

[COURT OF CRIMINAL APPEAL]

1948 Present : Howard C.J. (President), Canekeratne J. and
Nagalingam J.

THE KING v. EBERT SILVA

APPEAL No. 87 OF 1948

S. C. 13—M. C. Balapitiya, 57,809.

Court of Criminal Appeal—Charge of murder—Corpus delicti—Body of deceased not found—Can accused be convicted?

The caution that a man should never be convicted of murder or manslaughter on circumstantial evidence alone unless the body of the deceased person has been found need not, however, be followed when very strong circumstantial evidence of death can be given.

APPPEAL from a conviction in a trial before a Judge and Jury.

Colvin R. de Silva, with M. M. Kumarakulasingham, K. C. de Silva and K. A. P. Rajakaruna, for accused appellant.

T. S. Fernando, Crown Counsel, with Ananda Pereira, Crown Counsel, for the Crown.

Cur. adv. vult.

November 25, 1948. HOWARD C.J.—

The accused appeals from his conviction on an indictment containing three counts of murder. The first count was in respect of the murder of a man called Muttusamy, the second in respect of Muttusamy's mistress Baby Nona and the third in respect of Baby Nona's child Hemalatha. The accused, since 1938, was the conductor of an estate of about 50 acres situated at Porawagama belonging to his uncle one Piyadasa de Silva, a Proctor of Balapitiya. The deceased Muttusamy was an Indian Tamil and had been employed by Mr. Piyadasa de Silva as a rickshaw puller. Muttusamy had also worked at various intervals as a resident labourer under the accused on Piyadasa de Silva's estate. In May, 1946, after having been away Muttusamy returned and with the deceased Baby Nona was employed on the estate. They were also given accommodation on the estate. The names of Muttusamy and Baby Nona appear in the check roll of the estate up to October 17, 1946. At the time when these murders are alleged to have taken place the accused had in his employment as cook a boy called Wilfred, 16 years old. He was living in the accused's bungalow together with Jayaratne who was 23 years old and was employed as a tapper. Jayaratne was a relation of the accused. No one else lived in the latter's bungalow, but just outside the boundaries of the estate was the house of Banda, Wilfred's father. His daughter, Jane Nona, a sister of Wilfred and another son Edwin or Arnolis, lived with him. It was proved in evidence

that the house in which the deceased were living was between the accused's house and Banda's and was 418 yards from the former and 484 yards from the latter. A footpath running through the estate passed by all three houses. It was in evidence that the accused had been intimate with the deceased Baby Nona and used to visit the house of Baby Nona during the days when Muttusamy was not there. Baby Nona was pregnant at the time of her death. According to the witness, Wilfred, Muttusamy quarrelled with Baby Nona about 4 p.m. on the day before these murders are alleged to have taken place. This incident took place on the hill near the accused's bungalow and the accused is said to have intervened. This was the last occasion on which the witness, Wilfred, saw the three deceased. This quarrel between Muttusamy and Baby Nona does not appear to have been of a serious character as a witness called Erolis testifies to the fact that all the deceased came to him that night with some paddy to be pounded and that when they left Muttusamy and Baby Nona appeared to be friendly and the child was carried by Muttusamy.

Wilfred and Jayaratne in their evidence state that the accused on the night in question after dinner went out of his bungalow taking the estate gun, cartridges and a torch with him. Wilfred says that the cartridges were imported. Jayaratne says that the accused went in the direction of Muttusamy's hut. Both witnesses say that later they heard the report of a gun. Jayaratne says that it was 5 minutes after the accused left the hut and Wilfred says that he heard the report as he was falling asleep. Wilfred also states that he got up early in the morning and the accused had not then returned. He returned while Wilfred was boiling water, bringing the gun and the torch with him. He was perspiring and said he had shot at a bandicoot. He had his tea and saying he must go out again with his dog he went out with his gun and dog. Jayaratne states that he spoke to the accused when he came in and the latter said that he did not shoot at anything. According to Jayaratne the accused went away and returned about 9 a.m. and told Jayaratne that Muttusamy and his family had bolted. After the accused had gone away the first time a rubber tapper called Samathapala, according to Wilfred, came to the bungalow about 7.30 or 8 a.m. to see if tapping was being done. Samathapala and Wilfred then went in search of the accused. They arrived at Muttusamy's house. As they arrived a stench came from the house. The door was ajar, they looked in and saw a heap of ash and blood and also a hole in the back wall opposite the door. They also saw drag marks from inside the house to the outside. At the back of the house they saw the accused's dog swallowing some dark flesh. They then went towards the jungle. The accused came up dressed in a white sarong with the upper part of his body bare. He had soot marks over his body and chest. He said he got those soot marks following the track of a wild boar. He told Samathapala that there would be no rubber tapping today and when asked about the smell said that when tracking after pigs he fell over a heap of burnt logs. Wilfred and Samathapala then returned to the bungalow of the accused and the latter went away. Normally accused, according to Wilfred, has his meal at 12 noon. As he had not returned by 2 p.m. Wilfred went in search of

