## SUPREME COURT

**Attorney General**
**vs.**
**D. Seneviratne**

*- S.C. Appeal No. 72/80*
*C.A. Appeal No. 114/78 — H.C.Kandy No. 253/77*

*Appellate Court's functions in cases of appeal; from verdict of Jury; Murder and robbery in the same transaction; Circumstantial evidence so cogent calling for accused person's explanation. Accomplice — Scope of review when Special leave to appeal is granted by Supreme Court.*

Respondent was indicted for murder of G.P. Charlis and his wife and also for robbery of six bags of pepper belonging to G.P. Charlis.

The Jury returned an unanimous verdict of guilty on all the counts. At the trial the Prosecution established (1) the footprints of the left leg in human blood on a newspaper found inside the room where the deceased lay dead belonged to the accused (2) that on a statement made by the accused a bunch of keys belonging to the deceased was found - (3) that the Police recovered a recently washed black coat and a pair of black shorts with blood stains on it. (4) that Rasheed saw a man wearing a black coat meet Arnolis a taxi driver. (5) that a man wearing a black coat loaded pepper into Arnolis's car.

In the face of this cogent circumstantial evidence implicating the accused the accused only stated that he was not guilty and knew nothing about the incident. On appeal to Court of Appeal all the convictions were set aside. The Attorney-General's application for leave to appeal was also refused. The Attorney-General appealed to the Supreme Court having obtained special leave to appeal.

HELD by Weeraratne J, Sharvananda J and Soza J (with Wanasundara J and Ratwatte J dissenting):
per Weeraratne J "The summing up does not contain any substantial misdirection or non-direction either on the facts or law. There is no reasonable basis upon which the verdict of the jury could be interfered with."

per Soza J "When the Supreme Court in its discretion grants special leave to appeal the scope of review is not limited to substantial questions of law". Since" the Supreme Court has jurisdiction to correct errors of fact or law committed by any Court ..... it is open to it to review the case so far as it is pertinent to the question to be decided" where it grants special leave to appeal.

An accomplice is a guilty associate whether as perpetrator or as incitor or helper in the commission of criminal acts constituting the offence charged of a lesser or kindred offence of which the accused could be found guilty on the same indictment. Where there are special circumstances which only the accused can explain the accused must offer an explanation.
This was not a case where the verdict of the jury could be characterized as unreasonable. It cannot be said that the substantial rights of the accused had been prejudiced or that there had been a failure of justice.

APPEAL from Judgment of the Court of Appeal

**Before:** Weeraratne, J.
Sharvanada J.
Wanasundera J.
Ratwatte J.
Soza J.

**Counsel:** T. Marapona. Deputy Solicitor General with C.R. de Silva, State Counsel for Attorney General.

Dr Colvin R. de Silva with Mrs. Muttetuwegama and N.V. de Silva for Respondent.

**Argued on:** 15.2.82, 16.2.82, 17.2.82, 18.2.82, 19.2.82, 23.2.82 and 24th February 1982

*Cur. adv. vult.*

**Decided on:** 8.4.1982

WEERARATNE J.

This is an appeal by the Attorney-General in a case in which the accused-respondent was indicted on charges of murder of G.P. Charlis Silva, his wife Seelawathie Weeraratne, and of robbery of a stock of pepper in the possession of Charlis Silva valued at Rs. 1,400/- which alleged offences were committed in the course of the same transaction on the 23rd July 1973. At the trial in the High Court of Kandy, he was found guilty on all three counts of the indictment by an unanimous verdict of the Jury. The accused-respondent appealed against this verdict. The Court of Appeal while affirming the conviction on the charge of robbery, acquitted the respondent on the two charges of murder.

The prosecution evidence reveals that the deceased Charlis Silva (aged about 58 years) and his wife a few years younger, were the sole occupants of their house situated in the village of Godamune about three miles from the Talatuoya bazaar. They were comfortably well off owning about twenty-two acres of agricultural land planted with pepper, cocoa and coconut which provided a fair income. A labourer named Simon, in giving evidence stated that he worked daily in the garden of the deceased for the past eighteen years. They had some hired labourers four to five years before. He stated that there were about twelve gunny bags of pepper in the house at the time. According to him on the 22nd July 1973, the day previous to the death of the deceased couple, he had as usual at about 4.30 p.m. kept the garden tools in the deceased's home and had spoken to them. Then on the following morning about 7 a.m. when he came to work he found the door leading to the bed-room padlocked from outside which was unusual since at night the doors were locked with door-bars from inside. His suspicions were aroused and he called out to the "Mudalali", as he was accustomed to address him and received no response. Simon reported this to Juwanis, a relative of the deceased, and Juwanis complained to the Police that morning of the 24th at about 10.40 a.m. When the door of the bed-room was forced open by the police, the couple were found dead, with serious cut injuries inflicted on each of them.

Inspector Ratnayake the O.I.C. Talatuoya Police Station had gone to the scene and found stains like blood on the floor of the verandah and on the door. He removed the hasp of the door and entered the

room and saw a newspaper with blood stains on it. There were two bodies covered with gunny bags between the two beds. The bodies had serious cut injuries on the necks, and there was blood on the floor between the two bodies. He saw pepper strewn in the compound and also along the path which led for three-quarters of a mile to the V.C. road after a short flight of steps to meet the bus road at the Pinwatte junction. The house of the deceased couple consisted of a long verandah with a door from each room connected to the verandah. There is no connecting door from one room to the other. Access to the kitchen is from outside. Inside the room just by the feet of the two bodies was a newspaper of the 23rd July 1973. On it was found two blood stained foot prints. That same afternoon the O.I.C. Ratnayake informed the Magistrate, summoned the Examiner of Finger Prints and proceeded with the investigation of the case. The case for the prosecution was based on circumstantial evidence. The main items of evidence may be summarised as follows:-

(a) Two foot prints of the accused-respondent *stained with blood* were found on a newspaper bearing the same date as the date on which the murders were committed, namely 23.7.73. This newpaper ($P^7$) was found inside the bed-room where the bodies of the deceased persons were lying. The evidence of the Registrar of Finger Prints was that he was definite that the two prints were those of the accused-respondent.

(b) The evidence was that death could have taken place between 8.00 and 9.00 p.m on 23.7.73 and that one weapon could have caused the injuries on both the deceased persons.

(c) The evidence for the prosecution established that the accused-respondent had engaged the services of a hiring car driver named Arnolis Appuhamy to bring his car to a point which is three-quarters of a mile away from the house of the deceased in order to load bags of pepper, that the accused-respondent did in fact load 7 bags of pepper into the said hiring car at about 11.30 p.m on 23.7.73; six out of the said bags were identified as gunny bags belonging to the deceased, Charlis Silva. The following morning, police found that bags of pepper which had been in the bed-room of the deceased had disappeared, and there was a trail of pepper seeds from the house of the deceased to the point where the pepper bags were loaded into the hiring car.

