

1939

Present : Soertsz A.C.J.

SUB-INSPECTOR OF POLICE, EHELIYAGODA *v.* POSATHAMY.

173—*M. C. Avissawella, 19,480.*

Causing evidence to disappear—Request made to persons not to identify the accused—Elements of offence—Penal Code, s. 198.

Where the accused was alleged to have requested two persons to whom one P had sold some rubber and who, the accused thought, would be asked by the Police to identify the man who sold the rubber to them, to say that they could not be sure that it was P who sold the rubber to them,—

Held, that the act of the accused did not amount to the offence of causing evidence to disappear with the intention of screening an offender within the meaning of section 198 of the Penal Code.

A PPEAL from a conviction by the Magistrate of Avissawella.

H. V. Perera, K.C. (with him *C. V. Ranawake*), for the accused. appellant.

D. Janszé, C.C., for the complainant, respondent.

May 24, 1939. SOERTSZ A.C.J.—

The accused in this case was convicted of the offence of having attempted to cause evidence to disappear with the intention of screening the offender from legal punishment, knowing or having reason to believe that the said offender had committed offences of housebreaking, theft, and disposing of stolen property. It was alleged that the accused committed this offence by requesting two persons to whom one Podimahatmaya *alias* Dingirimahatmaya had sold some rubber, and who, he thought, would be asked by the Police to identify the man who sold that rubber to them, to say that they could not be sure that it was Dingirimahatmaya *alias* Podimahatmaya the alleged offender, who sold that rubber to them on that day.

The accused was convicted and sentenced to one month's rigorous imprisonment.

It is obvious that the conviction cannot stand. The offence contemplated by section 198 is causing evidence already in existence to disappear. Assuming all the facts to be as stated by the prosecution,

the most that can be said against the accused is that he attempted to tamper with a probable source of evidence, or to put it in another way, he was trying to interfere with evidence *in posse*, and not to make evidence '*in esse*' to appear. The two men had not given any evidence in Court. Not that, I think, it matters if they had, for instance, given evidence-in-chief and were approached while they were awaiting cross-examination, for in that case, whatever else the offence of the accused might have been, it is not the offence of causing evidence to disappear. What section 198 deals with and has in view is some present objective evidence. In Dr. Gour's comment on the corresponding Indian section 201, I find it stated, "the disappearance of evidence does not include disappearance of a witness who would have given evidence in the case It is here used in its primary sense as meaning any *thing* that is likely to make the crime evident or manifest—in short, it means such facts as may probably lead to the proof of a crime. An eyewitness is not such a fact, for the value of his evidence depends on his credibility".

In other words, my view is that section 198 deals chiefly with such things as the *corpus delicti*, instruments or weapons of offence, marks, stains and other relevant indications of the commission of an offence. It may conceivably extend to cases of causing evidence already given by witnesses to disappear, for instance the evidence given by a witness who is dead or cannot be called, but whose evidence could have been read under section 33 of the Evidence Act, but it certainly does not extend to a case like this.

I set aside the conviction and acquit the accused.

Set aside.

