1975 *Present:* **Sirimane, J., Wijesundera, J. and Ratwatte, J.**

WIJERATNE, Appellant and THE REPUBLIC OF SRI LANKA, Respondent

S. C. 78/74—H. C. Kurunegala 66/74

Criminal Law—Murder—Denial of a fair trial—what amounts to such denial—Failure of Trial Judge to refer to circumstances in favour of accused.

When an accused is facing a capital charge it is essential that every point in favour of the accused, though is may seem trivial, should be placed before the jury. It may well be that all such matters, if so placed before the jury may create a reasonable doubt, the benefit of which the accused is entitled to. When the circumstances against the accused are emphasised and the Trial Judge expresses his opinion as to the adverse inference that could be drawn from the circumstances and fails to place the circumstances and inferences in favour of the accused before the jury, the accused is deprived of the substance of a fair trial.

APPEAL against conviction at a Trial before the High Court.

F. W. Obeysekera, for the Accused-Appellant.

T. Wickremasinghe, Senior State Counsel, for the State.

Cur. adv. vult.

June 11th, 1975. SIRIMANE, J.—

The appellant was convicted on a charge of murder and sentenced to death. At the conclusion of the arguments before us on 20th May, 1975 we made order setting aside the conviction and acquitting the accused-appellant. We now give our reasons for so doing.

The case against the accused-appellant rested on circumstantial evidence and one of the many grounds urged before us was that the accused was denied the substance of a fair trial. It transpired in the evidence led for the prosecution that the accused and the deceased were seen by witness Gunatilleke between 7 p.m. and 8 p.m. on the day of the alleged murder taking a meal, the accused being after liquor and acting in a boisterous manner. The next item of evidence was that at 9 p.m. the same night the accused engaged the car belonging to witness Somaweera. It was the case for the prosecution that the deceased came by his death (he was found manually strangled and lying face downwards in a paddy field) sometime between the time that witness Gunatilleke saw the accused and the deceased together and

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witness Somaweera saw the accused alone. In this context the time of death is of utmost importance. The medical evidence disclosed that death could have taken place between 2-4 hours after the last meal. The evidence of Gunatilleke (who saw the deceased having his meal) and the Doctor shows that death must have taken place between 9 p.m. and midnight—being the terminal hours. If the deceased had died after 9 p.m. this accused could not have been the person who caused his death. This was a circumstance favourable to the accused but the learned Trial Judge did not even refer to it in his charge to the Jury.

Then again the Doctor in answer to a question by the Foreman of the Jury stated that it was not possible, considering the constitutional build of the deceased and the accused, for the accused to have throttled the deceased alone. This was not placed before the Jury as a circumstance in favour of the accused. The learned Trial Judge having referred to this circumstance proceeded to give the Jury a version of his opinion as to how the accused could have strangled the deceased alone, and thus deprived the accused of the benefit of that circumstance. Though a Trial Judge is undoubtedly entitled to express his opinion on the facts, still it must be exercised with caution and if an opinion is expressed as to an adverse inference that could be drawn against the accused, it is only fair that the attention of the Jury is also drawn to the possible inference in favour of the accused.

The medical evidence further showed that certain injuries on the elbows of the deceased could not have been caused in the field where the dead body was found—the relevant question and answer given is as follows :—

Q. "That is, the point of throttling, was quite different to the point where the body lay ?"

A. "Most probably so."

This aspect of the matter was not properly placed before the Jury for its consideration. On the other hand the learned Trial Judge in the course of his charge stated that the deceased "died in the field that night"—accepting as a fact that death took place in the field. When the accused was facing a capital charge it was essential that every point in favour of the accused, though it may seem trivial, should be placed before the Jury. It may well be that all such matters if so placed before the Jury may create a reasonable doubt the benefit of which the accused is entitled to. When however the circumstances against the accused are emphasized and the Trial Judge expresses his opinion as to the adverse inferences that could be drawn from the circumstances

and fails to place the circumstances and inferences in favour of the accused before the Jury, the accused is deprived of the substance of a fair trial.

It is not necessary to consider the many other grounds urged by learned Counsel for the defence as for the reasons mentioned above the conviction cannot be allowed to stand. We therefore set aside the conviction and acquitted the accused.

WIJESUNDERA, J.—I agree.

RATWATTE, J.—I agree.

Appeal allowed.