[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present:* **Basnayake, C.J. (President), Sansoni, J., H. N. G. Fernando, J., Sinnetamby, J., and de Silva, J.**

# THE QUEEN *v.* MAPITIGAMA BUDDHARAKKITA THERA and 2 others

*Appeals Nos. 100, 101 and 102 of 1961, with Applications Nos. 106, 107 and 108*

*S. C. 8—M. C. Colombo, 23838/A*

*Charges of murder and conspiracy to murder—Evidence—Direct evidence of eye-witnesses regarding murder—Conviction based thereon despite introduction of inadmissible confession—Legality—Weight of unsworn statement from dock—Political motive for conspiracy—Admissibility of evidence reflecting on character of accused—Statements made by prosecuting Counsel in opening address—Effect of failure to tender evidence in support thereof—Corroboration of accomplice's evidence—Summing-up—Misdirection—Leading questions put to witnesses—Ineffectiveness of irregularities when they do not cause miscarriage of justice—Evidence of an accused inculpating co-accused—Proper direction to be given to jury—Witnesses— Rule that Counsel should not interview a witness once he is in the witness-box—Statement made to police officer during investigation of a cognizable offence—Admissibility—Conspiracy, between August 1958 and September 1959, to commit or abet murder—Illegality of sentence of death—Penal Code, ss. 102, 113B, 296—Criminal Procedure Code, ss. 121, 122 (3), 123, 134, 232, 283 (4)—Evidence Ordinance, ss. 21, 24, 25, 27, 30, 91, 120 (6), 142, 143, 157—Suspension of Capital Punishment (Repeal) Act No. 25 of 1959, ss. 2, 3 (a)—Interpretation Ordinance (Cap. 2 Revised Ed. 1956), s. 6 (3).*

(1) Where several accused are tried jointly, and one of them elects to give evidence on oath in his own behalf and, in doing so, inculpates his co-accused, the jury should be warned of the danger of basing a conviction of the co-accused on the evidence of the witness unless it is corroborated in material particulars. It cannot be contended that the evidence of the witness is totally inadmissible against the co-accused as being a " confession " within the meaning of section 30 of the Evidence Ordinance.

(2) Where, in a case to which section 27 of the Evidence Ordinance did not apply, oral evidence, which was objected to as inadmissible, was nevertheless admitted of an oral statement made by an accused person to a police officer who was investigating a cognizable offence under Chapter XII of the Criminal Procedure Code—

*Held,* that the use of the oral statement made to the police officer by the accused was as obnoxious to the prohibition contained in section 122 (3) of the Criminal Procedure Code as the use of the same statement reduced into writing. *Rex v. Jinadasa* (1950) 51 N. L. R. 529, discussed.

(3) It is an unwritten rule that, except in the case of expert witnesses, Counsel does not interview a witness once he is in the witness-box. Once the cross-examination commences, even an expert is not interviewed.



2——R 1683—2,033 (3/62)

(4) Under the Suspension of Capital Punishment (Repeal) Act No. 25 of 1959, only a sentence of imprisonment for life, and not a sentence of death, can be imposed upon the conviction of a person of the offence of conspiracy to commit or abet murder, if the offence had been committed by him during the period of operation of the Suspension of Capital Punishment Act No. 20 of 1958.

The 1st, 2nd and 4th accused-appellants were convicted, at the trial, of conspiracy to commit murder, and the 4th accused was convicted of murder. The 3rd and 5th accused, who were also charged with conspiracy to commit murder, were found not guilty. The deceased was the Prime Minister of Ceylon and the leader of a political party at the time he was shot by the 4th accused on 25th September 1959.

*Held*, (i) that the admission in evidence of a confession made by the 4th accused to the Magistrate, even assuming that the confession was not voluntary and was obnoxious to section 24 of the Evidence Ordinance or was otherwise inadmissible, could not vitiate the conviction of the 4th accused, because the fact that the 4th accused killed the deceased was established beyond any manner of doubt by the direct evidence of some of those present at the deceased's house at the time when he was shot there.

*Obiter :* No police officer who is not empowered to investigate a cognizable offence under Chapter XII of the Criminal Procedure Code may legally act under that Chapter even though he be attached to the Criminal Investigation Department.

(ii) that the right of an accused person to make an unsworn statement from the dock is recognized in our law. That right would be of no value unless such a statement is treated as evidence on behalf of the accused, subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination.

(iii) that, considering that the murder which was the subject of the alleged conspiracy was that of the Prime Minister and that there was at least a strong likelihood that the motive for the murder was political and not purely a private one, the evidence concerning the 1st accused's political and business interests was relevant to show positively that he was ambitious, if not for political power itself, at least to wield political influence. If this evidence did in fact create an impression that the 1st accused, who was a Buddhist monk, did not pay much regard to the code ordinarily accepted by Buddhist monks and was therefore unworthy of the robe of a monk, that was quite unavoidable.

(iv) that the omission of prosecuting Counsel to tender evidence in support of certain statements made by him in his opening address in compliance with the requirements of section 232 of the Criminal Procedure Code did not vitiate the conviction of the accused inasmuch as, having regard to the length of the trial (which lasted nearly three months) and suitable directions given by the Judge to the Jury, there was no miscarriage of justice.

(v) that that jury were duly warned in the present case that an accomplice's evidence must be corroborated by independent testimony from somebody other than the accomplice. Nor was there any question of the jury being invited to regard as corroboration items of evidence each capable of an innocent interpretation.

(vi) that, although there was some misdirection on the subject of the crime revolver and it could be complained with some justification that the trial Judge laid too much emphasis, in his summing-up, on the arguments of Counsel for the prosecution and permitted too many leading questions to be put to the witnesses on crucial matters, it could not be said that the irregularities occasioned a miscarriage of justice.

(vii) that, although the 5th accused, when he gave evidence in his own behalf, implicated the 1st, 2nd and 4th accused, the jury were properly warned by the trial Judge of the danger of convicting the co-accused on his evidence unless it was corroborated in material particulars.

(viii) that the evidence of an oral statement made by the 2nd accused to the police officer who investigated the offence under Chapter XII of the Criminal Procedure Code should not have been admitted in contravention of the provisions of section 122 (3). However, the improper admission of this evidence was not by itself a ground for a new trial or reversal of the verdict inasmuch as, independently of it, there was sufficient evidence to justify the verdict.

(ix) that the sentence of death passed on the accused-appellants for the commission of the offence of conspiracy to commit or abet murder was illegal for the reason that the offence was committed by them during the period of operation of the Suspension of Capital Punishment Act No. 20 of 1958. The retrospective operation of the provisions of the Suspension of Capital Punishment (Repeal) Act No.25 of 1959 relating to the imposition of capital punishment on a person convicted of an offence of murder, which had been committed by him prior to the date of the commencement of that Act, were not applicable to the offence of conspiracy to commit or abet murder.

APPEALS against three convictions in a trial before the Supreme Court.

*E. G. Wikramanayake, Q.C.*, with *E. A. G. de Silva, Robert Silva, S. Suntheralingam, Nimal Wikramanayake, Manivasagam Underwood* and *S. C. Crossette-Thambiah* (assigned), for 1st Accused-Appellant.

*M. M. Kumarakulasingham*, with *E. A. G. de Silva, P. Nagendram* and *F. A. de Silva* (assigned), for 2nd Accused-Appellant.

*L. G. Weeramanthri*, with *Anesley Perera, D. R. P. Rajapakse* and *M. B. Jayasekera* (assigned), for 4th Accused-Appellant.

*G. E. Chitty, Q.C.*, with *Ananda Pereira*, Senior Crown Counsel, *L. B. T. Premaratne*, Crown Counsel, and *V. S. A. Pullenayegum*, Crown Counsel, for Attorney-General.

*Cur. adv. vult.*

January 15, 1962. BASNAYAKE, C.J.—

The three accused-appellants, Mapitigama Buddharakkita Thera, Hemachandra Piyasena Jayawardena, and Talduwa Somarama Thera, the 1st, 2nd, and 4th accused respectively, along with two others, Palihakkarage Anura de Silva and Weerasooriya Arachchige Newton Perera, the 3rd and 5th accused respectively, were indicted on the following charges :—

"1. That between the 25th August 1958 and the 26th September 1959 at Kelaniya, Wellampitiya, Rajagiriya, Colombo, and other places, within the jurisdiction of this Court, you did agree to commit or

abet or act together with the common purpose for or in committing or abetting an offence, to wit, the murder of Solomon West Ridgeway Dias Bandaranaike, and that you are thereby guilty of the offence of conspiracy to commit or abet the said offence of murder, in consequence of which conspiracy the said offence of murder was committed, and that you have thereby committed an offence punishable under section 296 read with sections 113B and 102 of the Penal Code.

"2. That on or about the 25th September 1959 at No. 65 Rosmead Place, Colombo, within the jurisdiction of this Court, you Talduwe Somarama Thero, the fourth accused above-named did, in the course of the same transaction, commit murder by causing the death of the said Solomon West Ridgeway Dias Bandaranaike, and that you have thereby committed an offence punishable under section 296 of the Penal Code."

After a trial which commenced on 22nd February 1961 and ended on 12th May 1961 the 1st, 2nd, and 4th accused were by a unanimous verdict found guilty of the charge of conspiracy to murder and the 4th accused of the charge of murder of Solomon West Ridgeway Dias Bandaranaike (hereinafter referred to as the deceased) and sentenced to death. The 3rd and 5th accused were found not guilty and acquitted. The former by a unanimous verdict and the latter by a divided verdict of 5 to 2.

It would be helpful if the following general facts are stated before the grounds urged on behalf of each of the appellants are discussed :—The deceased was the Prime Minister of Ceylon and the leader of the Sri Lanka Freedom Party (hereinafter referred to as the S. L. F. P.) at the time he was murdered. He lived at his private residence at No. 65 Rosmead Place, which also faced another road known as McCarthy Road which intersected it at the point at which the deceased's house was. The 1st accused was at all material times the Viharadhipati of an ancient and well-known temple called the Kelaniya Raja Maha Vihare (hereinafter referred to as the Kelaniya Vihare). The 2nd accused was a close associate of the 1st accused and was at one time the President of the Board of Indigenous Medicine. He was also the owner of a printing press and was generally engaged in business and other activities. The 3rd accused was a resident of Kelaniya. His residence was not far from the Kelaniya Vihare. He was a motor mechanic specialising as a tin smith employed under a garage owner named Waragoda Kankanamalage Don Sirisena commonly known as Michael Baas also a native of Kelaniya who had his workshop at No. 171 Kynsey Road in Colombo. Michael Baas was a member of the Village Committee for the Peliyagoda Ward since 1957 and till 1959 a member of the S. L. F. P., whose candidate for the Kelaniya constituency he supported in the 1960 Parliamentary Elections. The 4th accused was an ayurvedic physician specialising in diseases of the eye and was a member of the staff of the Hospital of Indigenous Medicine and a lecturer at the College of Indigenous Medicine, also referred to in the evidence as the Auryvedic College, situated at Rajagiriya. He resided at a place called Amara Vihare close to it. A bhikkhu known as Boose

Amarasiri was its incumbent. The 5th accused was an Inspector of Police attached, at the relevant date, to the Crimes Branch of the Kollupitiya Police Station. He was also a native of Kelaniya whose ancestral home was not far from the Kelaniya Vihare of which his parents and he were dayakayas.

The 3rd and the 5th accused were, as participants in the activities of the temple, well-known to the 1st accused. The 1st and 2nd accused were interested in politics and were founder members of the S. L. F. P. The former was also one of its patrons. The 1st accused supported Mrs. Wimala Wijewardene who unsuccessfully contested the Kelaniya constituency as a candidate of the S. L. F. P. in the 1952 Parliamentary Elections. In the 1956 Parliamentary Elections he supported Mr. R. G. Senanayake as an independent candidate for the Kelaniya constituency and Mrs. Wimala Wijewardene as an S. L. F. P. candidate for the Mirigama constituency. The 4th accused was also interested in politics and had participated in the 1952 elections as a supporter of the deceased's party. He had presided at several meetings at which the deceased addressed the voters.

Both the 1st and 2nd accused owned cars, the former an Opel Kapitan painted cream and the latter a Fiat painted black. The 1st accused had a chauffeur but his car was driven by the 2nd accused on occasions on which they happened to travel in it together. The 1st accused was possessed of means. His brother, Dr. K. K. U. Perera also a man of means, was a medical practitioner in private practice in Peliyagoda. The 1st and 2nd accused were close associates in both political and other activities. They were both well-known to Mrs. Wimala Wijewardene who was a member of the Cabinet till a short while after the death of the deceased. They often met at her home. Carolis Amerasinghe, the alleged accomplice, who was the 7th accused at the early stage of the inquiry in the Magistrate's Court and later examined as a witness after he had been given a conditional pardon under section 283 of the Criminal Procedure Code, was an Ayurvedic Physician who practised his profession at Dematagoda in Colombo. He was also a person interested in politics and was a founder member of the S. L. F. P. and a member of its Committee. He was a man of means and standing, and was the Chairman of the Kolonnawa Urban Council at the time of the murder of the deceased. He also had an Opel Kapitan of a colour similar to that of the 1st accused. He described the colour as ivory. He was the family physician of the 2nd accused and they were known to each other from their childhood. In 1956 or 1957 after the S. L. F. P. came into power he was appointed a member of the Board of Indigenous Medicine of which the 2nd accused was appointed President and the 1st accused and the witness Kelanitillake were members. In the same year the 4th accused was appointed by the Board as an eye specialist in the Hospital of Indigenous Medicine. The witnesses Kelanitillake and Kalansuriya were also staunch supporters of the party. At the relevant time they were both resident in Kelaniya.

With these general observations it will be convenient now to turn to the questions arising on the appeals and deal with the case in the order in which the learned trial Judge dealt with it in his summing-up. The charge of murder which is against the 4th accused alone falls to be dealt with first. The evidence against him on this charge consists of the direct evidence of some of those present at the deceased's house at the time of the shooting and the accused's confession made to a Magistrate and recorded under section 134 of the Criminal Procedure Code.

