65, 1936

No. 55 of 1935.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN—

STEPHEN SENEVIRATNE
(Accused) *Appellant*

— AND —

THE KING - - (Complainant) *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal by special leave from a Judgment of the Supreme Court of the Island of Ceylon delivered on the 14th day of June 1934, whereby the Appellant was convicted of murder and sentenced to death, which sentence has since been commuted to one of rigorous imprisonment for life. p. 8

2. The Appellant was indicted at a Session of the said Supreme Court in its Criminal Jurisdiction for the Western Circuit held at Colombo before Mr. Justice Akbar and an ordinary jury of seven persons, consisting of two Europeans, one Tamil and four Sinhalese.

Fifty-two witnesses were called for the Crown and the trial lasted for twenty-one days.

3. The summing-up commenced five days after the evidence had been concluded and lasted for two days and the transcript thereof occupied 67 pages in the printed Record. pp. 312-379.

APPELLANT'S CASE.

4. At the close of the summing-up the jury were absent for five hours and ultimately found the Appellant guilty by a majority
p. 6, l. 16. of 5 to 2, but one of the five recommended the Appellant to mercy.

5. The Case for the Crown was that the Appellant had murdered his wife by administering chloroform to her between about 6.15 a.m. and 6.45 a.m. on the 15th October 1933, in her bedroom at a time when a maidservant who slept in that room had shortly before left it to prepare the servants' breakfast in a kitchen close by, when a son of the deceased and of the Appellant aged nine was sleeping in a room which led into the bedroom, and when to the knowledge of the Appellant there were a considerable number of other servants near enough to hear any noise coming from the bedroom.

The case for the Appellant was that his wife had died either as a result of suicide or of misadventure, and there was uncontradicted evidence that she was of a suicidal tendency and also that she suffered from diabetes.

6. The Appellant humbly submits that his said trial upon the said charge was vitiated by such manifest violations of the principles of justice that grave and substantial injustice has been done to him and an evil precedent created for the future.

7. The matters of which the Appellant complains are more fully set out hereafter, but may be very briefly summarized as follows:—

(a) The learned Judge allowed the case to go to the jury when upon the evidence as a whole it was manifest that there did not exist any reliable evidence upon which a capital conviction could safely and justly be based;

(b) The medical witnesses called by the Crown disagreed upon almost every medical aspect of the case and whilst they agreed that death was not due to natural causes none of them expressed a definite opinion that the death of the deceased was caused by homicide;

(c) The whole of the witnesses called by the Crown who were in the vicinity at the time when the deceased met with her death gave evidence which, if accepted, exculpated the Appellant and a verdict of guilty was only possible if the evidence of those witnesses was rejected;

(d) Some of the witnesses called by the Crown alleged that other witnesses called by the Crown had made statements to them before the trial as to what those other witnesses had seen, and the learned Judge treated such evidence, not merely as discrediting the evidence given by those other witnesses at the trial, but as constituting evidence of what those other witnesses had in fact seen upon which the jury were entitled to act.

In other words he treated hearsay evidence of what witnesses had seen as comparable with and capable of being substituted for different evidence of what they had seen given on oath by the same witnesses themselves at the trial;

(e) The learned Judge led the jury to suppose that there was an onus on the Appellant which in fact there was not;

(f) The learned Judge exercised undue and erroneous pressure upon the jury to induce them to arrive at a verdict by a sufficient majority;

(g) The learned Judge used for a certain purpose in the course of his summing-up certain letters which after argument he had previously admitted solely for another purpose;

(h) The learned Judge made a number of comments adverse to the Appellant which were not justified by the evidence.

8. The facts of the case as disclosed in the evidence are summarised in the succeeding paragraphs hereof.

9. The Appellant was called to the Bar by The Honourable Society of the Inner Temple in 1919, and obtained a degree at Trinity Hall, Cambridge, in 1920, after which he returned to Ceylon, where his family is one of the leading families.

In 1923 he married his cousin, the deceased. The evidence was to the effect that he never used any violence towards her, and there was no evidence showing that she had any real cause of complaint against him, but after a time she became very unhappy and it appeared both from the evidence of several witnesses and from letters written by her which were produced at the hearing that she frequently said that she was tired of life and that she would sooner or later put an end to her life.

p. 37, l. 46. p. 79, l. 24.

p. 91, l. 16; p. 94, l. 40; p. 95, l. 10; p. 97, l. 20; p. 119, l. 1. pp. 382-389.

p. 16, l. 4; p. 37, l. 5; p. 88, l. 23; p. 94, l. 32; p. 95, l. 20; p. 27, l. 30; p. 75, l. 23; p. 91, l. 22. p. 92, l. 1; p. 102, l. 3. p. 30, l. 32; p. 327, l. 35. p 5, l. 7. p. 152, l. 40.

