[COURT OF CRIMINAL APPEAL]

1965 *Present:* **Sansoni, C.J. (President), H. N. G. Fernando, S.P.J., and G. P. A. Silva, J.**

THE QUEEN *v.* G. K. JAYASINGHE and 6 others

APPEALS NOS. 31 to 37 OF 1965, WITH APPLICATIONS NOS. 36 TO 42

S. C. 124 of 1964—M. C. Kalawana, 88577

Evidence—Accomplice—Corroboration—Summing-up—Non-direction.

Before each of joint accused persons can be convicted upon the evidence of an accomplice, a clear direction is always necessary that the corroboration that the law requires in respect of the evidence of an accomplice is corroboration in some material particular tending to show that *each* accused committed the crime charged. Corroborative evidence against some of the accused cannot be used to accept the evidence of the accomplice even as regards the other accused.

Where the trial Judge, in his directions concerning accomplice evidence, lays unusual stress on the point that corroboration of such evidence is not an essential requirement, it is his duty to stress the gravity of a decision to convict on uncorroborated accomplice evidence. If the accomplice's evidence is very nearly uncorroborated and is false on some material points, it is the duty of the Judge to direct the Jury to consider whether it would be safe to convict upon the accomplice's testimony.

The power given to a trial Judge to express opinions on questions of fact must be used cautiously, more so in respect of the uncorroborated evidence of an accomplice.

Evidence of corroboration, like all other evidence, has to be weighed. It may be legally admissible for the purpose of corroboration, but its probative value as corroboration may be very slight or nil. Thus a statement made by an accomplice that the accused persons came to see him in a car at about 12.30 a.m. may be corroborated by another witness who says that he saw the accused at about 2 a.m. on the same day at a point about ¾th mile from the scene of offence, but such corroborative evidence has little probative value if there is nothing else in it to connect the accused with the offences committed.

APPEALS against certain convictions at a trial before the Supreme Court.

E. F. N. Gratiaen, Q.C., with *Eardley Perera* and *M. A. Mansoor*, for 1st Accused-Appellant.

E. F. N. Gratiaen, Q.C., with *M. A. Mansoor* and *Anil Obeyesekera*, for 2nd Accused-Appellant.

E. F. N. Gratiaen, Q.C., with *A. C. M. Ameer, Q.C.*, *M. A. Mansoor* and *Anil Obeyesekera*, for 3rd Accused-Appellant.

E. R. S. R. Coomaraswamy, with *Kumar Amarasekera*, for 4th and 5th Accused-Appellants.

G. E. Chitty, Q.C., with *E. R. S. R. Coomaraswamy* and *Kumar Amarasekera*, for 6th Accused-Appellant.

Colvin R. de Silva, with *M. L. de Silva*, *(Miss) Manouri de Silva*, *P. O. Wimalanaga* and *Kumar Amarasekera*, for 7th Accused-Appellant.

L. Jayetileke (Assigned), for all the Accused-Appellants.

V. Thamotheram, Deputy Solicitor-General, with *Siva Pasupati*, Crown Counsel, and *Ranjit Abeysuriya*, Crown Counsel, for the Crown.

Cur. adv. vult.

October 4, 1965. SANSONI, C.J.—

In this case eight accused were indicted on three counts. After trial they were all convicted on all the counts, except the 8th accused who was acquitted on all the counts. The seven convicted accused have appealed.

On the first count they were charged with having conspired between 20th July 1962 and 21st August 1962 to commit the murder of one Silva. On the second count they were charged with the murder of Silva between the 20th and 21st August, 1962. On the third count they were charged with the murder of one Punchimahatmaya, at the same time and place as the murder of Silva.

The case for the prosecution rested almost entirely on the evidence of a witness named Daniel, who was at the time in question an attendant at Kalawana Hospital, where the 6th accused also worked as the Apothecary. The 1st accused was the Inspector of Police, Kalawana. The 2nd accused was a Police Constable and the 7th accused a Police Sergeant, both under the 1st accused. The 3rd accused was a landed proprietor

who owned land at Kalawana, but who resided mainly at Dehiwela, many miles away. The 4th accused was the Village Committee Chairman of Kalawana. There is no evidence as to the 5th accused's occupation. The 8th accused was a motor mechanic, who also worked at times as a motor car driver under the 3rd and 4th accused.

