Privy Council Appeal No. 55 *of* 1935

Stephen Seneviratne - - - - - - *Appellant*

v.

The King - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

REASONS FOR JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1936

Present at the Hearing:
LORD MAUGHAM.
LORD ROCHE.
SIR GEORGE RANKIN.

[*Delivered by* LORD ROCHE.]

This is an appeal by special leave from a verdict and sentence given and passed in the Supreme Court of the Island of Ceylon on 14th June, 1934. The appellant was charged with having murdered his wife on the 15th October, 1933, and after a trial lasting 21 days he was found guilty by a majority of five to two of the jury, one of the five in the majority recommending him to mercy. Sentence of death was passed but this sentence was commuted to one of rigorous imprisonment for life.

The main ground of the appeal is that on the evidence a verdict of guilty could not properly or safely be found and that the jury ought to have been so directed and that in these circumstances such grave injustice had been done as to require the interference of His Majesty. The appellant also complained of certain specific matters in the conduct of the trial as causing or contributing to the miscarriage of justice. Such matters were: that a very large amount of hearsay evidence was admitted and was used as evidence of fact: that the learned Judge misconstrued section 106 of the Ceylon Ordinance No. 14 of 1895 relating to the law of evidence and in consequence gave an erroneous direction to the jury as to the onus of proof: that the learned Judge used language to the jury in his charge which was calculated to put undue pressure upon them and to prejudice the accused. Complaint was also made, though this was not one of the specific reasons assigned for the allowance of the appeal, that after the evidence was concluded the hearing was re-opened and further heard at the appellant's house, where

the death of his wife occurred, in a manner that was entirely irregular and was not permitted by law.

There is no uncertainty as to the principle upon which this Board acts in the matter of the review of a criminal case. The statement of the principle most useful for the purpose of this case appears in the judgment delivered by Lord Sumner in the case of *Ibrahim* v. *The King-Emperor* [1914] A.C. 599—at p. 614, and is as follows :—

> "Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Riel* v. *Reg.* (1885, 10 *App. Cas.* 675); nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done': *Dillet's Case* (1887, 12 *App. Cas.* 459). It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's Case; Ex parte Deeming* ([1892] *A.C.* 422). The Board cannot give special leave to appeal where the grounds suggested could not sustain the appeal itself; and, consequently, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* ([1893] *A.C.* 346). There must be something which, in the particular case, deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg.* v. *Bertrand* (1867 *L.R.* 1 *P.C.* 520)."

Whether mischiefs within the scope of the above description have occurred in the present case is a question which depends for its solution upon an examination of the facts and evidence in the case and upon the course of the trial. The facts and their Lordships' observations thereon are as follows:—

The appellant is a Cambridge graduate who was called to the bar in 1919. His wife in 1933 was about 38 years old. She was a cousin of the appellant and they had been married in 1923. They had one child, a boy aged 9, called Terence, another child having died soon after birth. The deceased, though short in stature (5 feet 3 inches) is described as huge. For some years husband and wife had not got on well together, constant quarrels arising out of various questions, including questions as to property, whether they should live in a rented house, and minor matters. A number of letters found after the death of the deceased amongst her belongings and purporting to be written to the appellant in 1932 show that the deceased was making accusations against the appellant in respect of a discharged servant girl, and of marital neglect and indicate that the deceased had become somewhat abnormally unhappy and was putting into writing expressions of unhappiness and of hope that she would not live long, with more than one threat of ending her own life. When she was angry with her husband she was in the habit of

shutting herself up in her room and at times of taking no food. On the other hand it was in evidence that the appellant, though not infrequently quarrelling with his wife and not attentive to her wishes, had never been seen by anyone to threaten his wife with any form of physical violence. Further, there was a substantial body of oral evidence to the effect that the deceased had been threatening suicide, and it is stated by two witnesses that some six weeks before her death she had discussed suicide by chloroform with a relation, Mr. Charles Seneviratne.

On the day before her death a Mr. and Mrs. de Saram had come to dinner, and the deceased was said to have become angry when she was told that the appellant had taken the boy Terence with him to the house of a Mrs. Francis Seneviratne. According to the statement of the appellant before the police magistrate, he had a conversation with his wife after the visitors had left in the course of which she said that he would repent his action.

The arrangements at Duff House, the appellant's residence, relevant to the night of the 14th-15th October, 1933, are not in dispute. The house was one storied and in it the deceased slept in a room together with her personal servant maid Alpina, and in a room, which opened off this room, Terence slept and his nurse Mabel Joseph. A bathroom and lavatory opened off each of these two rooms. Both in front and behind and also on the east side of the bungalow were verandahs and a number of poultry runs surrounded the house on all sides. The deceased's bed lay lengthwise along a wall and in her room were a couple of teapoys, an almirah, an iron safe and a wash stand. The evidence is that these rooms made a self-contained suite and that at night the doors giving access to these two rooms from other parts of the house were locked so that no one could have access thereto. The appellant had his bedroom apart in a suite of rooms at the back of the bungalow on the other side, and he would proceed most directly by the back verandah if he was minded to go from his own rooms to those of his wife. There was the evidence of a male servant called Banda to the effect that when on Sunday the 15th October he got up at 6.0 a.m. he found the doors closed as he had left them on the previous night. The evidence of Alpina as to what happened during the night was that the deceased wakened her twice, once to close the shutters because it was raining and another time when the deceased was seen to be drinking some water.

