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In Court of Appeals.

The People

agt.

Edward H. Rulloff.

POINTS FOR DEFENDANT.

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Court of Appeals.

THE PEOPLE
Agt.
EDWARD H. RULLOFF.

Defendant's Points.

I.

The Court, upon the trial of the prisoner, erred in refusing to stop the prosecution upon the admission that the death was to be *presumed*, and in refusing to direct an acquittal at the conclusion of the evidence, no sufficient proof of a death having been given.

(1.) In every case of homicide, the death must be *proved* by evidence *certain* and *conclusive*, and can in no case be *presumed*, however high the degree of probability.

(2.) In determining what *kind* of evidence is thus sufficiently certain and conclusive, we are not driven in this case to insist upon the rigid rule of the English courts that the dead body must *always* be found: (1 *Cow. & H. Notes* 394,) though the solemn adoption of that rule by the constitution might well make such a claim serious. (5 *Cow. Rep.* 632, 636—9 *id.* 623.)

(3.) We insist only upon the original and true rule of Lord Hale, never yet questioned or departed from, that there can be no conviction for murder unless

1st, the *fact* be *proved to be done*, or

2d, *at least* the dead body be found.

(2 *Hale P. C.* 290.)

When either branch of this rule is complied with, there is *proof* of the death. When neither is obeyed, there can be but a *presumption*. (1 *Cow. & H. Notes* 307.)

(4.) The Court below have entirely misapprehended this rule, and discussed a question foreign to the case.

(a.) It does not forbid proof of the *fact of dying*, which is the *fact* alleged in the indictment, by *indirect* evidence or by *circumstances*, but permits that *fact* to be *inferred* from an act of violence necessitating death or a finding of the dead body, each of which, *relatively* to the fact of dying, is a circumstance. (*Burrill on Evidence*, 121 *note d.*, 678.) The rule therefore does not repudiate *indirect* evidence, but *selects* and *specifies* from among "circumstances" the only two upon which it is deemed safe to rely.

(b.) It follows at once that the entire argument of the Court below is misapplied. Degrading "direct" evidence and exalting "indirect," does not touch the discussion. The question lies back of that, and is really between two classes of circumstances—those which are specified in our rule, and are essentially "*unequivocal*," and those which exist in the case at bar, and are essentially "*equivocal*."

(c.) The *conclusion* of the court below is, therefore, illogical. It is also essentially erroneous. That conclusion is, that the death may be established by an array of "equivocal" circumstances; which may all be possible and true *without a death having taken place*; which can only raise a *suspicion* or a strong *probability* of death; which can never make it *certain*; which permit a new rehearsal of the tragedies that shocked Lord Hale. On the other hand, the rule contended for requires proof, either of the *cause* of death, to wit: the violence, or of the *effect* of death, to wit: a dead body; each of which circumstances is connected with the fact of dying by a *necessary* and *certain* relation, and is,

therefore, essentially "*unequivocal*," *cannot* be *true or possible* without a death having taken place.

(5.) *All* the authorities fully sustain the rule of Lord Hale, and *none* are inconsistent with it.

[a.] By its terms, when the body is not found, the act of violence alleged in the indictment must be directly proved; its *actual commission* must be shown. It was under this branch of the rule that the conviction of Hindmarsh was sustained. *The violence was directly proved.* [2 *Leach* 571, 1 *Russel on Crimes* 567, 2 *Chitty's Crim. Law* 492, 738.] In this aspect, also, it permits convictions for murder at sea where a person is thrown overboard; [*per Mason J., fol.* 165, 221, *Story J., U. S. vs. Gilbert*, 2 *Sumner's C. C. R.* 27,] or when the body is destroyed by the same means that cause the death.—[*Balcom J., fol.* 236, *Gray J.*, 360, 361.] But after the act of violence alleged in the indictment is proved, if its character be such as to leave a doubt whether the death was a *necessary* consequence, even that doubt is fatal to a conviction. [*per Garrow arguendo* 2 *Leach* 571.]

(b.) When the violence has been proved in obedience to Lord Hale's rule its conclusive or inconclusive character becomes a question for the court and jury. But when that is not done, in the absence of a dead body, there is nothing for court or jury to pass upon; *the prosecution should be stopped.* (*Fol.* 42, 1 *Cow. & H. Notes* 394. *Burrill*, 120.) The "equivocal" circumstances are not then admissible into the case; their *foundation* is wanting; they by themselves can never even *operate* toward proving the *corpus delicti.* (1 *Starkie on Ev. p.* *492 *Whartons Am. Crim. Law.* 283.)