The witness Asoka Christopher Seneviratne states that he went to the deceased's residence with his uncle Stephen Dias Bandaranaike between 8-30 and 8-45 in the morning in order to obtain a certificate of character from him. He says that the 4th accused arrived after he had been there for about 20 minutes. At that time he was seated in the verandah. After entering the verandah the 4th accused walked up and peeped into the drawing room and came back and occupied a vacant chair near him and engaged in a conversation with him, in the course of which he disclosed that he was from the Ayurvedic Hospital. While the 4th accused was there others came in. Those noticed by the witness Seneviratne were the American Ambassador, Mr. N. E. Weerasooria, and the witness Nivantidiye Ananda. The deceased first saw the American Ambassador off, next he attended to Mr. Weerasooria. The witness was the third person to receive the deceased's attention. He did not see the attack on the deceased as he had gone to the office to write down certain particulars about himself which the deceased wanted. While he was doing so he heard gun shots.

Nivantidiye Ananda states that he got to the deceased's house at about 9-50 a.m. and noticing the 4th accused, whom he knew before, spoke with him. The only two persons in yellow robes were the witness and the 4th accused. The deceased came up to the witness and referred to a petition he had given him on the previous day and informed him of the action he had taken and saluted him and moved towards the 4th accused, bowed his head, saluted him, and asked him why he had come. As the deceased spoke he was shot. The deceased cried in pain and ran into the house followed by the 4th accused with revolver in hand.

Although the witness Barnes Ratwatte, a brother-in-law of the deceased, heard three or four shots when he was in the circular side verandah he paid little heed to them until he noticed his sister who was in the garden rush into the house. He followed her and he saw the 4th accused following the deceased with a revolver in his hand stooping forward and pointing it at him. His sister rushed up, held the deceased by one hand and with the other caught the 4th accused by his robes. The deceased seemed to attempt to seize the accused but he ducked and evaded the attempt. As he did this one Hema Dabare jumped on the accused and the witness did likewise and both of them grappled with him till he fell. Dabare, the witness, and his brother held him down and dealt him a few blows and were soon joined by others. At this stage the revolver dropped

from the accused's hand. He tried to recover it while those around him were endeavouring to keep him off it. The witness next went in to attend to the deceased.

Vedage Piyadasa is another eye-witness. He had gone on the same mission as Ananda but reached the deceased's residence before him. He was behind Ananda's chair at the time the deceased came up to the 4th accused. He says that as the deceased saluted him and addressed him the accused pulled out a revolver from underneath his robes and fired at him. The first shot caught him on the back of his hand. He fired a second time and got him in front of the chest. The deceased cried " Buddu Amme " and ran in with the accused following him with the revolver pointing at him.

The witness Wickremasinghe who was also one of those present in the verandah at the material time states that after speaking with Ananda the deceased moved towards the 4th accused who got up hurriedly, took a step or two towards the deceased and fired, and the deceased ran inside raising cries. The 4th accused chased after him with the revolver. He heard two more shots inside the house. Later the 4th accused was shot by constable Samarakoon and was overpowered, taken to the office room and detained there. It is also established that P1 is the revolver with which the accused shot.

The statement made by the deceased as to the cause of his death reveals that he was shot by a Buddhist monk with a revolver which he drew out of his robes. The medical evidence disclosed gun shot injuries on the back of the left wrist, on the back of the left hand, on the right side of the chest, on the left side of the chest, on the right hip, and left lower abdomen. There were four entrance and three exit wounds. The bullet lodged in his body was removed by the surgeon who attended on him.

The evidence of the witness Ananda was challenged by the 4th accused. It was even suggested that Ananda or some other person in robes was the real assailant. The basis on which the suggestion was made was that the deceased knew the 4th accused and if he had been his assailant he would have named him instead of saying that a Buddhist monk shot him.

On this evidence alone the jury were perfectly entitled to find that it was the 4th accused and no other who murdered the deceased by shooting him with the revolver P1. But the prosecution went further and tendered in evidence a confession made by him to the Magistrate on 14th November 1959 at the Magistrate's residence in Mt. Lavinia while the accused was on remand in Fiscal's custody. The admission of this confession in evidence was objected to on the ground that it was not voluntary and was obnoxious to section 24 of the Evidence Ordinance. It will be therefore necessary to examine that objection. The confession reads—

" In August 1959 when I was in the dispensary at Borella the high priest of the Kelaniya temple Buddharakkita came and told me that ' if things go on like this we will have no place in this country '. We got

into a car and it was in the car that this conversation took place. I was dropped at my residence at Obeysekerapura. Buddharakkita came again the following day to my residence. He stopped the car on the road and sent for me. It was about 7-00 p.m. I came to the car and Buddharakkita told me that ' several lakhs of money is being lost at the harbour and there is no future for the Sinhalese or the language if things go on like this. Let us therefore destroy the Prime Minister. After that we could carry on our work as we wish '. I asked him what was going to happen to us. ' Nothing will happen to you ' he said. ' I have made arrangements with everybody who would be necessary for this '. H. P. Jayawardena was also present in the car at the time. Jayawardena said ' Only do this job and in 2 or 3 weeks you will be out of remand '. I told them that I had 2 pupils and also my temple to look after. They said ' We will look after all that '. I then asked them ' When I am to do the job ? '. I also told them that ' I am willing to do this job to a man who had done me no wrong only for the sake of my country and my religion and race.' They then told me ' Tomorrow or the day after we will get you a revolver.' So saying they went away. About two days later Buddharakkita brought me a revolver which was about a foot long. The revolver had six chambers. All 6 were loaded. The following day 8 more cartridges were brought by them. We took these and the revolver and went to Ragama to the house of Dickie de Zoysa. We met Dickie de Zoysa. With him, Buddharakkita, Jayawardena and I went to Muthurajawela. I was asked to fire at the kaduru fruits which were on trees by the road. I fired at these fruits. One of them said ' That is good, but whatever happens don't tell anybody. We will save you.' Then Dickie Zoysa stayed behind. The other two dropped me at my residence. I had fired 8 cartridges at Muthurajawela. I then loaded the other six. After that Buddharakkita and Jayawardena used to come and see me daily. One day C. Amarasinghe the Kolonnawa U. C. Chairman also came. Buddharakkita, Jayawardena and I decided on 25th September as the day on which to shoot the Prime Minister. At about 8 or 8.30 a.m. on September 25th I took a medicine to make myself brave and went to the Prime Minister's residence. The Prime Minister came out and spoke to a priest. I became nervous but I soon became very bold probably due to the medicine. I then fired at the Prime Minister. I fired one shot in the verandah. That struck him. Then the Prime Minister went into the house. I followed and fired 3 more shots. These shots also struck the Prime Minister. At this stage I fell down and somebody shot me. Thereafter I do not remember clearly what happened."

The statement was made in Sinhala and recorded by the Magistrate who attached the following certificate to it :—

" I hereby certify that the above record of the statement of Talduwe Somarama was taken by me and contains accurately the whole of his

statement and that it was not practicable to me to record it in Sinhala in which language it was given. I have a very good knowledge of Sinhalese. I have explained to him this statement in Sinhalese."

Several submissions were made in regard to this confession, its admission in evidence and the directions of the trial Judge concerning it, the principal submissions being the following :—

(*a*) That, upon all the evidence elicited at the trial with regard to the circumstances antecedent to the making of the confession, the defence had succeeded in establishing that it was not voluntary, and that the jury should have been directed accordingly.

The 4th accused was on remand, from the day after the shooting, first in the General Hospital and later in the prison hospital, till he recovered from the gun-shot wound inflicted by constable Samarakoon. On the very day of the shooting, Colombo Saranankara a bhikkhu friend of his went to see him at the instance of Inspector Wettasinghe of the C. I. D. under the guise of friendship but in fact as a police spy and in order to get information pertaining to the assassination.

Thereafter on the 2nd, 3rd, 13th, 22nd, and 31st of October and on the 7th of November, the 4th accused was questioned by police officers, sometimes by three or four of them, and on some occasions for quite long periods. Twice he was given cigarettes by these officers ; the 4th accused having been addicted to opium, counsel suggested that the cigarettes may have contained opium.

These and other similar facts, it was argued, established the probable truth of the 4th accused's statutory statement at the Magisterial inquiry that the confession had been induced partly by threats and partly by police promises that he would be released if he made a statement to the Magistrate implicating himself and the 1st and 2nd accused.

(*b*) That the confession had been the consequence of a long and wearing process of interrogation by the police, which was illegal because Chapter XII of the Criminal Procedure Code does not authorise the interrogation of a suspect remanded to the Fiscal's custody. It was argued that the interrogation of a person charged with an offence was prohibited by section 123 of the Code.

(*c*) That since the confession had been retracted in the statutory statement to the Magistrate the jury should have been warned that it is unsafe to act upon the confession unless it is corroborated in material particulars, or unless after full consideration of all the circumstances the truth of the confession is clearly established. There are decisions of African Courts to this effect (*Toyi v. R.*[1] ; *Onyango Otolito v. R.*[2]).

(*d*) That in any event the prosecution must prove affirmatively and beyond reasonable doubt that the confession had been voluntary and

[1] *1960 E. A. L. R. 760.*

[2] *1958 E. A. L. R. 471 and 1959 E. A. L. R. 936.*

not the consequence of any inducement, threat or promise, and that the learned Judge failed to direct the jury correctly on the law governing this matter. Reliance was placed on the decision in *Queen v. Amaris Appu*[1]; *Thompson*[2]; *Ibrahim v. R.*[3]; *Bass*[4]; *Murray*[5]; *Stuart v. The Queen*[6]; *R. v. Masinyana*[7]; *R. v. Ndoyana and another*[8]; *R. v. D.*[9]; and other cases.

It is not necessary to discuss the arguments on either side with regard to these submissions, or to express any opinion thereon. Even if any or all of these submissions are entitled to succeed, that would make no difference in the instant case, because the fact that the 4th accused killed the deceased was established beyond any manner of doubt by the direct evidence. Indeed, it is surprising that with that evidence available the prosecution thought it necessary to lengthen the proceedings so much by seeking to prove the confession.

In the course of the argument it was submitted that the officers who interrogated the accused were neither officers in charge of a police station nor subordinate officers deputed by an officer in charge of a police station to investigate the crime, and the legality of their action was challenged. It is sufficient to say that no police officer who is not empowered to investigate a cognizable offence under Chapter XII of the Criminal Procedure Code may legally act under that Chapter even though he be attached to the Criminal Investigation Department.

Before leaving this part of the case reference should be made to the statement made by the accused from the dock. The right of an accused person to make an unsworn statement from the dock is recognised in our law (*King v. Vellayan*[10].) That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination. In the course of that statement which the jury were invited by the trial Judge to consider as a matter before them which they had to take into account in arriving at their verdict, but not as evidence, the accused said—

" In the morning of the 25th September 1959 I went to meet the Prime Minister. I went and sat on a chair that was on the verandah. The Prime Minister came out, spoke to a number of persons on the verandah and thereafter came up to me and asked me why I had come. I told him that I came to remind him of some very important matters pertaining to Ayurvedha. The Prime Minister wanted me to communicate in writing so that he could make a report to Mr. A. P. Jayasuriya. He wanted me to give details to Mr. A. P. Jayasuriya and he said that he too would remind and speak about them. I said, ' All right ', and I had placed my handkerchief and my paper on the stool and I was

[1] *(1895) 1 N. L. R. 209.*
[2] *(1893) 2 Q. B. 12.*
[3] *(1914) A. C. 599.*
[4] *37 Cr. App. R. 51.*
[5] *34 Cr. App. R. 203.*
[6] *(1958-59) 101 C. L. R. p. 1 at 6.*
[7] *(1958) 1 S. A. L. R. 616 at 621.*
[8] *(1958) 2 S. A. L. R. 562.*
[9] *(1961) 2 S. A. L. R. 341.*
[10] *(1918) 20 N. L. R. 257 at 266.*

getting ready to go. As I turned to pick them up I heard two or three gun shots, I remained petrified and was looking in that direction. Then two persons in robes in the company of some others ran in the direction of the compound. I find it difficult to express the condition that prevailed at that time as I had such fear in my mind. I noticed a pistol dropped about three or four feet away from me. I noticed the Prime Minister entering the house through the doorway having received some gun shots. Taking the pistol, and wondering what had happened to the Prime Minister, I went inside the house with the idea of handing over the pistol to someone. I carried it in this manner in front of my body (witness demonstrates the manner in which he carried the pistol in his hand). As I went up there was somebody there and I said 'Someone shot with this and ran away'. Before I could finish saying that he jumped on me. I asked him to wait till I related the incident. He did not listen to that. He struggled with me and I fell down. As I lay fallen I was shot."

The rest of the statement refers to the visits of the police officers to him in jail and what they said and did. His statement is in general accord with the evidence of the eye-witnesses, except for the fact that he denies that he shot the deceased. The jury have obviously rejected his extraordinary explanation for his handling the revolver with which the deceased was shot.

So much for the charge of murder. The charge of conspiracy calls for attention now. It is a charge which concerns all three appellants and the prosecution case was based on the evidence of the alleged accomplice Carolis Amarasinghe. After the 5th accused gave evidence implicating the 1st, 2nd and 4th accused the Crown sought to make use of his evidence and probed his story at great length. The corroborative evidence relied on by the Crown against the 1st and 2nd accused is not exactly the same. The material against the latter is less than that against the former. As against the 4th there is the strong circumstance of his shooting the deceased.

Although numerous grounds of appeal have been stated in the respective notices of appeal—48 in the case of the first accused, 45 in the case of the second accused, and 60 in the case of the fourth accused—learned counsel's submissions fall under a few broad heads. The submissions made on behalf of the 1st accused may be grouped under the following heads :—

(*a*) That by improper admission of evidence he was denied a fair trial in that such evidence showed—

(i) that he was a man of violent disposition ;

(ii) that he was a monk who did not observe the rules of his order.

(*b*) That the counsel for the Crown made statements of fact of a highly prejudicial character on which no evidence was led.

(*c*) That the jury were directed that evidence which did not afford corroboration of the accomplice's evidence were in fact corroborative.

(*d*) That the jury were not directed that evidence which was capable of an innocent as well as a guilty meaning did not afford corroboration.

(*e*) That the jury were not told that a number of instances of corroborative evidence each capable of an innocent interpretation do not when added afford corroboration.

(*f*) That the decision of the question whether the 1st accused had any connexion with the revolver P1 was not left to the jury.