The murdered man Silva was an Ayurvedic Physician, who also appears to have encouraged unlawful gambling in his house ; the murdered man Punchimahatmaya was Silva's servant.

Daniel said that, shortly prior to the 1st of August, he went to the 6th accused's house in the evening at the invitation of the 6th accused. The 3rd accused arrived there carrying a live fowl which he himself killed. 1st, 4th and 5th accused also came to that house. Daniel cleaned and cooked the fowl, boiled some vegetables, sliced some bread and then all those accused who were there dined in that house that night. Daniel said that he heard some of the conversation that took place during the meal. The 1st accused said " If Silva is allowed to remain it will not be possible for us to live. Something must be done to that fellow. " 3rd accused said : " He has given me also a bit of trouble ", and 4th accused said " That is not much of a job ". Daniel does not claim to have heard the 5th or 6th accused saying anything, except that 6th accused warned Daniel not to tell anyone of what had been said during that conversation.

The next series of incidents spoken to by Daniel are said to have occurred on the night of 20th August. He reported for night duty at about 6 p.m. as a substitute for another attendant called Charles. He said that both Charles and the 6th accused asked him to be on duty that night. When he was at the hospital, the witness named Ekmon asked him to go and meet the 6th accused who was near the Mortuary in the hospital premises. When he went up to the 6th accused, the latter told him to direct any patients who might come to the hospital to the 2nd Apothecary. Daniel said he then returned to the hospital.

At about 12.30 a.m. on the 21st morning, according to Daniel, two motor cars came near the hospital ; and the 6th accused, who was among those who arrived in the cars, took him up to them. In one there were the 1st, 2nd and 7th accused : that was the 1st accused's car driven by the 1st accused. In the other car, 8th accused was the driver, and the 3rd, 4th and 5th accused got down from it. All the occupants of the cars, except the 8th accused, came up to him, and the 6th accused told him that he had to do a small job, viz. to strike a barrel or a zinc sheet and thus make a noise, when he heard the report of a gun shot. Daniel also said that at that time 2nd accused took a double barrel gun from the 4th accused's car, while the 3rd accused had a pistol or revolver which he loaded. 2nd and 3rd accused then walked away, 3rd accused saying " Now the time is approaching ". When Daniel started to walk back towards the hospital, the 6th accused called him back and ordered him to get into the 1st accused's car which the 6th and 7th accused also entered. 4th, 5th and 8th accused were the occupants of the other car.

Both cars travelled in the direction of the deceased's house. 5th accused stopped near the 23rd mile post, while 7th accused was dropped near a house belonging to one Bentara Mudalali. The deceased's house is between these two points. Daniel said that he saw the 2nd and 3rd accused entering the rear compound of the deceased's house. He was then told to go back to the hospital, and carry out the instructions he had been given.

According to Daniel, when he was near a hospital ward he heard a loud sound like the report of a gun shot, and he then threw a stone which hit a barrel. About half an hour later the 1st accused's car arrived with the 1st, 2nd, 3rd and 6th accused in it. The 1st accused took Daniel to the car and warned him not to talk about what had happened.

At the post mortem examination of the two dead men, the Doctor discovered that Silva had been shot with a revolver, and Punchimahatmaya with another firearm. The post mortem on Silva was at 2.30 p.m. and on Punchimahatmaya at 4.30 p.m., both examinations having been held on the 22nd August, and the Doctor's opinion was that the two men had died 36·54 hours earlier.

That evening Daniel got to know that Silva and his servant Punchimahatmaya had been killed. He did not disclose what he knew to anybody until the 12th September, when he was taken by a Police Constable to his own house which was searched, and also to the deceased Silva's house. He admitted that when he was questioned about the murders he at first denied all knowledge of the matter; later he made a lengthy statement disclosing all he knew.

It was accepted by the prosecution and the trial Judge that, on his own evidence, Daniel was a self-confessed accomplice who was well aware of the conspiracy he claims to have heard being hatched, and of the planning of the crimes that were going to be committed on the night in question. Daniel's character was attacked while he was under cross-examination. It appeared that complaints had been made against him of dynamiting fish; molesting school girls (for which he had sent an apology to the Principal of the school); being drunk while on duty at the hospital; and committing criminal intimidation.

