not tell her anything about Gouramma. She says that before going to Gouramma's house she had seen the accused in the bazaar and that he had told her that Gouramma was in her house. Then she says that she went back to the accused after she found the house locked and told him and he said "Oh! she must be in the house. Go and find out". Then she says that she visited him a third time and again he told her that Gouramma would be at home. After that she went again to Gouramma's house and on the advice of P.W. 9, pushed at the door and then peeping through the chink saw Gouramma lying dead across the veranda in a pool of blood. She says that she went and told P. W. 9 the opposite

shop keeper what she had seen but that P.W.9 advised her to keep quite as it was no business of hers and there was no need for her to get into trouble about it. But she says that she went again for the fourth time to the appellant and tried to find out what he had to say without disclosing what she had seen. The accused, she says, replied, "I shall give you one cheera, and I shall give Chinna Rosamma (P.W. 4) another cheera". Then the witness says she replied ironically to the accused "You have given one woman a cheera. Now she is lying on her back. You may do the same for me" and with these remarks she went away to the cart-stand, purchased her fruits, kept quite all day, travelled by night in a bandy back to Rajoli and then informed the daughters of Gouramma that their mother had been murdered. This woman's evidence is entirely unreliable and it is rather astonishing that the learned sessions judge should have paid any attention whatever to it except to denounce it as perjury. It is quite incredible that if the accused had murdered Gouramma the night before, he would have persistently told this woman to go to Gouramma's house because she would be found there. Moreover, when this woman made a statement under s. 164, Cr.P.C. to the sub magistrate on the 24th February, her description of what she said to the accused and what he said to her after the discovery of the corpse was very different. She then said (Vide Ex. H): "I went to where Pulliah was and inquired him as to whither Gouramma had gone. He replied, "Madam, she is at the house. Where could she go." I said, 'You have killed her and laid her in the house and often and often you tell me that she is at the house. What do you mean by your talking in this way.' He turned to a deaf ear to what all I said to him. He never replied to my queries." This is a vastly different account from the one which she gave in the sessions court. Moreover, P.W. 9 the shop keeper has stoutly denied from the first that she ever came and told him that she had discovered Gouramma's corpse. The learned sessions judge accepts this evidence of P.W. 9 as true but passes over P. W. 7's lies with the remark that she was merely "trying to attribute to herself a civic consciousness which she did not possess". We must observe that this is not at all a proper attitude for a sessions judge to take up in the presence of deliberate perjury. The evidence of P.W. 7 should have been rejected *in toto*.

The evidence is quite insufficient to sustain the conviction of the appellant for murder. We therefore set aside the conviction and sentence of death and direct that the appellant be released forthwith.

T. *Conviction set aside.*

---

R. T. No. 25 of 1940
Cr. App. No. 121 of 1940

*April* 1, 1940

BURN & LAKSHMANA RAO JJ.

ABDUL BASHA SAHIB
v.
EMPEROR

*Evidence Act (I of* 1872) *Ss.* 27 & 30—*Statement under S.* 27, *Evidence Act—Applicability against co-accused.*

*Under S.* 27, *Evidence Act, only portions of the information given by the accused which relate distinctly to the facts discovered thereby are admissible. Portions of the information which involve a co-accused but which do not in any way relate to the facts discovered cannot be taken into consideration against the co-accused.*

Trial referred by the court of session of the Chingleput division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 33 of 1939 on 27—1—1940 and appeal by the appellants against the sentence of death passed upon the 1st appellant (accused No. 1) and the sentence of rigorous imprisonment for three years passed upon the 2nd appellant (accused No. 2) in the said S.C. No. 33 of 1939.

*R. Narasimhan*, for accused.

*Public Prosecutor* for Crown.

JUDGMENT

(BURN, J.)

On the morning of the 13th October, 1939, an Adi Dravida named Mandan (P.W. 9) who lives in Poonamallee found a corpse floating in a well called Mangadu Mudaliar's well. He saw a crowd of people searching in a neighbouring well and he told them what he had seen. Amongst that crowd was Mahadeva Chettiar (P.W. 8). He and the other people with him were looking for his mother Kanniammal who had left home the previous evening at about

6-30 to deliver some oil at the house of one Abdul Wahab Sahib and had not returned. P.W. 8 had reported the disappearance of his mother at the police station in Poonamallee at 1-10 a. m. on the 13th (Vide Ex. F) and had requested the police to make enquiries about her disappearance. He mentioned there that his mother was in the habit of wearing valuable jewels consisting of a gold chain made out of 20 sovereigns, gold bangles and kammals set with red stones. P.W.8 on hearing what P.W.9 had discovered went to the well of Mangadu Mudaliar and saw that the corpse in the well was the corpse of his mother. He therefore went again to the police station at 7 a. m. and reported this fact. The police had the body lifted out of the well and held an inquest which showed that the woman had been brutally murdered. No jewels were found upon the body except a nose screw. After the inquest the body was sent to the doctor in charge of the Poonamallee hospital and on the afternoon of the 13th October he made a post mortem examination. He found that the woman's lower jaw had been fractured, that there was a contused wound on her face, abrasions on her face and neck, that the lobes of both ears had been torn through and that seven ribs on either side of the chest had been fractured. All these injuries had been inflicted before death and were the cause of death. There were no signs of drowning.

The two appellants were tried by the learned sessions judge of Chingleput for the murder of Kanniammal. The unanimous opinion of the assessors was that the 1st accused was guilty of murder and that the 2nd accused was guilty of an offence under s. 201, I. P. C. The learned sessions judge agreed with the assessors and convicted the 1st accused of murder and sentenced him to death. He convicted the 2nd accused under s. 201, I. P. C. and sentenced him to 3 years R. I.

The 1st accused is the brother-in-law of Abdul Wahab Sahib, and the evidence of P. Ws. 4 and 5 the grand daughter and grandson of the deceased was that on the evening of the 12th October the 1st accused came to their house to tell their grandmother Kanniammal that oil was required at the house of Abdul Wahab. Both these witnesses say that their grandmother picked up the vessel containing oil and the other implements of her trade and went off to deliver oil as requested. The police in their investigation found that she had actually delivered oil at the house of Abdul Wahab that evening. A dhobi (P. W. 6) said that he had seen the deceased going in the direction of Abdul Wahab's house followed by both the accused. Narasammal (P. W. 7) who lives on the way between the house of the deceased and the house of Abdul Wahab also said that she had seen the deceased going in the direction of Abdul Wahab's house followed by the two accused.

The most important evidence is connected with the discovery of Kanniammal's gold chain, gold bangles and ear ornaments. The 1st accused was arrested after the inquest and on the morning of the 14th October he made a confession to the Circle Inspector (P. W. 14). The portions of this confession admissible under s. 27 of the Evidence Act relate to M. Os. 1, 6, 7 and 8. He alleged that Kanniammal had been beaten with a brick by the 2nd accused and offered to show the place where the murder had taken place. He showed in the backyard of Abdul Wahab's house a piece of brick (M. O. 1) upon which stains of blood were found. These stains were afterwards proved to be stains of human blood. The 1st accused further said that after Kanniammal has been murdered he and the 2nd accused had robbed her of her bangles, kammals and chain and had concealed them in a place which he offered to show. He took the police inspector and sub inspector and three other witnesses (P. Ws. 10, 11 and 12) to a piece of waste ground in front of the Dharmaraja Kovil and there dug up a spot which he had marked. He produced a piece of rag (M. O. 19) which when untied was found to contain a gold chain necklace, a pair of gold bangles and a pair of kammals (M.Os. 6, 8 and 7). These have been identified as the jewels of Kanniammal which she was in the habit of wearing and which she was wearing on the evening of the 12th October when she went out. Moreover, on the kammals the Chemical Examiner found blood though the stains were so far disintegrated by the time the kammals reached the Imperial Serologist that it was not possible to say for certain that the blood was human blood.

The 2nd accused was arrested on the 15th October after the confession made by the 1st accused in which he was involved. He is then

said to have made a statement which led to the discovery of the oil vessel, the funnel, the ollock measure and the ladle that Kanniammal was in the habit of using. These are M. Os. 2, 3, 4 and 5 and they were found in consequence of information given by the 2nd accused in two ruined wells about half a mile away from the well in which Kanniammal's corpse was found. Some evidence also was let in about some articles of clothing which it was said had been left by the 1st accused in the house of his brother Ismail. Blood was found on one of these garments but this item of evidence cannot be taken into consideration against the 1st accused because no one has been examined as a witness to prove that they were left in the house of Ismail by the 1st accused.

Both the accused denied that they had anything to do with the murder. The 2nd accused pleaded *alibi* and examined eight witnesses in support of his plea. The 1st accused alleged that on the evening of the 12th he had been engaged in his shop until 8-30 or 8-45 P.M. and that after that he had gone home and gone to bed. He said that the Chettis namely the relations of Kanniammal had been to his house during the night to enquire about her and that he had joined them in the search. He did not examine any witness to prove that he was engaged in his shop till 8-30 and when P. W. 8 was in the witness box no suggestion was put to him that the 1st accused had joined in the search. The *alibi* of the accused was therefore clearly not established. The *alibi* of the 2nd accused need not be discussed in detail since we are of opinion that he must be acquitted on the evidence adduced for the prosecution.

Learned counsel for the 1st appellant has contended that the evidence of the witnesses who say they saw the 1st accused come to fetch Kanniammal on the evening of the 12th October is unreliable, and that the confession said to have been made by the 1st accused to the police is inadmissible in evidence. We can find no reason whatever for rejecting the evidence of P. Ws. 4, 5, 6 and 7. No facts were elicited from them in cross examination from which it could be inferred that they had any reason to give false evidence against either of the accused. Narasammal (P. W. 7) was mentioned by P. W. 8 in his first complaint to the police (Ex. F) which was made at 1-10 A.M. several hours before the corpse of Kanniammal was found. With regard to the statement made by the 1st accused to the police learned counsel's argument is based upon an assumption that before the 1st accused made any statement to the Inspector on the morning of the 14th October he had already disclosed to the police what he knew. This argument is an attempt to apply the principle of decisions recently given to the effect that if the police got incriminating information from an accused person and then called upon him to repeat that information in the presence of witnesses, the statements made in the presence of witnesses would not be admissible under s. 27 of the Evidence Act. In the present case, however, there is no foundation for that argument because the Inspector has said quite clearly that the information given by the 1st accused which led to the discovery of the jewels was disclosed to him only on the morning of the 14th in the presence of the village munsif (P.W. 10) and two other witnesses (P. Ws. 11 and 12). We cannot find any reason to suspect the Inspector of telling falsehood in this matter. The jewels undoubtedly belonged to the deceased woman; she was wearing them when she went out to her death; the ear-rings had blood on them; they were found in consequence of what the 1st accused said. The 1st accused's statement so far as it relates to the discovery of these jewels is therefore admissible under s. 27 of the Evidence Act. There can be no doubt that the 1st accused is guilty and has been properly convicted of the murder of Kanniammal. We confirm his conviction for murder and the sentence of death passed upon him by the learned sessions judge.

The case of the 2nd accused is very different. He did not make any confession involving him in the murder. All that he said was that he had met the 1st accused at about 7-30 on the night of the 12th October and that the 1st accused had given him M. Os. 2, 3, 4 and 5 and had asked him to throw them away in any well that might be on his path. The learned sessions judge considers that the 2nd accused must have known that Kanniammal had been murdered and must have disposed of these articles in order to screen the 1st accused from punishment. It cannot be said that this conclusion follows from the mere fact of the 2nd accused complying with the request made by the 1st

accused. The 2nd accused can only be convicted if the statement of the 1st accused is taken into consideration as against him. The learned Public Prosecutor suggested that this could be done under s. 30 of the Evidence Act. One great difficulty in accepting this contention is that if the statement of the 1st accused is taken into consideration as against the 2nd accused and if it is believed, the 2nd accused also should be convicted for the murder of Kanniammal. In fact if the 1st accused was telling the truth to the police, it was the 2nd accused who inflicted on Kanniammal the injuries that caused her death. The 1st accused says that it was the 2nd accused who sat upon the old woman's chest and beat her on her face and neck with a brick. We are of opinion that it is not possible to take the statement of the 1st accused into consideration as against the 2nd. It is necessary to observe strictly the provisions of S. 27 by which the only portions of the information given by the 1st accused which are admissible are those which relate distinctly to the facts discovered thereby. The facts discovered thereby, as we have already said, are the jewels of the murdered woman and the blood stained brick (M.O.1) which was used to beat her about the face. It cannot be said that statements made by the 1st accused involving the 2nd accused relate in any way to these facts. All that is established as against the 2nd accused therefore is that he met the 1st accused on the evening of the 12th October and that he knew where M. Os. 2, 3, 4 and 5 were to be found. These facts lead to grave suspicion against the 2nd accused but they are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. The 2nd accused must therefore be acquitted. We set aside his conviction under S. 201, I.P.C. and the sentence of 3 years R. I. and direct that he be set at liberty forthwith.

N. T. R.

---

R. T. No. 42 of 1940
Cr. App. No. 197 of 1940
*April* 30, 1940

BURN & LAKSHMANA RAO, JJ.

KARUPPAN CHETTI & another
v.
EMPEROR

*Evidence Act (I of* 1872), *S.* 30—*Confession by one accused—Use against a co-accused.*

*The confession of a co-accused is of less evidentiary value than the testimony of an accomplice, because the man in the dock cannot be cross-examined. It can only be taken into consideration under S.* 30 *of the Evidence Act along with such other evidence as there may be, and may help the court to decide whether the other evidence is or is not credible. It cannot, however, supply the place of positive evidence regarding the commission of the crime.*

Trial referred by the additional sessions judge of the court of session of the Madura division for confirmation of the sentence of death passed upon the said prisoners in C. C. No. 119 of 1939 and appeals by the said prisoners against the said sentence.

*K. S. Jayarama Iyer, N. Krishnamurthi & C. K. Venkatanarasimham,* for Accused.

*Public Prosecutor,* for Crown.

JUDGMENT
(BURN, J.)

The appellants were the second and third accused in S.C. No. 119 of 1940 in which the learned additional sessions judge of Madura tried them and one Parthasarathi Chetti (first accused) on the charge that the second and third accused had murdered one Chokalingam Chetti on the 17th June, 1939, and that the first accused had abetted the commission of the murder by them. The learned additional sessions judge considered that the evidence of abetment by the first accused was insufficient and acquitted him, but the second and third accused, the learned additional sessions judge, agreeing with the assessors, found guilty of the offence of murder.

There is no doubt about the fact that Chokalingam Chetti was murdered on the night of the 17th June, 1939, at Bodinaikanur. He was stabbed in 24 places and his head was cut off. The case was undoubtedly one of murder. The chief evidence against the appellants con-

sisted of confessions made by the third accused. He was arrested on the 26th June in the house of a country doctor (P.W.29) to whom he had gone for treatment of a wound on his leg. When the circle inspector saw him, the third accused made a long confession to the inspector which has been recorded in Ex. AA. The learned additional sessions judge has only admitted in evidence under S. 27 of the Evidence Act certain portions of this statement which in his opinion relate distinctly to important facts discovered in consequence of the information given by the third accused. The third accused said that he was prepared to show the weapon which had been used by himself and the second accused in killing Chockalingam Chetti. He also said that he would show the place where the head had been buried separately from the trunk. He took the police to a place about a furlong to the north of Bodipuram and there he produced from under a bush a dagger (M. O. 1) and an aruval (M.O.2). According to his story the dagger had been used by himself and the aruval by the second accused. The evidence of the doctor who made the postmortem examination showed that at least two kinds of weapons had been used, a stabbing instrument and an ordinary cutting instrument. The third accused's story that M.Os. 1 and 2 were the weapons used may therefore be true but it was not confirmed by the results of chemical and serological examination. The chemical examiner was unable to find blood on the dagger (M.O. 1). He found blood on the aruval (M. O. 2), but it was in such a disintegrated condition that it was not possible to apply the test for human blood. The third accused also pointed out the place where he said the skull had been buried. Here again his information was not fully corroborated by the fact discovered for the skull was not found there. It was corroborated to some extent however because the police found a nasty smell and some human hair. A human skull was found a few days later about a furlong further off and the lower jaw bones separated from it. The doctor was able to find that the jaw bones fitted the skull but he was not able to say that the skull was the skull of the person to whom the trunk had belonged.

The third accused was taken before the submagistrate on the 28th. On the 1st July he made a long and detailed confession to the sub magistrate of Tirumangalam which is Ex. J. The sub magistrate took all the possible precautions to ensure that he should not make a confession of any kind unless he really wanted to do so and the sub magistrate was satisfied that he was making a statement voluntarily. The third accused persisted in confessing throughout the proceedings in the court of the magistrate who held the preliminary enquiry. When he was questioned on the 30th September, 1939, more than three months after the offence he again repeated his confession and in fact added details which he had not mentioned before. The sub magistrate decided to commit the three accused for trial on the 4th October and even on that date when the third accused was asked if he had any witnesses to be examined in the sessions court he said that he had none but he did not disown his confessions. This is some what important because the plea of learned counsel for the third accused is that his confessions ought to be held to be irrelevant as having been made under inducement. It was alleged that the inspector of police had induced him to confess by promising that he should be taken as an approver.

If the confessions of the third accused are true, there is no doubt about his participation in the murder of Chockalingam Chetti for he says that he stabbed him in several places. We have been asked to say that the confessions cannot be relied upon because they do not tally with all the evidence that has been given by the prosecution witnesses and because they are not identical. There are slight differences between the confessions made on the 1st July and on the 30th September. We do not think however that these divergences between the two confessions or the omissions from the confessions of facts spoken to by the prosecution witnesses are sufficient reasons for rejecting the confessions. The allegation that the police inspector induced the third accused to confess by promising to take him as an approver cannot be believed. It is clear, we think, that these confessions were made voluntarily by the third accused and that, so far as concerns his participation in the murder they are true. They are rather strongly corroborated by the discovery on information given by him of the two weapons and of the place where something dead had been buried. The confessions are strongly corroborated by the

evidence given by three witnesses, P. Ws. 27, 28 and 29. As already stated, the third accused was arrested in the house of P. W. 29 who is a country physician. The third accused had been taken to that house by his relations P. W. 27 and by P. W. 28. All these three witnesses said that when he was asked to explain the wound on his legs, the third accused admitted that he and the second accused at the instigation of the first accused had killed a Chetti in Bodinaikanur. The assessors and the learned sessions judge, we think, were undoubtedly right in holding that the third accused was guilty of the offence of murder. We confirm his conviction for murder and also the sentence of death and dismiss his appeal.

The case of the second accused is quite different. The evidence against him was that of several witnesses who said that, on three or four days before this murder was committed, they had seen him in company with the third accused in Bodinaikanur. The third accused belongs to Mallapuram which is a long way from Bodinaikanur. There was evidence also given by P. W. 26 that on the night of the 17th June, the second accused went to Bodinaikanur along with the third accused and both of them entered the house of the second accused. The evidence of P. W. 26 was accepted by the learned Sessions Judge. Learned counsel for the second accused has criticised the evidence of P.W. 26 rather severely because he was unable to explain consistently how he happened to get up and come out of doors in the middle of the night and see the second and third accused. In one place he said that he thought somebody was knocking at the door of the house in which he was sleeping. But in the sessions court he says that he got up and came out because he heard somebody knocking at the door of the house of the second accused. The learned sessions judge was apparently favourably impressed by the demeanour of this witness and we find it difficult to reject his evidence. Besides this, the only other item of evidence against the second accused was given by a police foot-print expert. In the confession of the third accused before the sub magistrate on the first July it was stated that, after committing the murder, the third accused and the second accused ran away in a north easterly direction and passed over some clay bricks which had been laid to dry. When these bricks were examined, marks of human feet were found on them. The foot print expert took specimen prints from the feet of the second and third accused in clay which was as nearly as possible of the same texture as that of the bricks found near the brick kiln. Having compared these test prints with the prints found on the bricks near the kiln, the expert said that in his opinion the foot prints had been made by the second accused and the third accused. We have examined the prints ourselves and find it very difficult to express any opinion. It is quite conceivable that the eye of the expert can see a good deal more in matters of this kind than an untrained eye. But it has to be remembered that the brick kiln where these foot prints were found is about a quarter of a mile away from the place where Chockalingam Chetti was murdered. The positive evidence, therefore, even if it is all accepted, is simply that before the murder the second accused was in the company of the third; immediately after the murder, or very shortly after the murder he was in company with the third accused and his foot prints have been found alongside the foot prints of the third accused on some soft bricks about a quarter of a mile away from the scene of the crime. On these facts learned counsel for the second accused asks us to say that the second accused cannot be held guilty of the murder of Chockalingam Chetti. We think that this contention is well founded. The third accused implicated the second accused in the crime in his confessions and if the third accused's confessions are true the second accused took in fact a leading part in the killing of Chockalingam Chetti. But the confessions of the third accused, as has frequently been held, are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under s. 30 of the Evidence Act along with such other evidence as there may be. This has been generally interpreted to mean that a confession like these given by the third accused in this case may help the court to decide whether the other evidence is or is not credible. It cannot however supply the place of positive evidence regarding the commission of the crime. In the present case, for instance, if we were in doubt as to the credibility of the evidence given

by P. W. 26, that doubt might be resolved by taking the confessions of the third accused into consideration. But since the rest of the evidence does not show that the second accused took part in the crime the confessions of the third accused cannot be used to supplement it and to furnish the sole evidence of the actual murder. The circumstances proved against the second accused by the witnesses to whom we referred do not in our opinion lead inevitably to the inference that he took part in the murder of Chockalingam Chetti. For these reasons we set aside the conviction of the second accused and the sentence of death and direct that he be set at liberty.

N.T.R.

—

Cr. R. C. No. 56 of 1940

Cr. R. P. No. 53 of 1940

*April* 3, 1940

LAKSHMANA RAO, J.

MUTHUSWAMI THEVAR *alias* MAPPILLAISWAMI THEVAR

v.

Rajakumar B. RAJARAM PANDIAN

*Cr. P. C. (V of* 1898), *s.* 145—*Petitioner claiming possession of entire village—Magistrate declaring petitioner entitled to possession of undivided* 5-8 *share—Not permissible under the section.*

*In a peiition under s.* 145, *Cr. P. C., the petitioner claims to be in possession of the entire village and the magistrate found him entitled to possession of an undivided* 5-8*th of the village and declared accordingly.*

Held, *that such an order was not permissible under s.* 145, *Cr. P. C. and the order declaring the petitioner to be entitled to possession of* 5-8*th share must be set aside.*

The facts appear from the order of the lower court which was as follows :

1. Mr. Rajaram Pandian, uncle of the present Raja of Ramnad, files this application under s. 145, Cr. P. C. against the five C. Ps. C. P. 1 is the direct brother-in-law of petitioner, as the latter had married C.P. 1's sister Sethumuthu Nachiar, who died in 1932.

2. The petition alleges that the village of Vathiendal in Mudukulatur taluk is in the possession and enjoyment of petitioner as the guardian of his minor daughter Tillakarasu Nachiar. The manner in which the village came to his minor daughter is alleged to be as follows. Chinnaswami *alias* Kumarswami Tevar, father of C.P.1, and of Sethu Muthu Nachiar, made a will dated 9–11–08 by which he gave 9-16 share of the village Vathiendal in equal halves to his two daughters Parvata Vardhini Nachiar and Sethu Muthu Nachiar. The former was a wife of the late Rajah Sahib and died issueless in 1923. Executors were also appointed by the will who managed it and during their period of office, they purchased another 3-16 of the village. The entire 12-16 was handed over in 1917 to Velusami Tevar elder brother of C. P. 1, who managed the 12–16 on behalf of the sisters. This Veluswami Tevar managed till 1929 and he got possession of the remaining 1-4 of the village by an othi-deed. Petitioner's allegation is that in 1929 Velusmi Tevar handed over the entire village to him as the elder sister Parvata Vardhini had died, and as petitioner was the husband of the surviving sister Sethumuthu Nachiar. In 1932 the latter also died, and petitioner's case is that he managed the entire village through his agents and servants till 1936. In 1936 petitioner asked C.P.1 to manage the village for him on behalf of his minor daughter. C. P. 1 was accordingly managing for him, and as petitioner was dissatisfied with his management he issued him a registered notice Ex. D dated 21–1–39 terminating his management. To this C.P.1 gave a reply (Ex. D.1) intimating that he was managing correctly on behalf of the minor, and that he was not doing anything adverse to her interests.

3. C.P.1's case as outlined in his written statement is that the two sisters only had each a life interest in the half of the 9-16 share of Vathiendal village, that as each sister died, her half share was extinguished, and that he, as one of the two sons of Chinnaswami Tevar is entitled to the 9-16 share. He admits that Veluswami Thevar his elder brother had executed a mortgage of the 1-4 share of the village he had got on othi, to Sethumuthu Nachiar in discharge of the mesne profits due to her for management of her half of the 9–16 share, and that it is only to this 1-4 share of the village that the minor Tillakarasu Nachiar is entitled. C.P.5 is the father-in-law of C.P.1 and had been given a general power of attorney by the deceased Veluswami

Tevar to manage during the illness of the latter. C. Ps. 2 to 4 are merely the partisans or servants of C. Ps. 1 and 5.

4. The petitioner examined two witnesses besides himself. The C. Ps. examined two witnesses. It is admitted by petitioner that since 1936 the C. P. 1 has been in possession and management of the village, but he claims that this is only as his manager or servant and on behalf of his minor daughter Tillakarasu Nachiyar. The petitioner has filed documents Exs. A, B and C series to show that Velusami Tevar did in fact hand over the village to him in 1929 or so, after petitioner had married Sethumuthu Nachiar. There is little doubt that petitioner and his wife were managing till latter died in 1932. This is supported by the evidence of the Karnam (prosecution witness 2), who mentions both mother and daughter as managing for 3 faslis from fasli 1338. From 1932 to 1936 petitioner's mother-in-law Kuppu Nachiar seems to have looked after the village. Petitioner says that she was managing on behalf of his minor daughter and it was with his consent. Counter petitioner 1 urges that Kuppu Nachiar was managing as she was the heir of her deceased daughter Parvata Vardhini and therefore she was of right entitled to one half of the 9-16 of the village. But this does not square with counter petitioner's own case that the sisters had only a life interest which perished with them. It is also significant that the husband of Parvata Vardhini the late Rajah Sahib claimed one half and sent a registered notice (Ex. II). So also did the present Rajah (Ex. III) claiming to be the heir of his father and therefore entitled to the land. All this seems to indicate that Kumaraswami Tevar bequeathed the entire land to his two daughters and not merely a life interest. At best therefore counter-petitioner 1 could only lay claim to 1-2 of the 12-16 (3-4) share on the ground that he was the heir to Kuppu Nachiar his mother. Counter petitioner 1's pleader argues that he is really in the position of a co-sharer who is in full possession of one half having title to the same and has been admitted to the possession of the other half. But this title to one half of 3-4 (i.e. to 3-8 of the village) which is now set up is one which the civil courts have to decide. There is not the slightest doubt in my mind that the minor Tillakarasu Nachiar is entitled to 1-2 of the 3-4 (3-8) and also to the entire 1-4 which was mortgaged to her mother by Velusami Tevar in liew of *mesne profits*. Thus for 3-8 plus 1-4 of the village the minor alone has the right and as regards this 5-8 the counter petitioner is clearly only a manager as is clearly proved by his own admission in Ex. D-1.

The only other question which remains is whether the manager (counter petitioner 1) can assert that he can plead his possession and enjoyment as adverse to that of his principal. The petitioner's learned pleader relies on 1932 M. W. N. 1079: Cr. 219 for the position that "no authority has been quoted to show that a servant can set up that possession by him for his master or superior is his own possession or that the master or superior cannot set up that possession as his own though exercised for him by his servant." As against this the counter petitioner's pleader relies on 1937 M. W. N. 732; Cr. 156 in which Horwill, J. held that a squatter's possession as against his principal would be upheld unless his possession began within 2 months of the filing of a petition under s. 145 Cr. P. C. The counter petitioner's pleader's argument is that as the registered notice terminating his management was on 21—1—39 and as the s. 145 petition before this court was filed only on 2—5—39 his position as a squatter has to be protected as it began before 2 months from the date of s. 145 petition. But the counter petitioner 1 did not admit that he would not hand over or that he refused to manage. His reply Ex. D-1 to the notice Ex. D was that he was managing on behalf of the minor and doing nothing adverse to her interest. In other words he stated that he wished to continue as manager and not as a trepasser. He cannot now plead therefore that he was a trespasser, or a squatter. His possession therefore continued to be his master's as per the earlier decision.

I therefore declare that the minor Tillakarasu Nachiar is entitled to enjoyment and possession of 5–8 of the village Vathienda! through her guardian the petitioner and do hereby restrain the counter petitioners from interfering with the petitioner's enjoyment of the said 5–8 in any way unless evicted therefrom in due course of law. As regards the remaining 3–8 I refer the parties to a civil court."

PETITION under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the

order of the Court of the joint magistrate of Ramnad dated 27—11—1939 and passed in M. C. No. 22 of 1939.

*K. S. Jayarama Iyer*, for Petr.
*U. Somasundaram*, for Respt.
*Public Prosecutor*, for Crown.

ORDER

The respondent claimed to be in possession of the entire village and the joint magistrate has declared him to be entitled to possession of an undivided 5–8ths of the village. This is not permissible under s. 145, Cr. P. C. and the order declaring the respondent to be entitled to possession of 5-8ths of the village is set aside.

N.R.G. — *Order set aside*

Cr. App. No. 654 of 1939
*April* 25, 1940
LAKSHMANA RAO, J.
PATTAMMAL
v.
EMPEROR

*Penal Code (XLV of 1860), s. 201—Information under the section need not be to police or magistrate—May be voluntary or in reply to enquiries.*

*For an offence under s. 201 I. P. C., the information need not be given to the police or the magistrate and it is immaterial whether that information is volunteered or given in reply to enquiries.*

APPEAL against the order of the court of session of the Chingleput division in C. C. No. 26 of 1939.

*V. T. Rangaswami Iyengar*, for Applt.
*Public Prosecutor*, for Crown.

JUDGMENT

The appellant is a dancing girl and she was charged with the murder of her paramour Murugesa Mudali. She was acquitted of that offence and has been convicted under s. 201(1) I. P. C. for giving false information with intent to screen the offender from legal punishment and sentenced to R. I. for three years.

Murugesa Mudali went to the house of the appellant about 3 p. m. on the 15th July last and P.W. 5 the sweeper woman found him and the appellant lying and chatting on a cot when she left the house about 4-30 p.m. There was none else in the house and the appellant came out some time later and shouted "Akka, Akka, see the aniyayam." The mother and sisters of the appellant who were near their house close by rushed into the house and P. Ws. 13 and 14 who were near P. W. 13's house next door ran up. The appellant requested them not to crowd and closed the door against them and P. Ws. 13 and 14 returned. But P. Ws. 15 and 16 who were near the opposite house went and knocked the door and the sister of the appellant opened it. P. Ws. 15 and 16 then went in and they found Mugugesa Mudali partially reclining on the chest of the appellant in the room which was almost closed. He was unconscious and breathing heavily and P. Ws. 15 and 16 enquired what the matter was. The appellant stated that Murugesa Mudaliar complained of stomach-ache, had a motion and was reduced to that condition and P. Ws. 15 and 16 suggested that he should be brought to the verandah. This was done and one of the sisters of the appellant asked P. W. 15 to fetch her paramour Sundaresa Pillai. He was brought and P. W. 8 was sent for. He was absent from his house and his son P. W. 6 was informed. P. W. 6 informed his brother P. W. 4 who was in the house of Murugesa Mudali and P. Ws. 4, 6 and 7 rushed to the spot. Murugesa Mudali was lying unconsicious and P. W. 2 the mission doctor was sent for. P. W. 4 asked the appellant what the matter was and she stated "We are chatting and lying. Mudaliar suddenly complained of stomach-ache. He went to latrine. He passed no stools. He returned. He had a hiccough. He passed stools in his bed and then he became unconscious."

But Murugesa Mudali was in fact reduced to that condition by the throttling and he died on 18th July of pnuemonia due to throttling. The information given by the appellant was therefore false and on her own statement to P.W. 4 there was none else in the house and she and Murugesa Mudali were lying and chatting. There is also the evidence of P.W. 5 the sweeper woman to the same effect and whether or not the appellant had any hand in the matter Murugesa Mudali could not have been throttled without her knowledge. The information was thus false to her knowledge and it is

obvious that it was given with intent to screen the offender from legal punishment. The information need not be given to the police or the magistrate under s. 201, I. P. C. [vide *The Queen* v. *Subramania Pillai* (1), and it is immaterial whether that information is volunteered or given in reply to enquiries vide *Queen Empress* v. *Ramji Sajaba Rao* (2), and *The Acting Public Prosecutor* v. *Chinnappa Reddi* (3)]. The conviction under S. 201, I. P. C. is therefore correct and in the circumstances of the case the sentence is not excessive.

The conviction and sentence are therefore confirmed and appeal is dismissed.

N.R.G. *Appeal dismissed.*

—

Cr. R. C. No. 128 of 1940
Cr. R. P. No. 122 of 1940
*April* 25, 1940

LAKSHMANA RAO J.

M. N. BELLI GOWDER
v.
EMPEROR.

*Motor Vehicles Taxation Act* (III *of* 1931), *S.* 7—*Madras Motor Vehicles Rules, r.* 138—*Car used as a transport vehicle—Conviction for —Essentials.*

*A car would be a transport vehicle as defined in r.* 4, *cl.* 30 *of the Madras Motor Vehicles Rules only if it is habitually used for the carriage of goods.*

*Where the petitioner denied that his car was so used and no enquiry was held about it a conviction under R.* 138 *of the Madras Motor Vehicles Rules cannot be sustained.*

THE FACTS appear from the judgment of the court below which was as follows: "This is a case of using a car registered as a private car for commercial purposes under s. 7 of the Motor Vehicles Taxation Act. The accused owns an ordinary touring car which he uses for carrying tea leaf from his estate to a neighbouring factory. This he has done on a number of occasions, e. g. 31–8–1939, 8–9–1939, 4–9–1939, 13–9–1939 and 7–10–1939. It is contended that these odd occasions do not constitute 'habitual' use as required by R. 138. I cannot accept this plea. I am therefore bound to find the accused guilty and convict. Nevertheless I feel that the rule is a very hard one and as conviction necessitates payment of enhanced tax for the period concerned, I feel that the actual penalty inflicted should be light. Fined Rs. 5 and ordered to pay enhanced tax for the period during which it was used as a goods vehicle, i.e., for the quarter ending 30–9–1939, Rs. 75 or three months' simple imprisonment."

Petition under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the joint magistrate of Coonoor dated 6—12—1939 and passed in S. C. No. 599 of 1939.

*K. S. Sankara Iyer & A. K. Sreeraman,* for Petr.

*Public Prosecutor,* for Crown.

ORDER

The accusation against the petitioner was under s. 7 of the Motor Vehicles Taxation Act, 1931, for using his car as a goods vehicle and he has been convicted under r. 138 of the Madras Motor Vehicles Rules for using a transport vehicle without the requisite permit. The car would be a transport vehicle as defined in r. 4, cl. 30 only if it is habitually used for the carriage of goods and the petitioner denied that it was so used. No enquiry was however held about it and the conviction cannot for that reason be sustained. The conviction is therefore set aside and there will be a retrial in accordance with law by the district magistrate or such other magistrate as he may direct.

N.R.G. *Conviction set aside.*

—

Cr. R. C. No. 110 of 1940
Cr. R. P. No. 107 of 1940
*April* 11, 1940

LAKSHMANA RAO, J.

Pudukodu ISWARA SUBRAMANYA AYYAR
v.
EMPEROR

*Prevention of Adulteration Act* (*Mad. Act III of* 1918), *s.* 5 (1) (*b*)—*Offence under—Ingredients.*

1. 3 M. H. C. R. 251
2. [1886] 10 Bom. 124
3. 1 weir 118.

*Petitioner stored adulterated ghee intended for the preparation of eatables in his restaurant. Petitioner was convicted by the lower court for an offence under s. 5 (1) (b), Prevention of Adulteration Act. In revision,*

Held, *that the ghee was not stored or offered for sale, and that the conviction under s. 5 (1) (b) was unsustainable.*

The facts appear from the judgment of the lower appellate court which was as follows :

"The taluk magistrate, Vizagapatam, found the accused in C. C. No. 1567 of 1939 on the file of his court guilty under s. 5 (1) (b) and r. 28 under s. 20 (2) (f) of Madras Act III of 1918 convicted and sentenced to pay a fine of Rs. 100 with S. I. in default for a month for storing adulterated ghee intended for the preparation of eatables in his restaurant known as Palghat Coffee Club. Against that finding and sentence it is now contended before me that the prosecution launched by the sanitary inspector is not maintainable in law.

The main contention on behalf of the appellant is that he does not sell ghee as ghee. It is said that the ghee was intended for preparing estables for sale. But, the price of ghee is necessarily included in the price of the estables and even storing of adulterated ghee is an offence punishable under s. 5 (1) (b) and r. 28 framed under s. 20 (2) of the Act....."

Petition under ss. 435 and 439 Cr.P.C. 1898, praying the High Court to revise the judgment of the court of the sub divisional magistrate of Vizagapatam in C. A. No. 57 of 1939 preferred against the judgment of the court of the taluk magistrate of Vizagapatam in C. C. No. 1567 of 1939.

*V. Rajagopala Mudaliar*, for Petr.
*Public Prosecutor*, for Crown.

ORDER

The ghee was not stored or offered for sale, and the conviction under s. 5 (1) (b) of the Madras Prevention of Adulteration Act [Act III of 1918] is unsustainable. It is therefore set aside and the fine if levied will be refunded.

N.T.R. *Conviction set aside.*

—

Cr. R. C. No. 899 of 1939
Cr. R. P. No. 847 of 1939
*October* 27, 1939

LAKSHMANA RAO J.

PONNUSWAMY PILLAI
v
EMPEROR.

*Criminal trial—Charge by sub collector—Sub collector as joint magistrate, if can hear appeal from conviction.*

*Where a prosecution was sanctioned by the joint magisrtate as sub collector he should not hear an appeal from the conviction as joint magistrate except with the permission of the court to which an appeal lies from his court.*

FACTS:—The accused was charged on the initiative of the sub collector for an offence under s. 26 (c) Madras Forest Act and was convicted by the stationary sub magistrate to fine. The appeal therefrom came on before the sub-collector, who charged the accused, in his capacity as joint magistrate and he confirmed the conviction. Although it was pointed out to him accused had no objection to the district magistrate hearing the appeal. The revision was filed inter alia on the ground, "The lower appellate court having sanctioned the prosecution ought to have transferred the appeal *suo motu* to the file of some other court of competent jurisdiction under the principles of justice, equity and good conscience (under s. 506 Cr. P. C."

PETITION under ss. 435 & 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Hosur dated 17th July 1939 and made in C.A. No. 37 of 1939 preferred against the judgment of the court of the stationary sub magistrate of Hosur dated 2nd June 1939 and made in C. C. No. 309 of 1939.

*T. M. Venugopal Mudaliar* for Petr.
*Public Prosecutor* for Crown.

ORDER.

The prosecution of the petitioner was sanctioned by the joint magistrate and the appeal should not have been heard by the joint magistrate except with the permission of the court to which an appeal lies from his court. This petition is therefore allowed and the appeal is remanded to the district magistrate of Salem for disposal by him or such other magistrate as he may direct.

N.T.R. — *Petition allowed.*

R. T. No. 50 of 1940
Cr. App. No. 226 of 1940
*June* 10, 1940
GENTLE & PATANJALI SASTRI, JJ.
EMPEROR
v.
ANDI THEVAN

*Penal Cade (XLV of* 1860*), S.* 300, *exception* 1*—Scope of—Grave and sudden provocation.*

*Where the accused having already attacked four persons was running in the street armed with a knife and the deceased attempted to take it from him and thereupon the accused stabbed him in a vital part of the body, the offence is clearly one of murder.*

*Where the accused stabbed a person while he was running and the injuries were then slight and after an interval the person closed with the accused in order to take the knife from him and by the time the accused had already attacked three persons, and that person threw or flung the accused against a wall, to prevent the accused from continuing the attack, and the person died,*

Held, *that any violence which the deceased used in wrestling with the accused and throwing him against the wall cannot amount to grave and sudden provocation within the exception to S.* 300, *I. P. C. reducing the offence of murder to one of culpable homicide.*

*The question of grave and sudden provocation is a question of fact.*

*Where the accused was asked by M and four others to come to a panchayat and on refusal by the accused he was dragged by his hand and pulled away from the steps of his house by M the deceased, and the accused took out his knife and inflicted injuries which proved fatal and the evidence showed that all the five people were unarmed,*

Held, (*Gentle J.*) *that pulling by hand is exercising some force and was done in order to make the accused go to some place against his will and may be provocative, but as this was done by an unarmed man such conduct is not what the first exception to S.* 300, *I. P. C. contemplates as amounting to grave and sudden provocation.*

Held, (*Patanjali Sastri J.*) *that having regard to the fact that a few days prior to the occurrence there was an abortive panchayat, what the deceased is said to have done to the accused at the time of the occurrence amounted to grave and sudden provocation as contemplated by the exception to S.* 300, *I. P. C.*

The facts of the case appear clearly from the judgment of the lower Court.

The sessions judge states *inter alia* in his judgment: "The next point, arising for determination, is what is the offence which the accused must be deemed to have committed on the several charges. It is strenuously urged on behalf of the defence that as far as the death of Muthukaruppa, covered by the first charge is concerned, the offence, if at all, would amount to one of culpable homicide not amounting to murder and not murder, on account of the sudden and grave provocation that the accused received at the hands of Muthukaruppa. The evidence discloses that Muthukaruppa pulled the accused by the hand, asking him to come for a panchayat, before the accused whipped out a knife and stabbed him. It must be conceded in favour of the defence that there was some provocation because the accused was in a sullen and refractory mood and reluctant to submit the dispute between his wife and P.W.8 to the deliberations of a panchayat and the act of Muthukaruppa in pulling him by the hand must have irritated him and roused his anger, to some extent. But the provocation, though sudden, cannot be considered to be grave. The offence, therefore, amounts to murder. As far as charges Nos. 2 and 3, relating to the murder of Masanan and Dorairaj, are concerned, there can be very little doubt that the offence committed by the accused would amount to murder. They gave him no provocation whatever for the brutal attack on them. They merely attempted to wrest the knife from him probably to prevent him from running amok and from stabbing others, as he had stabbed Muthukaruppa. Under S. 59, Cr.P.C. a private person had got the right to arrest anybody who, in his view, commits a nonbailable and cognisable offence. When the accused stabbed Muthukaruppa, in their presence, Masanan, Dorairaj and P. Ws. 5 and 6 had the right to arrest the accused. It is not, therefore, open to the accused to successfully contend that he stabbed them because they attempted to catch hold of him or his knife or because he thought that they would disarm him and inflict injuries on him, with his own weapon,

If he had any real or genuine apprehension that these persons would inflict injuries on him if they succeeded in wresting the weapon from him, he could have contended himself with stabbing them on the hand or some less vulnerable or less vital part of the body than the chest and the abdomen. But he stabbed Masanan on the back and Dorairaj on the chest and abdomen and caused their almost instantaneous death. The offence in both the cases would, therefore, amount to nothing less than murder. On the fourth charge there can be little doubt that the offence committed by the accused amounts to attempt to murder. He stabbed P. W. 6 on the abdomen with M. O. 1 which is a very sharp knife. P.W. 11 says that the injury to the abdomen was a grievous one likely to endanger life. It had cut the liver, after penetrating the abdominal cavity. An operation had to be performed on the patient and the injured liver tissue was repaired. P.W. 6 appears to have had a narrow escape from the jaws of death. The injuries on P.W. 5, however, were simple; and on the fifth charge, therefore, the accused would be liable only under S. 324 I. P. C. as charged.

