[COURT OF CRIMINAL APPEAL]

1950 *Present:* **Dias S.P.J. (President), Nagalingam J. and Gunasekara J.**

KARUPPIAH SERVAI, Appellant, *and* THE KING, Respondent

APPLICATION 20 OF 1950

S. C. 22—M. C. Colombo, 19,660

Court of Criminal Appeal—Charge of murder—Evidence only of disposal of body of deceased—Conviction for the latter offence—Legality—Penal Code (Cap. 15), ss. 198, 296—Criminal Procedure Code (Cap. 16) s. 182.

In a case of murder by manual strangulation, the question was whether the person who strangled the deceased was A or B or C.

Held, that in order to secure the conviction of A for murdering the deceased, the prosecution would have to establish beyond reasonable doubt that the murder was not committed by B or C. The fact that A, after the deceased

[1] *(1913) 16 N. L. R. 31.*
[2] *(1937) 37 N. L. R. 304.*
[3] *(1912) 16 N. L. R. 26.*
[4] *(1913) 17 N. L. R. 29.*
[5] *S. A. (1913) A. D. 433.*

had been strangled, helped to dispose of the dead body might be a suspicious circumstance, but, on the facts proved in the case, that fact did not indubitably point to his having strangled the deceased.

Held further, that, where the evidence warrants it, a person charged with murder can be convicted under section 198 of the Penal Code for causing the disappearance of evidence of the crime, although the indictment contained no specific charge under that section.

APPLICATION for leave to appeal against a conviction in a trial before a Judge and Jury.

M. M. Kumarakulasingham, with *J. C. Thurairatnam* and *H. A. Chandrasena* (assigned), for the accused appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 5, 1950. DIAS S.P.J.—

Sallaiappen Karuppiah Servai (the first accused appellant) and Suppiah Karuppiah Servai were jointly charged with committing the murder of a man named M. Vairavan on October 3, 1948. The jury unanimously convicted this appellant of murder and by a majority of five to two acquitted the second accused.

The evidence clearly established that on the night of October 2/3, 1948, the deceased man had been done to death by manual strangulation, after which he had been decapitated and his headless trunk thrown into the sea. The evidence of Dr. Gerald de Saram, the Judicial Medical Officer, proves that the hyoid bone at the base of the tongue of the deceased was absent, and the whole of the right horn of the hyoid bone had been fractured at its inner ends. Although the doctor at first was inclined to the view that the cause of death was decapitation, he stated that on further consideration it was clear that the decapitation had been done after death, which had been caused by manual strangulation causing asphyxia. The fracture of the hyoid bone is a characteristic sign of manual strangulation. This view the jury accepted.

Death by natural causes, accident and suicide having been negatived, the jury was, therefore, face to face with a case of homicide. The manner in which the deceased had been killed made it clear that he had been murdered.

On the question as to the identity of the persons who committed the murder, the jury has acquitted the second accused. The only question for consideration, therefore, is whether the evidence proved the guilt of the appellant beyond all reasonable doubt?

The case against the appellant was entirely circumstantial in character, there being no direct evidence of any kind. The appellant gave evidence on his own behalf and denied that he had anything to do with the death of the deceased. The second accused gave evidence on oath, and brought the appellant on the scene about the time the deceased was killed, but his evidence, although admissible against his co-accused, did not help the prosecution on the vital question as to who strangled the deceased man.

According to the second accused, he met the appellant when he was asked to persuade the deceased man to pay to the appellant some money which was owing to him. Therefore, on the night of October 2, the two accused, Sinniah, the deceased man, and Sinnathamby met, and after drinking arrack the five of them proceeded to the sea-beach near the railway line to discuss the question of the payment of the money. It was a very dark night. They sat down besides the railway line. The second accused then went to a place about twenty-five yards distant to answer a call of nature. He was absent for about ten minutes. When he returned, he discovered, by the aid of the electric torch which he had, " the first accused (i.e., the appellant) pressing the buttocks of the deceased who was lying on the ground, while Sinniah was cutting his neck ". If that evidence is true, then the *strangulation* of the deceased man must have taken place during the ten minutes when the second accused was absent from his companions. There is no other evidence in the case. The evidence of the second accused, even if accepted *in toto*, does not throw any light on the question as to which of the three men who remained with the deceased strangled him. There is no assignable motive as to why the appellant should have strangled the deceased. There is no evidence that the appellant abetted the strangulation or shared a common murderous intention with the strangler. All the five men had partaken of arrack. Why they went to the sea beach in the dead of night to discuss whether the deceased man should repay his debt to the appellant is unexplained.

The situation in which the prosecution found itself may be reduced to the following propositions:—X (the person who strangled the deceased) may be A, B or C. In order to secure the conviction of A, the prosecution had to establish beyond reasonable doubt that X is *not* B or C. It is then, and only then, that the guilt of A can be said to have been established beyond reasonable doubt. In the present case the prosecution was unable to do that. When to that is added the absence of any motive why the appellant should strangle the deceased, it seems clear that the case for the prosecution against this appellant is bound to collapse. In a case of circumstantial evidence in order to secure the conviction of the appellant the facts must be totally inconsistent with any reasonable hypothesis of his innocence. The fact that the appellant *after the man was strangled* helped to dispose of the dead body may be a suspicious circumstance, but on the facts deposed to, it does not indubitably point to his having strangled the deceased. Had the death of the deceased been caused by decapitation and not by strangulation, the position of the appellant might have been different, for then there was evidence, which the jury accepted, that while the man's throat was being cut, he was holding down the deceased by his buttocks. It is unnecessary to consider this aspect of the matter further.

We are, therefore, of opinion that the conviction of the appellant for murder cannot stand.

The verdict of the jury indicates that they believed that this appellant was at the scene when the man was done to death, and that thereafter he helped in the decapitation and in the disposal of the body in order to screen the offender from punishment (section 198 of the Penal Code).

In the case of *Emperor v. Begu* [1], the Privy Council affirmed the conviction of a person under section 198 who was only charged with murder, but whose guilt was not proven. It was held that he could be convicted under section 198 of the Penal Code although the indictment contained no charge under that section. In the unreported case *S. C. 38 M. C. Hambantota No. 13,140* [2] the Court of Criminal Appeal followed *Emperor v. Begu* [1]. The Court said: " It was not disputed at the argument that they could be properly convicted of this offence (i.e., section 198). The case of *Emperor v. Begu* [1], to which Crown Counsel referred us, bears this out. There was ample evidence in the case to establish a charge under section 198 of the Penal Code against the 2nd, 3rd and 4th appellants. In these circumstances we feel that the conviction of these appellants under section 296 should be quashed, and a conviction under section 198 substituted ". Such an order is clearly justified by the provisions of section 182 of the Criminal Procedure Code.

We, therefore, quash the conviction of the appellant under section 296 of the Penal Code, and convict him under section 198 of the Penal Code and sentence him to undergo seven years rigorous imprisonment.

Conviction altered.