[CROWN CASE RESERVED.]

1920.

Present: Bertram C.J., De Sampayo J. and Schneider A.J.

THE KING *v.* THAMBIPILLAI.

P. C. Jaffna, 9,101.

No. 3, First Northern Circuit, 1920.

Murder by some of several persons—Accused acquitted as jury could not tell which of them committed the murder—Conviction for causing evidence to disappear—Penal Code, ss. 198 and 296.

The accused, who were all found carrying off a dead body, were charged with murder and under section 198 of the Penal Code, with having caused evidence of the commission of the offence to disappear. The jury was of opinion that one or more persons among the accused committed the murder, but they could not say which of them did it. The jury acquitted the accused on the charge of murder, and convicted them on the second count.

Held (De Sampayo *dissentiente*), that the conviction on the second count was not illegal.

BERTRAM C.J.—The evidence being the same in both cases, I see nothing unreasonable in the actual crime and the subsidiary offence being charged in the alternative, so that if the jury are not satisfied as to the former, they may at least convict the offender of the latter.

THIS case was reserved for consideration by a Bench of three Judges by the Chief Justice.

The facts are set out in the following minute of the Chief Justice:—

1. In this case six persons were indicted on two counts: The first, charging them with murder; the second, with causing evidence to disappear under section 198 of the Ceylon Penal Code.

2. Four of the accused were related, the second, third, and fourth accused being uncles of the first accused. The fifth accused was of an inferior caste, a dhoby, and was said to wash for the first four accused, who were dyers. The sixth accused was also of an inferior caste, and was not shown to be in any way connected with the others.

3. The body of one Sinnatamby Kanagasabai was found hanging on a well sweep in the precincts of a temple under such circumstances that the jury were satisfied that he had been first murdered by strangulation, and that afterwards his body was hung up in such a way as to produce the appearance of suicide.

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4. The principal witness was one Manikkan Sathasivam, who swore that on the night of the murder he saw all six accused carrying the body of the deceased towards a well sweep. Another witness swore that on the same night at a junction of a road and a path leading to the deceased's house he saw the first accused holding a rope, the sixth accused standing near him, and four or five others bringing a body along the lane. A third witness swore that he passed the deceased's house that night, heard a cry of distress, and saw at the gateway the second accused, who explained to him that the noise he heard was that of somebody snoring.

5. After the case before the Magistrate was complete, a new witness appeared in one Sittampalam Ambalavanar, a remand prisoner, who posed as an ascetic, and was awaiting trial on a charge of abduction. He deposed to a series of conversations in the remand prison with the first, second, and third accused. According to this witness, the first prisoner confessed that he had assisted in the concealment of the body, but explained that neither he nor the fourth accused had any part in the actual crime; that they had arranged to seize and rob the deceased, but on arriving at the spot found that their two partners in the design—the second and third accused—had anticipated them, had gone further than was intended, and had actually killed their victim. The conversation imputed to the second and third accused consisted of mutual recriminations, each imputing the chief responsibility of the crime to the other. The effect of this evidence was to exonerate altogether the fifth and sixth accused, and the Crown, accepting this witness's evidence, did not press the charge against them.

6. The witness was of such a character, and his evidence was of so hypocritical and treacherous a description, that no jury would have been warranted in giving any decisive weight to it against any person accused of a capital charge. Moreover, in so far as it specially implicated the second and third accused, it was inconsistent with the medical evidence.

7. I recommended the jury to acquit the sixth accused, whose presence in the situations in which he was seen by the witnesses was consistent with his innocence. With regard to the fifth accused, who gave evidence of an *alibi*, and who was exonerated by the first accused in the alleged conversation reported by Ambalavanar, I left it to the jury to say whether they were satisfied that he was actually one of the party.

8. With regard to the other accused, I directed the jury that if they accepted Sathasivam's evidence, and were satisfied that the only reasonable inference from the situation in which the four men were seen by Sathasivam was that they all concerted the murder, they should find them all guilty of murder, notwithstanding that all may not have actually laid hands on the deceased. I further said, while it would be dangerous to act upon the evidence

of Ambalavanar against any person in particular, yet if his evidence suggested in their minds any reasonable doubt as to the guilt of any persons among the accused, those persons were entitled to the benefit of the doubt.