Assessors 1 to 3 say that the accused is guilty only of culpable homicide not amounting to murder on the first three charges; under S. 308, I.P.C. on the fourth charge and under S. 324 I.P.C. on the fifth charge, while the 4th assessor says that the accused is guilty of murder on the first three charges, attempt to murder on the fourth charge and under S. 324 I.P.C. on the fifth charge. For reasons which I have set out in my judgment, I agree with the opinion of the 4th assessor on charges Nos. 1 to 4 and all the assessors on charge No. 5.

On the first charge, I sentence the accused to transporation for life. Although the provocation was not grave still there was some provocation which would justify the infliction of the lessor penalty. But as far as charges 2 and 3 are concerned, I see no valid reason to refrain from passing the extreme penalty of the law upon the accused. The accused acted in a very cruel manner, in going on indiscriminately stabbing people who were only trying to wrest the knife from him, to prevent him from causing further havoc and from running amok. On the second and third charges, therefore, I sentence the accused to be hanged by the neck till he is dead, subject to confirmation by the High Court. He is informed that if he wishes to appeal to the High Court, he should do so within seven days. On the fourth charge I sentence the accused to ten years' rigorous imprisonment; and on the 5th charge to eighteen months' rigorous imprisonment."

TRIAL referred by the additional sessions judge of the Court of session of the Madura division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 7 of 1940 on 5th March, 1940, and appeal by the said prisoner against the said sentence and the sentences of transporation for life and rigorous imprisoment for ten years and rigorous imprisonment for 18 months passed upon him in the said case.

*D. Narasaraju*, for Accused.

*Public Prosecutor*, for Crown.

## JUDGMENT

GENTLE, J. The appellant was tried and convicted by the learned additional sessions judge of Madura upon five counts in an indictment, the first three counts being for murder, under S. 302 I. P. the fourth count for attempting to murder under s. 307 I. P. C. and the fifth count, voluntarily causing hurt with a dangerous weapon under s. 324 I.P.C. He was sentenced to transportation for life for the offence of murder in the first count, to death in respect of the second and third counts, rigorous imprisonment for a term of ten years under the fourth count and rigorous imprisonment for eighteen months under the fifth count.

The offence is alleged to have been committed in Madura on the evening of the 3rd of October 1939. The occurrence took place in a lane in a block of houses which are owned by P. W. 1 who lives in a large house in the block himself and lets the others out to tenants, which tenants include P.Ws. 2, 3, 4, 9 and the accused, P. W. 4 being a subtenant of the accused who is himself the immediate tenant of P. W. 1. The three deceased persons are Muthukaruppan, Masanan, and Dorairaj. Muthukaruppan and Dorairaj together with P. W. 9 are brothers. P. W. 8 is the wife of P.W. 9.

Three or four days before the occurrence, a quarrel arose between the son of P. W. 9 and the son of the accused. The respective mothers of those childern seem to have intervened,

naturally supporting their own offspring, and the offices of P.W.1 were obtained, for him to terminate the quarrel. P. W. 2 another tenant of the building seems to have supported the side of P.W.9's son and wife, P.W.8, and the matter ended by pacifying the parties although P.W.2 and the accused seem to have exchanged hot words.

On the evening of the occurrence, the two deceased Muthukaruppan and Dorairaj, together with P. Ws. 5 and 6 were playing cards together about two furlongs from the block of houses, the deceased Masanan went to them and told Muthukaruppan that it was necessary in the interests of peace that a reconciliation should be effected between the wife of the accused and P.W.8. Thereupon all the above five persons went to the house of the accused being No. 8 in the block and adjacent to a lane running east. The case for the prosecution is as follows. The accused was in a sullen and resentful mood. Muthukaruppan asked him to accompany them to the house of P.W.1 in order that the differences between the women could be composed. One criticism made upon this part of the evidence is that P.W. 9, the husband of P.W.8 was at the time away from the village and comment has been made of the unlikelihood of the suggestion that anything in the nature of a panchayat would take place involving differences in which P.W.8 was concerned in the absence of P.W.9. The accused said that he was not prepared to go to any panchayat and Muthukaruppan then caught hold of him by the hand and pulled him again asking him to go to the proposed panchayat. At this time the accused is said to have been sitting on some steps which lead from the passage communicating with his house into the east to west lane. When Muthukaruppan pulled him by the hand, the accused suddenly whipped out a knife (M.O.1) which was in his waist, opened it so that it formed a dagger and stabbed Muthukaruppan in the chest. Muthukaruppan ran down the lane in an easterly direction followed by the accused. P. W. 5 followed and attempted to prevent the progress of the accused whereupon the accused stabbed him three times in the head, arm and shoulder. Masanan tried to snatch the knife from the hands of the accused who stabbed him two or three times and then the accused entered a lane leading from east to west lane which was on his right, into which Muthukaruppan had gone. Accused immediately emerged from this second lane back into the first lane. Masanan again caught hold of the accused, tried to wrench the knife from his hand and pushed him with some force. The accused was flung against the wall of the house opposite the entrance to the second lane and then recovering himself, the accused stabbed Masanan twice, once in the back and once in the thigh. Masanan fell down and died. At this point, it is relevant to indicate that when P. W. 5 was giving evidence about this in the committing magistrate's court, he said that Masanan snatched the knife from the accused. This he denied before the learned sessions judge. The accused then turned back in the direction of his house. P. W. 6 next tried to obtain possession of the knife from him and was stabbed by the accused in the hand and abdomen. Dorairaj then went towards him and tried to get hold of the knife. The accused plunged it twice into his chest and abdomen and Dorairaj dropped down dead at that spot.

The medical officer (P. W. 11) examined the injured persons and in so far as the deceased are concerned, he gave the causes of death, and that the injuries were serious. He said that the injuries inflicted upon P. W. 6 were grievous and upon P. W. 5 were simple. The injuries inflicted upon the last two persons are the subject of the charges and convictions under the fourth and fifth counts. He also examined the accused and found a small cut on one finger and an abrasion on one wrist. He expressed the opinion that the cut might be caused by an attempt to wrench a knife from his hands and also that the abrasion on the wrist might be due to contact with a wall such as when he was pushed by Masanan against the wall facing the second lane.

The eye witnesses who have spoken to the whole or parts of the five happenings are P.Ws. 3, 4, 5, 6, 7 and 8, of which P. Ws. 3 and 4 are independent and unconnected with any of the other witnesses. A suggession was made to P.W. 4 that he was in similar employment as the accused and also that he was his debtor in respect of some rent.This the witness denied. This is the only suggession or criticism which was made in regard to the witness P.W.3 spoke to the second attack upon Masanan and

the tussle or srtuggle which took place at the junction of the second with the first lane. P.W. 4 gave evidence of attacks upon the five injured persons. The learned sessions judge has accepted the evidence of these two witnesses and in doing so consequently has believed the story which the other prosecution witnesses, who may be described as interested, have given and he recorded the convictions which are mentioned above.

The defence which the accused put forward can be summarised as follows. He referred to the earlier quarrels put forward by the prosecution and said that on the evening in question the three deceased—and later he included P.Ws. 5 and 6—went to his house and there beat him and his wife with a stick and a leather strap and at that place he said that he stabbed these five persons. It is not clear, although he says it was in his house, whether he intended to convey that the happening occurred inside the house or within his compound or other part of his premises but it is manifest that he intended to say that the whole affair and episode connected with the five injured persons was in some part of his premises.

Immediately after the termination of the occurrence, the accused went to the police station and whilst he was there, P. Ws. 5 and 6 arrived. Ex. A is the statement of P. W. 5 given to the police officer P. W. 16 in which he mentions the arrival of Masanan, with the other two deceased, that P. Ws. 5 and 6 were sitting together, and the subsequent visit to the deceased's premises and the attacks upon the three deceased and P.Ws. 5 and 6. P. W. 6 did not make a statement at the police station, he was in a parlous condition and was sent to the hospital where he made a dying declaration (Ex, B). At that time apparently it was thought that he would not recover. He gives in this exhibit details of the attacks by the accused upon the five persons. The detail is not entirely in accordance with the statement by P.W. 5 in Ex. A. But these two statements were given very shortly after the happening of the events. The statement which the accused gave to the police officer is Ex. L. Neither the learned Public Prosecutor nor the learned counsel on behalf of the appellant has raised any objection to the examination of this document by the court. After giving in some detail the earlier history which it is not necessary to discuss, he says that the three deceased and P.Ws.5 and 6 came to his house and beat him and his wife with their hands and at that place the whole occurrence took place. In the committing magistrate's court, the accused said that ten or fifteen persons including the persons who were stabbed beat him (the accused), he does not say with what the beatings were inflicted. In his statement before the learned sessions judge he said that the five persons kicked him and beat himself and his wife with a stick and a leather belt.

Under s. 105 of the Evidence Act, when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code or within any special exception or proviso contained therein is upon him and the court shall presume the absence of such circumstances unless they are proved by the one asserting them. No evidence has been called in support of the story which the accused has put forward. There are merely his three statements which to some extent vary. If the accused's story is true, then the evidence of P.Ws.3 and 4 must be wrong. There is nothing to justify the rejection of the evidence of these two witnesses. There is nothing to show that they are in any way unfriendly or ill-disposed towards the accused or partisans of any of the prosecution witnesses or the deceased. P.W.3 stated he witnessed the happening of the second assault upon Masanan and he does not pretend to have seen anything more. 'A witness who is unfriendly or has been approached to support the story of another is not likely to confine his evidence to one of five episodes. I see no reason whatever to differ from the view to which the learned additional sessions judge arrived, namely, that these two witnesses' evidence should be accepted and that they are witnesses of truth. Their evidence being accepted, then it must follow that in substance the testimony given by the other eye witnesses, although they are associated with or partisans of the deceased or P.Ws.5 and 6, must be true. The evidence of the two independent witnesses being truthful and acceptable, then the evidence of others who similarly speak to the happenings of the same events must also be accepted.

The result therefore is that in my view the

case so far as facts are concerned which the prosecution sought to establish has been proved.

The next matter for consideration is what offences have been committed by the accused. I will deal with the charge in respect of the death of Muthukaruppan last. So far as the charge of murder in respect of Dorairaj is concerned, it is shortly this. The accused having already attacked four persons, he was running in the street armed with a knife and Dorairaj attempted to take it from him or to stop him. Thereupon, the accused stabbed him in a vital part of his body in such a way that he died immediately. The only offence which can be committed under these circumstances is that of murder under S. 302.

I now come to the charge in respect of the death of Masanan. The accused stabbed him in the first instance while he was running in a westerly direction, the injuries then inflicted were slight. After a short interval, Masanan, closed with the accused in order to take the knife from him and at that time the accused had already attacked three persons including Masanan himself. There was doubtless some violence used by Masanan. He appears to have thrown or flung the accused against a wall. It is not only right but indeed it would be the duty of Masanan having seen the attacks made by the accused on two others and sustained an earlier attack upon himself, to do his utmost to prevent the accused from continuing the attacks upon himself or upon any other persons. It is not always that persons sufficiently courageous—unarmed themselves—are prepared to do this. Any violence which Masanan used in wrestling with the accused and throwing him against the wall cannot amount to sudden and grave provocation within the exception to S. 300, I.P.C. The journey which the accused made from his house in the east to west lane and thence into the lane leading from it and then back again shows a continuous intention to inflict hurt, and indeed death, upon those who stood in his way or who tried to impede his progress. Masanan did nothing on that day in any way to justify a court holding that there was sudden and grave provocation which would reduce the offence committed from murder to culpable homicide. In my view, the offence committed in regard to Masanan was murder and the conviction for that offence is correct.

So far as the offences in respect of P. Ws. 5 and 6 which form the subject of the convictions under the fifth and fourth counts are concerned, no argument was addressed to us that those convictions were wrong or the sentences were unduly heavy. Suffice it to say that no interference with the learned sessions judge's judgment both as regards conviction and sentence is justified.

I now come to the charge in respect of the death of Muthukaruppa. Learned counsel on behalf of the appellant has argued that, accepting the evidence of the prosecution as given by the witnesses, it shows that after the accused refused to accompany Muthukaruppan and the four others to the panchayat, he dragged him by his hand and pulled him away from the steps of his house where he was then seated. It was then that the accused took out his knife and inflicted the injuries upon the deceased which shortly afterwards proved to be fatal. It was contended that this amounted to sudden and grave provocation so as to reduce the offence from murder to culpable homicide. That all these five persons were unarmed is a fact which I find from the evidence and no witness has said to the contrary. Although pulling by the hand is exercising some force and was done in order to make the accused go to some place against his will and may be provocative, this was done by an unramed man. In my view, such conduct is not what the first exception contained in S. 300, I. P. C. contemplates as being grave and sudden provocation. The question of what is grave and sudden provocation is a question of fact and one must consider the facts of each case and apply the provisions of the section to those facts. The facts in one case are not always of assistance in another case. The first accused, in my view was not subjected to such treatment by Muthukaruppa which would reduce the offence committed by the accused to culpable homicide and I am of the opinion that the offence which was committed by the accused in regard to Muthukaruppa is one of murder.

Now as to the sentences. I agree with the learned sessions judge that the sentences of death which he imposed in respect of the deaths of Masanan and Dorairaj are correct. There is nothing on the facts justifying lesser sentences. The accused made violent attacks upon these

two deceased who only tried to prevent him inflicting injuries by attempting to take the weapon from his hands and stopping his wild career. His vicious attacks upon them when they went to prevent further injury can amount only to murder of such a degree that sentence of death is the proper punishment. So far as the conviction regarding Muthukaruppan is concerned, I agree with the view which the learned sessions judge has expressed. There was some provocation regarding the circumstances surrounding the episodes and the proper sentence is one of transporation for life and not one of death. In my view, the convictions and sentences which the learned additional sessions judge has passed should be confirmed and the appel dismissed.

PATANJALI SASTRI J. I agree with the judgment just pronounced by my learned brother except as regards the offence relating to the deceased Muthukaruppa. I do not recapitulate the facts as my learned brother has referred to them in detail. I am inclined to think that the offence so far as Muthukaruppa is concerned amounts only to culpable homicide not amounting to murder. It is quite clear from the evidence of P. W. 1 that a few days prior to the occurrence there was an abortive panchayat by P. W. 1 to compose the quarrel between P. W. 9 and his wife on the one hand and the accused and his wife on the other and during that attempt hot words passed between the accused and P. W. 2 who was evidently a partisan of P. W. 9. Subsequently the accused appears to have been smarting under the memory of these happenings and the learned sessions judge described his mood on the day of the occurrence as 'sullen and resentful'. While he was in that mood, deceased Muthukaruppan and Dorairaj accompanied by P. Ws. 5 and 6 presented themselves in a body at or near the premises of the accused and invited him, according to the prosecution story, for another panchayat by P. W. 1 and what followed is thus described by P. W. 5.

"The accused said that Muthukaruppan had no business to call him and that he was not prepared to come for a panchayat. Muthukaruppan caught the accused's hand and pulled him, asking him to come for a panchayat. The accused thereupon whipped out a knife from his waist, opened the blade and stabbed Muthukaruppan with it on the left side of the chest."

The learned judge below took the view that though this was sudden provocation, it was not sufficiently grave to attract the application of exception 1 to S. 300 I. P. C. I am unable to share that view. As indicated in the Explanation attached to that provision, whether in a given case, the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact, and, in my judgment, having regard to all the circumstances of this case, what Muthukaruppan is said to have done to the accused at the time of the occurrence amounted to such provocation as is contemplated in the provision referred to above. The offence committed by the accused in relation to Muthukaruppa would therefore be only culpable homicide not amounting to murder. This does not however affect the result of the case as I agree with my learned brother that the conviction and sentence for the other offences committed by the accused should be confirmed.

N.R.G. *Conviction confirmed.*

Cr. App. No. 371 of 1939

*September* 26, 1939

LAKSHMANA RAO J.

K. L. SUBBA RAO

v.

EMPEROR.

*Cr. P. C. (V of 1898), S. 235—Penal Code, S. 471—Documents already forged used to get a document registered—One transaction and one trial—Complaint after termination of civil suit—No complaint by court necessary.*

*Where the accused is stated to have used four forged documents during the registration of a sale deed knowing them to be forged and obtained the balance of price, they all form one transaction and S. 235 (1), Cr.P.C. permits the trial of all these offences at one trial.*

*Where the offences were committed after the termination of proceedings in a civil suit, a complaint by the court is unnecessary.*

FACTS: The accused in this case, K. L. Subba Rao, is charged under four counts with having used each of four forged documents which he knew or had reason to belive to be forged documents and therefore with having committed an offence under S. 471 I. P. C. He is also charged with having by use of the forged documents cheated one Mrs. Alice Lobo by dishonestly inducing her to deliver a sum of Rs. 35 when registering a sale deed by the accused in favour of that Mrs. Alice Lobo and therefore with having committed an offenee punishable under S. 420 I. P. C. The accused denied committing any of the offences charged against him.

The accused had originally executed a mortgage in favour of the husband of Mrs. Alice Lobo, J.C. Lobo (P.W.1) who was in addition lending moneys to the accused on promissory notes. P.W.1 obtained a decree on one promissory note and got the accused arrested in execution and he and the accused entered into an agreement which was executed in the name of P.W. 1's wife, the accused undertaking to give a fresh mortgage deed in favour of the wife. The agreement (Ex. B) so to execute a fresh mortgage was as to properties, the accused had purchased in an execution sale in the Karkal district munsif's court.

No mortgage was executed in favour of the wife as undertaken under the agreement (Ex. B) and a second agreement was executed (Ex. D) this time in the name of P. W. 1 himself and the accused contracted to execute a mortgage in favour of P. W. 1. The accused undertook in Ex. D to furnish P. W. 1 with all title deeds, encumbrance certificate, delivery receipt and other documents as to the properties he had purchased in execution sale described as the pandyar properties and meanwhile executed a promissory note (Ex. E) for all the amounts due on that debt by the accused to P. W. 1. The documents produced were all taken to a lawyer Mr. Sequiera (P. W. 5) who became suspicious over the alterations in the sale certificate (Ex. C) and the encumbrance certificate (Ex. F) in regard to the extent and the assessment as to an item of land claimed to have been purchased by the accused in the execution sale and as to which with others the accused was to execute a mortgage deed. The accused assured Mr. Sequiera and P. W. 1 that nothing was wrong and he wrote out and handed over a document described as a "solemn declaration" (Ex. G) that no alteration had been made by him in the encumbrance certificate. No mortgage was again executed pursuant to Ex. D and both parties again went to Mr. Sequiera in whose favour both executed a muchilika (Ex. H) and Mr. Sequiera passed an award (Ex. J) determining the amount due by the accused and deciding that the money should be paid both personally and on the responsibility of the properties agreed to be mortgaged. P. W. 1 and the accused then obtained a decree (Ex. K 1) on the footing of the award.

The accused did not pay the money decreed under Ex. K-1 and the accused proposed to sell the property for Rs. 5000, P. W. 1 taking credit for the amount decreed on the basis of the award and the sale deed was meant to be in the name of P.W. 1's wife, P.W. 2 in the case,

The wife agreed to make the purchase if the papers were all right and she authorised her husband to act and then the accused began to take further moneys from the wife. A sale deed was then executed on 11-1-1938 (Ex. M) and it was registered on 10—2—1938. The case is that in respect of this sale deed the accused made use of two encumbrance certificates and a sale certificate in regard to the properties the accused had previously purchased in court auction that the figures as to the extent of an item being altered from 1.57 acres to 11.57 acres and the assessment payable from Rs. 9—14—0 to 69—14—0.

The further case is that the accused purchased in court auction having been subject to a mortgage due to one Dr. U Raghurama Rao, the accused used an alleged certified copy of a petition and order under S. 83 of the Transfer of Property Act purporting that the mortgage in favour of Raghurama Rao was discharged by the accused. A yet further charge is that by using these documents known to be forged the accused induced Mrs. Lobo at the time of the registration of the sale deed to part with a sum of Rs. 35. The sale deed (Ex. M) recited the handing over by the accused at registration of several documents inclusive of the sale certificate, the certified copy of the petition under S. 83 of the Transfer of Property Act and two encumbrance certificates, these 4 being the subject of charges under 4 counts under S. 471 I. P. C. When Mr. Sequiera examined these documents and discovered the sale certificate mentioning that the purchase was subject to the mortgage in favour of Raghurama Rao, the accused is stated to have told Mr. Sequeira that the mortgage had been discharged and then produced the alleged copy of a petition and order under S. 83 of the Tranfer of Property Act.

In the course of the judgment the sessions judge observed "The charge that the accused used the forged sale certificate, forged in the manner stated with the full knowledge that it was a forged document is abundantly established in the case.

* * *

"The first charge then is that in respect of Ex. L, the alleged copy, and Ex. C. the sale certificate and Exs.F and F-1 the accused made use of them and led P.W. 2 to believe in their truth when they gave the extent of S.No. 284-3 as 11 acres 57 cents and thus induced P.W.2 to accept the sale deed and make a payment of Rs.35 in cash at the date of the registration; it will be remembered that while the sale deed was for Rs. 5,000, Rs. 1,000 were allowed to be kept with P. W. 2 and the Rs. 35 were to make up the consideration otherwise. The argument advanced on behalf of the accused was that the accused had used Exs. L, C, F and F-1 long previously to the registration of the deed as for instance at the time Mr. Sequeria was satisfied as to the extent, when the accused gave the false solemn declaration Ex. G or again at least when the sale deed was executed and therefore there was no *use* of these documents at the time of the registration on 10—2—1938 as is stated in the charge. The sale deed Ex.M. however recited these documents among other things handed over that day and Ex. M. elaboratelely recited that the accused was executing the sale deed assuring the purchaser that the property was free of all encumbrances except the mortgage in favour of the husband P. W. 1 which was among the first transactions between P.W.1 and the accused. That assurance was clearly false because the mortgage in favour of Raghurama Rao subject to which the accused had purchased in court auction had not been paid up. Ex. M. recited the handing over of Ex. L and other documents to evidence the title and other details in respect of the property being sold. The fact that the accused was uttering these lies previously also would not mean that when he reassured at the time of the registration and handed over the forged documents he was not at that time also making use of these forged documents or that the use of those documents had been completed so that there was no use made at the time of the registration and no offence was committed then. It only means that the accused persistently continued to be committing the crime of using the forged documents at every stage of the transaction culminating at the date of the registration when he solemnly assured by the recitals in Ex. M. his own title free of encumbrances and handed over at that very moment the documents to evidence the clean title and the large extents claimed. The wife, P. W. 2, was also present at the time of the registration and she speaks to the husband also being there

and the accused handing over a bundle of papers to the husband at the moment of registration when she being assured that she was buying a property with a clear title and with Survey No. 284–3 being of an extent of 11·57 acres parted with Rs. 35 towards the consideration. The argument that there was no use made of the documents at the time of the registration and there was no need to make use is absolutely frivolous and wicked and the first charge that by the use made of these documents the accused cheated P. W. 2 and received Rs. 35 is therefore clearly established. It is also established that the accused made use of the forged documents at the time of the registration on 10–2–1938.

* * *

S. 471, I. P. C. under which charges 2 to 5 are laid provides the same punishment as for forging a document. The charge in this case is the using of a forged document purporting to be a record or proceeding of a court of justice as Exs. L and C are, and of a certificate purporting to be made by a public servant in his official capacity, as the encumbrance certificates Exs. F and F-1 are, and thus s. 466 I. P. C. would apply to the case and the punishment provided under s. 466 I.P.C. is imprisonment for seven years. In using Ex. L the accused because of his knowledge of the working of the court committed a most daring and impudent fraud. It was a most calculated one and the immensity of the fraud could not be tolerated at all. In respect of the fifth charge as to Ex. L, I sentence the accused to rigorous imprisonment for five years. In respect of the fourth charge relating to Ex. C., the accused will be sentenced to three years' rigorous imprisonment. In respect of each of the second and the third charges relating to Exs. F and F-1 the accused will be sentenced to rigorous imprisonment for two years. In respect of the first charge of cheating the accused will be sentenced to rigorous imprisonment for three years. All the sentences will run concurrently."

Appeal against the order of the court of session of the South Kanara division in C. C. No. 7 of 1939.

*K. Venkataraghavachari*, for Crown.

Accused not represented.

JUDGMENT

The appellant has been convicted of the offence under s. 420, I.P.C. and four offences under 471, I.P.C. and sentenced to rigorous imprisonment ranging from 2 to 5 years, the sentences being directed to run concurrently.

The appellant is stated to have used Ex. F, F-1, C and L the forged documents, during the registration of Ex. M the sale deed on 10—2—1938, knowing them to be forged and obtained the balance of price, and the evidence of P. W. 1 the husband of the vendee which is borne out by the recital in the sale deed proves the user of the documents on 10—2—1938 and payment of the balance of price to the appellant. That the documents are forged is beyond dispute and it is obvious that the appellant knew them to be such. The guilt of the appellant under ss. 420 and 471, I. P. C. does not therefore admit of any doubt and the user of the documents and obtaining of the balance of price from one transaction. S. 235 (1), Cr. P. C. permits the trial of all these offences at one trial and they were committed after the termination of the proceedings in O. S. 18 of 1937. A complaint by the court was therefore unnecessary and the sentence is not excessive. The conviction and sentences of the appellant are therefore confirmed and the appeal is dismissed.

N.T.R. *Conviction confirmed*

—

Cr. R. C. 442 of 1939
Cr. R. P. No. 412 of 1939
*October* 3, 1939
LAKSHMANA RAO, J.

RAMASWAMI KONAR
v.
NACHIAR AMMAL

*Cr. P. C. (V of* 1898*), s.* 195*—Complaint under s.* 500*, I. P. C. on statements in a petition and sworn statement filed in court to which complainant is no party—Complaint not cognisable without sanction of court.*

*Where the complainant filed a complaint against the accused under s.* 500*, I.P.C. alleging that the accused made certain defamatory statements calculated to harm her reputation in a petition filed before the same court under*

*S. 100, Cr.P.C. and to which the complainant was not a party and the accused objected that the complaint was not cognisable under s. 195 (1) (b), Cr. P. C. except on a complaint by the court and the lower court rejected the defence on the grounds mentioned in the order set out below, in revision,*

Held, *the complaint of defamation is founded on allegations in a petition and sworn statement to the court and such allegations being stated to be false, the offence committed would fall under S. 182 or 193, I. P. C. and parties cannot be allowed to evade the provisions of S. 195 by filing a complaint under another provision of law.*

THE FACTS appear from the judgment of the lower court which were as follows:

"P. Nachiar Ammal daughter of Palani alias Palavesa Konar of Alwar Tirunagari, filed a complaint against Ramaswami Konar of the same place under s. 500 I.P.C. alleging that the latter had made certain defamatory statements calculated to harm her reputation in a petition filed before this court on 24—1—39 under s. 100 Cr. P. C. The complaint was taken on file under s. 500 I. P. C. and processes issued. The pleader for the accused filed a petition stating that the complaint under s. 500 I. P. C. should not be taken cognisance of by this court with reference to s. 195 (1) (b) of the Cr. P. C. as an offence under s. 193 I. P. C. was alleged to have been committed.

The petition under s. 100 Cr. P. C. which is said to contain the defamatory imputations against the present complaint was filed by the accused on 24—1—39, against the father of the present complainant and his son-in-law Sankara Konar to whom the complainant was subsequently married as a second wife. The allegation in the petition dated 24—1—39 was that the present complainant was the legally wedded wife of the accused and was locked upon in her father's home by the two persons referred to and a search warrant under s. 100 Cr. P. C. was sought for her production in court. A search warrant was accordingly issued by my predecessor for the production of Nachiar Ammal before the S. M. Tiruchendur and the petition was also forwarded to him. The S. M. after further enquiry dismissed the petition.

Now the accused's pleader contends that an offence under s. 193 or 182 I. P. C. has been committed by the accused which cannot be taken cognizance of by this court under s. 195 Cr.P.C. except upon a complaint of this court. The pleader for the complainant argues that though the imputations against the complainant were contained in the petition and the sworn statement of the accused dated 24-1-39 no offence under ss. 193 or 182 I.P.C. could be deemed to have been committed in the circumstances of this case, that the present complainant was not a party to the petition dated 24—1—39 though a search warrant was asked for her production and that the complainant against whom imputations had been made in the petition has a right to bring her own complaint against the accused to vindicate her reputation. He further stresses on the fact that S. 195 (1) (a) (b) and (c) of the Cr. P. C. does not lay down that an imputation which would bring the offence under S. 500 I. P. C. whether it was made before a court of justice or a public servant, should only be taken cognizance of on a complaint by the court of public servant concerned. He further states that the decisions quoted in favour of the accused have no bearing on the present case and cites a decision of the Full Bench of the Rangoon High Court (A. I. R. 1938 Rang. pp. 232-236) which he argues has a direct application to the present case.

In the present case, the complainant was not added as a party to the petition dated 24-1-39 which is alleged to contain the defamatory imputations against her. S. 499 I.P.C. which enumerates the exceptions, does not lay down that where the defamatory imputation is made before a public servant or before a court, no private complaint under S. 500 could be brought but only the public servant or the court alone should bring forward a complaint. Nor are Ss. 499 or 500 I. P. C. included in S. 195 Cr. P. C. The offence complained of in the present case is personal, alleged to have caused harm to the reputation of the complainant and I think that a complaint under S. 500 I. P. C. can be properly brought by the person aggrieved. In these circumstances, the accused's petition is dismissed and the enquiry will be proceeded with."

Against this order the present revision was filed on the following grounds:

"2. That since the allegations in the com-

plaint amount to the commission by the accused of offences under Ss. 182, 193, and 211 I.P.C., the lower court ought to have held that the complainant cannot be allowed to circumvent the statutory bar under s. 195 (1) (a) and (b) Cr. P. C. by stating that the acts amount to an offence of defamation.

3. The lower court failed to note that the allegations in the complaint attract the mischief of s. 195 Cr. P. C. and as such the lower court ought not to have reduced the offence to one under s. 500 I. P. C. so as to give it jurisdiction to take cognizance.

5. The fact that the complainant was not included as a party in the proceedings under s. 100 Cr. P. C. is absolutely irrelevant.

6. The lower court erred in rejecting the present claim by the accused on the ground that it is not included as an exception in s. 499 I. P. C. since the legislature has provided for such cases as these by enacting s. 195 Cr. P. C. prohibiting private complainants if the offences committed came under any of the sections noted therein.

PETITION under Ss. 435 and 439, Cr. P. C., praying the High Court to revise the order of the court of the sub divisional magistrate of Tuticorin dated 12—4—1939 and made in C. C. No. 21 of 1939.

*N. Shankar Bhat & G. Gopalaswami*, for Accused.

*Public Prosecutor*, for Crown.

*K. R. Rama Iyer*, for Complainant.

ORDER.

The complaint of defamation is founded on allegations in a petition and sworn statement to the sub divisional magistrate and the allegations are stated to be false. The offence committed would therefore fall under s. 182 or 193, I. P. C. and as held *in re. Appadurai Nainar* (1) parties cannot be allowed to evade the provisions of s. 195, Cr. P. C. by filing a complaint under another provision of law. The revision petition is therefore allowed and the proceedings are quashed.

T. *Petition allowed.*

1. [1935] M.W.N. 946 (2) : Cr. 162 (2): 59 Mad. 165

Cr. P. C. No. 731 of 1939
Cr. R. P. No. 688 of 1939

*November* 7, 1939

LAKSHMANA RAO, J.

Vitta VENKATASUBBARAYADU
v.
EMPEROR

*Penal Code (XLV of* 1860*), S.* 379*—Removing of crop after court sale—No order for delivery of crop by court—No dishonest intention in lessee removing the crop.*

*Where the crop on the land was raised by the lessee of petitioner after the court sale, and delivery of the crop was not ordered by the conrt, the removal of the crop cannot be said to be dishonest and a conviction of the petitioner under S.* 379*, I.P.C. is unsustainable.*

The facts appear from the judgment of the lower appellate court which were as follows :

"The appellant was convicted of an offence under s. 379 I.P.C. by the stationary sub magistrate, Tenali and sentenced to pay a fine of Rs. 100.

The appellant is a Brahmin resident of Srugarapuram, and he was indebted to the daughter of P.W.1. She filed a suit in the district munsif's court at Tenali, and brought this land for sale in satisfaction of the above decree. It was purchased in court auction by P.W.1 on 14—3—38 and the sale was confirmed on 19—4—38. The land was handed over to P.W.1 on 3—11—38 with the crop on by the Court Amin, P.W.5, and he obtained a receipt Ex. B from P.W.1. On or about 12—12—38 P.W.1 had the crop cut and heaped it in the land. On 22—12—38 the appellant had the crop removed to some other field. It is for committing theft of this crop that the appellant has been convicted.

The appellant states that the land was leased out to D.W.3 and that it was he who cut the crop and removed to another field. He adds that the delivery of the land and crop was done secretly and that this case was foisted on him at the instigation of his enemy Velpuri Venkatasubba Rao.

P. W. 7 is the sub inspector of police who investigated this case and he found a ring in the field. This is borne out by the mediator's statement then drawn up (Ex. E). He also found that there were two kinds of hay in the field of

the appellant and this is noted in Ex. F. From the above two exhibits it is clear that the paddy crop heaped in the land under dispute was removed and heaped along with the paddy crop heap of the appellant.

It has to be determined as to who removed the crop and heaped it in the heap of the appellant. It is argued on behalf of the defence that the crop was cut and removed by the lessee (D.W.3). He has no written lease and it is stated that the land was leased out to him orally. The sale was confirmed on 19—4—38 and the cultivation commences in the month of July. The auction purchaser gets title for the land from the date of sale, and the appellant has no manner of right for the land from that date. I do not thus believe that the land was leased out to D.W.3, and that he cut the paddy crop and removed.

It is argued that P.Ws.3 and 4 are mere coolies and creatures of P.W.1 and that no disinterested witnesses have been examined in the case. As shown above the cultivation of the land by D.W.3 was found to be false. There is no doubt that the crop was first heaped in this field, and later on transferred to the field of the appellant (Exs. E and F). It is not probable that under the circumstances any person other than the appellant would have removed it. P.Ws. 3 and 4 are no doubt coolies, but there is nothing to show that they are the creatures of P.W.1. At the time of the offence they were working in the neighbouring fields and have noticed what was going on in the field. There are no grounds to disbelieve their evidence and it is very probable that they witnessed the offence while doing their ordinary daily work. I hold that it was the appellant that got the heap removed from this field.

It is argued that the delivery was done secretly and that the land alone was delivered without the crop. P.W.5 states that it was the land alone that was delivered, and it seems to be absurd. The receipt given by P. W. 1 (Ex. B), clearly states that the crop ripe for harvest in about a month was also delivered. His memory should have been bad or it should be a deliberate lie to save the appellant. Even granting that the land alone was delivered P.W.1 is entitled for all crops standing thereon (A. I. R. 1932 Pat. 344). It has been held therein that any one removing any things from the lands will be guilty of an offence under s. 379 I. P. C. I have no doubt that P. W. 5 delivered the land with the crop thereon, and that P. W. 1 is liable for an offence under s. 379 I. P. C.

I find that the appellant has been rightly convicted of an offence under s. 379 I. P. C. The appellant was sentenced to pay a fine of one hundred rupees. The appellant has deliberately planned to remove the crop to set at nought the order of the court."

A revision was filed to the High Court on the following grounds:—

"5. The courts below should have held that only the land was delivered and not the crop standing thereon to P. W. 1 and since it is not the case of the prosecution that P. W. 1 raised it, he has no right to cut the same and heap it and its removal by the person who raised it does not constitute any offence, much less the offence of theft.

6. The courts below should have held in the circumstances of the case there is no dishonest intention on the part of the petitioner in removing the crop (assuming that he removed it).

7. The courts below have not paid due importance to the fact that the Amin, P. W. 5 deposes that he delivered only the land and not the crop.

8. The courts below failed to advert to the fact deposed to by him namely that he was directed by the civil court to deliver the land only. In view of this admission the delivery of the crop, if any, would be contra to the order of civil court and therefore illegal and the removal of the crop under such circumstances will not amount to any offence.

9. The courts below should have held that the prosecution failed to show satisfactorily that the petitioner had knowledge of the delivery of the crop and the prosecution has not proved beyond reasonable doubt that it was he (the petitioner) who removed the crop."

PETITION under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of Tenali dated 24—4—1939 and passed in C. A. No. 10 of 1939 preferred against the sentence of the court of the stationary sub magistrate, Tenali, dated 20—3—1939 and passed in C. C. No. 6 of 1939.

*K. Kameswara Rao*, for Petr.
*Public Prosecutor*, for Crown.

ORDER

The crop was raised by the lessee of the petitioner after the court sale and delivery of the crop was not ordered by court. The removal of the crop cannot therefore be said to be dishonest and the conviction of the petitioner under S. 379, I. P. C. is unsustainable. It is therefore set aside and the fine if levied will be refunded.

T. *Conviction set aside.*

---

Cr. R. C. No. 568 of 1939
Cr. R. P. No. 527 of 1939
*November* 7, 1939
LAKSHMANA RAO, J.
AGASTIAPPA NAINAR & others.
v.
SAMI PILLAI

*Criminal trial—Penal Code, S.* 379—*Theft of crops—Claim of right—Proceedings under S.* 145, *Cr.P.C. dropped—Civil suit pending—Right, a civil one and not criminal.*

*Where the crops were harvested under a claim of right and proceedings under S.* 145, *Cr. P. C. were dropped in respect of the land and a civil suit was pending, a complaint under Ss.* 379 *and* 447, *I. P. C. for theft of crops was dismissed by the first court under S.* 253 *(1), Cr. P. C. as being of a civil nature. On a petition to the sessions judge, he ordered further enquiry.*

Held, *in circumstances the order for further enquiry is not called for.*

FACTS: Complainant and his father originally owned the land in question and sold it to one Chinnakolandai Ammal in 1937. Subsequently P. W. 1 became a waram tenant under her and raised paddy crop on the land under a waram muchulika. It is alleged that Chinnakulandai Ammal subsequently transferred the same land to her granddaughter Chinna Ammani Ammal under a settlement deed. The allegation is that under the direct instructions of the 1st accused and supervision of the 4th and 5th accused, a number of men entered on the land and carried away the produce without paying heed to the protestations of P. W. 1 on 8-1-1939 When P. W. 1 protested the 1st accused pushed him away and the 5th accused threatened to strike him with an *aruval*. This is corroborated by the evidence of P. W. 2 who cultivates another portion of the land, as a waram tenant under Chinna Ammani Ammal and P. Ws. 3 to 5 who were also present there. It would appear that P. W. 1 appeared before the sub inspector, Wandiwash, on 10—1—1939 and made a statement that the occurrence was due to disputes between the 1st accused and his father and that as it was of a civil nature he would seek his remedy in a civil court, but subsequently he seems to have been induced by Chinnkolandai Ammal or Chinna Ammani Ammal to present the complaint in court.

The sub magistrate after enquiry held "Chinna Ammani Ammal the alleged landlady is accused 1's sister's daughter. From the plaint in O. S. No. 464 of 1938 it is seen that the suit was filed by Chinna Ammani Ammal and her minor son against accused 1 in this case and others, requesting among other reliefs for permanent injunction against the defendants in the suit (accused 1 in this case and others) from entering upon the land now in question in this case and some other lands. From the statement filed by accused 1 so long back as 28th October, 1938 in that suit, it is seen that he contends that the allegations in the plaint were false and that he himself has been in possession and enjoyment of the lands in question ever since 1937. So, it is plain that the very question of the possession and enjoyment of the land which is the subject-matter of this case has yet been engaging the attention of the civil court the contending parties being Chinna Ammani Ammal and her minor son as plaintiffs and accused 1 and others as defendants. In the present case, instead of Chinna Ammani Ammal being the complainant it is only her alleged 'waram' tenant (P. W. 1) who is put forward as the complainant alleging that accused 1 along with his relatives accused 2 and 3 and his servants and coolies accused 4, 5 and others, committed criminal trespass and theft of the produce on the land. To constitute these offences the question of possession is the main point at issue, and the question of possession of the land is already in dispute before the civil court. Such being the case, I cannot arrogate to myself the functions of the civil court in deciding the question which is already pending before the civil court. In the end I hold that

this case is purely one of a civil nature presented in a criminal garb and that no case has been made out against the accused which, if unrebuted, would warrant their conviction under Ss. 447 and 379, I. P. C. I therefore discharge all the accused under S. 253 (1), Cr. P. C.

In revision, the sessions judge said: "On the basis of this defence, the lower court has disposed of the matter, as one purely of a civil nature. The learned advocate for the petitioner contends, that there is no justification for adopting such a short cut, and that when it is once proved, that paddy raised by one person has been harvested, and removed by another, the offence is essentially criminal in character, and must be enquired into by a criminal court. The case of the respondents has not been fully set forth, as they have not been called upon to enter on their defence. The learned vakil, however, suggests that the first respondent has been in possession of this property from June 1938. He also contends that the paddy crops were actually raised by him. The whole trouble is obviously due to the fact, that the parties are close relations, and there is a family dispute with regard to certain properties belonging to the father of the first respondent. The case of the first respondent is, that his father bought these lands in the name of Chinnakolandai Ammal, his grandmother, and that subsequently the father delivered the lands over to him. But in the meantime, it is suggested that this grandmother Chinnakolandai Ammal, made a settlement deed, gifting the same properties to his niece Ammani Ammal. There is no doubt that the dispute has to be finally settled in a civil court, so far as the rights of the first respondent, and of Chinna Ammani Ammal under the settlement deed are concerned. But the question for consideration is, whether the facts proved in this case are sufficient to call for interference by a criminal court. The petitioner has proved that he has been holding the lands under a waram tenure under Chinnakolandai Ammal. I think the evidence also justifies the view, that the crops were actually raised by him. The lower court has nothing to say against the evidence of P. Ws. 3 to 5, which supports the evidence of P.W. 1, that the respondents entered on the land, and high-handedly cut and removed the crops. The fact that a civil suit (O. S. No. 464 of 1938) is now pending on the file of the district munsif's court, Arni, is neither here, nor there, and cannot help the first respondent, since it is admitted, that that is a suit filed by Chinna Ammani Ammal, for a permanent injunction to restrain the respondents from entering on the land. Had the case of the first respondent been true, I have no doubt that he would have been the first to rush to court, to seek to vindicate his rights and to restrain the present petitioner, or his lessors from entering on the land. On the evidence, therefore, it must be held that the contentions of the first respondent are not *prima facie* credible, and that he is clearly acting in a lawless manner in an endeavour to coerce Chinna Ammani Ammal, through her tenant P. W. 1. In these circumstances, I hold that the enquiry held by the lower court must be deemed to be incomplete and perfunctory, and further enquiry should be held into the truth of this complaint, in order to ascertain, whether the respondents can be deemed to have acted under any colour of legal right, when they entered on the property, and carried off the produce.

For these reasons, I allow the revision petition, set aside the order of discharge passed by the lower court, and direct that further enquiry should be held into the complaint by the district magistrate, through any magistrate having competent jurisdiction to hold such enquiry."

PETITION under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of session of the North Arcot division dated 7—7—1939 and made in Cr. R. P. No. 8 of 1939 presented to revise the order of the court of the 2nd class magistrate of Wandiwash dated 13—3—1938 and made in C. C. No. 23 of 1939.

*V. T. Rangaswami Iyengar*, for Petrs.
*Public Prosecutor*, for Crown.