Furthermore it was proved by witnesses that on several occasions when she had become annoyed with the Appellant she had locked herself up in her room and tried to starve herself to death. She was interested in scientific questions, and about six weeks before the date of her death she had discussed with one of the witnesses the possibility of committing suicide by means of chloroform. Her teeth were in a decayed state and she suffered frequently from tooth-ache and was in the habit of using chloroform to allay the pain. The anæsthetist (Dr. Cook) who had used chloroform on her in connection with one of her confinements, stated that she was susceptible to chloroform.

10. The evidence of the witnesses as to the deceased's suicidal tendencies was wholly uncontradicted, and was confirmed by the letters referred to above.

p. 79, l. 15. p. 319, l. 17; p. 322, l. 29.

Those letters were admitted by the learned Judge, after some argument, solely for the purpose of showing the state of her mind at the time when they were written, but in the course of his summing-up he referred to them as showing that the Appellant had in fact ill-treated the deceased during her lifetime.

It is respectfully submitted that the letters were wholly inadmissible for that purpose and that after being admitted for another purpose they ought not to have been used in the summing-up for that purpose when it was too late for Counsel representing the Appellant to take any effective objection.

11. One of the matters upon which the deceased and the Appellant disagreed was that the deceased objected to the Appellant visiting certain houses, including that of his sister-in-law, Mrs. Francis Seneviratne.

p. 76, l. 21; p. 88, l. 31; p. 91, l. 36; p. 140, l. 13. p. 70, l. 20; p. 68, l. 18.

On the day in question she had again objected to the Appellant going with his son to visit the house of this sister-in-law and when he returned in the evening and she ascertained that their son had in fact been taken to the house in question she was annoyed and according to the evidence of two visitors her face fell and she became very thoughtful.

p. 33, l. 18; p. 41, l. 18. p. 67, l. 34.

She received those visitors in her kimono, without troubling to dress herself properly, and during the course of dinner she remarked "I wonder what you husbands would say of us when we are dead "and gone."

After dinner and before retiring to bed she asked the Appellant for some aspirin and he gave her a bottle which still contained a considerable number of tablets.

12. The deceased then retired to her room which formed part of a self-contained suite consisting of her room, the child's nursery and bathrooms and lavatories belonging to those two rooms. pp. 14. 15.

The uncontradicted evidence was that the doors leading to those rooms were all kept bolted at night and that the Appellant, who occupied a separate suite of rooms detached from the rest of the building, had no possibility of obtaining access to the room occupied by his wife until the doors were unbolted in the morning. pp. 14. 45, 47. p. 15, l. 5.

Furthermore, a maidservant called Alpina, who was employed and paid by the deceased, slept on a mat in the deceased's room. p. 13, l. 44.

The deceased appears to have passed a somewhat disturbed night, because she twice awakened the maid during the course of the night, and she also appears from the evidence of one of the witnesses to have made use of the lavatory, in the pan of which diabetic urine was discovered the next morning p. 18, ll. 12, 20. p. 29, l. 2; p 141, l. 36.

About six o'clock in the morning the maid Alpina, who had slept in the deceased's bedroom, and the nurse Joseph, who had slept in the boy's room, awoke and met in the bathroom. When the maid first got up, the deceased was still sleeping but after she had washed she returned to the bedroom and then found that the deceased was awake, although still lying in bed. p. 33, l. 46; p. 19, l. 8. p. 19, ll. 1, 19.

One of the statements made by the learned Judge to the Jury was that the deceased was sleeping, thereby suggesting that the Appellant could have come upon her unawares, but this statement was not supported by the evidence of either Alpina or Joseph who were the only persons who saw the deceased at that time. p. 321, l. 7. p. 33, l. 44; p. 19, l. 19.

Joseph then departed in a rickshaw to attend early service at Church, and did not return until after the deceased had died, and Alpina went into the kitchen to prepare the servants' breakfast.

About the same time the Appellant came out of his bedroom, and after giving instructions to Banda, one of the servants who was sweeping the verandah, to take in the Sunday papers went on to the verandah and began to supervise the work of another servant named Martin who was attending to the fowls. p. 48. pp. 41, 58.