9. I further told them that if they were not satisfied that the evidence justified them in saying that all the accused were actually guilty of the murder, or in singling out any particular persons among them as especially responsible, they would be entitled to find them all guilty of the second count, notwithstanding that they might be of opinion that one or more of them must have carried out the murder.

10. The jury acquitted the fifth and sixth accused, and found the others guilty on the second count. They explained to me that though they were satisfied that the deceased was murdered, they did not feel justified in finding on the evidence that all the four concerted the murder, or that all had an actual hand in it. I sentenced the four accused so convicted to seven years' rigorous imprisonment.

11. As the direction recited above in paragraph 9 was inconsistent with certain Indian cases, which were referred to in text books, but the *ratio decidendi* of which was not available for examination at Jaffna, I have reserved the question of the correctness of this direction for a Bench of three Judges.

A. St. V. Jayawardene (with him *Peri Sundaram*), for accused.—The jury has found as a fact that it was one or more of these four accused that committed the murder, but they could not say which of them did it. Thus, it was proved, and not merely suspected, that the actual murderer was one or more of the accused. Therefore, they cannot be charged under section 198, Ceylon Penal Code, with having caused the evidence of the offence to disappear. *Limbya.*[1] The person charged under this section cannot be the person charged with the principal offence. This section deals with "accessory after the fact," and does not apply to the principal offender himself, who cannot be prosecuted for obliterating the traces of his own crime. *Gour's Indian Penal Code, 2nd ed., para 1861; Reg. v. Kashi Nath,* [2] *Sumanta Dhupi*[3].

If this conviction stands the actual murderer himself would be punished, which is contrary to the Indian authorities. *Gour, para 1867; Torap Ali v. Queen Empress.*[4]

When the Ceylon Legislature introduced the Penal Code in 1883, after these Indian decisions, it must be presumed that it accepted the interpretation put on the corresponding section by the Indian Courts. The Indian decisions are very clear that the principal cannot be convicted of the secondary offence of concealing evidence

[1] *(1895) B. U. C. 799.*
[2] *(1871) 8 Bom. H. C. R. 126.*
[3] *(1915) 20 Cal. W. Notes 166.*
[4] *(1895) 22 Cal. 638.*

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of the crime. *Queen Empress v. Lalli;*[1] *Empress v. Kishna;*[2] *Queen Empress v. Nahala Bibi;*[3] *Queen Empress v. Dungar;*[4] *Starling's Indian Criminal Law, 8th ed., p. 285.*

Akbar, S.-G. (with him *Dias C.C.* and *Jansz C.C.*), for the Crown.—The Indian decisions are not binding on us. *The King v. Jeeris* [5] and our Courts have declined to follow them in certain cases. *Rex v. Asirwatham;* [6] *Rex v. Kalu Banda.*[7]

In *Torap Ali v. Queen Empress* [8] the Judges followed the decisions in the Bombay reports. The reasons given in the Bombay reports are first, that this section introduced what is known to the English Law as " accessory after the fact." This will not apply to our law, as section 209 of the Ceylon Penal Code makes provision for " accessory after the fact." The addition of the words " assists or maintains " in section 209 was clearly meant to provide for " accessory after the fact. " A second reason is that this section 201, I. P. C. (section 198, C. P. C.), must be read with the two following sections 202 and 203, I. P. C. (sections 199 and 200, C. P. C.), which clearly do not apply to the principal offender. It is clear that section 199 cannot apply to the principal offender, because an offender is not legally bound to give information of his own crime. But there is no reason why section 200, C. P. C., should not apply to the principal offender as well. The words are wide enough to include the principal offender. A third reason is that the only illustration to section 198 shows that it was not meant to apply to the principal offender. But the illustrations are not always exhaustive. Therefore the Indian decisions should not be followed.

If the principle of the Indian decisions is right, then even a man who stands on guard to enable an offence be committed would not be within the section, as such a man is " principal offender, " yet such a case is clearly within the words of the section.