ORDER

The crop was harvested under a claim of right and the proceedings under s. 145, Cr. P. C. were dropped in respect of the lands concerned. A civil suit is pending and the order for further enquiry is not called for. The revision petition is therefore allowed and the order directing further enquiry is set aside,

T *Petition allowed*

—

Cr. R. C. No. 149 of 1940
Cr. R. P. No. 142 of 1940

*February* 22, 1940

LAKSHMANA RAO, J.

PERUMAL KONAN & others
v.
EMPEROR

*Penal Code (XLV of 1860), Ss. 147, 380 & 457—A section of the villagers breaking into the temple and removing idol for celebrating a festival—Intention not dishonest—Conviction under Ss. 457 and 380 not sustainable—Common object to enforce right by means of criminal force and violence — Offence one under S. 147, I. P. C.*

*Where the accused, a section of the villagers, broke into the village temple and removed idols for celebrating a festival and both the lower courts convicted them of offences of theft and house breaking under Ss. 380 and 457 I. P. C. and also under s. 147 of rioting, in revision.*

Held, *that the conviction under Ss. 457 and 380, I. P. C. is unsustainable as the taking was not dishonest and that the petitioners would be guilty under s. 147, I. P. C. as their common object was to enforce a right by means of criminal force and violence was used in prosecution of the common object.*

FACTS: In a factitious village, the accused belonging to one faction formed themselves into an unlawful assembly with the common object of effecting a forcible entry into the temples and removing the idols to celebrate a procession and to beat those who might obstruct. The accused were charged under Ss. 147, 157 and 380, I. P. C. The first court convicted them on all charges. The appellate court confirmed the convictions and observed *inter alia*:

"There is no doubt that the accused's party took the law into their own hands and celebrated the festival by taking charge of the deities and taking them out in procession. The submagistrate has held that it is a private temple owned by the Pillais only. It is a matter for civil courts to decide. Whoever is the owner or is entitled to perform puja the trustee is the custodian of the temples and their properties and the villagers who want to insist on their rights should do so by removing the trustee or having recourse to other legal actions. Instead the accused broke into the temple and did illegal acts. Fortunately there was no effective retaliation as otherwise some other serious consequences should have happened.

* * * *

It is no doubt certain that the temples were broken into and the idols removed without the consent and against the protests of the trustee. The appellants were no doubt members of the unlawful assembly with the common object of breaking into the temple and bringing out the idols by force and in prosecution of which they have injured some of the prosecution witnesses and did what they wanted. It is argued by the learned advocate for the appellants that the idols are not properties to be stolen, there was no dishonest motive and that if they are the properties they are the common properties of the villagers. No temple or the idols in it can be safe if this proposition is upheld and there would be rioting and lawlessness everywhere. I therefore confirm the finding and sentence of the lower court so far as A-1, 2, 3, 8 and 9 are concerned under ss. 147, 457 and 380 I.P.C. The sub magistrate has very much erred on the side of leniency in dealing with such lawlessness. These appellants are re-committed to jail to undergo the unexpired portion of their sentences.

A revision was filed in the High Court urging inter alia on the following grounds :

"The court below failed to notice that there is absolutely no dishonest intention to commit theft of idols which were taken out in procession and erred in holding that such taking out constitutes theft.

The court below failed to note that there was merely an assertion of the right, at the worst, of the villagers to celebrate the festivals in the village common temple, and that the matter is not one for criminal courts at all.

The court below has failed to conceive the correct position as regards village temples managed by villagers, and erred in holding that P. W. 1 could be in custody of the temples and the idols.

The court below failed to consider if the elements essential to make out a criminal offence had been made out."

PETITION under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the sub divisional magistrate, Chidambaram, in Cr. App. No. 76 of 1939 preferred against the judgment of the court of the 2nd class magistrate, Vriddachalam, in C. C. No. 659 of 1939.

*V. T. Rangaswami Iyengar & T. E. Ramabhadrachariar*, for Petrs.
*Public Prosecutor* for Crown.

ORDER.

The temples were broken into and the idols were removed for celebrating a festival and the taking was not dishonest. The conviction under Ss. 457 and 380, I. P. C. is therefore unsustainable but the petitioners would be guilty under S. 147, I. P. C. as their common object was to enforce a right by means of criminal force and violence was used in prosecution of the common object. The conviction under Ss. 457 and 380, I. P. C. is therefore set aside and the conviction under S. 147 I. P. C. will stand. But the consequences were not serious and the case was taken up on a private complaint. Under the circumstances the sentences already undergone are sufficient and the sentence of the petitioners under S. 147, I. P. C. is reduced to the period already undergone.

T.

—

Cr. R. C. No. 27 of 1940
Cr. R. P. No. 24 of 1940

*April* 11, 1940

LAKSHMANA RAO, J.

A. RAHIM SAHIB
v.
EMPEROR

*Local Boards Act (Mad. Act XIV of* 1920*), Ss.* 194 & 223—*Installation of a rice mill without permission, a continuing offence—Complaint within* 12 *months, not barred—Mere application for permission under s.* 194 *will not do.*

*A prosecution for installing a rice mill without the permission of the local authority can be made within* 12 *months from the commencement of the offence under s.* 223 *of the Act.*

*Under s.* 194 *of the Act, it is not sufficient compliance with the provisions of the Act that one merely files an application for permission of the local authority.*

THE FACTS appear from the judgment of the lower appellate court which was as follows:

"The appellant was charged by the Panchayat Board, Tindivanam, before the stationary sub magistrate, Tindivanam, for an offence under s. 194 of the Local Boards Act by installing an oil engine without permission punishable under s. 207 (1) of the Act. The stationary sub magistrate found him guilty and sentenced him to a fine of Rs. 10 and in default to simple imprisonment for ten days. The appeal is against the conviction and sentence. On 14th March, 1939 the appellant applied to the President, Panchayat Board, for permission to install an oil engine and to run the same. This application was placed before the panchayat board on 28th March 1939 and it was resolved to refer it to the District Health Officer and the Director of Town Planning, Madras, for remarks. The appellant was informed of this on 8th April 1939 and also that pending receipt of final orders by the board, the application must be deemed to have been not granted. On 21st June 1939 the appellant was informed that the district health officer and the Director of Town Planning did not approve of the site as it was near resi-

dential quarters and he was told that the permission to instal the oil engine could not be granted. But the appellant is said to have installed the engine about two days prior to 13th April 1939. The charge sheet against the appellant was filed before the stationary sub-magistrate, Tindivanam, on 24th July 1939. It is argued for the appellant that under s. 194 of the Act all that one has to do is to merely file an application as the section does not specify that the installation should not be done before the permission is granted. The learned counsel for the appellant further argues that in this, he waited for 30 days for an order of the panchayat board and that as the order of the panchayat board communicated to him on 8th April 1939 was not a valid order he proceeded to install the engine as s. 212 (xi) permits him to do so. He also says that the panchayat board did not refuse permission for any of the reasons mentioned in s. 194 (3) (b) of the Act and hence the order of refusal was not a valid one. Lastly he argues that the complaint was barred by limitation under s. 223 of the Act as it was filed more than three months after the offence was committed. Thus the points at issue are: (1) Whether the appellant has complied with the provision of s. 194 (3) of the Act by merely applying for permission and then installing the engine. (2) Whether he is entitled to act under s. 212 (xi) of the Act and install the engine after 30 days from the date of the application. (3) Whether the order of refusal of the Panchayat board is a valid one. (4) Whether the complaint is in time. Issues (1) and (2) are answered by a judgment of the Madras High Court in *President, Taluk Board, Tiruvannamalai* v. *A. M. Muttayya Chetti* reported at 1933 M. W. N. 733; Cr. 120. In this it has been remarked that S. 212 (xi) does not authorise any person to proceed with the construction of a factory, if after the expiry of 30 days he had received no orders on his application for permission. It is also laid out clearly that s. 212 (xi) does not cover the case of an application for permission to construct a factory and that it deals only with cases of applications for permission to do something of a temporary nature. It is no doubt true that the judgment refers to the construction of a factory, but the installation of an oil engine is also of a permanent nature and the same principle applies. Thus I find that the appellant is not entitled to install the engine merely after sending an application for permission not even after 30 days from the date of his application, if he did not receive an order from the board. I now come to the third issue. Two orders have been communicated to the appellant. The first is the order of the president, dated 6th April 1939 in which it was stated that the application for the installation of the oil engine was referred to the District Health Officer and the Director of Town Planning, and that pending final orders the application must be deemed to have been not granted. The pleader for the appellant contends that the panchayat board should have either granted or refused the permission according to s. 194 (3) of the Act and not pass an intermediate order. But it is to be noted that under s. 194 (b) of the Act certain statutory procedure is prescribed before the permission can be granted. The panchayat board has to consult the District Health Officer as to the suitability of the site before the permission is granted. The panchayat board has only acted according to this. Meanwhile the panchayat has issued this order merely to inform the appellant of the stage at which the matter stands. The final order of the panchayat board was issued on 21st June 1939 and served on the appellant on the same date. This order states that the permission applied for cannot be granted as the District Health Officer had given his opinion that the site was objectionable being too near the residential quarters. It is argued that under s. 194 (3) (b) of the Act the Board can refuse permission, if it is of opinion that the installation is objectionable by reason of the density of the population in the neighbourhood or that it is likely to cause a nuisance and that the order of refusal does not specify clearly that it was one of these reasons. But it has to be remarked that

the proximity to residential quarters practically means that there is density of population in the neighbourhood. I, therefore, find that the order of the board is a valid one.

I now come to the fourth issue of limitation. The learned pleader for the appellant relies on s. 223 of the Act to show that as the prosecution was made more than three months from the installation it was barred by limitation. But according to proviso to this section in the case of failure to obtain permission under the Act (if the permission is not for a specified period) complaint can be made within 12 months from the commencement of the offence. Hence I find that the complaint is not barred by limitation. In this case prosecution witness 1, the sanitary inspector has proved that the oil engine was installed about 2 days prior to 13th April, 1939, and this has not been rebutted by the appellant. The appellant has installed it without obtaining permission to do so as required by s. 194 of the Act. The appellant is clearly guilty under s. 207 of the Act. I, therefore, confirm the conviction by the stationary sub magistrate. The sentence is not excessive. The appeal is dismissed."

Against this, a revision was filed in the High Court on the following grounds:

The lower court erred in holding that construction of the building without permission is itself an offence as a violation of s. 194.

The lower court failed to note that s. 194 merely requires an application to be made before erection and that having been admittedly made in this case, there is no contravention of s. 194 to justify a conviction.

The lower court further erred in law in holding that the prosecution is not barred by limitation of 3 months prescribed.

The lower court erred in confusing the offence alleged with failure to take out a licence for working and that an offence for contravening s. 194 cannot be treated as a continuing offence.

The lower court failed to note that even 'installation' with permission is a complete act by itself and cannot be held to be a continuing offence.

The lower court erred in its construction of s. 194. The lower court failed to note that wherever a prohibition against doing an act without permission is intended, the sections categorically say so; and that a penal statute ought to be constructed strictly.

The lower court failed to note that the very ruling relied upon also holds that all that s. 194 requires is an application.

The lower court erred in holding that the orders on the application are valid orders. The lower court failed to make note that the statutory body must act strictly within the statute and the provisions of the Act do not contemplate or justify orders of the kind passed by the Board.

The lower court ought to have held that the orders not being 'valid' orders, they have to be treated as no orders at all, and the petitioner is entitled to act as if there had been no order and thus claim the benefit of s. 212 (xi) of the Act,

PETITION under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the joint magistrate of Tindivanam dated 20—11—1939 and passed in C. A. No. 78 of 1939 preferred against the order of the court of the stationary sub-magistrate of Tindivanam dated 10—10—1939 and passed in C. C. No. 828 of 1939.

*K. Desikachari*, for Petr.
*Public Prosecutor*, for Crown.

ORDER

The prosecution was for installing a rice mill without the permission of the local authority and the complaint was made within twelve months from the commencement of the offence. The complaint was thus within time and there is no substance in the contention that permission of the local authority need only be applied for. The revision petition therefore fails and is dismissed.

T. *Petition dismissed*

—

R. T. No. 89 of 1940
Cr. App. No. 353 of 1940
*July* 30, 1940
BURN & MOCKETT, JJ.
Baggam APPALANARASAYYA
v.
EMPEROR

*Evidence Act* (*I of* 1872), *S.* 32 — *Cr. P. C. S.* 162—*Statement of accused to police when arrested — Difference between Indian and English law—Duty of Public Prosecutor to reject inadmissible evidence even though defence do not object.*

*Under S.* 32 (1), *Evidence Act, in relation to statements of deceased persons who have been murdered, the circumstances must be circumstances of the transaction; general impressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible.*

*Where the statements of the deceased provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed his wife's sister in a civil case, such statements are in no way to be associated with the actual murder and are not admissible in evidence under S.* 32, *Evidence Act.*

*Under S.* 162, *Cr.P.C. it is not possible for an arrested person to make a statement to the police which can be used in evidence at the trial. Evidence of what the accused person said when arrested, often so valuable to innocent accused according to English experience, is denied to the defence under the Indian procedure but an accused person, if he knows it, can make a statement of his version of the case before a magistrate.*

*Where the evidence with regard to motive rested on a statement by the deceased not admissible under S.* 32, *Evidence Act but such evidence was not objected to by the defence, it is only right that the public prosecutor should himself have seen that such wholly inadmissible evidence was not placed before the court.*

Trial referred by the court of sessions of the Vizagapatam division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 12 of 1940 on 15-4-1940 and appeal by the said prisoner against the said sentence of death passed upon him in the said case.

*S. Suryaprakasam & R. Guruswami*, for Applt.

*K. Venkataraghavachari*, for Crown.

JUDGMENT

MOCKETT, J.—The appellant who is the karnam of the village of Gangachollapenta was charged before the learned sessions judge of Vizagapatam together with three other persons for murdering one Thalada Ramaswami on the night of the 2nd August last. The murder must have taken place on the main road between Gajapatinagaram and Mentada very near to Mendata. There is ample evidence on the record to show that the appellant and the deceased were on terms of friendship. That has been proved by the village munsif and there are circumstances in this case which strongly bear that out. But the learned sessions judge has relied on certain evidence in this case as proving motive on the part of the appellant to murder the deceased. That motive is derived from statements made by the deceased to his wife and to his wife's sister to the effect that in relation to a law suit in which the deceased's wife's sister, one Pydithali was concerned the appellant had accepted a bribe from the plaintiff one Narayanamma in the suit against Pydithalli. The motive is thus entirely derived from statements made by the deceased. These statements are wholly inadmissible There is nothing in S. 32 of the Evidence Act which makes them admissible. They are not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death. The Judicial Committee in *Pakala Narayanaswami* v. *The King Emperor* (1), has considered the provisions of S. 32(1) Evidence Act in relation to statements of deceased persons who have been murdered. Lord Atkin (at p. 188) points out that "the circumstances must be circumstances of the transaction, general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible." In this appeal the deceased's statements provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed his wife's sister in a civil case. They in no way are to be associated with the actual murder.

Evidence of these statements should have been excluded.

There was thus no admissible evidence of

1. (1939) M.W.N. 185 : Cr. 19

motive on the record. On the other hand as we have indicated there was evidence showing the contrary and friendship between the persons is not consistent with a desire on the part of one to murder the other in the absence of evidence to the contrary. On the day in question it is in our view beyond dispute that the deceased and the appellant set out together to go to Mentada village. We think they were going out together on a drinking bout. This is probabilised by the evidence of the deceased's wife and in fact there is the evidence of P.Ws. 5 and 6 that at about dusk on the evening in question the appellant and the deceased were drinking together in Mentada. P.W. 4 also proves that the deceased and the appellant went together because he lent a stick to the deceased and pieces of that stick were found at the place of the murder. It is convenient to pause here and say that at about 3 p.m. on the 3rd August that is the next day after these two went to Mentada together, P.W. 21 found in his field which is marked on the plan the body of a man. He at once sent a report Ex. H to the village munsif. The body was identified as that of Thalada Ramaswami and it is beyond doubt that he had been murdered. The medical officer P.W. 1 in his certificate Ex. A describes the injuries. The skull was fractured in no less than four places. In all there were ten injuries, cuts and bruises; and all the injuries, says the doctor, could have been caused by blows with a stick and in fact portions of a broken stick were found upon the scene.

So the position is that the appellant and the deceased were together in Mentada on that evening at about dusk. The next evidence of their movements is given by P.Ws. 14, 15 and 16 and their evidence can be summarised very shortly. They were proceeding in a jutka from Gajapatinagaram railway station to Mentada. There were three people by the side of the road near the place where the body was found. A little beyond, that is to say, on the Mentada side P.W. 14 saw the appellant and the deceased. P.W. 15 and 16 saw the deceased and another man the difference being that P.W. 14 identifies the appellant the other two are unable to do so. P.W. 15 says that they were reeling along the road as if they were drunk which is entirely consistent with the information which P.Ws. 5 and 6 have given about what they were doing in Mentada. So P. Ws. 14 to 16 prove that at the spot they passed three unknown men whom they later identified as the 2nd, 3rd and 4th accused waiting by the side of the road and beyond them were coming towards the village the deceased and the appellant and we have no doubt that they were both under the influence of drink. The only other evidence of what happened on the road is given by P. W. 18. With regard to P. W. 18 evidence has been led by the defence and his cross-examination casts some doubt on whether he was there at all. However the probabilities are that he was there. But his evidence amounts to no more than this. He says that on the road between Chittivalasa and Mentada he saw the accused 1, 2 and 3—he does not mention the 4th accused—and Ramaswami fighting and abusing each other. He goes on "I did not see who beat whom. They were all fighting together. I ran away as I was afraid." Ten days later only he says did he hear of Ramaswami's death and four days later he was examined by the sub-inspector. He was able to identify accused 2 and 3. And that is the evidence led by the Crown.

The appellant followed a course which might well be followed more often. It must be remembered that in view of the provisions of S. 162, Cr. P. C. it is not possible for an arrested person to make a statement to the police which can be used in evidence at the trial. Evidence of what an accused person said when arrested—often so valuable to innocent accused—according to English experience is denied to the defence under the Indian procedure. But an accused person can—if he knows it—make a statement of his version of the case before a magistrate and this is what the appellant at once did. He made a statement under S. 164, Cr. P. C., giving his version of what happened and his story is consistent with the case for the prosecution. He says that on the day in question he proceeded to Mentada with the deceased and that on their way home he saw Muppadi Krishnamurthi who is P.W. 14 was in his jutka as he had stated. According to the appellant the deceased said that he did not wish to be seen in the state in which they were, that is under the influence of drink and they stepped aside from the path. A little further the three other

accused Bugatha Sanyasi, Kalla Ramaswamy and Divakala Ramudu were waiting and according to him they set upon Ramaswami, put a rope round his neck and beat him with sticks and a pen-knife with a folding blade. He says that the pala stick to which reference has been made and which had been lent by P. W. 4 was broken. According to the appellant these three men threatened him not to say anywhere which presumably means anything to anyone. Taking this evidence at its highest, we only have a statement by P. W. 18 that a melee took place on that road that night. There is nothing to show that the appellant was doing anything hostile to the deceased. Indeed the probabilities are from the fact that they had been out for the evening together under circumstances that made for friendship that he would have been on the deceased's side rather than against him It is not impossible that having seen this man attacked in this manner and living as he did in the village with the three persons concerned he might have been afraid that he might meet a similar fate and quite wrongly kept silence. We are not however dealing with what was the proper procedure for a village officer under the circumstances but with the question whether he has been proved to be guilty of murder. The learned sessions judge has arrived at the conclusion that he is guilty for the following reasons Holding rightly that Ex. C. was admissible (Vide the observations of Lord Atkin at p. 190 of the report to which we have referred) the learned sessions judge referring to Ex. C. says "It does prove beyond doubt that not only was the first accused with the deceased when the deceased was last seen near the place where he was murdered but that he continued to be with him until he had been beaten to death. The first accused is a karnam and a man in position of authority. It cannot be believed that he was taken by surprise stood by horrified and then kept quiet because he was afraid of the threats of his assailants." (With regard to this it must be remembered there was evidence that he was very much under the influence of drink) "The only conclusion that can be drawn is that he either took part in the beating himself or was a party to it. I am of opinion, therefore that the prosecution has proved its case against the first accused." At the sessions, it is right to observe, the appellant resiled from Ex. C which contained at least a possible story and substituted for it a wholly incredible *alibi*. Whether he did this on his own initiative or on legal advise we do not know. He may have been influenced by the fact that Ex. C was treated throughout as being a strong circumstance against him. What should have been a shield was turned into a hostile spear. Ex. C was labelled at once by the magistrate as a 'confession statement,' in spite of the fact that it was self-exculpatory a circumstance which must have seemed ominous to the appellant. In our opinion Ex. C and the evidence of P.W. 18 proved no more than that there was an attack probably by accused 2-3 of which P.W. 18 could see very little as he was quite unable to see who was striking whom. We have already indicated that the evidence of P.W.18 taken with the relationship between these two—the deceased and the appellant—is quite as consistent with the view that the appellant might have been taking the side of the deceased, as with the supposition that he was hostile to him. Accused 2, 3 and 4 were acquitted and it must therefore be presumed that the trial judge did not believe that accused 2 made a confessional statement as stated by P.W. 3. But it appears to us that although he arrived at the conclusion that they were innocent or at least not proved to be guilty, the learned judge has convicted the appellant not on the ground that he wholly committed the murder himself but that he took part in it or was a party to it. In our view there was no evidence at all on which a conviction could be based. It is reasonable to suppose that this evidence with regard to motive rested as it was on statements by the deceased was not objected to by the defence but we consider it right to observe that the trial Judge should have excluded these statements and that in any case the Public Prosecutor of the district should himself have seen that such wholly inadmissible evidence was not placed before the court. The learned judge is entitled to the assistance of the Bar with regard to these matters. It does not appear in this case the learned sessions judge received the assistance to which he was entitled.

As a result of these conclusions the conviction and sentence of the appellant must be set aside, his appeal allowed and he will be set at liberty.

N.R.G. — *Conviction set aside.*

Cr. App. No. 170 of 1940

*July* 24, 1940

LAKSHMANA RAO, J.

KESAVA REDDI & another
v.
EMPEROR

*Evidence Act (I of 1872), S. 133—Conviction on uncorroborated testimony of approver—Cr. P. C., S. 297.*

*Where the jury were told that the evidence of an accomplice must be corroborated and a conviction was founded on the evidence of an approver which was not corroborated in any material particular bearing upon the implication of the accused in the crime, the conviction cannot be sustained.*

FACTS: The appellants were accused 1 and 2 in the lower court. The sessions judge in the course of his charge to the jury observed *inter alia*:

"As against them all conjointly there is the evidence of P.W. 2. You will not have to decide whether you will attach any weight to this evidence or not. There are some general features about the evidence of this approver which you will do well to know in the beginning. By its very nature the evidence of an approver has to be viewed with great caution. The approver in this particular case is on his own statement seen to have been involved in previous offences. Before you accept the evidence of the approver therefore it will be necessary for you to find out if his evidence has been corroborated in material particulars by the other evidence adduced in the case. This portion of the case is common to these accused and that of accused 1 and 2. The learned counsel who appeared for accused 1 and 2 has brought to your notice what according to him are the particulars which show that the evidence of P.W. 2 is not corroborated on material facts. He relies upon four points. Two of them are omissions and two are contradictions. If there is contradiction there could be no doubt that the evidence must be held to be not corroborated. I will therefore first refer to these two points of contradiction. The first relates to the hour of arrival at Kootadi on the day of the occurrence. You will remember what he has stated before us is, that they left Perangiyur on Kirthigai day of Vaikasi after finishing the virtham and they reached the Kootadi forest by about 7 P. M. The contradiction relied upon is in what is contained in Ex. D, his confession statement, and this is as follows. (Relevant portion in Ex. D. is being read to the jurymen). It is for you to determine whether on the strength of this statement contained in Ex. D. you will come to the conclusion that they left Perangiur at 1 P. M. or reached Kootadi at 1 P. M. and that there is contradiction between what he has said in Ex. D. and what he has said before you. The next contradiction lies in what P. W. 2 has said before you about the part that was taken by the 7th accused. You will remember that he told us that when he saw a man approaching he himself sent 7th accused to go inside and ran off. He has also told you that till that time both himself and 7th accused were keeping watch at the front door to prevent the inmates from making good their escape. The contradiction that is relied on is the following statement of his in Ex. D. It is for you now to say whether there is any contradiction between there two statements.

These contradictions, however, do not directly concern accused 1 and 2. The attack that is levelled on behalf of accused 1 and 2 against the evidence of the approver relates to the two omissions which I referred to above The first of them is that until his examination before the lower court, the approver has not mentioned of one incident. This incident is that of 1st accused having come on bicycle to Perangiur on the 3rd of Vaikasi, the day previous to the Amavasai day. In dealing with the case of 1st accused and 2nd accused I will have to tell you what is the part taken by these accused in this affair. Several other facts are alleged. I may briefly recapitulate them to you as follows: that 1st accused actively instigated these people to commit the dacoity, that after futile attempt was made by these people to enter the house he furnished the information about the number of inmates in the house, that they gave information about the place where the box was secured that they supplied the umbrella ribs out of which torches were made, and the ploughshare. These are the several acts alleged against 1st accused. It is for you to say whether by not having said one more act on a previous occasion and alleging it for the first time before the lower court, the

P. W. 2 was concocting an incident. You will therefore decide whether it is a concoction that he has now made or whether it is omission of an incident for which there may be some explanation. The next omission is that P. W. 2 has not stated that 1st accused or 2nd accused mentioned specifically that the account books were to be robbed. He has told you that the instruction of accused 1 and 2 was that everything available in the house was to be robbed. It is for you to say whether the absence of specific mention of a book amounts to want of corroboration on a material particular. Before proceeding further, you will therefore make up your mind whether you will accept the evidence of P. W. 2 or not.

I will now proceed to the case against accused 1 and accused 2. But before I do so, it is necessary for me only to point out that it has not been suggested by any of the accused excepting accused 3, that P. W. 2 has a motive to falsely implicate them. The motive alleged by accused 3 is what he has stated before the lower court, namely that the sister of P. W. 2 has been kept as his mistress by the uncle of the accused. P. W. 2 has been leading the life of a prostitute. You are certainly good judges of the conditions in which these people live, and you will therefore have no difficulty in making up your mind as to how far you will consider such motive sufficient or not.

I will next take you to what is more complicated, namely the case against accused 1 and 4. The case against them is that they abetted the commission of the offence by accused 3 to 7. I will first have to tell you what abetment consists in. Abetment of doing a thing may be committed in one of three ways. Firstly by instigating any person to commit that thing: secondly engaging with one or more of other persons in a conspiracy for the doing of that thing and thirdly by intentionally aiding by any act or omission in doing that thing. The evidence of P. W. 2 is that 1st accused actively instigated him and the other offenders to the committing of this dacoity, that he did so on more than one occasion, that in the course of a conversation between accused 3 and 1st accused, 3rd accused asked to be supplied with two torches and ploughshare and that 1st accused went inside the house, brought two ribs of an umbrella and gave them over after preparing torches and soaking them in oil. His evidence against 2nd accused is that he was present on every occasion of conversation with 1st accused and with two acts that are alleged against him are the supplying of umbrella ribs and the purchase of fried peas to be given to the offenders. With regard to the first of these, his evidence is to the effect that both accused 1 and 2 were present on that occasion. It is for you to come to a decision whether both or one, and if so, which of them was present on that occasion. With regard to the purchase of fried peas, it is necessary for me to draw your attention to what he has mentioned in Ex. D. The only other act that he has deposed to with regard to 1st accused is incident of his having come on a bicycle to Perangiyur on the day previous to the Amavasai day. It is not necessary for me to dilate upon his evidence any further as I have pointed out to you what are the points relied on as not corroborating his evidence and all that remains for you is to decide whether you will believe him or not.

The next piece of evidence with regard to these accused to which a certain amount of importance has rightly been attached is what relates to the motive for accused 1 and accused 2 to have abetted the commission of this crime. It is common ground that there is no love lost between P. W. 3 and accused 1 and 2. But the question that you have to decide is whether this enmity is responsible for accused 1 and 2 to have taken steps for P. W. 3 being plundered or for P. W. 3 making an attempt to get rid of this thorn in his side. You have also heard mentioned what are the causes for this enmity between these two people. Perhaps it will be necessary for you to pay some attention to this cause because they may help you to arrive at a conclusion as to which of them had the upper hand or which of them had the need to get rid of the other. The causes are (1) that P.W. 3 was instrumental in 1st accused not getting married to a girl he wanted, — 1st accused has denied this and it is for you to decide whether you believe P. W. 3 and P. W. 30 or not—the second is that the fortunes of the family of 1st accused and 2nd accused are now in a low tide and that they feel P. W. 3, who is well off is responsible for their adversity. P.W. 3 has also said that he holds a decree against their father. It is pertinent now to refer to the evid-

ence relating to what has been mentioned as the big account book. Even in the earliest report, Ex. E. P. W. 3 has said that the offenders specifically asked him for the big book. If you believe him and decide that such a question was put to him, it will be a material circumstance for you to consider.

I may lastly refer to what is admittedly the present cause of the strife. This is that P. W. 3 has under his management certain lands to a share in which accused 1 and accused 2 are laying a claim. P. W 3 has deposed that the differences in this respect have become accentuated by reason of the birth of a male child to him within five years past. With a certain amount of propriety it has been urged by 2nd accused that P. W. 3 is availing of this opportunity to implicate them and place them out of danger As a factor lending support to this suggestion reliance is placed on behalf of the accused. upon one circumstance in this case. This circumstance is that the suspicion of P. W. 3 against 1st accused and 2nd accused is mentioned for the first time in Ex. E. The suggestion is that P.W. 3 met P.W.12 the village munsif even some four or five hours earlier and that during all these hours he did not mention anything about accused 1 or accused 2. It is for you to consider how far this delay would be explained by reason of the mental confusion in which P. W. 3 would naturally have been then. P. W. 3 has definitely said in Ex. E. that his mind was confused. So far as P.W. 3 therefore is concerned it is for you to determine on these materials as to whether he was trying to make capital out of his sufferings

The learned counsel for the accused has not stopped with the attack against P. W. 3. He would involve both the village munsif and the police in this false implication of accused 1 and 2. As supporting this attack he has sought to prove that Ex. E. itself was prepared at a much later hour than it purports to and, after the arrival of the police. You will remember that in the circumstances of this case accused 1 and accused 2, are not directly concerned with the offence and that the accused who are concerned with the offence and whom the police are interested in getting booked are accused 3 to accused 7. It is a circumstance which will help you to come to a decision as to how far the police could be said to have implicated accused 1 and 2. Coming to P. W. 12, the village munsif, the learned counsel for the accused has gone to the length of giving up the very proper suggestion made by 2nd accused and argued that though P. W. 3 might have been unwilling to implicate accused 1 and 2, he would have done so at the bidding of P. W. 12. If you accept this argument it must follow that the person solely responsible for implicating accused 1 and accused 2 is P. W. 12. And then the only question that remains for you to decide is whether there has been sufficient enmity between accused 1 and 2 on the one hand and P. W. 12 on the other that has been established, that will justify you in coming to the conclusion that P. W. 12 has foisted such a serious case on accused 1 and 2.

The next piece of evidence that is of importance in this connection has reference to the umbrella ribs The learned counsel for the defence has argued that umbrellas are common, broken umbrellas are equally common and that there is no charm or virtue in two broken ribs of an umbrella being found. One other argument of his has been that it is not likely that they would have retained these pieces of evidence which would point to their guilt. How far it is a fact that in all cases the offenders get rid of the evidence relating to all traces of the offence must be within your common experience. Whether there are instances where such traces are, owing to inadvertance or any other causes, still left behind or not, is a question on which you will have no difficulty in coming to a conclusion. There is no doubt some force in what the learned counsel for the accused has told namely that umbrellas are found in ever so many places, and broken umbrellas too. But the coincidence in this case is a circumstance which you will have to weigh. It will not be sufficient by itself to help you to come to any conclusion, but it is one circumstance which you will have to keep in mind when you consider the other evidence in the case. These are all the facts that are relied upon by the prosecution in support of their case that accused 1 and 2 have abetted the commission of the offence. I have already told you what abetment consists in. There must be active instigation or engaging in a conspiracy or doing any act aiding the committing of an offence. It is very necessary for you to come to a conclusion as to each of the accused 1 and 2 having

been guility of one or more of these three acts."

The jury returned an unanimous verdict of guilty of abetment against the accused.

APPEAL against the order of the court of session of the South Arcot division in C. C. No. 47 of 1939.

*N. Somasundaram*, for Applts.

*A. S. Sivakaminathan*, for Crown.

JUDGMENT

The appellants have been convicted under Ss. 457 and 395 read with S. 109 of the Indian Penal Code and sentenced to rigorous imprisonment for 5 and 3 years respectively.

The trial was by jury and the verdict was unanimous. But the conviction is founded on the evidence of the approver and as rightly conceded it is not corroborated in any material particular bearing upon the implication of the first appellant. The only piece of corroboration against the second appellant is the finding of an umbella in his family house, and the jury was not told that the evidence of an accomplice must be corroborated in some material particular bearing upon the implication of the accused in the crime. The conviction of the appellants cannot therefere be sustained and having regard to the evidence on record a retrial is not desired The appellants are therefore acquitted and their bail bonds will be cancelled.

N.T.R. — *Appaal allowed*

R. T. No. 77 of 1940

Cr. App. No. 358 of 1940

*July* 18, 1940

BURN & MOCKETT, JJ.

KARUPPAL *alias* Chetti Boyachi

v.

EMPEROR

*Penal Code (XLV of* 1860*), S.* 302—*Sentence*

*Where the accused is found guilty of murder the law gives the judge the option of sentencing the person convicted either to death or transportation for life. Where there are extenuating circumstances, it is the duty of the judge to award the lesser sentence and not to pass the sentence of death*

TRIAL referred by the court of session of the Coimbatore division for confirmation of the sentence of death passed on 3-4-1940 upon the said prisoner in C. C. No. 33 of 1940 and appeal by the said prisoner against the said sentence of death passed upon her in the said case on 3—4—1940.

*P. Sivaramakrishniah*, for Accused.

*V. L. Ethiraj* (*Public Prosecutor*) for Crown.

JUDGMENT

(BURN, J.)

The appellant has been convicted by the learned additional sessions Judge of Coimbatore for the murder of her own two children, a little girl aged 5 and a little boy aged 2 on the 17th December, 1939. The evidence against the appellant consisted mainly of confessions of her own said to have been made to her aunt, (P. W. 10) and to an acquaintance (P. W. 1, Rama Boyan) and also to the village munsif of Pattaramangalam (P. W. 12). The appellant according to these witnesses admitted that she had thrown her children into a well and said that she had jumped into the well herself but had afterwards apparently repenting of her intention to take her own life, managed to get out. She said that the reason why she had decided to take her children's life and her own was that she had been very harshly treated by her husband and was living a life of the utmost misery. The learned additional sessions judge has accepted these confessions of the appellant and has stated that in his opinion this was a fit case for awarding as lenient a sentence as possible but strangely enough, he goes on to say that, having found the accused guilty of murder, he has no option but to award her the extreme penalty under law. This is of course quite incorrect. The law gives the sessions judge the option of sentencing a person convicted of murder either to death or to transportation for life. Where there are extenuating circumstances as in this case, it is the duty of the sessions judge to award the lesser sentence and not to pass the sentence of death. We agree entirely with the reasoning of the learned additional sessions judge. Since the only evidence that the appellaut took the lives of her children is derived from her own confession, it is only fair to take into account also the reasons which she alleged for taking such a terrible step. Her husband was examined as P. W. 5 and he said that his wife had not been right in the head for some years before, but it must be borne is mind that according to the woman herself if was her husband's ill treatment that drove her to take

the lives of her children. There was no evidence of insanity such as would take away the criminality of the act; that is to say, there is no evidence that the woman was incapable by reason of unsoundness of mind of understanding what she was doing or the consequences of her act. The conviction for murder is correct and is confirmed. The sentence of death is in this case wrong. We set it aside and substitute a sentence of transportation for life.

The learned additional sessions judge has made a separate recommendation to the government to reduce the punishment imposed upon this appellant to a sentence of three years' rigorous imprisonment. The letter of the learned additional sessions judge has already been forwarded to the government and they will take such action as they deem fit in the exercise of their prerogative. We do not associate ourselves with the express recommendation that the sentence be reduced to three years' rigorous imprisonment but we are in agreement with the learned sessions judge that the sentence of transportation for life is excessive in the circumstances of this case.

N.T.R. —— *Sentence reduced.*

Cr. App. No. 172 of 1940

*August* 9, 1940

LAKSHMANA RAO, J.

THE PUBLIC PROSECUTOR

v.

CHELLIAH THEVAN & another

*Borstal Schools Act* (*Mad. Act V of* 1 96), *S.* 7 (1) — *Reference under — Powers of magistrate.*

*The accused were convicted by a sub magistrate for offences punishable under Ss.* 323, 324 *and* 114, *I P. C. and the proceedings were submitted to the joint magistrate under S.* 7 (1), *Madras Borstal Schools Act, and the joint magistrate acquitted them. On appeal.*

Held, *that the powers conferred by S.* 7 (2) *Madras Borstal Schools Act, are neither appellate nor revisional and the order permissible under S.* 7 (2) *is only such as can be passed upon a convicted person and that the order of acquittal was improper.*

APPEAL under S. 417, Cr. P. C. 1898 against the acquittal of the aforesaid respondents (accused) by the joint magistrate of Tuticorin in C. C. No. 173 of 1939 on his file.

*V. L. Ethiraj* (*Public Prosecutor*), for Applt.

*N. T. Raghunathan*, for Accused.

JUDGMENT

The respondents were convicted by the sub magistrate of Tuticorin for offences punishable under Ss. 323, 324 and 114 I.P.C. and the proceedings were submitted to the joint magistrate of Tuticorin, under S. 7 (1) of the Madras Borstal Schools Act with the opinion of the sub magistrate that the respondents who are adolescent offenders as defined in S. 2 (1) of the Act are proper persons to be detained in a Borstal school. The joint magistrate acquitted the respondents and the question is whether this is permissible.

The proceedings were submitted under S. 7 (1) of the Madras Borstal Schools Act which provides that when a magistrate not empowered to pass sentence under that Act is of opinion that an adolescent offender is a proper person to be detained in a Borstal school he may without passing sentence record such opinion and submit his proceedings and forward the adolescent offender to the district magistrate or sub divisional magistrate to whom he is subordinate and the joint magistrate to whom the proceedings were submitted has to dispose of the case as prescribed in S. 7 (2) of the Madras Borstal Schools Act. That section provides that he may make such further enquiry if any he may think fit and pass such sentence or order dealing with the case as he might have passed if the adolescent had been tried by him, and as pointed out in *Public Prosecutor* v. *Gurappa Naidu* (1) with reference to the analogous provision in S. 380 Cr. P. C., it is not permissible to the joint magistrate to acquit the accused. A conviction has to be recorded before the proceedings are submitted under S. 7 (1) of the Madras Borstal Schools Act as otherwise there would be no "adolescent offender," and when the proceedings reach the joint magistrate he has to deal with a person who has been convicted. The powers conferred by S. 7 (2) of the Madras Borstal Schools Act are neither appellate nor revisional, and the order permissible under S. 7 (2) is only such as can be passed upon a convicted person. The order of acquittal is therefore set aside and the case will go back to the joint magistrate for disposal according to law.

N T.R. —— *Appeal allowed.*

1. (1933) M W.N. 760 : Cr. 104 : 57 Mad. 85

R. T. No. 69 of 1940

Cr. App. No. 318 of 1940

*July* 17, 1940

BURN & MOCKETT JJ.

Thalappil THITHACHUMMA
v.
EMPEROR.

*Penal Code (XLV of 1860), s 302-Existence of a young baby—No ground for passing lesser sentence.*

*The existence of an extremely young baby born to the accused since the murder is not a ground for passing the lesser sentence, transportation for life when there are no extenuating circumstances.*

Trial referred by the court of sessions of the South Malabar division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 9 of 1940 on 4-4-1940, and appeal by the said prisoner against the said sentence passed upon her in the said case.

*P. Basi Reddi*, for Accused.

*Public Prosecutor* (*V. L. Ethiraj*), for Crown.

JUDGMENT

(BURN, J.)

This is one of the many cases of murder of a child for the sake of jewels worn upon the person. An unusual feature of the case is that the murder in this case was committed by a young woman aged about 20.

There is no possible doubt about the facts. On the 2nd January, 1940, the appellant decoyed a child named Katheesa aged 12 to her house, strangled her by putting a cloth round her neck and pulling it tight, took her silver jewels worth about Rs. 5 off and then threw the body into a well in the compound. With the jewels she went straightaway to a silversmith (P. W. 14) and requested him to make them over for her. The silversmith deducted one rupee's weight of silver for his own wages and turned the rest of the jewels into chittors which were recovered from the appellant by the police very shortly afterwards. There was no eye witness of this crime and the evidence against the appellant consists almost entirely of confessions made by herself. When she was questioned on the 3rd January by a member of the local vigilance committee (P. W. 11) it is alleged that she admitted the murder. She waf sent immediately to the village munsis (P. W. 3) and to him also she admitted her guilt and she made a statement which the village munsif reduced to writing (Ex. K.). She was sent to the sub magistrate and on the 6th January the police asked the sub magistrate to record her confession. The sub magistrate having given the woman time for reflection till the 11th January recorded her confession which is Ex. B and finally when the preliminary investigation was being made the appellant said to the magistrate "It is true that I killed Katheesa and took the jewels. I committed a folly. I have nothing else to state." In the sessions court she retracted the confession before the sub magistrate and she alleged that she had not made any confession out of court.

Her story was confirmed by the evidence of the younger sister of the deceased (P. W. 6) who said that on the morning of the 2nd January the appellant came and asked her sister Katheesa to go with her to pick tamarind. Katheesa never returned. The evidence of the silversmith (P.W. 14) also confirms her story. He produced the bits of silver (M.Os. 3, 3-a, 4, 4-a and 5) which he had kept for his remuneration and he spoke to M.Os. 6 to 26 which he said he had made for the appellant out of the silver jewels brought to him on the 2nd January.

The appellant was advanced in pregnancy and has given birth to a child since this murder. This was apparently made a ground for urging before the learned sessions judge that the extreme sentence should not be passed; but the learned sessions judge, we think, has dealt with this matter in the proper manner. He has pointed out that the crime was obviously committed after deliberation and in a brutal manner. There was no suggestion that the appellant was in any way unbalanced in mind or that she was unaware of the nature of her act or the consequences of it. There was no suggestion made at the trial that the appellant might not have been in full control of her faculties. The learned sessions judge has therefore said quite rightly that the existence of an extremely young baby born to the appellant since the murder might perhaps be taken into consideration by the Provincial Government when the appellant prefers an application for clemency but would not be a ground for passing the lesser sentence.

We agree with the learned sessions judge that the offence was clearly established. We confirm the conviction for murder and the sentence of death and dismiss this appeal.

N.T.R. — *Appeal dismissed.*

Cr. R. C. No. 498 of 1939

Cr. R. P. No. 463 of 1939

*October* 27, 1339

LAKSHMANA RAO, J.

ABDUL HAMEED ROWTHER & Others

v.

