
(1932) 03 MAD CK 0012
In the Madras High Court

The Public Prosecutor and Lakshmamma and Another APPELLANT
Vs
Mitta Venkatamma and Another RESPONDENT

Date of Decision : 15-03-1932

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302

Citation : (1933) ILR (Mad) 63 : (1932) 36 LW 798 : (1933) 64 MLJ 153

Hon'ble Judges : Curgenven, J

Bench : Division Bench

Judgement

Curgenven, J.—This case comes before me owing to a difference of opinion between Waller and Pandalai, JJ. The facts have been stated

fully in the judgment of the learned Sessions Judge and briefly but sufficiently in that of Waller, J. On Thursday, the 2nd April, 1931, a male child

aged 3 entered or was decoyed into the house of which the two respondents, who are mother and daughter, are inmates, and there murdered. The

motive for the crime was undoubtedly a wish of the husband of the 2nd respondent, Kondayya, to adopt the boy, which for easily understood

reasons would be objectionable to the two women. They were tried on charges both of murder and of causing the disappearance of evidence with

the intention of screening the offender from legal punishment under Sections 302 and 201, Indian Penal Code. As regards the former charge, the

learned Sessions Judge found that the child must have been killed either by both the women together or by one of the two; but he was of opinion

that the evidence did not exclude the possibility that one might have committed the murder without the assistance of the other, so that in his view it

was not possible to convict either of that offence. He convicted them both u/s 201, Indian Penal Code, and sentenced the 1st respondent to four

years" rigorous imprisonment, imposing upon the 2nd respondent the nominal sentence of simple imprisonment until the rising of the Court. The

Public Prosecutor has appealed against the order of acquittal u/s 302, Indian Penal Code, and for enhancement of the sentences passed u/s 201,

Indian Penal Code. There is also a Criminal Revision Petition presented by the parents of the child, praying for similar modifications in the orders passed.

2. When the case came before the Criminal Bench of this Court, Waller, J., after summarising the facts drew the inference from them that both the

respondents must have been acting in concert throughout. He relied upon the considerations that both shared in the motive and were alone together

in the house and he was unable to believe that either would have run the risk of killing the boy and hiding his body without the knowledge and

connivance of the other. It had also been proved that both of them had subsequently made false statements when asked if they had seen the child

and had acted together in disposing of the body. The learned Judge concludes with the observation,

Probably only one of them actually committed the murder--it does not matter which of them it was--but I do not doubt that the other connived at it.

3. The view taken by Pandalai, J., agreed with that of the Sessions Judge, that the evidence was insufficient to show in the case of either of the

respondents that she actually participated in the crime. It was clear from the facts, as indeed was conceded by Waller, J., that it was possible for

either of the respondents to kill the child without the assistance of the other, and although both may have had a motive to do away with it, that

circumstance did not show that both had in fact participated in the act. The subsequent conduct of the respondents in disposing of the body was in

Pandalai J.'s view fully explicable on the ground that they are mother and daughter and that if either of them had committed the murder the other

would readily help her to keep it a secret to escape detection.

4. Unless we are to gather the facts from a statement made by the 2nd respondent, there is nothing beyond circumstantial evidence to show in what

manner the death of the child was caused. The 2nd respondent's statement certainly cannot be used against the 1st respondent and I think that

Waller, J., has adopted the best course in ignoring it altogether. The evidence shows that the child was last seen in the street outside the house at about 6 p.m. on the Thursday. There is nothing to show how it was induced to enter the house. We can only presume that the murder was committed that evening from the state of decomposition in which the body was subsequently found and from the improbability that the child would be kept alive in the house for any length of time. Even apart from the 2nd respondent's statement there seems good ground to suppose that it was drowned and that it was subsequently buried for the time being in a trough of sand used as a stand for pots in the kitchen. From there it was taken, almost certainly on the Sunday morning, carried upstairs on to the terraced roof of the house and thrown on to the adjoining roof, which belongs to the house occupied by the child's parents. I shall have to refer later more specifically to the evidence relating to the disposal of the body and it is sufficient to say here that both the respondents are shown by the evidence to have taken part in the operation. So far as the charge of murder is concerned these are in substance the facts upon which a decision has to be based. There is no proof direct or circumstantial to connect either of the women in particular with the physical act of murder, and in fact the prosecution has not even shown that they were both in the house at the time when it was committed. The case is admittedly not one giving rise to any presumption that two persons must have joined in the act itself, and in fact Waller, J., has conceded that probably only one of them committed it. That being so, I am unable to say that the evidence is sufficient to establish that both the women took such part in causing the death as would justify the conviction of each of them of the offence of murder, and it need scarcely be said that no other offence can be in question. The facts proved appear to me compatible with the theory that either may have killed the child without the assistance of the other and I think that the subsequent conduct of both the women is explicable otherwise than on the supposition that they both did take part. I agree accordingly with Pandalai, J., that so far as they relate to the acquittal on the charge of murder the appeal and the Criminal Revision Petition must be dismissed.