He admitted that he had experience in the handling of firearms, and could shoot well. The defence suggested to him that it was he who had murdered Silva and Punchimahatmaya, and that one of the steps he took prior to committing that crime was to have his hair cut on the 19th August in order to disguise himself. Further suggestions made to him by the defence, which appeared to have the support of Daniel's statement to the Police, were that he had married on the 1st March 1962 a woman who, he later came to know, had been intimate with a Police Constable called Gunasinghe; that the deceased Silva had in his possession a letter (1D16) written prior to her marriage by Daniel's wife to Gunasinghe in very affectionate terms; that Silva had refused to return the letter to Gunasinghe or to Daniel in spite of their request to him to return it.

Mr. Gratiaen, who appeared for the 1st, 2nd and 3rd accused-appellants urged the following grounds of appeal :—

(1) that the Jury were misdirected and misled by the learned Commissioner of Assize in his charge, on a vital issue of law, viz., (*a*) the proper approach to the evidence of an admitted accomplice, and (*b*) what constitutes corroboration of an accomplice ;

(2) the learned Commissioner should have made it clear to the Jury that there was no independent evidence of corroboration. He had, instead, made them believe that what could not constitute corroboration was in fact corroboration ;

(3) the summing up as a whole did not deal adequately with the evidence and was not fair to the accused ; and the facts were dealt with in such a way as to favour the prosecution theory; and

(4) the case for the defence on the facts was not adequately placed before the Jury.

Counsel appearing for the other appellants supported Mr. Gratiaen's submissions on these points. We shall deal first with the 3rd and 4th submissions.

At the time of the murders there were pending in the Rural Court, Kalawana, two criminal cases filed by the 1st accused against Silva, charging him with gambling and permitting his premises to be used for gambling. Silva had obtained summons against the 1st accused's mother and sister to appear as witnesses for the defence at the trial, which had been fixed for August 24th. It was apparently suggested by the prosecution that this was a matter which would have made the 1st accused annoyed with Silva. A petition had also been sent by Silva, into which the Assistant Superintendent of Police had inquired. The learned Commissioner suggested many times to the Jury that feelings between Silva and the 1st accused were bitter as a result of these cases and summed up his opinion by saying: " The simple question is, if the gambling case was a false case or if the petition was a false petition, then don't you think that the feelings were getting enraged, that they were angry ? Here, I am on the point of feelings. Now, gentlemen, if you are satisfied that there was this state of feelings, then, gentlemen, I think you should consider this matter of the letter in which Daniel was interested, the letter 1D16, in that setting. " The learned Commissioner then told the Jury that the letter was most probably written by Beeta, the wife of Daniel, to P. C. Gunasinghe in January 1961; that Silva, who had the letter, would have thought it was a very useful document to use against P. C. Gunasinghe, when the latter gave evidence in the gambling cases; that Gunasinghe and Daniel and 2nd accused had tried to get the letter from Silva, but the latter had refused to give it up.

He then asked the Jury to consider whether Daniel had tried to get the letter from Silva on his own account, or whether he had done so to help P. C. Gunasinghe, telling the Jury : " In those circumstances, gentlemen, was Daniel trying to get the letter for himself or was Daniel, in the setting I told you of, trying to get the letter to help the police officer, that is Gunasinghe ? It is a matter for your consideration. "

But he did not leave it to them to decide the matter for themselves, because he immediately thereafter said : " Then, gentlemen, if Daniel was getting the letter in those circumstances, trying to help Gunasinghe to get the letter back—the case was for the 24th August—do you think, Gentlemen, that if Daniel was only doing that, there was this over-powering motive for Daniel to kill ? Daniel may have been annoyed that he did not get the letter he asked for, but do you think that in the proved circumstances, that Daniel would have an over-powering motive to kill ? Daniel may have been one who had a grievance with Silva, reason to be annoyed with Silva, but do you think that he was the person who had an over-powering motive to kill, in those circumstances ? Do you think, Gentlemen, that if this woman had been intimate with a constable, that that fact would not have been known to a number of police officers and others. Do you think that it would be a possible source of shame to Daniel if it came out and this letter was read in Court ? It is a matter for you all who are now representing common sense. "

The Jury were thus told in no uncertain terms (1) that feelings between Silva and the Police were bitter, (2) that Daniel was not personally interested in getting the letter from Silva, but was only trying to help P. C. Gunasinghe, (3) that Daniel had no motive to kill Silva. This part of the summing-up ended by his saying : " Then, gentlemen, if you come to the conclusion that there was not an over-powering motive for Daniel to kill, then, Gentlemen, what is the reason ?" He thus indicated to them plainly, on the logic of this reasoning, that there was no cause for Daniel to kill Silva. One assumption followed another, but each theory put forward was treated as proved, and the final conclusion then stated as though it was the only possible one.

