APPELLATE CRIMINAL.

1916.

September 7.

Before Mr. Justice Beaman and Mr. Justice Heaton.

EMPEROR *v.* BLANCHI C. CRIPPS.*

Indian Penal Code (Act XLV of 1860), section 317—Exposure or abandonment of a child by a person having care of it—Person entrusted with a child for abandoning it has the care of it.

Accused No. 1 having given birth to an illegitimate child gave it to her sister, accused No. 2, with a view to dispose of it secretly. Accused No. 2 accordingly carried it by a railway train and abandoned it in a Second Class compartment. On these facts, accused No. 2 was charged with an offence under section 317 of the Indian Penal Code ; and accused No. 1 with having abetted the offence under sections 317 and 109 of the Code. The Sessions Judge acquitted them both, the accused No. 2 on the ground that she had not the care of the child, and accused No. 1 on the ground that as no principal offence had been committed she would not be guilty of abetment. The Government having appealed,

Held, reversing the order of acquittal, that both the accused had committed the offences with which they had been charged.

APPEAL by the Government of Bombay from an order of acquittal passed by B. C. Kennedy, Sessions Judge of Ahmedabad.

The two accused were sisters. Accused No. 2 was charged with an offence made punishable by section 317 of the Indian Penal Code, in that she abandoned a child of 15 days ; and accused No. 1 was charged with having abetted her sister, under sections 317 and 109 of the Code.

The facts were that accused No. 1 who was unmarried and a girl of fourteen became pregnant. With the help of her sister, accused No. 2, she went to the Civil Hospital at Ahmedabad, where she gave birth to a child. Fifteen days afterwards, both the accused drove from the hospital to the Railway station at Ahmedabad

* Criminal Appeal No. 307 of 1916.

in the evening ; accused No. 1 gave her child to accused No. 2 ; and accused No. 2 took it with her in a Second Class compartment in the Gujarat Mail leaving Ahmedabad at about 9-20 p. m. At the first stop (Mehmadabad) accused No. 2 got out of the carriage leaving the child under the seat and turning out the light. The child was carefully wrapped up and was provided with a bottle of milk. The train went on ; and at the next stop (Nadiad) the child was found by a passenger and given over to the Police.

The accused were tried by the Sessions Judge of Ahmedabad : but the learned Judge being of opinion that both the accused were not guilty of offences charged, acquitted them, on the following grounds :—

As for the question of abandonment I find that this was an abandonment. The analogy (relied on by the defence) of a person who puts a child into the box of a foundling hospital is faulty. There is the transfer to the care and custody of a person who will look after the child. Such abandonment is not therefore an exposure or leaving. Here no doubt the second accused hoped and expected that the child would be found by some charitable person and had wrapped it up well and provided it with milk so that it could be fed immediately on its being found. But all this was contingent and conjectural and the finding and preservation of the child if it took place would depend on no act of the person leaving it but on the course of events which she could not foresee with certainty or in any way control ; and this seems to me what is meant by exposure or leaving with the intention of totally abandoning.

If then the person abandoning the child is a person contemplated by the section the offence is complete. But it is here that the difficulty arises.

The person who abandoned the child was not the father or mother. The mother handed it over to the second accused. The mother therefore did not expose or leave the child.

In a carefully drafted Act like the Penal Code it is impossible to read into the section for " expose or leave," " causes to expose or leave."

Was the aunt, the accused No. 2, a person having care of the child ? I do not on the whole think so.

The words obviously mean a person entrusted with the child to take care of it and not a person who is merely a minister for exposing it. As far as I can

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see the persons aimed at in the section are parents, baby farmers and wicked uncles and the law does not seem to make it punishable to hand over a child to a person for the purpose of abandoning it. The only authority on the point is quoted in Mayne and is to the same effect. The law thus differs very materially from the English Law as it stood when the Code was drafted and I suppose that the legislators had some reason for drafting the section in the way in which it has been drafted.

Possibly they thought that the case was not likely to occur very often because children abandoned are generally bastard children and are exposed in order to conceal that the mother had misconducted herself and therefore there would be little likelihood of the mother's confiding the fact of her having a child to a third person. Probably the case is rare, as there are no reported cases.

It would appear then that the second accused has not committed the offence defined in section 317, Indian Penal Code. The accused No. 1 cannot, therefore, be convicted of abetting the accused No. 2, who has committed no offence, and section 37 does not help matters.

The Government of Bombay appealed against the order of acquittal.

S. S. Patkar, Government Pleader, for the Crown :— Accused No. 2 had the care of the child when she received it from its mother accused No. 1. Her custody was with a view to abandon the child. Her offence is complete as soon as she abandons it: see Statute 57 & 58 Vic. c. 41; *King-Emperor* v. *Antakke*.[1]

T. R. Desai, for the accused :—The act of the accused No. 2 did not amount to "*wholly* abandoning" the child; and so it was not an offence under section 317 of the Indian Penal Code when she left the child fully covered up and provided it with a feeding bottle. She fully expected that the child would ultimately be discovered at the terminus station in 10 hours time, if it was not found at an intermediate station. Accused No. 1 took no part in the affair and was not guilty of any offence: see *Queen-Empress* v. *Mirchia*[2];

[1] (1901) 24 Mad. 662.