He remained with Martin until the noise from the deceased's
pp 41, l. 40. room occurred, which is next mentioned, and was seen with Martin by another servant named Seelus or Seemon for part of the time and
p. 43, l. 18. heard talking with Martin by Seelus for the rest of the time before
pp. 58, 41, 48, 50. the noise occurred. Martin, Seelus and Banda all gave evidence to the effect, as the learned Judge pointed out, that the Appellant could not have got to the deceased's bedroom before the noise occurred without being seen.

pp. 55, 51, 61. There were also about the premises a cook named Simon, a chauffeur named Perera, and another servant named Thomisa.

p. 41, l. 41. Just after Seelus had seen the Appellant and Martin feeding the chickens he heard a noise from the bedroom of the deceased,
p. 51, l. 39; p. 55, l. 30; p. 4, l. 27; p. 42, l. 10; p. 44, l. 24; p. 51, l. 40. and this noise was also heard by Perera, by Simon and by the Appellant. Seelus and Perera both told Alpina that they thought her mistress was calling her and Alpina accordingly went to the bedroom of the deceased but without realising that there was any urgency.

The Appellant, according to his story, thought that the noise
p. 133, l. 36. p. 180, l. 44. might have come from his son, who might have put his head through
p. 40, l. 15. the bars of his cot and become stuck, as the nurse proved that he had done on previous occasions, and the Appellant therefore went in the first instance to the nursery, but finding that the boy was asleep he went from the nursery into his wife's bedroom. As he stepped through the communicating door between the nursery and
p. 4, l. 30; p. 21, ll. 19, 36. his wife's bedroom Alpina, according to both his statement and her evidence, came in through another door. They found the deceased lying across her bed and they both thought that she was in a faint. All the other witnesses who saw the room shortly after the occur-
p. 30, l. 40; p. 74, l. 39; p. 80, l. 25; p. 90, l. 12; p. 105, l. 22. rence agreed that the bedclothes were not disarranged and that there was no sign of a struggle.

p. 21, l. 42. 13. The Appellant at once began to fan the deceased and sent Alpina for brandy which he tried to administer to the deceased and
p. 23, l. 22; p. 42, l. 32. also rubbed on her face. He also sent, as was proved by Alpina and another servant, for a succession of hot water bottles which he
p. 29, l. 40. applied to various parts of the body, and he attempted artificial respiration.

By this time Simon, the cook, had come to the bedroom, and
p. 56, l. 39. was told by the Appellant to fetch Mrs. Bandaranayake, who was a relative and close friend of the deceased, and Dr. S. C. Paul who was the family medical attendant.

Simon accordingly summoned Perera the chauffeur and went off in the car to fetch Mrs. Bandaranayake but he forgot, until he was on the return journey, that he had also been directed to fetch Dr. Paul. p. 52, l. 16.

When Mrs. Bandaranayake arrived the Appellant told her to go and fetch Dr. Paul or any other doctor and she departed in the car accordingly and came back with Dr. Paul. p. 72, l. 44. p. 52, l. 43.

By this time about an hour had elapsed since the noise had been heard coming from the deceased's bedroom and according to the evidence of the doctor the deceased had been dead for about that period. p. 178, l. 14; p. 192, l. 8.

The doctor asked the Appellant what had occurred and the Appellant then gave his version of what had happened. p. 180, l. 38.

The doctor asked the Appellant whether the deceased had taken anything and the accused replied that he had given her a bottle of aspirins and that a considerable number of the tablets were missing. The doctor then apparently formed the opinion that the deceased had taken an overdose of aspirin and he subsequently certified her death as having been caused by syncope. p. 181, l. 4. p. 182, l. 19.

14. According to the evidence of one of the witnesses Leo de Alwis, who was very hostile to the Appellant and laid the information which resulted in his arrest, that witness asked the Appellant about 4 p.m. on the day of the death whether there was any chloroform in the house and the Appellant then at once stated that about two months previously he had bought some chloroform for use in an amputation on a buffalo which had broken its leg and that it might be in the house or at Chilaw. Leo de Alwis passed this information on to three other witnesses and added that, according to the Appellant, the chloroform had been temporarily given to the deceased for safe custody, although he repudiated this addition at the trial. Similar information was given by the Appellant to two witnesses besides Leo de Alwis. p. 106, l. 3; p. 121, l. 1. p. 71, l. 34; p. 98 l. 33. p. 201, l. 23. p. 98 l. 46. p. 94, l. 13.

Endeavours by the police to trace a purchase of chloroform by either the deceased or the Appellant were completely unsuccessful and the sole evidence that the Appellant had ever been in possession of chloroform at any material time consisted of the information which he thus gave to three witnesses and an admission to the same effect made by his Counsel at the trial.

p. 5, l. 10; p. 121, l. 35. The chloroform had been purchased, according to the Appellant, in an ampule which when once opened could not be re-stoppered or re-corked so that the contents, if not all used at once, would have to be transferred for preservation into some other receptacle.

p. 26, l. 26; p. 178, l. 45. When the deceased was first found there was an unstoppered bottle which had formerly contained smelling salts close to her bed and Alpina found a handkerchief lying on the bed near the

p. 22, l. 17; p. 305, l. 24. right hand of the deceased which was bent upwards and also near her head. Unfortunately Alpina put this handkerchief with some

p. 22, l. 36; p. 304, l. 19. other soiled linen and it was sent to the wash and was not subsequently forthcoming. 10

p. 106, l. 33; p. 123, l. 24. A few days after the death the Appellant found another handkerchief belonging to the deceased in her room and he handed this over to Leo de Alwis but there was no evidence to show that this second handkerchief had any relevance.

