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which ought to be inquired into in British India. The inquiry held by the Sub-divisional Magistrate was *ultra vires*, and the commitment wholly void. Section 188 corresponds to section 9 of Act XXI of 1879, and before it was introduced into the Code of Criminal Procedure, this Court quashed a trial held by the Sessions Judge of Mangalore without the prescribed certificate in *Bapu Daldi* v. *The Queen*(1). The defect cannot, in our judgment, be cured under section 532 of the Code of Criminal Procedure, for, it is not a case of mere irregular commitment under the Code of Criminal Procedure, but it is a case which cannot be dealt with at all under the Code until a certificate has been produced. If that section applied, it would not be necessary to produce a certificate even at the trial, and such a construction would tend to take away from the accused the protection to which he is entitled under section 188. Though the District Magistrate happens, by accident, also to be Political Agent in this case, that circumstance cannot alter the construction which we have to place on the last-mentioned section. The commitment is illegal, and must be quashed as such. It will be open to the District Magistrate to institute criminal proceedings *de novo*, in accordance with law.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1890. Feb. 3, 6.

QUEEN-EMPRESS

v.

SAMI AND ANOTHER.*

Evidence—Trial for robbery and murder—Offences constituting parts of the same transaction—Evidence of robbery considered in trial for murder.

Persons convicted of robbery by a Sessions Judge and a Jury, and of murder by the Sessions Judge with Assessors appealed to the High Court against the conviction on the charge of murder:

Held, that in coming to a conclusion as to whether the evidence justified the conviction appealed against, the verdict of the Jury should not be taken into consideration.

But on its appearing that the two offences constituted parts of the same transaction:

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(1) I.L.R., 5 Mad., 23. * Referred Trial No. 58 of 1889.

Held, that recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder.

APPEAL against the conviction of the appellants on the charge of murder by W. Dumergue, Sessions Judge of Salem.

Mr. *Gantz* for appellant No. 1.

Mahadeva Ayyar for appellant No. 2.

The Government Pleader and Public Prosecutor (Mr. *Powell*) for the Crown.

The facts of this case appear sufficiently for the purposes of this report from the following judgment.

JUDGMENT :—The appellants who were charged on three counts, viz., of kidnapping, of robbery and of murder, were tried on the second count by the Sessions Judge and a Jury and on the first and third counts by the Sessions Judge and Assessors. The charges had reference to a boy named Thevoo who is alleged to have been enticed away, robbed and murdered by the appellants on the evening of the 31st August last. The Assessors were of opinion that the appellants were guilty on the charge of kidnapping, and as a Jury found them also guilty on the charge of robbery, but returned a verdict of not guilty on the charge of murder.

The Sessions Judge agreed with the opinion of the Assessors as to the first count and with the verdict as to the second count, but dissented from the verdict of not guilty on the charge of murder. He passed a sentence of death subject to the confirmation of this Court on the latter charge, but also in deference to the verdict of the Jury, as he observed, sentenced the appellants to a term of ten years' rigorous imprisonment on the charge of robbery. It was argued before us by the Vakil for the second appellant that the Sessions Judge ought not, having regard to the proceedings of this Court, dated 11th February 1889, No. 336, to have tried the three charges together in one trial and that the conviction was therefore bad. The Sessions Judge has, under section 239 of the Criminal Procedure Code, a discretion to try prisoners separately or together as he thinks fit, accused of several offences committed in the same transaction, and the circular order referred to was merely intended to suggest the procedure which in such cases it would be most convenient to adopt. It is not alleged that the appellants have been prejudiced by the course adopted by the Sessions Judge.

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We think there is no ground for setting aside the conviction as illegal. The sentence passed by the Sessions Judge appears to us however anomalous. Having sentenced the appellants to death it was obviously unnecessary to pass any further sentence on the other counts, and he ought to have refrained from doing so, though he might have not improperly mentioned the sentence which might, in his opinion, be appropriately passed if the conviction on the charge of murder were set aside. Neither of the appellants has questioned the conviction on the charges of kidnapping and robbery. What we have to consider is whether the evidence justifies the conviction of both or either of the appellants on the charge of murder. In coming to a conclusion on this question, we dismiss from our minds the verdict of the Jury.