(c.) The necessity of proving one of Lord Hale's "unequivocal" circumstances is every where conceded in the authorities. (4 Black. Com. *359.)

In a case where a child had disappeared under circumstances of grave suspicion, but no violence was proven nor was the dead body found, Lord Abinger *directed*

an acquittal. (*Reg. vs. Hopkins*, 8 *Car. & Payne* 591.) He would not permit her to be called upon to *account* for the missing child as is done in this case by Gray J. (*fol.* 364) just as did the justices in the case of "the uncle and niece" and whose conduct the same Gray J. incon-sistently blames. [*Fol.* 347, 348.]

It is said by Wharton [*Am. Crim. Law.* 198] that the death must be distinctly proved "*by direct evidence of the fact or by inspection of the body.*"

It was said by Abbot ch. J. of the cases cited by Lord Hale which were made up, like the one at bar solely of *equivocal* circumstances, that there was no *actual proof* of death and the *corpus delicti* was not established. (*Rex. v. Burdett*, 4 *Bar. & Ald.* 162.)

The rule contended for was strongly enforced in a case of larceny where testimony that the horse was stolen was held insufficient evidence of the *corpus delicti*, the facts *constituting the offence* being unproved. [*Tyner v. The State* 5 *Humphrey* 383 *cited in Wharton* 198.]

The same rule is stated approvingly by Roscoe and many of the authorities cited. [18, 693.]

It is said by another authority that a departure from this rule was a capital error in Miles' case; that the rule is *universally* acted upon; and the judge should have stopped the prosecution. [1 *Cow. and H. Notes*, 394, *Note* 323.]

[d.] The soundness of the rule is further sustained by a class of authorities which distinctly deny the power and fitness of "equivocal" circumstances to prove a death, and shut them out from the jury till proof *aliunde* of the death is given.

Thus Starkie emphatically denies that proof of a *strong motive* to commit the crime can "*operate* in proof of the *corpus delicti.*" [1 *Starkie on Ev.* *492,] and again "that the *coincidence of circumstances* tending to indicate guilt, however *strong* and *numerous* they may be, avails nothing unless the fact that the crime has been *actually* perpetrated be *first* established." [1 *Starkie*, *510.]

Said Lord Stowell "to take presumptions in order to swell an *equivocal* and ambiguous fact into a *criminal* fact would be an entire *misapplication* of the doctrine of presumptions. [*Evans v. Evans* 8 *Hagg C. R.* 105 *cited by Wharton* 198.]

Says Greenleaf of the proof establishing the death, "without this proof a conviction would not be warranted though there was evidence of the *conduct of the prisoner* exhibiting *satisfactory* indications of guilt. [3 *Gr. Ev.* § 131 *p.* 121.]

Says Burrill "*until* a *corpus delicti* is established there is in fact no *proper* subject before the jury." [*Burrill on Ev.* 120.]

And again: "It is considered *unwarrantable* and dangerous to *infer* the fact of the death of a person from the *circumstance* of his *sudden disappearance*, even when followed by *long continued absence* and even although such circumstances may be *connected with others* apparently casting *suspicion* upon a particular individual." [*Burrill on Ev.* 678.]

[e.] Still another class of authorities couched in *general* language sustain the rule by their description of the *kind* of circumstances necessary to establish a death.

Thus Wills describes them as "*unequivocal*;" from which the conclusion is "irresistible" and "admits of no dispute and requires no corroboration." [*Fol.* 206, 212, 213, *Wills on Cir. Ev.* 156, 178, 185.] Chitty says in very general language that there ought to be no conviction "before a felony is *known* to have been *actually* committed." [1 *Ch. Crim. Law* *563.] Walworth declares that there should be no conviction unless the dead body be found or there be "*other* clear and *irresistible* proof of the death. (*The People vs. Videto* 1 *Park. Cr. Rep.* 609.)

All this language, however general, is prudently guarded against any sanction of the position held by the people that upon mere "equivocal" circumstances and

without proof of the "unequivocal" ones required by Lord Hale there may be a conviction.

(f.) Finally the conclusion as to the drift and force of authority is rendered conclusive by the consideration that since Lord Hale's rule was first announced *not one case* of a conviction outside of its limits, not *one attempt* to evade it can be found in the records of the law: while yet temptation and occasion have not been wanting. Thus in the case of Eugene Aram (*fol.* 194) notwithstanding the strong array of circumstances indicating guilt, for 13 years no attempt was made to convict him and then only upon a finding of the body. And in the later case of "Morgan" even political zeal had not the effrontery to indict for murder.

On the other hand it should not be forgotten that the only recorded cases to be found on a diligent search in which convictions were allowed on mere equivocal circumstances are those which resulted in judicial murder.