15. Several of the relatives, including Leo de Alwis, knowing of the deceased's threats to commit suicide were of the opinion

p. 101, l. 31. that she had carried out her threats, although Leo de Alwis thought the Appellant had driven her to it and "ought not to get off scot "free." 20

p. 125, l. 18. The Appellant agreed to a suggestion that the body of the deceased should be embalmed and after this had been done by means of the injection of six barrels of formalin the deceased was buried, but later on Leo de Alwis laid an information with the police as a result of which the deceased was exhumed and a post mortem took place twenty-one days after her death.

A judicial inquiry followed at which the Inquirer came to the conclusion that death was due to homicide and accordingly the Appellant was arrested and the proceedings culminating in his conviction ensued. 30

16. The witnesses called on behalf of the Crown fell into the following categories:—

(a) Medical evidence;

(b) Persons who were in the vicinity at the time when the deceased met with her death;

(c) The relatives of the deceased and of the accused;

(d) Police witnesses;

(e) Certain witnesses who dealt with the question of the injured buffalo.

17. The medical witnesses called by the Crown consisted of an analyst and no less than seven doctors. These doctors all agreed that the death was not due to natural causes but at that point their agreement ended and on almost every other medical aspect of the case, both large and small, they were in hopeless disagreement. The medical evidence covers 138 pages of the printed Record and an exhaustive analysis cannot be attempted within the limits of this case, but some instances of the differences of opinion are hereinafter given and generally it may be said that the doctors differed both as to the physical conditions which they found when they examined the body of the deceased and as to the proper inferences from the physical conditions which they respectively spoke to finding.

One of the doctors (Dr. Hill) who did not give evidence at the trial, but whose deposition was read, was of opinion that death was mainly due to respiratory failure (asphyxia) but expressed no opinion as to how the respiratory failure had been occasioned. p. 2, l. 44.

Another of the doctors (Dr. Nair), who admitted that he was the least qualified of any of the medical witnesses, expressed the view that the internal signs were consistent with obstruction of breathing brought on with the aid of chloroform and that certain marks on the face of the deceased were consistent with chloroform, but said that he did not think that death was due to chloroform, although chloroform could bring about asphyxia. p. 211, l. 36. p. 208, l. 15. p. 207, l. 42; p. 217, l. 47. p. 208, l. 10; p. 218, l. 5.

The remaining five doctors were of opinion that death had resulted from the administration of chloroform, but they disagreed as to whether the chloroform had produced failure of respiration (asphyxia) or failure of the heart (syncope), and even the doctors who agreed that it had produced both asphyxia and syncope did not agree as to which had been produced first, although there was medical evidence that in connection with other factors in the case this was a point of importance. p. 187, l. 5; p. 236, l. 13.

18. Shortly after the death certain marks were observed on the face of the deceased and subsequently certain marks on her arms and a mark on one of her thighs. The pathologist (Dr. Karunaratne), who was admitted by the other doctors to be the witness best qualified to express an opinion on that aspect of the matter, came to the

p. 295, l. 28. conclusion that all the marks with one exception might have been caused either before or after death, and as regards the marks on the
p. 295, l. 8. face he agreed that a handkerchief saturated with chloroform and lying on the face might have accounted for them, if the skin was very sensitive.

19. The two most experienced and best qualified doctors, Drs. Paul and de Silva, were clearly of the opinion that all the medical signs were consistent with suicide or misadventure and Dr. de Silva who had been the Senior Anæsthetist at the General Hospital for twenty-five years was clearly of the opinion that the symptoms were more consistent with suicide than with homicide.

p. 235, l. 40. Dr. Milroy Paul thought that a handkerchief soaked with chloroform had been applied to the face, but he agreed that chloroform could have produced asphyxia without any mechanical stoppage of the breath and although he inclined to the view that pressure had been applied he admitted that the absence of burns on the lips, except a burn on the left side, and of burns on the tip of the nose indicated an absence of pressure to those parts. He agreed
pp. 194, 242, 260, 272, 281. with all the other doctors that it would be very difficult to administer chloroform to anyone against their will, even if they were asleep, and that if there had been any struggle, one would have expected to find marks which were in fact absent.