There is no doubt that the boy Thevoo was enticed away from the temple in the agraharam, robbed of two gold bangles he had been wearing and murdered on the evening of the 31st August last. As to these facts the evidence of his father (the first witness) and the Hospital Assistant is conclusive.

The material question is whether the offences are sufficiently brought home to the appellants or either of them. Against appellant No. 1 the principal evidence is that contained in a confessional statement made by him before the Second-class Magistrate of Salem on the 27th September 1889, two days after he was arrested in the Madras Roads by the Chief Inspector Eaton. In this statement he says that the boy was brought by appellant No. 2 and another to the entrance of the Eswaran temple in the garden where the body was found and he admits that he and the other appellant removed the bangles from the boy's wrists and that he went to his house to secure them in an almirah. On his return after doing this, he says that he found his companion in a room near the temple, and, hearing a gurgling noise, was told by them in answer to his question that they had killed the boy. He reproached them, as he says, and went off to his own house, but in a short time appellant No. 2 came to him, told him the body of the boy had been disposed in the well of Gopalasami Mudaliyar and asked him to come away with him to Kumbakonam. They thereupon the same night went to the railway station and took the train to Kumbakonam. He then describes how he and appellant No. 2 remained together for two days, and afterwards the appellant No. 2 on his brother-in-law appearing went away, taking one of the bangles and leaving the

other with appellant No. 1. This bangle, he says, he sold at Tiruvadamarudur for Rs. 75. He then went to Negapatam and embarked in a steamer for Rangoon, but on the way he was arrested at Madras by the Inspector Eaton. He further related how, while he and appellant No. 2 were at Kumbakonam, a bond was executed by him in favor of a relative, and how that bond was ante-dated, the date of Saturday, the day on which the murder was committed being inserted instead of Monday, the day on which it was really executed. Before appellant No. 1 made this confessional statement he had been duly warned by the Magistrate that his statement would be used against him and the Magistrate certified his belief that the statement was made voluntarily and not under any threat or inducement. On the 31st October appellant No. 1, when his statement was read out to him, declared that it was not made voluntarily and he made another statement to the effect that he was not in Salem on Saturday the 31st August. The next day when he was about to be committed for trial, he told the Magistrate that he had retracted his confession, because the other accused were with him and he feared their speaking against him. As the Magistrate, although he made a note of the statement and appended it to the answers given by the appellant to questions put to him, had not recorded the statement itself in the appellant's words, we thought it desirable to have the Magistrate's evidence on this matter taken. In his evidence the Magistrate repeats what he had recorded in his note and he says that the appellant asking at the same time that he might be admitted to bail and permitted to change his dress, volunteered the statement. Before the Sessions Court appellant No. 1 left his defence to his counsel and no further questions were put to him.

There is a considerable body of evidence which goes to corroborate material parts of the confessional statement made on the 27th September. Several witnesses referred to by the Sessions Judge prove that the two prisoners were seen together near the Perumal kovil on the evening of the 31st August. They also say appellant No. 2, who is proved to have been on friendly terms with the boy Thevoo, was seen speaking to him at the same time and place. The fact that the body of the murdered boy was hidden in a pit in Gopalasami's garden is established by the evidence of the first witness and others who were present at the discovery of the body on Monday the 2nd September. The fact that the two