(*g*) That the trial Judge laid too much emphasis in his summing-up on the arguments of counsel for the Crown and gave too little attention to the submissions of counsel for the 1st and 2nd accused.

(*h*) That the value of the evidence for the prosecution was impaired by the large number of leading questions put to the witnesses.

(*i*) That the jury were not properly directed in regard to the manner in which they should treat the evidence of the co-accused Newton Perera.

(*j*) That the demonstration given by the Government Analyst of firing ·450 bullets with P1 was prejudicial to the 1st accused.

(*k*) That the sentence of death passed on the accused is illegal.

The above points will now be discussed in their order.

The evidence against which learned counsel complains under the head of improper admission of prejudicial evidence falls under four heads : (i) The Govi March, (ii) The Town Hall Meeting, (iii) The Kurunegala S. L. F. P. Sessions, and (iv) the unorthodox behaviour of the 1st accused at the house of Mrs. Wimala Wijewardene.

It was submitted that irrelevant evidence was improperly introduced in the case and that the 1st accused was thereby prejudiced as some of the items of such evidence reflected on his character, and that on this ground alone he would be entitled to a fresh trial. It was further submitted that in addition to this evidence of bad character there was other irrelevant evidence principally concerning the 1st accused and that in view of the directions of the learned trial Judge which would have led the jury to utilise against the 1st accused and his associate the 2nd accused both the evidence of bad character and the irrelevant matter, the verdict ultimately reached against him on the charge was unreasonable.

There was evidence to the effect that, at the house of Mrs. Wimala Wijewardene which he visited quite often and stayed at for the greater part of the day, the 1st accused had no regular hour for his forenoon meal, that at times he had it before noon, that at other times he took it after 12 noon about 1 or 2 p.m., that he took his meals along with the ladies

sitting at the same table with them like any layman, that he had meals of solid food at night also and that on certain occasions he spent the night too in that house. It was also elicited that, presumably because the 1st accused did not conduct himself in the manner usual to a monk, he was not always accorded the ordinary marks of respect such as the customary salutation and the laying of a white cloth upon his chair. If it must be assumed that the evidence in this category is in law evidence of bad character, we are unwilling to accept the excuse put forward by Mr. Chitty that it was necessary for the prosecution to prove that the house at Buller's Lane, which was the residence of Mrs. Wimala Wijewardene, was a sort of "second home" to the 1st accused where he spent much of his time. The fact could have been satisfactorily established without showing further such details of the 1st accused's conduct as tended to indicate that he did not pay much regard to the code ordinarily accepted by Buddhist monks in this country. Nevertheless even if some injury was caused to the reputation of the 1st accused in this manner it did not heighten the effect of other relevant evidence which the prosecution properly led with a view to prove that, although the 1st accused was a monk and therefore a person whom a jury would not ordinarily expect to be interested in wielding political influence and in gaining the benefits which often unfortunately accrue from such influence, he was nevertheless such a person in fact.

There was abundant evidence to show that the 1st accused had between 1952 and the time of the assassination been deeply interested in politics. This interest was first evinced when in the General Election of 1952 he sponsored the candidature of Mrs. Wimala Wijewardene unsuccessfully for the Kelaniya seat. This failure was turned into success at the election for the Mirigama seat in 1956, when, in addition, the 1st accused in support of the S. L. F. P. took a prominent part in a number of election meetings at Kelaniya, Mirigama and in other electorates. In addition to being a founder member and a Patron of the S. L. F. P. he was a member of the Eksath Bhikkhu Peramuna which according to the evidence itself prominently supported the same party in and after 1956.

There was evidence to the effect that the 1st accused interested himself in the appointment of Kelanitillake to the Board of Indigenous Medicine and the 4th accused to the staff of the Hospital of Indigenous Medicine. Counsel for the 1st accused could not complain that the items of evidence which have just been mentioned were not relevant, for it was the case for the prosecution that the 1st accused ultimately began to feel that his influence with the deceased was waning.

According to the evidence Malewana Gnanissara the President of the Board and Dr. Lenora the Principal of the College of Indigenous Medicine resigned somewhere towards the end of 1956 or early in 1957 in protest against the appointment to the Board of the witness Carolis Amarasinghe, who in their view was an unqualified person. In that connexion there was a move among a section of the students to hold a meeting in the Town Hall in Colombo, apparently with a view to demanding the return to office of the two members who had resigned. It was alleged in the

evidence that the 1st accused on that occasion interested himself in collecting funds and gathering people, his object being (as it was described in the evidence) to " break up the meeting ". It is not clear whether this object was successfully achieved but apparently the 3rd accused and some others were injured in the course of incidents which actually occurred. The complaint in regard to this matter has been that the evidence would have led the jury to regard the 1st accused as accustomed to the use of violence to gain his objects. Perhaps some such impression may have been created in the minds of the jury, but the evidence was relevant to show that in this instance the 1st accused took a leading and active interest in support of a particular action which had been taken by a member of the deceased's Cabinet.

There was evidence that about March 1958 the Minister of Agriculture had made an order that the Government's Guaranteed Purchase Price of paddy at Rs. 12 a bushel should not be paid to the cultivator wholly in cash, and that Rs. 2 per bushel should be kept back to be paid apparently in kind in the form of fertilizers and agricultural equipment. That order had been discussed at the Kelaniya sessions of the S. L. F. P. In protest against this order a number of farmers came to Colombo from Polonnaruwa in order to make a demonstration and they proposed to march to Gordon Gardens in the Fort near the Cabinet Office where a Cabinet Meeting was to be held. On the way the procession from the Railway Station was stopped by the police, but was allowed to continue when Mrs. Vimala Wijewardene, then Minister of Health, put herself at the head of the procession. This demonstration resulted in a skirmish between the farmers and some Colombo Harbour workers but ultimately the order of the Minister of Agriculture was revoked. The 1st accused apparently was present at Gordon Gardens although he took no part in the meeting or demonstration. What has been said about this ' Govi March ' in itself indicates that no aspersion was cast on the character of the 1st accused by the evidence on this matter but we consider that the evidence was of some slight relevance in that it showed some tendency on the part of the 1st accused to take an interest in political issues, in this instance in a matter which had the strong support of Mrs. Vimala Wijewardene. In another context in a conversation with Mr. Kalugalla, then a Parliamentary Secretary, the 1st accused had referred to her as " our Minister " and had invited him to form a new political party which she too would join.

The same tendency is again indicated in the evidence concerning the Kurunegala sessions of the S. L. F. P. held in March 1959. The witness Kelanitillake said that shortly prior to those sessions he received a message from the 1st accused to meet him at Kelaniya Vihare and he was told that it was necessary to go to Kurunegala together with members of the Party as well as a crowd in order (as the 1st accused is alleged to have said) to " see that people we want are elected to offices " in the Party. The 1st accused on the same occasion made certain remarks which are referred to in another part of this judgment as being significant of very

strong ill-will against the deceased. For present purposes however it is sufficient to note that a remark such as this " in order to get this Party into power I have spent over a lakh. There is no purpose served now, he is of no use now ; he must be driven out, " was made. The witness Kelanitillake was not himself a member of the S. L. F. P. but he informed the 1st accused that one Michael Baas was a member. Thereafter the witness accompanied the 1st accused to Michael Baas' garage where the latter too was told by the 1st accused to get ready with a gang of people to go to the Kurunegala sessions. This evidence disclosed an admission on the part of the 1st accused that he had spent large sums of money to put the governing party into power and also that when he found Government policies not to be in accord with his own ideas he proposed if possible to place in power leaders of his own choosing, even if this would involve open opposition to the deceased.

Considering the totality of the evidence to which reference has been made so far in this connexion, it was relevant for the purpose of indicating to the jury that the 1st accused's interest in politics was not restricted to lending his support either to the party in general or to any individual candidate in particular, but also involved heavy expenditure on his part. It further indicated that after success had been achieved at the 1956 Parliamentary Elections the 1st accused expected to obtain and did in fact obtain a price for his support in the form of appointments for his nominees. At a later stage when the deceased's Government appeared to be carrying out policies not favoured by the 1st accused the evidence indicates that his reactions were forceful and that he proposed to exert his influence upon Government policies.

The prosecution led some evidence on which the jury were invited to hold that the 1st accused was financially interested in a company called The Metal & General (Ceylon) Trading Corporation Limited. The evidence principally relied on in this connexion was that of the witness Kalansuriya who stated that the 2nd accused had requested him to stand security with a Bank in connexion with a guarantee which the Bank was to provide on behalf of the Company. What the 2nd accused precisely wanted was that the deeds for some property of Kalansuriya should be offered to the Bank as security. In view of the promise by the 2nd accused of Rs. 20,000 for furnishing the security Kalansuriya was agreeable to the proposal. The 2nd accused then took him to the house of Mrs. Wimala Wijewardene and there introduced him to the 1st accused who asked him whether he was prepared to give the deeds and he said he was prepared to do so if the 1st accused would enter into an agreement to compensate him in order to safeguard his interests. Kalansuriya was given to understand that the 1st accused was agreeable to this suggestion. During the conversation Kalansuriya in the presence of the 1st accused asked the 2nd accused " Why are you asking my deeds ; has not the 1st accused got property ?". In reply the 2nd accused said

that they did not want to show the Government that they were interested in the matter and therefore they did not want to take the temple property and that was why they wanted Kalansuriya's deeds.

Ultimately Kalansuriya took no part in the proposed transaction, but it seems that the evidence which has just been summarised could properly lead the jury to infer that the 1st accused was anxious to assist the Company and may even have been agreeable to pledge his own credit in order to induce Kalansuriya to give the required security.

Another witness A. J. Fernando who apparently was concerned in the manufacture of bodies for lorry chassis gave evidence to the effect that the 1st accused asked him whether he could arrange for the construction of some lorry bodies and upon his agreeing to do so, the witness received a letter in August 1958 from the Metal & General (Ceylon) Trading Corporation enclosing a cheque for Rs. 1,000 on account of lorry bodies. The witness was instructed in that letter to despatch the lorry bodies completed to Kantalai where the Company was carrying out some work on a sub-contract which they had with Techno-Export Foreign Trade Corporation, a firm engaged in construction of the Sugar Factory for the Kantalai Sugar Corporation. Subsequently however the lorries were not despatched to Kantalai ; instead the 1st accused directed the witness to dispose of the lorries in accordance with different instructions given to him.

Here again the evidence gave some indications, however slight, that the 1st accused was interesting himself even in rather minor matters concerning the business of the Company.

The relevance of the evidence of the 1st accused's interest in this Company (if it sufficed to establish an interest) will be referred to later in this judgment. But it must be noted for the present that the learned trial Judge made it clear in the summing-up that the prosecution did not prove that the 1st accused was a shareholder in the Company or had made any contribution towards its capital.

In about May 1958 there was formed a company known as The Associated Colombo Shipping Lines Limited, the directors of which included the brother of the 1st accused (Dr. K. K. U. Perera) and the 2nd accused Jayawardena, and another person who is the brother-in-law of Dr. Perera. In April 1950 the 2nd accused informed the then Minister of Finance, Mr. Stanley de Zoysa, of the proposal to float a company " to operate a Shipping Line for the purpose of lifting Government cargo ". He enquired from the Government whether the Ceylon Shipping Lines had a monopoly in respect of all Government cargoes, and if not whether the proposed new Company could compete for the transport of Government cargoes. This letter was apparently handed over personally to the Minister by the 2nd accused and a very favourable reply was also forthwith handed back. After further correspondence the new Associated Colombo Shipping Lines was invited by the Deputy Secretary to the Treasury to

make tenders for a rice lift from Burma to Ceylon. Accordingly a letter of 22nd May 1958 signed by the Chairman of the Company was sent to the Minister of Finance tendering for the carriage of 200,000 tons of rice from Burma to Ceylon at the rate of 35 shillings per ton. The same letter constituted a tender for the carriage of a similar quantity of rice for a period of three years. There had apparently been a reply from the Treasury dated 28th June 1958 inquiring for particulars as to the Directorship and management of the Company and as to the mode in which it is proposed to fulfil the tender if accepted. The letter sent in answer to this inquiry concludes with the observation (as paraphrased) "You will agree that our Firm's offer was the most competitive rate quoted."

The Company was informed by the Treasury on 27th August 1958 of a press communique (P170) issued by the deceased on 25th August 1958. In this communique the deceased stated—

> "In May 1958 it was felt that it was likely to be in the interests of Government to enter into a long-term contract (for one year or for three years) in respect of the carriage of rice to Ceylon from China and from Burma.
>
> In pursuance of this view the Deputy Secretary to the Treasury asked for offers from these Shipping Lines: Ceylon Shipping Lines Ltd., The Associated Colombo Shipping Lines Ltd., The Eastern Star Lines Ltd.
>
> As these offers were received at the time the Hon. Minister of Finance was out of Ceylon on urgent Government business, at his request to me to deal with the matter, I opened the letters which contained the offers, but I came to no final decision as certain further information was necessary and as I also wished to consult the Hon. Minister of Finance who was due to return to Ceylon early. After his return I went into this question further in consultation with him and also with the Hon. Ministers of Commerce and Trade, and Agriculture and Food.
>
> After very careful consideration and in view of the fact that meanwhile a Commission had been appointed with wide terms of reference to report on existing shipping lines in Ceylon including the desirability of nationalising shipping and also the fact that Government itself may be giving serious consideration early to the desirability of nationalisation and purchase of ships, I have come to the conclusion that, in all the circumstances of the case, it would not be desirable to enter into a long-term contract with any shipping line as originally contemplated.
>
> The practice that has obtained hitherto regarding the carriage of Government freight will continue for the present.
>
> If any shipping line which made offers has been put to inconvenience, I express my regret for any such inconvenience and also for the delay in coming to a decision."

On 20th February 1959 the 2nd accused as Chairman of the Associated Colombo Shipping Lines wrote to the Prime Minister requesting him to " grant us the contract for our successful tender for the 200,000 tons Burma rice lift for 1959 option, 1960 option, and 1961 option ". This request was not granted.

