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Pritchett v. *English and Colonial Syndicate* (1899), 2 Q.B., 435: "If a person brings an action upon the garnishee order without any necessity he will run the risk of having it stayed as an abuse of the process of the Court, and probably have to pay the costs. It is obvious that if the amount to be paid can be obtained by execution but instead of that he incurs the expense of an action that is an abuse of the process of the Court." I think that every word there applies to this case with great force—here there is no evidence at all that the amount to be paid could have been met by any mode of execution. The time is nearly up, and he has obtained no satisfaction and there is no proof that he ever could have obtained it, and, therefore, I think that this appeal should be allowed.

THOMAS, J.: I am of the same opinion. This case brought before the Court was founded almost entirely on the question as to whether it was competent to bring the 2nd action. Both Courts below decided this point and said it was *res judicata*. Now the cause of action in the 1st case must be and becomes extinguished by the judgment. When it was pronounced that judgment constituted a new cause of action and created obligations which in the words cited by the Chief Justice form an obligation to pay the amount of the judgment. The action relies upon the judgment. I agree with the views expressed by the President of the Court, and for this reason, the appeal should be allowed with costs.

Appeal allowed and judgment entered for appellant.

[STRONGE, C.J., THOMAS AND FUAD, JJ.]

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IN THE MATTER OF THE COURTS OF JUSTICE LAW, 1935, SECTION 24, AND OF FIVE QUESTIONS RESERVED FOR THE OPINION OF THE SUPREME COURT BY THE ASSIZE COURT OF FAMAGUSTA IN THE CASE

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v.

ANTONI CONSTANTI TRAMBOULLI.

Murder — Questions to be decided by Trial Court — Evidence to be taken into account in considering identification of remains and whether death was due to unlawful violence.

The above-named defendant was charged before the Assize Court of Famagusta in October, 1937, with the murder of his son, who has been missing since the beginning of March. Certain remains were found in a well early in July, which are alleged by the Crown to be those of the missing son. At the conclusion of the case for the Crown the Assize Court, acting under section 24 of the Courts of Justice Law, 1935, reserved five questions for the opinion of the Supreme Court, the text of which is as follows:—

(A) Are the issues for consideration by the trial Court in a murder case correctly formulated and in the proper order if put as follows:—

(i) Is the person alleged to have been murdered dead ?

(ii) If so, was that person's death due to unlawful violence ?

(iii) If so, did the defendant murder him ?

(B) If not, what is the correct formulation of such issues and what is their proper order ?

(C) Is it a rule that, in considering whether certain remains found are those of the person alleged to have been murdered, a trial Court should only take into account the description given of that person in conjunction with the evidence furnished by those remains alone, without allowing itself to be influenced by the other evidence in the case ?

(D) If so, is it a rule that the identification cannot be regarded as established unless the remains found bear some distinctive peculiarity directly identifying them as those of the person alleged to have been murdered ?

(E) If the trial Court arrives at the conclusion that the identification has been established, is it a rule that, in considering whether the death of the person alleged to have been murdered was the result of unlawful violence, the trial Court should only take into account the evidence furnished by the remains found alone, without allowing itself to be influenced by the other evidence in the case ?

The answers of the Supreme Court are given in the judgment of the Court.

G. Mylonas for the defendant:

As to Question (A): I submit that the issues are properly stated in the order given, and (iii) must come third after proof of the *corpus delicti:* Wills on Circumstantial Evidence (6th Ed.), p. 333; Halsbury (2nd Ed.), Vol. 9, p. 183 and p. 449. There must be found a body or part thereof, which must be proved to belong to the alleged victim; and in the absence of such evidence *Evans* v. *Evans* is a guide (English and Empire Digest, Vol. 14, p. 432); see also *R.* v. *Hopkins* (*ibid.* p. 433). Whether death was due to unlawful violence may be proved by circumstantial evidence, not necessarily by direct evidence.

As to Question (C): *Evans* v. *Evans* applies here also; and see Wills (6th Ed.) at p. 349.

As to Question (D): The cases cited in the English and Empire Digest are based either on confession of the defendant or on a peculiarity common to the body found and the murdered person. No other evidence is admissible to prove identity.

