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tickets they intentionally aided the keeping of a place for the purpose of drawing a lottery. They would not therefore be guilty of any offence, and the object of section 294-A of the Indian Penal Code was undoubtedly to save people from the effects of unauthorised lotteries. If so, the subscribers would be a protected class and the principle of "*pari delicto*" cannot be invoked. Even otherwise the *delictum* in such cases would not be at par and the second part of section 84 of the Indian Trusts Act which requires the transferee of property for an illegal purpose to hold it for the benefit of the transferor who is not as guilty as himself would be applicable. The subscribers would in this view be entitled to recover what was actually paid by them and clause 13 of Exhibit I (*a*), the kuri regulations, does not exclude the personal liability of the promoters.

A.S.V.

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Gentle.

1936, April 15.

IN RE SANGAMA NAICKER AND ANOTHER (ACCUSED), PRISONERS.*

Code of Criminal Procedure (Act V of 1898), sec. 342 (1)—Trial Judge—Matters from which adverse inferences can be drawn against accused—Putting to accused of—Duty as to.

Under section 342 (1) of the Code of Criminal Procedure, though it is not obligatory on a trial Judge to put to an accused

* Referred Trial No. 26 of 1936 and Criminal Appeals Nos. 153 and 154 of 1936.

every piece of evidence or point which has been given or made against him, yet, he should put matters from which, in the absence of an explanation by the accused, adverse inferences could be drawn against him.

Dwarkanath Varma v. *The King-Emperor*, (1933) 64 M.L.J. 466 (P.C.), followed.

Panchu Choudhry v. *Emperor*, (1921) 23 Cr.L.J. 233, referred to.

TRIAL referred by the Court of Session of the Ramnad Division at Madura for confirmation of the sentence of death passed upon the prisoners in Case No. 109 of the Calendar for 1935 and Criminal Appeals by the said prisoners respectively against the said sentence of death passed upon them.

K. S. Jayarama Ayyar for first accused.

G. K. Damodar Rao for second accused.

A. Narasimha Ayyar for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

Cur adv. vult.

The JUDGMENT of the Court was delivered by GENTLE J.—This is an appeal by two accused who were convicted by the learned Sessions Judge of Ramnad Division at Madura on 19th February 1936 under sections 364 and 302, Indian Penal Code, or sections 302 and 109, Indian Penal Code. GENTLE J.

The offences are alleged to have been committed on or about 18th January 1935. Since we are setting aside the conviction and ordering a re-trial of these two accused, we are not dealing with any facts save those which are necessary for the purposes of our judgment. It is alleged by the prosecution that the two accused, together with the deceased, left the village of Nachiarpatti on the

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morning of 18th January 1935, the deceased driving a bullock cart and the two accused riding as passengers. It was their intention to go to a village six miles away named Rajapalaiyam there to buy some plough shares—stopping on the way to Rajapalaiyam at the Sanjivi hills to cut some pegs for the bullock cart—and to return to Nachiarpatti. The father of the deceased (first witness for the prosecution) saw them leave and as they had not returned by sunset he went to the first accused at his house in that village and according to the evidence of the first witness for the prosecution the first accused told him that they had made their purchases in Rajapalaiyam and the deceased and bullock cart would be returning to Nachiarpatti the next morning. They never returned. The bullock cart and the bullocks were found outside the police station by a police constable at Srivilliputtur at about 1 a.m. on 19th January. On Sunday the 20th, the dead body of the deceased was found in the Sanjivi hills badly mutilated; and on 21st January a number of witnesses who were called by the prosecution went to this spot. The first accused was never seen again after his interview with the first witness for the prosecution on the night of 18th January until he surrendered to the police some three months later. The second accused also disappeared and was not seen after the ninth witness for the prosecution says he saw him driving the bullock cart with the first accused and the deceased, until he was arrested on 5th February 1935 some twenty-five miles away in the Madura district. There was no explanation given by either accused regarding (i) their departure in

