[IN THE COURT OF CRIMINAL APPEAL]

1960 *Present :* **Basnayake, C.J. (President), K. D. de Silva, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* K. VELLASAMY and 4 others

Appeals Nos. 76 to 80 of 1959, with Applications Nos. 93 to 97

S. C. 3—M. C. Chavakachcheri, 10,171

Evidence—Indivisibility of a witness's credibility—Charge of murder—Conviction, without amendment of indictment, for causing disappearance of evidence of commission of an offence—Scope of ss. 181 and 182 of Criminal Procedure Code—Penal Code, ss. 198, 296.

(i) Where the evidence of a witness is disbelieved in respect of one offence it cannot be accepted to convict the accused of any other offence. Accordingly, if a witness's evidence is disbelieved in respect of a charge of murder it cannot sustain the conviction of the accused in respect of a charge under section 198 of the Penal Code.

(ii) A person who is indicted on a charge of murder cannot be acquitted of murder and, at the same time, without due amendment of the indictment and being afforded an opportunity of answering the charge, be convicted under section 198 of the Penal Code of causing disappearance of evidence of the commission of murder or culpable homicide not amounting to murder. Such a conviction is not covered by the provisions of section 182 of the Criminal Procedure Code.

APPEALS against certain convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *T. W. Rajaratnam* and *M. L. de Silva*, for Accused-Appellants.

V. S. A. Pullenayegum, Crown Counsel, for Attorney-General.

Cur. adv. vult.

February 15, 1960. BASNAYAKE, C.J.—

These appeals first came up for hearing on 30th July 1959, but as it appeared to us from the arguments addressed by learned counsel that he sought to canvass certain decisions of the Supreme Court and of this Court the hearing was put off to enable the Registrar to list this case before a Bench of five Judges. Learned counsel indicated more than once when the case came up on the usual list that although the accused were on remand he was prepared to await the constitution of such a Bench. But as it later appeared that it was not possible to constitute a

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Bench of five Judges within a reasonable time learned counsel stated that as delay in constituting a larger Bench was unavoidable the interest of the prisoners would be served by the case being heard by the usual Bench. The appeals were accordingly listed for hearing on 14th December 1959.

The accused-appellants Karuppiah Vellasamy, Ponnusamy Nadar Panneerselvanadar, Muthukaruppan Ratnam, Sinivasagam Morgan and Muthiah Vaithilingam were indicted on a charge of murder of one Nallan Kuppan on 25th April 1958. By a unanimous verdict the jury acquitted the appellants of that charge, but they found them guilty—to quote their very words—" of the offence of knowing or having reason to believe that an offence has been committed, cause the evidence of the commission of the offence of culpable homicide not amounting to murder to disappear, an offence punishable under section 198 of the Penal Code." The appellants were each sentenced to a term of three years' rigorous imprisonment.

Of the grounds set out in the joint notice of appeal learned counsel confined his attention to the following :—

(*a*) that the verdict is unreasonable, and

(*b*) that the conviction of the accused of an offence under section 198 of the Penal Code is illegal.

It would be helpful if the material facts are briefly stated before the above grounds are examined. They are as follows : The lst accused was both a tapper and a toddy salesman in the toddy booth of the 3rd accused Ratnam. The 2nd and 3rd accused were also tappers. The 4th accused was a tailor. The occupation of the 5th is not known. The evidence against the accused is in two stages. The first stage consists of the events that occurred at about 5.30 p.m. on the afternoon of 25th April, the second stage of the events that occurred at about 11.30 p.m. on that day. Both stages were enacted at Emerson Road, a busy street, with a theatre known as the Parasakti Theatre and a number of boutiques which are open till late at night. Except two of them which were open till midnight, the others closed at 10.30 p.m. In this area there are two irrigation channels, one broad and the other narrow. The broad channel intersects Emerson Road at right angles. The narrow channel, which is a branch of the broad one, is to the north of that road and runs almost parallel to it. It is built of earth and turf and at the relevant date had a foot of water.

