

# William and Mary Review of Virginia Law

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Volume 2 (1954-1956)  
Issue 2

Article 13

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May 1955

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W. Charles Poland, *Criminal Procedure - Proof of Corpus Delicti by Circumstantial Evidence*, 2 Wm. & Mary Rev. Va. L. 170 (1955), <https://scholarship.law.wm.edu/wmrval/vol2/iss2/13>

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## CRIMINAL PROCEDURE—PROOF OF CORPUS DELICTI BY CIRCUMSTANTIAL EVIDENCE

Six days after birth the illegitimate son of defendant, who was alone and unattended at the time of the birth, died under dubious circumstances. Defendant shared a two-party telephone line with a witness who testified that she heard accused state in a telephone conversation with her paramour that she did not want the baby, that she had to get rid of it, and that she was going to throw it into the furnace. Upon investigation, the police procured from defendant a signed written statement that she had placed the body of her son in the furnace; however, the body was later discovered in a vacant field. Accused was misleading and also evasive in other ways; nevertheless she denied any responsibility for the death of her child. The chief medical examiner for the county stated in his testimony with respect to his autopsic examination, "My diagnosis was asphyxia, probably due to smothering, suffocation," while a pathologist, presented as a witness on behalf of the defense, testified that in his opinion the child "probably died of a fulminating respiratory disease." The defendant was convicted of second degree murder. On appeal, *held*, affirmed. The circumstantial evidence was sufficient to substantiate the verdict. *Opanowich v. Commonwealth*, 196 Va. 342, 83 S.E.2d 432 (1954) (Whittle, J., dissenting).

To sustain a conviction for crime, it devolves upon the state to prove the corpus delicti—the fact that the crime charged has been actually perpetrated—as a material element of the offense.<sup>1</sup> "In every criminal prosecution there are two fundamental and essential facts to be established: First, that the party alleged to have been murdered is dead; and, second, that the death was brought about by the criminal agency of another."<sup>2</sup> In other words, "the corpus delicti has two components; death as the result, and the criminal agency of another as the means."<sup>3</sup>

The argument against the conviction of the defendant, which was stressed by Justice Whittle in his dissenting opinion, is based

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<sup>1</sup> 5 Michie's Jurisprudence, Criminal Procedure §54 (1949); see also Note, 103 U.Pa.L. Rev. 638 (1955).

<sup>2</sup> *Bowie v. Commonwealth*, 184 Va. 381, 388, 35 S.E.2d 345, 348 (1945).

<sup>3</sup> *Terry v. Commonwealth*, 171 Va. 505, 508, 198 S.E. 911, 913 (1938).

on the rule that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the corpus delicti be first established. So long as the least doubt exists as to the criminal act, the question of criminal agency cannot even arise.<sup>4</sup> There was conflicting medical testimony as to the cause of death; the medical examiner merely stated that the cause was "probably" due to asphyxiation; and even conceding this, it would be a reasonable hypothesis that the infant smothered in his bedclothing. "A citizen should not be deprived of his liberty or his life on a mere possibility."<sup>5</sup> Further, it has been contended that the conduct of the accused was unjustly utilized to establish the corpus delicti, that in affirming the conviction the Court permitted the criminal agency to be proved and then assumed the criminal act.<sup>6</sup>

It must be borne in mind that the issue before the Court was not whether the corpus delicti had been established, but whether the jury could have found, with full assurance of moral certainty, that it had been proved from the evidence presented by the Commonwealth. "It is for the court to determine whether there is sufficient testimony to make it appear prima facie that a crime has been committed, and if there is no evidence of the corpus delicti, the court may properly so hold; but whether the corpus delicti has been proved is a question of fact for the jury."<sup>7</sup>

"Direct evidence is not essential to prove the corpus delicti in any case. It may be proved as any other fact may be proved which is essential to establish the guilt of the accused, namely, by circumstantial evidence which produces the full assurance of moral certainty on the subject."<sup>8</sup> "While circumstantial evidence must always be scanned with great caution, it is sufficient where all the circumstances of time, place, motive, means, opportunity and conduct, concur in pointing out the accused as the perpetrator of the crime; it must produce a moral, if not absolute, certainty of his guilt."<sup>9</sup> It is not necessary that the evidence eliminate every possibility of the cause of death; the criminal

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<sup>4</sup> 5 Michie's Jurisprudence, Criminal Procedure §54 (1949).

<sup>5</sup> Terry v. Commonwealth, 171 Va. 505, 509, 198 S.E. 911, 913 (1938).

<sup>6</sup> Recent Decisions, 40 Va.L.Rev. 1109 (1954).

<sup>7</sup> 23 C.J.S., Criminal Law §1124 (1940).

<sup>8</sup> Nicholas v. Commonwealth, 91 Va. 741, 750, 21 S.E. 364, 367 (1895).

<sup>9</sup> Dean v. Commonwealth, 32 Gratt. (73 Va.) 912, 924 (1879); accord., Toler v. Commonwealth, 188 Va. 774, 51 S.E.2d 210 (1949).

agency as well as the identity of the agent may be established by circumstantial evidence.<sup>10</sup> Nor does the criminal act have to be proved before circumstantial evidence will be admissible. If this contention were sound, "there could never be a conviction upon circumstantial evidence."<sup>11</sup> It is the duty of the state to present evidence of all the surrounding facts and circumstances having any bearing upon the manner of death and any tendency to show whether it was natural, accidental, or felonious. The jury should be given as complete a picture as possible of all the surrounding circumstances, irrespective of any question of subsequently connecting the defendant with the transaction by other proof. Such proof is a necessary preliminary to any evidence offered to connect a particular person with the homicide.<sup>12</sup>

"In all cases of circumstantial evidence the conduct of the accused is always an important factor in the estimate of the weight of circumstances which point to his guilt."<sup>13</sup> Had the accused in the case under comment conducted herself in a more savory manner, her conviction might have been reversed. She at first maintained that the baby was deformed, but after the body was found and the coroner testified as to its normal condition, she testified that she did not remember whether it was deformed or not. She was "evasive, confusing and misleading"<sup>14</sup> when examined as to her conversations with her paramour. When asked if she remembered saying she placed the baby in the furnace, she replied, "The word 'furnace' means a great deal in this case, and you are leading yourself into it." In this case there is more than the slight or insignificant conflict in testimony to be expected from one who is affronted with the possibility of being deprived of his life or freedom.

It is conceded that the jury could have reasonably found for the defendant on the basis of the evidence presented; but it is submitted that the telephone conversation and medical evidence, together with the conduct of the accused, fully justified the Court in holding that the jury properly found that the evidence

<sup>10</sup> *Orange v. Commonwealth*, 191 Va. 423, 434, 61 S.E.2d 267, 271 (1950).

<sup>11</sup> *Nicholas v. Commonwealth*, 91 Va. 741, 750, 21 S.E. 364, 367 (1895).

<sup>12</sup> *Annot.*, 159 A.L.R. 523, 524 (1945).

<sup>13</sup> *Bowie v. Commonwealth*, 184 Va. 381, 391, 35 S.E.2d 345, 349 (1945); accord, *Dean v. Commonwealth*, 32 Gratt. (73 Va.) 774 (1879); *Toler v. Commonwealth*, 188 Va. 774, 51 S.E.2d 210 (1949).

<sup>14</sup> *Opanowich v. Commonwealth*, 196 Va. 342, 350, 83 S.E.2d 432, 437 (1954).

presented by the Commonwealth was sufficient to establish the fact that the criminal act had been committed.

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