Dr. Spittel, who was a surgeon, thought that a handkerchief had been applied to the face and that the marks had been caused by pressure, but he agreed that the pressure might have been caused in the course of a suicide and that the burns did not indicate that there had been any movement of the face, although he thought that a suicide would not have had sufficient fortitude to keep a handkerchief saturated with chloroform applied sufficiently long to cause death.

p. 270, l. 35. This doctor went nearest to saying that the case was one of homicide but he seems to have relied mainly upon a belief that the deceased had given vent to a definite articulate call to a servant whereas there was no evidence that there had been such a definite articulate call. He stated, moreover, that the case was a particularly difficult one from the medical point of view.

p. 285, l. 2; p. 298, l. 11. Dr. Karunaratne, the pathologist, thought that the chloroform might possibly have been self-administered, and agreed that the asyphxia to which he attributed death might have been caused without any mechanical stopping of the breathing.

The evidence of three of the doctors therefore supported the view that suicide or misadventure was a feasible explanation, whereas the evidence of three of the doctors inclined to the contrary view, and one of the doctors was quite neutral.

Not one of the doctors committed himself to a positive opinion that death was due to homicide.

20. The learned Judge read certain extracts from this medical evidence to the jury and pointed out the conflict between the doctors. He said that they had got two groups of doctors giving expert testimony and they must keep in mind the fact that experts "take a "partisan spirit—a sort of sportsmanlike spirit—and they like to "back their opinion through thicker and thicker." It is to be observed that the whole of these experts were called by the Crown. p. 350, l. 10.

Finally after concluding his review of the medical evidence he said "These problems are set by doctors. If you cannot make up "your mind from the doctors' evidence it is still your duty to come "to a conclusion on your own observations in this case." It is respectfully submitted that if the jury could not make up their mind from the doctors' evidence that the death must have been caused by homicide, the only safe course open to them was to acquit the Appellant and that the learned Judge ought to have so directed them. p. 373, l. 33.

The issue between homicide on the one hand and suicide or misadventure on the other hand was the crucial issue in the case, and it is respectfully submitted that there were no other facts or circumstances which could possibly entitle the jury to come to a conclusion upon that issue adverse to the Appellant despite the contradictory and inconclusive character of the mass of intricate medical evidence placed before them.

21. In the course of his summing-up the learned Judge told the jury that if they believed the witnesses Martin, Seelus and Banda they should acquit the Appellant, but he did not point out to the jury that apart from the affirmative evidence of those witnesses, which was wholly in favour of the Appellant there was no evidence to show that the accused had any opportunity of committing the crime alleged. Furthermore he suggested to the jury that those witnesses might be disbelieved because:— p. 348, l. 40; p. 349, l. 16; p. 366, l. 40.

(a) they were employed by the Appellant, although the evidence was in fact that Seelus (like Alpina) was engaged and paid by the deceased; p. 27, l. 20; p. 43, l. 32.

(b) they were village youths, meaning presumably that they were not accurate or responsible witnesses; and

(c) they might have been subjected to some outside influence, although there was no evidence whatever that they had been subjected to such influence.

He also drew attention to certain minor contradictions in their evidence.

22. In the course of reviewing the evidence of these servants the learned Judge pointed out to the jury that the Appellant himself in his statement to the magistrate had said "I was on the back "verandah when I heard the groan", and the learned Judge
p. 334, l. 41. proceeded to add the comment "He thus brings himself in line with "the evidence."

It is respectfully submitted that this was a most unfair and prejudicial comment to make, since it clearly suggested that the Appellant had framed his evidence so as to make it agree with the evidence of the Crown witnesses.

In fact the Appellant had been compelled to give evidence on oath at the Inquest before any of the servants gave their evidence, so that he clearly could not have framed his evidence at the Inquest in accordance with what those witnesses had previously said. Furthermore he had made statements to various persons and to the police immediately after the occurrence which agreed in all material respects with his subsequent statement.

It is respectfully submitted that the learned Judge could not have adopted more unfortunate language for the purpose of commenting upon the fact that the statements of the Appellant as to his movements at the material time were corroborated by the evidence of the Crown witnesses and were not contradicted by any evidence whatever.

23. With regard to the hearsay evidence given by relatives of the deceased the use made by the learned Judge of such evidence can be illustrated by two instances amongst others.

As already mentioned in paragraph 12 hereof, Alpina gave evidence to the effect that as she went into the bedroom of the deceased through one door, after being told that the deceased was calling her, the Appellant came into that room through another door communicating between that room and the nursery.

The witnesses Leo de Alwis, Mrs. de Alwis and Mr. Dias Bandaranayake were nowhere near the place at that time and they did not say that they were, but Leo de Alwis and Mrs. de Alwis did say that they had been told by Alpina before the trial that when she first went into the room the Appellant was already there. p. 107, l. 40; p. 138, l. 43.