him. He went to the house of Muttusamy which he now found locked with a padlock. He then went down the hill and found the accused digging a large hole in the jungle in the bed of a drain. Wilfred also saw two human heads. The teeth and heads were blackened. One head was larger than the other. Wilfred also caught the smell of burning. The larger head was that of a grown up person and had ears, nose and two eyes and was blackened. Wilfred could not identify it. The smaller head was also blackened and burnt and was according to Wilfred the head of a child. Wilfred also saw one hand with fingers. It was the hand of a grown up person and had been cut and severed. He also saw the hand of a child, two legs, and the trunk of a grown up person. Wilfred asked the accused what the pieces were and the accused rushed at him and said "It is none of your business, you better go away." Wilfred then ran to his father's house and told the latter that the accused was trying to bury some dead bodies. Banda returned with Wilfred and questioned the accused. The accused first of all denied he was burying dead bodies, but a short while after, according to Banda, said with some hesitation "Muttusamy has killed his wife and gone away". Banda then states that he said to the accused "If Muttusamy had killed them and gone away, what are you doing?" The accused said "Well I am covering them up." Banda and Wilfred then went to the bungalow of the accused. The latter arrived home about 4 p.m. with his sarong washed. Three days later Wilfred says that he and Jane Nona, his sister, at the request of the accused helped the latter to mud the house where the deceased had lived. During these three days Wilfred says the hole in the wall had been closed. On the day after he had seen the accused burying the bodies he had been to Muttusamy's house and taken some wadding out of this hole. He showed it to the accused who threw it into the jungle.

According to the evidence of Wilfred the accused and Jayaratne were friendly after the disappearance of Muttusamy and his family and were talking in secret. About three weeks after their disappearance he saw Jayaratne chopping firewood on the hill. This was at the place where he had previously seen the accused burying the bodies. Wilfred also states that Jane Nona his sister spent a night with the accused in his bungalow and that after that Jane Nona became the mistress of Jayaratne. About a month after the disappearance of Muttusamy and his family Jayaratne and Jane Nona went into occupation of Muttusamy's house. This witness also states that two weeks after the disappearance Lucy Nona, Baby Nona's sister, came and asked after Baby Nona. The accused told her that all three had bolted from the estate. The accused also gave Lucy Nona money and sent her away. This evidence was corroborated by Lucy Nona herself. Wilfred also states that after the disappearance he saw Muttusamy's ration book with the accused. Wilfred further states that the accused threatened to kill him if he told anyone about what had occurred.

The witness Jayaratne states in his evidence that when the accused told him that Muttusamy and his family had bolted his suspicions were not aroused in any way. Some days later he saw the accused burning something in the jungle. The accused asked him to cut firewood. A

gunny bag was brought from the jungle by the accused. It contained blue shorts similar to a pair worn by Muttusamy. Also a waistcoat which he identified as the latter's. There were also bones in the bag which were burnt. The accused then burnt the bag and its contents. Then Jayaratne says his suspicions were aroused and he questioned the accused. The latter said Muttusamy had bolted after killing his wife and child. His suspicions were allayed and he helped the accused to dispose of the bones. This incident took place about three months after the disappearance and about the time he took Jane Nona as his mistress. He says that the small bits of bone were grounded by the accused on a stone. Later when clearing the jungle with Handy, Gunawathie, the latter's sister and Jane Nona he came across a cane box containing clothes. He informed the accused about it. This box was burnt with the clothes.