As to Sunday, the 15th October, Alpina's evidence was that she woke at 6.0 a.m., saw the deceased sleeping, went to the bathroom, and when she came back, found that the lady had turned over on her side, with her head on one pillow and another pillow at her side near to the wall; that the lady was awake but neither of them spoke; that Alpina, leaving the door ajar and having dressed, went to do some cooking in a kitchen at the back of the house towards the

western side; that 15 or 20 minutes from the time when she had got up, Seelas, a servant boy of 15, came to her and told her that her mistress wanted her. The chauffeur Perera came into the kitchen at the same time and said the same. Alpina said she then washed her hands and went without hurry to her mistress's room, followed by Seelas, who was going to his pantry; that she then saw her lady lying across the bed, that is to say not in a recumbent or sleeping position but out of bed in the sense that she was lying across it with her head towards the wall and legs and feet hanging over the outer edge of the bed; that as she entered the room, she saw the appellant coming in from the child's nursery; that she noticed a smell which she describes as poisonous and oily; that the accused went to the bed, commenced fanning his wife with a book and sent her (Alpina) for brandy and afterwards on repeated errands for hot bottles, which he applied to his wife; also that he attempted artificial respiration. She also said that there was a handkerchief on the bed, about a foot square in size, near to the lady's right hand. This handkerchief she said she put with some soiled linen on to the dressing-table after the doctor had come and she knew her mistress was dead. It appears to have gone to the laundry and nothing further is known about it. A small green smelling salts bottle, marked P.4, was on the teapoy upon which the deceased had kept her books. The stopper was out and it was empty. Alpina first saw it on the 16th October, when she had to clear the teapoy for some purpose, and put the books aside. She does not remember seeing such a bottle on the dressing-table. On the 16th she took the bottle and put it on a chair, on which she put the books. This is the bottle which, it was suggested, might have been filled with chloroform from some other container, and which the deceased might have used if she administered chloroform to herself.

The evidence of the nurse, Mabel Joseph, aged 21, was that she got up at 6.0 and left for church about 6.30, having seen the lady lying in her bed with her hand to her head.

Seelas, the boy of 15 who spoke to Alpina about her mistress wanting her, said that he got up at 6.0 and that he saw the appellant and the servant Martin feeding the fowls on the back verandah and heard them talking about the fowls. When in the pantry he says he heard some noise, not very loud, other noises from the fowls occurring at the same time, which seemed to him to come from the direction of the deceased's room. He says he went to Alpina and told her of this in the kitchen, and that the chauffeur Perera was there at the time, that he went back with Alpina to go to his pantry, and that later he assisted Alpina to bring hot water bottles to the lady. He says it was not possible for the appellant to go to the lady's room without his being seen by the witness. Banda, aged 18, who is

Alpina's brother, says he was sweeping the outer verandah when the appellant came out and told him to take two Sunday papers that morning, that the appellant went to the front verandah and came through the hall to the back verandah to feed the fowls. Banda was occupied with sweeping the verandahs until the car went off to fetch Mrs. Bandaranayake and if his evidence is true he must have seen the appellant if the appellant went to his wife's room at the material time.

Perera, aged 38, the driver, says he got up about 6.30 and was washing himself in his room when he heard a noise and that he went to tell Alpina and then went back to his room. Afterwards Simon the cook told him to fetch Mrs. Bandaranayake, that he went with Simon in the car to bring this lady, that Simon did not tell him to fetch Dr. Paul also until they were on the return journey He went back with the lady to fetch Dr. Paul and brought him about 7.30.

Simon, the cook, aged 26, says that he was in the kitchen, and that he had washed when he heard a noise and saw Alpina going to the lady's room, that he followed and saw the appellant fanning his wife and was told first to go on a cycle and then afterwards with the motor car to fetch Mrs. Bandaranayake and the doctor.

Martin, aged 14, was giving food to the fowls. He says the appellant came from his room along the back verandah, that the witness went to the kitchen and went back and the appellant had reached the back verandah. The appellant was finding fault with the witness for giving rice and water to the chickens, as distinct from the ducklings, and was engaged in picking out certain of the chickens. Martin speaks to seeing the appellant on the back verandah just before Alpina and Seelas went to the lady's room.

It is plain that this evidence, if believed, makes it impossible to suppose that the appellant was with the deceased in the room at the time she uttered the cry, and the learned judge treated it as obvious that if the evidence of these witnesses were believed, the appellant must be acquitted as having established an alibi.

The story of the appellant himself in a statement made at an early stage of the proceedings was that he was on the verandah where the chickens were when he heard a groan, that he thought the noise was made by Terence so went to the child's room first. The explanation which he is said to have given at the time for going to the child's room first is that he thought Terence might have got his head stuck fast between the rails of his cot, and he thought the noise which he heard might have been due to this.