(d) According to the hiring car driver, the accused-respondent

was wearing a black coat at the time he loaded the bags of pepper into the car. On the following day, the police recovered from the possession of the accused-respondent a black coat and a pair of black shorts. The black coat was wet at the time of its recovery by the police and the black pair of shorts had stains of human blood according to the Government Analyst.

(e) On a statement made by the accused-respondent, a bunch of keys was recovered from inside the gutter of the house of the deceased. This bunch of keys was identified as one which belonged to the household of the deceased.

In my view, the cumulative effect of the aforesaid items of evidence is that a strong prima facie case is made out against the accused. In the face of this evidence, the accused was content to make a statement from the dock stating, "I am not guilty, I know nothing about this." The presence of his foot prints in blood on the newspaper is certainly an item of evidence peculiarly within his knowledge and is a matter which calls for an explanation from him. This however does not mean that there is a burden on the accused to prove his innocence. The trial judge has quite properly commented on the failure of the accused to give an explanation, having regard to the particular facts of this case.

The Court of Appeal in its judgment sets out that learned Counsel for the appellant submitted that more than one person committed the offence, inasmuch as there were indecipherable foot prints in the bedroom. The fact that other indecipherable foot prints were found does not indicate that more than one person participated in the murders and robbery for the reason that these indecipherable foot prints may have been that of the accused himself. In any event, the only decipherable foot prints found in the bed-room were those of the accused. The fact that the foot prints were stained in blood indicates that the blood was fresh at the time the feet rested on the newspaper.

The Court of Appeal has in the course of its judgment stated that there is merit in Counsel's submission that it was incredible that only one person had carried out the entire plan. In this connection it must be noted that the persons attacked were an elderly couple who lived by themselves in this house. As to whether the assailant, who was undoubtedly armed, could have in a few moments attacked these two defenceless persons is eminently a matter for the Jury.

As regards the suggestion that there was more than one person who loaded the bags of pepper into the hiring car, Dr de Silva referred us to the fact that Rasheed in his statement to the police had stated that a very tall man helped to load the bags of pepper into the car driven by Arnolis and that description fitted Simon. Rasheed in his evidence in Court however denied having made such a statement. I find that the trial Judge in his charge to the jury had dealt fully with the infirmities in the evidence of Rasheed and had placed before the jury the several contradictions between his evidence in Court and his statement to the police. As against the said statement of Rasheed, there is evidence of Arnolis that it was this accused who loaded the bags of pepper into the hiring car. Rasheed's statement to the police did not constitute substantive evidence which could be taken into consideration, as Rasheed had denied making such a statement. That statement served only to impeach Rasheed's credibility. On the question of Arnolis being an accomplice, the evidence at most would show that he was an accomplice only in relation to the the theft of the bags of pepper. There is no evidence to implicate him on the charges of murder or even of robbery. In any event, as was held by the Court of Appeal, the foot-prints on the newspaper $P^7$ stained with blood constituted a strong item of circumstantial evidence corroborating the evidence of Arnolis regarding the robbery of pepper.

The Court of Appeal has referred to Counsel's submission as to what happened to six of the twelve bags of pepper which were in the bed-room of the deceased. The bed-room does not show that some others were responsible for taking away the remaining six bags. In this connection it may be noted that the bodies of the deceased persons were covered with gunny bags. Nor is there evidence to show that the twelve bags were all filled to the brim with pepper. It could well be that some of the bags were not completely filled and that the assailant could have emptied some of the bags and used them to cover the bodies. In any event, these are pure questions of fact and one must presume that Counsel would have addressed the Jury on these matters.

Another complaint made by Counsel for the respondent was that the trial Judge erred in not emphasising to the Jury that there was a gap of 2 1/2 to 3 1/2 hours between the time of death and the delivery of the bags of pepper at the Pinwatte bend. There is evidence that there was a trail of pepper from the house of the deceased to

the bend on the road. This path was not motorable. Therefore whoever carried the bags of pepper would have had to do so on foot and it would have taken him at least ten to fifteen minutes to walk this distance. He would have had to walk this distance to and fro twelve times. The time gap is therefore easily explained. Once again, I wish to state that these are pure questions of fact which are solely within the province of the Jury, and upon which Counsel would have addressed the Jury. The Court of Appeal has referred to a gap of about 3 to 3 1/2 hours between the cry of distress and the delivery of the pepper. The Court has further stated that, "this was a very important aspect of the case from the point of view of the defence and the learned trial Judge had omitted to draw the attention of the Jury to it in the course of his charge." The evidence in the case however, as stated earlier, was that the distance between the house of the deceased and the point of the loading of the bags of pepper to the hiring car was no less than 3/4 of a mile. Therefore the fact that there was a gap of 3 1/2 hours between the cry of distress and the delivery of pepper does not in any way mean that there was a gap of 3 1/2 hours between the robbery and the murders. It seems to me that when an accused person complains of non-direction on the facts he must satisfy the Court of Appeal that such non-direction resulted in a miscarriage of justice. In my view however, there was no non-direction. The trial Judge has drawn the attention of the Jury to all the relevant facts.

It is significant that on the evidence of Arnolis the conclusion that the robbery was well planned is inescapable. On the first occasion that the accused invited Arnolis to bring his hiring car to transport the bags of pepper, Arnolis was unable to accede to his request. That night, not only was there no robbery, but there were no murders as well. However on the following day when Arnolis brought his hiring car to the Pinwatta bend the 6 bags of pepper had been removed from the bed-room of the deceased. It was on this same night that the deceased perosns were done to death. On the evidence there is no doubt that the accused had been involved in the attack on the couple, for otherwise his foot-prints could not been stained with blood. It would have been a strange coincidence that the couple had already been done to death at the time the accused came to remove the bags of pepper. In that event the accused would not be guilty even of robbery; he would have been guilty of theft only. But both the Jury and the Court of Appeal have found the accused guilty

of robbery and the accused has not appealed against his conviction for robbery. It is somewhat illogical, in the circumstances, to acquit the accused on the charge of murder and convict him for robbery of the bags of pepper in the possession of Charlis Silva. The trial Judge had stressed to the Jury that the element of violence was a necessary ingredient of robbery. The Jury, acting on such a direction, had unanimously found the accused guilty of robbery. It is implicit from such finding that the Jury had found that the accused had, in the course of committing robbery, used violence on the deceased couple which resulted in their death.

The other misdirection on the law in the summing up complained of by Counsel for the accused-respondent was that the direction on circumstantial evidence was inadequate, incorrect and prejudicial to the accused. He referred to the passage where the trial Judge in the course of his summing up has stated as follows when dealing with the question of circumstantial evidence, "if a certain circumstance is consistent with the innocence of the accused and also is consistent with the guilt of the accused, then you should not consider that circumstance. The doubt that arises in such an instance should be resolved in favour of the accused. Therefore gentlemen, you must consider as a whole these circumstances which point only to the guilt of the accused...."