The first report made to anyone in authority was that of Banda who a few days before Christmas complained to Piyadasa de Silva that the accused kept his daughter on the estate for two days and now she was living with Jayaratne. According to Mr. de Silva, Banda was angry about it. Mr. de Silva said he would enquire into the matter. Banda also told him that Muttusamy had run away after killing his wife and child. Mr. de Silva says that he visited the estate before Christmas but did not question the accused about Muttusamy and his wife. He says he did not believe Banda. The evidence of Banda does not tally with that of Mr. Piyadasa de Silva. Banda states that he told Mr. de Silva that the accused buried Muttusamy's wife and child saying that Muttusamy had killed them and gone away. This was the first time he mentioned it to anybody. Later he told one Nanayakkara, the Manager of the Co-operative Stores at Porawagama. The latter on February 1, 1947, made a complaint to the Assistant Superintendent of Police at Galle. The Police then instituted enquiries. Statements were taken from Banda and Wilfred. A. S. P. Poulter visited the scene on February 7, 1947. The Government Analyst also visited the place and its surroundings. The latter has identified a piece of wadding and card-wadding found by the Sub-Inspector behind the house of Muttusamy as portions of wadding found in Ely-Kynoch cartridges. The examination of slugs found by the Police did not carry the case for the Crown any further. With regard to the evidence of Wilfred as to having seen a hole in the back wall the Government Analyst stated that a shot fired from the door if it went through a human body would not have penetrated the rear wall. Dr. Chanmugam, Professor of Anatomy in the University of Ceylon, gave evidence as to the nature of the bones which had been dug up by the Police from a mound on the eastern side of Muttusamy's house. Dr. Chanmugam states that P1 contains a piece of human adult bone from the head, sex indeterminable. There were signs of charring and burning. P 7 was the right knee bone of an adult, sex indeterminable. P 15 contained a portion of the right human rib of an adult. In this exhibit there was a small portion of a human face. Some of these bones had been subjected to heat. P15A was the milk tooth of a child under 8 years of age. It was in evidence that Hemalatha was 5 years old.

The accused who elected to give evidence on affirmation, stated that he was on intimate terms with Baby Nona and that he had intervened in a dispute between Muttusamy and Baby Nona and told Muttusamy not to assault her. He was also the watcher of the estate and on the night that Muttusamy disappeared he went out on his night round. He had his gun, a torch and 5 or 6 foreign made cartridges with him. It was about 11 o'clock when he reached the compound of Muttusamy's house. He saw his door open and called out. Then he saw Baby Nona lying inside the house near the doorstep. There were blood stains on her jacket. The little child was nearby with stains of blood on her. As Muttusamy was not to be seen he took to his heels as he got frightened and went back to his wadia. He shouted "Jayaratne" as he ran. Both Jayaratne and Wilfred came out from the wadia and asked what was the matter. He said he found Muttusamy's wife and child murdered and Muttusamy not about the place. He asked them what they should do about it and whether they should inform the Police. Jayaratne said "We cannot get out at this moment. We might get involved in this." He got frightened and they arranged they should summon Banda who was an elderly man from whom one could seek advice. Through fear they did not fetch Banda that night. Next morning they went to Muttusamy's house and Wilfred fetched Banda. They saw broken pots and pans in the kitchen and stabs over the corpses. As they came out of the house Banda said "You were also on terms of intimacy with this woman and that might come out in this affair. The best thing is to eliminate the dead bodies and say all have run away." They all agreed to hide the whole affair. Jayaratne was left to watch the house which was closed. The accused then set the workers to work. He could not take his mid-day meal through fear. After meal time they went to Muttusamy's house and Edwin and Jayaratne dug the grave and put the bodies into it. They scooped up the blood on the floor and covered up the hole with mud. Into a pit nearby they put the broken pots and clothes and cane box with clothes. Subsequently he arranged for Jayaratne to take Jane Nona as his mistress as she was being beaten at home by Edwin her brother. He put them in Muttusamy's bungalow. Banda was angry with him after this. Later he got frightened and dug up the grave, exhumed the bodies and put them in a fire prepared by Jayaratne and Edwin. The following day the mud pit was opened and the things taken out and burnt.

One of the points taken by Dr. Colvin de Silva is in connection with the evidence of Jane Nona. This witness stated in cross-examination that on the morning of the disappearance she left the house of her father Banda just after dawn. She came to Muttusamy's house and saw that it was locked with a padlock and a large volume of smoke was emerging through the roof and walls. There was also a bad smell. Jane Nona then says she passed the wadia of the accused and was about to tell the people there what she had seen when the accused came up and put his hand over her mouth. When she returned from work Muttusamy's hut was still smoking. The other witnesses for the Crown were not questioned in regard to Jane Nona's evidence. Dr. de Silva takes the point that they should have been re-called by the Attorney-General.

We think there is no substance in this complaint. The evidence was elicited in cross-examination and was not part of the Crown's case. Dr. de Silva could himself have asked for the re-call of the other witnesses.