Mr. Dias Bandaranayake did not even give evidence as to what Alpina had said to him on the subject, and Mrs. Dias Bandaranayake said repeatedly in her evidence that Alpina had made no statement to her as to where the Appellant was when Alpina first went into the room. p. 74, l. 28; p. 83, l. 16.

24. The manner in which the learned Judge dealt with this evidence in summing-up to the jury was as follows :—

"I am taking this case of Alpina saying 'As I entered the p. 321, l. 2.
" 'room the accused stepped in there.' Some of the witnesses
" say—Leo Alwis, Mrs. Alwis and Mr. Dias Bandaranayake—that
" the accused was actually on the bed and a great battle was
" fought here. Taking the test I told you—any previous state-
" ment made by this woman cannot be taken into account
" because your oath is to decide the case on the evidence given
" here—what Alpina states—one washes the other. Even
" supposing you believe her statement that accused was on the
" bed, are you going to convict him on that. He may have just
" come and tried to revive her. How are you going to acquit
" him—because he may have committed the offence and gone
" out and come again. You see the value of that from a proba-
" tive point of view whether he was actually on the bed with his
" palm on the face of the lady. Is that going to convict him?
" He may have come a second before and tried to revive her, or
" is the fact that he was just entering going to acquit him if he
" committed the crime. It is quite possible that he could have
" done it. He could have gone out and come again and
" pretended and said 'Has the lady fallen'. These are facts to
" which you must give due weight. What I want to point out
" is that ordinarily when Alpina says 'When I was going to the
" 'room accused was just stepping in' and when other witnesses
" say 'What we saw was accused was actually on the bed' there
" must be the effect of one washing the other and entirely
" Alpina's evidence on that point, but you cannot do that here
" because of the accused's admission that as he stepped into the
" room Alpina entered the room. So that you have taken an
" oath to decide the case on the evidence."

25. A second instance of the use made by the Judge of hearsay evidence is as follows :—

p. 138, l. 48. Mrs. de Alwis in evidence said that she had been told by Alpina that when Alpina went into the room the Appellant was trying to revive the deceased and asked her "Did the lady "have a fall." This alleged statement by Alpina was inconsistent with the evidence which Alpina gave at the trial, namely that she and the Appellant entered the room simultaneously.

The learned Judge treated this hearsay evidence as admissible evidence of what had in fact occurred.

p. 327, l. 21. He said "Alpina got the smell at once, sees the accused. 10
p. 349, l. 30. "Accused says 'Did the lady fall'." And again "The words 'has the " 'lady fallen down' are confirmed by Mrs. Leo de Alwis. I pointed "out that Alpina's evidence if believed does not pull either way".

26. Soon after the death of the deceased the Appellant made detailed statements to a number of persons and to the police as to what had happened and these statements were given in evidence by the persons to whom they were made. He also gave evidence on oath at the Inquest which was held and made a statement in the Police Court which was put in by the Crown at the trial. 20

The Appellant's version of the occurrence was therefore fully put before the jury, but at the close of the case for the Crown his Counsel did not call him to give evidence and this omission was a subject of comment by the Judge which may well have proved fatal to the Appellant's case with the majority of the jury.

p. 317, l. 34. 27. The learned Judge in the course of his summing-up said that the law was that "when any fact is specially within the know- "ledge of any person the burden of proving that fact is upon him. " . . . In the absence of any explanation the only inference is "that he is guilty . . . There is that overriding presumption of 30 "innocence in favour of the accused, but if any fact is specially within "his knowledge for which you want an explanation, the burden of "proving that is upon the accused and he must satisfy you. That "burden can be discharged either by his giving evidence—I want "to tell you in fairness to the accused—or in any other form which "Counsel pleases. He can discharge that burden by eliciting facts "from the prosecution witnesses . . . I want to read that section "to you again.—When any fact is specially within the knowledge of

"any person the burden of proving that fact is upon him . . . .
"When any fact is specially within his knowledge the burden is upon
"him—nobody else can do it. He can do it by extracting facts, or
"more satisfactory, by coming into the witness box and telling you
"his explanation so that you may know. Dr. Crippen was cross-
"examined for days. I want you to keep that in mind. That is the
"difference between circumstantial and direct evidence."

It is submitted that this was a very serious misdirection on the part of the learned Judge and calculated in the circumstances of this
10 case to produce substantial injustice to the Appellant. Furthermore the learned Judge never told the jury, as the fact was, that if the evidence of all the Crown witnesses who were in the vicinity when the death occurred was to be believed there was no material fact specially within the knowledge of the Appellant which called for an explanation from him, and that so far as elucidating facts from prosecution witnesses was concerned the facts elucidated from such witnesses conclusively established the innocence of the Appellant.