It must be noted that the trial Judge is here directing the Jury as to how they should evaluate the evidence led on behalf of the prosecution since the case for the prosecution is based on circumstantial evidence. In the context it cannot be fairly said that the trial Judge had invited the Jury to ignore the effect of circumstances which are favourable to the accused and consistent with his innocence. In any event the trial Judge has on more than one occasion, directed the Jury very fully that the case for the prosecution must be proved beyond reasonable doubt. He has explained fully what reasonable doubt means. Therefore it seems to me that the inadequacy, if any, in the direction on circumstantial evidence has not occasioned a failure of justice. *Mc Gready vs. Director of Public Prosecutions (1973) 57 Crim App. Ref. 424.*

This brings me to the important question as to how far the Court of Appeal could interfere with the verdict of the Jury on pure questions of fact in the absence of any material misdirections or

non-directions amounting to misdirections on the law. Generally speaking it would be correct to say that it is not the function of an appellate court to re-try a case already tried by a Jury. The opening words of Soertsz A.C.J in King vs. Endoris reported in 46 NLR 498 are apposite:-

> "Counsel appearing in support of these applications addressed us as if we were the Jury in the Assize Court, but our function clearly, as laid down by the Court of Criminal Appeal Ordinance, is to examine the evidence in the case in order to satisfy ourselves with the assistance of Counsel that *there is evidence upon which the Jury could have reached the verdict to which they came*, and also similarly, to examine the charge of the trial Judge to satisfy ourselves that there has not been any misdirection or non-direction."

This same point was emphasised by the Privy Council in *Ebert Silva vs. King* 52 NLR 505. Lord Tucker delivering the judgment of the Judicial Committee stated:-

> "With regard to the first submission, the Court, after considering a number of authorities and discussing the evidence said, "In the present case the death of Muthusamy has not in our opinion, been established beyond reasonable doubt. It may be observed with respect that this was not the issue before Court, *the issue was whether there was any evidence fit to be left to the Jury* from which they might infer that Muthusamy was dead." Viewed in the light of the approach to questions of fact set out above, it seems to me that there was ample evidence upon which the Jury could have arrived at a verdict that the accused respondent was guilty on all three counts of the indictment."

As I have already stated this was a case in which the circumstantial evidence was of a sufficiently cogent nature to call for an explanation from the accused-respondent. Howard C.J. in *King vs. Seeder de Silva* 41 NLR p. 337, made the following observation which is relevant to the instant case:-

> "In considering whether the Jury were entitled to convict on such evidence, it must also be borne in mind that the appellant gave no evidence and offered no explanation of the various parts of the evidence that incriminated him. A strong prima

facie case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellant the Jury was justified in coming to the conclusion that he was guilty."

I would now consider the non-direction which, according to the Court of Appeal amounted to a misdirection. The Court thus commented as follows:-

"The omission of the trial Judge to direct the Jury that even where a murder and robbery formed part of the same transaction, a recent and unexplained possession of the stolen property will be presumptive evidence against the accused only on a charge of robbery, and that there is no similar presumption that a murder committed in the same transaction was committed by the person who had such possession was a non-direction, which amounted to a misdirection. The authority relied on for the above proposition is the case of *Somapala vs. the Republic* 78 NLR 183".

In that case, the Appeal Court held on the facts that the trial Judge had seriously misdirected the Jury when he said: "In a case where murder and robbery has been shown to form part of the same transaction, recent and unexplained possession of the stolen property will be presumptive evidence against a person on a charge of robbery and similarly be evidence against him on a charge of murder". Though that was also a case resting entirely on circumstantial evidence, the facts in that case are quite different from the facts in the present case. In that case, though the accused alone was committed to stand his trial and the indictment was presented on the basis that the accused alone was responsible for the robbery and the murder, the prosecution case at the non-summary inquiry was that more than one person had participated in the robbery and the murder. Further, at the trial the defence brought out material in which it was probable that more than one person had participated in the killing, and the medical evidence indicated that probably at least two persons had participated in the killing.

According to Thamotheram J, "looking at the circumstance of the killing and the nature of the injuries, one would infer that the assailants had entered the house at night with murder in the heart rather than robbery. Either the murder was pre-planned, or something

had transpired after the entry of the assailants into the house to make such brutal killing necessary." (78 NLR 183 at 185) According to the judgment of the Court, the only facts which incriminated the accused in that case were (a) the possession of a sword about 18 days after the murder; (b) the possession of the stolen articles; and (c) the accused's conduct and the finding of finger and palm prints of the accused at the scene and on the facts the prosecution could only rest a case of robbery against the accused. It was in the context of those facts that the Court held that the trial Judge had erred in directing the Jury that recent and unexplained possession of the stolen property would be presumptive evidence that a murder committed in the same transaction was committed by the person who had such possession . In the instant case, on the other hand, the case for the prosecution right through was that the accused alone was responsible for the robbery and the murder and the defence did not bring out "any material on which it was probable that more than one person had participated in the killing that night." Further, the foot prints of the accused, unlike the finger-prints of the accused in *Somapala's case*, were found stained with blood on the newspaper $P^7$. Coupled with the blood-stained finger-prints was the accused's blood-stained foot-prints which suggest that the accused was involved in the killing and not merely that he was present at the time of robbery.

In my view, the ruling in *Somapala's case* should be confined to the special facts of that case and has no application to the facts disclosed in the instant case. The Jury, who are judges of fact, are entitled, as they did in the present case, to conclude that where murder and robbery form part of the same transaction, the person who committed the robbery committed the murder also. The validity of such a conclusion depends on the facts of the transaction. The trial Judge in the present case did not, in stating the case for the prosecution, justifiably refer to any presumption under Section 114 of the Evidence Ordinance. In omitting to do so there was no non-direction which amounted to misdirection.

In my view the summing-up does not contain any substantial misdirection or non-direction either on the facts or on the law. The summing-up read as a whole is unexceptionable. There is little doubt that the circumstantial evidence which is of strong and compelling nature implicates the accused-respondent on all three counts of the indictment. In the face of cogent circumstantial evidence the accused

merely stated that he is not guilty and knows nothing about this incident. Thus it seems to me that there is no reasonable basis upon which the verdict of the Jury could be interfered with.

I accordingly set aside the judgment of acquittal entered by the Court of Appeal on the two counts of murder and restore the verdict of guilty on the two charges of murder brought in by the Jury.

Sharvananda J

I agree that the appeal be allowed for the reasons set out in the judgments of Weeraratne A.C.J and Soza J.

Wanasundera, J.