The first stage of the evidence discloses the following facts : The deceased was assaulted by the 1st accused because he had pulled the cadjans from the latter's toddy booth. This assault was not of a serious nature as the deceased soon recovered from it, bathed in the channel nearby in Emerson Road, and went in the direction of the toddy booth in that road, which is also the direction in which his house lay. About dark the deceased went to the house of Mariampillai who had

borrowed Rs. 900 from him and wanted the return of the loan. He was drunk at the time and appeared to have taken a bath and was wearing a white shawl over his body. When Mariampillai tried to put him off he insisted on payment, but he was able to give only Rs. 150. He took this sum and left about 6.30 p.m. Between 7 and 8 p.m. the deceased was seen by the witness Alagaratnam seated on the side of the road at a spot between the toddy booth and the Parasakti Theatre. He was wearing a verti and a shawl and appeared to be quite well.

Now comes the next stage of the evidence which discloses the following facts : About 11.30 p.m. the same day—the witness Maniccam is not sure of the date—four of the accused were seen by him carrying a human body covered with a verty from the neck downwards on two poles or one he is not clear. The 5th and 3rd accused were at the head, the 1st and 2nd were at the foot. The 4th accused was walking with the others carrying a club. Maniccam who was proceeding along Emerson Road in the opposite direction on a bicycle with another called Arunachalam on the luggage-carrier, met this party on the same road at a point beyond the broad channel. The bicycle had a dyno-hub lamp and Arunachalam also had a torch which he flashed when they met the accused. Maniccam recognised the accused and also the person who was being carried. He was the deceased Kuppan. As he was a man addicted to liquor and was often found drunk the witness inferred that as the deceased was too drunk to go by himself he was being carried to his home which was in the direction in which the accused were proceeding.

This brief narrative of facts completes the evidence of the two stages of the prosecution case and takes us to the discovery of the body of the deceased. On 26th April it was found in the narrow channel by the witness Velupillai when he went for a bath about 8 a.m. He informed the Police immediately. The banian and verty of the deceased were at two different spots up stream. The autopsy held on 27th April revealed a fracture of the skull at the fronto temporal suture $2\frac{1}{2}''$ long on the left side. There was laceration of the middle portion of the upper part of the cerebrum with blood clots and stains. The laceration of the brain was $2''$ long and $\frac{1}{2}''$ deep on the left side. The decomposition of the body was too advanced for the detection of any external injury corresponding to the internal injuries. The stomach contained semi-digested rice and curry with the smell of toddy. In the opinion of the doctor the man had died between two to three hours after the last meal. The cause of death was the fracture of the skull and laceration of the brain. The doctor did not exclude the possibility of the fatal injury being caused by a violent fall on a hard object. He was also of opinion that the state of the body at the time of his examination was consistent with the case of the prosecution that the man had died on the night of 25th April ; but he did not venture to give an independent opinion as to the time of death. The key to the sketch reveals that there were two witnesses by name Kuruppuarachchige Wijedasa and T. A. Robertinahamy who had from the spots marked G and H respectively seen the deceased being dropped into the channel by the accused. It is strange that

these witnesses were not called at the trial although their names were on the indictment and their places of residence appear to have been known. Their evidence would have gone a long way to support Maniccam.

On this evidence the learned trial Judge directed the jury that, if Maniccam's evidence was rejected, the whole case for the prosecution failed. These are his very words :

" Now as Counsel for the defence rightly remarked, this case turns almost entirely upon the evidence of Maniccam. If you reject Maniccam's evidence or if you cannot act upon it with confidence, then, of course, the whole case for the prosecution fails because he is the one man who, by his evidence, connects these accused with the deceased . . . .

" So, as I said, the whole case really depends on whether you accept Maniccam's evidence or not. If you reject his evidence then you will acquit the prisoners, but if you think you can confidently accept his evidence, then it means this : Here, there are five people who carry a man on two poles—it cannot be one—Maniccam said he could not say whether it was one or two, and he has consistently said so—they carry him covering him with a verty cloth and they are seen at 11.30 p.m. carrying this man towards the channel where his body is discovered the following morning. The evidence in regard to the guilt of the accused is based on the following circumstances ".