On the contrary a considerable portion of the Judge's summing-up was directed to making suggestions that the Crown's
20 witnesses ought to be disbelieved in so far as they gave evidence which established or tended to establish the Appellant's innocence.

28. During the course of his summing-up the learned Judge p. 321, l. 36. informed the jury that a verdict by a majority of four to three would be unacceptable and would mean that they would have the misfortune of having to go through the trial again, and that although it would be in his discretion whether to accept a verdict of five to two their verdict ought to be unanimous having regard to the gravity of the case. The crucial words used by the learned Judge were :—

"Four to three means an unacceptable verdict. That means
30 "you have to go through the trial again. I hope you will not
"have that misfortune."

29. Section 223 (1) of the Criminal Procedure Code of Ceylon provides that "the verdict returned shall be unanimous or by a "majority of not less than 5 to 2", so that the learned Judge was correct in saying that he could accept a verdict of five to two, but Section 252 of the Criminal Procedure Code provides that "whenever "the jury is discharged the accused shall be detained in custody or "released on bail as the Judge may think fit and tried by another "jury" so that the Judge was completely wrong in suggesting that

if the jury only arrived at a verdict by a majority of four to three, they would have the misfortune of having to go through the trial again.

30. It is humbly submitted that after a trial lasting twenty-one days such an observation to the jury during the course of the summing-up and before they had intimated any opinion was extraordinarily undesirable and calculated to result in substantial injustice to the Appellant.

The jury, as already mentioned, only returned a verdict of guilty by the minimum majority of five to two and one of the five recommended the Appellant to mercy although it is submitted that such a recommendation was inexplicable, in the case of a man who had been found guilty of murdering his wife without any provocation, except upon the footing that the juryman entertained a doubt as to the correctness of the verdict.

The learned Judge none the less accepted the majority verdict thus qualified.

31. With regard to the conduct of the Appellant the learned Judge made a series of comments averse to the Appellant.

In the first place he commented on the fact that the Appellant had sent for the doctor instead of telephoning for him, and suggested very strongly to the jury that this was because the Appellant was afraid that the deceased might revive if she had prompt medical attention. The learned Judge said "what is the reaction on a guilty "person. It is very necessary for you to keep both these pictures in "your mind. What is the reaction on a man who administered "chloroform. Did he know the certainty or uncertainty of the "chloroform. If that woman revived what would have happened to "him. If she revived was there certainty of action of chloroform "or uncertainty of action. I am taking a picture of a man who had "done it."

p. 327, l. 39.

The learned Judge ignored the explanation advanced on behalf of the Appellant that at such an early hour an answer to the telephone is not always readily obtainable and the doctor might not have his car immediately available, that in any event the Appellant might have been guilty at most of an error of judgment, and that the efforts which he made to revive his wife, as testified by Alpina and corroborated by other witnesses, were totally inconsistent with any suggestion that he was anxious lest his wife should revive.

32. A further comment made by the learned Judge was that when Mrs. Bandaranayake arrived the Appellant did not ask why the doctor had not come also.

The learned Judge said "What was the reaction of a husband p. 339, l. 44.
"who thinks his wife in a swoon. He does not even ask if the doctor
"had come. Why did he conclude that Dr. Paul did not come."

The learned Judge did not point out that what the Appellant did do, according to the evidence of Mrs. Bandaranayake, namely ask her at once to go and fetch the doctor when he found that she had arrived without the doctor, was far more effective and sensible than asking why the doctor had not come.

Later on, the learned Judge read the evidence of Mrs. Bandaranayake, "The accused got down from the bed and standing p. 340, l. 11.
"near the bed asked me to fetch the doctor" and commented as follows. "He does not even ask her, if he had already sent for the
"doctor, 'Is the doctor come'? . . . Had he any doubt that she
"was dead? You have to answer that question. What is the
"reaction? . . . If the picture is of homicide, did he know that it
"was certainty of action of chloroform or not? This is the first case
"in the British Empire it is said. That is a point you must keep
"very prominently in your mind. Then the action of chloroform is
"unusual. If that lady had got up it was a serious matter for the
"husband. If it was homicide, the man who committed the murder,
"would he like his wife to get up suddenly and say: 'You are the
" 'rascal who did this to me'."

33. A further criticism made by the learned Judge was with regard to the mention by the Appellant to the doctor of the fact that he had given aspirin to the deceased.