In this case the accused-respondent stood charged in the High Court of Kandy on two counts of murder, namely, with having on 23rd July 1973 murdered G.P. Charlis Silva and his wife Seelawathie Weeraratne, and on a third count of robbery, in that he had, in the course of the same transaction, robbed a stock of pepper from the possession of the said Charlis Silva.

After trial, the jury, by their unanimous verdict, found the accused-respondent guilty on all three counts. He appealed to the Court of Appeal and the Court of Appeal acquitted the accused-respondent on the two counts of murder, but upheld the conviction and sentence of ten year's rigorous imprisonment on the charge of robbery. The present appeal is by the Attorney-General and is in respect of the acquittal on the two counts of murder.

The facts adduced at the trial revealed that the two deceased persons were an aged couple living alone in the village of Godamune. They were wealthy and possessed land of about 22 acres in extent, which contained pepper among other crops. It would appear that they also possessed a reasonable quantity of money and jewellery though the exact quantity is not known.

They had employed a man named Simon, who was a day labourer and worked in the garden. Simon used to come for work at about 7.30 a.m. and leave at about 4.30 p.m. after leaving the tools inside the house. During this period they had no other servants and Simon

was the last person who saw the couple alive when Simon left at about 4.30 p.m. on the day previous to the day of the murders. Simon had come into the house and spoken to the deceased persons before he left for home. At about 7 a.m. next morning, when Simon came for work, he saw that the doors of Charlis' house were padlocked and Simon had alerted the neighbours about these murders. Considerable suspicion was thrown on Simon himself as being the person who had caused those deaths. The learned trial Judge referred to this suspicion in his charge, but dismissed it as a fanciful suggestion.

The medical evidence showed that the two deceased had been severely attacked with a sharp cutting instrument, and the doctor placed the time of death at a time between 8 and 9 p.m. on the night of the 23rd July. Although the Medical Officer says that these injuries on the two deceased persons could have been caused by one weapon, he was prepared to admit, under cross-examination, the "probability" of many weapons being used and the "possibility" of only two weapons being used. It may be mentioned that running through the entire defence case is the suggestion that more than one person was involved in these crimes.

There was no direct evidence of the commission of these offences. The prosecution case was based entirely on circumstantial evidence.

The foot-prints of the accused respondent, marked P7, stained in blood, on a newspaper bearing the date 23rd July 1973, were found inside the bedroom where the bodies were discovered. The foot prints have been identified as those of the accused-respondent.

For the prosecution, Arnolis Appuhamy, a taxi driver, stated that the accused-respondent had engaged the services of his taxi for transporting some bags of pepper and wanted it brought at about mid-night on the day of the murders to a lonely spot called the Pinwatte bend, which is about 3/4 mile from the house of the deceased couple. The accused had asked Arnolis to find a buyer for this pepper. Arnolis says that on the night of the 23rd July, he along with one Rasheed, a trader, kept this assignation. They had arrived at the spot at about 11.30 p.m. and the accused-respondent loaded seven bags of pepper into the car.Six of these bags were identified as gunny bags belonging to the deceased. A trail of pepper from the deceased persons' house up to the Pinwatte bend was also found

in the course of the Police investigations. There was evidence that prior to the date of the murders there had been 12 bags of pepper in the room occupied by Charlis Silva and his wife. It would be observed that the number of bags loaded into Arnolis Appuhamy's taxi accounts for about half of the stock that was kept in the room occupied by the two deceased persons. The Police did not find any money or a single item of jewellery or valuables on the premises in the course of their investigations.

In this context it may also be mentioned that it was the submission of the defence that Arnolis should have been treated as an accomplice to the crime. Arnolis had falsely told Rasheed, the purchaser of the pepper, that the pepper belonged to Arnolis and to the Police that he has had previous dealings with Rasheed. These statements were flatly denied by Rasheed. The collection of the bags of pepper had taken place at mid-night at a lonely spot on the road and the delivery had been made by a person, attired in black, who emerged from the dark without a light. Arnolis had done two trips that night and had carefully avoided taking the same route when coming and going. Arnolis was not paid a fare for the hire; nor is there evidence that payments were made for the sale of this pepper. It appears that this pepper was mixed with other pepper by Rasheed and quickly disposed of the next morning at a place 22 miles away from this spot.

According to Arnolis, the accused-respondent was wearing a black coat at the time he had loaded the pepper into the car. On the following day the Police had recovered from the possession of the accused-respondent a black coat and a pair of black shorts. The black coat was wet at the time of recovery and the black shorts had stains of human blood.

The accused-respondent did not choose to enter the witness-box and give evidence. He made a dock statement denying the charge and stated that he did not know anything about this. As stated earlier, a suggestion had been made that the accused-respondent could not have committed those offences single handed. The distance from the deceased persons' house to the Pinwatte bend was about 3/4th of a mile and the transport of 7 bags of pepper, presumably one at a time, on this dark night would have taken about two hours. Dr Colvin R. de Silva strenuously argued that the fact that Rasheed had told the Police (and this statement was put to him by the defence

to attack his credibility) that there were two persons at the time the pepper was loaded into the taxi, should carry some substantive effect when considering the totality of the evidence. Counsel for the accused-respondent also stressed the fact that, since the two deceased persons had not made any cries of distress, access to the house had apparently been freely obtained and there is the strong probability of the intruder being a known person.

The Court of Appeal had summed-up this material in the following words:-

> "..... There were indecipherable foot prints in the bedroom where the bodies of the deceased were found. The evidence that only one person committed these offences was not conclusive. According to Simon there were 12 bags of pepper inside the bedroom of the deceased couple on the day before they were murdered. However, according to Rasheed only 6 bags of pepper had been delivered to his house on the 23rd night. What happened to the missing 6 bags? This crime involving a double murder and a theft of 12 bags of pepper had to be committed swiftly in order to avoid detection. Counsel suggested that it was incredible that only one person carried out the entire plan. It would have taken too much time and would have defeated the object of committing the offence within the minimum time possible. Rasheed in his statement to the police had stated that a very tall man helped to load the bags of pepper into the car driven by Arnolis. Simon was an unusually tall man and fitted this description and the police had failed to search his house or any other house in the vicinity for the missing bags of pepper. There were several houses close to the deceased's house. It was significant that not one neighbour heard cries for help. Heen Banda the closest neighbour heard "Hoo!" shouts at about 8.30 p.m. There were 24 incised injuries on the deceased couple which indicated, assuming there was only one assailant, that when one was being attacked the other had the opportunity of raising cries for help. The absence of cries for help was an indication that the deceased couple were overpowered by more than one assailant who stifled their cries for help. There were difficulties in the disposal of 12 bags of pepper single handed as the time element was vital in this whole transaction. Learned counsel submitted that it

was incredible that only one person would have carried out the whole transaction as suggested by the prosecution.