S. M. MUHAMMAD SATI ROWTHER.

*Cr. P. C (V of* 1898), *ss* 259 *&* 403—*Discharge after framing of charge—Effect.*

*Discharge of an accused on transfer of a case after the charge had been framed by the first court amounts to an acquittal and a fresh complaint on the some facts is barred by s.* 403, *Cr. P. C.*

THE FACTS appear from the order of the lower court (sub magistrate, Shiyali):

"This case (C. C. No. 298 of 39) was originally C. C. No. 208 of 39 on the file of this court. The case in C. C. No. 208 of 39 was transferred to this court by the A.D.M. from the file of the sub magistrate Tranquebar after the latter had framed a charge against the accused. When the case was taken up for trial the accused asked for the resummoning and rehearing of all the P.Ws. under s 350 Cr. P. C. In other words a de novo trial was asked for On 8-5-39 P.W. 1 was examined and the case was adjourned to 22-5-39 for which date three witnesses for the prosecution were bound to appear. When the case was taken up at 12 A.M. that day it was found that the accused only were present. Neither the complainant nor his pleader was present. I therefore discharged the accused under s. 259 Cr P.C. About 20 minutes thereafter the complainant, his pleader and the three witnesses turned up. The complainant put in a petition stating that he missed the bus which would have taken him before 11 A.M. and requesting restoration of the complaint. He also put in a fresh complaint the next day containing the same facts. Though I could entertain this fresh complaint and go on with it I could not do so in this case for want of jurisdiction because the complaint dealt with an offence alleged to have taken place at Tirukkalacheri a village in the jurisdiction of the Tranquebar sub magistrate. Hence I returned it for presentation to the court having jurisdiction.

On 25-5-39 that complaint was presented before the S.D.M. who took it on his file and transferred it to me the same day for disposal according to law. The accused raised an objection to my going on with the case on the ground that an order of discharge passed after a charge had been framed is an order of acquittal and that the accused cannot be tried again for the same offence. Various conflicting authorities are quoted by both parties for and against the above view.

I passed the order of discharge under s. 259, Cr.P.C. when the case was in the enquiry stage in my court and it could not be held that the order was one of acquittal, for the case has been transferred to me for disposal by a competent court I overrule the objection raised. The petition is dismissed."

Against this a revision was filed in the High Court on the following grounds.

"The court below erred in holding that the complaint on the same facts is maintainable notwithstanding the order passed on the previous complaint.

The court below erred in holding that the order of discharge was pronounced when the case was in the enquiry stage.

The court below overlooked the fact that the case was transferred to the file of that court after a charge under s. 323, I. P. C. had been framed.

The court below ought to have found that the case was being tried on an application by the accused for resummoning and rehearing the witnesses under s. 350, Cr. P. C in which case the charge already framed continues in force.

The court below ought to have found that an order of discharge passed after the framing of the charge amounts to an acquittal. (38 Mad. 585).

The court below ought to have therefore found that the order of acquittal precludes a fresh enquiry or complaint under s. 408, Cr. P. C.

The court below has materially erred in not

considering the effect of an order of discharge after the framing of the charge.

The court below ought to have found that the accused are materially prejudiced by a fresh complaint when they had been acquitted by virtue of the prior order."

PETITION under Ss. 435 & 439, Cr. P.C. 1898, praying the High Court to revise the order of the court of the stationary sub-magistrate of Shiyali dated 19th June, 1939 and made in C.C. No. 298 of 1939.

*V. T. Rangaswami Iyengar & R. Somasundaram* for Petrs.

*S. Rajaraman & S. Sitarama Iyer*, for Respt.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER

The charge had been framed before the proceedings were re-commenced under s. 350, Cr. P.C. and as pointed out in *Sriramulu* v. *Veerasalingam* (1) the discharge of the accused thereafter amounts to an acquittal. The accused cannot be tried again when that order is in force and their objection under s. 403, Cr. P.C. is valid. The revision petition is therefore allowed and the proceedings in C.C. No. 298 of 1939 on the file of the second class magistrate, Shiyali are quashed.

N.T.R. — *Petition allowed.*

R. T. No. 53 of 1940

Cr. App. No. 225 of 1940

*August* 5, 1940

KING, J.

ON A DIFFERENCE OF OPINION BETWEEN GENTLE & PATANJALI SASTRI, JJ.

SANKAPPA SHETTY

v.

EMPEROR

*Penal Code (XLV of 1860), S. 84—Plea of insanity—Proof.*

*Appellant was charged with having murdered his wife and the defence was that at the time appellant killed his wife he was insane and to substantiate the plea of insanity the following facts and circumstances were relied on :*

(1) *that the deceased and appellant throughout their married life lived upon affectionate and friendly terms;*

(2) *that there was no motive for the appellant to kill the deceased, and the act of killing was done with needless fury and great violence;*

(3) *that when the prosecution witnesses went to the scene of occurrence the appellant appeared to be dazed and offered no resistance when he was seized and secured;*

(4) *that the conduct of the accused was strange and eccentric for a period of three days prior to the occurrence;*

Held, (*King, J. agreeing with Gentle J.*), *that these circumstances were not sufficient to establish the defence of insanity under s. 84, I.P.C.*

*The burden of proving insanity is cast upon the accused by S. 105 of the Evidence Act and under S. 84 of the Penal Code he must prove that at the time of the killing he was by reason of unsoundness of mind incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law.*

Trial referred by the court of session of the South Kanara division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 3 of 1940 on 11-3-1940 and appeal by the prisoner against the said sentence.

*P. Sivaramakrishniah*, for Accused.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

JUDGMENT.

GENTLE J.—The appellant has been convicted by the learned sessions judge of South Kanara of the offence of murder under S. 302, I.P.C. and has been sentenced to death.

The appellent is Sangappa Shetty and the deceased was his wife, Kaveri. They had been married for 8 years and had four children, issues of the marriage, of the ages between 7 years and 18 months. The offence is alleged to have taken place in the house of Honnaya Hegde who is the uncle of the mother of the deceased. P.W. 2 Hoovamma is the wife of Honnaya Hegde. In the community to which the accused and the deceased belonged, it is the custom for the husband to bear the expenses of the wife's confinement. 18 months before the death of the deceased, as her parents were dead, the deceased went to the house of P.W. 2 in Kuthavoor village for her confinement. The appellant was unable to bear the cost of the confinement or for his wife to return to him at his own village about 11 miles distant and during the period of 18 months following her last confinement she remained at her relation's house wher he visited her from time to time.

1. (1914) M.W.N. 646 : 38 Mad. 585

On 28-11-1939, the appellant arrived at the house, the deceased, P.W. 2 and her son P.W. 3, were then present. He spent the night with his wife and children in a room in the house. On 29-11-1939, P.W. 2, P.W. 3 and P.W. 5, the brother of the deceased who also lived in the house but had been absent the previous night, took their food with the appellant and the deceased at about 10 a.m. The appellant asked the deceased to give him Rs. 25 and she replied that if he returned her jewellery which he had previously taken, she would let him have that amount. It was said that upon her marriage she had jewellery worth about Rs. 200 which the appellant had taken and upon which he had raised some money. About noon, P.Ws. 2, 3 and a servant, P.W. 4, went to a building about 45 feet away from the room which the deceased, the appellant and their children occupied, in order to pound paddy. About 2 hours later, these three witnesses heard the deceased cry "Killing" and the children shouting "father is killing mother". They went to the room in the house and found the door shut and bolted or locked from inside. P.Ws 2 and 3 went to an open window and saw the appellant inflicting a blow with a plank, upon which food was served, upon the deceased's temple. P.W. 5 was not then in the house having gone out. P.W. 2 immediately raised an alarm which brought two neighbours, P.Ws. 6 and 7. P.W. 3 fetched P.Ws. 9 and 10 who were working near by. P.W. 6 forced open the door with a crowbar, the deceased was lying dead on the floor, and the appellant was seized, brought out and secured. He appears to have offered but little, if any, resistance and some of the witnesses said he appeared dazed. Communication was made to P.W. 16, the village patel, who sent his report to the police and the police officer arrived later. On 1-12-39 P.W. 1, the medical officer in charge of the local fund hospital at Mulki, performed the post-mortem examination upon the body of the deceased. He found 20 injuries of which 13 were on the head and the others on various parts of her body. 17 of the injuries could have been caused by the plank with which P.Ws. 2 and 3 had seen him striking the deceased, two of the head injuries would have occasioned death within five minutes. Learned counsel on behalf of the appellant stated that he was unable to suggest that the evidence of the above witnesses could in any way be attacked or disputed. There is nothing which shows that these were unreliable or their evidence unacceptable, and that it is beyond doubt that the appellant caused the death of the deceased by striking her with a wooden plank which, in the way he used it, was a dangerous weapon.

The defence which was put forward before the learned sessions judge and which has been argued before us is that at the time he killed his wife, the appellant was insane. S. 84, I.P.C. provides as follows:

> "Nothing is an offence which is done by a person who, at the time of doing it by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law."

The question of the sanity of the appellant was not raised or suggested to be in doubt until the trial in the sessions court which commenced in February, 1940, about three months after the occurrence. In the statement which he made before the committing magistrate on 10-1-1940 the appellant said he did not know anything and that the rest he would tell in the higher court, he had no witnesses to be examined in that court, it was not possible for him to give a list of witnesses at that stage, as he would produce them in the sessions court. The facts and circumstances which are relied upon to substantiate the plea of the insanity are (1) the matters given in evidence in the sessions court by P. Ws. 1 and 14 and D. W. 1; (2) that the deceased and the appellant throughout their married life had lived upon affectionate and friendly terms; (3) that there was no motive to cause the life of the deceased; add (4) that when the prosecution witnesses went to the scene of occurrence, the appellant appeared to be dazed and offered no resistance when he was seized and secured. All the witnesses who were acquainted with the deceased and the appellant said they were always upon affectionate terms together.

Prior to the happenings on 28-11-1939 there is no doubt that the appellant was in some financial embarassment. He was also concerned in regard to some property belonging to his wife, or in which she was entitled to a share, and which he described as "our" property The ejaman of the deceased's family, is the husband of P. W. 2, a mortgage was subsisting upon this

property and the ejaman had not kept up payment of the interest and some amount in respect both of principal and interest was outstanding. Some approaches to, or negotiations with, a bank in Mangalore had taken place to borrow the necessary funds to discharge the mortgage debt, but these had not been successful On 23-11-1939, six days before the occurrence, P.W. 15, a sub-inspector of police had questioned the appellant regarding a piece of jewellery which was stolen and examined him as a witness who had some knowledge of the theft. The relevancy of these two matters will appear later.

It is now convenient to refer to the testimony of the three witnesses upon which the defence relies P.W. 1, the medical officer who performed the postmortem upon the body of the deceased, was asked about the mental condition of the appellant when he was cross examined before the learned sessions judge. He said that from the nature and the number of the injuries which he found, the attack was very brutal. There must be some deep-seated motive for a man to cause so many injuries, and if the the deep-seated motive was absent, then the assailant must be an insane man especially when he is the husband of the victim. In reply to further questions by the learned advocate for the appellant, he then gave the following evidence. One or two days before the death of the deceased, he travelled in a bus with the appellant. Both of them alighted as a village called Mulki. A little later, he said, he saw the appellant prostrating himself before a man who had been a passenger in the bus and talking incoherently to him, that his behaviour was not quite normal and that he was excited. In one part of his evidnce he said he could not make out what the appellant was saying. Later he stated he did not pay any attention to what exact words were uttered, but corrected himself and said that he heard now and then some of the words which the appellant spoke to the passenger, and which were, "You are my saviour", "Had it not been for you I would have been ruined", and "A telegram must be sent to Mangalore,, and later still the witness said he did not catch the subject matter of the talk. The appellant bent his head and touched the feet of the passenger several times. He did not say that the passengar resented the attentions of the appellant or that he tried to get rid of or escape from him, and added that whilst this man was a stranger to the witness, he was not sure that he was a stranger to the appellant. The appellant is a villager and conduct of this kind is not an unique way for such a man expressing his thanks and appreciation for help ,and services rendered by another who might be in a higher station in life. If, as he said, he did not know what the subject was of the remarks made by the appellant and heard only the words which are set out above, it is difficult to see how he could say the appeallant was talking incoherently. Hearing only three short disjointed sentences of a conversation without knowing the remainder or the subject of the remarks should not lead to an inevitable conclusion that the words which were heard must be incoherent, that is to say, inconsistent The sentences seem to me to be more compatible with consistency than with incoherence. The witness said that it was the words he heard and being incoherent, made him understand the appellant was not in his senses. As a general proposition, one cannot accept the opinion which this witness expressed that in the absence of what he described as a deep-seated motive, the brutal assault must have been committed by an insane man. P.W. 1 said that later he went to the house of one Raman Shetty where he saw P.W. 14, Jayarama Shetty and told him of the incident of the appellant behaving "like a madman". P.W. 14 said he had been so informed.

P.W. 14, Jayarama Shetty in examination-in-chief said that he knew the appellant, who had stayed in his house at Mulki from the 26th to the 28th November, and that it was the custom of the appellant to do this whenever he was in that village. During this particular visit, the appellant told him that there was a debt upon "our" property. Rs. 1,000 was due which it was necessary to pay and to do this, application had been made to a bank in Mangalore for a loan which at first was promised but subsequently it had not been sanctioned. P.W. 5 the deceased's brother, who lives at the house of P.W. 2, said in cross-examination that there was a mortgage upon their family property the amount of which had been reduced to Rs. 3,000, it was decided to raise a loan to discharge this, and the appellant had been to a bank in Mangalore to obtain a loan. He apparently was not asked

and did not say whether the bank declined to grant it. There is no suggestion that the evidence of P.W. 5 was incorrect and therefore the statements by the appellant in regard to the mortgage and the attempts to obtain a loan are substantially correct. The appellant also told P.W. 14 that on account of financial difficulties he had not been able to cultivate his land and had let it out on lease, although no evidence was forthcoming about this, as the appellant was in straitened circumstances, it is likely to be correct. In re-examination, P.W. 14 said that when the appellant discussed financial matters, he talked like a sane man. From this part of this evidence there is nothing from which it can be contended the appellant was not in possession of his senses. Reliance is placed upon the evidence which this witness gave in his cross-examination. In this part of his testimony, P.W. 14 said that P.W. 1 had told him of a man behaving like a mad man, and that he P.W. 14, guessed that P.W. 1 was referring to the appellant. On the night of 26-11-1939 the appellant stayed in his house, his behaviour was not quite normal, he was talking much, which talk was incoherent and nonsense. He expressed the fear he was going to die, that "Thamma" (the younger brother or cousin) had given him some medicine which had made him ill and that he felt a strange sensation in his head. It was this talk which the witness said caused him to guess that the appellant was the man to whom P.W. 1 had referred as the former told him he had arrived by bus, on 27-11-1939. P.W. 14 said the appellant was acting or behaving like a madman on the road, someone informed him that a man who had stayed at his house the previous night was behaving in this way and on going up to a large crowd round the appellant, he ascertained that some rupees had been scattered on the road which had been picked up by a Konkani, except two, which the witness secured and took the appellant back to his house. He did not see the appellant throwing money on the road. At about 8-30 that evening he suddenly got up and struck him a blow, attempted to run away, and with the help of two other persons who were present he was caught, brought back and made to sit down. He wept like a child and when asked why he struck the witness he said "When I looked at you you appeared frightful. So I beat you. I am sorry for having beaten you." Later that evening he the appellant ran from an upper storey in the house saying that he would jump into a well. On the morning of 28-11-1939, P.W. 14 said the appellant was all right. He took him to the bus station, obtained a ticket for him to Kimmigowli which he gave to the appellant and asked some man in the bus to arrange for two people to go with him At the conclusion of his evidence, he, the witness said that only occasionally the appellant would go off his head and that for most part of the time during his stay, the appellant was all right by which the witness must mean he was behaving normally. There can be little doubt, indeed the learned Public Prosecutor said that he would concede, that at times the appellant's conduct and behaviour were peculiar, but the expressions of regret which the appellant made to P.W. 14 after he had struck him indicate that he realised what he had done and that it was wrong. The incoherency and nonsense mentioned by P.W. 14 appear to refer to the appellant saying he feared he might die and blamed "Thamma" for having given him some medicine which made him feel ill and that he felt a strange sensation in his head. The evidence does not establish it was the appellant who threw money on the road, the defence suggests this should be inferred. The incident when he said he would jump into a well, if it occurred, reflects a suicidal and not a homicidal tendency. The effect of his evidence, whilst it shows the appellant's actions and conduct were strange and eccentric does not establish either that he did not know what he was doing or did not realise what he had done was wrong.

P.Ws. 1 and 14 both described the appellant's conduct as not quite normal which is not unsoundness of mind of the degree required by s. 84 Indian Penal Code. Neither P.W. 1 nor P.W. 14 mentioned any of the matters to which I have just referred when they gave evidence before the committing magistrate and they were disclosed for the first time in the sessions court. Whatever might excuse P.W. 14 not refering earlier to the conduct of the appellant, P.W. 1 is a gentleman of education and a doctor, and one would have thought that if he had formed the opinion that the appellant was not responsible for his actions, he might have mentioned it earliar and not wait

until he gave evidence in the sessions court. Mr. Ethiraj, the learned public prosecutor, however, stated that he did not wish that the position of the appellant should be adversely affected by the failure of these two witnesses to disclose the matters to which they spoke, and would make no observations regarding the belated nature of their evidence but confine himself to criticising their testimony. He submitted it did not establish that the appellant, at the time he inflicted the injuries upon his wife, did not know what he was doing, or if he did not know that it was wrong or unlawful.

D.W. 1, Sridhara Shetty, did not give evidence until the trial in the sessions court. He said that he knew the appellant and saw him at the end of November in Kimmigowli sitting on a bench in a coffee hotel. There were other people present including a man named Degu Bhandari, who gave some rupees to the appellant. The witness said that he told the appellant that P.W. 14 had sent word that he (the appellant) should be sent to his house escorted by two other persons and asked him whether he was going to his wife's house at Kodeppa (this is the name of the house where the deceased was living with P.W. 2). The appellant replied that he had been drugged, Krutrima has been done to him and went on talking. The witness said he paid no attention to this. Upon being asked again where he intended to go, the appellant informed him that he was going to Kodappa. The witness said that he told two men, Isthu and Babu, who were not called to give evidence, to take the appellant and leave him at Kodappa. Incidentally, P. Ws. 2 and 3 when cross examined said that the appellant arrived alone. D. W. 1 did not remain long at the hotel or talk to him much, when the appellant said he would go to his relation at Kodappa he spoke rationally, that he was now and then all right and talked properly. The only matter to which this witness deposed showing abnormality was the appellant's reference to drugs and krutrima and as he remained only a short time his statement that the appellant was alright now and then suggesting at other times he was not, carries little, if any weight.

In the sessions court, the appellant made a lengthy statement in the course of which he said that prior to the occurrence he was not well and felt that his enemy had administered evil drugs to him At that time a man named Aga Kala Dasu Chetty had stolen a jewel, he had informed the sub inspector who was responsible for the theft and ten days afterwards his illness grew worse and he had some fear and a sensation in his stomach. On one occasion when in the dark he felt as though he saw an apparition like a big man. In the journey to Mulki in the bus he felt a sort of fear and was unwell. He lost some rupees which he had on arrival and asked P.W. 14 and others where they had gone. The next day he felt better. He referred to his stay with P.W. 14 and the visit to the hotel at Kimmigowli where he had taken food. He said two persons accompanied him to the house where his wife was one a Christian and the other a dark man. He felt a chill and was shivering as if he had fever. On arrival at the house, his wife and P.W. 2 asked him if he had fever, they applied some medicine to his head and gave him a bath. next day, he said that P.W. 2 and his wife told him that there was some talk that he had stolen the jewel, later he said his wife alone told him this. At noon his wife roused him from his sleep and asked him to take some food and then inquired about the jewellery and at that time he was not well. The statement then continues that he was unaware after this if he beat his wife or not. There was no disagreement between them, he did not ask his wife for money, she had none and that whenever she needed any he gave it to her The next day he was told by the police that he had killed his wife and he said that he had no recollection of doing so. P.W. 2 and her son P.W. 3 bore feelings of enmity against him arising out of a mortgage loan to be obtained from a bank, a disagreement over a marriage and a dispute regarding money and they had given evidence against him on account of this animosity. He added that he first became aware of his surroundings during the night when he was in the yard his legs and hands tied. The learned sessions judge put to the appellant a large number of questions which more resembles cross-examination than an examination under s. 342 of the Cr, P.C.

P.Ws. 2 and 3 denied the appellant was brought to the house by two men, that he was ill on arrival and had been given treatment and a bath. These two witnesses and P.W. 5 said

that he was in his senses and and alright. The evidence regarding the occurrence is given by P.Ws. 2 and 3, it was not suggested they were not speaking other than the truth. There is no reason to reject their testimony upon the appellant's state and condition of mind.

The case for the appellant is that his conduct and behaviour during the three days prior to and on the day of the occurrence shows that he was of unsound mind to a degree that he was unable to distinguish between right and wrong. According to his own statement, he underwent a "blackout" at the time of the attack upon the deceased and his memory of that event is a complete blank There was no evidence indeed there was no suggestion, that previous to the period covered by the occurrence and the three days prior thereto or at any time since, the appellant has shown any signs of mental derangement, his unsoundness of mind being limited to those few days. In his statement, he gives the places to which he went during that time and his arrival at Kodappa house. His statement is at variance with the evidence of P.Ws 2 and 3 regarding his arrival with two persons and being given treatment and a bath, but a conflicting statement is not necessarily a sign of insanity. He therefore had a recollection of his movements during this period. His reference to the loss of some money at Mulki and his enquiring of P.W. 14 what had become of it doubtless refers to the affair in the road to which this witness spoke and the inference is sought to be drawn that his mind is a blank in respect of that incident Whilst this incident may have occurred. one is dependant upon the accused's own statement that he has no recollection of it, the suggestion being that this freak of memory is similar to his want of recollection of the occurrence in the room where his wife was killed. If he was suffering from unsoundness of mind, it is unlikely it would have been manifest only during the period of four days and terminated immediately after the attack upon his wife, when, for a short time, the suggestion is that he became a homicidal maniac.

Even accepting the whole of the evidence of P.Ws. 1, 14 and D.W. 1 of whom the first two witnesses described the conduct of the appellant as not quite normal, it shows he was strange and eccentric, he was under a delusion that a brother or cousin had given him drugs and that krutrima had been done to him, and putting it at the highest, was acting upon some insane impulse when he struck P.W. 14, but nevertheless, his expression of regret shows he must have known he was then doing what was wrong. P. W. 14 said that when he told him of his financial troubles he talked like a sane man and it would seem with substantial accuracy. D. W. 1 said he spoke rationally when he said he was going to his relation at Kodappa house. His cognative faculties were therefore not absent.

When a man is worried with his affairs or distracted about money matters, as the appellant was, slight annoyance may rouse his anger which at other times would be left unperturbed and may cause him to lose his temper and do an act even of violence. Can it be said that such a person is insane to a degree the section requires? The appellant and the deceased were in the room for two hours prior to the occurrence. Their young children were with them but are too young to give evidence of what transpired. Whilst there is no apparent motive for the appellant's act, it is not without some significance that the door was bolted from inside the room at the time and although there is no evidence who secured the door the attack was made at a time when entry into the room was obstructed and prevented. This factor is relevant also when considering the appellant's knowledge. The absence of motive and the violence used to cause the death of another alone are not sufficient to establish that the assailant was insane at the time. (See *King Emperor* v. *Gedka Goala* (1) and cases cited in the judgment).

The last two matters requiring consideration are that the appellant appeared dazed and offered no resistance when he was secured after the occurrence It is likely that he would be dazed when he realized what he had done and as five men broke into the room, in such circumstances a man who is not out of his senses would appreciate the futility of offering resistance. If the appellant had exhibited violence to, and fought with those men, such conduct might well reflect a disordered mind. If an inference is to be drawn from his behaviour at this time, it is that he appreciated what he had done and knew that resistance was useless.

Upon consideration of all the evidence, facts and circumstances including the absence of an

1. (1936) 16 Pat. 333.

apparent motive and the appellant's conduct both before and after the occurence, it is not established that he did not understand the nature and quality of his act. Although his behaviour may have been unusual and strange, he was not suffering from unsoundness of mind so as to be incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law when he put his wife to death. The defence under S. 84, I. P. C. should therefore fail.

The appellant inflicted grievous injuries upon his wife with a wooden plank which was, by the way in which it was used, a dangerous weapon. The persistence of the attack evidenced by the number of injuries and the grievous nature of at least two of them show that when he was beating his wife, he intended to kill her. Therefore the offence which he committed is murder.

The absence of an apparant motive is material when the question of sentence is considered. The offence which the appellant committed was not premeditated in any way and must have been the result of impulse and temper. In these circumstances, I consider that although the assault was a violent one, the proper sentence is one of transportation for life. I would therefore affirm the conviction but reduce the sentence.

PATANJALI SASTRI, J.: I regret I am unable to agree with my learned brother in the conclusion he has arrived at. I would accept the appellant's plea of insanity and set aside his conviction.

The facts of the case have been fully stated in the judgment of my learned brother which I have had the advantage of reading and it is unnecessary to recapitulate them here. I would content myself with briefly indicating the grounds of my decision.

The appellant's plea is based upon S. 84 of the Indian Penal Code and the onus of establishing it is on the appellant—see S. 105, Illustration (a) of the Indian Evidence Act. The question for determination therefore is whether the appellant has succeeded in proving that when he killed his wife, he was incapable, by reason of unsoundness of mind, of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It may be observed at once that the appellant was not placed under any medical observation soon after the occurrence and we have thus no expert medical evidence relating to the cognitive faculties of his mind during the period immediately following the occurrence. There is, however, sufficient evidence, in my opinion, to establish the appellant's plea of insanity.

In the first place, there is such a complete lack of apparent motive and the act of killing was done with such needless fury and violence that it is difficult to regard it as the act of a person in the unimpaired possession of his cognitive faculties, especially as the deceased was the appellant's wife and it is abundantly proved by the prosecution evidence itself that they were living on quite affectionate terms. Some attempt was no doubt made by the prosecution to suggest a motive of a sort, namely, that the appellant had previously taken and sold the jewels of the deceased for his own purposes and when he asked her on the morning of the day of occurrence to give him Rs. 25, the latter replied that if he returned what he took from her previously, meaning the jewels, she would pay the sum required. This is said to have so enraged the appellant that he killed her in a fury. P.Ws. 2, 3 and 5 speak to this incident in the morning but the story is very thin and the witnesses themselves admit that even after the appellant took away the jewels of the deceased, they were living on very affectionate terms. P.W. 2 the grand aunt of the deceased said :

> "Yes, the accused was showing great affection to her. Kaveri never complained to me or to my husband about the accused. They were loving each other very much. Even about his having taken away her jewels she never complained to me or to any of us. The accused was also loving his children very much."

P.W. 5 the brother of the deceased said :

> "Kaveri did complain to me about the accused having sold away her jewels and having himself utilised the proceeds. Yes, in spite of that both husband and wife were loving each other. Up till that Wednesday I have not known of any instance of the accused having beaten or ill-treated Kaveri on any other occasion."

This evidence clearly shows that there was no ill feeling or misunderstanding due to the appellant having sold away his wife's jewels and it

could not have possibly served as a motive prompting the perpetration of the deed. Then as to the appellant having asked his wife for Rs. 25 on the morning of the day of the occurrence, it is difficult to accept the evidence as it was admitted by P.W. 5 that the deceased had no money at the time and that the appellant also knew that she had no money, and in any case, it has been elicited from P.W 2 that the appellant did not show any signs of having got irritated by his wife's alleged answer to his demand for money. The attempt, therefore, on the part of the prosecution to make out that the appellant's act of killing his wife was prompted by a rational motive must be held to have completely failed and indeed, the learned public prosecutor made no such attempt before us.

We have thus the spectacle of a loving husband and an affectionate father who had never been known to have beaten or ill-treated his wife on any previous occasion suddenly killing her by battering her head and body with a sitting plank inflicting as many as twenty wounds and bruises. The post-mortem certificate (Ex. K) describing the injuries shows that the appellant must have been seized with a frenzy of violence which led him to deal blow after blow indiscriminately all over the body, and the doctor (P.W. 1) who conducted the autopsy gave it as his deliberate opinion that from the nature and number of the injuries which he had examined, there must have been either some deep seated motive or the man must have been insane. Comment was made that this was a mere matter of opinion. I did not however understand the public prosecutor to argue that it is inadmissible in evidence. In *Mc' Naghten's case* (2) the learned judges who were consulted by the House of Lords expressed the view that a medical man who had been present in court and heard the evidence might be asked as a matter of science, whether the facts, assuming them to be true, showed a state of mind incapable of distinguishing between right and wrong. If so, I do not see why the opinion of P.W. 1 who was a medical man and has himself seen the injuries on the body of the deceased, should be rejected as inadmissible. Even apart from this opinion of P.W.1, I consider that the nature and circumstances of the appellant's act justify the inference that it must have been committed under an insane impulse when he was incapable of understanding what he was doing.

This inference is supported by the evidence in the case relating to the abnormal behaviour of the appellant spoken to by P.Ws. 1 and 14 during the two days immediately preceding the occurrence. P. W. 1 said that one or two days before the death of the deceased, he saw the appellant at Mulki "behaving like a mad man". He deposed:

> "I saw this accused prostrating before a passenger (in the bus) and talking incoherently to him. His behaviour that day was not quite normal. He was excited. I could not make out what he was saying to the passenger.....
>
> I told him (P. W. 14) about this incident —the accused behaving like a mad man."

In re-examination he added:

> "The accused's prostrating to the pasenger was on the road. He did not lie flat on the ground. He simply stopped and bent his head and touched the feet of the passenger so many times. He said "You are my saviour and so on...". He would say some words now and then touch the feet of the passenger and then keep quiet and then he would say some words. The words that I caught, now and then while he talked, were incoherent and they made me understand that he was not in his senses."

It is true that this witness did not refer to this incident when he was examined before the committing magistrate. But it must be remembered that he was not cross examined on behalf of the appellant in that court and though he might have voluntarily placed the information that he possessed before the magistrate, no inference against his veracity could in my opinion, be drawn from his omission to do so. It might well be that he thought that it is none of his business to bring it to the notice of the court It might also be that he did not want to run the risk of his statement being discounted or disbelieved as something volunteered on account of his supposed interest in the appellant, The learned public prosecutor stated quite fairly before us that he would not question the veracity of this witness on the ground that he failed to refer to this incident when he gave

2. 10 Cl. & F. 200

evidence before the committing magistrate and argued only that taking his evidence to be true, it was not sufficient to support a plea under S. 84 of the Penal Code. P. W. 14 also gave evidence as to the accused's state of mind during the same period, i.e., the two days prior to the occurrence. He is a resident of Mulki and he said that whenever the appellant came there, he used to take his food in a hotel but stay in the witness's house during the nights. This witness was examined for the prosecution to show the financial condition of the appellant at about the time of the occurrence. In cross-examination, however, certain important incidents throwing light on the appellant's state of mind have been elicited. The witness said that on the night of the 26th when the appellant came to his house, the appellant was talking incoherently and even talked nonsense. He expressed some fear and was saying that he was going to die. He said that "Thamma" (younger brother or cousin) had given him some medicine and after that he had been keeping ill and was feeling a strange sensation in his head. On the 27th November the witness saw the appellant acting and behaving like a mad man on the road in Mulki. Some one told the witness that the man who had slept in his house on the previous night was behaving like a mad man on the road, whereupon the witness went and saw a large crowd round the appellant on the road where he noticed rupees lying scattered. Some of the coins had been picked up by a Konkani and the witness picked up two which had been left on the road and took the appellant to his house. The witness also said that on hearing his voice, the appellant sat down on the road. After the appellant was taken to the house, at about 8-30 in the night, he suddenly got up and gave the witness a blow when the latter was talking to certain other persons in the room. After the appellant gave the blow, he attempted to run and the witness and another caught hold of him and brought him back to the house. When asked why he beat the witness, the appellant did not talk at all for an hour; then he wept like a child and said that he was sorry, explaining that he beat the witness as the latter "appeared frightful" to look at Later in the course of the night, the appellant ran down from the upper storey saying that he would jump into a well. The next morning however, the appellant was all right and left the house of the witness saying that he would go to his place. The witness accompanied him to the bus station and bought him a ticket to Kimmigowli where the appellant wanted to go. Finding one Beju Shetti also going to Kimmigowli, the witness asked him to take the appellant to one Shridhara Shetti there and to request the latter to arrange for two men to escort the appellant to this place.

In view of those statements of the witness the prosecution obtained permission to cross-examine him and all that was elicited in such cross-examination to shake his credit was that he did not refer to these incidents when he was examined before the committing magistrate. He explained the omission by saying that the prosecuting inspector in that court did not ask him what all talks passed between him and the appellant but asked him only to say what the appellant told him about his financial difficulties and to answer only questions that were put to him. The witness denied that the appellant was his particular friend. He added that only occasionally the appellant would go off his head and would think and think and talk incoherently, but most of the time during his stay on that occasion, the appellant was all right. As in the case of P. W. 1, the learned public prosecutor said that he was not prepared to impeach the testimony of this witness on the ground of his failure to refer to those incidents before the committing magistrate but only urged that it did not assist the appellant any more than than evidence of P. W. 1, to bring himself within the exemption under S 84 of the Indian Penal Code.

The learned public prosecutor contended placing reliance upon *King Emperor* v. *Godka Goala* (3) that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption under S. 84 and that neither the apparent lack of motive nor the particulars of the appellant's behaviour as described by P. Ws. 1 and 14 on the two days immediately preceding the occurence are sufficient to bring the case within that section. It is no doubt well settled that unless

3. (1937) 16 Pat. 333

the unsoundness of mind pleaded is such as to render the accused incapable of understanding the nature of the act with which he is charged or that what he was doing was wrong or contrary to law, he is not excused from criminal responsibility. It is also true to say that a mere lack of apparent motive for the deed does not necessarily or always lead to an inference of intellectual aberration or insanity but a total lack of an apparent motive may in some cases taken along with other facts legitimately give rise to an inference that the act was done under an insane impulse — see *Vodde Subbigadu in re* (4). Similarly, it is true to say as was said by the learned judges in the case referred to above, that a crime is not excused by its own atrocity. This indeed in a trusim. But can it be said that the nature of the act or the mode of perpetrating it can under no circumstances be taken into account in considering a plea of insanity. It may be that as a rule of prudence courts will be slow to infer from such material that the person committing the act was not conscious of its criminality. But I can see no warrant for laying down, as a rule of evidence that one must look outside the act itself for the evidence as to how much the accused knew about it. The truth is that in dealing with all such cases no general rule can be applied and the only proper course to adopt is to decide each case on its own peculiar facts bearing in mind, of course, that the point for determination is whether the evidence before the court is sufficient to establish that the person charged with the offence was not conscious of the nature of the act he was doing or that he was doing what was wrong or contrary to law. It will be seen that in the case referred to above, the evidence showed that at the time he committed the offence, the accused 'knew what killing was and meant to do it knew what he had done already, knew who was his brother and his sister-in-law and where they lived and the way to that place," In the present case, not only is there nothing to show that the appellant was aware of what he was doing but the extracts given before above from the evidence of P. Ws. 1 and 14 as well as the conduct of the accused immediately after the occurrence would seem, to my mind, to show that the accused was incapable by reason of his mental aberration of knowing the nature of his act. His incoherent talk to a passenger in the bus which led P. W. 1, who was a medical man himself, to think that the appellant "was not in his senses", and his abnormal behaviour in repeatedly stooping and touching the feet of the passenger on a public road "so many times", hailing him as his saviour certainly show that his reason was affected at the time, and his conduct in throwing rupees on the road is a strong indication that he was not conscious of what he was doing. No doubt, P. W. 14 said that he did not see the appellant throwing rupees on the road but his evidence leaves no reasonable doubt that the act of scattering the rupees which had attracted a crowd round the appellant on the road was an act of the appellant. The learned public prosecutor urged that the impression formed by P. W. 1 about the mental condition of the appellant cannot be accepted as correct as it is not warranted by what the witness said he observed and heard with reference to the behaviour and utterances of the appellant. It was said that the appellant's conduct towards the passenger is not an uncommon way among villagers of expressing gratitude for help rendered and that the words which the witness said he heard from the appellant did not indicate that the appellant's talk was incoherent or that he was not in his senses. I cannot agree with this criticism. Surely it is a strange way, either for villagers or townsfolk, to express gratitude by stooping and touching the feet of a helper "so many times" on a public road with intervals of silence; and as for incoherent talk the witness does not say that the words he was able to quote from his recollection three months later were all the words he heard the appellant utter on the occasion of such a casual incident. The impression which the witness says definitely he formed from the conduct and utterances of the appellant that the latter was "behaving like a mad man" and "was not in his senses" goes a long way, in my judgment, to support the appellant's plea of insanity. The learned public prosecutor also laid stress on the statement of P. W. 14 that the appellant attempted to run after beating him and later expressed regret, as indicating the appellant's consciousness that what he did was wrong. But it is significant that when the appellant was asked why he beat the witness, he did not give any

4. (1925) M.W.N. 649

reply at all for an hour and then wept like a child and expressed regret saying that he struck the witness because he was frightful to look at. The attempt to run away might have been therefore due to the "frightrul appearance" of P W. 13 in the eyes of the appellant, and the expression of regret which followed only after an hour of dazed silence in spite of questioning' is more consistent with the absence of cognitive faculties at the time when he struck the blow than with possession of such faculties

Turning next to the appellant's conduct on the day of the occurrence he said in the course of his examination by the learned sessions judge that after his wife roused him at about noon when he was sleeping and served him food and questioned him about some stolen jewels, his mind became a perfect blank and when he became aware of his surroundings in the night he found himself placed in the yard his hands and legs tied, with people crowding round him and talking. The appellant also stated that he did not know if the door of the room in which the deceased was killed was bolted from inside or not, or if the door was forced open or not and that he was not aware whether Bogga Shetty (P.W. 7) and others caught hold of him, tied his hands and feet and kept him in the yard. This statement of the appellant receives some support from the admission of several prosecution witnesses in cross-examination that when the appellant came out of the room and was tied after the occurrence, he did not offer any resistance. P.W. 6 said:

> "When the accused came out after I forced open the door, he did not try to run away. He quiety submitted when we tied him and did not offer resistance. I did not ask the accused why he beat his wife,"

P.W. 10 said:

> "When we caught and tied the accused after he came out after the door was broken open he did not offer resistance. He made no attempt to escape from our hold and to run away. We ourselves tied him to avoid his escaping and running away. We tied him up, because we were afraid that he might beat somebody else."

P.W. 7 no doubt spoke to some resistance on the part of the appellant at the time but in the face of the clear admissions of P.W. 6 and P.W. 10 in their cross examination, it must be taken that the appellant offered no resistance when his hands and feet were tied and he was taken and placed in the yard of the house where he remained until the sub inspector of police came and arrested him in the afternoon of the next day. It is no doubt true that there were so many persons present when the appellant came out of the room and his attempt to resist would have been ineffectual and though it is possible that the non-resistance might be due to the realization of this fact, I think it is more probable that it was due to a blank mind for it would be a natural instinct of a sane person in the situation of the appellant to try to escape without pausing to think whether such an attempt would be effectual or otherwise. And it is somewhat remarkable that if the appellant was quite all right, as the prosecution witnesses would have the court believe, that none of the persons who came on the scene ever attemped to question him regarding his apparently unaccountable conduct in killing his wife. Even the brother of the deceased (P. W. 5) did not ask him the reason why he beat his wife to death. He said:

> "It struck me as strange that the accused should have beaten and killed her, knowing that he and his wife were affectionate before that. Yet I did not ask the accused. What am I to ask, after he has killed her"?

None of the witnesses said that he asked the appellant why he committed the deed. This somewhat strange conduct lends countenance to the suggestion made for the defence that the prosecution witnesses were aware at that time that the appellant did the act when he was not in his senses and that they tied him hand and foot lest he should inflict injury on others, though they denied this at their examination.

The learned public prosecutor drew attention to the circumstance that the appellant had bolted the door of the room before committing the crime and argued that this was an act of preparation showing that the appellant was conscious of the criminality of the act he was about to perpetrate. The argument would have force if there was clear evidence to show that the appellant bolted the door from inside just prior to the act by way of preparation for it. All that the evidence discloses however is that the appellant and the deceased had been in the room for about two

hours before the occurrence and that the room was found bolted from inside when other persons came to the spot on hearing the cries of the deceased. It may well be that the deceased bolted the door for privacy or that the appellant did so for the same reason before the idea of killing his wife ever occurred to him. This circumstance cannot therefore be relied upon as definitely pointing to the appellant's knowledge of the nature of the act.

Lastly, the public prosecutor referred to the evidence of P. W. 15, the sub inspector, who said the appellant appeared quite normal when he was examined as a witness in the course of investigation of a theft case about six days prior to the occurrence, and also from the time when the witness arrived at the scene of occurrence, till the time he got the appellant remanded, and argued that the appellant's case of mental aberration only during the three or four days about the time of the occurrence was highly improbable. I am unable to see any force in this contention. Temporary fits of insanity which come all of a sudden and disappear after a short while are by no means uncommon. Indeed, the evidence of P. Ws. 1 and 14 shows that even during this period the appellant had perfectly lucid intervals. The evidence of P. W. 15 and of some of the other prosecution witnesses who say that he appeared all right when they saw him either before or after the occurrence is not therefore necessarily inconsistent with the truth of the appellant's case.

On the whole I am of opinion that the appellant must be held to have killed the deceased under an insane impulse without understanding the nature of his act, and must therefore be acquitted.

GENTLE, J.—As my learned brother and I have arrived at different conclusions, this case will be posted before another judge for his consideration.

## JUDGMENT

KING J:—The accused in this case, one Sankappa Shetty, has been convicted by the learned sessions judge of South Kanara for the murder of his wife, Kaveri, on the 29th November last and has been sentenced to death. He is about 35, she was about 24 years of age. They had been married for eight years and had four children of which the youngest was about 18 months old. That child has been born in the house of Kaveri's family in Kuthethur and since its birth the husband and wife had not been living together. The evidence, however, is that this fact was not due to any estrangement, but to financial reasons, and that the accused frequently came and stayed with his wife for some days. It was on such a visit that accused last went to Kuthethur on the 28th November. On the early afternoon of the 29th accused and his wife were alone in a locked room together. Cries were heard coming from the room and when the witnesses broke open the door they found Kaveri still alive, and her body covered with injuries, found at the post mortem to be twenty in number, ten of them being on the head. Accused was seized and kept tied up until in due course report was made to the village munsif and the police arrived. Kaveri died within a very short time.

The accused did not deny at his trial that he was alone with his wife at the time when she was killed but put forward the plea of insanity and stated that he had no recollection whatever of what happened. The learned sessions judge has rejected this plea. Whether he was right or wrong in this rejection is the only point at issue before me.

The burden of proving insanity is cast upon the accused by S. 105 of the Evidence Act and under S. 84 of the Penal Code he must prove that at the time of the killing he was by reason of unsoundness of mind, incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law His case is sought to be made out in the following way :

(i) by a consideration of the circumsances attending upon the actual offence;

(ii) by medical evidence;

(iii) by the evidence of P. W. 14;

(iv) by the evidence of D. W. 1;

and I will deal with each of these in turn.

In regard to the first point stress is laid upon the lack of motive or of adequate motive, the exceptionally brutal nature of the attack, and upon the discovery the accused made no serious attempt to escape. That there was lack of adequate motive is clear, but everyone who has to do with the administration of criminal justice in this country is unfortunately aware that the commission of crimes of violence, including murder, as the result of the most trival quarrels is all too common. It is also clear that

accused might well have achieved his purpose with a lesser degree of violence, but here again experience amply proves that once an offender has lost control of his temper he gives way unrestrainedly to his passion, without any thought for what may or may not be precisely necessary to carry out his intention. That the accused made no serious attempt to escape on discovery was no doubt due to the fact that five men were there to seize him—and the weapon he had used was no knife, but only a wooden footstool. It is further argued for the accused that he appeared to be dazed, but, this, I think is natural enough upon any view of accused's state of mind when he committed the act. No doubt there is nothing positive in the evidence relating to accused's conduct to prove conclusively that he was able to think of his position and make rational decisions but this evidence standing alone, is equally inconclusive in favour of accused's plea.