From other evidence concerning the Associated Colombo Shipping Lines it seems clear that the mode of operation proposed by the new Company was such that it could not undertake the carriage of Government freight except upon the basis of long-term contracts. The evidence summarised above concerning the efforts of the new Company to secure contracts with the Government shows that the Company hoped to obtain a contract for three years the gross annual value of which would have been £200,000, that during its first contract with the Ministry of Finance it was given every expectation of success, and that after making its tender at the rate of 35 shillings per ton the Company thought that it had indeed made the most acceptable tender. Some of the directors of the Company made trips to England on two occasions with the object of consulting the financiers in regard to the tender and the arrangements for carrying out its operations. From these matters it was open to the jury to infer that those interested in the formation and operation of the Company must have been grievously disappointed at the decision taken by the deceased to maintain the *status quo ante* as regards the carriage of Government freight, in consequence of which the Company would be unable to secure the desirable Government contracts.

In so far as the 1st accused was concerned there was first the circumstance that his brother Dr. K. K. U. Perera and his close associate the 2nd accused were keenly concerned in the project. There was in addition proof that when two of the Directors of the Company made one of their visits to London their air passages were paid for by a cheque drawn by the 1st accused. There being no evidence before the jury that this money was ever returned to him by the Company, the evidence was certainly capable of the construction that the 1st accused personally paid for those passages. Further there was in evidence his own admission to the witness Kelanitillake that he had spent large sums of money in connexion with the launching of the Associated Colombo Shipping Lines.

Counsel on behalf of the 1st accused has questioned the relevance of the evidence concerning the alleged connexion of the 1st accused with both concerns which have been mentioned — The Metal & General (Ceylon) Trading Corporation and The Associated Colombo Shipping Lines — in which he held no shares. In this connexion there was the evidence of the witness Kalugalla that the 1st accused had stated that with this Government its supporters could not make money and that only the enemies of the party could make money. When the prosecution invited the jury to accept this particular item of evidence as true it was relevant for the prosecution to adduce some examples of events likely to have

created dissatisfaction in the mind of the 1st accused and therefore to have induced him to make the reported remark. The evidence concerning the failure of the Metal & General (Ceylon) Trading Corporation in its sub-contract for the construction of the Kantalai Sugar Factory in a slight degree, and the evidence concerning the Associated Colombo Shipping Lines and their failure to obtain a contract for the rice lift and other Government cargoes were in the view of the Court matters which were relevantly brought to the notice of the jury in this connexion.

What has been stated as to the relevancy of this part of the evidence upon the case of the 1st accused applies more strongly in the context of the case against the 2nd accused, for the evidence was to the effect that he participated most actively in the affairs of both the Companies.

Considering that the murder which was the subject of the alleged conspiracy was that of the Prime Minister himself and that there was at least a strong likelihood that the motive for the murder was political and not purely a private one, the evidence concerning the 1st accused's political and business interests was relevant to show positively that he was ambitious, if not for political power itself, at least to wield political influence. If this evidence did in fact create an impression that the 1st accused was unworthy of the robe that was quite unavoidable. If in addition there were some items of evidence not strictly relevant for the purposes which have just been mentioned and which therefore only tended to create such an impression, those items could not have exaggerated the effect of that part of the evidence which was relevant to establish the political and business interests of the 1st and 2nd accused to show that they had a motive for conspiring to murder the deceased.

The next point that calls for attention is the complaint that the learned counsel for the Crown in his opening address made statements of fact in support of which he placed no evidence before the jury. Section 232 of the Criminal Procedure Code makes it obligatory for prosecuting counsel to open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused and thereafter examine his witnesses. Paragraph 4 of the notice of appeal lists nine statements made by learned counsel for the Crown in support of which no evidence was tendered. Evidence has been tendered in respect of the ninth statement through the witness Bradman Silva. Of the remaining eight statements learned counsel emphasised only (i) and (iv) which reads—

"(i) That dissemination of scurrilous literature against the 1st accused in respect of which the deceased took no action although requested to do so by the 1st accused originated ill-feeling between the 1st accused and the deceased.

"(iv) That the 1st accused telephoned Mr. K. C. Nadarajah's bungalow about an astrologer Sunderam just after the shooting."

These statements should not have been made if it was not intended to establish them by evidence. No explanation has been offered as to why they were made if it was not intended to lead evidence in support of them. A reference to the indictment shows that Mrs. Nadarajah was a witness whom the prosecution included in the list contained therein as a witness whom the prosecution intended to call at the trial. It remains now to consider whether the prejudice caused by those statements has resulted in a miscarriage of justice. The trials in the instant case commenced on 22nd February 1961 and ended on 12th May 1961. The learned trial Judge states that he himself was unable to recall those statements and directed the jury thus :

> " You should forget whatever was said by Mr. Chitty in his opening address that has not been followed up by the evidence. I do not think that in this case that is a difficult task for you. I do not know, gentlemen, about your own powers of recollection, but if your powers of recollection are no better than mine, then you may think that you have really retained very little of the opening address of Mr. Chitty made so long ago as the 22nd February this year, some two and half months ago ; but if you do recall Mr. Chitty having opened the matters which Mr. Quass did say he had opened and where they have not been followed upon by evidence led in the case, you must eradicate them entirely from consideration in this case. Please bear that in mind gentlemen. "

It cannot be assumed that the jury do not retain in their minds what they are expected to hear and remember. But what is the trial Judge to do when at the end of a very long trial which has lasted nearly three months defence counsel takes the unfortunate course of bringing such matters to the notice of the jury. He has one of two courses to adopt, discharge the jury and order a new trial or proceed with the trial and give the jury suitable directions. Having regard to the length of this trial the Court is of opinion that the course taken by the learned Judge is not wrong in the circumstances. This view is in accord with that taken in the matter of *Richard Albert Jackson*[1].

The next ground is that the jury were directed to regard as corroborative evidence which did not afford corroboration. The learned Judge divided the corroborative evidence into two parts and drew their attention to the salient features of each part. He introduced his examination of the corroborative evidence in these words—

> " The prosecution urges you that the evidence of Amarasinghe and Newton Perera or, put it this way, the evidence of Amarasinghe or Newton Perera finds support in the evidence of two groups of witnesses. One such group the prosecution refers to or has been referred to in this case is the Amara Vihare group of witnesses. The prosecution says that some little time immediately preceding this

[1] *37 Cr. App. R. 43.*

murder, the 4th accused, who according to the evidence of the prosecution is the person who shot, was in earnest, secret, prolonged conversation with two of the accused in this case, and the prosecution urges that the evidence is of such a nature that it tends to support Amarasinghe or Newton Perera, as the case may be, that there was an agreement to murder Mr. Bandaranaike. When I say that I must remind you that neither Amarasinghe nor Newton Perera in express words says that there was a conspiracy to murder. In fact Newton Perera's evidence is that he was completely ignorant of any conspiracy to murder. The prosecution submits that the effect of the evidence of those two witnesses is that there was such an agreement. The prosecution urges that the evidence of the Amara Vihare group of witnesses tends to show that the evidence of Newton Perera or Amarasinghe is true.

" The other group of witnesses are witnesses who speak to the conduct of one or more of these accused after the incident. Now we are dealing with the case of the 1st accused, and the evidence here is the conduct of the 1st accused after the shooting, and the prosecution says that his conduct is such that it tends to show that the 1st accused was in agreement to kill Mr. Bandaranaike.

" Let us, with those remarks, shortly consider what the evidence of the Amara Vihare group of witnesses is. "

The learned Judge then went on to consider the evidence of that group of witnesses (pp. 3292–3310) and discussed it in detail. The discussion occupies nearly seventeen pages of the typescript and briefly their evidence (except that of Mendis and Charles) is as follows :—Those who fall into that group are Somaratne, Lewis, Sirisena, Mendis Appu, Charles Appuhamy, David, and Mrs. Wijelatha Kuruwita. The learned trial Judge directed the jury that they should not act upon the evidence of Mendis Appu and Charles Appuhamy because of the many contradictions in their evidence. Of the others Somaratne's evidence is to the effect that, in September before the 24th, the 4th accused went out early in the morning at about 6 in a big " cream " or " milk " coloured car driven by a fair, fat, grey-haired driver with hair closely cropped on about eight occasions and returned between 6 and 9 p.m. That on one or two of those occasions the 1st accused travelled in the same car. Lewis, an employee in the circulation department of Lake House, said that on 19th August the day of the fast of Boosa Amarasiri, the incumbent of Amara Vihare, the 1st and 2nd accused came to the temple at about 7 p.m. in a " white-coloured " Opel Kapitan car driven by the latter. The 1st accused went in and came back to the car with the 4th accused, carrying on a conversation with him. The two accused came again a week later at about 2 p.m. in the same car driven by the 2nd accused, stopped the car in the same place, i.e., near the gate of Amara Vihare. The 2nd accused went into the temple and in about five minutes came back with the 4th

accused and all three of them left in the car. The two accused came a third time in early September at about 8 p.m. in a " black-coloured " car driven by the 2nd accused and stopped in a different place where there was no light. The 2nd accused went inside the Amara Vihare and returned with the 4th accused. A week later the two accused came again in the " white-coloured " Opel Kapitan at about 7 p.m., stopped where it stopped on the third occasion, the 2nd accused went into the Vihare, and returned with the 4th accused. They came a fifth time about a week prior to 25th September in a " white coloured " Opel Kapitan at about 7 p.m. and stopped in the same place as on the third and fourth occasions, the 2nd accused went into the Vihare and returned with 4th accused. The witness Sirisena the tailor says that he saw the 1st accused come to the Amara Vihare in early September at about 6.30 p.m. in a " milk-coloured " big car driven by a fair elderly driver with slightly grey hair. The driver who was wearing a white shirt and sarong went to the Vihare and returned with the 4th accused who entered the car and they drove off. A few days later the same car came again about 6 p.m. driven by the same driver and stopped at the same place ; the driver went to the Vihare. He went for a cup of tea to the opposite boutique and the car had left when he returned. On 24th September at about 7 p.m. the 1st and 2nd accused came in a large " black car " driven by the 2nd accused, both alighted from it and went in the direction of Amara Vihare. They came back saying "The priest is not in" and drove off. Wijelatha says that on 23rd September at about 7.30 p.m. she saw a " milk-coloured " car halted near Amara Vihare and she noticed the 1st and 4th accused in the rear seat and near it a man was walking up and down. Again on 24th September at about 8.30 p.m. she saw the same car stopped beyond the point at which it was stopped earlier. She did not see who was in it. David, the dispenser at the Ayurvedic College, says that on 24th September on his way from his mother's house about 8.30 p.m. near Amara Vihare he saw the 1st and 4th accused engaged in conversation, the 1st in a " white-coloured " Opel car and the 4th standing on the road by it.

Learned counsel brought to light certain material discrepancies between their evidence in the lower Court and their evidence at the trial. The jury were told by the learned Judge how they should approach the evidence of three of them—Mendis, Charles and David—and he gave the following general direction :—

> " Well, gentlemen, there are a whole lot of contradictions which were brought out in the evidence of this witness. I do not think I need detail all that to you, but I think I should tell you how to approach evidence of contradictions of a witness. You, gentlemen of the jury, have to judge a witness's evidence, as to whether it is acceptable or not, by what he says here ; but what he has said earlier at some other place like the Magistrate's Court or at a police inquiry is relevant, gentlemen, in considering the truth of what he says here."

He concluded that discussion thus—

> " Well, gentlemen, that, I think, is a fair summary, but not in any way exhaustive, of the evidence of Amara Vihare group of witnesses. The prosecution relies on that as affording some corroboration of some of the evidence of Amarasinghe and Newton Perera that there was an agreement or conspiracy in which the object was the killing of the Prime Minister."

He then proceeded to consider the other group of witnesses he had referred to earlier as giving evidence corroborative of the alleged accomplices. He opened the discussion of that evidence in these words—

> " Let me, gentlemen, go on to the other evidence which the prosecution says comes from an independent source, that is from an untainted soure, which corroborates or supports the prosecution allegation that there was a conspiracy, that is the conduct of the 1st accused. Now, right throughout today I am dealing with nobody's case but the 1st accused's case. If I have referred to the others, it is incidental. You must find independent evidence from somebody other than Newton Perera or Amarasinghe."

Having made the above statement before referring to Kelanitillake's evidence he proceeded to describe Amarasinghe's reactions on receiving the information that the Prime Minister had been shot and the reaction of Newton Perera and the way in which Amarasinghe had dealt with a telephone call from the 1st accused. The learned Judge referred to Kelanitillake's evidence of his conversation with the 1st accused at the Kelaniya Vihare after the shooting on the afternoon and evening of the day of the shooting and the day following. He also referred to what Kelanitillake said he observed in the behaviour of the 1st and 2nd accused and others and his own reactions to what he saw. Referring to Kelanitillake's evidence that the 1st accused after receiving a telephone message said—

> " The Cabinet has just decided to direct the police to inquire about Somarama's connexion with the Board of Indigenous medicine."

the learned Judge observed—

> " If there was this telephone message and it had been correctly reported by the first accused to Kelanitillake, as men of the world you will ask yourselves the question ' Who could have told him what happened at the Cabinet Meeting ? ' ' Who thought it so important that what happened at the Cabinet Meeting should be conveyed to the Kelaniya temple immediately ? '."

The learned Judge then proceeded to refer to the following items of evidence concerning the conduct of the 1st accused relied upon by the prosecution as corroborative :—

1. His saying "No, this kalakanniya had gone to hand over a petition and he had been shot. I cannot even see him in hospital. I am

thinking about that." in response to Kelanitillake's statement that the rumour was that Somarama had shot the Prime Minister.

2. His silence when Kelanitillake thrust a newspaper in front of him when the 1st accused talked of a petition and expressed his doubts that the 4th accused would do such a thing.

3. The excited state of the 1st accused when Dickie de Zoysa and two others came and went inside the quarters of the 1st accused.

4. His saying to Kelanitillake in the evening of the day after the shooting " No man, I do not think that fellow would do a thing like that " in answer to Kelanitillake's statement, " No doubt; it is Somarama who has shot."

5. His saying after he had got ready to go out on receiving a telephone call on 26th September, " The Cabinet has just decided to direct the police to inquire about Somarama's connexion with the Board of Indigenous Medicine."

6. His saying, " Yes, they might come ; be careful of what you say ", in answer to Kelanitillake's inquiry whether he himself might be questioned on the matter because he was also a member of the Hospital Board (Kelanitillake).