A. St. V. Jayawardene, in reply.

May 27, 1920. BERTRAM C.J.—

The facts in this case are sufficiently explained in my minute. Briefly stated the question is this. If several persons are detected in the act of causing evidence of a crime to disappear with a view to screening the offenders, are the jury precluded from convicting them under section 198 of the Penal Code, if they feel satisfied from the circumstances of the case that one or more of the persons charged must have been actually guilty of the crime, though the

[1] *(1885) 7 All. 749.*
[2] *(1880) 2 All. 713.*
[3] *(1881) 6 Cal. 789.*
[4] *(1886) 8 All. 252.*
[5] *(1905) 1 Bal. 185.*
[6] *(1914) 18 N. L. R. 11.*
[7] *(1912) 15 N. L. R. 422.*
[8] *(1895) 22 Cal. 638.*

evidence may not justify them in attributing this guilt to any one of them in particular?

The Indian Courts have answered this question in the affirmative, They have held not only—

(a) That a man cannot under section 198 be found guilty of concealing evidence of his own crime, but also—

(b) That where, as in the present instance, the actual authors of a crime are uncertain, but may, nevertheless, be considered as certainly included in the group of persons engaged in concealing evidence of the crime, this circumstance is fatal to the conviction of any member of the group for the latter offence. As one of them must, and all of them may, be guilty of the crime, none of them can be found guilty of the subsidiary offence.

The authorities for the first proposition, amongst others, are *Regina v. Kashinath Dinkar*,[1] *Queen Empress v. Dinkar*,[2] *Queen Empress v. Nahala Bibi*,[3] *Queen Empress v. Lalli*,[4] *Queen Empress v. Dungar*,[5] *Ghanasam*,[6] *Sumantha Dhupi*.[7]

The authority for the second proposition is the case of *Torap Ali v. Queen Empress*.[8] This case is, indeed, on all fours with the present case. It has been distinguished and dissented from in a subsequent case *Limbya*,[9] but unfortunately the grounds on which the case was distinguished are not fully before us.

Though we always treat Indian authorities with respect, more especially where, as in this case, they consist of a long chain of decisions, which have established a settled practice, we are not in fact bound by them. See *The King v. Jeeris*.[10] This Court has in more than one instance declined to follow a line of Indian authorities. Thus, in *Rex v. Asirwatham*[11] this Court declined to give to the word "fraudulently" the restricted signification in which the decisions of the Indian Courts had gradually involved it and in *Rex v. Kalu Banda*[12] this Court, dealing with the subject of confessions, did not follow the Indian doctrine that a statement made for the purpose of exculpation is not a confession.

What we have to decide in this case is, in effect, whether, in our opinion, the case of *Torap Ali v. Queen Empress*[8] was rightly decided, and as that case was decided upon the basis of the preceding authorities, we have also to ask ourselves whether we adopt the reasoning of these previous authorities.

[1] *(1871) 8 Bom. H. C. Cr. 126.*
[2] *(1880) 2 All. 713.*
[3] *(1881) 6 Cal. 789.*
[4] *(1885) 7 All. 749.*
[5] *(1886) 8 All. 252.*
[6] *(1906) 8 Bom. L. R. 538.*
[7] *(1915) 20 Cal. W. N. 166*
[8] *(1895) 22 Cal. 638.*
[9] *(1895) B. U. C. 799.*
[10] *(1905) 1 Bal. 185.*
[11] *(1914) 18 N. L. R. 11.*
[12] *(1912) 15 N. L. R. 422.*

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An examination of that case and the preceding cases discloses that their *rationes decidendi* may be classified under three heads, all of which are recapitulated in the the judgment of the Court in *Torap's case*[1]:—

(*a*) The section was intended to give effect to the English law relating to accessories after the fact, and therefore cannot apply to a principal offender.

(*b*) It has to be read in conjunction with the two following sections, both of which commence with the same formula: " Whoever, knowing or having reason to believe that an offence has been committed. " As " it is evident " that both these sections have no application to the persons who committed the offence (see *per the Court in Torap's case*[1] on page 540, adopting the reasoning of the Court in *Regina v. Kashinath Dinkar*),[2] so also the present section can have no application to such persons.

(*c*) The only illustration appended to the section indicates that it was intended to apply only to persons other than the principal offender.