The case for the prosecution thus depended upon the Crown being able to displace the evidence of the servants. To this end in addition to the suggestion that the servants would be easily induced to try to exonerate the appellant

there was adduced the evidence of relatives who had gone to the house on the day of the death and afterwards, and had had conversations with the servants about the occurrences of the morning of the 15th. By Ceylon Ordinance No. 14 of 1895, section 145 (2), proof of previous statements to contradict witnesses is provided for. A very considerable body of evidence of this kind was given that is to say of oral statements said to have been made by servants in contradiction of evidence given by them in so far as it assisted the appellant. Much of this evidence of previous statements was uncertain and varying and in no case does any servant seem to have made admissions so as to bring the evidence given in court into accord with their supposed statements. Therefore at most the evidence of alibi would be weakened or destroyed. There would still remain proved by the evidence circumstances of improbability, tending to cast doubt on the suggestion that with the child sleeping in the next room, a number of servants going about their ordinary work in adjacent rooms and verandahs, the appellant, almost immediately after the nurse had left for church, had gone into his wife's room and proceeded to administer chloroform in such a manner as to permit of her so completely altering her position in bed and of uttering a cry and dying immediately afterwards. If he did this and at the same time managed to leave the room and to come back again before Alpina reached the lady's room, his movements were extraordinary.

Dr. S. C. Paul's evidence was that he arrived at 7.30 and that when he arrived, the appellant left the room. Dr. Paul found that the woman was dead and had probably been dead since about 6.30. He appears thereafter to have examined the room and finding a bottle of aspirin tablets, asked the accused about them. In addition to telling the doctor how he had heard the noise from his wife's room and how he thought that the boy had put his head between the rails of his cot, the appellant, in answer to the doctor's question, said that his wife had the night before complained of headache, and he had given her the bottle of aspirin nearly full. It appears that the bottle if full, would have contained 25 aspirins, and in the bottle there actually were nine remaining. Accordingly Dr. Paul thought that death was probably due to an overdose of aspirin, and that the marks which he had noticed on the face of the deceased were caused by rubbing of brandy and application of hot water bottles to the face. Dr. Paul was not content to certify death in the ordinary course but telephoned to the coroner and gave information to the police and to Mr. Leo de Alwis, the brother of the deceased. On learning from the police and coroner that they did not suspect foul play or propose to take any proceedings, he gave a certificate that afternoon according to which death was due to syncope or heart failure.

Comment was made by the Crown upon the suspicious conduct of the appellant in that though there must have been some smell of chloroform if he entered the room immediately

after the cry, and although it would appear that his wife had died very soon afterwards, the appellant at no time mentioned the smell of chloroform to Dr. S. C. Paul on his arrival.

Dr. Paul's son, Dr. Milroy Paul, in the afternoon injected formalin into the body by way of embalming or preserving it, and on the 16th the funeral took place. On the evening, however, of the 15th, while Dr. Milroy Paul was talking to his father, the question of the marks on the face of the deceased was discussed by them. Dr. Milroy Paul stated his opinion that the marks must be due to chloroform. The deceased's brother, Mr. de Alwis, not being satisfied that his sister had died from natural causes and apparently at first adopting the view that she had been driven to suicide took steps after a day or two to instigate the authorities to action, with the result that the body was exhumed and a post-mortem was held upon it on the 7th November. The salient features of the post-mortem findings were much discussed in the medical evidence. It may be taken to be common ground that aspirin was not found in the body, that the face marks were most probably attributable to chloroform and that except on the face there were no marks whatever on the body of any significance. A slight bruising on the insides of the arms might have been caused in the course of the movements made to attempt artificial respiration.

It is now necessary to examine the medical evidence. It should be observed that the doctors could not properly state their opinions as to whether the death was due to murder, suicide or accident; that was a question for the jury. Apart from evidence as to what they saw on an examination of the body, the function of the doctors was confined to giving expert opinions as to the effects of chloroform on a human body, including the marks of burning which chloroform may occasion, and as to the immediate cause of death and other matters of that nature. Dr. S. C. Paul was in a special position for he was the family doctor and had attended the deceased on two confinements, and he as already stated saw the deceased at 7.30 a.m. at Duff House and interviewed the appellant. The main points on which expert evidence was given were, first, whether the death was due to aspirin poisoning or to chloroform, secondly, whether it was due to asphyxia or syncope, thirdly, whether the marks on the face were such as would be caused by burns from chloroform, fourthly, whether pressure on the face would be necessary to cause such burns, fifthly, as to the behaviour of persons during the administration of chloroform, *e.g.*, as regards struggling, shouts or other cries and so forth. It may be mentioned here that evidence of a very inconclusive character was given on this last point, inconclusive because not one of these witnesses had heard any of the sounds coming from the room of the deceased, and all they had to guide them were the very different descriptions of

these sounds given by the Cingalese witnesses who heard them. In these circumstances their Lordships do not think it necessary to summarise the expert evidence as to these sounds; but they must observe that any theory as to the cause of death must take into account the fact that cries or sounds apparently coming from the deceased were heard an extremely short time before Alpina entered her room and found her lying insensible. The conclusion that the death was due to homicide must therefore involve the idea that the murderer had discontinued the means which he must obviously have employed to prevent calls for assistance and had done this just before causing insensibility; and the cries or sounds must have emanated (on the footing of homicide) from a partially suffocated woman.