(g.) The authorities which have been cited in the case at bar and which are not in the number above mentioned are all impertinent to the discussion. Some *merely* discountenance the rigid English rule without at all touching the question at bar. (2 *Starkie on Ev.* *944 1 *Russel on Crimes* 567, 2 *Chitty's Crim. Law* *738, *U. S, vs. Gilbert* 2 *Sumner C. C. R.* 27.) The others we shall now discuss in a different connection.

(6.) The rule of Lord Hale is deeply grounded in principle. We have said that no question as to the relative merits of direct and indirect evidence arises in the case and that the authorities lauding the latter are impertinent. Were it necessary we might add the latter are *overstrained* and their *extreme* language was intended as an antidote to the "Theory of Presumptive Proof" which had disturbed the equable administration of the law. (2 *Cow. & H. Notes, note* 323, *Burrill* 234, 235.) However, that line of comment is unnecessary since *no* authority claims for mere "equivocal" circum-

stances, for a *part* of an entire chain, *its two central links gone*, the "dignity of *proof*" or a probative force mounting up to "moral certainty," but all those claims are predicated of an array of circumstances in which the *corpus delicti*, or at least one of Lord Hale's "unequivocal" circumstances is a main and constituent element.

Thus in Barbour's Crim. Law (*1st ed. p.* 415) and in Rex. v. Thurtell (1 *Cow. & H. Notes* 393) the *effect* of circumstantial evidence is stated *generally* but without the shadow of an intimation that such was its force in a case barren of proof of the *corpus delicti.*

In the Comm. v. Webster (5 *Cush.* 295) *the agency of the accused* is the question to the solution of which the evidence is declared competent, and its force that of moral certainty.

In Archbold's Crim. Pl. (*Vol.* 1 *p.* 134, 135) the strength of the evidence is tested in connection with the inquiry whether the *Defendant* committed the crime.

In Starkie on Evidence (*Vol.* 1 *480) the inherent power of circumstantial to equal the force of direct evidence is asserted but the very next sentence limits the remark to the question of the offender and shows that the *corpus delicti* is assumed as among the circumstances.

The same thing is asserted by Burrill (235) but he afterwards explains that in his discussion of the nature and use of circumstances he has assumed previous proof of the *corpus delicti.* (677, 149.)

Two other cases cited below were not cases of homicide. (*U. S. vs. Johns* 1 *Wash. C. C. R.* 372, *Jacobson's case* 2 *C. H. Rec.* 143.) They but assert the possibility of *such* an array of circumstances as will amount to proof but evidently assume a *corpus delicti* first proved.

(a) There is strong reason in all this. The probative force of circumstances to show the ultimate fact of guilt is relative to the breadth of inquiry. As that is narrowed their force increases. (*Burrill* 88.) Hence an array of "equivocal" circumstances, operating against a *double* uncertainty, are essentially weak. Where there

is the least uncertainty as to the *act* there can be no certainty as to the *actor.* (1 *Starkie* *510 *per. Balcom J. fol.* 342.) The strength of an inference is weakened by the number of circumstances essential to its proof. (1 *Cow. & H. Notes* 313.) Thus the inference of guilt in any given case may be strong when the *corpus delicti* is proved and the inquiry narrowed to the actor, but becomes exceedingly weak when there is uncertainty *both* as to the act and the actor.

Just here Gray J. falls into gross error. He argues that the position of the defence would reject circumstances to prove guilt when the body was found. We *never reject* circumstances. If we did they may well be fit for one purpose and unfit for another and their strength is greatly increased *when conjoined with the proven fact of death.*

(b.) The *reason* of Lord Hale's rule is further seen in the danger of founding a presumption upon a presumption. In the absence of a dead body and without proof of a violence necessitating death, the latter is first presumed from certain "equivocal" circumstances; upon that is grounded the further presumption of violence; upon the two in combination is grounded the final presumption of guilt! (*Balcom J. fol.* 341.)

Now on a trial for homicide the death must be *first* established. The *order* of proof is inflexible. [1 *Starkie* *510, *Burrill on Ev.* 120, 3 *Gr. Ev.* § 30, *Wharton's Am. Cr. Law* 198, *The People v. Videto,* 1 *Park.* 609, 1 *Cow. & H. Notes* 394.] The death in the absence of a body, can only, as we have seen, be proved by circumstances of violence necessitating that as an effect. But these circumstances, the basis of the inference, must be directly proved. "*Proof* in the *strict* sense of the word is at this stage of the trial *indispensable;* and its place cannot be supplied by *presumption.*" [*Burrill* 136.] You cannot *infer* but must directly *prove* the violence and then only may you infer the death. The violent death being thus *first* established the case is open for presumptions.