5. The learned Judges have also differed upon the sustain-ability of a conviction u/s 201, Indian Penal Code, although they are agreed in accepting

the evidence upon which the charge is supported. It is of course open to the respondents upon this reference to show that that evidence should not be believed. It is adduced to prove that on the Sunday the two women joined in removing the body from the sand-bath in which it was concealed and in taking it in a basket on to the roof whence it was disposed of as described above. That it was so taken there is indisputable circumstantial evidence to show, and it can hardly be disputed too that the act must have been committed not long before the discovery of the body at about noon on Sunday. The complicity of both the women is sought to be proved by the evidence of three witnesses, P. Ws. 2, 3 and 12. The first of these witnesses, P. W. 2, deposed that he was easing himself near a dust-bin at the point marked D in the plan when he saw both the women upon the terrace of their house, the 1st respondent carrying a basket from which the feet of a child protruded and the 2nd respondent holding in front of it as a screen a green cloth. The 1st respondent threw the body out of the basket on to the terrace of P. W. 1, the child's father; It was common knowledge that the child had disappeared the evening before the witness cried out that they were throwing out the body. He then went to P. W. 1's house and gave the information, not to P. W. 1 himself who was inside, but to one Abbayi, P. W. 22. There is some conflict as to whether P. W. 1 himself heard what was said, but I do not think it is of any consequence, as he was told immediately by Abbayi and receipt of the news was followed by discovery of the body on the terrace above. Nor do I think that the evidence of this witness is to be disbelieved because the Police did not record a statement from him until 5 p.m. that day. He himself says that he stated the facts to the inquest panchayatdars, which is very probably true, and it appears that the Circle Inspector, who really investigated the case, did not arrive until 5 p.m. The evidence of P. W. 3 is to the effect that he was writing upon his terrace when he heard P. W. 2's cry and looking up saw both the respondents upon their roof, the 1st respondent with a basket in her hands followed by the 2nd respondent. He went upon P. W. 1's terrace and saw the body of the child there. He was not examined by the Police until the following day as he says he went to his field but no other ground has been adduced why he should not be believed. The third witness, P. W. 12, Khader Mohidin Sahib, is a Bench Magistrate, and since there is no reason for distrusting his evidence it must be

taken as strongly corroborative of that of P. W. 2, since he states that he heard the latter cry out ""They have thrown the body"" and went to the place where the body lay. The evidence of these three witnesses has been accepted both by the learned Sessions Judge and by the two learned Judges of this Court and I can find no reason to differ from the view that it is true. It effectually establishes that both the respondents took part in disposing of the body.

6. There then remains the point as to which Waller and Pandalai, JJ., are in disagreement, whether the respondents should have been convicted u/s

201, Indian Penal Code, of causing the disappearance of evidence of the offence with the intention of screening the offender from legal punishment,

it being clear that one or other of them, if not both, committed the murder. Upon this point there are undoubtedly differences of judicial opinion.

There is in the first place a difference of opinion upon the question whether, where a person has himself committed the offence, he can be

convicted of causing the evidence of it to disappear. That the section would not include the special case of the offender himself was held in an early

case of the Bombay High Court, *Reg v. Kashinath Dinkar* (1871) 8 Bom. H.C.R. (Cr.) 126. The course of judicial opinion upon this question has

received consideration in a very recent case of this Court, decided by Wallace and Jackson, JJ., *Chinna Gangappa, In re* ILR (1930) 54 Mad. 68

: 59 M.L.J. 677, and these learned Judges have given their reasons for holding that Sections 201 to 203, Indian Penal Code, are applicable to a

person who is guilty of the main offence, though they add that in practice Courts will not convict an accused both of the main offence and under

these sections. The grounds of that decision have been criticised before me, but I consider that, sitting as a single Judge, I am bound by it. I do not

for my part however find it necessary to carry the argument quite so far as to include a person who is guilty,--that is to say, who has been judicially

proved guilty,--of the main offence. Cases in which such proof has been or could be given rarely or never give occasion for the application of