The expert evidence was taken as conclusively establishing that the death was not due to aspirin. Further it is reasonably clear that the direct cause of death might be the same if due to the administration of chloroform vapour either by the deceased or by another person, and the contest of conflicting opinions as to whether the signs observable on the post mortem examination pointed to asphyxia or to cardiac syncope or to asphyxia with secondary syncope was not of first importance. It was apparently supposed that asphyxia would take longer to produce, and be more likely to require an agent external to the deceased to bring it about; but the supposition itself was not at all clearly established. It must also be remembered that none of the doctors had any experience of the changes which might take place in a formalin injected body buried underground for twenty-four days in the climate of Ceylon.

It seems desirable to summarise the material expert evidence. The evidence of Dr. W. C. Hill was to the effect that death was due to asphyxia which he explained as meaning respiration being prevented and sufficient oxygen not coming in. There might also, he said, have been secondary syncope. The marks on the face were consistent with burns from chloroform. Dr. G. Cook stated that chloroform in a bottle or an ampoule which had been opened five years before would be useless. He had attended the deceased about eight years before in her confinement as an anaesthetist and she was "susceptible to chloroform." Dr. S. C. Paul who was F.R.C.S. and Doctor of Medicine (Madras) and who as stated had been the medical attendant of the deceased for many years, testified that she had some symptoms of diabetes and also had a skin disease called Tina Nigrantes, a sort of fungus on the face, neck and body. When he saw the body at 7.30 a.m. on the 15th October there was a slight discoloration of the face on the right side including the lips and just below them, tip of the nose and the eyelids but not on the chin. The face was placid and calm. The eyes were not protruding, there were no injuries to the tongue, no paleness, no lividity of nails, finger tips or lips. He thought

she might have taken something, but the suggestion of chloroform did not then occur to him. At that time he thought that brandy and hot water bottles (which the appellant said he had used) might have produced the burns. He was present at the post mortem. The marks were then more visible on both sides of the face. He then did not doubt that the death was due to chloroform. In his experience chloroform burns might be caused without pressure. He had on an average 2,000 cases a year of the administration of chloroform at his hospital and there were five or six cases of burns every year. If it was a case of suicide whether a handkerchief saturated with chloroform remained on her face or not death would have occurred within two or three minutes. In ten minutes or so the smell would have gone. (That is of course in the atmosphere of Ceylon.) He agreed with several statements in the text-books as to the great difficulty of causing death by the administration of chloroform by force (he cited the works of Taylor and Webster). He agreed with a statement in Webster (p. 706): "It is probable however that no authentic case is on record in which chloroform has been successfully used on a sleeping person for criminal purposes. Cases of suicide by inhalation are rare though some are reported." He testified that the deceased was a robust woman. One of his remarks was that if a third person was applying a handkerchief or some like object soaked in chloroform to cause death the natural impulse would be to close the mouth to prevent screaming and the burns would then be more on the lips and in the region of the mouth than elsewhere. He thought the deceased died of syncope and not of asphyxia.

Dr. T. S. Nair, an L.R.C.P. and S. (Edinburgh) and Faculty of Physicians (Glasgow) was present at the post mortem. He held a strong opinion that death was caused by asphyxia. The marks could have been caused by pressure with some fluid irritant. He alone of all the doctors said that the signs he saw at the post-mortem pointed to smothering, but he added that he could only say that the marks were consistent with smothering. He added that he had seen no evidence of chloroform. He looked for bruises or marks of violence on the body but could not find them. He thought the marks on the face indicated that pressure had been used. He agreed that round the mouth, chin and lower lips there was no blister or burn.

Dr. Milroy Paul, the son of Dr. S. C. Paul, was an F.R.C.S. (England), M.R.C.P. (London) and M.D. (London), and he embalmed the body on the 15th October by an injection of formalin into the veins. He noticed the marks on the face. He thought on reflection that they were due to chloroform and so informed his father. He was present at the post-mortem. Death in his opinion was not due to syncope pure and simple. It was at least partly due to asphyxia. He was clear that it was not a case of asphyxia caused by simple

smothering, for the signs in such a case were quite different. He gave elaborate evidence as to the marks and stated that they could be caused by chloroform without pressure and gave an instance of a very recent case under his own observation. He found no burns on the lips except a drip on the left side and no burns on the bridge of the nose. This, in his opinion, indicated absence of pressure on those parts. He also agreed that it was very difficult to administer chloroform when a person was asleep. He would expect such a person to awake and shout out. " Even under operation a patient struggles and two or three persons are kept to hold him down." There were no bruises and no scratches.