[7.] The rule of Lord Hale also, is wise in its actual application and useful and expedient in practice.

[a.] It permits a conviction in every case where a conviction is justifiable and only compels an acquittal in the class of cases of which the two cited by Lord Hale, Reg. vs. Hopkins, Miles case and the one at bar are examples.

[b.] It destroys the dangerous doctrine of "exceptions" and exceptional cases put forth in the court below and brings *all* cases under one general rule.

[c.] It substitutes a rule of definite and easy application and certain in its terms for the fitful and often unreasonable judgment of a jury suspiciously inclined in an atmosphere of mystery and wonder.

[d.] It requires at least some one count in the indictment to be proven. It discountenances the absurd idea of requiring certain facts to be alleged in an indictment as material and permitting a conviction though they are wholly unproved; of allowing a jury to wholesale a verdict without being able to say on their oaths that any one of five counts in an indictment is true.

[8.] Finally, the soundness of Lord Hale's rule is shown and its philosophy evolved by its practical application to the facts of this case.

[a.] The fundamental doctrine is that "equivocal" circumstances, the class of facts which serve to found *presumption* merely and which Burrill denominates "presumptive evidence" as contra-distinguished from "circumstantial" (76, 77, 78,) are never sufficient to prove the *corpus delicti*; and that their only *proper* office and arena is *after* the crime has been established *to connect the crime with the criminal.*

(b.) Now a presumption springs from one of these "equivocal" circumstances on the ground that the fact sought, the *factum probandum, usually and ordinarily* accompanies the circumstance known. (*Burrill* 149, 150, 151.) It follows that whether the "fact sought" is the violent

death or the agency of the criminal makes a *wide* difference in the force and bearing of the circumstances.

(c.) Thus, *threats of violence* are not ordinarily and *usually* accompanied by a killing, and therefore raise no presumption of a killing. But a killing having been proved, it is *usual* and *ordinary* that it was done by some person who had threatened, and proof of the threat raises a presumption of *his* agency.

A *violent temper* and *acts* are not *usually* accompanied by murder; hence no presumption of murder. But a murder proven is usually done by a person of violent temper and conduct; hence a presumption as to that person.

Strong motives to kill are not usually followed by a killing; hence no presumption. But a killing known is usually done by a person having strong motives to kill; hence on proof of the motives a presumption as to the individual.

So of mysterious conduct, of flight, of falsehood, of statements that a person is dead, of possession of a child's clothing by the father, of expressions of remorse.

None of these applied to the *corpus delicti* raise even a presumption of murder but, the crime being "*first* established," they each raise a presumption as to the *criminal* and their *united* force is often sufficient for a conviction.

(d.) There is therefore but one *solitary* circumstance in the case which by any straining can raise a presumption of the *corpus delicti*, and that is "sudden disappearance and long absence." But that only raises a *weak* presumption of a violent death, and in the scheme of the prosecution this weak presumption is made to supply the place of the *proven corpus delicti*. It is at once evident, however, that the circumstances which, conjoined with a violent death *proven*, may raise a strong presumption of guilt, conjoined with a violent death *weakly presumed* gain no new or additional force: so that in the case at bar the *corpus delicti* hangs *only* upon

the equivocal fact of disappearance, the remaining facts having no power to raise a presumption of any kind until linked with a violent death *proven.*

The grand and fatal fallacy of the prosecution is that in the place of a *corpus delicti* they put the bare fact of a disappearance; instead of "laying the foundation" for their presumptive evidence in a violent death distinctly proven they lay it in the proven fact of a mere disappearance.

A conviction thus grounded cannot be sustained and a new trial should be awarded to the prisoner.

II.

In any view of the law the conviction was not warranted by the evidence in the case and the court erred in sending the case to the jury and also in the charge to the jury.

(a.) Not only was the jury allowed to find the violent death of the mother upon a bare presumption, but the murder of the child was presumed from such previous presumption. If, which is denied, there is any ground to presume the death of the prisoner's wife, there is none for the further presumption of the murder of the child.

(b.) The charge to the jury was erroneous not only in the aspects previously noticed but in that part of it also which related to confessions. (*Fol.* 173, 174, 175.) It allowed the jury to put a "construction" upon language which was plain and unambiguous and treated a substantial *denial* of the charge of murder as a *confession* of the same; and the language used had a direct tendency to *prejudice* and *mislead* the jury. (11 *Wend.* 83, 16 *Wend.* 652, 1 *Cow. & H. Notes* 230, 231, 232, 233.)

On these grounds also the conviction should be set aside

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