the bullock cart with the deceased on the morning of the 18th January or where and under what circumstances they parted from him and the finding of the empty cart by the police constable on the morning of 19th or (ii) why they absconded from their houses at the time when the deceased's body had not yet been discovered and it was then unknown that he was dead and, as admitted by the learned Counsel for the appellants, had been murdered. In the absence of any explanation by them, the strongest inferences can be drawn against them. Under section 342 (1) of the Code of Criminal Procedure it is provided that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against them, the Court, may, at any stage of any inquiry or trial, without previously warning the accused put such questions to them as the Court considers necessary, and shall, for the purpose aforesaid, question them generally on the case after the witnesses for the prosecution have been examined and before they are called on for their defence. The learned Sessions Judge at the close of the case by the prosecution at the trial put to each of the accused only formal questions to the effect that :—having read the statements made by them orally and given in writing in the Magistrate's Court, whether they were correct; and having heard the evidence given by the prosecution witnesses, whether they wished to say anything. He did not point out to them the two important matters which we have mentioned and which are referred to in the judgment of the learned Sessions Judge and ask them for any explanation of these circumstances. In *Dwarkanath Varma* v. *The*

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King-Emperor(1), a case in the Privy Council, Lord ATKIN at page 481 says that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court shall question him generally on the case after the witnesses for the prosecution have been examined and adds :

> "In pursuance of this section one of the puisne Judges put questions to the doctor. The only questions put on the contents of the post-mortem report were as to the congestion of some of the organs, the cause of antiperistalsis, and the omission from the report of the condition of faecal matter, and clots of blood at the orifices of the ruptures deposed to at the Sessions. The other question is a general question whether there was anything else he desired to say about the charges or the evidence. The learned Chief Justice told the Jury that the absence of blood in the body cavity was a vital point. If so it is plain that under section 342 of the Code it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation. . . But it deprives of any force the suggestion that the doctor's omission to explain what he was never asked to explain supplies evidence on which the Jury should infer. . . ."

We are bound by this decision of the Privy Council from which it would appear that the matters which we have mentioned should have been pointed out to the two accused and explanations asked of each of them. In *Panchu Choudhry* v. *Emperor*(2), a decision of the Patna High Court in 1921, BUCKNILL J. dealing with this matter says that, where an accused is undefended, the tribunal may point out to him the elements of the evidence adduced against him which seem in his own interest to demand an explanation, but, where an accused is defended by a legal practitioner, it

(1) (1933) 64 M.L.J. 466 (P.C.). (2) (1921) 23 Cr.L.J. 233.

would be altogether impossible to expect or desirable to contemplate a tribunal entering upon a lengthy examination of an accused person. This decision appeals to us as one of common sense and in the spirit of section 342, Criminal Procedure Code, but since we are bound by the later decision of the Privy Council, *Dwarkanath Varma* v. *The King-Emperor*(1), in our view, the two matters mentioned should have been put before the two accused and their explanations invited. It is not necessary or practicably possible for a trial Judge to put to an accused every piece of evidence or point which has been given or made against him but he should put matters from which, in the absence of an explanation by him, adverse inferences can be drawn against the accused. Since this was not done by the learned Sessions Judge, we have no other course but to set aside the conviction and to order a re-trial.

[The following judgments were referred to in the course of the arguments :]

Criminal Appeal No. 113 *of* 1934.

1934, May 4.

PANDRANG ROW J.—The appellant has been convicted of the murder of his wife whose dead body was found on 7th September 1933 floating in a tank about 6½ furlongs distant from the "Salai" of the appellant where according to the case for the prosecution the murder took place during the night of 5th September. There was no direct evidence connecting the appellant with the murder of his wife who was admittedly living separately from him till the 4th September for over a year. The learned Additional Sessions Judge relied on several circumstances in coming to the conclusion that the appellant had murdered his wife but he did not put them to the appellant in order to give him an opportunity to explain them. As observed by their Lordships of the Judicial Committee in *Dwarkanath Varma* v. *The*

(1) (1933) 64 M.L.J. 466 (P.C.).

