[COURT OF CRIMINAL APPEAL]

1968 *Present :* **Sirimane, J., Alles, J., and Samerawickrame, J.**

THE QUEEN *v.* D. G. DE S. KULARATNE and 2 others

APPEALS NOS. 56–58/68, WITH APPLICATIONS 79–81

S. C. 119/67—M. C. Galle, 48232

Trial before Supreme Court—Evidence—Two persons who could have committed an offence—Inference of guilt against one only of them—Burden of proof then—Statements made by a witness outside the Court of trial—Inadmissibility as substantive evidence—Circumstantial evidence—Trial Judge's emphasis on one hypothesis only in preference to another—Misdirection—Evidence of an expert—Requirement that it should be based on scientific criteria—Production in a criminal case—Mode of proving its identity—Scope of s. 122 (3) of Criminal Procedure Code—Meaning of term " a police officer "—Indictment—Amendment of it by Court—Proper procedure—Unsworn statement of accused from dock—Evidential value—Misdirection on possibility of suicide—Unreasonableness of verdict of jury—Circumstances when trial Judge may direct jury to acquit accused at end of case for the prosecution—Criminal Procedure Code, ss. 121 (2), 122 (3), 172, 173, 176, 234 (1).

The case for the prosecution was that the 1st accused, his mother (the 2nd accused) and their woman servant (the 3rd accused) caused the death of the 1st accused's wife by arsenic poisoning. There was strong evidence of motive against the 1st accused in that there was a great deal of unpleasantness between him and his wife. It was also shown that the 2nd accused had a strong dislike for the deceased. The 3rd accused was alleged by the prosecution to have served the poisoned food on to the deceased's plate on the day in question at the instance of the 1st and 2nd accused. The case against all three accused, however, rested entirely on circumstantial evidence.

The main grounds urged on behalf of the accused-appellants were that it was unreasonable for the jury to have acted on the evidence of the deceased's daughter Achini, the chief witness for the Crown, and that even if that evidence was accepted, there was no basis for a reasonable inference that the poison was contained in the food served by the 3rd accused, as the possibility of the presence of the poison in the food served by one Cicilin (another cook in the same house), who was not called as a witness, had not been excluded. Crown Counsel submitted that Cicilin was not called because there was no evidence of motive against her.

Held, (i) that, when the evidence led for the prosecution lends itself to a reasonable inference that either of two persons could have committed an act, the burden is on the prosecution to exclude one person effectively if it seeks to attach responsibility for that act to the other person ; and the best way—often the only way—in which this can be achieved is by the prosecution calling as a witness the person sought to be excluded. The failure of the prosecution to call Cicilin as a witness resulted in a serious deficiency in the proof of the prosecution case. There was no evidence of motive against Cicilin, but at the same time there was no evidence to show that she had no motive.

(ii) that when a witness is shown to have made a previous statement outside the Court of trial, inconsistent with his evidence at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, but should also be directed that previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act. In the absence of such directions, the jury could well have thought that, however unreliable Achini's evidence in Court might be, her previous evidence at the Coroner's inquest (or later at the non-summary inquiry) was *substantial evidence* on which they could act.

(iii) that where, in a case of circumstantial evidence, the jury are faced with the difficulty of choosing one hypothesis in preference to another, they would only be too strongly inclined to follow the one recommended by the trial Judge, despite the strongest direction that they are free to ignore it and act on their own. The strong suggestion in the summing-up to test Achini's vital evidence on the basis that one only of three possible theories was an established fact was a misdirection.

(iv) that the two "experts"—a Professor of Forensic Medicine and an Assistant Government Analyst—whose evidence was led by the prosecution in an effort to prove that there was Potassium Arsenite in the stomach of the deceased gave their opinion on the basis of criteria an important part of which was such that they themselves considered unworthy of recommendation as a scientific fact. It was, therefore, the duty of the trial Judge to have given a clear direction to the jury to disregard the opinion of the experts altogether.

(v) that in a criminal case the identity of productions must be accurately proved by the direct evidence which is available and not by way of inference. At the trial the Analyst produced the plate on which he found a trace of arsenic, but neither the Police Constable who had brought the plate to him nor Achini who had given it to a Police Inspector was called to identify the plate as the one which was alleged to have been used by the deceased when she took her last meal.

(vi) that the term "a police officer" in section 122 (3) of the Criminal Procedure Code is not restricted to an officer in charge of a police station or one deputed by him. It extends also to other officers who are, in one way or another, in charge of a police station in so far as the investigations are concerned, e.g., an Assistant Superintendent of Police of the town, the Superintendent of Police of the District, the Inspector-General of Police and his Deputies. Accordingly, a statement made by the 1st accused to an Assistant Superintendent of Police in the course of the inquiry under Chapter 12 of the Criminal Procedure Code was governed by the provisions of section 122 (3).