We hold that there is merit in the above submissions and that the learned trial Judge should have left it open to the jury to decide whether more than one assailant participated in the offence without withdrawing this important question of fact from the consideration of the jury."

The Court of Appeal also criticised the trial Judge's conduct in withdrawing from the jury the question whether or not Arnolis was an accomplice.

In regard to P7, there was a suggestion by the defence that these prints were a subsequent introduction. Much was made of the fact that the reference to P7 in I.P. Ratnayake's notes of inquiry is in the form of an interpolation. The defence also drew the attention of the court to the fact that in the sketches that had been sent to the D.P.P., there is no marking showing the spot where P7 was alleged to have been found. I.P. Ratnayake sought to explain these discrepancies and omissions and the learned trial Judge quite properly left these matters for the consideration of the jury.

The foot prints P7 were the main items of evidence against the accused-respondent and this has been stressed by the learned trial Judge at more than one place in his charge to the jury. I think Mr. Marapona, Additional Solicitor-General, is right when he submitted that the prosecution did not rely on the presumption arising from a recent possession of stolen property to prove the murders. There is no reference in the trial Judge's charge to the presumption referred to in section 114(a).

The trial Judge, accepting the submissions of the prosecution, had taken the view that the two murders on the one hand and the robbery on the other formed one transaction. He appears to have directed the jury to the effect that if the accused was found guilty of robbery, his guilt as regards the murders would, as it were, automatically follow. He has said that:-

"The case for the prosecution is that the accused loaded pepper into Arnolis Appuhamy's car and that the accused

> committed theft of bags of pepper belonging to Charlis Silva that night and that the foot-print of the accused was found on a piece of paper marked P7; and therefore, this accused who loaded the car with pepper is the person who committed both murders."

The Court of Appeal however approached this matter somewhat differently. Upon a consideration of the totality of the evidence and the inferences drawn from it, the Court of Appeal thought that the question whether or not the murders and the robbery took place at one and the same time and formed one transaction should have been left to the jury.

It is in this context that the Court of Appeal referred to the case of *Somapala v. The Republic of Sri Lanka*, 78 N.L.R. 183. Mr. Marapona's submission - if I understood him correctly - that *Somapala's case* did not make any reference to a case of robbery is not borne out by the *dicta* in that case. Dealing with the presumption arising from recent possession of stolen property, Thamotheram, J., said that such a presumption does not lie to prove that "a murder committed in the same transaction was committed by the person who had such possession". He added-

> "There is no presumptive proof of this. The burden still remains to prove beyond reasonable doubt that the person who committed the robbery did also commit the murder. All that the prosecution has established is that the accused was present at the time of robbery."

When the Court of Appeal chose to follow the law as laid down in *Somapala's case*, it was undoubtedly aware of the decision in *The Republic v. Karunapala*, S.C. 228-229 decided on 23.1.79. There is also a subsequent case, *Abeysekera v. The Attorney-General*, S.C.25/81, C.A. 47-52/79, H.C. Kurunegala 26/77, decided on 22.9.81, dealing with this question.

It is therefore clear that there is a conflict of authorities in regard to the application of the presumption contained in section 114 and the Attorney-General apparently thought that this was a fit occasion for bringing up this matter for an authoritative ruling from us.

In the petition for leave to appeal, the Attorney-General, after referring to *Somapala's case*, has quoted a passage from the judgment of the Court of Appeal which reflects what Thamotheram, J. said in *Somapala's case*. The Attorney-General has submitted that "the interpretation placed on section 114 of the Evidence Ordinance is completely erroneous in law, having regard to a series of judicial decisions as well as the opinions of well-known text writers on the law of evidence." This was the only substantial ground of law in the petition of appeal.

Therefore, when this matter came for leave in the first instance - and I was a member of that Court - I for my part thought that even though it was an appeal from an acquittal, the substantial question of law taken in the petition of appeal merited our intervention. Leave was accordingly granted.

It would also appear that subsequently the Additional Solicitor General had met the Registrar and indicated to him that a larger bench would be necessary to hear this case since he was canvassing the correctness of *Somapala's case*. It was in deference to this request that the Chief Justice thought it fit to constitute this divisional bench of five Judges to hear and determine the legal issue that was intended to be canvassed in this case.

Unfortunately, this legal question which is the only issue for our consideration has been abandoned or at least not been argued at the present hearing. Mr Marapona, Addl. Solicitor General, who has taken over this appeal from his predecessor has sought to argue this appeal on an entirely different footing. He appears to have a more realistic appreciation as to where the strength of his case lies and has very skilfully made out a strong case on the facts as to the correctness of the verdict of the jury which, he states, should now be restored.

In my view the question as to the correctness of *Somapala's* case was the basis on which we granted leave. That legal issue was one of the contentions before the Court of Appeal and appears to be founded on statements made by the trial Judge. This then was the only matter which this Court was called upon to decide and not any other question.

Since the sole legal issue submitted for our consideration has not been argued, the appeal must necessarily fail. But I do not wish to allow the matter to rest there. If it were necessary to consider Mr Marapona's submissions on the facts, we would equally have to take into account Dr Colvin R. de Silva's arguments. Dr de Silva has drawn our attention to at least two serious misdirections in the learned trial Judge's charge to the jury which, he says, are alone sufficient to invalidate the convictions. Viewed in that light, this is a matter in which I would not have in the first instance given leave to appeal from the acquittal except on the legal issue concerning *Somapala's* case, nor was the case presented to us in the manner it is being done now. Having listened to the arguments of counsel, I am confirmed in my view that this appeal ought not to be allowed on the matters that have been argued before us. For these reasons I would dismiss the appeal, making no pronouncement on any of the matters touched on by counsel which strictly does not arise for determination before this Divisional Bench.

RATWATTE, J.

I agree with Wanasundera, J. for the reasons stated by him that this appeal ought not to be allowed on the matters that have been argued before us. I would accordingly dismiss the appeal.

SOZA J:-

I have had the privilege of reading in draft the judgment proposed by Weeraratne A.C.J. I agree with it. Yet, I would like to state my own views on the matters argued before us.

The respondent to this appeal was indicted before the High Court of Kandy on two counts of murder of a person called G.P. Charlis Silva and his wife Seelawathie Weeraratne and one count of robbery of a quantity of pepper valued at Rs. 1,400/- from the possession of the said Charlis Silva. The offences were alleged to have been committed on the night of 23rd of July 1973 at a place called Koswatte which is about three miles from the Talatuoya Town where the nearest Police Station is.