The medical evidence was given by P. W. 1. the officer in charge of the local fund hospital at Mulki. So far as it deals with insanity as a branch of medical jurisprudence it is of no value whatever. He quotes no text books but gives it as his opinion that a husband who inflicts so many injuries without a deep-seated motive must be insane—and he says this without any reference to the knowledge referred to in S. 84. He, however, also describes an incident which occurred on November 26 when he saw the accused prostrating himself before a man and talking incoherently to him. I do not think P. W. 1's evidence which may be accepted as true is of any assistance to the accused. Whether talk is incoherent or not is a matter of opinion. P. W. 1 heard only snatches of the conversation and the statements which he heard are by no means incoherent. These statements and accused's action are quite consistent with the theory that accused was deeply grateful to another man for help rendered, and was expressing his thanks to him. There is no evidence at all to show that the man was a stranger, or the help rendered delusion.

P. W. 14 is a landholder of Mulki. His evidence is that accused came to him on the evening of the 26th November and stayed until the morning of the 28th. He says that during this time the accused frequently talked incoherently; once accused a relation of having given him medicine which made him ill; once gave him a blow and fell to weeping and did not reply for an hour when asked why he had done so, and said finally it was because the witness looked frightful. He also said he would jump into a well, and once on the 27th took out Rs. 17 and scattered them on the roadside. When he left, the witness bought a bus ticket for him, and gave him in charge to one Deju Shetti with instructions to see that he got safely home. Now this evidence, if believed, certainly reveals some measure of eccentric conduct on the part of the accused but the learned sessions judge does not believe it. He points out, that according to the witness himself accused was able to speak quite rationally about his cultivation and his financial difficulties and that the witness took no steps to inform others about or protect himself against possible further violence from the accused. For these, and for other reasons which I shall mention later I agree that the learned sessions judge was right in rejecting this evidence however respectable the social position of the witness way be.

D. W. 1 is a cultivator of Mennakettu, and the president of the panchayat court in that village. His evidence is that he arranged on what must have been the 26th November to send accused to his wife's house. He was told by one Degu Bandari that accused was unwell. He called two men Isthu and Babu, and told them to take accused to his wife's house and to tell its inmates that he was sick. Accused told him that he was the victim of witchcraft, but the witness paid very little attention to his remark, and was unable to say positively whether accused's talk in general was coherent or not. Neither Degu Bandari nor Isthu nor Babu was called as a witness to support him. In these circumstances it is not surprising that

the learned sessions judge thinks his evidence of no importance.

I may now state that, apart from the lack of corroboration to which reference has already been specifically made I am unable to believe P. W. 14 or D. W. 1 in so far as they seek to establish insanity because if their evidence were true, further corroboration should inevitably have been available. If we take the evidence for the accused at its best, we have in this case proof of delusions, and of some degree of eccentric conduct extending over the extremely short period of three days (26th to 28th November). There is no proof of any form of insanity or eccentricity before 26th November; no proof of any accident or shock or any other event which might have brought on insanity, and no indication whatever of any thing abnormal during the police investigation, the period of accused's detention in jail, the peliminary enquiry, or the trial. I do not wish to be too dogmatic on the very difficult subject of insanity, but I feel convinced that it is impossible for manifestations of an insanity so serious as to result in the killing of a wife, to be confined to these comparatively trivial incidents over a period of only three days — and for the witnesses to such incidents to be confined to comparative strangers. And even on the 28th and 29th November themselves it is to be noted, we get no indications at all (apart, of course from the murder) of eccentric conduct on the part of the accused as it appeared to his wife and her relations. The Kuthethur witnesses are unanimous on this point. It is argued that they are so determined to see that accused suffers the penalty for his crime that they are wilfully suppressing evidence which would help him to establish his plea. I am unable to take this view of their evidence and must point out on the contrary that all are anxious to emphasise that accused and his wife were on good terms.

For the reasons which I have given I am thus of opinion that the learned sessions judge was justified ia not accepting the evidence of P.W. 14 and D.W. 1. Even if it were accepted as true, it would still in my opinion be insufficient to prove accused's plea. Delusious about witchcraft and poisonous medicine may have been mentioned—there is nothing whatever to connect these with accused's wife. Accused himself does not say who it is who has practised witchcraft upon him Surely if insanity be the cause of this crime it is explicable only on the hypothesis that accused was actuated by homicidal mania, or killed his wife under the delusion that she was not his wife at all, or that he was bound to kill her for one reason or other. Of homicidal mania there is really no trace in the evidence. The 'blow' to P.W. 14, if given, must have been a trivial one Of any delusion concerning the identity or actions of accused's wife, there is clearly no trace.

I find accordingly that the accused has been rightly convicted for murder. I think, however, that this is a case which does not call for the extreme penalty of the law. There cannot have been any premeditation—and I feel sure that the accused must have received what he felt to be considerable provocation before he attacked his wife in the way he did. I accordingly in confirming the conviction commute the sentence into one of transportation for life.

N.T.R. — *sentence reduced*

**R.T. No. 121 of 1939**

Cr. Apps. Nos. 533, 535 & 565 of 1939

*November 24, 1939*

BURN & MOCKETT, JJ.

**Emperor**

v.

**Pullannagari Rami Reddi** & others

*Evidence Act (1 of 1872), Ss. 25, 27 & 30—Confession of co-accused—Use of—Witnesses to corroborate, when to be called.*

*Witnesses called to corroborate a statement by another witness should not be examined until the main witness had been called and had given evidence.*

*A confession by a co-accused may be taken into consideration against another accused and confessional statements under S. 27, Evidence Act come within the terms of S. 30, Evidence Act. But there must be admissible evidence pointing to the accused's guilt. In assessing the probative value of that evidence a co-accused's confession may be taken into consideration.*

*The court will not convict a co-accused when the admissible evidence against him goes no further than that he was in the company of the other accused before and after the crime.*

Trial referred by the court of session of the Chittoor division for confirmation of the sentences of death passed upon the said prisoners in C.C. No. 17 of 1939 on 13-9-1939 and appeals by the appellants abovenamed against the sentences of death passed upon them in the said case.

*Nugent Grant, P. Chandra Reddi & P. Sivaramakrishnayya*, for Applts.

*Public Prosecutor (V. L. Ethiraj)*, for Crown.

JUDGMENT.

(MOCKETT, J.)

The three accused have been convicted and sentenced to death for the murder of one Akkammal, the wife of the first accused. The charge alleges that Akkammal died of suffocation. Her body was found in the village well on the morning of the 17th of March at about 9 A.M. The medical evidence was to the effect that she had died of suffocation and not of drowning. For the present we will discuss the evidence on the basis that Akkammal was in fact murdered although it will be necessary to return to an investigation of the medical evidence at a later stage.

The plan Ex. W. indicates that the first accused lived with his wife at Gangapurampalle in a kottam which is next to the main house in which his parents, P.W. 3 her husband, and her children lived. There is no doubt that the first accused and his wife were not happy. The first accused had married a second wife and had been ordered by a magistrate to pay Akkammal Rs. 10 a month for maintenance. Ex. J. is the revision petition field against that order, which was dismissed by King .J, There is evidence by P.W. 1 the uncle, that the first accused ill-treated his wife. The case for the prosecution is that the first accused hired the second and third accused, to murder his wife and that they all three together achieved this purpose. The evidence against the first accused is of a different character from the evidence against the accused 2 and 3. The evidence against the first accused consists largely on his conduct on the night of Akkammal's death and after, and the case against accused 2 (and in a measure against A-3) rests almost wholly on a confessional statement made by the second accused, Ex. E. The principal witness against the first accused is P.W. 3. She is the first accused's sister. Her story is that at midnight on the 16th of March 1939 she was woken by a cry, she came out of the house and saw the first accused outside the kottam. She said to him, "what Rammanna, I heard a noise here," to which the first accused replied, "There is nothing. You had better go and lie down." She does not appear however to have been easy in her mind because she woke her mother P. W. 4 and sent her to fetch P. W. 5 her husband. He came and then, in her evidence, she says, "I told him that I did not know exactly what had happened but I had heard a cry in my sleep." In the statement taken from her under s. 164, Cr. P. C., she said much the same. This statement was taken on the 20th of March 1939. But the next part of her narrative is important, namely, that she, P.W. 5 and P. W. 6 went to the kottam to see what had happened, and that neither the first accused nor Akkammal was there, but the beds were still spread out. Witnesses were called to corroborate P.W. 3's story. We must observe that P.W. 1 & P.W. 2 were called before P.W. 3 and it is difficult to understand how, until P.W. 3 had been called it was possible for evidence to be admitted of what she had said in the absence of the first accused. However, this was done and P.W. 1 stated that on the 17th he questioned P.W. 3

who described her conversation with the first accused in very different language. According to P.W. 1, P.W. 3 stated that about midnight she heard Akkammal cry out. "Chinnaamma, I am dead," and on going to make enquiries the first accused said, "Do you want to send me to jail now? Go and lie down." P.W. 2, the mother of Akkammal, also states that what P.W. 3 told her was that Akkammal cried out, "Chinnamma, I am dead"; but P.W. 2 also states that P.W. 3 had told her that the deceased had fallen into a well and died on the 16th night. The above part of the evidence of P.W. 1 and P.W. 2 was inadmissible at the stage it was given, and in any case if that inadmissibility can be cured, it does not confirm P.W. 3's statement but, on the other hand, shows that a variety of statements is said to have been made by her. But P.W. 3 was examined at the inquest early on the morning of the 17th and there she said nothing about having been woken in the night by a cry. On the other hand Ex. XV shows that early next morning she got up and called to Akkamma to pound sajja, that none replied and so she opened the door and went inside the house. It is, of course, said for the prosecution that P.W. 3 being the sister of the accused is making her evidence as favourable to him as possible. Other witnesses were called to corroborate her. i.e. P.Ws. 4, 5, 6 and 7. P.W. 4 professed to have no recollection of what happened. So her deposition in the magistrate's court was filed under s. 288 of the Cr. P.C. But that statement does not go much further than showing that P.W. 3 woke in the night owing to some noise which she said, according to P.W. 4, might have been made by a sheep or a goat. P.W. 5 confirms P.W. 3. There is a contradiction in his evidence. He says that P.Ws. 1 and 2 did not come to his house the following night, a statement which P.W. 1 had made in Ex. A. There is no doubt that P.W. 3 was seriously alarmed and that P.W. 5 her husband was fetched from his work at the sugarcane mill to investigate. P.W. 7 states that he was called by P.Ws. 5 and 6 to search for the 1st accused and the deceased, that he went to the first accused's house and found the first accused and the deceased absent, that he then went to Nimmanapalle where he saw the first accused and Papulamma, woman associate of the first accused, that he asked the first accused where Akkammal was to which the first accused replied, "She has gone somewhere." It is clear from his examination at the sessions that the first accused admits he and his wife did go to sleep in his house that night. This is borne out also by Ex. N. which is a report made to the village magistrate by the first accused himself. It is said to have been made at Nimmanapalle at 10 A.M. on the 17th but the evidence of the village magistrate himself (P.W. 31) shows that actually at 7 A.M., on that day the first accused had reported that his wife was missing, on which P.W. 31 told him to search for her and that at 9 the accused came back and said that his wife's duppatti was on the bank of a well near the village. The village munsif accompanied him to the well and the body of Akkammal was discovered in the water. The first accused was arrested on the 31st of March in a tope at Nimmanapalle by P.Ws. 31, 18 and 24. It is stated by the sub-inspector that the first accused was not present at the inquest, but this does not appear to be correct because the village munsif (P.W. 31) states that the first accused was present at the well when the inquest was held. P.W. 29 also admits that although he did not see him at the inquest he saw him in the crowd. It does seem however that the first accused was not playing a very important part and the theory of the learned trial judge is that he was keeping in the background awaiting events and, when they did not take a favourable turn, disappeared. However this may be, it does appear to be clear that at an early stage of these proceeding the notion that the first accused had murdered his wife was becoming a subject of public gossip and it is well-known that accused persons do frequently abscond even though they may be innocent of the offence. P.W. 6 refers to a meeting at Nimmanapalle with the accused and to P.W. 5 asking the fitst accused, "Where is Akkammal?" to which he replied, "I too am searching for her." If any hostile inference is to be drawn against the first accused as to his presence at Nimmanapalle, it should be stated that the learned judge did not question him as to why he was there and he thus had no opportunity of explaining his presence there.

The evidence therefore, against the first accused may be summarised as follows. It depends very largely on P. W. 3, the effect of whose evidence is that, hearing a noise at midnight she went to the first accused's house and there saw him and was told by him that there was nothing to be concerned about and that she could return to her bed; that later the first accused and his wife were both

found to be absent from the house; and that at 9 A. M. on the following morning, the 17th, Akkammal's body was found murdered in a well. There is the further evidence given by P. W. 28 that the first and the third accused were seen whispering together under a tree at Nimmanapalle on the evening before Akkammal died, a matter which was reported to the sub inspector after the event. This witness had never seen the third accused before that day but was able to identify him on the following Sunday (the 19th). The answer of the first accused to this is to the effect that he went to bed that night with his wife and that the next morning he woke up and saw her missing. He denies the evidence of P. W. 3 and P. W. 28. He also says he was present at his house on the day on which the inquest was held, a matter which appears to be in part corroborated by P.W. 31 and others. He denies that he was arrested in the manner alleged. He says that he went himself to the village munsif's house. It is convenient now to turn to Exs. N and A. It must be remembered that Ex. N was given on the morning of the 17th to the village munsif by the first accused himself and it is a simple report of a quarrel with Akkammal and of her subsequent disappearance and later the discovery of her corpse in the well. Ex. A is the first information report which was given on the 18th to the sub-inspector of Police at Agraharam Camp at 8-30 A.M. The contents of that report cannot be evidence, but it has been brought to our notice and we cannot overlook it that it contains a statement by P. W. 1 that one Venkata Reddi (who was not examined had reported to him that Rami Reddi at 10 P.M. on the 16th of March (sic) had said to him (Venkata Reddi) "My wife Akkammal fell into a well. I gave her two blows last night. My wife thereon ran up and I too followed her. She, who had been going two chains ahead of me, fell into a well" Now, this is a totally different version of the affair and Venkata Reddi is not called as a witness; but, if it is true, it is at least not inconsistent with the story of P.W. 3. Akkammal may have cried out when she was struck which would account for the cry in the night spoken to by P. W. 3. That she ran away and threw herself into a well might account for the absence of both herself and her husband. Much therefore must turn on the evidence of whether this woman was or was not suffocated as charged by the prosecution.

Before dealing with this topic, it is convenient to turn to the case against the second and the third accused which stands on a totally different basis. We have alluded to the mysterious Venkata Reddi referred to in Ex. A. This is not the only feature of this case which arouses enquiry. It is not at all clear how it was that the second and third accused were arrested. It is alleged by the police that they were arrested because they were seen by P. W. 10 passing a tamarind tree on the way to Nimmanapalle on the 15th, Wednesday. But, as P. W. 10 was unable to see the accused from the witness box this explanation cannot be a fact. This incident is on a par with the evidence of P. W. 18 who claims to have searched the village for the first accused who was unquestionably there all the time. But, whatever be the reason, the second accused was arrested at 10 P.M. on the 18th of March and the third accused on the morning of the 19th of March. They both made statements to the police, parts of which have been admitted in evidence under S. 27 of the Evidence Act. At 10 P.M. on Saturday the 18th of March the second accused made a long statement Ex. E, of which the following has been admitted by the learned sessions judge under S. 27 of the Evidence Act:

> "By that time Rami Reddi's wife, Akkammal, struggled for about ten minutes and expired. We tied the bundled-up corpse to the bamboo. I and Mondi Ramudu then went by a stream running eastwards, then along a path proceeding north of the wood-apple tree, and then to the Racha of ragi (poplar) trees, and turned to the west and threw the pole with which we carried the corpse over the fence of Syed Sabjan's mango garden."

The third accused also made a long and detailed statement, Ex. R. at 2-30 P.M., on Sunday the 19th, of which the following has been admitted by the learned sessions judge under S. 27 of the Evidence Act;

> "I went to Nimmanapalle on Wednesday .....I and Rami Reddi were together going sometime after sunset, when another Saheb too saw us."

The difference of the dates of Exs. E and R, the above statements is important, especially to the third accused. After making the statement Exs. E the second accused took P.W. 33 (sub-inspector) and others of whom P. Ws. 32 and 9 were called and showed M. O. 1, a bamboo pole. So Ex. E was admitted on the basis that the pole was discovered in conse-

quence of the information received in Ex. E. Ex. R was admitted as leading to the discovery of the fact testified to by P. W. 28 that the third accused and Rami Reddi were together sometime after sunset on the 15th. The sub inspector (P. W. 33) stated that, as a result of that statement, he discovered P.W.28 who did depose to the fact that the first accused and the third accused were together. Apart from these statements, the evidence against the second and the third accused may be summarised as follows: The second accused was seen by P. W. 10 on the 15th evening with P. W. 3, but this witness's eyesight has already been shown to be faulty. P. W. 11 on Wednesday saw the second and the third accused under a tamarind tree by the side of the road. P. W. 27 states that he saw the second and the third accused at ten minutes past nine in the morning between his village Reddivarepalle and Chintaparti. He claims to know both the accused by sight. Then there is a gr up of witnesses, P. Ws. 29, 30 and 33. P. W. 29 is the karnam of Agraharam village where the sub-inspector (P.W. 33) was at the time the crime was reported to him. P.W. 30 was the acting village munsif of Agraharam in March. These two and the sub inspector (P. W. 33) state that they were together in connection with the investigation of a case of theft, and that at 2 A. M., on the night of the 16th they saw accused 2 and 3 coming together; they questioned the secoud accused who said he was Syed Kassim of Nimmanapalle; they said they were going to the Ounti Gangamma festival at Chintaparti, which festival was in fact going on. The second accused had a torchlight. At that time, says P. W. 33, there was no reason to suspect them and they were allowed to proceed. The sub inspector received news of the offence at 8-30 A. M. on the 18th at Agraharam and he thereupon proceeded to investigate. P.W. 21 says he saw the second and the third accused together at a village five miles from the scene of Akkammal's death on the Thursday night, which is the 16th of March.

It is convenient now to deal with the case against the third accused. The only evidence against him is that he was in the company of the 1st and second accused at or about the time of the crime. His confessional statement, Ex. R, merely led to a discovery of a witness speaking to this fact as regards A-1. Ex.E is not evidence in the correct sense of that word against the third accused. A confession by a co-accused may be taken into consideration against another accused and confessional statements under s. 27 of the Evidence Act have been held to come within the terms of s. 30 of the Evidence Act, by this High Court, Vide *in Re, Athappa Goundan*(1). But there must be admissible evidence pointing to the accused's guilt. In assessing the probative value of that evidence a co-accused's confession may be taken into consideration. The evidence against the third accused as already stated is only that he was in the company of the other accused before the crime as testified to by P. W. 28 and after the crime as testified to by the other witnesses referred to above. This being so, we do not consider that the court is entitled to convict the third accused when the admissible evidence against him goes no further than we have indicated. Such a conviction in this case would amount to a treatment of Ex.E as substantive evidence against the third accused.

There remain the cases of the first and the second accused. It must be remembered that the parts of of Ex.E admitted do not contain any confession of the killing of Akkammal. The effect of Ex. E is that Akkammal was struggling and died. Why she was struggling is not revealed. The rest of the statement deals with the disposal of the body. But Mr. Grant has asked us to read the whole of that confessional statement and he argued as follows. This statement was never made at all by the second accused. It must be read not as a statement of the second accused at all and therefore not within the prohibition of s. 25 of the Evidence Act. It must be read in order to show that the case for the prosecution is demonstrably false because the actual evidence, and especially the medical evidence, is inconsistent with the statement put into the mouth of the second accused by the police. A court is always reluctant to shut out any argument advanced by an accused person; and we have examined this statement in the interests of the accused not as a confession but from the point of view advanced by Mr. Grant. An examination of this statement shows that it is alleged that Akkammal met her death by the third accused "with all his strength squeezing her throat, face and nose with both of his hands." Mr. Grant asks us on the medical evidence to say fistly that it is not certain that this woman was murdered at all and secondly that the mode of her death as testified to by the doctor does not agree with the prose-

1. (1937) M. W. N. 442 . Cr. 74 F. B.

cution case as falsely put forward in Ex. E. Ex. L is the *Post mortem* certificate and P. W. 16 is the sub-assistant surgeon who conducted the *Post mortem*. He expresses the opinion, and a very definite opinion, that this woman was not drowned, and he gives six reasons for arriving at that conclusion and he stated that although none of the reasons for concluding that death was not due to drowning was in itself conclusive, yet, if death had been due to drowning, many of these characteristics would have been found. There were no characteristics of death by drowning but there was evidence of suffocation. He found 14 injuries on the body of the deceased. Of them referring to Ex. L injuries 2, 3, 4, 6 and 7 were semi-circular nail-marks, and in addition, says the doctor, injuries 8, 9, 10 and 14 might have been caused by nails. The effect of this evidence is that injuries 2, 3, 4, 6, and 7 were caused by nails, in his judgment, owing to the semi-circular marks and the other injuries mentioned might have been caused by nails. The reasons for saying that death was due to asphyxia due to suffocation was largely based on the marks of the nails and violence round the mouth, but he considered also the dilated pupils, the right side of the heart being engorged and organs congested show death by asphyxia. There was mud on the toes of both feet and nails and both fingers. The defence relied strongly on the latter feature. Lyons Medical Jurisprudence, 5th edn. page 295 supports the view that mud in the nails indicate struggle in the water during life and is presumptive evidence in favour of death by drowning. But such a presumption is not absolute and other circumstances may of course negative it. But the defence also relies on the fact that there is no evidence of any marks on the throat and it must be remembered that the second accused is said to have squeezed her throat with all his might. But it must be remembered also that her face and nose were also squeezed and there is definite evidence of finger marks on the face and nose. We have examined the evidence of the doctor and we are impressed with its care and detail and it seems to us to come to this, that the only feature which the defence can suggest indicates drowning is the presence of mud on the toes and nails, and this in a country of bare-feet and not invariable cleanliness can scarcely weigh against the fact that no single characteristic of drowning is found by the doctor. We are satisfied that this women was not drowned but met her death by violence and that the doctor's evidence is reliable beyond question. It must be remembered that the process described in Ex. E combines both strangulation and suffocation and it may be that this woman was suffocated rather than strangled, which is in complete accord with the doctor's evidence.

Akkammal was therefore murdered shortly after taking her meal on the night of the 15/16th of March 1939. The first accused was with her that night on his own admission. At midnight a cry was heard from the house and P. W. 3, an indisputably friendly witness, went to investigate. She was told there was nothing wrong by the first accused. Later that night, others summoned by P.W. 3 went to the scene and they found not only the deceased but—this is of importance—her husband absent. The next morning the body of Akkammal is found in the well suffocated. What happened on that night is known of all men to the first accused. What is his answer? At the magistrate's court he reserved his defence. At the sessions he stated that the next morning he woke up and saw her missing. He denies that he ever saw P. W. 3. These facts undoubtedly cast the utmost suspicion on the first accused; but the question is, do they amount to mere suspicion, do they contain that element of certainty so essential to a conviction in a criminal case? The first accused has been shown to have been associated with the third accused; we are acquitting him and therefore no hostile inference can be drawn against the 1st accused from that association. There is nothing in the confession of the second accused to be taken into account against the first accused. We think it proper to say that, while appreciating the extreme difficulty of analysing a confessional statement and admitting only such portions of it as relate distinctly to a fact discovered, it is not impossible that the learned sessions judge might have admitted far more than he did and that, had he done so, the position of the first accused might have been very different. But the prosecution have not thought fit in this case to apply for the reception of further evidence and we therefore are considering those portions of Ex. E which are admitted and no more. We have already alluded to Ex. A which reveals that a witness who was not called stated that the first accused had said that his wife fell into a well in the sense that as a result of a quarrel she threw herself therein; and we have already alluded to certain unsatisfactory features about the denial of the presence of

the first accused in that village. As a result, our conclusion is that the evidence is not conclusive, that there is a doubt, and that the first accused is entitled to the benefit of that doubt.

As our decision with regard to the first accused has been arrived at by a strict application of the rules of evidence, similarly in the case of the second accused we judge, and it is well to remember that if of three equally guilty people two are so fortunate as to escape owing to the evidence not sufficiently implicating them, it is neither right nor logically sound to acquit the other accused against whom the evidence is sufficient. In the case of the second accused, according to his own admission, he carried the body of a woman demonstrably shown to have been murdered, and secreted it in a well, the pole on which the body was carried being discovered as a result of his admission, and he was present in the neighbourhood which enabled him to commit the crime was certain. His explanation at the sessions of Ex. E is that, coerced and beaten by the police, he agreed that he would "say as they desired and then they recorded as they liked", and he denies that he either showed M. O. 1 the pole or that he associated with the third accused. It will be noticed that he did not say in the magistrate's court that the statement was extracted by coercion. We do not think there is any substance in the suggestion that Ex. E was extracted in the manner suggested by the defence, and we have already made clear that we have examined it only for a consideration of the defence theory that it was a pure concoction, but it will be observed that that is not strictly the case of the second accused. He said that he "would say as they (the police) desired. Then they recorded as they liked." We entirely reject the idea that the police would have put the whole of this rigmarole into the mouth of this accused when so many much easier methods were open to them had they desired to avail themselves of such methods. But, owing to the exclusion of much in Ex. E that might possibly have been admitted and again owing to the absence of any application by the prosecution to admit further evidence, we find nothing in Ex. E to amount to an admission that the second accused committed the offence of murder. He was however unquestionably engaged in disposing of the body of a murdered woman. In his case we are not satisfied that the evidence against him is sufficient to warrant a conviction for murder. We however are satisfied beyond doubt that he has committed an offence under S. 201 of the I.P.C.

The result of our conclusion is that the convictions and sentences on the first accused and the third accused are set aside, their appeals allowed and they are acquitted and will be set at liberty. The conviction and sentence of the second accused under S. 302, I.P.C. is set aside and he is acquitted; but he is convicted of an offence under S. 201, I.P.C., and is sentenced to rigorous imprisonment for seven years.

T.

---

**R. T. No. 102 of 1940**

Cr. App. No. 485 of 1940

*August* 20, 1940

BURN & MOCKETT, JJ.

**Emperor**

v.

**Vellakanuu alias Karuppan Pillai**

*Criminal trial—Duty of prosecution to call in evidence all witnesses—Hostile witnesses—Discretion of prosecution to examine.*

*Where the counsel for accused complained that certain witnesses in the magistrate's court had not been called and suggested that there was a hiatus in the evidence which should be filled by the High Court remanding the case for examination of those persons.*

Held, *that the counsel cannot complain of the non-calling of those witnesses for the prosecution. It is a matter within the discretion of the prosecution and it cannot be said that the prosecution should call the witnesses who unquestionably had turned hostile.*

1936 M.W.N. 1340 : Cr. 224 P.C. followed.

TRIAL referred by the court of session of the Madura division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 34 of 1940 on 6—7—1940 and appeal by the prisoner against the said sentence of death and the sentences of rigorous imprisonment on all counts under S. 324 I.P.C. passed upon him in the said case.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

*C. K. Venkatanarasimham*, for Accused.

## JUDGMENT

(MOCKETT, J.)

The appellant has been convicted of the murder of one Manooran alias Noor Muhammad Rowther on the 12th December 1939 at Balasamudram. He was also charged before the learned sessions judge with offences under S. 324 I.P.C. committed at the same time upon four other persons namely Arunachalam Pillai, Palaniyappa Pillai, Sellappa Chetti and Ramalingam Chetti and he was tried on all those five charges simultaneously and convicted of them all. He has been sentenced to death for the murder of Noor Muhammad Rowther and with regard to the other four charges a sentence of one year's rigorous imprisonment to run consecutively in each case has been imposed.

The facts alleged by the prosecution are as follows: The accused owed money to P.W. 4. P. W. 4 sent P. W. 12 to the accused to ask for the money. P. W. 12 returned not having obtained payment but having been abused by the accused. At 8 P.M. on the evening in question P. W. 4 went to his shop. There he saw the accused and demanded again that he should be paid. The accused replied that he would pay later. P. W. 4 still pressed for payment and the accused took a knife from his waist and stabbed P. W. 4 on the left shoulder. P. W. 4 cried out and was stabbed again by the accused. P.W. 5 hearing the cry ran across, his shop being in the same street, to the assistance of P.W. 4 whereupon the accused attacked and stabbed him (P.W. 5) three times with his knife. By this time a crowd had gathered and the deceased came upon the scene. He appears to have been a stranger in the neighbourhood. At that point either he or some other there said: "Is this a village or is this a desert with this indiscriminate stabbing going on?" or words to that effect. The probabilities are that it was the deceased who must have said or done something because the accused turned upon him and stabbed him on the left side of his chest with the *bitchuva* which we have seen. The deceased fell down. P.W. 6 who witnessed this and apparently was very shocked, cried out 'sinners', whereupon the accused rushed at him and stabbed him on the left arm. P.W. 7 happened to be sitting closeby and according to P.W. 6 and to P.W. 7 the accused stabbed him also. Then the accused ran away. P.W. 1, the Doctor who examined all these persons describes the minor wounds upon the persons of Arunachala, Palaniyappa, Sellappa and Ramalinga and in the case of the deceased he had an incised penetrating wound on the left side of the chest 1 inch by ½ inch by 2½ inches. The left second rib was fractured and the upper part of the left lung was pierced. There was an injury in the lungs ¾ inch by 3/8 inch by ¾ inch. The deceased, says the doctor might have lived for a few minutes after the stabbing. The rest of the story is soon told. The accused ran away and was caught by P.W. 10, another man who has not been called having snatched his knife away, and P.W. 10 and another man tied the accused up to a pillar. P.W. 13 the village munsif came upon this scene because he had heard about this from a cattle boy. He saw the deceased lying dead and P.Ws. 6 and 7 lying injured in Sherif Rowther's shop. He summoned P.Ws. 4 and 5 and he took statements from P.W. 4 (Ex. B). P.W. 5 (Ex. C), P.W. 6 (Ex. D) and P.W. 7 (Ex. E). The accused, he said, was tied to a stone pillar and P.W. 13 took a statement from P.W. 10 who produced M.O. 1 the bitchuva. Ex. F. was the statement taken from P.W. 10. The accused was sent to the police station with the knife and a report to the police and P.W. 14 the sub-inspector describes how he met the talaiyari coming with the accused. The prosecution case therefore is simple enough and entirely depends on whether the eye-witnesses P.Ws.4, 5, 6 and 7 and also P.W. 10 are to be believed when they say that it was the appellant who killed the deceased on 12th December 1939 at 8 o'clock in the evening. It is important in this respect to consider what the defence of the accused is. Before the magistrate he said "I owed dues to Arunachalam Pillai P.W. 4. About 3 months ago when I was at Sherif Rowther's shop he demanded the dues. I said I would pay it on a particularly day. Arunachalam said that I must positively pay the money and beat me. I did not kick with sandals on my legs witness Venkatasami Pillai two days before this occurrence. On the day of the occurrence I did not stab P.Ws. 1 and 2, with bitchuva. I did not stab and kill Manoor Rowther. I did not stab with bitchuva and injure Sellappa Chetti and Ramalinga Chetti at the same time. The witnesses are saying falsely." In the sesslons court he adhered to his statement and on being asked whether he wished to say any-

thing he said 'No' and that he proposed to examine witnesses. Now the witnesses when he examined were Cani Rowther, Chinna Karuppan and Nallamuthu Kudumban D.Ws. 1, 2 and 3 of whom D.W. 1 was P.W.11 and D.W. 2 was P.W. 10 in the Magistrate's court. P.W. 5 Raman Chetti, P.W. 7 Subramaniam Chetti and P.W. 8 Saravana Pillai, thus numbered in the magistrate's court, were not called by either side. D.Ws. 1 and 2 gave evidence to the effect that the injury to the deceased came about in this way. D.W. 1 describes P.W. 4 beating the accused and P. Ws. 5 and 6 and other relations joining him but he says that the deceased endeavoured to intervene and that P. W. 9 came running from the lane on the west and aimed a blow at the accused with a bitchuva but it fell by accident on the deceased. In cross examination this witness (D. W. 1) admitted that he had not told the sub inspector or the circle inspector about P. W. 9 stabbing the deceased. D, W. 2 tells the same story in substance namely that it was P. W. 9 who stabbed the deceased accidentally. In his attempt to stab the accused D. W. 3 says the same thing. He says he had not told the story before to any one. Now it is obviously for the lower court to decide and for us to decide whether on the evidence this case has been brought home to the accused and especially whether the evidence for the defence has introduced into the case such reasonable doubt as to render a conviction unsafe. The learned sessions judge was satisfied that there was no such doubt and that the case had been clearly proved. It must be observed that these witnesses render no explanation whatever with regard to the unquestioned stabs that were inflicted on P. Ws. 4, 5. 6 and 7. They have directed their evidence purely to the stab upon the deceased. The learned counsel for the appellant Mr. Venkatanarasimham who has argued this case before us was obviously conscious of the great difficulty with regard to the facts and so he rested his argument on another point and it was this. He complained that P. Ws. 5, 7 and 8 in the magistrate's court (Raman Chetti, Subramania Chetti and Saravana Pillai) had not been called and he suggested that there was a hiatus in the evidence which should be filed by this court remanding the case for examination of these three persons. It was impossible for counsel to complain of the non-calling of these witnesses by the prosecution. It was obviously a matter within the discretion of the prosecution and any doubt on this question has been amply set at rest by the decision of the Judicial Committee in *Stephen Seneviratne* v. *The King* (1). It could not therefore be said that the prosecution should call the witnesses who unquestionably had turned hostitle. We see no reason to suppose that the learned trial judge has exercised his discretion wrongly or has failed to exercise it in not calling these witnesses. It will be observed from the grounds of appeal in the appeal petition before us that the appellant expressly states that he put in a petition to the lower court asking that these witnesses should be called as court witnesses. The lower court rejected the petition. The appellant in the lower court, as we have indicated before, called two of the witnesses for the prosecution (P.Ws. 10 and 11) and he could just as well, had he thought fit, have called the other three—P. Ws. 5, 7 and 8. No doubt for good and sufficient reason those advising him decided not to do so. There is nothing whatever in this case which suggests that the learned judge should have called P. Ws. 5, 7 and 8 or that the absence of P.Ws. 5, 7 and 8 has rendered the decision of this case in any way difficult. Apart from these two arguments which we have noticed, there is no difficulty in the case whatever. Looked at as a whole there is a body of evidence supported by many wounds which go to show that the accused on this evening ran amok with a knife in the street. A number of persons saw him with a blood-stained knife within a few minutes and tied up. This suggestion by persons, possibly partisans of his, that the death of the deceased was caused in an attempt by P. W. 9 to stab the accused is, we are satisfied, a sheer afterthought and was rightly rejected by the learned sessions judge. And it is significant that in his appeal petition the appellant does not in any way question the correctness of the conviction for the four offences under S. 324, I.P.C. preferring to deal solely with the conviction for murder.

There is no element of doubt in the case at all. The appellant was rightly convicted and rightly sentenced to death, the only sentence that in the circumstances was possible.

The conviction and sentence are both confirmed and the appeal dismissed.

N. T. R. *Appeal dismissed.*

1. (1936) M.W.N. 1340; Cr. 224 P.C.

**Case No. 7 of 4th Criminal Sessions 1940**

*August 21, 1940*

KRISHNASWAMI AYYANGAR, J.

**Emperor v. Kuppammal**

*Penal Code (XLV of* 1860), *s.* 302—*Murder of new born child—Proof of—No evidence to go to jury—Cr. P.C. s.* 287, *'duly recorded' meaning of—Ss.* 209, 342, *Cr. P. C.—Duty of magistrate under.*

*On a charge that the accused had committed murder by causing the death of her newly born infant on* 9—4—1940, *the prosecution adduced evidence tending to show that the accused was seen about the 6th or 7th April with signs of advanced pregnancy, but that those signs were found to have disappeared, when she was seen on the* 10*th. The medical evidence based on a physical examination of the accused also showed that she must have been about that time delivered of a child. On the* 10*th the dead body of a newly born infant was found in a municipal syphon in a neighbouring street. There was also evidence that no dead body of any child was brought to the burial ground between the 8th and the* 11*th April. But the prosecution were not able to prove that the dead body found in the syphon was that of the child born of the accused, or that it was she who deposited the body in it.*

Held, *that the evidence though tending to cast suspicion against the accused was insufficient to let it go before the jury.*

*There is no warrant under s.* 209 *or s.* 342, *Cr. P. C., for questions being put to the accused when the evidence adduced by the prosecution falls short of implicating the accused in the offence charged. If in such a case, questions are nonetheless put and answers are recorded by the committing magistrate, the answers do not come within s.* 287, *as it cannot be held to be an examination 'duly recorded, by the magistrate under the section. The magistrate is not entitled to put questions except for the purpose of affording to the accused an opportunity to explain such circumstances as may appear against him in the evidence adduced by the prosecution, which, if left unexplained, would tend to implicate him. The prosecution must make out the charge by evidence adduced by it, and cannot rely on answers given by the accused during interrogation by Court or magistrate to fill up gaps in the case.*

*Crown Prosecutor* for Crown.

*N. Rangachari* for Accused.

## CHARGE TO THE JURY

The accused in this case has been charged with having committed the offence of murder by intentionally causing the death of her new-born infant by drowning it in a Corporation syphon (cess-pool) on or about the 9th April, 1940, at Madras. The facts deposed to by the witnesses called for the prosecution may be briefly summarised as follows:

The accused is a widow with six children living at No. 16, Bhashyakarlu Naidu Street, Georgetown, Madras. She was keeping a betel-nut shop in No. 51, Krishnappa Naicken Agraharam, Georgetown.

On the morning of the 10th April last at about 10 A.M. Madurai Naicker, P.W.1, living in No, 30, Bhashyakarlu Naidu Street, found that the drain in his court-yard was obstructed. He went out to the street and examined the syphon in front of his house to find out what the cause of obstruction was. He removed the cement lid and then removed the iron bucket in the syphon; and when he looked in he found first, five fingers of the palm of the left hand of a dead child and then he noticed also the head. He went to the police station at the Seven Wells almost immediately and reported to the Head Constable present at the police station what he found in the syphon, The sub-inspector in charge of that station (Mr. Ramanujam) examined as P.W. 12, followed by a constable and a head constable came to the front of Madurai Naicker's house and found in the syphon the hand and head of a dead child as reported by Madurai Naicker. The body was taken out atthe instance of the police by Jogi Veeraraghavan and it was found to be the dead body of a recently born male child. The sub-inspector, P.W. 12, had the body removed to the police station and from there it was sent under police custody to the General Hospital for post-mortem examination. Dr. Srinivasalu Naidu, P. W. 3, Professor of Medical Jurisprudence attached to the Medical College, Madras, held the post-mortem examination and found the condition of the corpse in the state described by him in his certificate. It is unnecessary to go into details for the present purposes; but Dr. Srinivasalu Naidu expressed the opinion

in his certificate that the infant over whose body he held the port-mortem examination should have been alive when born and drowned in the cesspool an opinion which he repeated in his evidence before the court here. The accused was arrested at about 11-30 on 10-4-1940 by P.W. 12 and three sarees were seized from her. That night she was sent by Mr. Ramaseshen, sub-inspector, Crimes Branch (P.W. 14) to the Gosha Hospital, Triplicane, for medical examination. Miss Oommen, the Resident Medical Officer of the Hospital, examined the person of the accused at 3 A.M., on the morning of 11-4-1940 and from the appearances found she came to the conclusion that she must have been recently delivered of a child and that opinion was repeated by her before this court during the course of the evidence that she gave here. The three articles of clothing seized from the accused by P.W. 12 along with another saree and a jacket recovered from her at the Gosha Hospital were sent to the Government Chemical Examiner, and on examination he detected blood on one of the articles, namely M.O. 1, a torn dirty grey cotton cloth with red and white cross strips and red, green and white borders, on which were brownish stains. This was one of the three articles seized by the sub-inspector Ramanujam from the accused when he arrested her on 10-4-1940. A specimen of the stains found on it was sent to the Imperial Serologist for the purpose of ascertaining whether the stains were stains of human blood and his report (Ex, G-1) which has been exhibited on the side of the prosecution is that the cloth (M.O 1) was stained with human blood. Mr. Ramaseshan who was examined as P.W. 14, sub-inspector of the Crime Branch, was in charge of the investigation. It was he who took charge of the articles of cloth seized by P.W. 12 and also of those recovered from the accused at the Gosha Hospital.

Evidence has been called by the prosecution of three witnesses, namely, P.Ws. 6, 7 and 8, two of whom, P.Ws. 6 and 8 were tenants living in No. 21, Krishnappa Naicken Agraharam, the place where the accused was keeping the betel-nut shop and the third, P.W. 7, was the owner of the house. Briefly their evidence is that they had seen her about the 6th or 7th April and found her abdomen prominent, in other words, found signs of advanced pregnancy on her. On the night of the 10th when the accused was arrested P.W.7 the owner of the house was there and noticed that the size of the accused's abdomen had diminished or, as he put it, it was not so big as it was before. That statement is corroborated by the evidence of P.W. 8, a goldsmith, who was a tenant in the same house as the one in which the accused was having her shop. The prosecution also called the Kanakupillai in charge of the burial ground at Washermanpet to which place the bodies of persons who die in Bhashyakarlu Naidu Street are ordinarily taken. He deposed that no dead body of any child was brought to the burial ground between the 8th and the 11th April last.

This is the substance of the evidence adduced by the prosecution. It seems to me that there is a quantity of evidence tending to show, if believed, that the accused was seen in an advanced state of pregnancy about the 6th or 7th April last and was delivered of a child on or about the 9th April. The evidence, if believed, would seem to establish that on the morning of the 10th there was found in the syphon in front of Madurai Naicker's house the dead body of a recently born male child; but there is no evidence that that child was the child born to the accused, nor any direct evidence tending to show that it was the accused that deposited the child in the syphon. The charge against the accused, it may be remembered, is that she intentionally caused the death of *her* new-born infant by drowning it in the Corporation syphon That being the charge against her the prosecution must not only prove that she was recently delivered of a child but also that the body of the child found in the cess-pool was the body of *her* child. The facts deposed by the prosecution witnesses no doubt amount to circumstances causing a suspicion against the accused; but in the trial of an accused for a crime, or for that matter even in the trial of a civil cause, suspicion cannot be made the ground of a finding by the court or jury as the case may be.

Learned counsel for the accused placed before me for my consideration the decision in *Reg* v. *Williams* (1), of Mr. Justice Montague Smith. That was a case in which the learned judge held that there was no sufficient evidence to go to the jury on the offence charged and accordingly directed them to return a verdict of not guilty. The offence charged was that the accused had concealed the dead body of her newly born

1, 11 Cox's Cr. C. 684.

infant. The facts proved in that case by the prosecution are clearly stated in the headnote. A woman, apparently pregnant, while staying at an inn at Stafford, received by post, on the 28th August, 1870, a Rugby newspaper, with the Rugby post mark upon it. On the same day her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning carrying a parcel. That afternoon a parcel was found in a waiting room at Stafford station. It was the dead body of a newly born child, wrapped in a Rugby Gazette of August 27th, 1870, bearing the Rugby post mark. There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at the Stafford station. The judgment which was very short was as follows:

"It is impossible to proceed with this case. The gist of the offence charged in the indictment is the concealment, by the prisoner, of the dead body of *her* child. (The italics are mine). The evidence as to the identification of the body does not seem to me sufficient. A man cannot be convicted of murder unless the corpse of the murdered person is found, otherwise the prisoner charged might be executed, and the individual supposed to have been killed by him proved to be in fact living. So in the present case, the child of which the prisoner is said to have been delivered may, at this moment, be somewhere alive. I must direct you to return a verdict of not guilty."