Dr. J. S. de Silva, an M.B. and Master of Surgery (Aberdeen) was the senior anaesthetist at the General Hospital (Colombo). He had an unrivalled experience in the giving of anaesthetics, for he had administered them in 25,000 cases; originally he used chloroform alone and more recently chloroform followed by ether. He had had only one death and that was of a patient in a moribund condition, and he had had no cases of burns from chloroform—a very remarkable testimony to his skill. He was present at the post-mortem. He said the death was not caused by asphyxia basing his opinion upon the absence of the external and internal signs of it, and he cited various text-books. He thought the death was due to syncope caused by the inhalation of chloroform. He did not see how chloroform could be used on another person to cause death without touching the ridge of the nose, and the sides of the nostrils. A homicide, he said, would naturally soak the centre of the lint, or pad or handkerchief. He had made experiments as to burning with chloroform and said you could get burning with and without pressure. He said it was next to impossible to anaethetise a person single-handed and on an unwilling person he would not attempt it. He insisted on the absence of signs of violence or of any resistance offered by the deceased. There could be no doubt that the view of this witness was very definitely that the indications were either inconsistent with homicide or at any rate were strongly against it.

Dr. R. L. Spittel, F.R.C.S. (England), was not present at the post-mortem, but had read the report issued by Dr. Nair. He thought, judging from the report, that the cause of death was secondary syncope preceded by asphyxia and due to the administration of chloroform. He agreed that some skins were more susceptible than others. He held the view that it required superhuman determination for a person to saturate a handkerchief with chloroform and press it down on his or her face until death ensued. There were recorded instances of such suicides; they were " baffling ". He would expect a person to whom chloroform was going to be administered to struggle violently. He had made some experiments with chloroform burns and found he got burns

if there was pressure on the handkerchief and none if there was not; but the value of these experiments would depend very greatly on the degree of concentration of the chloroform used, and in re-examination he said that in one experiment he used a two p.c. concentration and there was no evidence as to the concentration in other cases.

Dr. Karunaratne, an M.D. of London was in government service as a pathologist. He had had a brilliant career as a student in London. He had personally done between 2,000 and 3,000 post-mortems in Ceylon, and he was present at the post-mortem on the deceased. There were signs that asphyxia went on for some time before the heart failed and assuming that chloroform was used he would attribute death to chloroform, i.e., to respiratory failure associated with secondary syncope. As regards the question of suicide or murder he said that the deceased being a well-built lady would have struggled if chloroform was being administered against her will and one would expect to find bruises and scratches in such a case; on the other hand it emerges from his evidence as a whole that he thought homicide was a more probable cause of death than suicide because of the great difficulty of a would-be suicide keeping the chloroform in contact with the face, since by unconscious action the person would take it off.

Such being the nature and effect of the evidence the further course of the trial may be shortly stated. All the witnesses were called by the prosecution. Fifty-four witnesses having been mentioned on the back of the indictment, 52 witnesses were called and two tendered but not examined. The statement of the appellant in the police court on the 10th February, 1934, was put in in accordance with the law but the appellant did not elect to give evidence in his own defence. Evidence having been taken from the 14th May to the 8th June, the judge and jury with the accused and counsel on both sides went on the latter date to the scene of the occurrence, namely, Duff House. The servant witnesses were there and were questioned further and at length presumably by the Judge and by nobody else. A certain Dr. Peiris was also present and took some part in the proceedings. He does not seem to have been at any time called as a witness or sworn. Experiments were conducted by pouring chloroform on a handkerchief to see how long the smell would remain, and by making noises at one place to discover how loud they would sound at another place.

The learned judge summed up on the 13th and 14th June, in a very long and careful charge, and the jury were absent for five hours. They brought in a verdict by the minimum majority of five to two, one of the five recommending the appellant to mercy.

The learned judge, in the course of his summing up, when dealing with the question whether the death was due to homicide or suicide, told the jury that they should view the

evidence under the four heads of: motive, opportunity, means and conduct. He laid before them the fact that the letters show a motive for suicide or a motive for taking an overdose of chloroform to frighten the appellant. He also said that the case would be the first of its kind, apparently, in the British Empire, where murder had been attempted by chloroform, and that the appellant would have taken a great risk of the victim screaming.

As regards opportunity, he told them that if they believed Martin, Banda and Seelas, opportunity was absent. On the other hand the accused had opportunity in the sense that he was up and that he was in the same house. As regards means, the only evidence in the case was supplied by the appellant himself who had stated that some 2½ months before he had bought an ampoule of chloroform in connection with an operation on the leg of a buffalo at his estate in Chillaw: that it had not been used for this purpose and had been brought home and had been handed to his wife.

Under the head of conduct, the learned judge invited the jury to consider the conduct of the appellant during "the faint," and after "the faint," when Dr. Paul came, and later, including such matters as whether the accused did not guess that his wife had died, whether he did not think it necessary to make a fuss about it or whether he really was attempting to revive his wife, and whether his leaving the room could be reasonably explained. He put to them also whether the conduct of the accused in telling the doctor about the aspirin was not suspicious in view of the fact that the medical evidence had disclosed that the lady could not have taken any aspirin, the view of the learned judge on this point being that unless the deceased had thrown away a number of tablets it cannot have been true that the bottle was full as the appellant had said it was.