The learned Commissioner then dealt with what he considered a glaring untruth in Daniel's evidence. He said : " I think you will not have a lot of difficulty in coming to the conclusion that Daniel is a liar when he says here he did not know about his wife's intimacy with Gunasinghe, that he knew nothing about it. Is there any reason, gentlemen, for Daniel giving false evidence on this point ? Well, gentlemen, this is one of the matters that you will consider on that matter. Daniel is aware, gentlemen, rightly or wrongly, that this letter will be treated as being the motive for the murder on his part because he was in search of this letter and he wanted this letter. So, is he now denying any knowledge of this intimacy and anything about it merely because he is afraid that if he admits it, then you can possibly come to the conclusion that he had

a motive for the murder, which according to his own way of thinking, he never had. In other words that a wrong impression would be created and this is the way of combating that wrong impression. You will remember, gentlemen, that a submission has been made to you by Mr. Chitty that Daniel has made peace with the prosecution by giving this evidence in this case. Mr. Chitty went on to explain that as far as his knowledge went nobody who has given evidence in this fashion has ever been charged with the offence, but you will remember this, that may be factually correct, but does Daniel know it ? Daniel has not been given any pardon. The Crown has been repeatedly saying that Daniel can be charged with murder. Probably it may not have happened before, but there can always be the first time to anything. So gentlemen, it is a matter that you will have to consider whether that is an excuse for Daniel giving false evidence on that point. It is a matter for you to consider when you consider the credibility of Daniel. Do you think that is an explanation that you can accept, inferentially ? I mean by drawing inferences do you think that he is a man who has all these matters in mind and that you cannot believe him on any matter. As I told you, that is a matter again for you. " In this passage a strong point which the defence had made against Daniel's credibility was whittled down, and the Jury were again clearly told that Daniel's untruthfulness was pardonable.

Daniel's demeanour in the witness-box was next dealt with by the learned Commissioner, who might surely have left it to the Jury to decide for themselves what impression his demeanour had made on them. But they were told this : " Now it has been proved that he was cross-examined by very eminent Counsel for many days in the Magistrate's Court. If you think, gentlemen, that that ordeal, I advisedly use the word, ordeal, has had any effect on his reaction and his demeanour in this Court, you will give some allowance for it on that ground. I do not for a moment intend to tell you that cross examination is not necessary. Cross-examination is very necessary because it is the one weapon by which the truth can be searched for and found out, but you will agree that whoever it is who has been searchingly cross-examined, even if he is a witness of the truth, that he is restrained. You will remember what Daniel said here. He said, " Even in the Magistrate's Court I was cross-examined from morning till evening sometimes for hours together and during that time I may have faulted in giving answers. " That is what he said here. " Then, after quoting at length from a part of the cross-examination, the learned Commissioner said : " Do you think or do you not think that it is possible for him to have made mistakes during that time. If you think that the length of his cross-examination may have made him to fault at times, that is a matter upon which you will give some allowance for him when you are assessing his credibility as a witness. That again is entirely a matter for you. I am merely telling you the excuse that the witness gave. "

The learned Commissioner then dealt with Daniel's account of the incidents of the night of 20th August. He pointed out the improbabilities of the story, viz. that the accused should have come to Daniel at all that night; that after asking him to hit the barrel, they should have taken him away in the car, as though they wished him to get to know a number of details which he would not otherwise have learnt; that there was no purpose in his hitting the barrel. These were very apposite comments, which should have made the Jury suspect the truth of Daniel's story. But the learned Commissioner proceeded to undo all the good he had thus done by then telling the Jury: " Now, first of all, gentlemen, if Daniel is telling a fabricated story, the defence position is that Daniel had time to think of what he was going to say ever since he took part in this incident. Naturally, gentlemen, Daniel took part in this incident. Whether he played a small part, as he says, or whether he played a much larger part, he played a part so that natural human instinct thereafter would be " what am I going to say if I get caught. " Quite legitimately, the defence say that from the day of the incident right up to the time he had to make his statement he was thinking of what he had to say. Then gentlemen, do you think that these same points would not have struck Daniel if it struck all of us, if he had time to think. Do you think if he was fabricating a story—you saw Daniel in the box. He has been described to you by the defence as a man of resource and ingenuity, and assuming you are of that same opinion, do you think he was so devoid of resources or ingenuity that he could not think of a story in which he becomes a witness without being involved in it. Remember, Daniel inculpates himself and as I said, if he was thinking of a false story, won't these very same points that appeared to be unusual strike him also ? " In other words, he told them that the very improbability of Daniel's story was a guarantee of its truth.