The facts of this case come very close to the facts of the case now before me. There was in that case, as in this, evidence sufficient to go to the jury that the accused was seen in an advanced state of pregnancy on the 28th August, 1870. There was evidence in that case, as in this, that her appearance and the state of the room that she occupied in the inn on the date of the alleged offence indicated that she had been delivered of a child. There was, however, in that case, one circumstance for which there is no counterpart here, viz., that she left for Shrewsbury next morning carrying a parcel. A parcel was found at the Stafford station containing the dead body of a newly born child and there was a railway station from Stafford to Shrewsbury. This circumstance has its counterpart in the present case in the fact that there was in the syphon in front of Madurai Naicker's house the dead body of a newly born infant. What was not proved in that case, was, that the woman was seen at the Stafford Station. What is not proved in this case is that the woman was seen near or about the syphon in which the body of the child was discovered. It will therefore be quite apparent that, if there was no evidence to go to the jury in the case cited, it cannot be held that there is evidence in the case before me either sufficient in quantity or character to put it before the jury.

It is, however, necessary to refer to one other matter in this connection. Practically the same evidence as the evidence adduced in this court seems to have been put before the magistrate who has committed the case to the sessions. I have seen the record of the depositions of the prosecution witnesses before the committing magistrate and I am satisfied that there was no evidence before the committing magistrate to indicate that the body found in the syphon was the body of the child born to the accused. In other words, the link, that is wanting before me was wanting also in the committing magistrate's court. That is to say, the evidence such as it was recorded by the committing magistrate was not sufficient to implicate the accused. At the end of the evidence adduced by the prosecution before him the committing magistrate put the following questions and recorded the following answers:

"Q. Have you any witnesses to be examined on your behalf here?

A. No.

Q. You have heard the evidence of the prosecution witnesses. What have you to say?

A. What I did is a wrong act. The police have taken charge of the bangle which I was wearing. I have six children. I was carrying and I gave birth to a child. I went to the latrine and there I gave birth to a still-born child. I kept the child for about 10 minutes and as there was no life I took it and threw it in the cess-pool opposite."

If this answer was an answer which could be said to have been *duly recorded* within the meaning of S. 287, Cr. P. C., it would undoubtedly take the case of the prosecution much farther in that it provided material upon which the missing link could be found. S. 287, Cr.P.C. says this:

'The examination of the accused duly recorded by or before the committing magistrate

shall be tendered by the prosecutor and read as evidence."

As I indicated, if the examination of the accused which resulted in the answers which I read just now can be said to have been *duly* recorded by the committing magistrate, the answers should be tendered by the prosecution and it is open to the court to read those answers as evidence in the case. I may at once say that the prosecution did tender the record of the examination of the accused by the committing magistrate and the only question for consideration is whether it could be read as evidence in this case. The condition for its being read as evidence is that it should have been *duly* recorded as I have said. For the purpose of finding out whether the answers can be said to have been *duly* recorded, reference must be made to Ss. 209 and 342, Cr. P. C. S. 209 says:

"1. When the evidence referred to in S. 208 sub-secs. (1) and (3) (that is the evidence of the complainant and the evidence of the witnesses called and the documents produced by the prosecution) has been taken, and he has if necessary examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him unless it appears to the magistrate that such person should be tried before himself or some other magistrate, in which case he shall proceed accordingly.

"2. Nothing in this section shall be deemed to prevent a magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such magistrate he considers the charge to be groundless."

The section makes it clear that the magistrate is to examine the accused not for the purpose of filling gaps in the prosecution but for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. It may be that it is not obligatory on the magistrate to examine the accused unless he decides to commit the accused in which case he is bound to examine the accused and that only for the purpose mentioned. S. 342 lays down the rule of procedure on this point in almost the same terms. S. 342 (1) says:

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally ont he case after the witnesses for the prosecution have been examined and before he is called on for his defence."

Cl. (3) says:

"The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

S. 342, as I understand it, is applicable not only to the trial before the court of session but is applicable also to the enquiry before the committing magistrate. Both these sections, 209 and 342, cast upon the magistrate the duty to interrogate the accused if the facts and circumstances proved are of such a nature that they tend, if unexplained to implicate the accused. The interrogation is to be made in order to afford him an opportunity for offering an explanation.

S. 80 of the Evidence Act relating to the presumption regarding documents produced as a record of evidence says:

"Whenever any document is produced before any court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any judge or magistrate, or by any such officer as aforesaid, the court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

The section merely purports to lay down the presumption to be drawn in the absence of positive evidence, viz., that a statement or confession given by an accused person or prisoner

and signed by the judge or magistrate was taken in accordance with the law and that such statement of confession was duly taken. That presumption cannot be drawn in the present case in view of the nature and character of the evidence before the committing magistrate which, even if taken at its face value, falls far short of making out a *prima facie* case against the accused. If, therefore, in a case in which the evidence so falls short, the magistrate proceeds to examine the accused as he did in the present case and record his answers, could it be said that the examination of the accused was *duly* recorded by him within the meaning of that expression in s. 287? On this point I have the advantage of the guidance afforded by the decision of a Bench of this court in *In re. Abdulla Ravuthan* (2). That was a case where there were seven accused who had been charged with having forged a promissory note. The preliminary enquiry into the offence was held by the committing magistrate who committed the accused to take their trial in the sessions court. There was no evidence adduced by the prosecution before the committing magistrate to show that the second accused forged the promissory note or that accused 6 and 7 attested the forged promissory note. At the end of the prosecution evidence before the committing magistrate the 2nd, 6th and 7th accused were asked the following question: "You heard what the prosecution witnesses stated. What do you say?" and they gave answers indicating that the 2nd accused had the promissory note in question prepared by his younger brother and he got the signatures of the witnesses appended to it. The 6th accused admitted that in response to a request from the 2nd accused he took the promissory note from the complainant and attested the document. The 7th accused also made a similar statement admitting his attestation of the promissory note charged as a forged document in the case. As against these accused, beyond the admissions contained in the answers given by them to the committing magistrate, the admissibility of which was in question, there was no evidence whatever. These accused were convicted and in the appeal preferred by them the point was taken that as there was no evidence given by the prosecution to connect them with the forged document before the committing magistrate, the magistrate was not entitled to put any questions to them or to take any statements from them. It was said that s. 342—the same may be said of s. 209 as well,—enabled the magistrate to examine the accused only if there were circumstances appearing against the accused in the evidence given by the prosecution and that answers given by the accused in the absence of such evidence to questions put by the magistrate, could not be used for filling up gaps in the proof adduced by the prosecution. The appeal was heard by a very strong Bench of this Court consisting of Sir John Wallis, C. J. and Coutts Trotter, J. as he then was, the judgment of the court being delivered by the latter. The court observed:

> "The admissions in the court below were made in answer to an invitation from the committing magistrate to say what they had to say. At the time when these statements were made in the court of the committing magistrate the prosecution had given no evidence at all involving any one of these accused, as appears from an examination of the record of the evidence given in that court. S. 342, Cr. P. C. only gives the magistrate the right to question the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. We think that where no evidence has been given implicating the accused, the magistrate has no right under the statute to put questions to the accused or invite him to make a statement. We further think that if a statement is made by the accused in such circumstances it is not admissible evidence against the accused on his subsequent trial."

The learned judges in support of their opinion relied upon an earlier decision of this Court in *Mohideen Abdul Kader* v. *Emperor* (3) and the decision in the English case of *Reg* v. *Berriman* (4). This decision in *In re Abdulla Ravuthan* (2) contains a clear pronouncement that answers recorded by the magistrate from the accused in the absence of evidence adduced by the prosecution implicating the accused are not admissible in the trial of the accused later in the court of session. Though s. 287 is not in terms referred to, it appears to my mind that when the learned judges were considering the question of the admissibility of the answers in evidence they must have done so only with reference to s. 287. The principle that gaps in the case of the

2. (1915) M. W. N. 413 : 39 Mad. 770.

3. (1904) 27 Mad. 238.

4. 6 Cox. Cr. C. 388.

prosecution cannot be filled in by answers elicited from the accused during his examination by the court is too well settled to need citation of authority. That principle is clearly stated in *Basantha Kumar Ghettak* v. *Queen-Empress* (5) and repeated in *Mohideen Abdul Kadar* v. *Emperor* (3). These decisions are in my view entirely consistent with the fundamental principle upon which the administration of criminal justice is founded in this country, and that is, that an accused person must be presumed to be innocent until the contrary is proved by credible testimony adduced by the Crown, a duty cast upon the prosecution and on the prosecution alone. Certain limited exceptions under specified safeguards are no doubt to be found in the Cr. P. C. and the Evidence Act. Statements in the nature of a confession made by an accused, provided they are free and voluntary, in other words, not induced by a promise of advantage and not procured by threats, are declared admissible by law. Apart from confessions, it appears to me that there is no warrant for supplementing the evidence for the prosecution by statements obtained from the accused as the result of judicial interrogation. The purpose of interrogation by court or by the committing magistrate is merely to obtain an explanation from the accused in respect of circumstances appearing against him. That this is the only legitimate purpose of the interrogation is not to be forgotten and it is not to be extended to cases where the prosecution evidence does not go far enough and tend to involve the accused in guilt.

I must therefore hold that in this case no proof has been adduced by the prosecution to show that the body of the child found in the cess-pool was the body of the child of which the accused was delivered. Nor is there any proof that it was the accused that deposited the body in the cess-pool in front of Madurai Naicker's house. The link, the most important link, in the chain of evidence by which the offence can be brought home to the accused is wanting. I must withhold the case from the jury.

(At this stage the jury are called in and addressed by His Lordship as follows:

"Gentlemen,

A question of very great importance has arisen for my consideration and I have come to the conclusion that there is no sufficient evidence to go to the jury. I therefore direct you to return a verdict of 'not guilty.')

ORDER

The jury at my direction having returned an unanimous verdict of 'not guilty', the accused is acquitted and she will be set at liberty immediately.

*Accused acquitted.*

5. (1899) 26 Cal. 49

---

Cr. R. C. No. 427 of 1940

Case Ref. No. 15 of 1940

*September 6, 1940*

LAKSHMANA RAO, J.

**Emperor** v. **C. Raghava Menon**

*Penal Code (XLV of 1860), S. 403 — Temporary misappropriation — Mere retention of money without using the same—No offence under the section.*

*Where the accused, the clerk of the official receiver, received three sums of money on particular dates, entered them in the accounts on different later dates and then paid the amounts to the official receiver, the police filed a charge sheet against him for an offence under S. 409, I. P. C. The lower court holding that the facts did not warrant a charge under S. 409 framed a charge under S. 403 for temporary misappropriation and convicted the accused.*

Held, *that as the accused was not in difficulties and did not use the amount, his mere retention of the money would not warrant a conviction under S. 403, I. P. C.*

FACTS: The accused was the clerk of the official receiver, Calicut. He has been charged by the police on the complaint of the official receiver (P. W. 1) for an offence under s, 309, I. P. C. in respect of three amounts of Rs. 35 each. Though the accused was a public servant, the facts of the case do not make out any breach of trust, so the charge as framed was only under s. 403, I.P.C. The accused pleaded not guilty to the charge. His case is that he did not misappropriate the amount and that

it was only a case of delay in accounting due to pressure of work and oversight. He did not examine any witnesses but admitted the facts and pleaded that the delays were due to carelessness and that the moneys were all along lying in the accused's drawer.

The judgment stated *inter alia*:

"The ruling in 1936 M. W. N. 83 has been brought to my notice. In the present case also there is no direct evidence to show that the amounts were not available with the accused during the interval before their delivery to the O. R. nor is there any direct evidence that he had spent the O. R's money on his own purposes. But I understand that ruling (and other rulings on the same point) to mean that mere delay in accounting is not proof of misappropriation but there must be other circumstances from which a positive inference can be drawn that it was not merely a case of retention but that the accused had not the money with him and that therefore there was misappropriation. I think the facts justify such an inference being drawn in this case. I therefore hold that the accused had committed dishonest misappropriation in respect of these three amounts and I find him guilty on all the counts in the charge.

As regards the sentence, though such conduct in public offices is serious enough there are also extenuating circumstances. The accused only wanted to benefit himself for short periods by the use of the amounts. He himself handed over the amounts after some days before he could be detected. I must also take into account the fact that this conviction will have some consequences on his career—consequences which will probably be more deterrent than a term of imprisonment would be and will certainly affect him more seriously. I sentence the accused to pay a fine of Rs. 17 on each count (Rs. 51 in all) and in default to undergo rigorous imprisonment for two weeks each (6 weeks in all)."

The district magistrate referred the case under S. 431 (1), Cr. P. C. to the High Court holding that the appropriate sentence for such an offence is imprisonment and further observed.

"The offence of criminal misappropriation is serious enough; it is the more so in a public office. Cases of misappropriation are not uncommon in public offices in this district and it is a deterrent sentence that is required, not a lenient one. The main reason for the lenient sentence, the expectation that the accused would be dismissed from employment, has not been fulfilled. I am informed that he was suspended for a period of from three to four months. Quite apart however from considerations of departmental action, in my opinion the law has not been adequately vindicated by this sentence. I therefore submit for the consideration of the High Court that the sentences should be enhanced to one of imprisonment.

CASE referred for the orders of the High Court, under S. 438, Cr. P. C. by the district magistrate of Malabar in his letter dated 14—6—1940 No. C.C. 61 of 1940.

*Public Prosecutor* (*V.L. Ethiraj*,) for Crown.
*P. Govinda Menon*, for Accused.

ORDER

The accused was the clerk of the Official Receiver of Calicut and three sums of Rs. 35 were received by him during the absence of the Official Receiver on 3rd October, 1939, 2nd November, 1939 and 2nd December, 1939. They were entered in the accounts on 7th October, 21st November and 18th December and on the complaint of the Official Receiver the police filed a charge-sheet against the accused for an offence under S. 409, I.P.C. The facts alleged did not warrant a charge under S. 409, I.P.C. and the sub divisional magistrate framed a charge under S. 403, I.P.C. for temporary misappropriation of this amount. The accused denied the offence and pleaded that the delay in making the entries and paying the amount over to the Official Receiver was due to oversight due to heavy work but the plea was not accepted and the accused was convicted and sentenced to pay a fine of Rs. 17 on each count.

The case has been referred by the District Magistrate for enhancement of sentence, but the evidence does not justify the conviction. The accused was not in difficulties and as found by the sub divisional magistrate there was no evidence that he used the amount. It has been repeatedly held that mere retention of money would not warrant a conviction under S. 403, I.P.C. and the accused was subsequently reinstated as the result of a departmental enquiry. The conviction is therefore set aside and the fine if levied will be refunded.

N.T.R. *Conviction set aside.*

## PRIVY COUNCIL

(Appeal from Judicial Commissioners' Court, Peshawar).

*May* 28, 1940.

VISCOUNT MAUGHAM, LORD WRIGHT & SIR GEORGE RANKIN.

**Mirza Akbar v. Emperor**

*Evidence Act (I of 1872), S. 10—Scope of—Cr. P. C., S. 274—Effect of—North West Frontier Province Courts Regulation, Rr. 1 & 3—Meaning of.*

*A statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed is not admissible. The words 'common intention' in S. 10, Evidence Act, signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention.*

*The true effect of S. 274, Cr. P. C. is that if the judge proceeds with seven jurors, it must be assumed in the absence of anything on the record to satisfy the appeal court that it was practicable to have more than seven jurors, that S. 274 had been complied with.*

*R. 3 of the North West Frontier Province Courts Regulation is satisfied if when the appeal comes on for hearing, it is not practicable to constitute a Bench without the judge who had exercised judicial functions in the proceedings.*

*To decide whether or not an appeal should be adjourned until a Bench can be constituted is particularly a matter for the discretion of the judge.*

*H. D. Cornish & G. Greenwood*, for Applt.

*G. D. Roberts & W. Wallach*, for Respt.

### JUDGMENT.

LORD WRIGHT:—This is an appeal in forma pauperis by special leave from a judgment and order of the court of the Judicial Commissioner, North-West Frontier Province dated 10th July, 1939. The learned Judicial Commissioner dismissed the appellant's appeal from his conviction of an offence punishable under S. 302/120B, Penal Code, i.e. conspiracy to murder in consequence of which conspiracy murder was committed, and confirmed the sentence of death passed on him by the additional sessions judge, Peshawar division, on 8th May, 1939. The appeal raises two main points, which are the only points calling in their Lordships' judgment for consideration here. They are independent of each other. The first is a question as to the jurisdiction of the court by which the sentence was confirmed. It was contended on behalf of the appellant that the court was not legally constituted, because the appeal to the court was dismissed and the sentence confirmed by a single judge of the Court of the Judicial Commissioner sitting alone. The second was whether if the objection as to jurisdiction failed, the decision of the court was vitiated by mis-reception of evidence. As their Lordships announced at the conclusion of the arguments before them, they were of opinion that both points failed the appellant and that the appeal should be dismissed. They will now state their reasons for coming to that conclusion.

The appellant was charged with conspiracy to murder, in consequence of which conspiracy, murder was committed under the joint effect of S. 302-120B, Penal Code. He was convicted and sentenced to death by the trial judge, Mr. Mohammad Ibrahim, additional sessions judge, Peshawar division, assisted by four assessors who were unanimously of opinion that all three accused including the appellant were guilty. The facts of the case and the circumstances under which they were convicted will be dealt with so far as relevant in this appeal, in connection with the second question, that of evidence. When, after some preliminary proceedings, the appeal came on for hearing before the court of the Judicial Commissioner on 12th July, 1939, it was heard by Almond the Judicial Commissioner, sitting alone. Kazi Mir Ahmad, A.J.C., the additional judicial commissioner, was absent on leave. The period of his leave was for two months with effect from 30th May, 1939. The Hon'ble Mr. M. A. Soofi had been appointed under S. 222(2), Government of India Act, 1931, to act as a judge of the court during the absence of Kazi Mir Ahmad, A. J. C. But it happened that in this particular case Mr. M. A. Soofi was disqualified from sitting on the appeal because, as the Judicial Commissioner, at the outset of his judgment on the appeal explained, Mr. M. A. Soofi had exercised judicial functionsin the proceedings. The question whether in those circumstances the court was properly constituted

by Almond, J. C. sitting alone falls to be determined on the basis of Rr. 1 and 3 of the Rules made on 19th May, 1939, by the Governor of the North West Frontier Province in the exercise of the powers conferred on him by S. 7 of the North West Frontier Province Courts Regulations, 1931 (as amended), for the purpose of specifying the classes of civil and criminal proceedings which were to be heard by a Bench of the Court of the Judicial Commissioner, North West Frontier Province. The Rules provide respectively as follows:

R. 1 of the said rules provides that the following classes of criminal cases are to be disposed of by a Bench, viz., any appeal from a sentence of death or of transportation for life and any cases of confirmation or revision of any such sentence.

R. 3 provides that notwithstanding anything contained in these rules where a judge of the court has in a subordinate capacity exercised judicial functions at any stage of a criminal proceeding or is personally interested therein, he shall not hear any appeal or reference arising out of such proceeding, and if it is not practicable to constitute a Bench without such judge, such appeal or reference shall be heard by another judge sitting alone.

That Mr, M. A. Soofi was disqualified under R. 3 was not disputed but it was contended on behalf of the appellant that in the circumstances of the case compliance with R. 1 was not excused and that the appeal could only be legally disposed of by a Bench. It was not established, so it was contended, that it was not practicable to constitute a Bench without such judge (that is Mr. M.A. Soofi) and accordingly the appeal could not legally be heard by another judge (in this case the Judicial Commissioner) sitting alone. Their Lordships are of opinion that the objection is not well founded. On 10th July, 1939, when the appeal came on for hearing, it was not practicable to constitute a Bench without Mr. M. A. Soofi, because there was no other judge of the court available to sit with Almond, J. C. In the event the precise language of R. 3 was thus satisfied. It was however contended that the appeal might have been adjourned until the return of Kazi Mir Ahmad, A. J. C. from his leave, say, until 30th July, 1939, an adjournment of 20 days. But their Lordships find in the rule nothing to justify this qualification of the words of the Rule. If however there is some reservation implied, so that the rule is to be construed as meaning 'not reasonably practicable' there must be some authority to decide what is reasonable in the circumstances. Their Lordships think that this authority could be no other than the judge. To decide whether or not an appeal should be adjourned is particularly a matter for the discretion of the judge. It is not here necessary to decide whether in any case the decision of the judge under R. 3 can be overruled, but their Lordships think that if the exercise of this discretion, which is a judicial discretion, is to be in any case overruled, strong grounds for doing so must be shown. It is enough to say that no such grounds are shown here.

No authority has been cited directly in point. Reference was made to various decisions under s. 274 Cr. P. C. which provides that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and if practicable of nine persons. The language of this provision is different from that of the Rule and the conditions are different, particularly in view of S. 276, which enables a deficiency to be made good by leave of the court by choosing other jurors from persons who may be present. There has been some difference of judicial opinion as to the true effect of S. 274, but the more recent, and in their Lordships' opinion, better, view is that adopted in *Emperor* v. *Bent Premanik* (1), which is that if the judge proceeds with seven jurors, it must be assumed in the absence of anything on the record to satisfy the Appeal Court that it was practicable to have more than seven jurors, that S. 274, had been complied with. These decisions so far as they go may tend to support the opinion just expressed in regard to R. 3, but as already stated, they do not give direct help in the construction of R. 3. In their Lordships' judgment the objection of want of jurisdiction fails.

The second objection requires some statement of the facts and the evidence. The appellant was tried along with the actual murderer Umar Sher, and with Mst. Mehr Taja who had been the wife of the murdered man, Ali Askar. The murder was committed on 23rd August, 1938, in the village of Taus Banda about four miles from Hoti. The guilt of Umar Sher was not really open to doubt. He was practically caught red-handed. He was caught running away with a single barrel shot gun in his hand, the barrel of which smelt as if freshly discharged. There was an empty cartridge jammed in the barrel. When the appellant came up from the field in which

1, (1935) A. I. R. Cal. 407 F. B.

he had been working about half a mile away from the scene of the murder he asserted that Umar Sher was innocent and should be released, but the others present refused to do so. Umar Sher's main defence seems to have been absence of motive. This fact however was relied upon by the prosecution as showing that he was a hired assassin, bribed to commit the murder by the appellant and Mst. Mehr Taja who were co-conspirators in that regard. This was found by the court to have been the fact. The principal evidence of the conspiracy between these two prisoners consisted of three letters, two from the female prisoner to the appellant, and one from the appellant to the female prisoner. The authenticity of the letters as being what they purport to be, and the handwriting have not and could not have been contested before their Lordships. It will be convenient to set out the relevant portions of the three letters. They are (1) Ex. P. A. in the handwriting of Mst. Mehr Taja:

"Greetings to thee, O my sweet heart. Mind not in the least if I have been hard on thee at times—pray forgive me for the same. In fact I feel offended when ill is spoken of thee. Khan Khela who had visited my house when Amir Jan was suffering from pain had a lot of talk against thee, but beware and lend not thy ears to these. They are arch devils. Partake not of anything from their hands. Now I shall sell myself and do this act if only I have thee at my back. What a blissful hour it would be when with Amir Jan wailing over Ali Askar we contract our Nikah and enjoy ourselves. Be not angry my darling for thy sorrow makes me sad. However hard on thee I have been in the past, that is all past. Henceforth I solemnly promise to desist. I do fervently cherish the hope that God will make thee mine. Try and send Mir Aftal often to me so that I may talk to him. I have found out money for thee but thou must unhesitatingly find out the man. My heart is bursting for thee and I long for thee immensely. In the end accept my greetings."

Exhibit P. B. (also in Mst. Mehr Taja's handwriting):

"Letter to the sweet heart. Peace be on you. The fact, my darling, is that I am in great distress: otherwise I would not have conveyed thee such harsh things. I say these to thee for I am extremely distressed. Whom but thee have I as my own in this land of the Lord.....I have a lot to tell you but I am helpless. For God's sake spare not a moment or thou wilt ever repent my loss. They are all one against me. It would be better if aught thou couldst do. Accept greetings."

Exhibit P.D. (in handwriting of the appellant):

"My sweet-heart and the bearer of my burden. If thou tauntest me in regard to my mother what do I care for her. I look to my God and to thee only for reliance. I cannot wait any more. For the sake of God and his Prophet do try or I will die. You must find out the money or I would die. Is it of my choice to be roaming about and thou be enjoying with him, but what shall I do. If I had my own way I would not have left you to remain with him. I am burning and have pity on me for God's sake. To me the passing of each day is like months and years. Once place thyself in my charge and satiate me with the honey of thy red lips. Even if thou cuttest my head off my neck I would still yearn for thy white breast. This is my last word if only thou wouldst attend to it. I have vowed for thy sake at many a shrine. The house of the torturer will be rendered desolate. Mirza Akbar's limbs have grown sapless after thee."

The Judges in the court below have found in these letters, their authenticity being established, evidence justifying the conviction of the appellant and Mst. Mehr Taja. The Judicial Commissioner in dismissing these prisoners' appeals, thus summed up the position, with special reference to the letters. He said:

"There is a reference to Mirza Akbar by name in Ex. P. D. and the name clearly refers to the writer of the document. Furthermore, the three documents taken as a whole show that the two writers of the documents desired to get rid of Ali Askar so that they should marry each other and there was a question of finding money for hired assassin to get rid him. Subsequently we find that Ali Askar was shot by a man who had no motive to shoot him. In addition to this there was the strange conduct of Mirza Akbar when Umar Sher was arrested. There is no reason for doubting the statement of the witnesses that he did request that Umar Sher should be released. It is true that in the earlier statements the witnesses did not mention this fact, but the obvious reason is that they did not attach any importance to it at the time because they had no conception as to what was the motive for the commission of the offence.

In my opinion there is no doubt whatsoever that these two appellants Mirza Akbar and Mst. Mehr Taja did enter into conspiracy to murder Ali Askar and that they hired Umar Sher to commit the actual murder, which he did."

But the appellant's contention was that this conclusion was vitiated by the admission as against him of a statement made by Mst. Mehr Taja before the examining magistrate after she had been arrested on the charge of conspiracy. That statement which was made in the appellant's absence was admitted in evidence both by the trial judge and by the Judicial Commissioner on appeal as relevant against the appellant under s. 10, Evidence Act. The Judicial Commissioner said that it had been argued that S. 10 did not apply to any statement made by conspirators if the offence to commit which they conspired, has actually been committed. He rejected that argument and refused to hold that s. 10 had that limited meaning, though he held that the evidence of the statement could not have great weight as against the appellant, since he had not had any opportunity of cross examining Mst. Mehr Taja upon it. In their Lordships'

judgment, the Judicial Commissioner misconstrued the effect of s. 10.

The English rule on this matter is in general well-settled. It is a common law rule not based on, or limited by express statutory words. The leading case *Reg* v. *Blake* (2), illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible. What in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used for carrying out the fraud. But a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other. No doubt what was contained in it amounted to a statement evidencing what had been done and also the common intent with which at the time it had been done, but it had nothing to do with carrying the conspiracy into effect. Lord Denman said at page 138 that the evidence must be rejected "on the principle that a mere statement made by one conspirator to a third party or any act not done in pursuance of the conspiracy is not evidence for or against another conspirator."

Patterson, J. described it as 'a statement made after the conspiracy was effected.' Williams, J. said that it merely related 'to a conspiracy at that time completed.' Coleridge, J. said that it 'did not relate to the furtherance of the common object.' The words relied upon in s. 10, Evidence Act, are 'in reference to their common intention.' These words may have been chosen as having the same significance as the word 'related' used by Williams and Coleridge, JJ. Where the evidence is admissible it is in their Lordships' judgment on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy (per Patterson, J. at p. 139). The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy; or the words written or spoken may in themselves be acts done in the course of the conspiracy.

This being the principle, their Lordships think the words of s. 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words, "common intention" signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment s. 10 embodies this principle. That is the construction which has been rightly applied to s. 10 in decisions in India, for instance, in *Emperor* v. *Ganesh Raghunath* (3) and *Emperor* v. *Abani* (4). In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past.

In their Lordships judgment the statement of Mst. Mehr Taja falls under the latter category, and was wrongly admitted. But in truth the question of law is not really material in this case. The statement so far from admitting a conspiracy with the appellant, categorically denied it. While the woman stated that the appellant had threatened to kill her and her husband if she refused to marry him, she had, she said refused his advances and stopped him coming to the house. Mr. Roberts, counsel for the respondent, frankly admitted that apart from the legal question, he could not rely on the statement as evidence of the conspiracy, or indeed on any other ground.

In their Lordships' judgment however the admission of the statement (to which it should be repeated that the Judicial Commissioner did not attach very great weight) did not vitiate the proceedings. On the material before the court, after the statement is excluded; there was evidence sufficient to

2. (1844) 6 Q.B. 126.

3. (1932) 55 Bom. 839.
4. (1911) 38 Cal. 169.

justify the conviction. The terms of the letters are only consistent with a conspiracy between the prisoners to procure the death of Ali Askar. The vague suggestion that they related merely to a scheme to obtain a divorce and to raise money for that purpose is clearly untenable. The handwriting of the letters is clearly established. Under those circumstances their Lordships will follow the precedent established in *Narayana Swami* v. *Emperor* (5), and hold that in this case as in that it is impossible to say that the proceedings which ended with the conviction resulted in a failure of justice. They accordingly humbly advise His Majesty that the appeal should be dismissed.

*Appeal dismissed.*

---

**Cr. R. C. No. 551 of 1940**
Cr. R. P. No. 524 of 1940
*September 4, 1940*
LAKSHMANA RAO, J.
**K. Sannaya**
**v.**
**Emperor**

*Government of India Act (1935), S. 270—Misappropriation of money order and forgery of M. O. form by postman—Prosecution under Ss. 409, 467 & 471, I. P.C.—Sanction.*

*Petitioner was a postman, who was charged for offences under Ss, 409, 467 and 471 I. P. C. for misappropriating the amount of a money order entrusted to him by forging the thumb impression of the payee in the M. O. form and using the forged document by returning it to the post office in token of payment. The offence were committed on 10—4—39 before the relevant date as defined in S. 270 (3) Government of India Act.*

Held, *that being a servant of the Crown in a department of the Central Government the petitioner would be a person employed in connection with the affairs of the Government of India, that the forged document was used in the execution of the duty of the petitioner as postman of returning the paid M. O. forms to the post office in token of having made the payments and that the consent of the Governor General was necessary for the prosecution for the offence under S. 471, I.P.C. but that there was no bar to the trial of the offences under Ss. 409 and 467 I.P.C.*

FACTS : The accused is a postman of Coondapur. He was entrusted on 10-4-39 with Rs. 15 and M. O. form payable to one Souza of Angalur village. The payee is illiterate. The accused returned the form to the postmaster with the endorsement that the amount had been paid to the payee. The form bore a thumb impression purporting to be that of the payee. It is alleged that the payee did not receive the money nor did he fix his thumb impression to the form. The finger print Bureau was of opinion that the thumb impressions did not correspond with that of other impressions of the payee. On these facts the accused was charged for offences under Ss. 409, 467 and 471, I.P.C.

An objection was taken before the sub magistrate of Coondapur that the court was not competent to try the accused without the consent of the Governor-General in Council on the ground that the accused was entitled to protection of s. 270 Government of India Act. The sub magistrate overruled the objection.

The order of the sub magistrate was as follows :

This is an objection petition filed by A-1 against proceeding with the case against him in which he has been charged by the Police under Ss, 409, 467, & 471 I.P.C. His objection is to the effect that, while denying guilt under any of those offences according to the charge sheet the said offences were committed by him while discharging or purporting to discharge his duties as a public servant and therefore under s. 270 of the Government of India Act, 1935, the sanction or consent of the Governor General is a condition precedent to his prosecution, without which it is illegal to proceed with the case.

The circumstances of the case are briefly as follows. A-1 is a postman attached to

5. (1939) M.W.N. 185; Cr. 17; 66 I.A. 66 P. C.

Coondapur sub post office. Shimoga M.O. No. 2176 dated 6-4-1939 for Rs. 15 payable to one Seraphine Souza at Kangalur village was received at the Coondapur sub post office on 10-4-1939 and was entrusted to A-1 on the same day. It was returned by him to the office after payment. The money order bears (1) a thumb impression purporting to be that of Souza, the payee (2) an attesting signature of A-2 (3) the signature and date of the paying official, A-1 (4) the date of payment in the handwriting of the attesting witness A-2 and (5) an endorsement in Kanarese to the effect—thumb impression of Souza near the thumb impression in the handwriting of A-1. S. Souza named in the M.O. denies having given any thumb impression on any money order form or received any money from the post man during April 1939 in which the payment is alleged to have been made by him. The case arose out of a complaint made by the sender of the money order alleging non-payment of the money to the payee. The finger print expert who compared various thumb impressions of S. Souza and found all the other impressions identical is of the opinion that the thumb impression of the paid M.O. No. 2176 dated 6-4-1939 is not identical with them.

The charge against A-1 under s. 409, I.P.C. reads as follows: That on or about 10-4-39 at Coondapur A-1 being a postman attached to the Coondapur post office and as such a public servant and in such capacity entrusted with Rs. 15 amount of Shimoga M.O. No. 2176 committed criminal breach of trust with respect to the said amount and thereby committed an offence punishable under s. 409, I.P.C. In the charges under Ss. 467 and 471, I.P.C. he is not so described. The learned advocate of A-1 argues that the offence under s. 409, I.P.C. attributed to A-1 is one that is capable of being committed only by a public servant and not by any one else and that therefore A-1 is protected by s. 270 of the Government of India Act, 1935. This argument is met by Sir Maurice Gwyer, Chief Justice of the Federal Court in Case No. 1 of 1939.* Sir Maurice Gwyer states therein that the intention of s. 270 seems to be to prevent public servants from being unnecessarily harassed. Explaining the extent of the protection afforded by that section Sir Maurice Gwyer remarks as follows: "Obviously the section does not mean that the very act which is the *gravamen* of the charge and constitutes the offence should be the official duty of the servant of the Crown: Such an interpretation would involve a contradiction in terms because an offence can never be an official duty. . ." The test appears to be not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done and purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it, necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a dereliction of it. What is necessary is that the offence must be in respect of an act done or purported to be in execution of duty, that is, in the discharge of an official duty. It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say, under the cloak of an ostensibly official act though, of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another the impression that he is so acting." Justice Sir S. Varadachariar also in the same holds that s. 270 of the Government of India Act, 1935 was, no doubt, intended to afford a measure of protection to public servants, but it was not part of *the normal* protection of such servants. Surely, it is an abuse to seek the aid of a measure intended to protect public servant from being unnecessarily harassed as a normal protection of every public servant who commits an offence while purporting to be in the discharge of his duty. For these reasons I hold that the consent of the Governor General is not necessary for prosecuting A-1 for the offence set forth in para 2 above.

The objection petition further states that the allegations set out in the charge sheet constitute, besides offences mentioned therein also offences under Ss. 167 and 477-A, I.P.C. and that for that reason also it is illegal to prosecute A-1 without the consent of the

* 1939 M. W. N. 497: Cr. 69

Governor General. S. 167, I.P.C. reads as follows: "Whoever being a public servant and being as such public servant charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing to be likely that he may thereby cause injury to any person, shall be punished with imprisonment etc." I do not think that a post man entrusted with an M.O. to pay the money to the payee can be regarded as one '*charged with the preparation or translation* of any document.' S. 477-A, I.P.C. deals with the falsification of accounts by clerk, officer or servant or employee. This section seems to apply only where there is falsification of accounts—falsification of something in the way of book-keeping or written accounts. No doubt every forgery is a falsification but when the law prescribes separate sections dealing with the forgery of valuable security and the using as genuine of forged documents it seems to be not proper to bring this case under s. 477-A, I.P.C, and as the object of s. 270 of the Government of India Act, 1935 is not to afford normal protection to public servants but to provide for exceptional situations, it would be going against the spirit of the law to bring offences which ordinarily fall under certain sections of the I.P.C. under certain other sections also, prosecution for which requires the previous sanction prescribed in that section.

For the foregoing reasons I dismiss this petition."

The accused moved the High Court raising the following points:

1. Is the accused a person employed in connection with the affairs of the Federation?

2. What is the relevant date with reference to such a person until the commencement of the Federation?

PETITION under Ss. 435 and 439 Cr. P.C. 1898, praying the High Court to revise the order of the court of the stationary sub magistrate, Coondapur, dated 11-7-1940 in R.C. No. 2 of 1940.

*K. S. Jayarama Iyer & G. Gopalaswami*, for Petr.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER

The petitioner is a postman attached to Coondapur sub post office and a charge-sheet has been filed against him for offences under Ss. 409, 467 and 471, I.P.C. for misappropriating the amount of a money order entrusted to him by forging the thumb impression of the payee in the money order form and using the forged document by returning it to the post office in token of payment.

The offences were committed on 10-4-1939, i.e., before the relevant date as defined in s. 270, Cl. 3 of the Government of India Act, which in relation to acts done by persons employed about the affairs of the Government of India is the date of the establishment of the Federation and being a servant of the Crown in a department of the Central Government the petitioner would unquestionably be a person employed in connection with the affairs of the Government of India. S. 270 (1) provides that no proceedings, civil or criminal, shall be instituted against any person in respect of any act done or purporting to be done in the execution of the duty as a servant of the Crown in India before the relevant date except with the consent in the case of a person who was employed in connection with the affairs of the Government of India, of the Governor-General, in his discretion and the forged document was used in the execution of the duty of the petitioner as post man of returning the paid money order forms to the post office in token of having made the payment. The consent of the Governor General is therefore necessary for the prosecution for the offence under S. 471 I. P. C. but there is no bar to the trial of the offences under Ss. 409 and 467, I. P. C. and the trial can proceed in respect of these charges.

—

**Cr. R. C. No. 85 of 1940**
Cr. R. P. No. 82 of 1940
*September 4, 1940.*
LAKSHMANA RAO, J.
**Arunachala Mudaliar & others** v. **Emperor**

*Police Act, Ss. 30 (2) & 32—Liability of a licensee for procession for breach of conditions—Liability of other people playing music under licensee.*

*The liability of a licensee under S. 30(2) of the Indian Police Act for a procession is absolute and on the violation of the conditions, he would be guilty under S. 32 of the Indian Police Act.*

*The person violating the condition need not be the licensee. Where the bandsmen of the procession (accused 2 to 11) were aware of the license and continued playing against the conditions of the license they also would be guilty under S. 32 of the Indian Police Act.*

THE FACTS appear from the Judgment of the lower appellate court which was as follows :

"The eleven appellants have been convicted by the stationary sub magistrate, Vellore under S. 32 of the Police Act for haviug violated the conditions of a licence granted under S. 30 (3) of the Act. On the 2nd May 1939 the Hindus of Vellore celebrated their Pushpapallakku festival. A-1 who was the promoter of the processions held on that day took out a licence (Ex.D) in obedience to a notice (Ex.B) issued by the District Superintendent of Police Vellore under S. 30 (2) of the Act. One of the conditions of the licence was that music of all description should be stopped within a distance of fifty yards on either side of the any mosque or shrine. The prosecution case was that in the procession held on the night of the 2nd May A 3 to A-11 who were the bandsmen heading the procession did not stop their music until they had got to within thirty yards of the Jumma Masjid in Main Bazar street. This led to serious communal riots which lasted for nearly a fortnight.

The fifty yards limit east of the Jumma Masjid falls according to P. W. 3 (the Circle Inspector of Police Vellore town) somewhere about the middle of one Vanachand's shop in the bazar street. This limit is very well known to the public of Vellore and it is the long established mamool for all music to be stopped at this point. P. W. 3 had nevertheless taken the pains to verify the distance by actual measurement. In the procession held on the morning of the 2nd P. W. 3 had shown this point to A-2 and to the bandsmen A-3 to A-11. They had replied that they were well aware of this limit. They had of their own accord stopped the music at this point and passed on the fifty yard limit on the other side. For the night procession P. W. 5 (a head constable) and four constables had been posted at Vanachand's shop in order to see that all music was stopped there. The pocession came along from east to west led by the band in which A-3 to A-11 were playing. When they came abreast him P. W. 5 asked them to stop playing. They paid him no heed but proceeded eastwards still playing on their instruments. A-2 who was just behind the bandsmen asked them to go on playing. P. W. 5 and the four constables who were by now joined by P. W. 4 the sub inspector of Police Vellore shouted in vain-the bandsmen continued playing egged on by A2. They went about twenty yards past Vanachand's shop. Meanwhile the Muhammadans who were standing outside the mosque grew restive. They made protests to P. W. 1, the Deputy Superintendent of Police who was in charge of the bundobust. P. W. 1 rushed up to the bandsmen. They had by then come to within 30 yards of the mosque and were still palying their music. P.W. 1 was joined by P. W. 3 who had been with the pallakku some distance behind the bandsmen. The bandsmen at first paid as little heed to P. W. 1 as they had done to his subordinates. But after a while P.W. 1 was able to persuade the bandsmen to stop their music. Meanwhile stones were thrown from within the mosque. The Hindu crowd retaliated. The riots followed.

The appellant examined a number of witnesses to show that all music had been stopped long before Vanachand's shop was reached.

* * *

I am satisfied that on the facts the appeal deserves no consideration. Some rather difficult points of law have however been raised. On behalf of A-1 it is urged that he never violated the conditions of the licence for there is nothing to show that he either incited A-3 to A-11 to play the music or that he suffered them to do so. When the police themselves were powerless he could have done nothing to stop the music. I think that the liability of a licensee under S. 30 (3) is absolute. He cannot be heard to say that the violation was owing to reasons beyond his control. Condition (a) of Ex. D runs as follows:

"The licensee shall be held responsible for carrying out the instructions of this licence" Condition (c) says "Music of all descriptions shall be stopped within a distance of fifty yards on either side of any mosque or shrine." The music was not so stopped. It follows therefore that the licensee A-1 has violated the conditions of the licence.

On behalf of A-3 to A-11 it is argued that only a person who is a party to a licence can violate its conditions. A licence confers privileges and imposes restrictions only on the person to whom it is issued. Only he therefore can violate it. A person cannot be said to have broken the conditions of a licence issued to some other person even though he might do acts which the license prohibits. He may be guilty of doing something without a licence (were a licence necessary) but not of violating the conditions of a licence where no licence has been issued to him. For example, if a circus were held under a licence a condition of which was that no member of the audience should be seated within 10 feet of the ring a member of the audience who though fully aware of this restriction seats himself within 10 feet of the ring cannot be punished for having violated the license for the good reason that the licence was not issued to him. This is an argument with which I was at first inclined to agree for one ordinarily thinks of a licence as binding only those who are parties to it. But on further consideration I think that there is no need for any restriction although the point is not free from difficulty. The licence was issued for the procession although in the name of its organiser. The procession itself is held under the licence and every member of the procession is bound to observe its conditions. The analogy of the circus does not hold since the whole procession (and in particular A-3 to A-11) in a sense works under the licencee. The licence says " that music of all descriptions shall be stopped" This obviously applies to every member of the procession who plays music and when A-3 to A-11 did not stop the music they violated the conditions of the licence. I am fortified in this view by the observations of Young C. J. and Munroe J. in *Bilas Rai* v. *Emperor*, A. I. R. 1938 Lah. 425, Morever S. 30A of the Act says that any magistrate etc " may stop any procession which violates the conditions of a licence granted under S. 30." This means that it is possible for a procession (or any member of it) to violate the conditions of a licence granted to its promoter.