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appellants went to the Suramangalam station the same night and took the train is proved by the seventeenth witness who, being a relation of Thevoo, had gone to the station in search of him. This witness says that he found appellant No. 1 sitting there with his companion lying down and having his face covered, and in answer to his inquiries he was told by appellant No. 1 that the man lying down was a stranger to him, though in fact he was known to him. The witness afterwards saw the man standing up and recognized him. That the two appellants did take the early morning train for the south as this witness deposes is further proved by the evidence of the twenty-sixth witness, the first appellant's brother-in-law, who says that he and appellant No. 2 came to his house at Bhagavatapuram on the Sunday evening. According to this witness the two stayed at his house over the Monday night, and meanwhile on the Monday the bond mentioned in the confessional statement was executed in favor of Krishnasami, the eighteenth witness. The execution of this document, dated the 31st August, on the 2nd September, is spoken to by this witness and by the twenty-third, twenty-fourth and twenty-fifth witnesses, who with appellant No. 2, attested the execution. At the trial the evidence of the stamp-vendor, whose endorsement bearing date 31st August appears on the document, was not taken, and we thought it desirable that he and his son, who, according to the witnesses, was said to have brought the paper to the house of the first witness, should be examined. Their evidence has now been taken and it appears that the endorsement was written entirely by the son, a boy of ten years old. His account of what took place with regard to the stamped paper and his father's, though the two do not altogether agree, is to the effect that in the absence of the latter the paper was given out as endorsed by the son on the 31st August and an entry made accordingly in the diary. Having regard to the strong evidence proving the presence of the prisoners in Salem on the evening of Saturday and to the twenty-third and other Tanjore witnesses, some of whom are related to the appellant, we are unable to accept the testimony of the stamp-vendor and his son as true with regard to the date on which the stamped paper was sold. The next fact mentioned in the confessional statement is the parting of the two appellants, and this is proved by the 26th witness who did not see appellant No. 2 in his house on the Tuesday and the ninth witness, who says he saw him at Srirangam on

that day. This witness also says that this appellant and his brother-in-law Ratna Sabapathi came to her house, and stopped the night, and that the latter and her husband went out to the bazaar, saying they had a bangle to sell. There is further evidence with regard to the sale of this bangle which will be mentioned hereafter in dealing with the second appellant's case.

In the present connection it is important to mention that these facts—the execution of the bond at Tiruvadamarudur and the sale of a bangle at Srirangam—were brought to light in consequence of a communication made by appellant No. 1 to Inspector Jay Singh when the two were travelling from Madras to Salem. This statement, in so far as it led to the discovery of the matters mentioned in it, is evidence against the appellant. From the time when appellant No. 1 parted from the twenty-sixth witness on Tuesday, the 30th September, at Kumbakonam, there is no direct evidence as to his movements until he is found at Madras on the 24th or 25th September consulting Mr. Michell's gumasta.

On the 25th September he was arrested on board the S.S. *Sirsa* by Inspector Eaton. He had on his person a ticket for Rangoon. When at first accosted by the Inspector as Sambia, he said he was not Sambia and was not a Brahman, but that his name was Narainasami Pillai, but in the boat on the way to the pier he admitted that he was the man whom the Inspector wanted. He was dressed as he was when he appeared before the Sessions Court, that is to say, in a manner which is proved to be unusual among Brahmans and he was not wearing the Brahmanical thread. It is suggested by the learned Counsel who appeared to support the appeal that this intended journey to Rangoon was undertaken in search of work and that was the explanation offered by the appellant himself in his statement of the 31st October. In our opinion, however, the explanation is entitled to no weight. The whole conduct of the appellant, as exhibited in his dress and in his conversation with the Inspector, points irresistibly to the conclusion that he was acting under a strong impulse to conceal his identity and escape from the country.

All the circumstances which have thus been detailed tend to corroborate the confessional statement made by appellant No. 1. In that statement he admits that he took part in the robbery and that one of the bangles was disposed of by him, the other being left with the other appellant. The evidence of the first and other