As regards the medical evidence, he told the jury that all the doctors were agreed that chloroform was the cause of death, but that the doctors were divided into two groups, those who thought that the death was caused by syncope and those who thought that it was caused by asphyxia and syncope, or simply by smothering as Dr. Nair had suggested. He told them that except for Dr. S. C. Paul and Dr. de Silva, the other doctors were of the opinion that death was due to secondary syncope with which there were concurrent asphyxial signs and he put it to them whether or not they would accept the proposition that there were asphyxial signs which must have taken some minutes to produce. He put the evidence about the burns on the face to the jury and the controversy between the doctors as to whether they must have been caused by pressure. After discussing the medical evidence he said:—

"These problems are set by doctors. If you cannot make up your own mind from the doctors' evidence, it is still your duty to come to a conclusion on your own observations in this case. Could the burns of that kind be caused by a mere handkerchief by putting

> it in that position, or must pressure have been used? If pressure was used, could not the lady herself have used pressure when she wanted to go off. Accused says in his statement that she was in the habit of inducing sleep by chloroform . . . . Make up your mind one way or the other and see whether it corroborates the prosecution story or the case for the defence, whether it was suicide or death by misadventure ".

Upon a review of the charge of the learned Judge as a whole, their Lordships do not find that it was calculated to bring before the minds of the jury the essentials of the case in respect of these circumstances: (1) that the only evidence as to where the accused was at or before the time of the death was in his favour or if the evidence were disbelieved and disregarded there was no evidence of his presence in his wife's room at the material time; (2) that there was particularly strong evidence pointing to a tendency or inclination on the part of the lady to commit suicide. This point was mentioned more than once, but as no more than balancing the motive for murder. This is unsatisfactory because assuming that there was such a balance as regards motives for suicide and murder yet more than motive was disclosed by the evidence. There was disclosed, as has been said above, a tendency towards suicide in the deceased. No tendency towards violence or murder in the accused was even suggested. (3) That the medical evidence was completely ambiguous in its effect, and did not show any preponderance of opinion among the doctors that the physical conditions apparent at the post-mortem were such as to be consistent only with the hypothesis of homicide or to point clearly in that direction. In considering the weight which a jury could properly attach to this medical evidence it is important to observe that the question was not whether they were justified in preferring the opinions of those doctors who thought that the appearance of the body pointed to the application of external force rather than to the application by a suicide of a handkerchief soaked with chloroform, but rather whether the evidence of the medical experts as a whole pointed so clearly in the direction of homicide that the evidence of the three servants that the appellant was elsewhere than in the room of the deceased, must be rejected as untrue. Expert evidence to have that effect must be clear and decisive. Their Lordships are unable to take the view that the jury was properly directed on this important aspect of the case: they were left to infer that they were at liberty to accept either of the views put forward by the medical witnesses conflicting as they were, and even to put aside all the medical evidence and to form their own opinion from the facts as to whether they pointed to homicide rather than to suicide. In the opinion of their Lordships the expert evidence was so conflicting, where it was not hesitating and doubtful, that the learned Judge should not have invited the jury on matters involving medical knowledge and skill to come to a conclusion for themselves to which the

medical men could not point the way either with certainty or with even an approach to agreement amongst themselves.

It is apparent that this general tendency of the summing up was to lead the jury to think that in effect they might convict the accused mainly if not entirely on the view they formed of his conduct. Many of the matters discussed under this head seem to their Lordships to be most uncertain in their effect and unreliable as a guide to a conclusion. There were points against the appellant. There were others in his favour. The greater number were merely ambiguous. It has always to be remembered that as the evidence showed the appellant was in danger, even if suicide were found to be the cause of death, of incurring at least moral blame, and it was quite consistent with innocence of murder that he should prefer misadventure to be deemed to be the cause of death. Still if there had been other evidence of weight their Lordships do not doubt that a jury might properly have taken into account these matters of conduct. But in this case at the end of the evidence the result was that there was no direct evidence justifying a conviction and for reasons already given there was no medical or other circumstantial evidence justifying a conviction; and to arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused was, their Lordships think, to act upon the merest scintilla of evidence and to be impermissible.

On these facts the advice proper to be tendered to His Majesty seems to their Lordships to be no doubtful matter. The submission of the Attorney-General was well founded, that it is not for this Board to interfere because its conclusion as to guilt or innocence might differ from that of the jury. But in the view of their Lordships, there are here no grounds on the evidence taken as a whole, upon which any tribunal could properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not, in law or justice, permissible grounds on which to base a verdict. The only proper direction to the jury in these circumstances was that they must return a verdict of not guilty or that they could not safely or properly find any other verdict. The direction was, as has been seen, quite other than this, and the verdict, in the opinion of their Lordships, cannot stand.

Having regard to this conclusion on the main issue in the appeal, it is strictly unnecessary to consider the other points raised, but in the circumstances of the case, and having regard to the general importance of some of the matters debated at the Bar, their Lordships propose to deal shortly with these points also.