With regard to Daniel having had his hair cut, and the defence suggestion regarding that, the learned Commissioner again gave the Jury several reasons as to why they should not regard it as a suspicious circumstance against Daniel, and why they should accept Daniel's evidence on this point.

Daniel had said that on the night in question he saw 2nd and 3rd accused crossing a stile into Silva's garden. The defence had attacked his evidence on this point. The learned Commissioner dealt with this attack in the following passage : " There again, gentlemen, it is suggested that this is an artistic touch that Daniel sees these people just crossing the stile and not at any other point. It is a matter you will consider, but Gentlemen, you will consider if it is a case of wanting to implicate those people, why does he not say " we took those two people, we dropped them and came back " ? Why does he want to give this other version if he wants to falsely implicate those people ? Does he know the law

regarding common intention ? Do you think that it was not simpler for him to say ' we took these two people and put them there ', instead of giving this story ? Gentlemen, you must, when you consider the story, consider it from the point of view whether it is true because if it is true, what can a man say except what he saw. What can he say except what he saw. You will consider whether it is a false story or a true story Those are matters for your consideration. "

The defence had suggested also that Daniel's evidence regarding the alleged meeting of 1st, 3rd, 4th, 5th and 6th accused at 6th accused's house was false. The learned Commissioner said on this point : " Now, gentlemen, is there anything unusual or improbable in people like that congregating once in a way at the house of one of them, specially in a distant outstation ? Is there anything unusual at such a gathering for them to drink and eat some thing in a way that the burden does not fall on one ? Do you think that the owner of the house should stand on his dignity and say, ' I am not going to allow you to bring any food. I am going to stand the cost of all that. ' That is a matter for your consideration. Well, gentlemen, assuming that you come to the conclusion that there is nothing specially improper in a thing like that then gentlemen, do you think that it is something that cannot happen or most unlikely to happen that the 3rd accused, a gentleman from Dehiwala, whose house is at Dehiwela, do you think that if there was such a meeting that there would be anything unusual in his walking in with a fowl in his hand ? Is it that his status in life, whatever it is, would prevent him doing a thing like that or that it is below his dignity to wring its neck ? Well gentlemen, as I said then, at such a meeting because there is a servant who does the normal cooking—we do not know how efficient his cooking is because there is no independent evidence on the point, we know that he is a boy of about 15 years of age, do you think it is an unlikely thing that a man who is better known as a cook is asked to give a little help on that particular day ? Daniel's evidence is this was not the first occasion on which he did a thing like that. A point is made that any one can boil a fowl and from the fact that Inspector has recorded Daniel as using the word, boil, it is sought to show that this a false story. Assuming that the word that Daniel used is, boil, is it not possible that there are some people who can boil a fowl more tastily than others ? We do not know whether Surasena could boil a fowl. Daniel says that anybody can boil a fowl, but we do not know how competent Daniel is to say that. There is the cleaning and so many other things to do. So whatever it is Daniel says that is how he happened to come there and then gentlemen, do you think that it is not possible that if these people had met there, that there was this talk going on ? I mean there is nothing to show that a plan had already been formed or that they met there to form a plan. That is nobody's evidence. All that Daniel says is that when he was there he overheard these snatches of conversation and in the light of what happened, he remembered these particular snatches of conversation. Do you think gentlemen, that their having got together, having had some