With every respect to the learned Judges who have propounded them, it cannot be said that any of these reasons is convincing. With regard to the first—the supposed intention to embody in the Code the English law as to " accessories after the fact "—the Indian legislative history of the corresponding section prior to its enactment is given in *Gour, 2nd ed., para 1857*. It appears that it originally stood as section 106 in the chapter relating to abetment. It was decided, however, to adopt the view of the English Law Commissioners who were at the time examining the Criminal Law of England, and to discontinue " the provisions as to accessories after the fact, the offence of parties falling within this description at present being for the most part referable to the class of offences against public justice. " Accordingly, " subsequent abetment " disappeared from the draft Code, and the section, together with other sections, including that relating to " harbouring " (our section 209), was transferred to the chapter relating to " Offences against Public Justice. " These historical circumstances are no doubt most interesting. They may be used for the purpose of suggesting an interpretation of the section, but they cannot control its construction. The fact that the section was removed from the chapter on " Abetment " neither requires nor entitles us to construe it as though it was still there. It must now be construed in accordance with its actual terms, and in connection with the context in which it is, in fact placed. Even if the section were intended to embody the doctrine, or an aspect of the doctrine, in question, the scope of its application must be

[1] *(1895) 22 Cal. 638.*

[2] *(1871) 8 Bom. H. C. Cr. 126.*

determined, not by the limitations of this doctrine, but by its own terms. But I am by no means clear that the origin of this section was an attempt to formulate the English doctrine as to " accessories after the fact. " " An accessory after the fact, " says Lord Hale, in a definition which has always been treated as authoritative, " may be where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. " The whole of the material words of this definition (or synonymous terms) have been embodied in our section relating to " harbouring " (section 209), though this is not true of the corresponding Indian section. It would seem then that it is to that section and not to the section now under consideration, that we must look for an expression of the English law of accessories after the fact. Even, therefore, if we feel disposed to attach weight to the suggestion put forward in the Indian cases as to the supposed intention of the section we could not fail to be affected by the circumstance that in the Ceylon Code that intention has been fully carried out elsewhere. The section has to me not the air of an attempt to reduce to statutory form a recognized principal of the English common law, but rather of a specific enactment designed to give logical completeness to the branch of the subject comprized in this chapter of the Code.

With regard to the second *ratio decidendi* of the Indian cases, viz., that this section and the two following sections must be construed on the same principle, there seems to me very great force in the argument of the Solicitor-General that this is a begging of the question. So far as section 199 is concerned, its application to principal offenders is negatived by the express words of the section, which confine it to cases of omission to give any information which a man is " legally bound to give, " no man being legally bound to give information as to his own offences. But as to section 200, there is no reason why it should not be construed on exactly the same principle as section 198, even though section 198 is held to extend to the case of causing the disappearance of evidence of a man's own crime. Both sections can be construed in the same way in any event. I have some difficulty, therefore, in appreciating the force of this reasoning.

So also as to the third reason: That the section has only one illustration appended, and that illustration relates to a case of screening some one other than the author of the crime. I think that this can only have been mentioned as a incidental circumstance, and not as an argument. The object of an illustration is to illustrate, and not either to exhaust or to delimit a subject.

The reasons which have appealed to the Indian Courts seem, therefore, not of themselves sufficient either to demand or to justify a restrictive interpretation of the section. But there are other considerations to which my brother De Sampayo called

attention in the course of the argument, which I confess impress me more forcibly. It is difficult to believe that the draftsman of this section had in his mind the case of a man making away with the evidence of his own crime. If such a case had presented itself to him, he would have put it in the forefront of the section. He would surely have commenced: " Whoever having committed an offence, or knowing or having reason to believe that an offence has been committed . . . . " I think that this is undoubtedly so. I am less impressed by the suggestion that if he had intended to include this case, he would not have used the expression " screening the offender. " If the section were amended so as to include this case in express terms, it seems to me that the term " screening the offender " would remain unaltered. It appears to me as a most appropriate formula for embracing all classes of cases. But I agree that if the draftsman had contemplated the case of a man screening himself, he would have expressly mentioned it. I go further and say that in the context in which the section originally stood, the chapter on " Abetment, " he could not possibly have contemplated it; and further, that those who subsequently transferred it from the chapter on " Abetment " to the chapter on " Offences against Public Justice " had probably no conception that by so doing they were greatly enlarging its scope. But the intention of the Legislature with regard to any particular enactment is not to be determined by what was in the mind of the draftsman, but by the words which he has, in fact, employed, and which the Legislature has adopted, not by the context in which the enactment was originally placed, but by that in which it ultimately stands. There can be no question that the words " whoever knowing that an offence has been committed " are wide enough to include the case of the man who has himself committed the offence, or to take a case put by the Solicitor-General, who has stood outside on guard to enable it to be committed. Who knows better that an offence has been committed than the man who has committed it or who has stood by to ensure its commission? Why, then, should the words not receive their full significance? It is true that in the first of the two cases just mentioned they are not the most appropriate words, but that does not seem to me sufficient to exclude a case which they reasonably cover.