After explaining the circumstances the learned Judge proceeded :

" There is no explanation forthcoming from the accused, if you accept the evidence. If they have an explanation why don't they come out with it ? In the absence of that explanation, you can draw an inference adverse to the prisoners . . . .

" If you accept Maniccam's evidence, are these not facts which cry for an explanation ? If you reject Maniccam's evidence then the whole case is over. "

Thereafter the learned Judge went on to say :

" Then you will have to consider another aspect of the matter. It is also an offence to cause evidence to disappear. Now, if you take the view that the evidence does not justify your coming to the conclusion, that there was the common intention shared by all these accused then you have to consider whether they are guilty of some other offence, namely, the offence to cause evidence of the commission of an offence to disappear. That is the verdict which you can bring. Under our law it is an offence for a person to cause evidence of the commission of an offence to disappear. I shall read the section to you :

' Whoever knowing or having reason to believe that an offence has been committed causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment shall be guilty of an offence. '

"That is the law. Supposing these people were not actually guilty of committing the murder still what did they do? They carried this dead body and put it into the stream. What was their object? Could it be that they wanted to create the impression that the man had slipped and fallen into the stream and drowned himself? The medical evidence is that it is not asphyxia that caused death but a blow on the head. Could it be that? Well, that is the offence of which you can find all these accused guilty, if you accept Maniccam's evidence.

"If you take the view, on the evidence, with regard to common intention that it is acceptable or such that can make you act with certainty with regard to causing of evidence of the commission of an offence to disappear, in this case, murder or culpable homicide not amounting to murder or grievous hurt to disappear, it is a possible verdict."

There is no evidence that the accused were carrying a dead body. The learned Judge's reference to a dead body appears to be a slip of memory, for earlier in his summing-up in dealing with the charge of murder he took care to make the evidence clear to the jury by saying :

"In his evidence Maniccam does not say that he was dead or alive but of course, that itself is suggestible that he was dead or dead drunk, one or the other. The medical evidence rather suggests that he was dead because the Doctor said that death was 36 hours prior to his examination."

Apart from the question whether the conviction of the accused of the offence punishable under section 198 of the Penal Code without an amendment of the indictment and the accused being afforded the opportunity of answering the charge is good in law, the question whether, on the directions given by the learned Judge, the verdict of guilty of an offence punishable under section 198 can be reconciled with the verdict of acquittal of the charge of murder arises for consideration. The learned Judge emphasised more than once, and it would appear from his charge that learned counsel for the defence did likewise, the fact that the whole case depended on Maniccam's evidence. He said : "If you reject Maniccam's evidence then the whole case is over". Again after discussing the evidence further he said : "If you reject his evidence then you will acquit the prisoners". Acting on this direction, so it may be presumed, the jury acquitted the accused. The inference that may be drawn from the verdict of acquittal is that Maniccam's evidence was rejected. The only relevant evidence he gave was the evidence of his meeting the five accused, four of whom were carrying the deceased covered with a verty cloth in the direction of the channel along Emerson Road. If this evidence was rejected on the charge of murder it is difficult to understand how on the same evidence a conviction of any other offence can be founded. The standard of proof required in respect of a charge under section 198 of the Penal Code is not below that required in respect of a charge under section 296. The acquittal of the accused

on the charge of murder shows that the jury disbelieved Maniccam's story that the accused carried the body of the deceased towards the channel at about 11.30 p.m. on the night of 25th April. Evidence which is unacceptable in respect of one offence cannot reasonably afford good ground for convicting the same persons of another offence. It was Maniccam's credibility that was in question. When the jury treated him as a witness who was not credible there was an end to the case as the learned trial Judge rightly observed more than once in the course of his summing-up. A witness cannot be both not credible and credible in regard to the very same evidence. This view of the indivisibility of a witness's credibility gains support from the case of *Baksh v. The Queen*[1], where the view was expressed that the evidence of a witness which was rejected as against one accused cannot be accepted against another. The Privy Council observed : " Their credibility cannot be treated as divisible and accepted against one and rejected against the other ". As his evidence has been disbelieved in respect of the charge of murder it cannot sustain the conviction on any other charge. The convictions of the accused cannot be upheld as there is no evidence apart from that of Maniccam which implicates them. We accordingly allow the appeals and direct that the convictions of the accused be quashed and that a judgment of acquittal be entered in respect of all of them.