7. His saying on the 28th September to Kelanitillake whom he had sent for " Look here, this Nondiar is trying to implicate me saying that I have got the Prime Minister murdered ", and adding " I will break that fellow's legs and have him deposited in the Kelaniya river." (Kelanitillake 3328).

8. His inquiring from the 3rd accused whether the police had come in search of him and telling him " Why don't you shave off that moustache of yours and get into national dress ", and taking him to his quarters and saying " You know."

9. The absence of the 1st accused from Kelaniya temple from 8.30 p.m. till 10 p.m. on 24th September.

10. The fact that the deceased said no less than four times " He is a foolish man. I do not know why he shot me." (3339) was an indication of a conspiracy.

11. The absence of the 1st and 2nd accused from Colombo and their failure to come to Mrs. Wimala Wijewardene's house (3347) on the night of the 25th September.

12. The fact that the 1st accused when in the dock had his hand on his hip and a handkerchief in the other hand or in the same hand (3350).

The learned trial Judge said at the outset of his survey of the corroborative evidence that it fell into two groups—the Amara Vihare group, and the evidence regarding the conduct of the 1st accused after the shooting. Concluding his survey of the corroborative evidence he said—

> " That corroboration, I repeat, the prosecution claims is to be found in (*a*) the visits which it claims to have proved as having been made by the first and second accused frequently to the fourth accused during the period immediately before the shooting, and (*b*) the conduct of the first accused after the hour of the shooting and right up to the time he was charged in Court."

Learned counsel for the 1st accused contended that none of the 12 items set out above were corroborative. His submission though not applicable to all the items is applicable to the following :—

(*a*) The 1st accused's statement that he would break R. G. Senanayake's legs and have him deposited in the Kelani river.

(*b*) The 1st accused's statement that the Cabinet had decided to direct the police to inquire about Somarama's connexion with the Board of Indigenous Medicine.

(*c*) The fact that the deceased said, " He is a foolish man. I do not know why he shot me ".

(*d*) The absence of the 1st and 2nd accused from Colombo and their failure to go to Mrs. Wijewardene's on 25th September.

(*e*) The attitude adopted by the 1st accused when standing in the dock.

There was also complaint that the learned Judge, in the course of mentioning to the jury the several items of evidence upon which the prosecution relied as being corroborative, also referred to parts of the evidence of the alleged accomplice Amarasinghe as to statements and conduct of the 1st accused—

1. His telephoning Amarasinghe about noon of the day of the shooting and saying " Don't get frightened about anything. Don't disclose to anyone." (Amarasinghe 3312).
2. His visit to Amarasinghe at 4.30 p.m. on 27th September and his saying, " Vedamahatmaya, why are you looking as if you were dead ? Do not fear anything. I will see to everything. Don't worry. I am just coming here from Radio Ceylon where I have delivered a broadcast message." (Amarasinghe 3327).
3. His saying on 12th October to Amarasinghe who was brought to the Kelaniya Vihare by Graham, " Vedamahattaya, don't fear anything. Everything that needs to be done has been done. If necessary, I will appeal even to the Privy Council." (Amarasinghe 3331).

4. His saying to the 2nd accused on 14th October in the hearing of Amarasinghe as they were about to enter a police car after they had been arrested, " Jaye, I did not think we would travel in a thing like this." (Amarasinghe 3332).

5. His saying to the 2nd accused while in the remand cells in the hearing of Amarasinghe who was in the cell between that of the 1st and that of the 2nd accused, " Jaye, don't know what Anura will say " or " don't know whether Anura will say." (Amarasinghe 3333).

6. His asking Amarasinghe after he had made a statement to the Magistrate Mr. Udalagama, " Please withdraw that statement. If you do that, I will see that counsel is retained for you ". (Amarasinghe 3333).

It appears that the learned Judge made these references at that stage only with the intention of pointing to parts of the alleged accomplice's evidence, the general purport of which was similar to one or other of the items of evidence contributed by some other witness, as well (to use his own expression) as to mention in the form of a " narrative ", in the order of their alleged occurrence, the facts deposed to by the several witnesses, including the alleged accomplice. While this was a somewhat unsafe mode of placing before the jury the case for the prosecution as to the various items of evidence claimed to be corroborative, the submission that the jury were for this reason misled into treating any of the alleged accomplice's evidence as being corroborative of himself is not acceptable; they were duly warned, and on more than one occasion, that they must look for independent testimony from somebody other than the alleged accomplice.

It will be convenient to deal with grounds (*d*) and (*e*) together as they are connected grounds. Learned counsel submitted that any item of evidence which is capable of an innocent meaning cannot be used as corroboration, and that the addition of any number of such items of evidence does not produce a positive result. He submitted that zero added to zero was also zero. Support for this submission is to be found in the following decisions :—*Thomas v. Jones* [1] ; *Finch v. Finch* [2]; and *Dowse v. Attorney-General, Federation of Malaya* [3]. It is sufficient to cite from the *dicta* in the case of *Thomas v. Jones* (*supra*). Bankes L.J. referred to the matter thus—

> But I think that assistance in this case can be derived by considering what is not and cannot properly be regarded as corroborative evidence. First of all, statements which are equally consistent with the story of the appellant as with the story of the respondent cannot properly

[1] *(1921) 1 K. B. 22.* [2] *(1832–3) 23 Ch. D. 267 at 277.*

[3] *(Privy Council) (1961) 27 Malayan Law Journal p. 249.*

be accepted as corroborative evidence. It is equally clear that evidence which obviously falls short of corroboration in a material particular cannot be accepted as corroborative evidence. "

Atkin L.J. in laying down the same rule said—

" There was a suggestion in the Court below that, although each one of these facts in itself was insufficient, yet the accumulation of them might make them sufficient. If all that is meant by that is the explanation given by my Lord, one can accept it. It may be that light may be thrown upon something, which in itself is innocent and irrelevant, by some other circumstance which though not itself conclusive may yet be illuminating. But, apart from that, it appears to me impossible, when dealing with the question of corroboration, that the accumulation of pieces of evidence, each of which by itself is not admissible as corroborative evidence, can amount in the whole to corroboration. *Ex nihilo nihil fit.* That appears to me to be different from circumstantial evidence, where evidence of independent facts, each in itself insufficient to prove the main fact, may yet, either by their cumulative weight or still more by their connection one with the other as links in a chain, prove the principal fact to be established. "

In the instant case there was no question of the jury being invited to add zero to zero in a search for corroboration of the evidence of either the alleged accomplice or the co-accused. According to the witness Bradman Silva the 1st accused had around December 1958 said to some other monks that the deceased must be killed, and that, by a Buddhist monk. According to Kelanitillake, he had at a later stage referred to the deceased in language the foulness of which is not reflected in its English translation and which could not conceivably have been used by an educated monk unless he entertained intense hatred for the deceased. The probable causes of this hatred, and the 1st accused's intention to oppose the deceased politically, were explained in other statements of his which have already been mentioned. In the light of these utterances, the proved fact that the deceased was killed, without any appearance of a personal motive by a close associate of the 1st accused, the two of them having been in contact with each other on numerous occasions immediately prior to the murder, could not have failed to assume a grave significance in the minds of the members of the jury. If they believed the evidence of the meetings by the side of the road after night-fall on September 23rd and 24th, the conclusion that the mission which the 4th accused ultimately carried out on the 25th had been the subject of their conversations would have been irresistible, particularly in the absence of any explanation from the 1st accused.

The next point that calls for discussion is the one relating to the misdirection on the subject of the crime revolver. It was submitted that the learned Judge did not invite the jury to decide whether P1 was

the revolver given by Newton Perera to the 1st accused. Learned counsel drew our attention in particular to the words, " The first accused gets connected to the revolver P1 or to a ·45 revolver, only through the evidence of the 5th accused ". These words are better examined in their full context. The learned Judge said—

" Now, gentlemen, I have not referred to the witness Ossie Corea at all. At the stage at which Ossie Corea left the witness-box, although he may have proved to be an interesting witness, if that be the correct expression, his evidence did not touch the first accused at all. All he said was that the fifth accused asked him for a revolver and he gave him a ·45 revolver. He gave a ·45 revolver to the fifth accused. The first accused gets connected to the revolver, to this revolver P1 or to a ·45 revolver, only through the evidence of the fifth accused.

" Now, gentlemen, you may wonder why, in regard to the identity of the revolver, which has been challenged on behalf of the first and second accused and I believe on behalf of the fourth accused also, Ossie Corea should have identified this revolver at all if in fact it was not his revolver. I take it, gentlemen, that by the time Ossie Corea was taken to the Government Analyst's Office he would have had a shrewd suspicion at least that it was Mr. Bandaranaike's death that was the subject of the investigation. Then when there were some six or seven revolvers placed before him would it not have been simplicity itself to say, ' Well, my revolver is not there '. But he chose to handle two revolvers which he put aside ; then he took a third into his hands and said, ' This is mine '. He claimed to identify it as his by the pitting in the barrel and the shaking of the cylinder. It is in evidence that those are common to any old revolver, but Mr. Chitty has told you that a person who owns a thing and who has had it for sometime can, without any particular distinguishing marks, with some confidence say whether the article belongs to him or not.

" You will bear in mind all the arguments of counsel which relate to this revolver. Now, gentlemen, this is a ·455 revolver. There is no doubt about that, but it is Mr. Sirimanne's evidence, that is the Ballistic Expert's evidence, that it is not possible to say by looking at a ·450 and ·455 revolver which is which. Newton Perera says that this revolver produced here is the revolver which Ossie Corea gave him. Newton Perera said that he would describe this revolver as a ·45 revolver. Lionel Gunatillake said that he would describe it as a ·45 revolver. Sydney Zoysa said that he would describe it as a ·45 revolver. The bullets proved to be the bullets which had entered the body of Mr. Bandaranaike or which were found in the house that day were both ·455 and ·45 bullets. That is, some were ·455 bullets and some were ·45. Mr. Sirimanne has given some evidence which has been analysed before you by Mr. Chitty in great detail in a manner which I cannot hope to better. Mr. Sirimanne said in

evidence that the putting into the cylinder, into the chamber, of smaller cartridges than was originally intended for the revolver may produce over a long time of such use a condition in which the actual cartridge, that is the correct size of cartridge, may find it difficult to enter. Mr. Sirimanne said that if the chamber is not properly cleaned from time to time rust can collect and the introduction of the right kind of cartridge may be fraught with difficulty. He said that rust is not the only thing that can bring this about; dirt can bring this about as well. Mr. Chitty has addressed you on those points and I don't think I need attempt to go over that ground once again."

Learned counsel also drew our attention to two erroneous statements on questions of fact occurring in the charge on this point. They are—

"(*a*) Newton Perera says that this revolver produced here is the revolver which Ossie Corea gave him.

"(*b*) The bullets proved to be the bullets which had entered the body of Mr. Bandaranaike or which were found in the house that day were both ·455 and ·45 bullets. That is some were ·455 bullets and some were ·45 bullets."

The evidence is that only ·455 bullets were found, one in the body of the deceased, three in the house, but there were two empty ·450 shells in the chamber of the revolver. Newton Perera did not state that Ossie Corea gave him the revolver produced but he gave him a revolver similar to P1. His evidence is as follows :—

"26438 Q. What was the type of revolver that Ossie Corea gave you on that day ?

A. It was a ·45 revolver.

26439 Q. (Shown P1). Was it similar to P1 ?

A. Yes, it was similar to P1."

Statement at (*a*) appears to be a slip because the learned Judge had earlier said—

"Newton Perera said that it was a revolver like the revolver P1 which has been proved to be the revolver that killed Mr. Bandaranaike, that he gave over to the first accused." (3273).

Again later on in his summing-up he made the same slip when he said—

"Newton said that he identified that revolver as the revolver which he had earlier obtained from Ossie Corea and given over to Buddharakkita." (3503).

The statement at (*b*) was perhaps influenced by the presence of two spent ·450 shells in the revolver.

Ossie Corea's examination-in-chief (Qs. 18305–18581) proceeds on the footing that P1 was his revolver; but he never resiled from his position that his revolver was a ·450. In support of it he stated that when he tried to use a ·455 bullet it did not go in because it was larger than a ·450. Even in cross-examination he maintained that P1 was his revolver as would appear from the following :—

"18574 Q. You don't know the calibre of the gun which you picked up before you picked up P1? You do not know what the calibre of the other guns were ?

A. No.

18575 Q. If this is a ·455 revolver, then it cannot be the gun which you say you handed to Newton Perera ?

A. This is a ·450 revolver.

18576 Q. If this revolver is a ·455 one—you say that this is the revolver that you handed over to Newton Perera—then it cannot be the revolver that you handed over to him ?

A. It can be similar to my gun.

18577 Q. Yours was a ·450 gun ?

A. I have said that it was a ·450 gun that I gave Newton Perera.

18578 Q. If this is a ·455 gun, then it cannot be the gun used by you ?

A. (No answer).

18579 Q. If this is a ·455 gun, then it cannot be the gun which you handed over to Newton Perera ?

A. Mine is a ·450 gun.

18580 Q. If this is a ·455 gun, then it cannot be the gun that you gave him ?

A. This is a ·450 gun and mine is a ·450 gun.

18581 Q. If this be a ·455 gun, then this cannot be yours, can it be ?

A. No. "

It would have been better if the trial Judge had quite precisely stated, at the time he discussed the identity of P1, that the identity of the revolver was a matter the jury had to decide and if they had any doubt it should be resolved in favour of the accused.

At the same time, it is unthinkable that counsel for the 1st and 2nd accused would not have in their addresses forcefully argued that Ossie Corea's revolver, which according to the evidence of Corea was a ·450, had not been proved to be identical with the crime revolver P1, or that the jury would not in any event have been fully alive to the difficulty created by Corea's evidence on this point. The learned Judge's reference to Mr. Sirimanne's explanation as to the probable reason why ·455 cartridges may at times not fit easily into the chamber of a ·455 revolver was without meaning, save as a reference to the prosecution's answer to the doubts as to the identity of P1. He should undoubtedly in the summing-up have prefaced the reference to Sirimanne's evidence by a statement of the defence position that P1 could not have been Corea's revolver, because Corea had claimed his to be a ·450 and not a ·455. But there is no reason to think that despite his omission to do so, the jury were not in possession of the defence position on this point.