It is argued that there is nothing to show that A–3 to A–11 were aware of the licence or its conditions. The evidence of P. W. 3 shows that they were aware of its conditions. But even assuming that they were not I think that they can plead their lack of knowledge only if their conduct comes within S. 79. I. P. C. But in this case A–3 to A1-11 continued to play their music even after they had been asked by responsible police officers to stop. There can therefore be no question of good faith.

The appellants have been rightly convicted under S. 32 of the Police Act. Considering the deliberate nature of the violation and the serious consequence it has had I do not consider the sentences heavy though they are excessive.

PETITION under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the court of the joint magistrate of Tirpputtur dated 6—1—1940 and passed in C. A. No. 47 of 1939 prefered against the judgment of the court of the 2nd class magistrate of Vellore in C. C. No. 387 of 1939.

*K. S. Jayarama Iyer & G. Gopalaswami*, for Petrs.

*Public Prosecutor*(*V. L. Ethiraj*)for Crown.

ORDER

The first petitioner obtained a licence from the District Superintendent of Police under S. 30, clause (2) of the Indian Police Act for taking a procession, and one of the conditions of the licence was that music of all descriptions should be stopped within a distance of 50 yards on either side of any mosque. This condition was violated by petitioners 2 to 11 and the first petitioner the licensee would unquestionably be guilty under S. 32 of the Indian Police Act. The real question is whether the other petitioners would also be guilty under that section and as urged by the Public Prosecutor S. 32 provides that every person violating the condition of any licence granted by the District Superintendent of Police for the use of music shall be liable to a fine. The person violating the condition need not be the licensee, and the finding is that petitioners 2 to 11 were aware of the conditions of the licence. They too would therefore be guilty under S. 32 of the Indian Police Act and there is no ground for interference with the conviction. But the fines are excessive and they are reduced to Rs. 100 in the case of the first petitioner and Rs. 25 each in the case of the others. Otherwise this petition is dismissed.

*Petition dismissed.*

**Case No. 13 of the Fourth Criminal Sessions 1940.**

*September 27, 1940*

KRISHNASWAMI IYENGAR J.

**Rex v. K. Krishnan & G. Srinivasan.**

*Cr. P.C. (V of 1898), Ss. 209, 287 & 342—Preliminary enquiry—Court putting questions under S. 209—Accused filing written statement—If admissible under S. 287 as being 'duly recorded.'*

*The committing magistrate after recording the evidence for the prosecution asked the accused under s. 209 if he had anything to say after hearing the prosecution evidence. The accused said he would file a written statement and filed one.*

Held, *that the written statement must be excluded from the record of the case, as not being one 'duly recorded' under s. 287.*

*The court is entitled to put questions to the accused under Ss. 209 and 342 to afford him an opportunity to explain circumstances that appear in the prosecution evidence against him. The questions which are to be put are questions to be put by court and the answers to be recorded are the answers to those questions. There is no warrant in the Code for the accused taking advantage of the occasion to prepare a written statement, and to put it in lieu of the explanation which is to be elicited and only to be elicited by questions put by the court.*

*E. A. Lobo & T. S. Venkataraman, for* Accused.

*Crown Prosecutor*, for Crown.

JUDGMENT.

It appears that in this case while the preliminary enquiry was being held by the committing magistrate, the accused was put the following question after the evidence for the prosecution had been recorded.

Q. You have heard the evidence of prosecution witnesses, what have you to say?

The accused gave the following answer.

A. I am filing my written statement.

That written statement appears to be a long document consisting of 24 pages of typed matter.

The question now arises as to whether this long typed statement filed by the first accused before the magistrate comes within s. 287 Cr. P.C. and whether it is a document containing the examination of the accused duly recorded by or before the committing magistrate. If the document contains the record of the examination by or before the committing magistrate, it is the duty of the prosecutor to tender it and read it as evidence. But for reasons which will be mentioned, it does not appear to be such a document. The written statement was filed in place of the answers to be given by the accused, at the stage at which the magistrate had to question him under s. 209, Cr. P.C.

S. 209 Cr. P.C. defines the purpose for which the magistrate is authorised to interrogate the accused, and the stage at which he is to do so. S. 209 (1) says:

> "When the evidenee referred to in s. 208, sub-sections (1) and (3), has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him such magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the magistrate, that such person should be tried before himself or some other magistrate, in which case he shall proceed accordingly."

What the committing magistrate is called upon to do by the terms of the section is to place before the accused the circumstances appearing in the evidence against him and afford him an opportunity, if he likes to take advantage of it, to explain those circumstances. Far from the section conferring any privilege on the accused to file a written statement, it merely casts a duty upon the magistrate to question the accused and record his answers, if any, for the limited purpose specified in the section.

There is another section relating to the matter under consideration in Ch. XXV containg the general provisions as to enquiries and trials, namely, s. 342. Cl. (1) of this section says:

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

Clause (2) says :

"The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just."

Clause (3) says :

"The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other enquiry into or trial for, any other offence which such answers may tend to show he has committed."

On the face of it, this section indicates the general procedure to be followed in the matter of judicial interrogation of an accused person and the extent to which the answers elicited are to be made use of, for deciding upon the guilt or innocence of the accused. The purpose for which the court is entitled to put questions to the accused under this section is identical with the purpose indicated in s. 209, namely, to afford the accused an opportunity to explain such circumstances as appear in the evidence against him. The questions which are to be put are questions to be put by the court and the answers to be recorded are the answers to those questions. There in no warrant for the accused or his advisers taking advantage of the occasion to prepare a written statement beforehand and put it in, in lieu of the explanation which is to be elicited and only to be elicited by questions by the court. I am aware of the practice that has been sometimes followed, of allowing the accused to file written statements in enquiries and trials. Written statements so prepared and filed are generally, as is well known, prepared with the assistance of the friends and legal advisers of the accused in order to present the case in as favourable a light as possible, with a view to exculpate the accused or minimise his guilt. The Code does not contemplate such a procedure. What it contemplates and what would be in fact really useful for the decision of the case is what the accused can himself say by way of explanation, and not what others can say for him. There is no warrant in the Code for the outcome of the labours of more capable and brainy persons being considered by the court under s. 287. The practice has been time and again condemned but does not appear to have wholly disappeared. I now add my protest in the hope that it will be laid to rest.

The written statement of first accused in this case is an extreme type and I must exclude it from the records of the case.

For the same reasons, the written statement of the 2nd accused though less objectionable in point of length must also be excluded.

N.T.R.

---

Case No. 6 of the Fourth Crl. Sessions, 1940

*October 2, 1940*

(RETRIAL)

KRISHNASWAMI IYENGAR, J.

**Rex**

v.

**B. K. Narayana Reddi**

*Cr. P. C. (V of 1898), Ss. 286 & 540—Right of prosecution to call fresh witnesses at the trial—Discretion of court to call court witnesses, how exercised.*

*The accused was tried along with two others D and E in August in the same criminal sessions. The trial resulted in the conviction of D and E and so far as the accused was concerned, the jury brought in a verdict of not guilty by 5 against 4, with the result that the jury were discharged and a retrial was ordered.*

*The Crown Prosecutor made this application for production before the court of the two prisoners D and E so that they may be examined and their evidence taken. They were not and could not have been examined before the committing magistrate during the preliminary enquiry. Both the persons who were sought to be produced before the court for being examined as witnesses*

*were, even according to the prosecution, accomplices.*

Held *that the evidence of the two witnesses was not essential to the just decision of the case and that the court would not summon either of the two persons or examine them suo moto in the exercise of its discretion under s. 540.*

*Where the evidence of certain witnesses cannot be made available to the prosecution without the intervention of the court the court has to be satisfied under S.* 540 *Cr.P.C. whether the witnesses should be summoned as court witnesses, a discretion which should be exercised judicially. The section lays a duty on the court to summon and examine any such person if it appears to the court that the evidence of such person is essential to the just decision of the case.*

*B. T. Sundarajan*, for Accused.

*Crown Prosecutor*, for Crown.

JUDGMENT.

The accused B. K. Narayana Reddi was tried aloug with two others namely Devanai Ammal and Ethiraja Pillai on the 15th, 16th and 19th August last. The trial resulted in the conviction of Devanai Ammal and Ethiraja Piilai and they are now serving their respective terms of imprisonment. So far as Narayana Reddi is concerned, the Jury brought in a verdict of not guilty by 5 against 4 with the result that I ordered the discharge of the Jury. I decided that it was a fit case for Narayana Reddi to be tried again on the charge framed against him. At the request of his counsel I ordered his retrial by myself during this sessions. The case comes on for trial tomorrow, the 3rd October, 1940.

Today the Crown Prosecutor makes an application for production before Court of the two prisoners aforesaid, namely, Devanai Ammal and Ethiraja Pillai so that they may be examined and their evidence taken. The first question that arises is whether it is permissible for the crown to examine these two persons as witnesses for the prosecution. That they were not examined—as they could not have been examined—befor the committing magistrate during preliminary enquiry is not by itself an objection to the Crown having their evidence taken. Under S. 286 as construed by a Full Bench of the Lahore High Court in *Niamat* v. *Emperor* (1) the prosecution is not confined to the witnesses examined before the committing magistrate but may examine other witnesses as well, in the sessions court. But I am not satisfied that the Crown is entitled to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. If the prosecution have additional witnesses, ready and available to them for giving evidence, their evidence can be taken and so far as I can see there is no legal objection to this course. In view however of the fact that without the intervention of the Court the evidence of these two witnesses cannot be made available to the prosecution, the learned Crown Prosecutor is thrown back on the provisions of S. 540 Cr. P. C. on which he relies for the purpose of persuading me to summon and examine the two witnesses named by him, as court witnesses. S. 540 runs as follows:

> "Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidenee appears to it essential to the just decision of the case."

The first portion of the section leaves a discretion in the court to summon any person as a witness, a discretion which should as a matter of course be exercised judicially. The second and the latter portion of the section lays a duty on the court to summon and examine any such person if it appears to the court the evidence of such person is essential to the just decision of the case. I have therefore to put myself the question whether this is a fit case in which in the exercise of my discretion I should summon these two prisoners who are now undergoing terms of imprisonment or whether I am satisfied that their evidence is essential to the just decision of the case.

The relevant facts which I must remember in this connection are these: According to the case for the prosecution Ethiraja Pillai one of the two witnesses now sought to be summoned stole the two postal orders in respect of which the offences charged are alleged to have been committed and passed them on to Narayana Reddi and Narayana Reddi in his turn got the orders cashed through Devanai Ammal, the other witness whose produc-

1, (1936) 17 Lah. 176.

tion is now sought. All the three, namely DevanaiAmmal Narayana Reddi and Ethiraja Pillai were tried together with the result I have already mentioned. In the course of the trial it appeared that Ethiraja Pillai had made a statement in the nature of a confession first to the investigating inspector Mr. Mahalinga Ayyar which statement he repeated in substance before Mr. Raghunatha Rao the Presidency Magistrate who recorded his confession under s. 164 Cr. P. C. In the statement before Mr. Mahalinga Ayyar he stated: "The two orders shown to me were taken out from a cover. I secreted that cover and opened it in the dark behind the privy. I showed them to Narayana Reddi some two days after that and asked him if they will fetch any money. Narayana Reddi took them from me and said that he will get money for them. He did not pay me anything. I asked him and he replied that he threw them away." In his statement before the magistrate he said: "Narayana Reddi would ask us to bring some letters in covers received by post so that if there were notes in any of them they can be extracted. About six months ago one day I gave two such letters from the inland mail to that Narayana Reddi. There were two shilling notes in one envelope. I saw the number '20' on each of the notes I handed over that letter to him and I do not know what happened to it subsequently. I gave him the other letter also. I was not present when he opened that letter. I do not know what he did with those notes and I never questioned him about them." I may also add that immediately after Ethiraja Pillai made his statement to Mr. Mahalinga Ayyar he was taken to Mr. Byrne the Presidency Post Master and he again confirmed the statement he had earlier made to Mr. Mahalinga Ayyar. When the case was before the committing magistrate he retracted these confessional statements and asserted that those statements were the result of inducements offered to him by Mr. Mahalinga Ayyar and by the police. The same attitude was taken up by him in this court when he was being tried here. Devanai Ammal was also examined by Mr. Mahalinga Ayyar. She then stated that the two postal orders had been received by her from her brother Manicka Mudaliar and that she cashed them at the Vepery Post Office receiving Rs. 26-8-0 therefor. She said nothing to indicate that Narayana Reddi had anything to do with the postal orders. In fact her story was a contradiction of the case for the prosecution that it was Narayana Reddi who gave her the postal orders for their being cashed. That story she stuck to during the enquiry before the commiting magistrate though there was some difference with regard to the details of the transaction as spoken to by her.

It will be clear from what I have said that both these persons who are now sought to be produced before the court for being examined as witnesses are, even according to the prosecution, accomplices whose evidence must be received with caution and not ordinarily to be accepted without corroboration in material particulars. So far as Ethiraja Pillai is concerned he definitely went back upon the statements he made to Mr. Mahalinga Ayyar and to the Presidency Magistrate who recorded his confession. His statements made at the various stages leave no room for doubt that he is a person having little regard for truth and who for his own ends would not hesitate to tell lies. As regards Devanai Ammal it is plain that her case is totally at variance with that of the prosecution. She dissociated herself entirely from Narayana Reddi and far from admitting the receipt of the postal orders from Narayana Reddi, she made the assertion that she got them from a different person, namely her own brother. The difference regarding the details of the story she gave before the committing Magistrate and that given here struck me at the time as a serious infirmity tending to show that her exculpatory statements were pure inventions. Evidence coming from such an untruthful person cannot but be regarded as extremely unreliable.

I have therefore little hesitation in holding that I should not summon either of these two persons or examine them in the trial of the accused in the exercise of my discretion under S. 540. I am equally unable to come to the conclution that the evidence of such untruthful and unscrupulous witnesses is essential to the just decision of the case. I cannot imagine that justice will be advanced by introducing into the trial the evidence of persons with the antecedents mentioned above; far from advancing justice their evidence would very likely tend in the opposite direction. I must therefore decline to have these two persons, namely, Ethiraja Pillai and Devanai Ammal produced before the court for their evidence being taken.

N.T.R.

Cr App. No. 476 of 1940.
Cr. R. C. No. 479 of 1940.
(Taken up No. 3 of 1940)
*October 11, 1940*
BURN & MOCKETT JJ.
Nannapaneni Seshayya
v.
Emperor

*Penal Code (XLV of 1860), S. 302—Sentence. The fact that a conviction is based on circumstantial evidence is no reason for not imposing the sentence of death. It matters not how an accused's guilt is established, whether by the testimony of eye witnesses or by the testimony of combined circumstances, provided that it is established beyond all reasonable doubt and the measure of proof must be the same in either case.*

*It is only in cases in which the lower court had manifesty failed in its duty that the High Court would impose the sentence of death.*

53. Mad. 585 explained.

APPEAL against the order dated 2—7—1940 of the court of session of the Guntur division in S. C. No. 22 of 1940 and case taken up in revision by the High Court calling on the accused in Guntur Division S. C. No. 22 of 1940 to show cause why the sentences passed on him should not be enhanced.

*S. Vepa & J. Krishnamurthi*, for Applt.

*Public Prosecutor* (*V. L. Ethiraj*), for Crown.

JUDGMENT
(MOCKETT, J.)

The appellant has been convicted by the learned sessions judge of Guntur of the murder of a little girl one Seetharamamma. The trial court imposed a sentence of transportation for life and the learned judge who perused the judgment of the trial court ordered the issue of a notice to the prisoner to show cause why the sentence should not be enhanced to a sentence of death.

The deceased was the daughter of P. W. I and the accused was her uncle. Her father died 3 years before this occurrence and he and his brother were then undivided. P. W. I continued to live in the family. The inmates of the house in which they lived—the house of Nagamma (P. W. 2)—were P. W. 1, the accused, the deceased girl aged six and the accused's wife. At the time of the death of Sitharamamma there had been a quarrel between P. W. 1 and the accused's wife with the result that P. W. 1 had been cooking separately. The little girl was last seen alive on Friday the 15th September and on that day P. W. 1 left home for her field at about 9 A.M. after giving her daughter food. She left in the house the accused, Nagamma and Seetharamamma. When she returned in the evening the accused and the deceased were absent. P. W. 2 tells us something of the movements of these two. She is the accused's aunt and she says that after P. W. 1 had left the house the accused took the deceased with him saying that he was going to the seed-beds but later saying that he was going to take her to Tekkellapad which will be seen on the south of the plan and is nine miles from the deceased's village At Tekkellapad lived P. W. 7 the father of P. W. 1 and therefore the grand-father of the little girl. That evening the accused returned home at about meal time and enquiries were made of him as to where the little girl was. He told P. W. 1 that he had left her in P. W. 7's house an answer which did not satisfy P.W. 1 who on the 16th September sent P.W. 5 to P. W. 6 a relative asking the latter to make enquiries. On Sunday the 17th P.W. 1's father and others came from Tekkellapad and said that the deceased was not there. The accused was questioned and P.W. 2 and P.W. 1 state—and their evidence is corroborated by P.Ws. 5, 6 and 7—that at first the accused said that Seetharamamma had been run over by a car at Mangalagiri. Later he stated that he had killed her and put her in a pond "being possessed of an evil idea". P.W. 5's description of what happened is as follows: The accused was interrogated and he said that the girl was run over by a car at Mangalagiri. Pressed further he said "I was taking her to Tekkellapad. When we reached a field-pond near Katikalla Buchi Reddi's field, some evil idea got into my head. I killed the girl and put her body in the pond and came home." It was extracted in cross-examination from P.W. 2 that the father and brother-in-law of P.W. 1 beat the accused before he confessed. Ex. A was made by P.W. 1 the next day. It was given to the village munsif who had come from Niddamaru to her house at Neerukonda. It is dated the 18th at noon and in that statement P. W. 1 set out in effect what she stated in evidence at the sessions and which has been

stated above. There is no doubt about the date of Ex. A and the time. The munsif is definite that it was at noon and it is dated the 18th September. Comment has been made on the fact that if the family had been told that the child was in the pond on the night of the 17th it does not appear that immediately they went to the pond to investigate. It must be remembered that these are villagers and it is impossible to say with any degree of certainty what any of them will do under any given circumstances. They chose to go to the munsif and the munsif came to the house the next day. What is certain is that after that the pond was examined, the body of Seetharamamma was found there. It had a cord round the waist and a heavy stone (M. O. 4), which we have seen, was attached to it. It was not possible says the doctor, to state with certainty how this child had died. There was no water in the lungs; the body was highly decomposed and there was a ligature mark round the abdomen of the deceased and that was all the doctor could say. A number of witnesses P. Ws. 3, 4, 9, 10 and 11 speak to seeing the accused and this little girl on that morning together and in various places in the vicinity and not far from the pond in which the body was found. Ordinarily the girl being in the company of the accused would be of little importance because she very often was with him in the fields. On that the evidence is clear but it is important in this case because the accused has totally denied that he ever took the girl on that day. Both at the committing magistrate's court and in the sessions court he told the same story. He states "I did not take the girl, I did not kill her" and he denies he confessed to the relatives. If therefore the evidence of P. Ws. 3, 4, 9, 10 and 11 is to be accepted it is curious and indeed significant that the appellant should totally say that he was never in the company of the girl on that morning.

The story of the prosecution may be summarised as follows:—On some pretext proved to be false the appellant took from her house Seetharamamma on the morning of the 15th September. He returned without her and according to the evidence first gave the explanation that she had been killed by a car and later stated that he had killed her himself being under the influence of the evil one. Enquiries showed that in fact the girl had died in the manner in which it is stated. She was in a pond. She had a stone tied round her waist and under those circumstances there is an irresistible inference that she was murdered. If the evidence were only that she was last in the presence of the accused and in his presence under suspicious cirumstances and that her body was found with a stone tied to it in the pond that alone would raise a hostile presumption against the accused which he would necessarily have to explain. But in this case there is in addition evidence of a confession to the relatives which we accept and which is entirely consistent with the rest of the case. It is true that the motive for this crime may be slight. It appears to be a fact that he quarrelled with the girl's mother but equally there are no grounds for supposing not only that anybody else had committed this crime but that this family should desire to fabricate false evidence with the purpose of obtaining a conviction for murder against the accused.

We have listened to a long and careful argument by Mr. S. Vepa and he invites us to say that the evidence of these witnesses for the prosecution is not satisfactory, that there is a doubt in the case and that the appellant should necessarily receive the benefit of that doubt. We are unable to accept that argument. The evidence is consistent in all material particulars. The most that can be said is that had these villagers acted in a manner which one would expect of people of a much higher grade of education a very strong case might have been somewhat stronger. In our view the guilt of the accused has been proved beyond any shadow of doubt and we have no reason to suppose that the evidence for the prosecution is other than true.

This appeal will therefore be dismissed.

In considering the question whether the sentence should be enhanced, it is well to remember that the appellant has been convicted of the murder of a little girl whom he was proved to have taken from her house for reason which have been shown to be false. He was never intending to take her to her grand father. The moment the girl's mother heard of his supposed intention she was surprised. She states she wondered why after the quarrel between herself and the wife of the accused the accused should take her daughter away without her permission because be it remembered that when P. W. 1 left the house that day there was no question. The

accused never asked her permission to take her daughter so far away as Tekkelapad 9 miles distance, We cannot doubt therefore that this murder was premeditated and deliberate. Why exactly it was perpetrated is known only to the appellant. The learned judge dealt with the question of sentence as follows: "As to the punishment since the guilt of the accused has been proved by strong circumstantial evidence this is not a case calling for capital punishment, I therefore sentence him to transportation for life." That reason namely that the conviction was based on circumstantial evidence has been in innumerable cases condemned by this High Court. It was condemned in 1914, by Ayling and Kumaraswami Sastri JJ. in *Muniandi* v. *Emperor* (1): in 1921 by Ayling and Krishnan JJ in *Public Prosecutor* v. *Paramandi* (2), and again in 1929 condemned by Waller and Krishnan Pandalai JJ. in *Chava Indramma* v. *Emperor* (3), There is thus ample authority for so self-evident a proposition. It must surely be obvions that it matters not how an accused's guilt is established whether by the testimony of eye-witnesses or by the testimony of combined circumstances provided that it is established beyond all reasonable doubt and the measure of proof must be the same in either case. Our attention has been drawn to some decisions the effect of which is as stated in the headnote in *In re Gunduthaalyan alias Thailan* (4)

> "Where on a conviction for murder the sessions court awarded a sentence lesser than death, the High Court will not enhance the sentence, unless it is satified that on the evidence in the case the sentence of death is the only possible sentence which could have been passed by the sessions court."

As on a conviction for murder the law provides for an alternative sentence we have no doubt that when using the phrase "the only possible sentence" the court intended to express the view that it was only in cases in which the lower court had manifestly failed in its duty that the High Court would impose the sentence of death. As stated by Waller J. in *Chava Indramma* v. *Emperor* (3), because the lower court had failed in its duty there was no reason why the High Court should do the same. In this case we consider that the trial court's duty was to impose the sentence of death. There must be cases in which that is manifestly so and perhaps as good an example as can be given is the case of the deliberate murder of a small child for purposes of robbery or any other purpose such as this case. No doubt examples can be multiplied but such an example may be mentioned. For reasons which are wholly unsupportable and which Mr. Vepa did not attempt to support the learned judge has passed the lesser sentence. There are no other reasons justifying such a course. It is our duty to pass a sentence of death.

We therefore enhance the sentence of transporation for life to a sentence of death and direct that the accused be hanged by the neck until he be dead.

N. T. R. *Appeal dismissed.*

1. (1915) M. W. N. 34.
2. (1921) 44 Mad. 443.
3. (1929) M. W. N. 270: Cr. 42
4. (1930) 53 Mad: 585

---

**R. T. No. 114 of 1940**

Cr. App. No. 486 of 1940

*September 16, 1940*

BURN & LAKSHMANA RAO, JJ.

**Emperor**

v,

**Vettukkattu Pechayanna Goundan**

*Penal Code (XLV of 1860), S. 302—Murder—Accused absconding for a number of years—Delay, no excuse to inflict lesser sentence.*

*It would be a dangerous proposition to state that if a murderer succeeds in making himself scarce for a number of years he may then hope to escape the extreme penalty of the law in a case in which the extreme penalty is called for.*

TRIAL refered by the court of session of the Salem division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 42 of 1940 on 17—7—1940 and appeal by the said prisoner against the said sentence of death passed upon him in the said case.

*Public Prosecutor* (*V. L. Ethiraj*), for Crown.

*P. Basi Reddi*, for Accused.

JUDGMENT

(BURN J.)

The case against the appellant was that at about sunset on the 18th of June, 1934 near the village of Mandagapalayam he stabbed

two women with a spear inflicting fatal injuries upon them. The two women were named Pappayi and Palani. The appellant had been on terms of illicit intimacy with Palani and it is said that Pappayi had persuaded Palani to give him up. This was the supposed motive for the attack by the appellant upon the two women.

Pappayi and Palani were both taken to hospital at Truchengode the same evening and as they were in a dangerous condition, the sub magistrate (P. W. 13) was sent for and both of them made dying declarations. Ex. D is the dying declaration of Palani but the learned sessions judge had not relied on this because it contains internal evidence that Palani was not fully conscious when she was making her statement. Ex. E is the dying declaration of Pappayi who was fully conscious while her statement was being recorded, Besides the evidence contained in the dying declaration of Pappayi, there were the depositions in the magistrate's court of no less than seven eye-witnesees, the women (P.Ws. 3 to 9) who were accompanying Palani and Pappayi on their way back from their field. All these witnesses in the magistrate's court gave evidence against the appellant in accordance with the statement made by Pappayi in her dying declaration. But when they came to the sessions court, five of them (P. Ws. 3, 4, 5, 6 and 8) alleged that they had no personal knowledge of the occurrence. One (P. W. 9) said that she had only seen the stabbing of Pappayi and only one (P. W. 7) had adhered to the testimony which she gave before the committing magistrate. In these circumstances, the learned judge admitted as evidence under S. 288, Cr. P. C., the depositions of P. Ws. 3, 4, 5, 6 and 8 in the magistrate's court. It is quite clear that he was fully justified in so doing and in treating those depositions as substantive evidence.

The appellant absconded and was not arrested until the 27th of March 1940 when P. W. 15, a member of the vigilence committee found him on the street and having some recollection in his mind of a Gazette Notification arrested him and took him to the sub magistrate of Trichengode. That is the reason why this case did not come on for trial until July 1940.

Learned counsel for the appellant has quite rightly made no attempt to show that the evidence against the appellant cannot be accepted. He has urged only the question of sentence. Quoting the judgment in R. T. No. 141 of 1929, learned counsel has urged that since the offence took place more than six years ago the appellant might be let off with a sentence of transportation for life. We see that in the case referred to the only reason for reducing the sentence of death which had been passed by the learned sessions judge to a sentence of transportation for life was that ten years had elapsed between the crime and the punishment. With due respect we do not think that that alone is any ground for imposing a lesser sentence. On the contrary we think it would be a dangerous proposition to state that if a murderer succeeds in making himself scarce for a number of years, he may then hope to escape the extreme penalty of the law in a case in which the extreme penalty is clearly called for. There are no extenuating circumstances in this case. The appellant deliberately committed two murders, without any excuse.

We confirm the conviction of the appellant for the two offences of murder and the sentence of death and dismiss this appeal.

N. T. R. *Appeal dismissed.*

---

R. T. No 36 of 1940

Cr. App. No 174 of 1940

*April 9, 1940*

BURN & LAKSHMANA RAO, JJ.

**Gampla Subbigadu alias Damasagadu**

v.

**Emperor**

*Penal Code (XLV of 1860), S. 300, Excep.2—Plea of self-defence—Evidence Act (1 of 1872), S. 105—Injury on accused, how far extenuating circumstance.*

*Where the accused sets up the plea of self-defence the burden lies upon him under S. 105, Evidence Act, to prove it.*

*When the evidence is clear that it was the accused who inflicted the fatal wounds upon the deceased, it is not possible to reject that evidence merely because the prosecution witnesses do not explain how the accused came by certain injuries.*

*The severe injuries the accused himself received are not sufficient to mitigate the*

*punishment, especially when the attack upon the deceased was deliberate and pursued to a fatal end.*

TRIAL referred by the court of session of the Cuddapah division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 1 of 1940 on 8-2-1940, and appeal by the prisoner against the said sentence passed upon him in the said case.

*P. Sivaramakrishnayya*, for accused.

*Public Prosecutor*, for Crown.

JUDGMENT.

(BURN J.)

The appellant has been convicted by the learned sessions judge of Cuddapah and sentenced to death for the murder of one Bitti Chennugudu *alias* Laddugadu on the 19th August, 1939.

Bitti Chennugadu was undoubtedly murdered on the 19th August at Buggalapalli where he lives. According to the evidence for the prosecution, P. Ws. 3, 4 and 5 and the accused were engaged at about noon in skinning a cow by the side of the Cuddapah-Rayachotti road. At that time Chennugadu, it is said, came and objected to their skinning the cow in that place because It was stinking and because it would provoke the anger of any inspecting officer who might come. He threatened to go and report the matter to the village munsif and so saying he turned away. When he had gone a few steps, the accused is said to have run after him and stabbed him in the back with the knife which he was using to skin the carcass. Chennugadu ran a few yards further away but the accused pursued him and stabbed him twice in the back and twice in front. The evidence of the doctor who made the postmortem examination the next day (P. W. 1) shows that one of the stabs inflicted from the front penetrated his heart and must have caused death instantaneously.

Besides the evidence of P. Ws. 3, 4 and 5 there was the evidence of P. W. 2 a brother of the deceased. He said that he was standing near a shop belonging to one Adam Sab which is close to the scene of the offence. He said that he saw two stabs inflicted. The village munsif was informed by one Dhollavadu (he lives half a furlong away). The village munsiff took a statement (Ex. B) from P. W. 2 at about 2 P. M. and reported the occurence to the police station at Cuddappah which is about 4½ miles away. Thc sub-inspector of police reached the village by 7-30 P. M. and held an inquest the same night.

The accused in the sub magistrate's court said that he knew nothing about the matter and in the sessions court also said that he had never seen the deceased and P. W. 2 but he filed a statement in writing in which he said that the deceased Chennugadu, Venkatasubbadu and others beat him with stones and sticks and, being unable to bear that, he himself had beaten to protect himself. It was a fact that the accused was very severely injured on the same day. The village munsif found him lying unconcious in front of his own house when he, the village munsif, was coming towards the scene of the crime. The investigating officer (P. W. 14) found him lying still in the same place when he reached the village. He made arrangements to send him to the hospital and the resident medical officer (P. W. 6) examined him the next day. He had four lacerated wounds on his head, an incised wound on his left ear and abrasions on his shoulder and side. He was unconscious at the time the doctor saw him and the doctor says that he remained unconscious for 2 or 3 days. He was suffering from concussion of the brain and his own life was in danger for a considerable time. He was not discharged from the hospital till the 7th October 1939. The mother of the accused preferred a complaint to the sub inspector the same night on behalf of her son against P. W. 2 and three others. The sub inspector says that after investigation he referred that complaint and it does not appear that any further proceedings were taken on it by the mother of accused.

The prosecution witnesses do not explain these injuries on the person of the accused and learned counsel has invited us to discard the evidence of the prosecution witnesses for that reason. It is clear, he says, that they have not given a full or wholly truthful account of what happened and therefore they ought not to be believed. This plea however cannot be accepted in the face of the accused's own statement that he caused the injuries on the person of the deceased in self-defence. Having set up the plea of self-defence the burden lay on him under s. 105 of the Evidence Act to prove it and in the absence of

proof it is not possible for the court to presume the truth of the plea of self defence. One witness was examined for the defence (the district medical officer of Cuddappah). He apparently was examined because some attempt was made in the sessions court to show that the accused was not in his right mind. The doctor's evidence however did not show that he was insane either at the time the offence was committed or at the time the trial took place. P. W. 3 when questioned about the injuries on the person of the accused said "Later on I saw the accused fallen near his dayadi's house. He had injuries. I do not know how they were caused. I heard that he got them subsequent to the murder. I did not go near the accused." As the learned sessions judge has pointed out, this is not itself evidence that the accused received his injuries after he had murdered the deceased. But it is not at all improbable that that was the case, when the evidence is clear that it was the accused who inflicted the fatal wounds upon the deceased, it is not possible to reject that evidence merely because the prosecution witnesses do not explain how the accused himself came by his injuries. The accused has been properly convicted of the offence of murder and we cannot consider that the severe injuries which he himself received are a reason for mitigating his punishment. The attack upon the deceased was deliberate and was pursued to a fatal end.

We confirm the conviction for murder and also the sentence of death and dismiss this appeal.

N.T.R. *Appeal dismissed.*

---

R. T. No. 78 of 1940

Cr. App. No. 291, 292, 293 & 396 of 1940

*July* 18, 1940

BURN & MOCKETT, JJ.

**Singampalli Yerranna & others**

v.

**Emperor**

*Evidence Act (I of 1872), S. 27—Disclosure by accused accompanying statement–Admissibility.*

*Where the accused made a statement describing the murder and almost simultaneously produced two ear rings worn by the deceased.*

Held *the ear rings were not discovered in consequence of information given by the accused but were discovered by the accused himself combined with a statement and that the statement was not admissible under s. 27, Evidence Act.*

*In a case of murder, it is not desirable to add a charge of misappropriation of articles of the deceased.*

TRIAL referred by the court of session of the Vizagapatnam division for confirmation of the sentence of death passed upon the said prisoners (accused Nos. 2 to 4) in C.C. No. 7 of 1940 and appeal by the prisoners against the said sentences.

*Kasturi Seshagiri Rao & E.T. Chockammal*, for Accused.

*Public Prosecutor*, (*V. L. Ethiraj*) for Crown.

JUDGMENT

(MOCKETT, J.)

The four appelants and one Killadi Dali Naidu who was the 5th accused before the sessions court were charged, in the case of the 2nd, 3rd and 4th accused with the murder of one Sriramulu on the 1st November 1939: the 1st accused was further charged with abetment of the murder by the 2nd, 3rd and 4th accused at the place of the murder and the 5th accused with abetment of 2nd accused by waiting nearby presumably with the object of cooperating. The 1st and 2nd accused were further charged with dishonest misappropriation of property of the deceased.

The first accused is the wife of the deceased and there can be little doubt that—to put it no higher—the married life of the 1st accused and the deceased was not happy. The father of Sriramulu deposes that the deceased and his wife had not slept together after their marriage until actually the night of the occurrence. It is not necessary to investigate the relations between these two further than that. The prosecution relied on the ill feeling alleged to exist between them as being at least the motive for the murder owing to the part said to have been taken in the murder by the 1st accused. The 3rd and 4th accused are the brothers of the 1st accused. The 2nd accused is a farm servant employed by a person who did not give evidence in this case. The conviction of these persons has rested almost entirely on a statement made by the 2nd accused to the police which statement the learned sessions judge held

admissible as coming within the provisions of s. 27 of the Evidence Act. That statement combined with other evidence in the case satisfied the learned sessions judge of the guilt of the accused 1 to 4. It is convenient however to observe here that for reasons which will later appear, if that statement should be inadmissible, there is virtually no evidence whatever against the 1st, 3rd and 4th accused. Naturally, the position of the 2nd accused will be different because apart from the statement, his actions accompanying that statement may be very relevant in considering whether the evidence as a whole is sufficient to establish the case against him.

Now the story is easy to relate because it depends on one or two witnesses and one or two facts. The learned sessions judge has set out the history of the case fully. On the night of the 1st November 1939 there was a quarrel between the 1st accused and the deceased because the 1st accused shut the deceased's room and it is stated that the deceased slapped his wife. On the night when he was last seen i.e. on the night of November 1st, 1939 the deceased was wearing ear rings, M.Os. 2 in this case. On that night he went out and apparently went out for the purpose which will later appear of getting leaves for the purpose of treating the mother of the accused 3 who suffered from boils. That at least is said to be the reason why he went out although the real reason may never be satisfactorily proved. He went out and never returned. All that is known of his movements appears from the evidence of P.Ws. 7, 8 and 10 in this case. P.W. 7 states that he saw the 1st, 2nd, 3rd and 4th accused and the deceased going towards the Golugonda road which is apparently in the north of the plan sometime after midnight. He was quite near to them and claims to be able to identify them. Later this witness communicated this fact to P.Ws. 4 and 5 because it came to his knowledge that the deceased had met a violent death. In fact he was told that the accused 1 to 4 had murdered him. P.W. 6 had been to a festival and was returning to his village which is Pappuchettipalem. He says that at a point identified by him on the plan, he sat down for the purpose of easing himself. One Pothirazu was sitting near. This witness (P.W. 5) almost saw four men and a woman passing near by and one of the men called out, "Sriramulu, come quickly." The man replied, "I am coming." Now this witness knows the deceased Sriramulu and he was the man who was there and he asked him where he was going and Sriramulu replied he was going to get Gatcha leaves as a relation of his wanted them. The witness says that he spoke to Sriramulu and he knew his wife but he did not now the four people who were with Sriramulu.

The next who knows of the movements of the deceased was one P.W. 10. P.W. 10 had also gone to the festival and he was driving home with his bulls late at night and coming to the main road, according to him, the bulls turned to go as they were accustomed to do towards the paddy fields whereas their owner (P.W. 10) wanted them to go in the opposite direction. It was necessary therefore for him to dismount from the bandy and turn the bulls round. He says he saw the deceased, accused 1 and 2 and the deceased's two brothers-in-law, that is to say accused 3 and 4, near the culvert. He asked the deceased what they were doing there. The deceased replied they were going to get Gatcha leaves for his mother-in-law. The witness got on to his bandy and saying—as no doubt correctly translated by the learned sessious judge—"Very well, you get your leaves. I am going off" and he went away to Pappanapeta returning to Jogampeta on the following Saturday. He there heard of the death of Sriramulu and reported in the village what he had seen. He identified accused 3 and 4 before the tahsildar. That is the evidence as regards the movements of the deceased.

The deceased was found on the 3rd in a water course near where he had been seen by the witnesses. His head was under water but the water was not deep enough to cover the body. A post-mortem was held and the medical officer (P.W.1) was unable to say how the deceased met his death because of the advanced stage of decomposition. He could not find signs of drowning and he found no signs of violence. It was not possible for him to say that the lobes of the ears which were missing had disappeared naturally or had been turned out. It is important because certain ear rings (M.Os. 2) in this case were identified as having been worn on the ears of the deceased. But some light is thrown—if it is to be accepted—by a statement made by the 2nd accused to P.W. 5. P.W.5 is a cousin of the deceased. He heard of Sriramulu being missing and he looked for him. He states that he questioned accused 2 as he and the 1st accused were on very friendly terms.

Accused 2 told him a long and detailed story about the death of the deceased. He said that after the festival he went and slept and that the deceased had waken him up and asked him to follow him as his brothers in law were waiting under a peepal tree; that he and the deceased went to the peepal tree and there saw the 1st accused and accused 3 and 4. Accused 3 asked him (accused 2) to show him where he could get a Gatcha leaf as his mother was ill. All of them, i.e. the deceased, accused 2 himself accused 4 and 1 then proceeded to the road where they found accused 5 sitting on a culvert holding a cycle. Accused 3, 4 and 5 talked together. Then accused 5 went with them for some distance and stopped. He i.e. accused 2 accused 1, 3 and 4 then took the deceased to Dara Gedda which is the water course and there killed him. Accused 2, 1, 3 and 4 after killing Sriramulu got on to the road and met accused 5 there. Then accused 3, 4 and 5 went along the road which leads to Mallempeta while accused 2 and 1 returned to Jogampetta. When asked by P.W. 5 why he had killed Sriramulu accused 2 replied that accused 5 had promised to give him Rs. 50. It will be observed that that statement implicates the other accused but it would naturally require the strongest independent evidence if any reliance can be placed upon it at all. Under s. 30, Evidence Act such a confession can be taken into consideration; it is not evidence against the other accused. A statement on which the prosecution rely under s. 27 was made by this witness in the presence of P.Ws. 14 and 15 and P.W. 20, the sub inspector. According to the sub inspector of police, a statement (Ex. E) was made part of which has been admitted in evidence by the learned sessions judge. That statement describes the murder of the deceased and the part played in it by the other accused. But there is no doubt from the evidence that what happened was the following. The accused made this statement and almost simultaneously—if not actually simultaneously—produced M.O. 2, the two ear rings. That that is so is quite clear from the evidence of P.Ws. 14 and 15 who witnessed Ex. E. P.W. 14 states:

> "Accused 2 made a statement before the sub-inspeetor. It was reduced to writing. I signed it. It is Ex. E. Accuced 2 then took, the ear rings, M.O. 2 from his waist cloth and handed them over to the sub-inspector."

P. W. 15 stated:

> "He made a statement. It was written down, I signed it. Ex. E is that statement. He handed over the jewels to the sub-inspector taking them from his waist cloth."

The sub-inspector who, we feel, was conscious of the difficulty surrounding the admissibility of the statement stated before the lower court:

> "I recovered the ear rings from the 2nd accused as a result of the statement which he made."

No doubt, bearing in mind, the precise wording of s. 27 of the Evidence Act which provides that when any fact is deposed to as discovered in consequeece of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The learned judge has considered this aspect but we think that he has overlooked the actual facts. We are satisfied that these ear rings were not discovered in consequence of any information given by accused 2. They were discovered by accused 2 himself combined with a statement. They were not found by the police upon him after he made this statement which is the nearest approach to a compliance with the section which might be possible under the circumstances before us. This topic is dealt with in the latest edition of Amir Ali's Evidence Act at page 282 and this court has on numerous occasions distinguished between cases where a discovery is made in consequence of information given and a disclosure by an accused accompanying a statement. In this particular case, we are quite satisfied that the statement is inadmissible under s. 27 of the Evidence Act, and should not have been allowed to appear on the record, But quite apart from this question it is obvious that the convictions of the 1st, 3rd and 4th accused cannot stand. Even if it could be taken into account it is obvious that there is virtually no adequate evidence on which a conviction could be based. Had accused 2 been examined as an approver his evidence would have required corroboration implicating the other accused in material particulars. There is no doubt evidence

that accused 1, 3 and 4 were in the deceased's company shortly before his death but the only statement that they took part in the murder comes from accused 2 who be it remembered was soon after in possession of the deceased's property. Morever, owing to the condition of the body, it is not even possible to infer that more than one hand was responsible for the deceased's death Their presence is no doubt suspicious but suspicion is not enough. Consequently, their convictions must be set aside and they will be set at liberty.

But the position with regard to the 2nd accused is different. We have his association on the night in question with the deceased clearly proved. There is no reason to disbelive the evidence of P. Ws. 7, 8 and 10. Neither do we disbelieve the evidence of P. W. 5. We consider that the confession made to P. W. 5 by accused 2 was made as stated. The conduct of P. W. 5 and P. W. 4 immediatly after accused 2 made his confession is consistent with the fact—vide Ex. C. There is further more the all important fact that, as we believe, the accused did produce from his person on the 3rd November that is to say, within two days of the death of the deceased his articles of jewellery. His explanation of his possesion of of these articles was not considered satisfactory by the trial judge with which view we agree. There is not the slightest ground in this case for doubting that the deceased met his death by violence and that accused 2 took part in that violence. No one suggests the deceased was not a healthy man. The 2nd accused told P. W. 5 that he assisted to murder him for reward Rs. 50 and we are satisfied —corroborated by other evidence—that he at least is guilty. Consequently, we see no reason to interfere with the conviction of the 2nd accused. His conviction for murder and the sentence of death are confirmed. It may be that accused 1, 3 and 4 have been fortunate but a court can only act upon evidence as it affects the indivudual.