There was a great conflict of medical evidence as to whether the absence of any trace of aspirin in the body when it was examined at the post mortem established that the deceased could not have taken aspirin on the night before her death, having regard to the fact that she was likely to have urinated during the night, that the body had been buried for twenty-one days and injected with a large quantity of formalin, that none of the doctors had any experience of an examination conducted in such circumstances, and that the test made by some of the medical witnesses for the Crown had been made with urine of living subjects kept in glass bottles and not under conditions comparable to those applicable to the urine of the deceased.

p. 343, l. 16. The learned Judge said "Then you remember he told Dr. Paul "death was caused by probably an overdose of aspirin . . . If "you find that no aspirin was taken at all you must come to one of "two conclusions. Either the lady deliberately threw away eleven "tablets or the story of the aspirin is absolutely false and designedly "brought in by the accused with a view to misleading the doctor. It "must be one of the two alternatives. Has he misled the doctor in "getting the certificate that she died of aspirin poisoning? . . . . "The suggestion came from him and not from Dr. Paul."

This was a complete mis-statement of the evidence, according to 10
p. 181, l. 4. which Dr. Paul asked the Appellant whether the deceased had taken anything and was merely told by the Appellant that he had given aspirin to the deceased when she complained of a headache.

p. 351, l. 46. At a later stage of his summing-up the Judge read part of the evidence of Dr. Paul and then admitted that he had been wrong the previous day when he attributed to the Appellant the statement that death was due to an overdose of aspirin, but he did not withdraw any of his comments to the effect that if aspirin had not been taken the Appellant had deliberately misled the doctor. 20

p. 337, l. 43. 34. A further comment by the learned Judge adverse to the Appellant was upon the fact that when the Appellant found the deceased lying across the bed he did not move her into a more normal lengthways position. The Judge failed to point out to the jury that the bed was closed in on three sides and that it was only by leaving the deceased in the position in which he found her that the Appellant was able to attempt artificial respiration.

35. The learned Judge further criticized the story of the Appellant with regard to the purchase of the chloroform.

p. 347, l. 16. He said "You must make up your mind with regard to this "chloroform story. That is to say that the accused bought this 30 "chloroform for the purpose of amputating and he forgot to send it "to Chilaw, forgot all about the buffalo and then he forgot to ask "back for it from his wife even when his mind was recalled to the "fact that he knew that the leg had been amputated, and you have "got this other fact that the telephone message came at that critical "time", but he did not remind the jury that the only evidence that the Appellant ever possessed any chloroform was voluntered by him.

In further comments upon the question of the purchase of chloroform, the learned Judge says "A serious question does arise "because if the ampule of chloroform was traced to the accused and "it never went to the deceased then it favoured the theory of "homicide and that is a matter for you to infer from all these facts." p. 363, l. 24.

The learned Judge did not point out that since the only evidence upon the question was that of the Appellant himself, they could not find that the chloroform was traced to the accused, but never went to the deceased.

10 36. The Appellant humbly submits that the cumulative effect of all the matters hereinbefore complained of amounted to a manifest violation of the principles of justice depriving him of the substance of a fair trial.

37. From the said Judgment of the Supreme Court the present appeal to His Majesty in Council has been brought and the Appellant humbly submits that the same ought to be allowed for the following amongst other

REASONS.

20 1. Because the medical evidence adduced by the Crown did not entitle the jury to find that the death of the deceased was caused by homicide.

2. Because all the Crown witnesses who were in the vicinity at the time when the deeasecd met with her death gave evidence which, if accepted, exculpated the Appellant.

3. Because the case for the Crown depended upon discrediting the evidence of many of the most material
30 Crown witnesses.

4. Because the learned Judge admitted a large amount of hearsay evidence and made a wholly improper use of some of such evidence in summing-up to the jury.

5. Because the learned Judge led the jury to suppose that there was an onus on the Appellant which in fact there was not.

6. Because the learned Judge exercised undue and erroneous pressure upon the jury to induce them to arrive at a verdict by a sufficient majority.

7. Because the learned Judge used for a certain purpose in the course of his summing-up letters which after argument he had previously admitted solely for another purpose.

8. Because the learned Judge in his summing-up made a number of comments adverse to the Appellant which were not justified by the evidence.

9. Because the learned Judge allowed the case to go to the jury when upon the evidence as a whole it was manifest that there did not exist any reliable evidence upon which a capital conviction could safely or justly be based.

10. Because the cumulative effect of the foregoing matters was to produce grave and substantial injustice to the Appellant and to deprive him of the substance of a fair trial and to create an evil precedent for the future.

11. Because the said conviction of the Appellant was wrong and ought to be quashed.

H. I. P. HALLETT.

STEPHEN CHAPMAN.

No. 55 of 1935

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN :

STEPHEN SENEVIRATNE - (Accused) *Appellant*

— AND —

THE KING - (Complainant) *Respondent*

CASE FOR THE APPELLANT.

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