As to Question (E): I agree that the Court can take other evidence into account, and need not confine itself to that furnished by the remains alone.

S. Pavlides, Crown Counsel, for the Crown:

As to Question (A): I submit there is only one issue—namely, whether defendant is guilty or not, though (i) and

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(ii) are relevant subsidiary questions. Clause 142 and clause 149 of the C.C.J.O., 1927. The passage in Wills (6th Ed.) at p. 333 does not lay down any propositions of law but indicates the author's method of treatment of the subject. There is no rule of law requiring consideration of subsidiary questions in any particular order. Singleton, J., in the *Ruxton* case, deals with the question of the identity of the bodies at the end of his summing up.

As to Question (B): I have dealt with this in my submissions on Question (A).

As to Question (C): There is no rule of law such as is suggested in the question. The question is one of fact for the trial Court, which can take into account any part of the evidence tending to show that the remains found are those of the alleged victim. See *Nash's* case in 6 C.A.R., 225, which shows that the trial Court is not to confine itself to the remains in considering identification and cause of death, but may have regard to defendant's conduct. In Wills on Circumstantial Evidence (6th Ed.) at p. 341 it is stated that it is not necessary that the remains should be identified by direct evidence. In the *Ruxton* case, though the charge was for the murder of his wife, evidence identifying part of the remains as being those of her maid, who disappeared with her, was admitted as tending to establish the identity of the other remains as being those of the wife. There were no identifying marks on the wife's remains, such marks having been removed. The defendant's conduct was invoked in aid of proof of identity. Nor need a body be found at all: *R.* v. *Davidson*, 25 C.A.R., 21, which shows that the alleged victim's death and its being due to violence may be inferred from defendant's conduct and statements.

As to Question (D): There is no rule of law requiring the presence of identifying peculiarities in the remains found. This is apparent from the cases cited in my submissions on Question (C).

As to Question (E): The cause of death can be inferred not only from the remains but also from the defendant's conduct: *R.* v. *Nash* (*ubi supra*); *R.* v. *Lapworth* (22 C.A.R., 89); *R.* v. *Davidson* (*ubi supra*).

The judgment of the Court was delivered by the Chief Justice.

STRONGE, C.J.: The Assize Court of Famagusta pursuant to powers contained in section 24 of the Courts of Justice Law, 1935, has reserved for the opinion of this Court five questions. The first of them is:

" (A) Are the issues for consideration by the trial Court in a murder case correctly formulated and in the proper order if put as follows:—

(i) Is the person alleged to have been murdered dead ?

(ii) If so, was that person's death due to unlawful violence ?

(iii) If so, did the defendant murder him ? "

An information which charges Y. with having murdered Z., and upon which, as between the Crown and the prisoner, issue is knit by a plea of "Not Guilty" implies that (1) Z. is dead, (2) as the result of unlawful violence which was (3) inflicted by Y. It is clear that a trial Court cannot on such a charge find Y. guilty if the prosecution upon which, of course, the burden of doing so rests, has failed to establish any one or more of these three propositions.

The first two of these propositions, viz.: that Z. is dead and that his death was due to unlawful violence constitute the substance or body of the crime charge, what is termed in legal language the *corpus delicti*.

Now, on the authorities, it would seem that the first two propositions ought to be considered and a decision on them arrived at by the trial Court before it enters upon consideration of the third proposition that it was Y. who inflicted the unlawful violence. For instance, Wills on Circumstantial Evidence (7th Ed.) asserts in several passages that that is the order in which they must be considered. At p. 337 he says: "The offence is, for instance, that a person has been killed and not only killed but murdered . . . . These matters being established—and not till then—we come to inquire who committed the offence." At p. 346 the following passage appears: "In cases of homicide three propositions must be made out in order to establish the *corpus delicti*" (*the learned author then states these propositions and continues*)—"It is not till these propositions have been proved that the question—not included in the inquiry as to the *corpus delicti*—Is the accused person the culprit arises."

Again, at p. 358 he says: "The cases, however, in which the moral conduct of a suspected person becomes relevant to the investigation of the *corpus delicti* are few and far between, and in the vast majority of instances the jury should be warned against allowing it to influence their decision of the questions which must be answered before the inquiry whether any individual is guilty can be entertained."