Sections 201 to 203, Indian Penal Code, the sort of cases in which necessity for the application of the sections arises is where the evidence falls

short of proof though it may have created a more or less strong suspicion, and the accused has been acquitted. Special instances, but I think

special instances only, of this class are those (like the present) where it is clear that the primary offence must have been committed by one or more of a relatively small number of persons whom, or some of whom, it is sought to prosecute under one or other of these sections. Although it may be true that the conviction of all such persons of the secondary offence must involve the conviction of at least one who has committed the primary offence, I do not think that that circumstance affords a good judicial ground for refusing to convict. We have to consider the case of each accused separately and if, say, he has been acquitted of murder, the prosecution is entitled to ask the Court to presume that he is not guilty of that offence; and if he wishes to escape conviction u/s 201 it lies upon him to rebut that presumption by showing (which of course he will not usually do) that he was a principal and not a mere accessory. The Court is not bound to refrain from convicting unless and until it is satisfied that the accused is innocent of the main offence. I do not think that mere suspicion, however strong, can form the basis of a rule of law, and if suspicion is to form the test where is the line to be drawn? If the rule is to apply to each of two persons, is it to apply to each of twenty, to each of a hundred, to all the occupants of a village? It is easy to imagine cases which would reduce the principle to an absurdity.

7. The case which has been cited as authority against accepting this line of reasoning is *Torap Ali v. Queen-Empress* ILR (1895) 22 Cal. 638.

There too the evidence for the prosecution pointed conclusively to one or other of two persons as being the actual murderer, but it was impossible

to support the evidence to show which of them had caused the death. They were accordingly acquitted on the charge of murder and originally convicted

u/s 201, Indian Penal Code. This conviction was set aside on the ground that the section referred to persons other than the actual criminals, who,

by their causing the evidence to disappear, assist the principals to escape the consequences of their offence. A perusal of the judgment in this case

shows that it is based purely upon the application of this principle, relying upon some earlier cases, of which *Reg v. Kashinath Dinkar* (1871) 8

Bom. H.C.R. (Cr.) 126 already referred to is, one. The further question is not considered, whether where, each or all of the accused have been

acquitted, there is room for the application of the principle. It has been pointed out to me that the report shows that the Deputy Legal

Remembrancer did not argue the case on behalf of the Crown, though I do not think that it would now be said that the case for a different view

was in fact unanswerable. It deserves notice that the question whether the offence of which evidence had been caused to disappear was committed

by the accused themselves, was definitely answered in the affirmative in *Reg v. Kashinath Dinkar* (1871) 8 Bom. H.C.R. (Cr.) 126 and that that

decision went purely upon the footing that the section would not apply to the actual criminals. The same is true of the other authorities upon which

the learned Judges rely, and since, therefore, the question as to the judicial effect of an acquittal of all the accused on the main charge was not even

considered in *Torap Ali v. Queen-Empress* ILR (1895) 22 Cal. 638, I do not think that it really affords much if any authority upon this point.

Cases directly in point are *Teprinessa v. Emperor* (1918) ILR 46 Cal. 427 and *Rup Narain Kurmi v. Emperor* ILR (1930) 10 Pat. 140. These

decisions have held that where it is impossible to say definitely that a person has committed the principal offence, he cannot escape conviction u/s

201, merely because he has been charged also with the principal offence, or because there are grounds for suspicion that he might be the principal

culprit. I may refer to the judgment of *Fazl Ali, J.*, in the last cited case for a full discussion of the question. I respectfully agree with the views

expressed by the learned Judge, which are also the conclusions of *Pandalai, J.*, in the present case. Nor do I think that it can be contended that

principle loses its application where a single trial embraces charges both u/s 302 and Section 201, Indian Penal Code." An instance of such a case

is afforded by the Privy Council judgment in *Begu v. Emperor* (1925) L.R. 52 IndAp 191 : ILR 6 Lah. 226 : 48 M.L.J. 643 (P.C.) where their

Lordships held that even without a further charge the conviction of persons acquitted u/s 302 of an offence u/s 201 was warranted by Section 237

of the Code of Criminal Procedure. I conclude accordingly that there was no legal impediment to the conviction of the respondents u/s 201.

8. As regards the 1st respondent, I do not find sufficient reason to enhance the sentence of four years" rigorous imprisonment passed upon her.

The sentence passed upon the 2nd respondent is utterly inadequate. There do not appear grounds for distinguishing in this respect between the two

cases. I enhance the sentence passed on her to one of rigorous imprisonment for four years. To this extent the appeal and revision petition are

allowed, and otherwise dismissed.