It would be otherwise if such a construction led to an absurdity, but the reasoning of the Sessions Judge, who was over-ruled in one of the Indian cases (*Queen Empress v. Dungar* [1]), seems to me to show that, on the contrary, it completes the logical scheme of the Code. It is quite true that under this construction cases may be imagined which impose an unreasonable burden upon human nature. But, on the other hand, it covers cases which ought to be provided for, and which otherwise are not provided for. It enables the Court

[1] *(1886) 8 All. 252.*

to say to a number of men who are found disposing of a dead body: "There is a moral certainty that some at least of you are the murderers, but it is impossible to say which of you. One thing, however, it is possible to say, that you are all engaged in making away with the evidence of the crime, and the law will punish you for that." The evidence being the same in both cases, I see nothing unreasonable in the actual crime and the subsidiary offence being charged in the alternative, so that if the jury are not satisfied as to the former, they may at least convict the offender of the latter Mr. Jayawardene asserts that under no civilized system of judicial jurisprudence is a man punished for concealing the evidence of his own crime. I do not know how that may be. I am by no means sure that under the English law the present case at any rate might not be indictable as a conspiracy to pervert the course of justice. But whether that is so or not, it is some satisfaction to feel that the present case is one which comes within the terms of our own Code.

For the reasons I have explained I am of opinion that the conviction and sentence should be confirmed.

DE SAMPAYO J.—

In this case six persons were charged on the indictment (1) under section 296 of the Ceylon Penal Code, with having murdered one Sinnatamby Kanagasabai, and (2) under section 198 of the Ceylon Penal Code, with having caused evidence of the commission of the offence to disappear by removing the dead body of Kanagasabai from the place where he was murdered and by hanging it up on a well sweep so as to produce the appearance of suicide. The jury acquitted the fourth and fifth accused altogether. They also acquitted the first, second, third, and fourth accused on the charge of murder, but convicted them on the second count of the indictment. With regard to this, the direction of the Chief Justice, who presided at the trial, as stated in the case reserved, was that "if they were not satisfied that the evidence justified them in saying that all the accused were actually guilty of the murder, or in singling out any particular persons among them as especially responsible, they would be entitled to find them all guilty on the second count, notwithstanding that they might be of opinion that one or more of them must have carried out the murder." I gather from the statement of the case reserved—and the argument before the full Bench proceeded on the footing—that the opinion of the jury was that one or more persons among the first four accused committed the murder, but they could not say which of them. The question for decision is whether the direction to the jury above recited was right, and whether the conviction can be sustained.

Having anxiously considered section 198 of the Penal Code, on which the second count was based, and the available authorities on the subject, I am of opinion that the question should be answered in the negative.

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Section 198 of the Penal Code is as follows: " 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, or with that intention gives any information respecting the offence which he knows or believes to be false, shall . . . . be punished with imprisonment, &c."