The complaint that the trial Judge in his summing-up laid too much emphasis on the arguments of counsel for the prosecution and gave too little attention to the submissions of counsel for the defence has some justification. It cannot be said, however, that in this case that irregularity has occasioned a miscarriage of justice.

The complaint that far too many leading questions were put to the witnesses on aspects of the case in which they should not have been led is not without justification. The transcript shows that the defence counsel did on some occasions object to the manner in which witnesses were being asked leading questions on crucial matters. Whenever objection was taken the particular question was recast, but counsel lapsed thereafter into the same irregular practice. The fact that section 142 of the Evidence Ordinance provides that leading questions must not, if objected to by the adverse party, be asked in examination-in-chief or in re-examination, except with the permission of the Court cannot be regarded as authorising the prosecution to lead its witnesses on crucial matters. It is difficult for the trial Judge or the defence counsel to keep a close watch on every question asked by counsel especially in a long trial. The greater is the duty therefore of the prosecution to be careful not to put leading questions on important matters and thereby impair the value of the answers so given. It cannot be gainsaid that leading questions deprive the answers given to them of their cogency and value.

The next ground is one of some importance and was argued by learned counsel at some length. The 5th accused gave evidence in his behalf as he was entitled to do; but in doing so involved the 1st, 2nd and 4th accused. His evidence occupies 444 pages of the transcript. Of that the cross-examination by the Crown takes up 181 pages. The accused showed so great an inclination to involve his co-accused that the trial Judge at one stage asked his counsel the question—

" Are you prosecuting in this case or defending the fifth accused ? "

He also observed further—

" Why are you worried about questions to show that the first accused is not what he appears to be. "

and added at another stage of the examination-in-chief :

" I do not think I can allow the line of questioning which you were about to pursue. I am not saying that I have made up my mind on this matter, that in all circumstances I will not allow such questions to be put; but having regard to the context of things, I cannot allow questions which are indicative of what the witness felt was the standard of behaviour of the first accused. "

Under this head learned counsel submitted that the evidence of the 5th accused was not admissible against the 1st accused, and that the jury should have been directed not to regard it as evidence against him. He relied on section 120 (6) of the Evidence Ordinance which reads—

" In criminal trials the accused shall be a competent witness in his own behalf, and may give evidence in the same manner and with the like effect and consequences as any other witness, provided that so far as the cross-examination relates to the credit of the accused, the court may limit the cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness. "

The provision is intended to enable an accused person to give evidence in his own behalf, viz., for himself. There would be no difficulty in a case where a single accused is tried ; but a difficulty arises where, as in the instant case, several accused are tried together and one of them gives evidence in his own behalf and in doing so implicates the other accused. In considering this question it is well to bear in mind that there are two aspects to it. One is where an accused while giving evidence in his own behalf incidentally says something which inculpates a co-prisoner with no intention of using his right to give evidence in his own behalf for the purpose of giving away his co-prisoners ; the other is where an accused person abuses his right of giving evidence in his

own behalf by making use of the opportunity to shift the entire burden on his co-prisoners by inculpating them and exculpating himself. In the ordinary case it may be difficult to distinguish one from the other; but in the instant case the defence submission has been that the 5th accused who exercised his right of giving evidence in his own behalf went out of his way to implicate his co-accused and became for all intents and purposes a Crown witness against the 1st and 2nd accused. This criticism has not much validity in regard to the evidence-in-chief of the 5th accused. In the face of Corea's evidence he might well have been convicted unless he succeeded in satisfying the jury that the revolver given to him by Corea had passed from his possession without knowledge on his part that it would be used for the commission of this particular crime. His implication of the three other accused was an integral part of the explanation of his own conduct which he furnished in his evidence. In regard to cross-examination, however, the fact that prosecuting counsel seized the opportunity to bring out many matters quite unfavourable to the 1st accused during the cross-examination of the 5th accused is to be much deprecated. But not much blame can attach to the 5th accused himself for answering the numerous questions which were put to him in the course of the cross-examination.

Learned counsel drew our attention to the fact that the cross-examination by the Crown was characterised by an unsually large number of leading questions of a character prohibited by section 143 of the Evidence Ordinance, where the question put into the mouth of the witness the very words which he was to echo back. Learned counsel in the course of his reading of the evidence paused to draw our attention to the more glaring of such instances. Even they are too many to bear reproduction in this judgment.

Although a co-accused who gives evidence in his own behalf does not stand in the same position as an accomplice where the evidence by which he seeks to exculpate himself is concerned, his evidence, in so far as it incidentally inculpates the other accused standing their trial along with him, must be treated in the same way as the evidence of an accomplice because there is always the danger of his seeking to exculpate himself and shift the blame on to the others and the jury should, as the learned Judge has rightly done in the instant case, be warned of the danger of basing a conviction on the evidence of a co-accused unless it is corroborated in material particulars. But learned counsel for the 1st accused goes much further; he submits that in so far as our law is concerned the evidence of a co-accused which inculpates an accused standing his

trial along with him should be disregarded and treated in the same way as a confession of a co-accused which affects other accused. Where a confession made by an accused jointly tried with others is proved, section 30 of the Evidence Ordinance provides that the Court shall not take into consideration such confession as against the others. This is how the section reads—

> " Where more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court shall not take into consideration such confession as against such other person. "

Learned counsel submitted that this section applies even to confessions made in the witness-box by a co-accused giving evidence in his behalf. It is difficult to find support for the contention of learned counsel in the language of the section. The words " and a confession made by one of such persons is proved " can hardly be said to apply to evidence given by an accused in his own behalf. Though he may admit the commission of the offence in the course of his evidence it would be inappropriate to regard such evidence as " proving " a confession. The evidence by which a person owns his crime is the confession itself and he confesses in Court. The words " a confession . . . . is proved " are designed to meet the case of extra-judicial confessions which are admissible in evidence and do not include evidence by which an accused person inculpates himself and others in the witness-box. Learned counsel submitted that *Rex v. Ukku Banda*[1] did not apply to the instant case and that, if it did, it was wrongly decided. That case is a decision of five Judges of the Supreme Court upon a reference made under section 355 of the Criminal Procedure Code and section 54A of the Courts Ordinance.

The full Court in *Ukku Banda's* case (*supra*) decided that the proper direction to be given to the jury in a case where a co-accused gives evidence inculpating an accused jointly tried with him was " that while they should be very careful in acting upon such evidence, in view of the temptation which always assails a prisoner to exculpate himself by inculpating another, yet, that subject to that warning, they must weigh and consider evidence so given against another prisoner. "

As has been pointed out in *Ukku Banda's* case (*supra*) our law is not widely different from the English law after the passing of the Criminal

[1] *(1923) 24 N. L. R. 327.*

Evidence Act 1898. In the case of *Hadveen*[1], which is cited in *Ukku Banda's* case (*supra*) as being a case which gave the full bench some occasion for thought, the question for decision was whether where two persons are jointly indicted for an offence and one elects to give evidence he may be cross-examined on behalf of his co-defendant because in some cases the Judge's direction to the jury to disregard such evidence would not be an effective protection, and because counsel for a co-prisoner would be better instructed and feel it fitting to cross-examine more strictly than prosecuting counsel. Lord Alverstone's judgment with which four of the Judges concurred proceeds on the assumption that the evidence of a co-accused which inculpates another should be disregarded where it affects the co-accused. Wright J., while expressing the view that, except section 1 (*f*) (iii), the Criminal Evidence Act 1898 contains nothing that tends to abrogate the ordinary rule that what one defendant says should not be admissible as evidence against another defendant, founded on the obvious temptation to one co-defendant to endeavour to shift the blame on to his co-defendant, said, " If this rule is abrogated, I agree with the judgment of my Lord ". In *Rex v. Paul* [2] the point for decision was whether the Crown was entitled to cross-examine a co-accused who goes into the witness-box, even if his evidence in chief is merely " I plead guilty ", with a view to incriminate a person charged jointly with him, and it was held that the Crown was. But, in the later case of *James Richards* [3], where the main question for decision was whether there should have been separate trials, after explaining the decision in *Bywaters* [4] as holding that where it appears that the essential part, or an essential part, of one prisoner's defence is, or amounts to, an attack upon another prisoner, then a separate trial should take place, Lord Hewart observed—

> " They were not called as witnesses for the prosecution. They went into the witness-box to give evidence, and they gave evidence, on their own behalf, and the rule with regard to corroboration of accomplices does not seem to apply to such a case."

After having quoted a passage from the *Baskerville* case on the rule of practice as to corroborative evidence he proceeded—

> " In no respect is it true to say that the evidence, which is referred to in this part of the notice of appeal, was evidence called by the prosecution nor was the jury being asked by the prosecution to act upon the evidence given by either of those two women. One looks in vain for any case in which it has been decided that, where prisoners are tried together on the charge of being jointly concerned in the commission of a crime and they elect to give evidence, and in so doing

[1] *20 Cox's Criminal Cases 206 (1902).*
[2] *(1920) 14 Cr. App. R. 155.*
[3] *(1940) 27 Cr. App. R. 154.*
[4] *17 Cr. App. R. 66.*

one of them happens incidentally to give a piece of evidence which tells against another of the persons accused, it is requisite that the warning with regard to the evidence of accomplices should be given."

These words presuppose a case in which the evidence against the other accused is incidental and on which the prosecution does not rely, for, the judgment goes on to say—

" In the opinion of this Court, on the facts of this case, and upon the evidence in this case, the necessity for a warning with regard to the evidence of accomplices did not arise. Even if it had arisen, it is manifest that there was ample and cogent evidence which made it clear what the verdict ought to be. There was ample evidence, apart from that evidence which is said wrongly, as it appears to us to have required corroboration."

It would appear from the report of this case in (*1940*) *2 All E. R. 229* that at the trial Singleton J. directed the jury that the evidence of each co-prisoner should be regarded in so far as it affects him and not the others. His summing-up was characterized as " careful, systematic and full ". The L.C.J. added " in our opinion there is no ground for the contention that in any of the respects referred to in the grounds of appeal the summing-up was defective ".

In the case of *Meredith and two others*[1] a case in which co-accused had given evidence affecting others the trial Judge summed-up as follows :—

" These men all made statements, and it is impossible for you to listen to all those statements and not to realise that they are statements which may implicate some persons other than the men making them. You will do your best, members of the jury, to remember that those statements are only evidence against the persons who make them. I will go further than that. When the individual making a statement of that sort comes into the witness-box and gives evidence on oath, it is a different situation. What he says then does become evidence against the other person, but I endeavour in this class of case when there are a number of prisoners in the dock always to warn juries that so far as possible they should not use any evidence given by a person who is accused when he is in the witness-box against anyone of his co-defendants. So far as his evidence is concerned, use it for the purpose of seeing whether he gives you an explanation which may be

[1] *29 Cr. App. R. 40.*

true or an explanation which leads you to disbelieve him and therefore to convict him, but try as far as possible not to use any one prisoner's evidence as evidence against one of his colleagues."

Caldecote Lord Chief Justice who presided over the Court of Criminal Appeal described this summing-up thus—

"In our Judgment, that was a proper direction and one that was fair to each of the appellants."

The case of *Garland* which appears as a note to *Meredith* in *29 Cr. App. R. at 46* cannot be taken as giving a decisive unqualified opinion on the point because the judgment proceeds—

"Is the other evidence in this case, apart from that of the woman co-defendant of the appellant, clear and convincing to such an extent that this Court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction to the jury."

and after a review of the evidence concludes—

"The evidence of corroboration was clear and convincing. We are satisfied that if there had been direction to the jury on the subject of accomplices, which we regret was not given, it would have made no difference to the result of the case. On that ground we dismiss the appeal."

In the later case of *Rudd*[1] Humphreys J. in delivering the judgment of the Court expressed the view that the evidence of a co-accused was admissible, that he was liable to be cross-examined but that there should be a direction against the danger of acting on the testimony of a co-accused unless the jury finds that it is corroborated. Humphreys J. then proceeded to make a reference to the following passage occurring in the First Supplement to the edition of Archbold then current :—

"Where several prisoners are tried jointly, and one or more of them gives evidence on oath, it may in some cases be desirable that the jury should be directed that, although the evidence given by one prisoner does in those circumstances strictly become evidence against his co-prisoners, they should not regard it as such, but should use that evidence only for the purpose of considering whether that individual prisoner has given an explanation which may be true, or whether his evidence compels the jury to disbelieve him."

and state—

"When the matter is looked at in that light, we agree that there may be causes in which it is desirable that that course should be taken."

[1] *32 Cr. App. R. 138.*

This statement in the supplement is now incorporated in the 34th Edition, section 566. The words quoted above are important and it is well to bear in mind that while the evidence of a co-accused is evidence in the case and is not to be shut out in the consideration of the case of the others merely because something has been said involving them, there can arise particular cases in which the jury should be directed as in *Meredith* or in *Rudd*.

The authoritative view taken in Scotland on this subject of evidence of a co-prisoner is in *Young v. H. M. Advocate* [1] where Lord Justice-General Clyde states the law thus at p. 73—

> " The general principle of the law of Scotland—apart from the Act of 1898—is that evidence led for the defence of one co-accused is not admissible against another co-accused. . . . The right of cross-examination is always subject in Scotland to the control of the trial Court ; and, if (as in *Rex v. Paul*) one of the accused used his right to be called as a witness for the defence simply to plead guilty in the box, it must not be assumed that, in Scotland, either his co-accused or the prosecutor would be entitled *eo ipso* to cross-examine him in order to incriminate others of the co-accused. Further, it may well be that a prosecutor is not entitled, under the cloak of cross-examination, to examine an accused upon matters irrelevant to the question of his own guilt, and extraneous to any evidence he has given, in order to make him an additional witness against his co-accused."

Having regard to the trend of judicial opinion both in England and Scotland, in which countries the law in regard to the right of an accused to give evidence is the same, it would appear that it is the duty of the trial Judge to be vigilant to see that the fact that the evidence given by a co-accused is evidence in the case is not abused by either an accused or the prosecution, by one or both of them making use of the opportunity to invite the co-accused to inculpate the others by a cross-examination designed to encourage him to do so.