Though this disposes of the appeals, as learned counsel has argued the question of law arising thereon at length, we shall now proceed to discuss it. At the conclusion of the summing-up learned counsel for the 1st, 3rd, and 5th accused submitted : " With regard to this, there was no charge and Crown Counsel did not open his case on that basis and I did not address the Jury on that ". To this the learned Judge observed : " This has been laid down by authority. Gentlemen, please retire and consider your verdict ".

The learned trial Judge appears to have taken the course he followed on the assumption that the instant case was covered by section 182 of the Criminal Procedure Code. That section reads :

> " If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it. "

In view of the reference in the section quoted above to the last preceding section it is necessary for a proper appreciation of the question involved in this appeal to reproduce that section as well. It, together with the illustration to it, reads—

> " 181. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried

[1] *(1958) A. C. 167 at 172.*

at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment : or he may be charged with having committed one of the said offences without specifying which one.

ILLUSTRATION

A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with "having committed one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust, and cheating."

For the application of section 182 to a given case—

(*a*) there must be a single act or series of acts,

(*b*) the act or series of acts must be of such a nature that it is doubtful which of several offences the facts which can be proved will constitute.

The illustration to section 181 indicates what the legislature had in mind when it enacted the two sections. The act or series of acts must be such as amounts to, as in the case of the illustration, any one of several offences and the doubt must be as to which one of those offences was committed by the accused. The second part of the illustration gives a further clue to the meaning of the section. The act or series of acts should be such as would permit of a charge which runs as indicated therein —"that you did commit one of the following offences". The doubt must be not in regard to the facts, but in regard to the offences disclosed by the undoubted facts. In other words the facts must be such as would equally support any one of the several charges. These two sections cannot properly be applied to a case in which one offence alone is indicated by the facts and in the course of the trial the evidence falls short of that necessary to establish that offence, but discloses another offence. Outside those offences given in the illustration, cases in which these sections may be applied seldom occur. These sections are of very limited application and it is important that they should be confined to their proper limits. They should be so construed as to be consistent with the principles of justice that are not only expressed but also inherent in the Code. Apart from that it is an established rule of interpretation that a statute must not be construed as altering the principles of natural justice unless it is so expressly and clearly provided. Where there is no such provision the Legislature must be presumed not to have enacted a law which departs from the rules of natural justice. For the application of these provisions there should therefore be not only doubt as to which of several offences the act or acts which can be proved amount to but the offences must be of such a nature that the accused may be convicted without a specific charge. The observations of Bonser C.J. in *The Queen v. Gabriel Appu* [1] and of Soertsz J. in *The King v. Piyasena* [2] are in accord with our view.

[1] *(1896) 2 N. L. R. 170.*

[2] *(1942) 44 N. L. R. 58.*

Now in the instant case the acts of the accused set out above are not of such a nature that renders it doubtful which of several offences the proved facts constitute. The only evidence which incriminates the accused is that of Maniccam who says that the body of the deceased was being carried by four of the accused while the fifth was walking alongside with a club. Even if the credibility of the witness was beyond question, which is not the case here, is the act of the accused in carrying the deceased in the way described by the witness of such a nature as to render it doubtful which of several offences that evidence constitutes ? The proved facts do not establish that one of the accused committed the offence of murder or culpable homicide not amounting to murder in furtherance of the common intention of all. Nor do they establish that all the accused caused evidence of the commission of the offence of murder or culpable homicide not amounting to murder to disappear with the intention of screening the offender from legal punishment knowing or having reason to believe that that offence had been committed. Two important elements of an offence under section 198 are—

(*a*) the knowledge or belief of the accused that a particular offence has been committed, and

(*b*) the intention to screen the offender from legal punishment.