It seems to me that this language refers, and can only be reasonably construed to refer, to a case where the offence has been committed by a person other than the person who is charged with having caused the evidence of the offence to disappear. The expressions " knowing or having reason to believe " and " with the intention of screening the offender " should be specially noted. It is, of course, possible to say of a person who has committed the offence that he knows or has reason to believe that an offence has been committed. But then this language would be employed, not in the ordinary, but a non-natural, sense. Observe also the sentence " that an offence has been committed." There is an element of detachment and impersonality in this locution which cannot with propriety be predicated of the person who has himself committed the offence. Again, if the purpose is to convey that a person, having committed an offence, did something to ward off suspicion from himself, it would be an odd way of putting it to say that he thereby intended to " screen the offender." A man may " screen " another, but ordinarily you will not say that he screened himself. The second part of section 198, which provides against giving false information with the intention of screening the offender, will certainly not apply to the offender, for it cannot be supposed that the law intends to punish an offender for trying to defend himself by making false statements. The whole language of this section will be rendered quite inapt if it is construed to apply to the offender himself. One may not expect literary elegance in a legislative enactment, but one is surely entitled to expect clearness and precision. Judging by this standard, I am unable to hold that the Legislature, when it enacted section 198, meant what would require considerable straining of language to say that it did. An Ordinance, after all, employs the language of the average man, and I do not think that the average man will express himself in this manner. The fact appears to me to be that the chapter in which section 198 occurs only contains provisions in aid of justice. It is is headed " Of False Evidence and Offences against Public Justice." It first provides for punishing the offence of giving false evidence and fabricating false documents, and then come a group of sections which appear to me to have regard to the punishment of persons, who by certain acts and omissions protect real offenders from punishment and thus defeat public justice. Section 198 in question aims at punishing persons who cause evidence against an offender to disappear with

the intention of screening him from legal punishment. Section 199 provides against failure to give information respecting an offence in accordance with the duty of a good citizen, and section 200 against giving false information. It is agreed that section 199 does not touch the offender himself, and I think that, considering the context and the principles of English criminal jurisprudence, section 200 does not touch him either. Section 201 provides against the secreting or destruction of documents by a person who may be compelled to produce them, and section 202 against falsely personating another, and in that assumed character making any admission or statement. Without referring to all the sections in this chapter in detail, I may mention section 208, which penalizes the making of false charges against another person; section 209, which punishes the act of harbouring an offender, and section 210, which provides against the taking of any gratification to screen an offender from punishment. All the sections, including section 198 in question, appear to me to have one common aim, namely, to punish those who interfere with the course of justice by assisting actual offenders, and by defeating the efforts of the public authorities to secure the punishment of such offenders.

The same view as regards section 201 of the Indian Penal Code, corresponding to our section 198, has been taken by the High Courts of India. I shall not here cite all the Indian decisions on this point. They are all referred to in the recognized commentaries on the Indian Penal Code. I need only say that they constitute an uniform series of decisions extending from 1870 and earlier down to 1895, when *Torap Ali v. Q. Empress* [1] was decided. Nor need I concern myself with the reasoning by which these decisions were supported. For my purpose I only take note of the fact that in India, from which our Penal Code has been borrowed, the Courts have always consistently construed section 201 of the Indian Penal Code as being applicable only to a person other than the offender himself. The decisions of the Indian Courts are, of course, not binding upon us, but I am glad to find this catena of decisions, because they are in entire accord with my own reading of the section. I may say that the decision in *Torap Ali's* case has not really been dissented from in *Limbya*.[2] Those Bombay reports are not available to us, but there is a note of the case in *Gour*, from which it appears that all that was held in that case was that in order to exclude the offender himself from the operation of section 201, it must be admitted or proved that he in fact was the offender, and that a mere suspicion against him would not be sufficient, but the principle of the decision in *Torap Ali* and the previous cases was otherwise accepted and followed. It is in view of this ruling that I mentioned what the opinion of the jury was with regard to the charge of murder against the prisoners.

[1] *(1895) 22 Cal. 638.*

[2] *(1895) B. U. C. 799.*

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In my opinion, then, a person who has himself committed an offence cannot be convicted under section 198 of having caused any evidence against him to disappear. There remains the subsidiary question whether, where there are several accused persons and one or more of them have committed the offence, and it cannot be specified which of them did so, any one of them can be found guilty under section 198. *Torap Ali's* case and *Limbya's* case are authorities for the proposition that none of them can be. This, I think, must be accepted as correct, because it appears to be in accordance with the principles of criminal justice.

I accordingly think that the conviction of the prisoners should be quashed.

Schneider A.J.—

I have had the advantage of reading the judgments of my Lord the Chief Justice and of my brother De Sampayo. I agree with the Chief Justice as to the construction of the section and for the reasons given by him. As there is nothing I can usefully add, I would say no more than that the consideration which mainly weighs with me is that such a construction is not inconsistent with the language of the section, nor repugnant to any recognized principle of criminal jurisprudence, while at the same time it meets the case where the evidence falls short of establishing the guilt of the murderer.

Conviction affirmed.