(vii) that a statement made in the course of an inquiry under section 122 of the Criminal Procedure Code can only be used for the limited purpose permitted by that section, viz., to contradict the person making it if he subsequently says something different. It cannot be used to form the basis for an inference that the *conduct* of the person who made it was suspicious.

(viii) that before a charge is amended, particularly at a late stage, the defence should be given an opportunity of making their submissions on the point. Thereafter, if the amendment is made, the defence should be consulted,

again before the Judge decides whether or not to proceed with the trial immediately in terms of section 172 or 173 of the Criminal Procedure Code. In the present case, however, the failure to observe this rule did not cause prejudice to the appellants.

(ix) that when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as *evidence*, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that (*a*) if they believe the unsworn statement it must be acted upon, (*b*) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and (*c*) that it should not be used against another accused. The dock statement of the 1st accused was dealt with in such a manner in the present case that it was likely that the jury thought that they were not called upon to pay any attention at all to that statement.

(x) that there was misdirection when the trial Judge, in effect, withdrew the issue of suicide from the jury although the possibility of suicide arose in the case.

(xi) that, quite apart from the misdirections which must have prejudiced the appellants, the verdict of the jury was unreasonable and, in any event, could not be supported having regard to the evidence.

Held further, by the majority of the Court, that the trial Judge was right in not giving a direction to the jury under section 234 (1) of the Criminal Procedure Code to acquit the accused at the end of the prosecution case.

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

G. E. Chitty, Q.C., with *Eardley Perera, G. Candappa, A. M. Coomaraswamy, M. Underwood, Anil Obeysekera, G. E. Chitty* (Jnr.) and *A. S. L. Gunasekera*, for the 1st Accused-Appellant.

E. R. S. R. Coomaraswamy, with *Kumar Amarasekera, Gamini Wanigasekera, C. Chakradaran, T. Joganathan, Asoka de Z. Gunawardena, Kosala Wijetilleke, M. S. Aziz* and *Shanthi Perera*, for the 2nd Accused-Appellant.

Colvin R. de Silva, with *B. C. F. Jayaratne, R. I. Obeysekera, Bala Nadarajah, P. D. W. de Silva, I. S. de Silva* and *P. Tennekoon*, for the 3rd Accused-Appellant.

Clarence M. Fernando (assigned), for all Accused-Appellants.

V. S. A. Pullenayegum, Senior Crown Counsel, with *A. C. de Zoysa*, Senior Crown Counsel, *Kenneth Seneviratne*, Crown Counsel, and *T. D. Bandaranayake*, Crown Counsel, for the Crown.

Cur. adv. vult.

November 10, 1968. THE JUDGMENT OF THE COURT—

Padmini Kularatna died on the evening of 9th April, 1967.

There can be no doubt that her death was due to arsenic poisoning.

The Crown alleged that her husband, the 1st accused, his mother, the 2nd accused, and a woman servant who did the cooking, the 3rd accused, were responsible for her death.

On the first count in the indictment, in its amended form, all three were charged with having conspired to murder the deceased between 10th March 1967 and 9th April 1967. On the second count, the 3rd accused alone was charged with murder and on the third count the 1st accused was charged with abetting the 3rd accused to commit murder. It was conceded at the argument that the date 10th March 1967 had been inserted in the indictment on inadmissible evidence, but nothing turns on this point.

The appellants were convicted on all three counts by the unanimous verdict of the jury, and sentenced to death.

There were several matters argued before us at the hearing of the appeal, when it was strongly urged that the verdict of the jury was unreasonable, or that it cannot be supported having regard to the evidence. In fact, learned Counsel for the appellants submitted that at the close of the prosecution case there was no evidence that the accused had committed the offences, and that the learned trial judge should have directed the jury, under section 234 (1) of the Criminal Procedure Code, to return a verdict of not guilty. Submissions were also made that there were several misdirections and non-directions in the learned trial Judge's charge to the jury and reception of inadmissible evidence, which vitiated the convictions.

The case rested entirely on circumstantial evidence, and it is necessary to examine that evidence, not for the purpose of considering whether that evidence raises a reasonable doubt in *our* minds (which we must guard against doing) but to consider the submissions made for the appellants, whether there have been misdirections on the evidence, and whether the verdict is unreasonable or cannot be supported having regard to the evidence.

There was, to begin with, strong evidence of motive against the 1st accused. The prosecution led evidence to show that there was a great deal of unpleasantness between the 1st accused and the deceased, that she had been treated harshly, in a humiliating manner, and that he (1st accused) had filed an action for divorce. There was also evidence

which indicated that the deceased was determined to resist the 1st accused's claim for a divorce and that the 1st accused was prepared to pay a large sum of money to the deceased if he could rid himself of the marriage tie.