As to the matter of hearsay evidence : it has been already observed that witnesses who gave evidence favourable to the appellant were extensively cross-examined as to other and

previous oral statements. Such procedure is with the leave of the judge permissible under section 154 and 155 of the Ordinance (Law of Evidence) 14 of 1895 and it is to be presumed that such leave was obtained. In other cases, as for example in the case of the maid Alpina whose good faith does not seem to have been questioned by the Crown, evidence of what she had said was given apparently without previous cross-examination of the witness as to such statements. This is both undesirable and not permitted by the above sections and it could not be and was not suggested that section 157 of the same Ordinance applied to make the further hearsay evidence admissible as corroboration. It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Raj* v. *The King-Emperor* (I.L.R. 42 Cal. 422) to the effect that all available eye witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. Thus, in the present case, the maid Alpina and Dr. S. C. Paul were indispensable Crown witnesses. As to some of the other witnesses, there might have been both less confusion and a fairer trial if, though their names were on the indictment, they had been put into the box to be questioned as to other than formal matters by the defending counsel. As the trial was conducted the result was unhappy. The jury was warned more than once in the judge's charge that evidence of previous statements of a witness not admitted by the witness to have been made and not adopted by him in his evidence in court was not evidence of fact. But how ineffective is such a warning when there is present a very extensive mass of hearsay evidence, is shown by what happened here. Not only did medical and other witnesses assume to be facts matters of which there was merely such hearsay evidence and then proceed to found conclusions upon them, but the learned judge himself in his charge,

through forgetfulness, more than once fell into the same error. In these circumstances the appellant's complaint under this head, seems to their Lordships to be established in fact.

As to section 106 of the Evidence Ordinance (No. 14 of 1895): that section provides as follows:—" When any fact is especially within the knowledge of any person the burden of proving that fact is upon him ". The learned Judge, who tried the present case, held a view as to that section which led him to give directions to juries, one of which is in question here, and another of which has been already considered and disapproved by this Board in a reported judgment (see *Attygalle* v. *The King*, ([1936] A.C. 338). That judgment had not, of course, been delivered when the charge was given to the jury in the present case, and the material passages of the charges in *Attygalle's* case and this case, though not in identical language, are substantially of the same tenour. Accordingly the direction given in this case is open to the objection which their Lordships explained in the judgment in *Attygalle's* case. That explanation need not be repeated. It is quite right to say that the learned Judge in the present case in the course of his very able charge to the jury explained generally that the onus was on the Crown to establish guilt. But the passage in the charge under examination seems nevertheless to be open to very serious objection. It is not primarily or at all a general comment, which would be and was quite admissible, on the fact that the appellant was not called to give evidence. Nor was it a direction that any specific named fact was one which fell within the section with the result that the onus of proving that fact was upon the appellant. It was a direction as to facts generally, and therefore it was particularly unfortunate that the relevant passage in the charge should have been expressed thus: " He has got to explain . . . . In the absence of explanation, the only inference is that he is guilty ". Its tendency would be to lead the jury to suppose that if anything was unexplained which they thought the appellant could explain, they not only might but must find him guilty. In a very difficult and quite exceptionally mysterious case such as this, the area of the unexplained was extensive, and how much the appellant himself could explain depended on where he was at material times, and indeed, on the very matter at issue in the trial, namely his guilt or innocence. One thing is quite clear, that this case and *Attygalle's* case are wide apart in one respect. In *Attygalle's* case this Board did not interfere because, owing to clear evidence of guilt free from all connection with the irregularity complained of, the irregularity caused no injustice. Here the case even as left to the jury admittedly hung suspended in a wavering balance, and no one can say what tipped the scale against the appellant.

The matter of undue pressure on the jury can be shortly dealt with. In the course of his charge the learned Judge

is reported to have said this : " . . . the verdict, whether it is a conviction or an acquittal, I hope it will be unanimous, owing to the serious and grave nature of the case, but if you cannot agree please remember that I have got the full power to ask you to reconsider your verdict, but four to three means an unacceptable verdict. That means you have to go through the trial again. I hope you will not have this misfortune." It was said that this meant and the jury would understand, that if they did not agree, they would have to try the case afresh. Their Lordships are satisfied that the learned Judge can have had no intention of threatening the jury with such a fate and must, as the Attorney-General said, have been referring to a possible necessity for a further direction from him and for a new and prolonged deliberation. Their Lordships also recognise that in this case, as often, the shorthand note is not in all respects either complete or accurate; but the form the note takes in this passage seems to indicate that the shorthand writer understood the language in the sense complained of and the jury may unfortunately have done the same.

There remains the matter of the proceedings at Duff House on 8th June, 1934. Section 238 of the Criminal Procedure Code (No. 15 of 1898) provides for a view by the jury and lays down definite and strict conditions for its conduct. Section 165 of the Evidence Ordinance provides for the judge asking questions at any time of any witness. The proceedings on 8th June, 1934, seem to have been a combination of a view and a further hearing with the introduction of some features permitted by neither procedure, such as the performance of an experiment with chloroform by a Dr. Pieris, who does not appear to have been sworn as a witness, the judge and the foreman of the jury being present with Dr. Pieris in a room and the rest of the jury being somewhere else. The jurors seem also to have been divided for the purpose of other experiments in sight and sound and to have been asked questions as to the impressions produced on their senses. Their Lordships have no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sounds or smells; but they feel bound to record their view that there were features in the proceedings of 8th June which were irregular in themselves and unnecessary for the administration of justice. Their Lordships do not find it necessary to consider whether any injustice resulted in this particular case, but they regard proceedings so conducted as tending, in the words used in *Ibrahim's* case " to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future."