Charlis Silva and his wife Seelawathie were about 58 years and 53 years old respectively according to the medical evidence. They

were the only occupants of their house which consisted of two rooms and a kitchen all of which according to the sketch filed of record opened into a verandah. There was no other access to the rooms or the kitchen and no means of access internally between the two rooms. Charlis and Seelawathie used one of the rooms as a bedroom. When they were in they secured the only door which served as access to this room with a crossbar. Whenever they had occasion to leave this room they padlocked it from outside. Inside this room there was a stock of pepper in 12 bags. The house stood on a land of about 22 acres in extent planted with various crops like pepper, cocoa and coconut. One V.H.G. Simon worked on the land as a labourer for Charlis during the day between 7.00 a.m. and 4.30 p.m. About 5 years prior to the date of the incident of this case the respondent (hereafter referred to as the accused) had cultivated vegetables on this land.

The prosecution case was that on the night of 23rd July 1973 the accused gained entry to the room occupied by the two deceased persons, killed them with a heavy cutting weapon and robbed the bagged pepper which was in the room. The accused sold this pepper on the same night to one M.Y. Rasheed a merchant through one A.K. Arnolis Appuhamy a hiring car driver. The pepper was delivered at a spot on the main road known as the Pinawatta bend some three quarters of a mile away from the house of the deceased. The deceased couple were last seen alive by Simon when he left after work about 4.30 p.m. on 23rd July 1973. On the following morning when Simon reported for work he found the room occupied by the deceased couple padlocked from outside. There was pepper strewn on the verandah and there were no signs of the inmates. His suspicions were aroused and he reported the matter to Charlis Silva's brother Juwanis who too went over and had a look. Together they informed the Police.

As a result of the Police investigations the prosecution was able to place the following main items of evidence against the accused:-

1. Two footprints in human blood of the left leg of the accused were identified on a copy of the Dinamina of the 23rd July 1973 found inside the room where the two deceased persons lay dead in a pool of blood.
2. On a statement made by the accused the Police recovered

from the gutter of the house of the deceased the bunch of keys identified by the witness Simon as belonging to the deceased persons.

3. From the house of the accused was recovered a black coat still wet suggesting recent washing and a pair of black short trousers on which there were human blood stains.

4. The Police saw a trail of pepper leading from the house of the deceased to the Pinwatte bend where the pepper was delivered around midnight on the night of 23rd July.

5. The sale and delivery of the pepper were by prior arrangement made by the accused with Arnolis Silva a taxi driver.

6. The accused was identified at the delivery point at the Pinwatte bend by Arnolis Silva. At that time the accused was clad in a black coat.

7. Rasheed saw an unidentified person dressed in black loading the pepper into the car.

These items of evidence were attacked by the defence on several grounds but after trial the Jury by a unanimous verdict found the accused guilty on all three counts. The accused was thereupon convicted and sentenced to death on the first two counts of murder and to ten years rigorous imprisonment on the third count of robbery.

The accused appealed to the Court of Appeal which set aside the convictions and sentences on the two counts of murder but allowed the conviction and sentence on the third count to stand. The Attorney-General applied to the Court of Appeal for leave to appeal to the Supreme Court but leave was refused. Thereafter the Attorney-General applied for special leave to appeal to the Supreme Court. This was granted and the present bench of five Judges of the Supreme Court was constituted to hear the appeal. The grounds set out in the petition seeking leave to appeal may be summarised as follows:-

1. The acquittal of the accused on the charges of murder is inconsistent with the conviction of the accused on the charge of robbery.

2. The Court of Appeal has set aside the conviction on the charges of murder by assuming the functions of the Jury in the matter of assessing facts and on certain matters by even going further and speculating on them. The Court thus held that the possibility that the footprints at the scene had been left some time after the murder, was not eliminated. Since there was a time gap of 2 1/2 to 3 hours between the time of death and the time of delivery of the

pepper bags, there was no conclusive evidence that the murders and robbery were committed in the course of the same transaction. Further there was substance in the contention that more than one assailant participated in committing the offences.

3. The decision in *Somapala v The Republic*[1] has been misapplied in the interpretation of s. 114 of the Evidence Ordinance.

4. The Court of Appeal while declaring that the withdrawal from the jury of the question whether Arnolis was an accomplice was wrong held that this did not prejudice the substantial rights of the accused or occasion a failure of justice on the charge of robbery. The latter consideration applies equally to the charges of murder.

I should add here that a bench of five Judges was constituted because there was the question whether the decision in *Somapala's case* was right. The argument before us was not confined to this. No limitations in fact have been stated in the order granting special leave. The question then arises whether it is open to us to consider the matters complained of in the petition of appeal.

The appellate jurisdiction of the Supreme Court has been conferred upon it by Article 127 of the Constitution of 1978. By subsection 1 of this Article the Supreme Court is the final Court of civil and criminal appellate jurisdiction for the correction of all errors in fact or in law which may be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution. So far as appeals from the Court of Appeal go, by subsection 2, the Supreme Court in the exercise of its jurisdiction has sole and exclusive cognizance by way of appeal from any order, judgment, decree or sentence made by the Court of Appeal where any appeal lies in law to the Supreme Court and it may affirm reverse or vary any such order, judgment, decree or sentence of the Court of Appeal and even issue directions to the Court of Appeal to record fresh or additional evidence if the interests of justice so demand.

When does an appeal lie in law to the Supreme Court from a decision or order of the Court of Appeal? The answer is found in Article 128:

1. If the Court of Appeal grants leave to appeal from a *final* order, judgment, decree or sentence made by it on any matter or proceedings whether Civil or criminal, which involves *a substantial question of law* (subsection 1).

2. If the Supreme Court in its discretion grants special leave to appeal from any *final or interlocutory* order, judgment, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where

(i) the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or
(ii) in the opinion of the Supreme Court, *the case or matter is fit for review* by it (subsection 2).

The Supreme Court must grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance (proviso to subsection 2). It might be added that an appeal shall lie directly to the Supreme Court where it is specifically so provided by statute (subsection 4).

It will be seen that it is only when the Court of Appeal grants leave to appeal, that the appeal is confined to substantial questions of law. When the Supreme Court in its discretion grants special leave to appeal the scope of review is not limited to substantial questions of law. It must be remembered that the Supreme Court has jurisdiction to correct errors of fact or law committed by any Court. An occasion for the exercise of this jurisdiction is when it grants special leave to appeal. So when the Supreme Court grants special leave it is open to it to review the case so far as it is pertinent to the question to be decided. Accordingly I am of the view that in the instant case this Court should consider the matters complained of in the petition of appeal as well as matters raised at the hearing before it on behalf of the accused.

I will take first the question regarding the participation of more than one assailant. It is wrong to say that this question was not put to the jury. The trial judge invited the Jury to consider the defence suggestion that more than one assailant would have participated in the attack when he was discussing the medical evidence. The question then was before the jury though of course there was no reference in this context to the number of indecipherable footprints found at the scene or the difficulties and time factor involved if one person robbed and transported the large quantity of pepper stolen.