A somewhat unusual procedure was followed in this case—a case of murder—charging the 1st and 2nd accused with misappropriation of articles of the deceased, S. 404. In a case of murder it is not a desirable procedure and one not within the experience of this court. In any case there is no evidence of misappropriation and these convictions are also set aside in the case of 1st and 2nd accused.

N.T.R.

Cr 25

Cr. R. C. No. 828 of 1940
Cr. R. P. No. 782 of 1940
*October* 17, 1940
LAKSHMANA RAO, J.
**Ramanuja Ayyangar**
v.
**Emperor.**

*Defence of India Rules, R. 38 (1) (a)—Offence under r. 38(1) (a) amounting to sedition—Sanction under S. 196, Cr. P.C. not necessary.*

*An objection to the competency of the magistrate taking cognizance of an offence under r. 38(1) (a) of the Defence of India Rules on the ground that the prejudicial act may amount to sedition which according to S. 196, Cr. P. C. cannot be taken cognizance of by any court unless upon the complaint made by order of or under the authority of the Provincial Government, is untenable.*

*The Criminal Procedure Code does not affect rules made for the arrest and detention of persons under the Defence of India Act.*

FACTS :—Objections to the following effect were filed by the accused to the maintainability of the case.

The charge sheet sets out that on 1—8—40 the accused made a speech at Sivaganga which endeavoured to create disaffection towards Government established by law in British India. If this were so, the offence is one coming under S. 124-A Penal Code.

The court cannot take cognizance of a case unnder S. 124-A, Penal Code in contravention of S. 196 Cr. P. C. There is no complaint in this case by order of or under authority from the Provincial Government, or authorised officer as contemplated in S. 196, Cr. P. C.

It is not open to the prosecution to evade the bar under S. 196, Cr. P. C. by filing a police charge sheet under some other provision of law as is done in the present case under the Defence of India Rules.

It is also submitted that the speech attributed to the accused cannot fall within the

the mischief of the penal provisions of the Defence of India Rules.

The accused begs to set out the above objections to the maintainability of the prosecution before the trial starts.

Thereon, the sub divisional magistrate passed the following order.

"The accused's pleader raises a preliminary objection to the trial of this case being commenced by this court as the offence is one under S. 124-A, I. P. C. and that the report of the police is not a complaint within the meaning of the definition in the Cr. P.C. and that there was no complaint in this case by order of or under authority from the Provincial Government or authorised officer as contemplated in S. 196, Cr. P. C. and that it was not open to the prosecution to overcome the difficulty by filing a charge sheet under the Defence of India Rules and that the speech alleged to have been delivered by the accused could not fall within the mischief of the penal provision of the Defence of India Rules.

The Additional Public Prosecutor meets the objection as follows. He states that the charge sheet is a report of the police officer under the Defence of India Rules and my attention was invited to r. 130 (1) of the Defence of India Rules. He adds that though the language of the charge was similar to that used in S. 124-A, still the appropriate law that should be applied is one under the Defence of India Rules, as the latter was designed to meet a special act of mischief in emergencies and no sanction was required under the Defence of India Rules for a case of the kind.

I agree with the Additional Public Prosecutor in thinking that the appropriate law to be applied in this case is the Defence of India Rules and not the Indian Penal Code as these rules were designed to meet emergencies. No sanction is required for a case of this kind, as S. 131 of the Defence of India Rules would imply. Evidently, the prosecution was launched upon the report of a police officer which the court was perfectly competent to take cognizance of, *vide* R. 130 (1) of the Defence of India Rules. Even if it were construed to be a complaint of an offence under S. 124-A, I. P. C. for which there should be a complaint under authority from the provincial government or an authorised officer, I undetstand there is the authority of the district magistrate for the launching of the prosecution.

As regards the contention that the speech could not fall within the mischief of the Defence of India Rules, it is premature to say whether it would or would not, until evidence has been let in. In fine, I find that the contentions are untenable. The trial of the case will be proceeded with.

PETITION under Ss. 435 and 439 Cr P. C., 1898, praying the High Court to revise the order of the court of the sub divisional magistrate of dated 17-9-'40 and made in C. C. No. 102 of 1940.

*V. T. Rangaswamy Iyengar & K. Umamahaswaran* for Petr.

*Public Prosecutor* (*V. L. Ethiraj*), for Crown.

ORDER

The petitioner has been charged under r. 38(1)(a) of the Defence of India Rules for doing a prejudicial act within the meaning of r. 34(6)(e) and (k) and a report in writing of the facts has been made by a public servant as required by r. 130(1). S. 3 of the Defence of India Act enacts that rules made for the arrest and trial of persons contravening any of the rules shall have effect notwithstanding anything inconsistent therewith contained in any other enactment and s. 1 Cl. (2) Cr.P.C. provides that nothing therin shall affect any special form of procedure prescribed by any other law for the time being in force. That the prejudicial act might amount to sedition which according to s. 196 Cr. P. C. cannot be taken cognisance of by any court unless upon the complaint made by order of or under the authority of the Provincial Government has therefore no bearing and the objection to the competency of the sub-divisional magistrate to take cognizance of the offence under r. 38(1)(a) of the Defence of India Rules is untenable. The revision petition therefore fails and is dismissed.

T. *Petition dismissed.*

—

Cr. R. C. No. 713 of 1940
Cr. R. P. No. 672 of 1940
*September 11, 1940*

**T. S. Ananthanarayana Iyer & another**
v.
**Emperor**

*Prevention of Food Adulteration Act (Mad. Act III of 1918), S. 5 (1)(b)—Servant of hotel keeper—If can be convicted under.*

*Where a hotel keeper and his servant were charged with having stored adulterated ghee for sale under S. 5 (1)(b) of Act III of 1918.*

Held, *that the servant could not be said to have stored the ghee for sale and could not be convicted under S. 5 (1)(b).*

Facts appear from the judgment of the lower courts which were as follows :

"This is a complaint preferred by the Food Inspector, Madura Municipality under S. 5(1)(b) of the Madras Prevention of Adulteration Act III of 1918 and R. 28 of the Rules framed under S. 20(2)(f) of the said Act against the two accused who are the proprietor and manager of the eating house known as the Madura Lodge. The charge is that the ghee served with meals in the hotel was found on analysis of the sample taken on 23-11-39 to be adulterated with 25% of fat not derived from milk or cream and it amounts to exposing and offering for sale adulterated ghee. The accused while denying the offence state that they do not sell ghee and that they serve ghee to those who ask for it even after being told it is not pure ghee.'.

It is contended that there was no ghee exposed or offered for sale by them on the evidence adduced. The 1st Court then said : "P.Ws. 1 and 2 prove that ghee is always served with meals and prosecution witness 1 proves that the ghee from which sample was taken was being served to the customers. The cost of ghee is included in the price of meals and it has been held by the Madras High Court that serving ghee with meals amounts to its sale and that it should be ghee as defined in S. 2 of the Act. This ghee has been found to be adulterated. In the result the charge stands proved. I accordingly find the two accused Anantanarayana Iyer and Ramakrishna Iyer, guilty, and convict them under S. 5 (1) (b) of the Madras Prevention of Adulteration Act and rr. 28 and 29 of the rules framed under S. 20 (2) (f) of the said Act and sentence them to pay a fine of Rs. 10 each in default to suffer R. I. for one week."

On appeal the City First Class Magistrate, Madura observed :

"The main point taken in appeal is that service of ghee with meals does not amount to sale, since ghee was not sold as such to the public and that in any case there has been no offer or exposure for sale as contemplated in the Act. This point has been settled in 1939 M.W.N. 1128 (1) : Cr. 168 (1). It was held there that service of ghee with the meal amounts to sale of ghee under the Act. The appellant's vakil tried to distinguish that ruling on the ground that it was only a case of storage of ghee in that case. I fail to see how that can make any difference. The only question there was whether service of ghee with the meals amounted to sale or not and it was held that it was a sale. The appellant's vakil has urged that the sub magistrate should have followed the ruling in 1939 M.W.N. 239 Cr. 31 and held that there was no sale of ghee. In that case, however, the ghee was not in the form of ghee as such, but had been fixed up in the sweetmeat and only the sweetmeat was sold. It was under those circumstances. that it was held that there was no sale of ghee. That ruling, therefore, does not apply to this case. Regarding the contention 'that there has been no exposure for sale in this case, the appellants' vakil has produced two rulings namely 25 Q.B.D. 152 and (1891) 2 Q.B.D. 107. Probably, the latter ruling is not relevant in this case because in that case the salesman put aside the meat as unfit for human consumption and did not expose it for sale. The other ruling however seems to be

applicable. There it was held that margarine which was kept behind the counter and not visible to the view of the public could not be considered to have been exposed for sale. It has been argued for the municipilaty that the term 'exposed for sale' has not been defined in the Act and must be construed according to the circumstances of each case. It is also argued that any of the customers could see the ghee if they wanted to and asked for it. I am unable to accept this argument. If this is all the exposure that can be expected, I must say that there can be no exposure in such cases. I however agree with the Municipalty that there has been in this case an offer for sale of ghee. It cannot be gainsaid that the meals was offered for sale by the appellant and since ghee formed part of the meal, the ghee also must be deemed to have been so offered for sale. The ruling 1939 M.W.N. 1128 (1): Cr. 168 (1) lends support to this contention. On the question of fact, the plea of A-2 that the ghee would be served only if the customers asked for it, is unacceptable. In the statement Ex. B to the Sanitary Inspector he had distinctly stated that it will be served with the meals and there is no mention of this plea. It is also a matter of common knowledge that it is not usual for serving ghee only after the customers asked for it.

The last argument of the appellant's vakil is that both the owner and the servant cannot be charged for the offence. He argues that the wording of S. 6 (3) of the Act and r. 28 show that the servant cannot be charged. I would like to point out that A-2 being the brother of A-1, cannot be said to be an agent or servant of A-1, and is probably also one of the owners. But since the prosecution has admited that A-2 is only the vendor, I do not want to raise that point. S. 5 (1) (b) of the Act makes liable every person who offers for sale adulterated food. The actual vendor is also clearly contemplated in that section. The argument that an agent cannot part with the ownership of the food is unsustainable because as an agent, he has got the same powers as the principal. S. 6(3) of the Act far from showing that only the owner can be charged under the Act shows in my opinion that the servant can be charged. It is no doubt true that r. 28 cannot be invoked for charging a servant but the servant's liability is not under that rule but under S. 5(1)(b) of the Act. It is enough to observe that r. 28 does not take away that liability of the servant. The argument of the appellant's vakil therefore fails.

PETITION under Ss. 435 and 439, Cr. P. C. 1898, praying the High Court to revise the judgment of the court of the City First Class Magistrate of Madura in Cr. App. No. 42 of 1940 (C.C. No. 58 of 1940 on the file of the court of the Second Class Magistrate, Madura town).

*N. S. Srinivasan*, for petr.

*Public Prosecutor*, (*V. L. Ethiraj*) for Crown.

ORDER

The ghee was stored for sale by the first petitioner, the hotel keeper, and his guilt under S. 5(1)(b) of Act III of 1918 admits of no doubt. But the 2nd petitioner the servant cannot be said to have stored the ghee for sale and his conviction is unsustainable. The conviction and sentence of the second petitioner are therefore set aside and the petition is dismissed as regards the first petitioner.

T.

## FULL BENCH

**Ref. Case No. 16 of 1940**

*September*, 23, 1940

SIR LIONEL LEACH, C. J., KING & PATANJALI SASTRI, JJ.

**In the matter of Sri A. R. First Grade Pleader, Vellore.**

*Legal Practitioners Act* (XXI *of* 1926), *S.* 13 *(f)—Professional misconduct—Failure to keep accounts.*

*It is the duty of every pleader to keep regular accounts of all moneys received and disbursed by him in connection with each suit in which he is engaged as a pleader. Even if a pleader has not much work, he is bound to keep accounts for whatever work he may have and if he fails to keep accounts he would be guilty of professional misconduct.*

FACTS :—Two complaints were filed by two clients against the vakil alleging misconduct on his part in the discharge of his duties. The vakil was called upon by summons to produce accounts. In answer to it he wrote a letter that he has no legal work worth mentioning and has not hence kept accounts.

*K. Umamaheswaran*, in support of the notice.

Respondent not represented.

JUDGMENT.

(SIR LIONEL LEACH, C. J.)

The respondent is a first grade pleader practising at Vellore. He has been charged with professional misconduct in that he has failed to maintain accounts in respect of his professional work. R. 16 of the Rules framed under the Legal Practitioners Act states that it is the duty of every pleader to keep regular accounts of all moneys received and disbursed by him in connection with each suit in which he is engaged as a pleader. The Rule goes on to say that the failure to keep such accounts will be treated as a reasonable cause for supension of certificate within the meaning of S. 13 (f), Legal Practitioners Act, 1879.

In answer to the charges the respondent sent by post a communication to the district munsif of Vellore who had framed the charge, stating that as he had no legal work worth mentioning there was no necessity to maintain any accounts and that he was under the *bona fide* belief that he need not keep any accounts under the circumstances. He admitted that he had committed an error and asked to be excused. The enquiry into the charge framed against the respondent was fixed for the 16th and 17th April of that year. On each occasion the respondents failed to put in an appearance.

We agree with the district munsif that even if a vakil has not much work he is bound to keep accounts for whatever work he may have and in failing to keep accounts the respondent has been guilty of professional misconduct. The respondent is at present under suspension by an order of this Court dated 17—10—1939 passed in another case in which he was charged with professional misconduct and the suspension in that case does not expire until the end of the summer vacation of the district court of North Arcot in 1941. It is necessary that the respondent should be punished for this further act of misconduct and we direct that he be suspended from practice on the present charge from the end of the summer vacation of the district court of North Arcot in 1941 until the end of that year.

N. T. R.

---

**Cr. M. P. No. 334 of 1940**

*August* 15, 1940.

LAKSHMANA RAO J.

**Govindarajulu Naidu**

v.

**Emperor.**

*Motor Vehicles Act* (VIII of 1914), S. 112—*Offence under r.* 138—*Prosecution.*

*Where the owner of a motor lorry for private use suffered his driver to carry goods of another person for hire,*

Held, *this constituted an offence under r.* 138 *of the Motor Vehicles Rules and was punishable under S.* 112 *of the Motor Vehicles Act.*

*The power conferred upon the transport authority to suspend the permit in such cases cannot be regarded or treated as a penalty for the offence and the prosecution under S.* 112 *is not illegal.*

FACTS : The two accused in the case were charged by the police under S. 123 of the Motor Vehicles Act IV of 1938. The particulars of the offence were as follows :

The first accused B. V. Govindarajulu Naidu was the registered owner of the goods vehicle M. D. 2035. The transport authority

issued a permit in Form G-1 for the vehicle for its being used for the owner's private use. On 8—10—39 the second accused, the driver of the vehicle carried for hire in the vehicle some goods despatched from the firm of Soniah Nadar at Madura to the firm of Abdul Gani at Kodaikanal, from Kodaikanal Road to Kodaikanal. Thus the 2nd accused used the vehicle and the 1st accused caused or allowed the vehicle to be so used in violation of one of the conditions of the G-1 permit issued for the vehicle.

Some preliminary objections were raised on behalf of the accused. They are to the effect that S. 123 of Act IV of 1939 is inapplicable to the facts of the case and that the permits for the goods vehicle in question having been one obtained prior to the coming into force of the Act IV of 1939, a prosecution under S. 123 of that Act is illegal and without jurisdiction. About these objections it was argued that under subsection 3 of S. 1 of the Motor Vehicles Act IV of 1939 as amended by the Motor Vehicles (Amendment Act XL of 1939,) Ch. IV of the said Act should not have effect until the 1st April 1940 or such earlier date as the Provincial Government might by notification in the Official Gazette appoint, that the Provincial Government had issued no such notification, that S. 42 (1) which is one of the sections in Ch. IV had therefore not been in effect on the date on which the alleged offence was committed and that therefore S. 123 which only created it an offence to use a motor vehicle in contravention of the provisions of S. 42 (1) could not be brought into operation. This is a valid argument so far as the question of the nonapplication of S. 123 of Act IV of 1939 to the facts of the case is concerned. It is true that even if the set of facts mentioned in the charge sheet are proved true the accused cannot be convicted under S. 123 of Act IV of 1939. The prosecution also admitted that, but, it suggested that as the prosecution case was that the accused used or caused to be used, as the case may be, the vehicle in violation of a condition of the G-1 permit issued by the Transport authority which action of theirs is a violation of r. 138 of the Madras Motor Vehicles Rules 1938 punishable under S. 112 of the Motor Vehicles Act IV of 1939 as amended by the Motor Vehicles (Amendment) Act 1939, the accused might be called on to answer a charge under S. 112 of the Motor Vehicles Act IV of 1939 as amended by the Motor Vehicles (Amendment) Act 1939, read with r. 138 of the Madras Motor Vehicles Rules, 1938.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C. C. No. 15 of 1940 on the file of the Court of the sub magistrate, Kodaikanal.

*K. S. Jayarama Ayyar & C. K. Venkatanarasimhan*, for Petr.

*A. S. Sivakaminathan*, for Crown.

ORDER

The petitioner is the registered owner of a motor lorry for private use and he is alleged to have suffered his driver to carry goods of another person for hire. This would unquestionably be an offence under R. 138 of the Motor Vehicles Rules and the offence would be punishable under S. 112 of the Motor Vehicles Act if no other penalty is provided for it. The power conferred on the transport authority to suspent the permit in such cases cannot be regarded or treated as a penalty for the offence and the prosecution of the petitioner under S, 112 of the Motor Vehicles Act is not illegal. There is therefore no ground for quashing the proceeding and the petition is dismissed.

N.T.R. *Petition dismissed*

---

**Cr.R. C. No. 561 of 1940**

(Case Referred, No. 25 of 1940)

*October* 25, 1940

LAKSHMANA RAO & HORWILL JJ.

**Boya Polamma**

v.

**Emperor.**

*Cr. P. C.* (V *of* 1898), *S.* 341—*Accused unable to understand proceedings during sessions trial—Reference to High Court.*

*Where the accused in the middle of the trial for murder before the sessions judge pleaded that she was unable to hear anything and the judge thereupon desisted from asking her further questions and the case was referred to the High Court under S.* 341, *Cr. P. C.*

Held, *that as on the evidence the offence was established beyond reasonable doubt, no injustice resulted from the fact that the sessions judge felt himself unable to question her further with regard to evidence*

*appearing against her, that the conviction by the lower court did not entail any miscarriage of justice, and that the conviction should be confirmed.*

Case referred for the orders of the High Court under S. 341 Cr. P. C., by the sessions judge of Kurnool Division in his letter dated lst August 1940.

*Public Prosecutor*, (*V. L. Ethiraj*) for Crown.

JUDGMENT.

(Horwill J.)

Boya Polamma has been convicted by the sessions judge of Kurnool of the offence of murder, punishable under S 302 I. P. C., but as the judge felt towards the end of the trial that she was unable to understand the proceedings, he has referred this case to us under S. 341, Cr. P. C. It has since been reported that there is no likelihood of her hearing improving.

There is no doubt in our minds that the learned sessions judge was right in convicting Boya Polamma of the offence with which she was charged. The prosecution story is that Boya Polamma was married to P. W. 8 and that just before this murder took place P. W. 8 took her and her children away to another village, and that he there renewed his intimacy with one Lakshmi, whom he was keeping as his concubine before he married Boya Polamma. She seems to have quarrelled with her husband for having resumed his relationship with Lakshmi in spite of his assurance that he would give up Lakshmi, and she came back with two of her children to the deceased Subbamma, who was her aunt. It was Subbamma who had arranged her marriage with P. W. 8, and it was apparently to her that the accused looked for comfort and sympathy. Subbamma, however, seems not to have given her the sympathy she expected and even refused to give her food and the consequence, according to the prosecution, was that Boya Polamma murdered Subbamma by smashing in her head with a large stone.

Only one witness (P. W. 5) claimed to have witnessed the murder, and her evidence has been rejected by the learned sessions judge. Apart from her evidence, however, there is very strong evidence against Boya Polamma. The most important of all is the confession (Ex. C) made to the sub magistrate (P. W. 3). In the course of that statement she said 'In the night I begged food and I slept at the house of Subbamma only. Being unable to put up with my misery and hardship I picked up a slab of stone and threw it on the head of Subbamma." She also told the magistrate about the jewels which she had taken from the body of Subbamma. In addition to this statement, there is reliable evidence that Boya Polamma took the police and certain panchayatdars to a rat hole in Subbamma's house and from it took some jewels which undoubtedly were worn by Subbamma just prior to her death. The further evidence against Polamma is that of P. Ws 4 and 6. P. W. 5 is a daughter of Boya Polamma and P. W. 4 and P. W. 6 say that they saw Boya Polamma going away from Subbamma's house in the night with P. W. 5. On account of information about this offence, Boya Polamma was detained by P. W. 4 and handed over to the village munsif. From all this evidence we are satisfied beyond reasonable doubt that Boya Polamma was rightly convicted of the offence with which she was charged.

Her answers to the questions put to her by the judge show that she understood the nature of the proceedings even in the sessions court. The learned judge first asked her if she heard her statement in the commiting court, which had just been read out to her, and she replied that it was correct. She was then asked if she wished to say anything in answer to the prosecution evidence and she replied: My husband took away Rs. 5 from me. When I asked him for it, he and his concubine murdered Subbamma and foisted this case on me I knew nothing." It was only after the accused was asked "P. W. 4 says he saw you the night Subbamma died. Do you wish to say anything?" that Polamma pleaded that she was unable to hear anything. The judge thereupon desisted from asking her further questions. As is seen, she must have understood the proceedings up to then. She was represented by a vakil appointed by the Crown and she put forward the defence that this case was foisted on her. We are satisfied that no injustice has resulted from the fact that the sessions judge felt himself unable to question her further with regard to the evidence appearing against her. The magisterial confession which was recorded after all the ordinary precautions had been taken, and the fact that she herself produced the jewels which were on the dead woman's body, satisfy us that there could have been no miscarriage of justice.

We therefore confirm the conviction by the learned sessious judge, and under S. 341 Cr. P. C. sentence Boya Polamma to transportation for life.

N.T.R. *Conviction Confirmed.*

---

Cr. R. C. No. 227 of 1940

Cr. R. P. No. 218 of 1940

*August 8, 1940*

LAKSHMANA RAO, J.

**Guruswami Chettiar & others**

v.

**Emperor.**

*Cr. P. C. (V of 1898), S. 195—Penal Code, S. 193—Procedings against S under Legal Practitioners Act—Receipt filed found to be a forgery—Person who obtained the receipt and the attestors prosecuted under S.* 467 *I.P.C—No complaint by court neessary.*

*One R was adjudged insolvent and one of his creditors was his concubine, the petitioner. The insolvent's son G was a pleader who was engaged by the petitioner to draw the dividend due. The amount not being received by her she filed an application under the Legal Practitioners Act to take proceedings against G who admitted having drawn the amount but produced a receipt as having been brought to him by his father for petitioner having received the amount. The receipt which was attested by witnesses was found to be a fabrication and the High Court struck* G *off the rolls. The petitioner thereon filed this application praying that a complaint may be filed against* G, R *and the attestors.* R *and the attestors were not parties to the proceedings against* S *under the Legal Practitioners Act.*

Held, *that as* R *and the two attestors could be prosecuted for forging of a valuable security under S.* 467 *I.P.C. no complaint by the court is necessary.*

*The offence that can be said to have been committed by them for which a complaint is required, is one under S.* 193 *I.P.C. and this is comparatively a minor offence compared to the graver charges for which they can be prosecuted without the intervention of the court.*

The facts appear clearly from the following judgment of the lower court :—

The facts which gave rise to this petition are briefly as follows. The 2nd respondent G. Ramachandran Chettiar was adjudged insolvent in I. P. No. 236 of 1928 (sub court, Coimbatore) dividends were declared and the petitioner (once the concubine of the insolvent) was also a creditor to whom Rs. 640—13—2 was allotted as dividend. The insolvent's son Guruswami Chetty (the first respondent herein) who was a pleader practising in Coimbatore was engaged by the petitioner to draw from the Official Receiver the dividend due to her. He drew it but failed to pay her.

She, thereupon, filed an application under the Legal Practitioners' Act (O.P. No. 66 of 1938) to take proceedings against her vakil (1st respondent.) The latter admitted that he drew the amount from the Official Receiver but contended that he paid it to the petitioner. His case was that he actually handed over the money to his father (insolvent) who, some time later, told him he had paid the petitioner and actually handed over to him a receipt alleged to have been signed by the petitioner.

It was found by this court that the receipt was a fabrication and that, in fact, the money was not paid to the petitioner. This finding was upheld by the High Court, who cancelled the sanad of the first respondent and struck his name off the rolls of pleaders. This was on 12—12—1938.

Within two months of it, the present application was filed by the same woman who moved under the Legal Practitioners' Act. She prays that a complaint may be filed against all the respondents. There is no doubt that the receipt was a forgery. It was filed by the first respondent in the proceedings against him under the Legal Practitioner's Act. There was no evidence that he forged it. But there is no doubt he used the forged document in the proceedings under the Legal Practitioners Act, with guilty knowledge.

The first respondent has been amply punished for using the document. He is a young vakil who had lost his sanad for ever. I do not think it expedient, in the interests of justice, that he should be also prosecuted for any offence.

The second respondent is said to have forged that receipt which was attested by respondents 3 and 4. The petitioner prays that a complaint may be filed against them for forging a valuable security and also giving false evidence on oath that the petitioner had passed that receipt.

These three respondents were not parties to these proceedings. Therefore they can be prosecuted for forgery of a valuble security under S. 467 I. P. C. without any complaint being filed by this court. The only offence that can of said to have been committed by them for which a complaint is required is one under S. 193 I P. C. This is comparatively a minor offence compared to the graver charges for which they can be prosecuted without the intervention of this court. On this ground mainly, I do not think it necessary to launch a complaint against them for this offence."

PETTION uuder Ss. 435 & 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the Town sub magisrate of Coimbatore dated 5—3—1940 and made R. C. No. 2 of 1940.

*V. K. John & D. Noronha,* for Petrs.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER

The complaint against the first accused is only under S. 403, I. P. C. and accused 2 to 4 were not parties to the proceedings under the Legal Practitioners Act. A complaint of the court is not necessary for prosecuting these accused for an offence under S. 467 I. P. C. nor does any question of evading the provision of S. 195, Cr. P. C. arise as in *Appadurai Nainar In re* (1) The court was moved to make a complaint against them and the making of a complaint by the court for an offence under S. 193 I. P. C. was considered unnecessary as accused 2 to 4 could be prosecuted for the graver offence under S. 467 I. P. C, without a complaint of the court. There is therefore no ground for interference and the revision petition is dismissed.

N.T.R *Petition dismissed.*

---

**Cr. R. C. No. 368 of 1940**

Cr. R. P. No. 357 of 1940

*October* 7, 1940

LAKSHMANA RAO, J.

**Guru Subramania Chetty**

v.

**Emperor**

*Cr. P. C. (V of 1898)—Charge under S.406 I. P. C. for offence in British India—Arrest outside British India without warrant—Release on bail—Appearance by accused—Legality of arrest—Jurisdiction.*

*The Petitioner was a resident of Tiruvottiyur and a complaint of criminal breach of trust was filed against him. He was arrested at Bangalore without a warrant by the sub inspector Tiruvottiyur and produced before the Bangalore magistrate. He was then produced before the magistrate, Saidapet. The petitioner was released on bail and he returned to Bangalore. A charge sheet was later filed and on a summons issued, the petitioner appeared. Objection was then taken to the competency of the sub magistrate to try the case on the ground that the arrest of the petitioner at Bangalore was illegal.*

Held, *that although the arrest of the petitioner in the first instance was undoubtedly illegal, the petitioner was released on bail and the summons having been issued for the appearance of the petitioner without reference to the previous proceedings the propriety of his previous arrest was no bar to the present proceedings.*

Held further, *that it cannot affect the jurisdiction of the magistrate to enquire into the offence under S. 406, I. P. C. committed by the petitioner within his jurisdiction.*

PETITION under Ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the order of the court of the stationary sub magistrate of Saidapet dated 29—4—1940 and passed in C. C. No. 935 of 1940.

*A. S. Nataraja Ayyar,* for Petr.

*A. S. Sivakaminathan,* for Crown.

ORDER

The petitioner was a resident of Tiruvottiyur and a complaint of criminal breach of trust was received against him. He was arrested by the sub inspector of Tiruvottiyur at Bangalore (Civil and Military Station) without a warrant on 21th December 1939, and produced before the first class magistrate there on 28th December. The magistrate remanded him to the custody of the sub inspector for production before the sub magistrate of Saidapet on 30th December, and he was produced before the sub magistrate of Saidapet on 30th December. The sub magistrate remanded him for ten days to enable the police to complete the investigation, and an application for bail was moved the next day. The petitioner was released on bail on 31st December and he returned to

1. (1935) M. W. N. 946 (2) : cr. 162 (2) : 59 Mad. 155.

Bangalore. The charge sheet was filed on 5th March 1940 and a summons was issued for the appearance of the petitioner on 20th March. The petitioner appeared on 20th March and the case was adjourned to 30th March for inquiry as it stood posted to 20th March only for apprehension of the petitioner. The case was then adjourned to 3rd April and objection was taken on that day to the competency of the sub magistrate to try the case on the ground that the arrest of the petitioner at Bangalore on 27th December was illegal. The objection was overruled and hence this petition.

The arrest of the petitioner on 27th December was undoubtedly illegal, but the petitioner was released on bail on 31st December and he returned to Bangalore thereafter. The chargesheet was filed on 5th March and a summons was issued for the appearance of the petitioner on 20th March without reference to the prior proceedings. The petitioner appeared of his own accord on that day and the propriety of his arrest on 27th December has no bearing on the present proceedings. Even otherwise it cannot affect the jurisdiction of the sub magistrate to inquire into the offence under S. 406 I.P.C. committed by the petitioner within his jurisdiction. Vide *Emperor* v. *Vinayak Damodar Savarkar*, (1) and the objection was rightly overruled.

The petition therefore fails and is accordingly dismissed.

N. R. R. *Petition dismissed.*

---

**Cr. App. Nos. 574 & 657 of 1940**

*October 29, 1940*

BURN & MOCKETT JJ

**Public Prosecutor**

v.

**Munigan alias Munisami.**

*Evidence Act (1 of 1872), S. 27—Persistent questioning by police—Statement—Admissibility—Accused seen in the company of the deceased and in possession of the jewels of the deceased—Inference.*

*Where after an accused person has been arrested he was interrogated three times by the Police,*

Held, *such persistent questioning may negative the impression that the statement is voluntary and that it would be extremely dangerous to attach any importance to the statment made in these circumstances.*

1. (1911) 35 Bom. 225

*Where the accused and another were charged with the murder of a woman and the evidence against the accused was that he was seen in the deceased's company on the night of the occurrence which was admitted by the accused, but he gave an explanation as to why he was in her company, and a jewel which was the property of the deceased was produced by him.*

*Held, the evidence was not sufficient to prove that the accused was guilty of murder, but that he was guilty of an offence under S. 201, I.P.C.*

APPEAL under S. 417 of the Cr.P.C,, 1899 to set aside the order of acquittal of the aforesaid respondent (2nd accused) by the sessions judge of North Arcot iu S.C. No. of 1490 on his file for an offence under S. 302 I.P.C. and to convict the said accused for the saidoffence and appeal against the conviction and sentence paassed by the sessions judge of the court of session of the North Arcot division in C.C. No. 18 of 1940 for an offence under S. 201 (1) I.P.C.

*C. K. Venkatanarasimham* for aceused..

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

JUDGMENT

(MOCKETT J.)

In this case the public prosecutor on behalf of the Provincal Government has appealed against the acquittal on a charge of murder of one Munigan *alias* Muniswami, who was the second accused in S.. C. No. 18 of 1940 tried by the learned sessions judge of North Arcot division at Vellore. The accused was charged with another, one Chinnaswami alias Chenga Reddi, with the murder on the 9th of February 1940 of a woman, one Thayarammal, near the village of Kainoor. There is no question whatever that Thayarammal was murdered. Her body was found on the morning of the 10th of February and, according to P.W. 1, the doctor, there were three external injuries, wonnds on it, and it is obvious that great violence had been used that could have been caused by M.O 1, a billhook which is so commonly in evidence in these cases. According to the dotctor, the death of Thayarammal might have occurred at about 2-30 in the morning on the 10th of February, which was a Saturday. Before the learned sessions judge the first and the second accused were acquitted of murder, but the second accused has been convicted under S. 201 of the Indian Penal

Code and has been sentenced to rigorons imprisonment for five years.

Thayarammal, the deceased woman, had been kept for sometime by the first accused and the witness Munisami Reddi (P.W. 8.) There is said to be a motive at the back of this murder, namely, that the second accused had been on intimate terms with Thayarammal's sister Salammal (P.W. 7) and it was suggested in evidence that the deceased was attempting to arrange the marriage of Salammal to the brother of P.W. 14. Indeed the marriage was said to have been fixed for the 11th of February. This action of the deceased is said to have been displeasing to the second aecused and to have influenced him in taking the life of Thayarammal. It was alleged at the trial too that the motive which was supposed to have influenced the first accused was that the first accused was endeavouring to persuade the deceased to discard P.W. 8 in his favour and that the deceased was not willing to do so. It is enough to summarise the alleged motive in that way. It rested largely on the evidence of P.Ws. 4, 5 and 7, and a great deal of it unquestionably was derived from statements said to have been made by the deceased woman. There are a number of statements attributed to the deceased woman which have been admitted in evidence which were wholly inadmissible. We would invite the learned sessions judge's attention to a recent decision of the judicial committee in *Narayanswami* v. *King Emperor* (1). In this case Lord Atkin explained the provisions of S. 32 as applicable to murder cases and after that authority there should be little reason for the burdening of the record with statements of persons who subsequently died, which are totally inadmissible, as is unhappily frequently the case. The evidence against the second accused is almost entirely derived from the statements made by himself accompanied by the fact, the undoubted fact, that he was on that evening in the company of the deceased woman. It appears that on the night of the 9th, the woman, Thayarammal, who was living in the house of P.W. 4, went to lie down and the next morning she was found to be missing. It was supposed she had gone to the fields to work, but no trace of her could be found and so enquires were set on foot and, on February the 10th, P.W. 6, seeing a crowd, went to it and there saw the body of the deceased woman. She still had some of her jewellery upon her, but one article of jewellery, a pair of kammal marked M.O. 2 in this case, was missing. The course of events afterwards was as follows. P.W. 4 made a report, which is the first information report in this case and which is marked Ex. D, and it is interesting to note in that report that P.W. 4 supposes that the likely criminals were the first accused and P.W. 8. On the 11th February the first accused was arrested and on the 12th the second accused was arrested. The second accused was remanded to the sub jail at Arkonam and remained there until the 17th, on which day the circle inspector (P.W. 19) after obtaining permission of the sub magistrate questioned him in jail. It is quite obvious that he made a statement which the circle inspector wished to use under the provisions of S. 27 of the Evidence Act. That is evident because an application was made to the sub divisional magistrate at Ranipet to have the accused transferred to police custody. The requisition on which that order was made is Ex. H. and the order thereon is Ex. H. 1. In it, the circle inspector says, "I interviewed Munigadu alias Muniswami in the Arkonam Sub jail and he promises to show the place where he had kept the kammals in question." But it must be remembered that in his evidence the inspector tells us that he had been "enquiring him", which presumably means questioning him. The accused was taken in charge by the inspector and was again questioned in the sub jail premises, outside his cell, panchayatdars having been introduced into the jail for the purpose of hearing what he was going to say. One of them is Varadarajulu Naidu who gave evidence in this case as P.W. 20. According to the inspector, the 2nd accused then stated that the kammals worn by the deceased Thayarammal had been handed over to him by one Valliammal and that he secreted them by the side of his house and would show the place and make recovery of the jewels; and the second accused also said that the kammals had been removed from the ears of the deceased and handed over to him immediately after Thayarammal was murdered. This statement was given in evidence in that form by the inspector, but it was actually reduced to writing and signed by the inspector and mediators and it is Ex. J. in this case. In it the second accused made a long statement of which the learned sessions judge has admitted the following. It begins in the middle of a sentence with the words "Cut Thayarammal's neck". Who it was that cut we are not allowed to know.

1. (1939) M.W.N. 185: Cr. 17

"He cut with knife. Valliammal removed the kammal and gave it to me. I have kept the said kammal by the side of my house. I shall now show that spot. The said spot is in Kainoor. If I am taken, I shall take out and give the said kammal." The accused did produce the kammal from a cattleshed by the side of his house in Kainoor village. But that was not all. According to Ex. J-3 and the evidence of the circle inspector, after the property was taken out, the accused was further questioned about the knife with which Thayarammal was cut and in reply to that the accused said that the knife with which Thayarammal was cut was the knife which his father Thangi Reddi had brought that day from Thangavelu Mudaliar of Kainoor for cutting fibre, that after cutting Thayarammal he kept the said knife in his house and that his younger sister Ayammal took away the said knife and gave it in the house of the said Mudaliar and he showed the house of the Mudaliar. The procedure adopted by the police in this case is, in our opinion, to be condemned. It appears to be in breach of the Standing Orders of the Madras Police. Order 583 (Madras Police Standing Orders) states quite clearly that, once an accused person has been arrested, the police are strictly forbidden to interrogate him or press him to make a statement. But the circle inspector's own admission is that the accused was interrogated more than once; he was apparently interrogated not less than three times—once when he was in the custody of the jail authorities and twice when he was in the custody of the police. We are furthermore satisfied that he was pressed to give these answers although P.W. 19, the inspector, says that he made the answer about the bill-hook immediately on being questioned and without hesitation. P.W. 20, who is of sufficient respectability to be summoned to be present at the questioning of prisoners, stated that the second accused was hesitating for about ten minutes before he replied to the circle inspector about the knife. This aspect of the case appears to have been wholly overlooked in the lower court. This court has on many occasions expressed its view with regard to the questioning of persons in custody. Naturally, persistent questioning may negative the impression that statements are voluntary. There are two decisions of this court reported in *Kataru Chinna Papiah* v. *Emperor* (2), and *Emperor* v. *Taduturu Poligadu* (3), which contain expressions of opinion by two different benches on this aspect. It would be extremely dangerous to attach any importance to statements made in these circumstances. There is however the fact that the second accused produced M.O. 2 from the shed of his house and there is the further fact that in consequence of a statement made by him an *aruval* was produced. There was however no blood upon the *aruval* detectable. There remains the statement Ex. S which the accused made at the magistrate's court and his statement at the sessions court. In Ex. S the accused said in answer to a long question put to him by the magistrate which was really a summary of the facts alleged against him, "I did not know that Salammal was going to be married. The first accused asked me to bring Thayarammal for the bioscope, I and the first accused are very friendly. Some enmity there is between P.W. 9 and the first accused. One night the first accused and P.W. 9 quarrelled. Accused 1 told Thayar, 'I told you that you should not talk to P. W. 9. Why do you talk to him?" and forbade her doing so. On the night of the murder, accused 1 said to me "Bring Thayarammal. We shall go to the bioscope at Arkonam". Myself accused 1 and Thayar used to come to the bioscope. That day near the field of Adinarayana Reddi, accused 1 asked me to hold Thayarammal's hand or arm. Accused 1 cut Thayar. 1 then went home. Accused 1 went away to the field to the place where sheaves lay." After the statement was read out to him, the accused added, "Next day, at daybreak on the day on which the police brought accused 1, accused 1 gave M.O. 1 to me asking me to keep it." It was contended that, on that statement, the court was entitled to draw the inference that this man was responsible for the murder of the deceased and cases were cited to the lower court to establish the principle on which such an inference could be made. Those cases were of the class where a single man is seen in the company of a person who is at or about that time clearly murdered and who in addition is found soon after in posession of jewels taken from the body of the deceased and who further gives no explanation which is reconcilable with the truth. This is not such a case. It must be remembered that, putting it at its highest, the only evidence against the accused was that of P.Ws. 10 and 11 who said that they saw him

2. (1940) M. W. N. 1134; Cr. 174

3. (1939) M. W. N. 873 Cr. 133

in the deceased's company at 9 and 10 P.M. respectively on the night of the 9th February But there is the accused's own statement admitting his presence with the deceased but giving an explanation as to why he was in her company, namely, that he had been asked by the first accused to fetch her. He furthermore does not admit his guilt. The most he admits is that the first accused asked him to hold Thayar's hand. He has not said that at that time the first accused had an *aruval* in his hand or had said or done anything to indicate that he contemplated violence against Thayarammal. That such a statement may arouse suspicion against the second accused cannot be doubted; but it is not such a statement as to raise the irressitible presumption of guilt which may arise in other cases on totally different facts. It is possible that there may be some truth underlying the accused's story. It is far from certain that he is guilty of murder. On these facts there is necessarily that element of doubt to which an accused person is always entitled. So far as the appeal against the acquittal is concerned it must, in our view, be dismissed.

But the accused is also an appellant in Crl. App. No. 657 of 1940 against his conviction under S. 201 of the Indian Penal Code. The facts which we have set out are sufficient for the purpose of considering this appeal also. Taking the accused's own statement and putting it as much in his own favour as one can as we have done for the purpose the the appeal of the Crown, after being present at a murder, he took from the man who, according to him committed the murder, a kammal which was unquestionably the property of the deceased and had hid it, and we know that he produced it. It cannot possibly be said that on these facts the court was not entitled to take the view that, when he hid this article of jewellery, he hid it with the intention of screening the offender, whoever he was, from legal punishment. We think therefore there is no substance in the appeal by the second accused and that appeal is also dismissed.

*Appeal dismissed.*

N. T. R.

---

**Cr. App. No. 532 of 1939.**

*November* 21, 1939.

LAKSHMANA RAO, J.

**Kuruba Anjanappa & another**

v.

**Emperor.**

*Cr. P. C.* (V *of* 1898), *S.* 476—*Not applicable to departmental enquiry.*

*S.* 476 *is not applicable to any departmental enquiry held by a district judge and he cannot direct the filing of a complaint against the witnesses in such enquiry.*

FACTS :—The petitioners were called as witnesses in an enquiry against an amin held by the tashildar. The district court held a further inquiry at the request of the collector and ordered that the petitioners should be prosecuted for giving false evidence. The present appeal was filed on the ground *inter alia* "The lower court ought to have held that it was not seized of any judicial proceedings and that it was not acting as a civil court in making the order of enquiry and that therefore it had no jurisdiction under S. 476 Cr. P. C. to order the complaint to be laid."

APPEAL against the order of the district court of Anantapur dated 14th August 1939 and made in E.P. No. 124 of 1938 in O. S. No. 247 of 1938 on the file of the court of the district munsif of Anantapur "In the matter of the departmental enquiry against Amin, D. Satyanathan of the district Court."

*Kasturi Seshagiri Rao*, for Applt.

*A. S. Sivakaminathan*, for Crown.

JUDGMENT

The enquiry held by the district judge was a departmental enquiry and S. 476, Cr. P. C. is not applicable. The appeal is therefore allowed and the complaint filed against the appellants will be withdrawn.

N.T.R. *Appeal allowed.*

---

END OF VOLUME

# INDEX, 1940

## CRIMINAL