In these circumstances even had their Lordships taken a different view on the main point in the case, and had thought that there was evidence which justified the learned judge in leaving the whole case to the jury as one where they might,

if they thought fit, properly find a verdict of guilty, their Lordships would feel impelled to say that, particularly in respect of the mistaken use made of the hearsay evidence, and in respect of the error arising upon section 106 of the Evidence Ordinance, such mischiefs attended this hearing as to bring the case into the category where the interference of His Majesty on the advice of this Board is necessary.

For these reasons their Lordships have humbly advised His Majesty that the appeal should be allowed and the conviction and sentence quashed.

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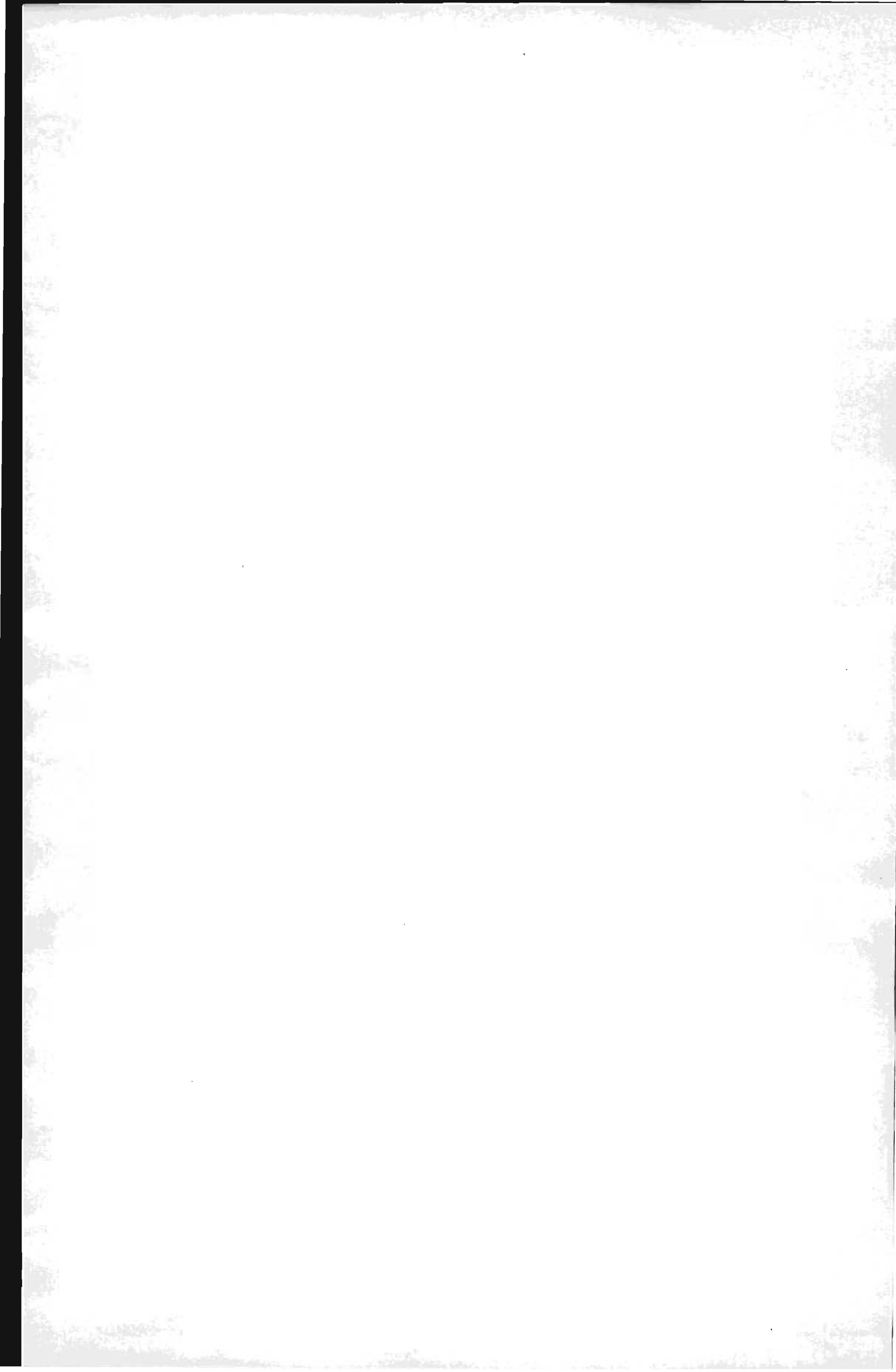

In the Privy Council.

STEPHEN SENEVIRATNE

v.

THE KING

DELIVERED BY LORD ROCHE.

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1936