Reference should also be made here to an argument advanced by learned senior Counsel for the accused concerning two contradictions

marked D7 and D8 from the statement made by witness Rasheed to the Police on the day after the incident. Rasheed had told the Police that two persons brought two bags of pepper to the car and that two tall persons wearing black put the two pepper bags into the car but his evidence in court is that there was only one person. It is well established that the jury should decide firstly whether the witness whose testimony is being impugned did in fact make the previous statement attributed to him and if so, whether it is truly a contradiction of his evidence in court and then how far it would affect the credibility of his evidence. The contradiction is not to be treated as substantive evidence - see for instance *The Queen v Kularatne* [2].

Learned senior Counsel for the accused submitted that the jury should also have been asked to consider the fact that such a statement of such contents was made, irrespective of its truth, as a circumstance to be taken into account in evaluating the other evidence regarding whether more than one person took part. The fact that a statement of such contents was made irrespective of whether it is true or not is a circumstance which should be fitted into the evidential picture. Learned senior Counsel for the accused sought to derive support for this proposition from the decision in the case of *Karunaratne v The State*.[3]. This was a case where the accused was charged with criminal breach of trust. The prosecution sought to prove a previous false statement made by the accused. Rajaratnam J held that in this connection two matters arise for consideration, namely,

(a) the truth of the contents of the statement
(b) the fact that such a statement was made by the accused.

Here the Court was considering a previous statement of the accused as an item of substantive evidence under s.8 of the Evidence Ordinance. The conduct of the accused in making a statement that was revealed to be false was held to point the finger of guilt to the accused. But the previous statement of witness Rasheed is not an item of substantive evidence. The use to which such a previous contradictory statement could be put is limited to the impeaching of the credibility of his evidence in court. I can see no reason to extend the principle employed in *Karunaratne* (supra) to such contradictions as D7 or D8 which do not constitute substantive evidence but have been used in accordance with the provisions of section 155 (c) of the Evidence Ordinance (and section 110 (3) of the Code of Criminal Procedure Act No. 15 of 1979.)

Although the significance of the indecipherable footprints at the scene and of the quantity of pepper and its transport and delivery was not specifically put to the jury on the question of the possibility of there having been more than one assailant, the evidence itself on these matters was generally placed before the jury who in connection with the medical evidence had already been invited to consider the suggestion that there was more that one assailant. Further the jury were repeatedly told that what they had to decide was whether the accused alone committed the offences or not. Taking the question as a whole I cannot agree that there has been such a serious non-direction on this point as to amount to a misdirection.

In passing I would like to refer to the allegation of the defence that Simon was the perpetrator of these offences. The trial judge dismissed this suggestion as fanciful. Learned senior Counsel for the accused contended that the trial judge was wrong in so lightly dismissing the allegation that Simon was the killer, especially in view of Rasheed's evidence that a tall man 6 or 6 1/2 feet in height helped to load the pepper. The physical description fitted Simon. Referring to the suggestion that Simon was the killer the trial judge also told the jury that they could form their own opinion on the matter. A decision on the question was entirely theirs. Earlier they had been told they were the sole judges of questions of fact and they were not bound by the judge's opinion though they should give it due consideration. Further Simon was a witness and gave evidence from the witness box. He was cross-examined by the defence. Not a single question even remotely suggesting he was the killer was put to him. In these circumstances the comment of the trial Judge on the question cannot be regarded as improper.

The second ground on which the Court of Appeal interfered with the verdict of the jury on the charges of murder is the omission of the learned trial judge to ask the jury to consider whether the murder and the robbery took place in one and the same transaction or not. The learned trial Judge told the jury that the three charges against the accused had been included in one indictment because the allegation of the prosecution was that the murders and robbery had been committed in one and the same transaction. If the charge of murder on Count 1 failed then the other two charges too would fail. The case on the three charges stood together or fell together. In other words the case for the prosecution would fail if it was not proved

that the offences were committed in one and the same transaction. The complaint is that the possibility of the murders and robbery being separated by a time gap of 2 1/2 to 3 hours should have been put before the jury. It is not the prosecution case that the robbery was committed at or about the time when the pepper bags were delivered to Rasheed at the Pinwatte bend. The prosecution case is that the murders and the robbery were committed by one and the same person, at the same time, at the same place, namely, the house of Charlis Silva. The jury were told that if they cannot so find they should acquit. The jury had before them the evidence of what happened at the Pinwatte bend and their attention was drawn to the importance of the time of delivery of the pepper and the quantity and the contradictions on these matters. The jury were also invited to compare this evidence with the evidence on the time of death. Although the jury were not told specifically to consider the offence of robbery separately from the murders still all the relevant items of evidence were before them and they were directed to find whether all three offences were committed in one transaction and to acquit the accused if even one was not. This approach could hardly be said to have prejudiced the accused.

I will now deal with the question whether witnesses Arnolis and Rasheed should have been treated as accomplices. I would like to observe that the Court of Appeal took the view that no prejudice had been caused to the accused so far as the charge of robbery went by the withdrawal from the Jury of the question whether Arnolis was an accomplice or not. It is hard to see how the alleged non-direction did not prejudice the accused on the charge of robbery but prejudiced him on the charges of murder.

Be that as it may, the question is whether on the evidence before the jury Arnolis and Rasheed could be treated as accomplices. From the cases three main definitions can be formulated:

(1) An accomplice witness is one who could have been convicted of the actual offence with which the accused is charged as a principal.

(2) An accomplice witness is one who could have been convicted of the actual offence with which the accused is charged whether as principal, aider and abettor, or counsellor. This test is adopted in Sri Lanka and in some other jurisdictions. In England the House of Lords held that on the existing case law the term accomplices includes

accessories after the fact and by an extended application receivers of stolen goods on the trial of the thief, and parties to other crimes (of a type identical with the crime charged against the accused) when evidence to prove system and intent and to negative accident is sought to be led - see the speech of Lord Simonds L.C. in *Davies v Director of Public Prosecutions*[4]. In Sri Lanka Basnayake J (later C.J.) in *Peiris v Dole*[5] and Jayatileke J (later C.J.) in *The King v Piyasena*[6] adopted the definition of O'Sullivan A.J.C. in *Chetumal Rekumal v Emperor*[7] that an accomplice is a guilty associate in crime or one who sustains such a relation to the criminal act that he could be jointly charged with the accused.

(3) An accomplice witness is one whose liability to prosecution arises from the same facts as that of the principal offender.