It is not, in face of these passages, possible to hold, as we were asked to do by learned counsel for the Crown, that the learned editor who thus repeatedly insists that the *corpus delicti* has to be considered and a decision as to it arrived at before the question whether the prisoner is the perpetrator can be considered, was merely intending to indicate the way in which he proposed to approach the subject for the purpose of developing his views about the *corpus delicti*, and not as laying down a definitive proposition.

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Common sense would, indeed, seem to demand such an order as the logical one; for what would it avail to consider as the first subject of inquiry whether the prisoner was the perpetrator of the unlawful violence when an affirmative decision on that question may be rendered otiose by a decision on either of the two remaining questions that the person killed is not the person named in the information, or, if he is, that he did not die as the result of unlawful violence.

It may further be observed that the order given in Wills on Circumstantial Evidence was the order adopted by Lord Alverstone, L.C.J., in his charge to the jury in the case of *R.* v. *Crippen*, for he told them (see Wills on Circumstantial Evidence (7th Ed.) at p. 476) that before they could find the prisoner guilty they must be satisfied that the remains in the cellar were parts of the body of Cora Crippen, that she had been murdered, and that the prisoner was the murderer.

The answer, then, to question (A) must be that though there is no rule of law requiring it the consideration of (iii) ought not as a matter of practice to be entered upon until an affirmative decision has been reached upon (i) and (ii).

As regards (i) and (ii) there is not any rule which requires them to be considered in the order set out in the question but that is a convenient and logical order in which to take them.

Question (B) is as follows:—

" (B) If not, what is the correct formulation of such issues and what is their proper order ? "

In view of the foregoing answer to question (A) an answer to this question is not necessary.

Question (C) is in these terms:

" (C) Is it a rule that, in considering whether certain remains found are those of the person alleged to have been murdered, a trial Court should only take into account the description given of that person in conjunction with the evidence furnished by those remains alone, without allowing itself to be influenced by the other evidence in the case ? "

The answer to this question is, that a trial Court for the purpose of deciding whether certain remains found are those of the person alleged to have been murdered is at liberty to take into account any evidence which is relevant as tending to establish or disprove identity. There is no rule of law or practice that a trial Court, in considering the question of identity between the remains and the person named as having been murdered, can only take into account

the description given of that person in conjunction with the evidence furnished by the remains and the clothing or wrapping in which they are found. On this point Wills on Circumstantial Evidence (7th Ed.) at p. 357 says: "In the great majority of cases, the moral conduct of the person accused or suspected has little or nothing to do with the investigation of death, identity, or foul play, but it would be going too far to say that moral conduct of an accused or suspected person *can* have no bearing upon any of these questions." A little further on on the same page there occurs the following passage: "Although the jury may be properly directed in one instance to put aside when considering the question of identity all regard to the moral conduct of the individual concerned, in another instance such a direction might be erroneous." The reference to *R.* v. *Cheverton* (1862) in 14 English and Empire Digest, p. 416 case 4339, is as follows: "Although it is necessary in a case of murder that there should be evidence that the body found is the body of the murdered person the circumstances may be sufficient evidence of identity."

In *R.* v. *Nash* (1911) 6 C.A.R., 225, Lord Alvertsone, L.C.J., in overruling the submission on behalf of the appellant that the evidence of identity was insufficient, nowhere refers to any similarity existing between particular articles of clothing proved to have been worn by the missing boy and the portions of those articles found on the body in the well. That they did in fact correspond in the minutest particulars is stated in the account of the case in Wills on Circumstantial Evidence (7th Ed.) at p. 360. Nevertheless, the Lord Chief Justice instead of basing himself on this similarity as proof of identity rests himself solely on the conduct of the appellant holding that the evidence of identity was sufficient on the strength of the facts that "appellant left the house with the child, saying she was going to Mrs. Hillier's; that she would pass near the well where the body was found; that a woman was seen there with the child on a day about that time. Alone these facts might not be sufficient, but she left with the child in perfect health and when she returned she said she had left it with Mrs. Hillier; she packed up its clothes and said she had sent them to Mrs. Hillier and later she said the child was well. All these statements were untrue. She had an object in getting rid of the child and if it had been lost or met with an accidental death, she had every interest in saying so at once."