drinks, they were talking in that way and it was possible that they lost sight of Daniel being there ; that as soon as he was observed there, he was asked to go away by the 6th accused ? Is there anything inherently improbable in that story ? Do you think it could not have happened in that way ? If you think that it could not have happened in that way, then of course you reject the story, otherwise what is there that is inherently improbable in that when you take into consideration the people who met there ? Is that something which never happens, for people like that to get together, contribute for the food and is it something unusual for a person who is known as a cook to be called in there ? What is the point, gentlemen, in Daniel telling you that part of the story if he is fabricating something ? He has mentioned the story of the 20th in which he brings in eight persons. Here he mentioned the names of the 1st, 3rd, 4th, 5th and the 6th accused. Nothing said against the 6th accused on that occasion, nothing so far as I remember said against the 4th accused. The 1st accused is alleged to have said something, the 3rd accused is alleged to have said something, and the 5th accused is alleged to have said something. Why should Daniel tell this story gentlemen ? Can you think of any reason if he is fabricating this story ? It has been commented in regard to Surasena that Daniel is anxious here not to reveal the fact that Surasena was there. Then gentlemen, why did Daniel say in the Magistrate's Court that Surasena was there ? It is proved that he said that in the Magistrate's Court and he has accepted that and if it is something that he is wanting to hide, then why say that Surasena was there ? "

The points made by the defence against Daniel's evidence in regard to this meeting were not fairly dealt with in the summing-up. One point was that there was no reason for Daniel to be summoned by 6th accused to his house when the 6th accused's cook Surasena was available to prepare the dinner. Daniel at first denied that Surasena was in the house that evening, but after he had been confronted with his evidence in the Magistrate's Court he admitted that Surasena was in fact there. We should have thought that Daniel's veracity was shaken by this contradiction. But the learned Commissioner made no point of that at all. Instead, he treated the contradiction as a point in Daniel's favour, as it showed that Daniel did not try to conceal Surasena's presence in the house when he gave evidence in the lower Court. This was a quite unfair way of treating this contradiction. On this one matter Daniel should have been exposed as a scheming and bold liar, instead of which he was held up as a witness of truth. Another point made by the defence was that if Daniel did cook on that day, it was strange that he was not able to describe the position of the fireplace in the kitchen. The learned Commissioner's comment on this was : " Now gentlemen, the other point in regard to this story was that Daniel is unable to tell you accurately where the fireplace in the kitchen is. You remember there was a built fireplace with bars across. Daniel's evidence is that he cooked on a kerosene oil cooker. If he went there and cooked on a kerosene oil cooker, does it necessarily follow he must observe the fireplace in the kitchen ? Is it

that he is saying something false or is that faulty observation ? If a man goes there to cook and cooks on a kerosene oil cooker, must he necessarily remember the details of this room ? The moment he is questioned, he tries to guess. Is that an explanation ? It is a matter for your consideration that the defence says it is false. It is entirely a matter for you. "

Daniel's testimony in regard to the conversation which took place in the 6th accused's house between 1st, 3rd, 4th, 5th and 6th accused is the sole evidence of the conspiracy. The truth of Daniel's role as cook at the 6th accused's house, therefore, assumes the greatest importance. The attack on Daniel supported by the contradiction from the Magistrate's Court evidence is one of considerable substance and should have been put to the Jury in such a way as to make it quite open to them to believe or disbelieve him. The explanations given by the learned Commissioner and the emphasis laid by him on the side of the truthfulness of that evidence do not give us the impression that very much was left for the judgment of the Jury as to the credibility or otherwise of Daniel.

Thus it is clear that on Daniel's demeanour, his improbable story of what happened on the night of 20th August, the cutting of his hair, and his account of the alleged meeting of some of the accused in 6th accused's house, the learned Commissioner went to the defence of Daniel the accomplice, and had nothing favourable to say about the defence criticisms of Daniel's evidence on these matters.

Daniel was first questioned by the Police on the 12th September. One point on which he contradicted his evidence in the lower Court was whether he was first taken to his own house and then to Silva's house, or vice versa. The former version was given by him at the trial, the latter at the Magisterial inquiry. The Police version was that Daniel was first taken to his own house first. The learned Commissioner asked the Jury to consider whether this " mistake " made by Daniel might have been due to the lengthly cross-examination he underwent.

Again, it was proved that when Daniel was questioned by the Police he at first said that he knew nothing about the murders. On being questioned further, however, he said that he had not told the truth earlier, and he then related his version of the incidents. No point was made to the Jury, by the learned Commissioner, of the two contradictory positions adopted by Daniel when he was questioned by the Police. Instead, the Jury were only asked to decide at what stage Daniel was arrested—whether it was when the Police first met him that day, or at some later point of time.