The English Criminal Law Revision Committee have recommended the adoption of the third definition in preference to the second. So far as the corroboration warning goes they support the view that it should be made a matter of discretion and practice. This would make the omission of the warning not necessarily fatal to a conviction provided corroboration in fact exists or the accomplice's evidence is sufficiently reliable to act on without corroboration. Accomplice evidence after all is not necessarily always dangerous and it is inadvisable to have a general rule operating more extensively than the mischief it is trying to cure - see the discussion in J.D. Heydons's article on "*The Corroboration of Accomplices*" (1973) Crim. L.R. 264 and the 11th Report on Evidence (General) 1972 of the English Criminal Law Revision Committee Cmnd 4991 paras 183 - 185. The approach recommended by the English Criminal Law Revision Committee is worthy of consideration in an appropriate case. In the instant case however the question is whether Arnolis and Rasheed are accomplices at all. This question can be disposed of by the application of existing tests. Glanville Williams in his *Textbook of Criminal Law* (1978) p. 285 defines accomplices as parties in different degree of complicity to a crime and adds "Accomplices consist of the perpetrator and the accessories". This indeed is the primary and natural meaning of the term. The perpetrator is the person who in law commits the offence. A person who incites or helps the commission of an offence by the perpetrator is an accessory. But help given after the commission of the crime does not make the helper an accomplice - Glanville Williams (ibid) p. 290

While a co-perpetrator and an accessory before the fact clearly are accomplices, an accessory after the fact is not necessarily always so. The principal danger in the evidence of an accomplice is that he may be tempted to purchase immunity by currying favour with the prosecution and implicating another while reducing his own role in the offence. But no such danger exists in the case of an accessory after the fact. Indeed the interest of an accessory after the fact should be to establish the innocence of the principal offender not his guilt.

The expression accomplice should be confined to the natural and primary meaning of perpetrators and accessories. The test which Basnayake J. adopted in *Peiries v Dole* (supra) is that an accomplice is one who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be charged jointly with the accused needs modification. An accomplice no doubt is a guilty associate in crime but the test that he should be chargeable with the same offence is not always suitable for general application.

There may be occasions when an accomplice though a particeps criminis cannot be charged with the same offence. His guilty participation may not go far enough for this. Further it does often occur that an accused person though charged with a particular offence is found guilty only of a lesser or kindred offence. More properly therefore an accomplice is a guilty associate whether as perpetrator or inciter or helper in the commission of the criminal acts constituting the offence charged or a lesser or kindred offence of which the accused could be found guilty on the same indictment.

In the instant case there was no robbery at the Pinwatte bend. The murders and robbery had taken place at Koswatte inside the room where the bleeding bodies of Charlis and Seelawathie lay. There is no evidence that Arnolis or Rasheed did anything at Koswatte in the room which was the scene of the murders and robbery. There are no positive proved facts from which it could be inferred that Arnolis or Rasheed were accomplices. Therefore the method of inference fails and what is left is mere speculation and conjecture. Accordingly I do not think the learned trial Judge could be faulted for not advising the Jury on accomplice evidence.

Now to the question of the application of presumptions under section 114 of the Evidence Ordinance and the decision in *Don Somapala v Republic of Sri Lanka* (supra). I must confess I am

baffled at how this question came to be raised at all. The judge referred to no presumptions in his summing up. He did not invite the jury to act on any presumptions to the prejudice of the accused. No presumptions assisting the prosecution to discharge its evidential burden were referred to. The judge placed the persuasive burden, the burden of proving its case beyond reasonable doubt fairly and squarely on the prosecution. And I can therefore see no cause for complaint by the accused and no occasion or necessity to review *Somapala* or even refer to section 114 of the Evidence Ordinance.

Before I part with this question however I would like to refer to the fact that the learned trial Judge delivered his summing- up to the Jury in Sinhala. For the purpose of making submissions before us an English translation (not always as accurate as desirable) of the summing-up was used both before us and before the Court of Appeal. The English translation records the trial Judge as having told the jury:

> "When a strong prima facie case is made out against the accused, there is a duty on the accused to explain certain matters."

The learned Judge did not use the expression "strong prima facie case". In fact the Sinhalese words he used could more properly be translated " a case strongly pointing the finger of guilt against the accused". In any event in the circumstances of this case casting a burden to explain on the accused when there are such items of evidence as two footprints of his in human blood at the scene and stains of human blood on his trousers as distinguished from a persuasive burden of proof was not at all improper. Where there are special circumstances which only the accused can explain and which call for an explanation from him, there is an evidential burden on him - see the decisions in *The King v Geekiyanage John Silva*[8] and *Albert Singho v The Queen*[9]. In no part of his summing up did the learned trial Judge shift the persuasive burden of proof, that is, the burden of proving charges beyond reasonable doubt, from the prosecution. The trial judge's comments on the failure of the accused to offer an explanation regarding the circumstances which needed explanation from him are unexceptionable.

There is one last matter remaining to be commented upon. Learned Senior Counsel for the accused submitted that there were misdirections in the summing-up on the question of circumstantial evidence. It was

pointed out that the learned trial Judge had told the jury to evaluate the items of circumstantial evidence separately and to see if the items of evidence consistent only with the guilt of the accused on a totality could be held to establish beyond reasonable doubt that the accused is guilty of the offences. In this way the effect of the items of evidence in favour of the accused on the whole prosecution case was negatived. These comments however were made by the learned trial Judge in the course of inviting the jury to weigh each item of circumstantial evidence. But he did instruct the jury that the whole of the evidence must be assessed and a verdict of guilty returned only if the conclusion was irresistible that the accused was guilty. After likening the items of circumstantial evidence to links in a chain the judge said:

> After completing the chain, it must necessarily point to the irresistible inference of the guilt of the accused."

And again he said:

> "Gentlemen, you must be able to come to an inference beyond reasonable doubt that having taken all the circumstances as a whole, that the only decision you can arrive at is that the accused is guilty and that it is the accused who committed the offence."

I think these passages sufficiently answer the point that has been taken.

This is not a case where the verdict of the jury could be characterised as unreasonable. It certainly cannot be said that the substantial rights of the accused have been prejudiced or that a failure of justice has been occasioned. The accused had left two of his footprints in human blood at the scene, he had stains of human blood on his black trousers, he knew where the keys were of the padlocked house where Charlis and his wife lay murdered and there was the tell-tale trail of pepper from the scene of the murder to the Pinwatte bend where the accused disposed of the stolen pepper. In the face of all this telling evidence it would indeed be a strain on human experience to accept that the accused found the way fortuitously made clear for his operation robbery, by the prior murder by someone else of the aging Charlis Silva and his wife.

I therefore allow this appeal and make order setting aside the judgment of the Court of Appeal in respect of the charges of murder and restoring the verdict of the jury on these charges and the sentence of death passed by the learned trial Judge on the basis of this verdict. In regard to the charge of robbery, the conviction and sentence entered by the High Court and affirmed by the Court of Appeal will stand.

*Appeal allowed*

**References:**

1. (1975) 78 NLR 183.
2. (1968) 71 NLR 439.
3. (1975) 78 NLR 413.
4. (1954) AC 378
5. (1948) 49 NLR 142
6. (1948) 49 NLR 389
7. (1934) AIR Sind 185, 187
8. (1945) 46 NLR 73.
9. (1969) 74 NLR 368.