The main point taken by Dr. de Silva on behalf of the appellant is that there is no proof that Muttusamy is dead. In these circumstances the first count in the indictment is not established. With regard to the second and third counts Dr. de Silva argues as follows: The Crown put forward as the motive for the killing of Baby Nona and Hemalatha the fact that they were privy to the killing of Muttusamy. In these circumstances if it is not proved that Muttusamy is dead the convictions of the accused on counts 2 and 3 cannot stand. The first question that requires consideration is whether there is in law sufficient proof that Muttusamy is dead. No portion of his body has been identified. In these circumstances does the evidence surrounding the whole affair establish that he is dead? This evidence is purely circumstantial. In regard to the English Common law the caution laid down by Hale was that a man should never be convicted of murder or manslaughter on circumstantial evidence alone, unless the body has been found. This caution, however, according to later opinion need not be followed when very strong circumstantial evidence of death can be given (Archbold 27th edition p. 866). In this connection I would refer to the cases of *R. v. Hindmarsh*¹, *R. v. Cheverton*², *R. v. Hopkins*³. In *R. v. Hopkins* the Jury were told by the Judge to acquit the accused. In *R. v. Cheverton* the case was allowed to go to the Jury and the accused was found not guilty. In both cases the body of the deceased was not found and the principle formulated in Archbold was followed. It was also followed in *R. v. Hindmarsh* where the accused was convicted although the body was not produced. In this case the murder took place at sea and there was evidence that the accused was seen to take up the deceased, the Captain, and throw him overboard into the sea and that he was not seen or heard of afterwards. The evidence establishing the death of the deceased is much stronger than in the present case. We have also been referred by Mr. Fernando to the law in India as laid down by Gour in the 5th edition of the Penal Law of India p. 1019. In paragraph 3390 the learned author refers to the caution formulated by Hale. In paragraph 3392 he states as follows:—

“ But, of course, having regard to the definition of ‘ proved ’ given in the Indian Evidence Act, there is no room for the ‘ body ’ doctrine. The existence of the body is no doubt a proof positive of the death ; but its absence is not fatal to the trial of the accused for murder. It is no doubt a material circumstance which the Court or the jury have to bear in mind in arriving at their verdict, but that is all. Indeed, any other view would place in the hands of the accused an incentive to destroy the body after committing murder and thus secure immunity for their crime. To recognise such a principle, would, in some instances, under the administration of justice, be impossible. Of course, in such cases there may remain a doubt as to the actual death of the victim, but if such doubt is reasonable, the

¹ 168 E. R. 387.

² 175 E. R. 1,308.

³ 173 E. R. 631.

prisoner is entitled to an acquittal. If it is only a doubt, the Court may regard it as sufficient not to justify the passing of the extreme penalty, but it can never by itself be a ground for acquittal.”

In paragraph 3394 it is stated as follows :—

“So far as this country is concerned, it may then be taken to be now settled, that there is no rule of law that no person shall be convicted of murder unless the body of the murdered person has been found. When the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was so committed is as safe as any other such inference ; so Glover J. upheld the conviction of the accused for murder on their confession corroborated in some particulars by circumstantial evidence. The accused confessed that the deceased had an intrigue with the accused Pettah's wife. He plotted with the other two accused to lie in wait for him on his next visit ; they then attacked him and killed him outright with lathies, and afterwards buried him in a grave close by a pond. Their confession led to the discovery of a grave, which was, however, empty, but in which there were found two pieces of cloth belonging to the deceased on the night of his disappearance, and strong smell of decomposed matter pointing to the recent removal of the body. There were marks on the earth close by, as if a body had been dragged along. Their confession was most circumstantial, and the Court held it to be sufficient to support their conviction notwithstanding the non-discovery of the body ”.

The evidence against the accused in the case referred to in this paragraph was much stronger than in the present inasmuch as the confession made by the accused proved the death of the deceased beyond all reasonable doubt. In the *Empress of India v. Bhagirath*¹ it was held by Straight J. that the mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the accused person of the murder. In *Adu Shikdar v. Queen Empress*², it was held by Norris J. that he would require the strongest possible evidence as to the fact of murder if the dead body was not forthcoming. I would also invite attention to the 7th edition of *Wills on Circumstantial Evidence*. At p. 346 it is stated as follows :—

“In cases of homicide three propositions must be made out in order to establish the *corpus delicti*. (1) That a death has taken place. (2) That the deceased is identified with the person alleged to have been killed. (3) That the death was due to unlawful violence or criminal negligence : and it is not till these propositions have been proved that the question—not included in the inquiry as to the *corpus delicti*—is the accused or suspected person the culprit, arises.”

