

1899.
March 29.

QUEEN v. VINASITAMBY *et al.*

D. C., Jaffna, 1,575.

Concealment of birth of child—Evidence of concealment—Penal Code, s. 309.

Where three women were present at a confinement, including the midwife and a married daughter of the woman confined, and the stillborn child was handed to two men for burial, and they buried it according to the custom of the village in a private compound without taking it to a burial ground—

Held, that such burial was not a secret disposal intended to conceal the birth of the child.

THE indictment charged the three accused in the case with endeavouring to conceal the birth of a child delivered by one Valliammai, by secretly disposing of the dead body of the said child on the 26th November last, and so committing an offence under section 309 of the Penal Code.

The District Judge acquitted the third accused, who was the midwife who helped at the delivery, as there was no evidence against her, but found the first and second accused guilty and sentenced them to rigorous imprisonment for six months and one month respectively.

The District Judge rested the conviction of the first accused (who kept Valliammai as his mistress), on his own admission and the evidence of the Police Sergeant. The admission referred to was that he was the father of the child, and that after its death that the body was handed by some one in the house to the second accused, and that he and the second accused buried it in his (the first accused's) land. The Police Sergeant deposed that the first accused denied that the body was buried in his premises, but afterwards admitted it and pointed out the place of burial, which was "between two tobacco nurseries, and the whole place was "covered up to prevent detection." As regards the second accused, Ponnachi deposed that she handed the body to the second accused, who and the first accused buried it in the compound of the first accused, as the compound of Valliammai was flooded

with water. It was elicited in cross-examination of two of the witnesses for the prosecution that, if a child was stillborn or died soon after its birth, it was not usual to take the body to a burial ground, but to bury it in a private compound.

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On appeal, *Asserappa* appeared for accused, appellants ; and *Ramanathan, S.-G.*, for respondent.

29th March, 1899. *WITHERS, J.*—

It is proved that the dead body of the illegitimate child of the witness Valliammai was buried by the first and second accused in the compound of the first accused, which adjoins that of the witness Valliammai. The first accused was at the time living with his lawful wife in the compound where the child was buried. The witness Valliammai had lost her husband some sixteen months before, and the first accused used to cohabit with her. The first accused admits that he is the father of the child, and that he buried its body in the compound. Two questions arise here : Was this a secret burial ? And did the accused by this secret burial intentionally conceal or endeavour to conceal the birth of this child ?

The District Judge has answered both questions affirmatively against the accused. He says, the only conclusion to be drawn from the above facts is that the accused intentionally endeavoured to conceal the birth. There are, however, important facts in the case to which the District Judge has not adverted in his judgment. There were three women present at the birth of the child. The mother's married daughter Ponnachi, another Valliammai, and the third accused, who was called in as a midwife.

It is not alleged that either of the accused even denied the birth of the child. Further, it is proved that it is customary to bury a stillborn child in the compound of the house in which it was born. Here it was not buried in its mother's compound because the ground was all under water at the time. It was a wet day when the body was buried, and first accused says there was no other place to bury it but his compound. The evidence is that the child was stillborn, and this is not contradicted by the statement of the doctor that the child had breathed, for a child may breathe and die before the child is born. I mention this as there is nothing to indicate the perpetration or concealment of a crime.

Taking all the circumstances into consideration, it is in my opinion not made out by the prosecution that the accused intended to conceal the birth of the child.

I therefore set aside the judgment and acquit the accused.