

1960

Present : H. N. G. Fernando, J.WEERAI, Appellant, *and* D. A. SAMARAKOON, Respondent.*S. C. 593—M. C. Kandy, 8,637**Penal Code—Section 309—Concealment of birth by secret disposal of dead body—Ingredients of offence.*

In a prosecution for the secret disposal of the dead body of a child and thus intentionally concealing the birth of the child, section 309 of the Penal Code requires proof of three matters : firstly that there has been a dead body of a child, secondly that the person charged secretly buried or otherwise disposed of the dead body, and thirdly that there was an intention to conceal the birth of the child.

APPEAL from a judgment of the Magistrate's Court, Kandy.

George Candappah, for the accused-appellant.

P. Nagendran, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 11, 1960. H. N. G. FERNANDO, J.—

The appellant has been convicted on a charge of secretly disposing of the dead body of a new born child and thus intentionally concealing the birth of the child. The midwife of Rockwood Estate, Hewaheta, testified that she examined the appellant on 16th March 1958 and found her to be about six months advanced in pregnancy. The midwife again examined the appellant on 20th June 1958 and formed the opinion that the appellant had recently given birth to a child. This evidence was confirmed by the Judicial Medical Officer, Kandy, who examined the appellant on 22nd June. According to him the condition of the appellant was such that she must have given birth to a full term child a few days prior to his examination. There was ample circumstantial evidence to establish the correctness of the doctor's opinion that the appellant had given birth on or about 20th June 1958 to a full term child.

Section 309 of the Penal Code requires proof of three matters : firstly that there has been a dead body of a child, secondly that the person charged secretly buried or otherwise disposed of the dead body, and thirdly that there was an intention to conceal the birth of the child. In the present case there was ample evidence to justify the inference that the appellant gave birth to a live infant. But no single witness could testify to the fact that the infant had died or to any circumstance from which it could have been inferred that the child had died. Furthermore there was no evidence whatever to indicate that the dead body of the infant had been buried or otherwise disposed of. The first two elements I have mentioned were therefore not established and there could be no call even to consider whether the third element was established. I cannot

agree with the learned Magistrate that the fact that the infant could not be found either dead or alive constitutes proof that the appellant disposed of its dead body. While an inference of guilt can of course be inferred from the circumstances, many other inferences arise none of which can with certainty be excluded : assuming that the child was "unwanted" for the reason that its mother was unmarried, the child may still be alive in some place the identity of which the mother and her relatives are unwilling to disclose ; again the appellant may have abandoned the child while alive and thus may be guilty of an act punishable under section 308, but not under section 309 : yet again it may have been not the appellant herself, but some relative, anxious to protect her reputation, who disposed of the child alive or dead. At the best the evidence in this case was only sufficient to create a suspicion that the appellant or some other person may have committed an offence under section 309 or else under section 308 or else some more serious offence. But such a suspicion alone does not justify the conviction.

I accordingly allow the appeal and set aside the conviction and sentence.

Appeal allowed.