The learned Commissioner then returned to the question of Daniel's credibility in the following passage : " Because the simple position still remains, has he fabricated this story having thought about it or has he

told the truth ? And as I have told you already, if he has fabricated a story from the 20th of March up to 12th September, was he so devoid of ingenuity that he must make himself a conspirator; in other words inculpate himself. I have already dealt with some of these points and it just struck me now about the story of the barrel and the fact that there was no dent on the barrel. If Daniel has invented this story of the barrel, do you or do you not think that Daniel would see to it that there was a considerable dent on the barrel to show anyone ? You see it was submitted for the defence that if you hit a barrel with a stone with such force that there was bound to be a dent. Do you think or do you not that Daniel also would have reasoned in the same way ? Do you not think that Daniel who went round with the police would not have taken the opportunity to take them and point out this dent on the barrel ? The evidence is that the barrel had no such dent." The part played by the barrel had been dealt with previously, and it was hardly necessary to return to it to make this plea on Daniel's behalf.

The learned Commissioner next considered whether Daniel had any reason for implicating these particular accused, and found none. He next dealt with the evidence of a witness Liyana Pathirana who alone spoke to anything that could be termed corroboration of Daniel's evidence against 3rd, 4th, 5th and 8th accused. This witness spoke to having seen these 4 accused in a car at a point about 3/4th mile from the scene of offence, at about 2 a.m. on the morning of 21st August. The learned Commissioner asked the Jury to consider whether this evidence did not support the evidence of Daniel that these same four accused came in a car and met him about 12.30 a.m. that morning.

We have two comments to make at this point. The first is, that though the evidence of Liyana Pathirana could be considered corroboration, like all evidence it had to be weighed. It may be legally admissible for the purpose of corroboration, but its probative value as corroboration may be very slight or even nil. It cannot be said that Liyana Pathirana's evidence about 3rd, 4th, 5th and 8th accused went any great distance to connect or tend to connect these four accused with the offences charged, and to confirm in this way Daniel's evidence against them in a material particular. Apart from the fact that Liyana Pathirana, like Daniel, saw the four accused together in a car, there is nothing else in Pathirana's evidence to connect them with the offences—even if we overlook the intervals of space and time between the four accused meeting Daniel and Pathirana respectively.

We do think, however, that at this stage in the summing-up, or even at a later stage, the learned Commissioner should have told the Jury in the clearest possible terms to bear in mind that Daniel's evidence against 1st, 2nd and 7th accused was not corroborated in any way by any witness. He failed to do so, and this was a grave omission on his part. It was not enough for him to have told them, as he did, that Pathirana's evidence only corroborated Daniel's story in regard to the 3rd, 4th, 5th

and 8th accused. It was all the more necessary for him to tell them that it did not corroborate Daniel in respect of the other accused, because he referred to certain evidence given by the witnesses Ariyawathie and Ekmon as " corroboration of the general story related by Daniel ", or as enabling the Jury " to decide whether Daniel was truthful or was speaking a lie ", as has been suggested. A clear direction is always necessary, and cannot be too often repeated, that the corroboration that the law requires is corroboration in some material particular tending to show that *each* accused committed the crime charged. The absence of such a vital direction may have induced the Jury to attach undue weight to the corroboration of Daniel by Liyana Pathirana in regard to the 3rd, 4th, 5th and 8th accused, and to make use of that support to accept the evidence of Daniel even as regards the 1st, 2nd and 7th accused.

Apart from the evidence of Pathirana that he saw 3rd, 4th, 5th and 8th accused at about 2 a.m. on the 21st morning, the only corroborative evidence led in the case was against 6th accused. It was evidence given by witness Podi Appuhamy, to the effect that on the 21st August evening the 6th accused asked him to say that he saw the deceased Punchimahathmaya alive at 11 o'clock that morning. That evidence could be considered corroboration of Daniel's evidence because, in the absence of any explanation from 6th accused, it indicated that 6th accused was trying to fabricate evidence to show that the murder of Punchimahathmaya took place long after it had actually been committed.

On certain matters the learned Commissioner very fairly told the Jury that certain evidence should not be counted against the accused, e.g., the alleged evidence of absconding ; a remark said to have been made by 6th accused that Silva had killed himself ; evidence that the accused had been seen together in a club of which they were members ; or had been seen talking to each other.