[2] (1896) 18 All. 364 at p. 366.

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The Crown v. *Mussammat Bhuran*[1] and *Queen-Empress* v. *Felani Hariani*.[2]

BEAMAN, J. :—This is an appeal by the Government of Bombay against the acquittal of two women by the Sessions Judge of Ahmedabad. The offences with which they were charged were under sections 317 and 109 of the Indian Penal Code.

The facts, which are undisputed, are that the younger of the two accused persons, a girl of fourteen, became pregnant while still unmarried, and in order to conceal her shame from her parents with the connivance of the elder of the two accused, her sister, she was conveyed to the Civil Hospital of Ahmedabad where she was safely delivered of a child. As soon as she was sufficiently recovered the two sisters agreed that it would be advisable to dispose of the child secretly. Accordingly, the young mother handed the child to her elder sister who carried it by train to Mehamedabad where she left it in a Second Class compartment. The child was carefully wrapped up and a bottle of milk was left by its side, so that as soon as it was discovered by any one there should be means of feeding it.

These being the admitted facts, the learned Sessions Judge came to the conclusion that no offence had been committed by either of the accused persons. The mother, in his opinion, was the only one of the two who had the care of the child and she neither exposed nor left it with the intention of wholly abandoning it. Her elder sister according to the view taken by the learned Sessions Judge—a view which had formerly been expressed in the Madras High Court—was not a person having the care of the child within the meaning of the section, because she was only entrusted with the child for the express purpose of exposing or leaving it.

(1) (1878) P. R. No. 5 of 1878 (Cr.). (2) (1871) 16 W. R. Cr. 12.

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A further point has been argued before us, viz., that in any view, neither of the accused had the intention of wholly abandoning the child. That, we think, is unnecessary to discuss. It is perfectly clear that having regard to the true objects of sections of this kind, we should not be too nice in fitting facts literally to the words of the section but look to them as a whole, and so looking at them we should have no hesitation whatever in saying that the intention of both the sisters was to get rid of the child, as far as they were concerned, that is to say, of wholly abandoning it without at the same time providing for its immediate protection and care by other persons.

The first point, however, needs a little more consideration although we have no doubt that the learned Judge was wrong. It is not so easy to demonstrate this by dialectical analysis. We cannot help feeling, however, that in cases of this kind, any person receiving an infant from its mother on the distinct understanding, as in this case, that the mother never desired or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she had transferred it to the care and custody of some other person or institution. The difficulty arises in cases where the care or possession—whatever term be used—intended by the mother, would be in the contemplation of both the persons concerned for an extremely short time. Suppose, for example, the mother desires to abandon her child and on that distinct understanding she requests another to leave it in a lonely field some two minutes distance away, we are still of opinion that during that space of time, the second person carrying the child with no other object than that of exposing and leaving it in the appointed place would have the care of it sufficiently within the meaning and contemplation of section 317. This can be easily exemplified by

retaining all other conditions but extending that of time. Suppose a second case in which the mother makes over her child in India to a person with the intention that that second person should carry the child to South America and there abandon it. The intervening period might be several months and during the whole of that time the person in actual possession of that child would, in our opinion, have the care of that child within the meaning and contemplation of the section and we do not think that in such a case the facts would ever occasion any doubt or hesitation at all. But if we are right, mere extension of time could not affect the underlying principle, and that principle again would have to be applied in each case with reference to its facts and also with that degree of common sense which Judges of experience are supposed to exercise while administering the criminal law. It is sufficient for our purposes to look first at the real intentions of the persons and see whether they fall within the mischief which the particular section of the Indian Penal Code is designed to strike at. If we needed confirmation of this view, we might look to the English statute, where the case with which we are dealing has been expressly foreseen and provided for. There it is enacted that a person, situated exactly as the accused No. 2 was situated in this case, that is to say, having the *de facto* possession of the child, has the care of the child for the purpose of the statute.

While, therefore, we think that the learned Sessions Judge was wrong in his law, we agree with him in his estimate of the moral guilt of the accused, and the learned Government Pleader has been instructed merely to ask for an expression of the law from this Bench and not to press in any way for sentence. Being of opinion, however, that the acquittal was wrong, the law compels us to convict and, therefore, to inflict some sentence.

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We reverse the acquittal and convict both the accused under sections 317 and 109 of the Indian Penal Code and direct that each of them do undergo one day's simple imprisonment.

As we understand that the accused are in Bombay the sentence will be sufficiently carried out by detaining them until the rising of the Court this evening.

HEATON, J.:—I agree. I think this is a very pitiable case, one in which no possible object can be gained by imposing a substantial sentence. But I think the learned Sessions Judge was wrong in the view he took of the law. It seems to me that when the accused No. 2, the elder sister, took or received this child from its mother and conveyed it to a railway carriage and then went off with it leaving the mother behind, she became immediately responsible for the well being of the child. It does not matter that her ultimate object was to leave the child and return without it. She was nevertheless for the time being the person who had the care of the child as, I think, within the meaning and intention of these words as used in section 317 of the Indian Penal Code.

Order of acquittal set aside.

R. R.