The act of causing evidence of the commission of an offence to disappear unless coupled with these two important elements does not establish the offence. In a charge under that section these mental elements must be established either by positive evidence or by the proof of such facts as lead to the necessary inference that they were present in the minds of the accused at the time the act of causing the evidence to disappear was committed. In this view of the matter the learned Judge's direction that it was open to the jury to return a verdict under section 198 of the Penal Code is not supported by the provisions of the Code.

Except the case of *Begu and others v. Emperor* [1], which has been cited in two decisions of this Court [2], one reported and the other not, it is not necessary for the purpose of this appeal to discuss the decisions cited by learned counsel on both sides. Whether section 182 is applicable to a given case would depend on its facts and the nature of the offences disclosed by them. Although learned counsel for the Crown placed great reliance on *Begu's* case it is not clear from the judgment of the Board how, on the facts stated, the act or series of acts proved in that case was of such a nature that it was doubtful whether they constituted the offence of murder or of causing the evidence of the commission of murder to disappear. The relevant portion of the judgment reads :

> " The case was tried by the learned Judge at the Sessions Court with the aid of three assessors, and at the end of the case the assessors gave their opinions, which were recorded ; that they were unanimously of opinion that Bakhu and Walia, the accused, had attacked Baksha with intent to kill him ; that they murdered him ; that two of the

[1] *(1925) A. I. R. Privy Council 130.*

[2] *Karuppiah Servai v. The King, 52 N. L. R. 227.*
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others who were present took part in the assault, as stated by Turez, the eye-witness ; that there might be some doubt as to whether Hamid one of the accused, was also present and took part in the assault or not ; and, finally, that the prosecution case and evidence appeared generally reliable throughout. That is what the learned Judge regarded as being the opinion of the assessors. The learned Judge, having the evidence and the views of the assessors before him and having considered them, on the 22nd December delivered his judgment. With regard to Bakhu and Walia he decided that they intended to kill Baksha and were guilty of murder and he sentenced them to death. With regard to the other three, he was of opinion that the evidence did not sufficiently or definitely prove that they were present at and had taken part in the murder, but, on the other hand, he convicted each of them of having removed the body, and he sentenced them each to seven years' rigorous imprisonment ".

The facts as found by the assessors show that all except one of the accused participated in the murder and that all participated in the removal of the corpse. The accused were guilty of two acts each of which constituted a distinct offence and they were not of such a nature as to render it doubtful which of them was constituted by the established facts. The judgment proceeds on the assumption that, even though the evidence falls short of establishing the charge in the indictment, section 237 of the Indian Code (which corresponds to our section 182) authorises a conviction of any other offence disclosed by the evidence though no specific charge has been framed. Such is not the case as has been pointed out earlier. Section 236 of the Indian Code (which corresponds to our section 181) lays down the considerations that should govern the formulation of charges in the case mentioned therein. This section is to be used at the pre-trial stage of a criminal case. Section 237 comes into operation at the end of the evidence ; but it is to be applied only to a case which satisfies the requirements of section 236. The conviction without a charge is authorised only if the evidence is such that it discloses an offence different to the one with which an accused person is charged but one in respect of which he might have been charged under section 236. Begu's case does not appear to give sufficient attention to the following words of section 237 : " If, in the case mentioned in section 236, ... a different offence for which he might have been charged under the provisions of that section, ..."

In applying section 182 of our Code there should be no departure from the fundamental rule of justice that a man should not be condemned unheard, and it would be a violation of that rule to direct the jury to return a verdict against a prisoner on a charge on which he has not been afforded an opportunity of being heard. The ingredients of the offence punishable under section 296 of the Penal Code and those of the offence punishable under section 198 are different. The defence to a charge under the former section does not necessarily involve the defence to a charge under the latter.

Accused acquitted.