In *R.* v. *Ruxton*, 1936, (Notable Trials Series) the prisoner was charged with the murder of his wife, Isabella Ruxton, who, together with a maid, Mary Rogerson, was proved to have been an inmate of his house on the night of 14th

September, 1935, after which date both of them were never seen or heard of again. Human remains were subsequently found in a ravine at Moffat, miles away from prisoner's house, which proved to be those of two female bodies. The evidence as to identification at the trial was not restricted to comparison between the remains alleged to be those of Mrs. Ruxton and the description given of her when alive, for evidence was admitted to prove that the other human remains were those of Mary Rogerson on the grounds that both she and Mrs. Ruxton having been in prisoner's house on the night of 14th September and having both disappeared at the same time, and portions of the remains of two bodies having been found in one of the parcels, identification of one set of the remains as the body of Mary Rogerson might help towards identification of the other remains as those of Mrs. Ruxton.

Furthermore, Singleton, J., in his charge to the jury refers to certain evidence to the effect that the prisoner gave away his wife's clothing, and that he did so subsequently to his learning that the remains found were supposed by the Police to be those of a man and a woman, and not two women, and after referring to this evidence the learned judge asks the jury (p. 342)—" Do you believe that any husband who thought his wife was alive would do that with her clothes ? Again, do you believe he would have done that with her clothes if he thought there was any danger of identity ? When I say ' of identity ' I mean of the bodies at Moffat being identified as the bodies of his wife and Mary Rogerson." It is permissible to infer from these questions that the learned judge was indicating to the jury that they might take into consideration the conduct of the prisoner both in regard to his being the person who murdered Isabella Ruxton and also on the question of the identity of the remains.

Question (D) is as follows:—

> " If so, is it a rule that the identification cannot be regarded as established unless the remains found bear some distinctive peculiarity directly identifying them as those of the person alleged to have been murdered ? "

As the answer to question (C) is in the negative an answer to this question is not, strictly speaking, called for, since the words " if so " which preface it presupposes an answer only in the event of question (C) being answered affirmatively. This notwithstanding, it may, perhaps, not be unhelpful to disregard these two introductory words and treat this question as if it were altogether independent of question (C).

Where human remains have been found which the prosecution allege are those of the person charged to have been murdered, it would seem to be the invariable practice in England, judging from the authorities, to adduce, whenever it is possible to do so, evidence of points of similarity between the remains and the description of the person supposed to have been murdered with the object of establishing the identity of the one with the other.

The evidence so adduced may be evidence of physical peculiarities possessed by both, as for instance, peculiarly small feet (*R.* v. *Dougal*, 1903) as evidenced by remnants of boots found on the remains; the scar of an operation on a particular part of the body (*R.* v. *Crippen*, 1910). Indeed the fact that the person alleged to have been murdered possessed several physical peculiarities and that, in the remains found, the parts of the body which would show these peculiarities have all been intentionally removed is a matter tending to show the identity of the two (*R.* v. *Ruxton*, 1936).

Nor is evidence of identity confined to that of physical resemblance between the remains and the person alleged to have been murdered. It may also extend to identifying articles of clothing found on the remains as belonging to the person said to have been killed. Thus, in *R.* v. *Dougal* (1903) a skirt and a comb found with the remains were so sworn to by Miss Holland's maid—Miss Holland being the victim. In *R.* v. *Platts* (1847) (of which, like *Dougal's* case, an account is given in Volume I of Taylor's Medical Jurisprudence) the clothes on the remains were identified as those worn by the deceased at the time of his disappearance, and two coloured garters on the leg bones of the remains were also identified as his by a person who made and gave them to him. So, too, in *R.* v. *Nash* (already referred to) evidence of similarity of articles of clothing was given. The fact that various articles belonging to the deceased are found or traced to the possession of the accused person may also be taken into account as tending to show identity, as was done in *R.* v. *Cook* (1834) and *R.* v. *Schneider* (1898) (Wills on Circumstantial Evidence, 7th Ed., p. 355) and *R.* v. *Platts* (*ubi supra*). So, too, may the fact that prisoner has proceeded to give away the deceased's clothing (*R.* v. *Crippen*, 1910, *R.* v. *Ruxton*, 1936).

