REGINA *v.* WAISAKE LABALABA

[Court of Appeal (Carew, Flaxman, Higginson, J.J.) July 21st, 1950]

Misdirection—s. 239 of the Penal Code—meaning of.

The appellant was convicted by the Supreme Court of Fiji of the offence of murdering his wife on 17th September, 1949.

It was proved at the trial that the deceased's death was caused by hanging, the accused being discovered in the crossbeams of his bure, his wife being suspended therefrom by a rope around her neck.

No reference was made to section 239 of the Penal Code at the trial. This section creates the offence of abetment to suicide.

HELD.—(1) That since the trial Judge did not direct either himself or the assessors to the provisions of section 239 this amounted to misdirection.

(2) That the test as to misdirection is to be found in the case of *R. v. Haddy* [1944] 1 K.B. 442.

Section 239 of the Penal Code explained.

Cases referred to:—

R. v. Haddy [1944] 1 K.B. 442.

R. Kermode for the appellant.

W. G. Bryce, Acting Solicitor-General, for the respondent.

CAREW, P.J.—It is admitted that the matter is entirely one of fact and that if the trial court could reasonably come to the conclusion which it reached, this Court could not be expected to interfere. It is contended, however, that the finding of murder is not the rational inference to be drawn from the evidence. The whole trend of the evidence and the inference to be reasonably drawn therefrom indicate some agreement between the accused and his wife to do some act of which they wished their neighbours to be in ignorance. Either they had made a suicide pact or the woman intended to commit suicide and the accused agreed to help her. At Common Law the accused would in either event have been guilty of murder; but under the Fiji Penal Code he would not. It is pointed out that section 239 of the Penal Code creates an offence which may be termed abetment to suicide.

It has been urged on us that although the learned Chief Justice directed the assessors and himself to the consideration of suicide, he did not draw their attention to the implications of section 239, nor did he himself consider the application of this section to the evidence before him. Had the assessors been given the opportunity of considering whether the accused had aided his wife to commit suicide as an alternative to whether he had hanged her, one is left to speculate on what their views would have been. It is admitted, of course, that the verdict is that of the trial Judge, who is not bound by the views of the assessors but who can say how the opinion of the assessors might have affected the mind of the learned Chief Justice or, indeed, apart from their views, how he himself would have reacted had he directed his own mind to the point. It is submitted that because of this misdirection there has been a miscarriage of justice.

For the Crown it is contended that whether the accused helped his wife to commit suicide or whether he was involved with her in a suicide pact, he would be guilty of murder; that section 239 of the Penal Code is not intended to cover such cases in that it does not contemplate active aid and that there has been no misdirection.

It is worthy of remark here that at the trial no reference was made to this section of the Code either by the Crown or Counsel for the defence. In fact the section seems to have been entirely ignored.

For an understanding of section 239 of the Penal Code and the offence or offences in contemplation thereof we have to go to the *Indian Penal Code*. We get no help from English law.

Section 306 of the Indian Penal Code reads:—

> " If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment of either description for a term which may extend to ten years. . . ."

Abetment is defined by section 107 as follows:—

> " A person abets the doing of a thing who—
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> First—Instigates any person do that thing, or
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> Secondly—Engages with one or more other person or persons in any conspiracy for the doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly—Intentionally aids, by any act or illegal omission, the doing of that thing."

On page 604 of *Gour's Penal Law of British India* Vol. 1 3rd Edition, the following passage appears under the heading " *Analogous Law* ":—

> " The chapter opening with this section deals with the law of what is known as accessories in English Law, under which there are three kinds (1) accessory before the fact; (2) accessory at the fact; and (3) accessory after the fact. Now, where two or more persons are prosecuted for the same offence, they are classified as (1) principals in the first degree; (2) principals in the second degree; and (3) accessories before the fact; or (4) accessories after the fact. Accessories at the fact are usually classified as principals of the second degree, that is to say aiders and abettors, who are actually or constructively present at the scene of the offence. . . ."

Under the Fiji Penal Code aiding suicide is defined by section 239 in these terms:—

> " Any person who:—
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> (a) procures another to kill himself; or
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> (b) counsels another to kill himself and thereby induces him to do so; or
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> (c) aids another to kill himself is guilty of a felony. . . ."

It would seem clear that the offence known as abetment of suicide under the *Indian Penal Code* and aiding suicide under the Fiji Penal Code are identical offences. And, as it is evident that a principal in the second degree known to English law is regarded under the Indian Penal Code as an abettor, it follows that he must, in view of the provisions of section 239 of the Penal Code, be so regarded in Fiji; this

section creates in Fiji an offence unknown to English law, and is applicable to the case now before us. We are therefore of the opinion that the contention of the Crown that section 239 of the Penal Code applies only where aid is not active cannot be supported. We are also of the opinion that the learned Chief Justice should have directed himself and the assessors to the provisions of this section when considering the evidence at the trial.

Has there then been a misdirection? And, if so, has any substantial miscarriage of justice actually occurred as a consequence? On the subject of misdirection we refer to the case of *Rex v. Haddy* [1944] 1 K.B. 442, where it was held that "if . . . the court . . . comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty there is no misdirection or at all events no substantial miscarriage of justice. . . ."

This is the test. If the learned Chief Justice had directed himself and the assessors in the terms of section 239 of the Penal Code would a verdict of murder have been returned? In considering this question the following facts adduced in evidence may be of assistance. The accused and the deceased, Saukuru, were alone in the house and later the deceased was found hanging by a rope fastened to a beam while the accused was standing beside her. On the other hand, before this the deceased was heard to say in a normal voice, "Is it to be a rope or a knife?" And later the accused called out to his sister, Calua, "Help me to get this woman down," and when she ran off he called to her repeatedly. When she returned she found him up on the beam trying, apparently, to undo the rope and he told her to call Meliya to help. Before the arrival of Calua there had been no sound of a struggle nor any call for help. If any such sound had been made it would presumably have been heard as clearly as the words, "Is it to be a rope or a knife." After the accused had been brought down from the beam he remarked, "My wife is a clever woman."

These facts point to a voluntary submission on the part of the deceased and might, apart from the provision of section 239 of the Penal Code, be indicative of duress on the part of the accused consistent with murder, but if section 239 were taken into account, could assume the complexion of assisted suicide.

In the circumstances of this case, had there been a complete direction, we cannot say whether a verdict of murder would have been found. We are, therefore, unable to satisfy ourselves that no substantial miscarriage of justice has actually occurred. It follows from this that the conviction for murder cannot be affirmed and must be quashed.

Appeal allowed, conviction quashed.