King-Emperor(1), it is the duty of the trial Judge under section 342, Criminal Procedure Code, to call the accused's attention to all vital points, i.e., points which the Judge considers to be vital, and ask for an explanation. This duty has not been performed by the learned Additional Sessions Judge in this case, for, what he did was to ask the accused whether the statements made by him during the preliminary inquiry were correct and after he answered this question in the affirmative to ask whether he wished "to say anything more here" to which he answered in the negative. The importance of the performance of the duty to which their Lordships of the Judicial Committee refer is, if I may say so, all the greater in cases where the evidence incriminating the accused entirely consists of a number of circumstances not of a directly incriminating character, and the accused is not in a position to know which circumstances are going to be relied upon by the Court as evidence of his guilt, and which therefore require explanation. The learned trial Judge has relied not only on several circumstances but also on the accused's omission to give any explanation regarding them. Some of these circumstances are circumstances which the accused might not have really thought necessary to explain. For instance, the absence of a bodice from the dead body, the medical evidence to the effect that the deceased must have been in a recumbent position when she was injured, and the absence of any mutilation of the sex organs have been relied upon by the trial Judge as evidence of the accused's guilt—*Vide* paragraph 13 of his judgment. Then again the scratches seen on the accused's person on 8th September are found by the trial Judge to be "undoubtedly indirect admissions of guilt", and he adds that there is "not a word of explanation concerning these injuries". (Paragraph 14.) The same remark is made about the evidence regarding the cart and the tracks made by it which according to the trial Judge "only too clearly show that it carried the corpse of the deceased from the Salai of the accused to the tank and then came back again to the Salai" (*Ibid*). The trial Judge also relies on the circumstance that one of the four cloths handed over by the accused to his cousins on the 6th September was stained with blood; there was no reference to this also in the

(1) (1933) 64 M.L.J. 466, 481 (P.C.).

accused's statements during the preliminary inquiry. The omission of the learned trial Judge to call the attention of the accused during the trial to these points which he apparently considered to be vital, in spite of the fact that nothing had been said by the accused about them in his statements in the Magistrate's Court during the preliminary inquiry, coupled with the stress laid by the Judge on the absence of any explanation by the acoused as regards these points has led to this result, namely, that the accused was not really given the opportunity of explaining "the circumstances appearing in the evidence against him" which section 342 of the Code of Criminal Procedure enjoins to be given to the accused. I am of opinion that the appellant has been seriously prejudiced thereby and that his trial has not been substantially in accordance with law. I therefore reverse the finding and sentence of the Addititional Sessions Judge, Coimbatore, in this case and direct that the appellant be retried on the same charge by the Sessions Judge, Coimbatore.

Criminal Appeal No. 782 *of* 1935.

1936, January 24.

The JUDGMENT of the Court (WADSWORTH and K. S. MENON JJ.) was delivered by K. S. MENON J.—The appellant has been convicted of the murder of one Nachammal and sentenced to death by the Sessions Judge of Coimbatore.

The husband of the deceased died about five years ago leaving some property. The deceased leased it to P.W. 5. The appellant, who was intimate with the deceased even during the life-time of her husband, prevailed upon the deceased to ask P.W. 5 to surrender possession of the property. The latter, it is said, at the instigation of P.W. 4, a brother of the deceased, who was not on good terms with the deceased because the daughter of the deceased was not given in marriage to him, refused to surrender possession. It is alleged that, in order to get possession of the property free from the obstruction of P.Ws. 4 and 5, the appellant took the deceased in the evening of the 25th August 1935 towards Pannaikinar and killed her on the way at about 8 p.m. at a place about six furlongs from their house and at once made a report to the Village Munsif, foisting the murder on P.Ws. 5, 6, 7 and another. As suspicion, however, fell on the appellant after the Sub-Inspector examined some witnesses in the village, he was arrested, and on information given by him the

aruval (M.O. 1) which is alleged to have been lent to the appellant by P.W. 15, and the bichuva (M.O. 3), both blood-stained, were recovered from a place about fifty yards from where the dead body was found. There were some marks of blood found on the cloth worn by the appellant. This is the case for the prosecution.

It will be seen that the evidence against the appellant is entirely circumstantial, and apart from the motive alleged, namely to get possession of the properties, the only incriminating circumstances against him are that M.Os. 1 and 3 were discovered on information given by him and that his cloth had marks of blood on it. But neither before the Committing Magistrate nor before the Sessions Court was the attention of the appellant drawn to these circumstances when he was examined under the provisions of section 342, Criminal Procedure Code. Before the Committing Magistrate he was simply asked: "What have you to say with reference to this case?", and he answered "I did not kill Nachammal. I did not do anything at all".

In the Sessions Court, he was asked: "Do you wish to add anything more" and he answered, "No. My elder brother's son and his wife Ranganayaki should be examined."

The important circumstances on which the conviction is based were not specifically pointed out to him, to enable him to give an explanation, if any, which is really the object of the questioning under section 342, Criminal Procedure Code.