In the present case the death of Muttusamy has not, in our opinion, been established beyond all reasonable doubt. The bones discovered have not been identified as belonging to him. It is possible that on the night of the murder of Baby Nona and Hemalatha, Muttusamy escaped

¹ *I. L. R.* 3 Allahabad 385.

² *I. L. R.* 11 Calcutta 636.

and is in hiding through fear. There was no evidence of Police or other search for Muttusamy. He may be alive. In these circumstances as he is not proved to be dead the question as to whether the accused is the killer does not arise. The verdict of guilty on count 1 must be set aside.

With regard to counts 2 and 3 we are not prepared to assent to the proposition put forward by Dr. Colvin de Silva that because of the motive put forward by the Crown the convictions of the accused on these counts cannot be maintained. Proof of motive was not a requisite for conviction. Nor was the Jury so charged by the learned Commissioner. The question is whether the evidence established these charges beyond reasonable doubt. The only evidence against the accused being of a circumstantial nature it must be only consistent with his guilt and incompatible with innocence. We think it was. The chain of circumstances clearly establishes his guilt. It is true that the motive may be obscure. On the other hand if the evidence of Wilfred is accepted the following facts are established :—

- (a) The accused with his gun, cartridges and a torch left his house on the night of the murder about 8 p.m. ;
- (b) Shortly afterwards a shot was heard from the direction of Muttusamy's house ;
- (c) The accused did not return to his house that night ;
- (d) He returned in the morning while Wilfred was preparing tea. The accused was perspiring and asked if he had shot anything said he shot at a bandicoot. To Jayaratne he said he did not shoot at anything ;
- (e) About 9 a.m. Wilfred and Samathapala went to the house of Muttusamy. They got a stench. They saw ash and blood and a hole in the back wall. Also signs of something having been dragged from inside the house. They also saw a dog swallowing some dark flesh ;
- (f) Towards the jungle they met the accused with soot marks all over his body and chest. He said that he got the soot marks through following a wild boar and that he fell over some burnt logs ;
- (g) At 2 p.m. Wilfred again went to Muttusamy's house and found the door locked with a padlock. Down the hill he saw the accused digging a large hole in a bed of a drain in the jungle. He was preparing this hole for the disposal of various human remains including two heads one larger than the other. Asked by Wilfred what the pieces were he rushed at him and said it was none of Wilfred's business and he had better go away ;
- (h) On the arrival of Banda on the scene he said that Muttusamy had killed his wife and child and run away and that he, the accused, was covering them up.

There is also the evidence of Jayaratne as to the later activities of accused and himself in burning bones and belongings of Muttusamy and his family, which the accused brought in a gunny bag from the jungle. According to Jayaratne the bones before being burnt were ground on a

stone. There was also the burning of the cane box with its contents. The evidence of Lucy Nona to the effect that the accused told her that all three had bolted from the estate also points to the guilt of the accused. There is also the evidence of the attempts made to cover up the events of that night by mudding the bungalow of Muttusamy. The evidence of Professor Chanmugam proves that the remains of bodies produced in Court were from an adult and a child. The finding of wadding by the Police is consistent with the firing of an imported cartridge from a double-barrelled gun. Even without the evidence of the accused the facts elicited by the Crown point in one direction and in one direction alone and that is to say the guilt of the accused. The evidence of the accused and his attempts to explain his behaviour in failing to notify the authorities of the discovery of the bodies of Baby Nona and Hemalatha and in disposing of them only serves to emphasize his guilt. No other explanation of his conduct is possible. His suggestion that in failing to notify the Police and in disposing of the bodies he acted on the advice of Banda is just not credible having regard to their relative positions. Nor can it be accepted that he acted through fear. If Muttusamy had run away how could the accused possibly be suspected of committing this crime? The chain of evidence against him is complete.

In addition to the points I have mentioned Dr. Colvin de Silva made certain complaints in regard to the learned Commissioner's charge to the Jury. Taking the charge as a whole we think that the case was fairly and squarely put to the Jury.

In the case of count 1 the appeal and application are allowed and the conviction is set aside. In regard to counts 2 and 3 the appeals and applications are dismissed.

*Conviction on count 1 set aside.
Convictions on counts 2 and 3 affirmed.*