Identity, then, it may be concluded, is a question as to which it is for the trial Court to decide whether it has or has not been satisfactorily established, and in considering this question the Court is to take into account any evidence

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which is relevant thereto. Whether the prisoner's conduct is or is not relevant will depend on the particular facts of the case which is being tried.

The fifth and last question is this:

"(E) If the trial Court arrives at the conclusion that the identification has been established, is it a rule that, in considering whether the death of the person alleged to have been murdered was the result of unlawful violence, the trial Court should only take into account the evidence furnished by the remains found alone, without allowing itself to be influenced by the other evidence in the case ?"

To this question the answer is that there is no rule of law that on a trial for murder the Court, in considering whether death was due to unlawful violence, can only take into account the evidence furnished by the remains. In the case *R.* v. *Nash*, already referred to in the answer to question (C), the contention was advanced that there was no sufficient evidence to establish unlawful killing inasmuch as there was nothing to show whether death was natural or violent or whether it occurred before or after the body was put into the well. Dealing with this contention Lord Alverstone, L.C.J., says: "Mr. Goddard cannot have meant that there must be proof from the body itself of a violent death" and goes on to say: "In view of the facts that the child left home well and was afterwards found dead, that appellant was last seen with it, and made untrue statements about it, this is not a case which could have been withdrawn from the jury."

Again in *R.* v. *Robertson* (1913) 9 C.A.R., p. 189, the doctors were unable to say definitely with regard to the three bodies discovered that death was due to their having been smothered; they could only go to the length of saying that the appearance of the bodies was consistent with that being the case. Sir Rufus Isaacs (as he then was) L.C.J., in his judgment, after stating the facts, says at p. 191: "These circumstances were before the jury as well as statements made by the appellant to the police, the fact that he gave no evidence and offered no explanation how the three children who were left alone in the house had disappeared and the fact that he had made a series of statements about the children which were fabrications." "It is argued," the Lord Chief Justice continues, "that these facts do not amount to evidence on which a jury could convict. It could be argued that on these facts no other verdict was possible. The only possible suggestion is a series of coincidences; the jury are reasonable men, and we have to exercise our common sense and must take into account what inferences reasonable men would draw."

In *R.* v. *Davidson* (1934) (25 C.A.R., 21), the prisoner was charged with the murder of his son whose body had not been found. Prior to his trial the prisoner had made several confessions of having murdered the boy and disposed of the body, but at the trial he gave evidence retracting these confessions and stating that he had found the boy's dead body in the canal.

Apart from the confessions there was no direct evidence that the boy was dead. The jury convicted and on appeal it was held that the verdict was one to which they were entitled to come on the evidence. Lord Hewart, L.C.J., who delivered the appeal judgment says in the course of it (at p. 27). " Presumably if the matter which has been argued and properly argued before us had been raised at the Central Criminal Court there must have been two questions put to the jury: Are you satisfied that the boy is dead ? Is so, are you satisfied that he was murdered by the prisoner ? But in our opinion it was perfectly open to the jury, upon the evidence which was given to hold that the boy was dead, and, after hearing the evidence of the appellant to disbelieve the retractation of his confessions which he made and to accept the statements which he had previously made, namely, that he was the cause of the boy's death. As Mr. Eustace Fulton has said, all his conduct was inconsistent with the view that this child had come to his death in a way not involving guilt upon the part of the appellant."

The passage secondly quoted in the answer to (c) from p. 357 of Wills on Circumstantial Evidence (7th Edition) continues on p. 358: " and equally with regard to the question whether the subject of the inquiry has been the victim of foul play the conduct of the accused person *may* have an important bearing upon the conclusion which ought to be arrived at " and adds " Certainly, in *Crippen's* case it was not possible to say that his conduct had not some bearing upon these preliminary questions relating to the *corpus delicti*."

In Russell on Crime (8th Edition), Volume I, p. 783, the learned author says: " A question has sometimes been raised whether a prisoner can be convicted of murder where it is impossible for any evidence to be given of the cause of death in consequence of the state in which the body was found, but it would seem that it is a question for the jury taking all the circumstances into consideration whether death was caused by violence or not and whether that violence was the act of the prisoner."