In cases where the evidence against the accused is not direct but entirely circumstantial, we think it is all the more necessary that the circumstances which, if unexplained, would lead to conviction, should be pointed out to the accused by the Court, so that he may have an opportunity to give his explanation, if any, in regard to them. It may also be observed that in this case the witnesses who speak to the recovery of the articles do not appear to have been properly cross-examined. In these circumstances, especially the failure to comply properly with the provisions of section 342, Criminal Procedure Code, we think it is necessary in the interests of justice to send the case back for re-trial. And as we have decided to do so, we make no observations whatever on the merits.

We accordingly set aside the conviction and the sentence and order under section 423, Criminal Procedure Code, that the

appellant be re-tried by the Sessions Judge, Coimbatore, for the offence charged.

Referred Trial No. 12 *of* 1936 *and Criminal Appeal No.* 101 *of* 1936.

1936, March 30.

The JUDGMENT of the Court (BURN and PANDRANG ROW JJ.) was delivered by PANDRANG ROW J.—The appellant has been convicted of the murder of a boy of twelve years and sentenced to death by the Sessions Judge of Vizagapatam. The boy was last seen alive in the morning of the 22nd October last. A search was made for him and a report was made to the police that he was missing and a dead body was discovered on the 26th October at a spot (marked A in the plan). The body was considerably decomposed, most of the soft parts having been eaten away by maggots, but the mother and two other relations of the boy were able to identify what remained of the deceased as his remains. A pair of gold ear ornaments which the boy was wearing when he was last seen alive were, however, found to be missing and these are alleged to have been sold by the appellant on the very day on which the boy was last seen alive and in the very village to which the boy belonged.

The evidence against the appellant is entirely of a circumstantial nature, but this is not to say that the evidence is not strong enough to justify and in fact to require, his conviction. Unfortunately, however, it is impossible for us to say whether the evidence is sufficient or not because of the failure of the learned Judge to elicit from the appellant any explanation which he had to give in respect of the facts appearing in the evidence against him. In the absence of any such opportunity given by putting the particular points to the appellant and asking for his explanation in respect of these points, it may not be fair to him to say, as the learned Judge did, that, in the absence of any explanation from him about the ear-rings which he sold, the inference should be drawn that he stole them from the deceased after murdering him. It has been very clearly laid down as a general rule by their Lordships of the Privy Council in *Dwarkanath Varma* v. *The King-Emperor*(1) that it is the duty of the examining Judge

(1) (1933) 64 M.L.J. 406, 481 (P.C.).

under section 342, Criminal Procedure Code, to call the accused's attention to any point which the Judge considers to be vital or, in other words, to lead to the inference of guilt, and to ask for an explanation. In this particular case it is clear that the examining Judge was certainly of opinion that, in the absence of any explanation about the jewels said to have been sold by the appellant, the proper inference to be drawn was that the appellant stole them from the deceased after murdering him because the appellant was the last person seen with the deceased when he was alive. This duty has not been performed in this case with the result that there is no explanation in the record by the appellant as to any of the points appearing in the evidence against him, viz., the sale of the jewels by him, his being seen with the deceased when he was last seen alive, his putting the search party off the scent when an attempt was made to discover the missing boy and so on. In a case of circumstantial evidence it is all the more necessary to perform this duty, because the accused cannot be expected to know, when all the evidence against him is of a circumstantial nature and some of it is important while some of it is not, which are the points on which an explanation from him would be necessary to avoid the inference of his guilt. For instance, in this case the learned Judge appears to have thought that "the finding of a partially-smoked cigarette near the dead body strengthens the case against the accused to a trifling extent". If, because the appellant himself smokes cigarettes and beedies, the learned Judge thought that this was a point leading to an inference of guilt, however slight, and was going to use it against the accused, the accused ought to have been given an opportunity of explaining, if possible, the discovery of a half-smoked cigarette near the dead body. It is unfortunate that the non-performance of an imperative duty by the learned trial Judge compels us to order a fresh trial. It is not fair that the appellant's case should be decided in the absence of an explanation from him about the points that were urged against him by the prosecution and regarded by the learned Judge as important or vital.

The conviction and sentence must therefore be set aside and there must be a re-trial of the appellant on the same charge, during the course of which he must be given a proper opportunity to explain all the points appearing in the evidence against him which should be stated to him.

G.R.