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witnesses with regard to the sale of a single bangle at Srirangam on the return of appellant No. 2 from Kumbakonam about the same time renders it probable that this part of the story is true. His attempt to make evidence for himself by ante-dating the bond, his projected flight by sea, his endeavour to conceal his identity are strong evidence to show that he was conscious of some great danger impending and that he was actuated by a strong desire to escape; and this conduct is the more important, because, so far at least as the execution of the bond is concerned, it was the conduct of a man who was not at the time pursued or even suspected. With all these facts proved we are of opinion that there is a strong case to justify the conviction on the charge of robbery. This being so, it must follow that the appellant was one of the persons who was last with the murdered boy before his death, because there is nothing to suggest the supposition that the robbery and the murder were separate transactions, committed at different times, and on the contrary, according to the confessional statement, the two crimes formed parts of one transaction. Moreover it is extremely unlikely that the deceased boy would not have returned to his house if he had been left free after he had been robbed. The appellant lived in the same agraharam with the boy, and the strong probability is that the motive for the murder was the desire to escape detection which, had the boy escaped alive after being robbed of his bangles, must almost inevitably have ensued. Under these circumstances, and in the absence of any explanation, the presumption arises that any one who took part in the robbery also took part in the murder. In cases in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder. All the facts which tell against the appellant, especially his conduct indicating a consciousness of guilt, point equally to the conclusion that he was guilty as well of the murder as of the robbery committed on the evening of the 31st August. His own account of what took place on that evening in so far as it exonerates himself from any part in the act of killing the boy is extremely improbable. It is very improbable that he being older in years than appellant No. 2, the latter would have acted, as he says, without his knowledge or privity. Still less is

it probable that if, as he says, the boy was being murdered when he returned to the temple and without his connivance, he would afterwards have left Salem with appellant No. 2 and associated himself with him in efforts to create evidence in his favor. In addition there is the evidence of the third witness, which, if believed, makes it clearer that the appellant was not, as he says, a mere spectator when the murder was committed. This witness's story to the effect that, on the evening of the 31st August, he saw some men carrying a corpse near the temple and that he recognized the first prisoner as one of the party, was first communicated to the Police on the 13th October. On the previous day only he had been found and brought before the Head Constable at Tiruvadamarudur. The Inspector who, on the 13th October, wrote down the substance of the man's statement and the Head Constable both say that he and his wife were not in police custody. Observations were made with regard to the language said to have been used to the witness by the Head Constable when the witness was brought before him, but it is now explained that the words used were not intended to have any threatening significance, and then the Head Constable was in fact ignorant as to the position which the witness occupied, whether he was an accused person or a witness. The fact that the witness when first brought into communication with the police gave the same account of what he saw on the evening of the 31st August as he gave before the Sessions Court, and there is no evidence to show that any improper influence was brought to bear upon him, is strongly corroborative of the truth of his evidence. Moreover, except for the explanation which he himself gives for his hurried departure from Salem, there is nothing to account for that fact. It may be added in favor of the acceptance of his testimony that he incriminates only one of the persons whom he says he saw and does not attempt to name the others. Taking into account these circumstances, as well as what may be said on the other side with reference to the status of the witness and the fact of his having been under police surveillance, we agree with the Sessions Judge in thinking that the evidence of the third witness, corroborated by that of his wife, may be accepted as true. The importance of the evidence is great; for while it corroborates the other evidence connecting the appellant with the robbery of the boy, it directly contradicts the appellant's own story of the part he took after

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the robbery and the murder had taken place and shows that he was actively engaged with the others in carrying away the corpse from the scene of the crime. To sum up the evidence which has now been dealt with as against the first prisoner we may state the matter as follows:—that it has been admitted by him that he was a party to the robbery, that his account of the transaction exculpating himself from all other part as being contradicted by other evidence and the probabilities of the case cannot be accepted as true, that he assisted in carrying away the corpse of the boy after murder, that he afterwards acted in concert with appellant No. 2 until they parted on the Monday night, and finally that in his flight, his abandonment of caste and other concealment of his identity he acted in a manner evincing an extreme desire to escape from an impending danger of a serious character. We are unable to reconcile these facts with any reasonable hypothesis of innocence on the part of appellant No. 1; on the contrary we see no reason to doubt that he was concerned in the murder. We must therefore uphold the conviction. The double crime of robbery and murder was an atrocious one and cannot be adequately expiated by any other punishment than that of death. We confirm the conviction and sentence against this appellant.

Against the second prisoner the evidence is not altogether the same. From his first arrest he made no statement except that he was absent from Salem for some days before the 31st August and with the first prisoner at Tiruvadamarudur on the Sunday.