In the instant case the learned trial Judge made his opinion that they should not act on the 5th accused's uncorroborated testimony quite clear to the jury, but at the same time he indicated that a conviction was not illegal merely because it proceeds upon on his uncorroborated testimony. A co-accused is in the strict sense of the term not an accomplice. An accomplice so far as the Evidence Ordinance is concerned is a guilty participator in the crime under trial who gives evidence for the prosecution. A co-accused does not fall within that expression in the Evidence Ordinance. His evidence in so far as it affects the others undergoing trial jointly with him has to be treated with the same and even greater caution depending on the circumstances of each case. In dealing

[1] *(1932) J. C. 63 at 71 et seq.*

with the question of accomplices the learned trial Judge early in the charge told the jury that in regard to Newton Perera they *must* treat his evidence as the evidence of an accomplice, and in regard to Carolis Amarasinghe they *should* regard his evidence in the same manner as that of an accomplice. He then went on to say that these were words of caution and that he would address them on the strict legal position which he immediately proceeded to do. Having first explained the meaning of the term ' accomplice ' he went on to say—

> " In some cases the Judge may properly rule that there is evidence that the witness was a participant in the crime. I am not going to make that ruling in this case. In the case of either of these witnesses I leave it entirely to you. . . . That will be your function in this case. . . . In this case both witnesses with whom we are now concerned—Newton Perera the 5th accused, and Amarasinghe—deny complicity in the crime of conspiracy to murder and the issue whether they are accomplices is entirely one of fact and therefore solely within your province. "

The use of the words " must "and " should " in the course of the learned Judge's earlier observations can therefore be regarded as nothing more than an invitation to the jury to regard these two witnesses as accomplices. Indeed earlier and subsequent observations by the learned Judge leave no room for doubt that in his opinion the jury would be well advised to proceed on the footing that they were accomplices, but he did not take the matter completely out of their hands. On the contrary he expressly left it to them for their decision.

The learned trial Judge having correctly directed the jury in regard to the law governing the evidence of accomplices proceeded to state that even if the jury formed the opinion that either Carolis Amarasinghe or Newton Perera was an accomplice, if they were so impressed with his evidence as to be satisfied that he was speaking the truth it was open to them, keeping in mind the warning given, to act upon his uncorroborated testimony. Having regard to the direction given to the jury it would not be correct to speculate what course of action the jury took in regard to the manner in which they should treat the evidence of Newton Perera or Carolis Amarasinghe. These observations apply equally to the cases of the 1st and 2nd accused.

This is a convenient point at which reference may be made to a matter which learned counsel submitted totally impairs the evidence of the 5th accused so far as it affects the others. It would appear that while the 5th accused was under cross-examination his counsel conferred with him for several hours on more than one day on the matter of his evidence. Even the counsel for the prosecution who said that he saw nothing wrong in it

was constrained to admit that that fact would lessen the value of the evidence given by the 5th accused thereafter. This is the evidence on the point—

" 27157 Q. Your Counsel visited you during this week-end ?

A. Yes.

27158 Q. How many such hours did you spend over this week-end ?

A. I think about four or five hours.

27159 Q. How many hours did you spend with him on Saturday last ?

A. About two hours.

27160 Q. At what time did he come there ?

A. I think he came there at 11 a.m.

27161 Q. He was there with you till 1 o'clock, was he ?

A. Yes.

27162 Q. Yesterday, Sunday, was he there with you, both in the morning and in the evening ?

A. Yes.

27163 Q. How many hours in the morning ?

A. I think about two hours in the morning.

27164 Q. How many hours in the evening ?

A. About 45 minutes in the evening.

27165 Q. This is in the middle of your being cross-examined by me ?

A. Yes.

27166 Q. Discussing with him, were you not, the evidence you were giving ?

A. Yes, I discussed the evidence with him."

It is an unwritten rule that except in the case of expert witnesses counsel does not interview a witness once he is in the witness-box and once the cross-examination commences even an expert is not interviewed.

Learned counsel's action in discussing the evidence with the accused while under cross-examination is such a grave departure from that rule that the Court cannot refrain from expressing not only its disapproval of his action but also its censure.

The ground that the demonstration given by the Government Analyst of firing with revolver P1 prejudiced the accused is not one which the Court can uphold as all the defence counsel were specifically asked by the trial Judge whether they objected to the demonstration and everyone of them said that they did not object (1699). In fact junior counsel for the 1st and 2nd accused took an active part in the demonstration.

The case of the 2nd accused now calls for consideration. On certain matters already discussed the evidence affects the 1st and 2nd accused equally. On those points learned counsel for the 2nd accused was content to adopt and abide by the arguments addressed to the Court on behalf of the 1st accused. The main submissions argued on his behalf are that the verdict was unreasonable and that a statement made by him to the police had been improperly admitted.

The main prosecution evidence against the 2nd accused consists of that of Carolis Amarasinghe the alleged accomplice, Kelanitillake, and Kalansuriya. The evidence of Amarasinghe was that on all the occasions on which the 1st accused came, before the assassination to his house, the 2nd accused drove his car and was in a position to see what the 1st did on those occasions and hear what he said. About a month before the shooting the 2nd accused came by himself to take medicine, Amarasinghe being his family physician. Then he asked him, " Jaye, what is this Somarama referring to about shooting practice ? ". He replied, " That is all a lie. They have given up those ideas. It is all false. " The next time the 2nd accused came was on 26th September at about 6.30 a.m. to borrow Rs. 100 which he gave him. He next met him at Kelaniya Vihare on 12th October. On that occasion it was, in the hearing of the 2nd accused, that the 1st accused said, " Vedamahattaya, you need not fear anything. Everything that needs to be done has been done. If necessary we will appeal even to the Privy Council." The next point at which Amarasinghe's evidence affects the 2nd accused is when he says that at the Harbour Police Station the 1st accused said to the 2nd accused when they were in the cell on 14th October, " Jaye, do not know whether Anura will tell " (85). Thereafter, after Amarasinghe had made a statement to the Magistrate, he says all the accused threatened him, and that 2nd accused was the one who threatened him most. His evidence on this point reads—

" He asked me whether my intention was to give evidence against them and then to practise my profession and also live with my wife and children. They told me that I would be destroyed along with my house."

Kelanitillake refers to his presence only once at the Kelaniya Vihare. He says—

(*a*) that the 2nd accused was at the temple in the afternoon of 25th September and hearing his conversation with the 1st accused and said, " That is so Vedamahattaya. That is why I am waiting."

(*b*) that he followed Dickie Zoysa and others to the room of the 1st accused and that he appeared to be in an excited state.

Kalansuriya's evidence is that the 2nd accused asked him to give security in Rs. 175,000 in connexion with the Sugar Factory at Kantalai by mortgaging his lands ; but that ultimately the security was not needed. It was a business transaction. Kalansuriya hoped to make Rs. 20,000 out of it. He also gave evidence of conversations with him about 19th September and 28th September. On the former occasion when he remarked to the 2nd accused, " What is the meaning of this useless Government ! The prices of things are going up and the unemployment problem is on the increase.", he replied, " Within a week 'Sevala' Banda's Government will be over." On the latter occasion, after the assasination when Kalansuriya observed, " Things happened exactly as you said.", the 2nd accused explained, " No, no, I did not say like that." Kalansuriya says he then asked, " Then how did you say it ? ". To that he replied that there was a fatal sign in the deceased's horoscope on 25th September. Kalansuriya admitted in cross-examination—

(*a*) that he had said in the lower Court that everybody including himself was dissatisfied with the Bandaranaike Government.

(*b*) that it was his view that Mr. Bandaranaike's Government might fall at any time.

(*c*) that according to the conditions prevalent at that time he expected the Government to fall at any moment.

(*d*) that he said in the Magistrate's Court that Mr. Bandaranaike was getting personally unpopular.

(*e*) that politicians and leaders of the Opposition used to call the deceased " Sevala Banda ".

In the light of these admissions counsel's submission that neither Kelanitillake's nor Kalansuriya's evidence regarding the 2nd accused can be regarded as corroborative of Amarasinghe's in material particulars is not without merit. One important bit of evidence relied on by the

prosecution against the 2nd accused was his own statement to the police. That evidence was objected to as inadmissible. The questions and answers which have a bearing on the evidence objected to are—

" 24384 Q. You remember I was questioning you at the time you were asked to stand down about whether you ascertained from the 2nd accused where he was on the morning of 25th September 1959 ?

A. Yes.

24385 Q. Did he tell you where he was on the morning of the 25th ?

A. Yes.

24386 Q. Where did he tell you as to where he was on the morning of the 25th ?

A. He told me that at 8.40 a.m. that day he drove to Mr. K. C. Nadaraja's bungalow at No. 8 McCarthy Road."

It is submitted that the statement, " He told me that at 8.40 a.m. that day he drove to Mr. K. C. Nadaraja's bungalow at No. 8 McCarthy Road", being a statement made to a police officer in the course of an investigation under Chaper XII of the Criminal Procedure Code, cannot be used except for the purposes prescribed in section 122 (3). The learned trial Judge was inclined to agree with the submissions of counsel for the defence but he admitted the evidence as he felt he was bound by the decisions of this Court in *Thuraisamy v. The Queen* [1] and *Regina v. Anandagoda* [2] to do so. In *Thuraisamy's* case (*supra*) the point now taken by counsel was not advanced or considered. There it appears to have been *assumed* that statements obtained from an accused person by a police officer acting under Chapter XII could be proved under section 21 of the Evidence Ordinance where such statements were admissions.

In the *Anandagoda* case (*supra*) too the point raised in the instant case was not taken, nor was *Rex v. Jinadasa* [3] referred to even in that case. In *Anandagodage's* case (*supra*) counsel urged that the statements of the accused when taken as a whole amounted to a confession, and as the statements were made to a police officer by an accused person, proof of them against the accused was prohibited by section 25 of the Evidence Ordinance. The Court held that those statements did not amount to a confession as defined in the Evidence Ordinance. It would appear therefore that neither of the cases referred to are decisions on the point raised by counsel. It was assumed in both cases that proof of

[1] *(1952) 54 N. L. R. 451.* [2] *(1960) 62 N. L. R. 241 at 252.*
[3] *(1950) 51 N. L. R. 529.*

an admission, which does not amount to a confession, made by an accused to a police officer investigating an offence under Chapter XII was not excluded by any statutory enactment.

The submission of learned counsel for the 2nd accused in the instant case that a statement made to a police officer investigating a cognizable offence under Chapter XII cannot be used except for the purposes mentioned in section 122 (3) of the Criminal Procedure Code was decided in the case of *The King v. Haramanis* [1]. Although the appeal was allowed on the ground that the Judge in his charge to the jury, had made an erroneous statement of fact in regard to a vital issue in the case, the Court nevertheless went on to consider the other two grounds of appeal—

(*b*) That there was misreception of evidence in the proof by the Inspector of Police of the statement made to him by the accused under section 122 (3) of the Criminal Procedure Code.

(*e*) That there was no direction in the charge that the statement referred to in (*b*) was not original evidence against the accused.

The piece of evidence objected to was elicited in this way. While under cross-examination by counsel for the accused, Inspector Doole stated that the accused made a statement to him voluntarily in which he said that he had a sword which he had thrown into the ela. The Inspector also went on to say that the accused did not say that he used that sword on that particular night or that he had been to the temple that night. At the end of his testimony the Inspector in answer to questions put by the Court stated as follows :—

" This is a part of the statement to me by the 1st accused which was recorded by me. On the morning of the 29th at about 10 a.m. when I was ploughing a field I heard that the police had been informed. I did not go to the Temple. I had a sword at home. Immediately after the murder I threw it into the ela for I feared that I could be unnecessarily implicated. I can point out where the sword is now. I know nothing about the murder. "

The Crown contended that—

(*a*) the statement did not fall within the ambit of section 122 (3) as it was not made in the course of an investigation under Chapter XII of the Code.

(*b*) section 122 (3) only limits the use of the written record of a statement. Oral evidence of such statement is not subject to such restrictions.

[1] *(1944) 45 N. L. R. 532.*

The Court held against the Crown on (*a*) and proceeded to consider (*b*). Its conclusion on (*b*) is thus expressed—

> " Although on the wording of section 122 the question cannot be said to be free from doubt, we are of opinion that on the various authorities I have cited oral evidence of a statement made under section 122 is not subject by virtue of subsection (3) to the limitation imposed by that subsection and can be given in evidence under section 157 of the Evidence Ordinance. "

It next proceeded to consider whether section 91 of the Evidence Ordinance barred oral evidence and came to the conclusion that it did. The conclusions are summarised as follows :—

> " (1) A statement made to a police officer or inquirer by any person, which expression includes a person accused in the course of an investigation under Chapter XII of the Criminal Procedure Code, must be reduced into writing.
>
> (2) By reason of section 91 of the Evidence Ordinance only the written record of a statement within the ambit of (1) is admissible in evidence. *Hence oral evidence of such a statement is inadmissible.* The effect of our finding on this point is to render the words, 'or to refresh the memory of the person recording it', almost nugatory, since there would appear to be no circumstances in which oral evidence regarding the content of the statement would be admissible. This is one of the matters to which we would invite the attention of the Legislature.
>
> (3) The written record of such a statement is admissible by virtue of section 122 (3) of Cap. 16 to contradict a witness after such witness has given evidence.
>
> (4) The written record of the statement of a witness used as formulated in (3), is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section 155 of the Evidence Ordinance.
>
> (5) If it had not been for the prohibition contained in section 91 of the Evidence Ordinance, oral evidence of a statement made under Chapter XII of the Criminal Procedure Code might be tendered not only to contradict a witness, but also under the provisions of section 157 to corroborate the testimony of such witness. Such oral testimony would again not be substantive evidence of the facts contained therein, but merely corroboratory. "

Six years after this decision the majority of a bench of five Judges of this Court in *Rex v. Jinadasa* (*supra*) expressed their dissent from the conclusion that section 91 of the Evidence Ordinance barred the reception of oral evidence of a statement recorded under section 122 of the Criminal Procedure Code. In doing so they stated—

> " The majority of us are, therefore, of opinion that the words ' And in all cases in which any matter is required by law to be reduced to the form of a document ' in section 91 of the Evidence Ordinance do not apply to the record which has been made under section 122 (1). "

*Jinadasa's* case (*supra*) first came up for hearing before a bench of three Judges who adjourned the hearing as the question raised by counsel for the appellant appeared to them to be one of considerable importance. That question arose in this way. In consequence of what the accused had told the Inspector who was investigating the offence the accused was taken to the place near which the crime weapon was found by the Inspector. The relevant portion of the Inspector's evidence as quoted in the judgment reads :

" Q. Did you search for anything when you went to the scene ?