The complaint that the summing-up was unfair to the accused is also borne out by the manner in which some of the necessary directions on matters of law were conveyed to the Jury, and by the omission to direct the Jury adequately on some matters of law.

In the directions concerning accomplice evidence, unusual stress was laid on the point that corroboration of such evidence is not an essential requirement. This point was frequently repeated, and it was emphasised by such language as " if you are so impressed by Daniel as a witness of truth, you are entitled to act on Daniel's evidence without going to see whether he is corroborated or not. *That is your legal right.* You are judges of fact. *Nobody can take it away.* " The learned Commissioner failed to stress the gravity of a decision to convict on uncorroborated accomplice evidence. These directions were a reflection of the very favourable view which the learned Commissioner had himself formed concerning Daniel. But having thus expressed himself, it became his

duty to draw special attention to aspects of Daniel's conduct and evidence which could shake confidence in his credibility. Instead, as we have earlier shown, the discussions of factual matters were usually limited to explanations and suggestions conducive only to belief of Daniel's testimony.

A proper direction was given at an early stage regarding the approach to the evidence of a witness in a case where it is shown clearly that some part of his evidence is false. But the actual example mentioned in the direction was the case of the witness William, who had given false evidence on an immaterial point, but whose evidence on another, apparently important matter, was in the opinion of the learned Commissioner very probably true. What was thus exemplified was that the falsity of one item of the evidence of William did not preclude belief of another item of his evidence. In the special circumstances of this case, however, the vital question was whether, if the accomplice Daniel's evidence was false on some material points, it would be safe to convict upon his testimony which was in fact very nearly uncorroborated. It was unfortunate that this question was not directly posed to the Jury, and if the Jury thought about it at all, the example actually available for their guidance was one which could only have induced an attitude favourable to the prosecution.

In the case of some of the accused, there was direct testimony from Daniel indicating the possibility that those accused were concerned in a conspiracy to kill the deceased Silva. In the case of the other accused, a finding on the count of conspiracy could depend only on an inference from the evidence of their alleged conduct on the night of the murder. The learned Commissioner did not however distinguish the cases of the two sets of accused persons on this ground. This omission might of itself suffice to vitiate the conviction of some of the accused on the first count of the indictment. But we here refer to that omission as being one of the indications that the mind of the learned Commissioner was not alive to matters favourable to the defence.

Looking at the charge to the Jury as a whole, we have come to the conclusion that it was of such a character as to deprive the appellants of the substance of a fair trial—see *Broadhurst v. R.*[1] We have pointed out that the learned Commissioner dealt with the attacks of the defence on Daniel's credibility in such a way as virtually to render such attacks harmless and important. It was particularly necessary that the Jury should make their own assessment of Daniel's credibility, as he was an accomplice

[1] *(1964) A. C. 441.*

whose evidence, by his admitted role of being an accomplice, was tainted If the point of each attack made against his evidence was to be blunted by the learned Commissioner, the accused ran a grave risk of his uncorroborated evidence being acted upon, and that is what seems to have eventually happened in this case.

The learned Commissioner expressed his opinions very freely in his charge, and there is some ground for the complaint that the defence suggestions were not favourably or fairly dealt with. Lord Devlin, in the Privy Council judgment cited, pointed out that a jury is likely to pay great attention to the opinions of a presiding judge, and that is why those opinions should not be much stronger than the facts warrant.

It is always necessary to bear in mind that the power given to a trial Judge to express opinions on questions of fact must be used cautiously, more so in respect of the uncorroborated evidence of an accomplice. Although at the commencement of the summing-up the learned Commissioner made some preliminary observations which were extremely appropriate to a case of this nature, and which correctly directed the Jury on their proper function as judges of fact, we cannot escape the feeling that the total effect of his later strong expressions of opinion obliterated the good effect of the preliminary observations.

Finally, we quote the following words from that judgment as they express our view of the learned Commissioner's summing-up : " The summing-up as a whole cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant(s) (have) thus been deprived of the substance of a fair trial. "

For these reasons we allow the appeals and quash the conviction of the appellants. We have considered whether we should order a new trial in this case. We do not take that course, because there has been already a lapse of over three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice's evidence on which alone the prosecution rests.

We accordingly direct that a judgment of acquittal be entered.

Accused acquitted