There is the evidence of several witnesses that he and the murdered boy were on friendly terms, and it is mentioned that the prisoner, who was a compositor, had given the boy some types on the previous day and those types were found by the boy's father in his jacket pocket. The witnesses say they saw the prisoner and the boy talking together on the Saturday afternoon about 3 o'clock, and that both prisoners were together near the temple in the evening about the time when the boy disappeared. Inasmuch as the boy was at that time in the agraharam in the neighbourhood of his father's house, and could not have been carried away from the street by force, it is clear that the persons who robbed him must have been assisted by some friend of the boy's who was able to persuade the boy to accompany them away from the street. So far as the events which occurred in Salem are concerned, the evidence carries the case no further. But from the moment of leaving

Salem, as has been already shown, the two prisoners acted in concert. Both leave Salem suddenly and for no explained reason and are seen at the railway station in the early morning of Sunday taking the train for the south. They go together to the house of the twenty-sixth witness, arriving there on the Sunday without baggage or clothes. The second prisoner remains there on the Monday, but is not seen by the witness on Tuesday morning. Meanwhile on Monday the bond was executed by the first prisoner in the way already described and the second prisoner attested it appending to his name a description of himself which is noteworthy —he calls himself "son of Virasami Pillai who is come to Tiruvadamarudur on this current date from Salem." It is clear that he and the first prisoner were equally anxious to create clear written evidence to prove their absence from Salem on that day, the 31st August. The second prisoner is next found on the Tuesday at Srirangam in company with his brother-in-law Ratnasabapathi. They go to the house of the ninth and tenth witness, himself a brother of Ratnasabapathi, and stay there over the next day; while there they went out into the bazaar saying they had a jewel to sell, and taking a bangle with them. The sale of a child's bangle by Ratnasabapathi to the thirty-first witness is proved by him and the twenty-ninth witness. The purchaser says that in buying it he had it cut up and sold the pieces. The bangle is described as weighing $15\frac{1}{16}$ pagodas and the price paid was Rs. 94. The pair of bangles worn by the murdered boy are described by his father as worth from Rs. 200 to Rs. 250. Although the bangle then sold to the thirteenth witness could not be produced for identification by the father, there is strong reason to think that this bangle is one of the pair taken from the boy. In addition to the facts already stated, namely, the presence of the prisoner with the boy and with the other prisoner at Salem on the afternoon of the 31st, the departure from Salem with the other prisoner, his co-operation with that prisoner in antedating the bond and his being in company with his brother-in-law, and that a single bangle was sold only four days after the murder, we are at liberty to take into account against the second prisoner the statement of the first prisoner in so far as it is a confessional statement. According to this statement the two prisoners took an equal part in robbing the boy. It is probable that the robbery was, as the first prisoner thus admits, committed by more than one person, and for reasons already given, it is

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almost inevitable that one of those persons should have been well acquainted with the murdered boy.

As already observed, there is considerable evidence to show that appellant No. 2 was regarded by the deceased boy as his friend, and the fact that the boy would not have gone to the scene of the offence unless he had been enticed, corroborates the confession of the first prisoner that it was the second prisoner who in company with another brought the boy to the temple. This being so it is reasonable to infer in the absence of any satisfactory explanation that the second prisoner was equally implicated in the crime of murder. His motive for committing the murder in order to save himself from detection was even stronger than that of the first prisoner, for he was well known to the boy. His subsequent conduct from the time he left Salem, acting in concert with the other prisoner, in making evidence to prove an alibi and in securing the sale of the bangle—as it is presumptive evidence against him that he was a party to the robbery—is equally evidence against him on the other charge. There seems to be no reasonable ground for saying that while both of the prisoners assisted in the robbery, the first only took part in the murder.

We are therefore of opinion that we must come to the conclusion that this appellant also was concerned in the murder.

Seeing however that the evidence against him is almost wholly circumstantial and that he is only eighteen years of age, we consider it safer to commute the sentence into one of transportation for life. The sentences of ten years' rigorous imprisonment are set aside and the sentence of death passed upon Sami Iyer is confirmed. The sentence of death passed upon Narayana Sami is commuted into a sentence of transportation for life.