A. I searched for a katty.

Q. Was the katty found ?

A. I found a katty.

Q. In consequence of what did you search for it ?

A. In consequence of a statement made by the 1st accused to me.

Q. Referring to what ?

A. Referring to the katty.

Q. What did he say ?

A. He said : ' I can point out the place where I threw it.' I produce a certified copy of it marked X2. The katty was found on the top of some bata bushes. 1st accused pointed the katty out and he had to shake the bata bushes and the katty fell. The bata bushes were by the side of the road about ninety feet from the place where the blood trail started. The katty was visible to anybody who was looking about the place.

Q. Anyone looking from the road could not see it ?

A. It was not visible to anyone looking from the road. At the time I took charge of P4 there was something like human hair on one side of the blade. I produced P4 before the Magistrate, Matara."

On this material the Court posed the following questions as the questions arising for decision thereon :—

" The questions for decision are whether oral evidence of what the appellant said leading to the discovery of the katty and the document X2 were rightly admitted ? "

The Court then proceeded to consider section 27 of the Evidence Ordinance and sections 121 and 122 of the Criminal Procedure Code and the decisions thereon, and formed the following conclusion :

" The ' information ' referred to in section 27 of the Evidence Ordinance is the oral statement of the accused himself, whereas the document contemplated in section 122 (3) of the Criminal Procedure Code is not a statement by the accused but another person's record of an oral statement which is alleged to have been made by the accused. *Therefore, the conclusion which the majority of us reach is that there is nothing in section 122 (3) which acts as a bar to the full operation of the provisions of section 27 of the Evidence Ordinance or the admission of an oral statement made by an accused person to a police officer for the purposes of section 27. There is nothing in section 122 (3) which prohibits oral evidence being given of so much of the statement made by an accused which is relevant under section 27 of the Evidence Ordinance as relates distinctly to a relevant fact thereby discovered.*

" My Lord the Chief Justice takes the view that in view of the language of section 122 (3), which enables oral evidence to be led of a statement, the provisions of section 91 of the Evidence Ordinance are not applicable, and that, therefore, it was permissible for the prosecution to lead oral evidence of the statement made by the accused which led to the discovery of the katty.

" With regard to the admission of the written record of that oral statement X2, we are of opinion that its admission was improper and not permitted by section 122 (3). Whether that irregularity vitiates the conviction in this case, we shall now proceed to consider. "

The decision in *Jinadasa's* case (*supra*) upon the question which arose for decision there is that stated in the words italicized in the passage quoted above. That case also decided that proof of such information by the production of the written record of the statement in the Information Book is prohibited by section 122 (3). In recent times a practice has grown of extending the scope of *Jinadasa's* case to statements not falling within the ambit of section 27 of the Evidence Ordinance. Under the supposed authority of that case oral utterances made to police officers in the course of investigations under Chapter XII have been proved under section 21 and section 157 of the Evidence Ordinance. There is no authority in that decision for the proposition that evidence of an oral utterance to a police officer in the course of an investigation under

Chapter XII or any record of such utterance is admissible in evidence either as an admission under section 21 or as corroboration under section 157 of the Evidence Ordinance.

It is necessary therefore to examine the point arising on the submission of counsel on its merits. At the outset it should be stated that no decision of the Supreme Court or of this Court has been cited to us in which it was argued and expressly decided that statements made by an accused person to an officer investigating a cognizable offence under Chapter XII may be proved contrary to the prohibition in section 122 (3) except in a case to which section 27 of the Evidence Ordinance applies.

When the Code was enacted in 1898 police officers were not given the power of investigating cognizable offences. That power was conferred only on Inquirers. Later it was felt that that power should also be conferred on officers in charge of police stations and Chapter XII of the Code was amended by the Criminal Procedure Code Amendment Ordinance, No. 37 of 1908. Although the Chapter was recast it remained in substance the same except for the power conferred on officers in charge of police stations and the institution of the ' Information Book ' and the abolition of the diaries kept by the inquirers. The Chapter has as its heading " Information to Police Officers and Inquirers and Their Powers to Investigate ". Section 121 deals with information relating to the commission of a cognizable offence given to an officer in charge of a police station. It requires that the information when given orally should be reduced to writing by him or under his direction and read over to the informant, and that the person giving it should sign the writing made by the officer or under his direction. The section also enables the information to be given by the informant in writing instead of orally, for it provides that a copy of the information whether given in writing or reduced to writing shall be entered in ' The Information Book '.

Although the section provides that the ' Information Book ' shall be kept in such form as the Minister may prescribe, no form has yet been prescribed. Nevertheless there is in fact in every police station a book called ' The Information Book ' in which information relating to the commission of cognizable offences is entered. The question whether those books are the books contemplated in the statute does not arise for consideration here. Section 121 (2) then goes on to provide that if from information received or otherwise an officer in charge of a police station has reason to suspect the commission of a cognizable offence he shall forthwith send a report of the same to the Magistrate's Court having jurisdiction in respect of such offence or to his own immediate superior and shall proceed in person to the spot to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender. An officer in charge of a police station is empowered to depute one of his subordinate officers to proceed to the

spot to make such investigation. Any police officer making an investigation under the Chapter is empowered to require, by order in writing, the attendance before himself of any person being within the limits of the station of such police officer or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case and such person is bound to attend as so required. It is significant that the power to issue a warrant to secure the attendance of such person, when any person required to attend refuses or fails to do so, is conferred on inquirers alone and is not given to police officers.

Section 122 empowers any police officer making an inquiry under Chapter XII to examine orally any person " supposed to be acquainted with the facts and circumstances of the case " and reduce into writing any statement made by the person so examined. The section expressly prohibits the administration of an oath or affirmation to any such person and the signing of the record of the statement made by such person. The enactment, by implication, requires that the statements made by persons examined orally by a police officer making an inquiry under Chapter XII should, wherever possible, be recorded in the " Information Book " in the first instance. But when it is not possible to do so it requires that a true copy thereof should as soon as may be convenient be entered by such police officer in the " Information Book ". Subsection (2) of section 122 provides that a person examined orally under section 122 (1) by an officer making an inquiry under Chapter XII is bound to answer truly all questions relating to the case under inquiry put to him by such officer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

The material portion of subsection (3) which is the provision that calls for interpretation for the purpose of deciding the question raised by counsel reads—

> " No statement made by any person to a police officer or an inquirer in the course of an investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. "

Does the word ' statement ' where it first occurs in the subsection include both the words spoken by the person examined and the record of it made in writing by the examining police officer? Having regard to the context in which it occurs both the spoken and the written word appear to be contemplated, i.e., the spoken word as well as the record of it. A reference to section 125 of Chapter XII of the Criminal Procedure Code as originally enacted confirms this view. That section reads—

> " No statement other than a dying declaration made by any person to an Inquirer in the course of any investigation under this Chapter shall if reduced to writing be signed by the person making it or shall be used otherwise than to prove that a witness made a different statement at a different time. "

This provision applies both to the spoken and written word. There is nothing in the new Chapter XII which indicates that the Legislature intended to make a far reaching change in the law when it re-enacted that Chapter in order to extend to police officers in charge of police stations the power to investigate cognizable offences. In this view of section 122 the use of the oral statement made to a police officer in the course of an investigation under Chapter XII is as obnoxious to it as the use of the same statement reduced into writing.

The evidence of the statement made by the 2nd accused to the police officer investigating the offence should not have been admitted. It was used against him by the prosecution. It is referred to in the summing-up :

> " The prosecution says that No. 8 McCarthy Road, is practically a stone's throw from Mr. Bandaranaike's garden. The prosecution seeks to utilize the 2nd accused's statement as evidence which indicates that the 2nd accused was at a very advantageous place in order to see for himself whether the plan was going to be successful or not. "

The improper admission of this evidence is by itself not a ground for a new trial or reversal of the verdict, if independently of the evidence objected to and admitted there was sufficient evidence to justify the verdict. Having regard to the totality of the evidence against the 2nd accused it appears to the Court that there was sufficient evidence to justify the verdict independently of the evidence improperly admitted.

Little need be said concerning the charge of conspiracy against the 4th accused. He had no grievance against the deceased and was only the instrument by which others achieved their end. In his confession he says that the deceased had done him no wrong. In his case, Amarasinghe's evidence that he said that he practised firing with a revolver to shoot the Prime Minister is corroborated by the fact that he shot the deceased with a powerful revolver. No more corroboration need be looked for as his act provides corroboraton in the most material particular. It is therefore unnecessary to discuss further the charge of conspiracy against the 4th accused. Most of the important grounds urged in regard to the 1st and 2nd accused do not arise in his case. The evidence of the Amara Vihare group of witnesses established that the 4th accused was in contact with the 1st and 2nd accused and in conclave with the 1st accused during the period immediately preceding the shooting.

There remains for consideration only the ground that the sentence passed on the 1st and 2nd accused is illegal. On their behalf it was argued that only sentence of imprisonment for life and not sentence of death should have been imposed upon their conviction, on count (1) of the indictment, of the offence of conspiracy to commit or abet the murder of the

deceased. Until the enactment of the Suspension of Capital Punishment Act No. 20 of 1958 (hereinafter referred to as the Suspension Act) which took effect on May 9th 1958, the punishment for the offence of conspiracy to commit or abet murder was undoubtedly the punishment of death; section 113B of the Penal Code provides that the punishment for that offence is the same as the punishment for the abetment of murder, and under section 102 of the Code the punishment for abetment of murder is the punishment provided by section 296 for the offence of murder itself. Section 2 of the Suspension Act, however, in addition to providing that capital punishment shall not be imposed under section 296 for the commission of murder, also made an alteration in the law affecting the punishment for the offence of abetment of murder and accordingly for the offence of conspiracy to commit or abet murder. While the Suspension Act would be in force section 2 (*b*) provided that section 296 shall have effect as if for the word " death " there were substituted the words " rigorous imprisonment for life ". Clearly therefore by virtue of the Suspension Act a person who committed the offence of conspiracy to murder while the Act was in force became liable to the punishment of rigorous imprisonment for life and not to the punishment of death.

The law however was again altered by the Suspension of Capital Punishment (Repeal) Act No. 25 of 1959 (hereinafter referred to as Suspension Repeal Act) which repealed the Suspension Act. This repeal took effect on December 2nd 1959 some months after the period during which, according to the indictment and verdict in this case, the 1st and 2nd accused committed the offence of conspiracy to commit or abet murder. Taking first section 2 of the Suspension Repeal Act, which section repealed the Suspension Act, it is pertinent to consider the punishment which on and after 2nd December 1959 the law provided in cases of murder, abetment of murder, and conspiracy to commit or abet the offence of murder, where such offences had been committed at any time during the period 9th May 1958 to 1st December 1959. *Prima facie* it might be thought having regard to the repeal of the Suspension Act, that the punishment for any such offence committed during the period aforesaid would be that of death, being the punishment " revived " for the offence under section 296; for as was the case prior to 9th May 1958, the punishment for the offence under section 296 became once again the punishment of death. This impression is however corrected by section 6 of the Interpretation Ordinance (Cap. 2 Revised Ed. 1956 at page 17). The relevant portion of section 6 (3) of the Interpretation Ordinance reads as follows :—

" Whenever any written law repeals . . . in whole or in part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected . . . any penalty . . . incurred under the repealed written law. "

Leaving out of consideration for the moment the words which have been underlined above, the repeal by the Suspension Repeal Act of the Suspension Act, and in particular the re-introduction into section 296 of the Penal Code of the word " death " in replacement of the words " rigorous imprisonment for life " (which latter words had temporarily been substituted into the section in 1958) did not affect the penalty incurred under the repealed law, that is to say under section 296 in the form in which that section stood during the " interval of suspension ", and therefore an offence of murder committed during the interval of suspension would have attracted only the punishment of rigorous imprisonment for life notwithstanding that the conviction for that offence may be entered after the Suspension Repeal Act came into force ; and it would follow that the same would be the case in the event of a conviction for an offence of abetment or conspiracy committed during the interval of suspension.

Turning now to the words from section 6 (3) of the Interpretation Ordinance underlined, there was undoubtedly in the Suspension Repeal Act some provision of the nature contemplated by the words underlined. The relevant part of that Act is section 3 (*a*)—

> " Notwithstanding anything in any other written law, capital punishment shall be imposed—
>
> (*a*) under section 296 of the Penal Code on every person who, on or after the date of the commencement of this Act, is convicted of the offence of murder committed prior to that date ; "

The effect of this section, having regard to its express words, is that the Legislature clearly declared its intention that upon every conviction for the offence of murder entered after 1st December 1959 the punishment to be imposed for that offence shall be the punishment of death, notwithstanding anything in any other written law, the written law here in reference being section 6 (3) of the Interpretation Ordinance. Hence for instance in the case of the 4th accused who has after 1st December 1959 been convicted of the offence of murder committed prior to the coming into force of the Suspension Repeal Act, section 3(*a*) avoids the effect of section 6 (3) of the Interpretation Ordinance by clearly providing for the death penalty for persons in the position of the 4th accused. There is however nothing more in the Suspension Repeal Act in the nature of any express provision to limit the operation of section 6(3) in its application in a case where a person is convicted after that Act of any other offence which at the time of its commission attracted, by reason of the Suspension Act only the punishment of imprisonment for life, and not the punishment of death.

The only argument adduced by counsel appearing for the Crown was quite unconvincing. It was that, since the relevant sections (113B, 102 and 296) of the Penal Code, as they stood at the time of the convictions in this case, provide for the punishment of death for the offence of

conspiracy to commit murder, the trial Judge had by law to impose that punishment. This argument completely ignores the existence and effect of section 6(3) of the Interpretation Ordinance.

We accordingly quash the sentence of death passed on the 1st, 2nd and 4th accused in respect of the first count of conspiracy and substitute therefor a sentence of imprisonment for life.

The sentence of death imposed on the 4th accused in respect of the second count of murder is affirmed.

Subject to the above variation of the sentence passed in respect of the charge of conspiracy the appeals of all the accused are dismissed and their applications are refused.

*Appeals and Applications dismissed subject to the variation that the sentence of death passed in respect of the count of conspiracy is altered to a sentence of imprisonment for life.*