It was also shown that the 2nd accused had some influence over her son, and that she had a strong dislike for her daughter-in-law. When the deceased died in the circumstances that she did, it is natural that suspicion should fall on them. It is of some importance to remember this, because it was urged right-throughout the arguments for the appellants that the jury was "in a mood to convict" regardless of all the infirmities in the evidence, on the basis, "if not they, who else ?".

The case for the prosecution was that the 1st and the 2nd accused had made use of the 3rd accused to serve some bilin achcharu, which contained poison, on to the deceased's plate that afternoon. To prove this, the prosecution relied on the evidence of the deceased's daughter Achini.

The main grounds urged on behalf of the appellants were that it was unreasonable for the jury to have acted on Achini's evidence, and that even if that evidence was accepted, there was no basis for a reasonable inference that the poison was contained in the foods served by the 3rd accused, as the possibility of the presence of the poison in the foods served by Cicilin (another cook) had not been excluded.

According to the evidence led by the prosecution, there were two people who served food on the deceased's plate that day—Cicilin and the 3rd accused-appellant. The prosecution had to prove beyond reasonable doubt that the poison could not have been introduced by, or through food served by, Cicilin.

Cicilin was not called as a witness.

Learned Crown Counsel submitted that Cicilin was excluded, (*a*) by absence of motive, and (*b*) by the evidence that other people also ate food cooked by her on that day. In regard to the first point, learned Counsel for the 3rd accused-appellant had suggested to Achini in cross examination that Cicilin was not well-disposed towards the deceased. Achini's answer was that she did not know. The only other evidence on this point was that the deceased, a few weeks before this incident, wanted only food cooked by Cicilin. That was not because Cicilin was on good terms with her but because food cooked by her (Cicilin) was eaten by everybody in the house, and the 3rd accused-appellant prepared certain special dishes for the 1st and 2nd accused-appellants. As the deceased

was apparently in fear of being charmed, she probably thought that a charm could more easily be introduced, to the special dishes cooked by the 3rd accused-appellant. On the evidence, therefore, there was no evidence of motive against Cicilin, but at the same time there was no evidence to show that she had no motive. As stated by Channel, J. in *Rex v. Ellwood* (see Cross on Evidence at page 28): "There is a great difference between absence of proved motive and proved absence of motive." There was no evidence of any motive against the 3rd accused-appellant either. The learned trial Judge, in dealing with this question, said (at page 981) that Achini's answer to Counsel's question "I do not know" meant much the same thing as "no", and went on to say, "as for Cicilin the available evidence is that she was on perfectly good terms with the deceased." There is no evidence to support this statement.

The first ground, absence of motive, on which it was sought to exclude Cicilin, therefore, in our opinion, fails.

On the second point, the evidence of Achini was that Cicilin dished food on to her mother's plate straight from the pots and pans and not from the dishes, and one gathers that at the time she went to Cicilin's kitchen some part of the food had already been dished out to dishes that were on the table (at page 698). In answer to a question (at page 765) Achini said that Cicilin did not put on the plate any food that had already been dished out from the chatties. It was the food which had been put on the dishes that were taken to the table and eaten by her and her sister. The evidence on this point does not positively exclude the possibility that the poison may have been in one of the foods which Cicilin had cooked. Achini was twice asked whether she remembered the food that was dished to her mother's plate by Cicilin (at pages 318 and 643) and she said she could not remember, and there was no evidence whether all the different kinds of vegetable that were dished on to her mother's plate from Cicilin's pots and chatties had also been sent to the dining table for the others to eat. On the second ground, too, therefore, Cicilin cannot necessarily be excluded. When the evidence led for the prosecution lends itself to a reasonable inference that either of two persons could have committed an act, then the burden is on the prosecution to effectively exclude one if it seeks to attach responsibility for that act to the other; and the best way—often the only way—in which this can be achieved is by the prosecution calling as a witness the person sought to be excluded. In *Rex v. Blom* referred to in Hoffmann (South African Law of Evidence, page 31) Watermeyer, J. referred to two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial: (1) The inference sought to be drawn must be consistent with all the proved facts. If it does not, then the inference cannot be drawn. (2) The proved facts should be such that they *exclude every reasonable inference from them, save the one to be drawn.* If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

Counsel for the 3rd accused-appellant had urged this matter at the trial and told the jury in his address that the failure by the prosecution to call Cicilin had left the inference that there was any poison in the food served by the 3rd accused-appellant in doubt. Counsel had also apparently added that had the prosecution called Cicilin the defence would have got something favourable to them by questioning her. But his real contention was that it was incumbent on the prosecution to call Cicilin as a witness. In dealing with this submission, the learned trial Judge, quite rightly, told the jury, that it was not the law that the prosecution should call a witness to enable the defence to question her. But when he added that if the defence wanted to question Cicilin, they could call her,—there was grave danger of his being misunderstood by the jury in regard to the burden of proof, for they may well have thought that once the prosecution showed that the 3rd accused-appellant had served some food and alleged that this was unusual, then they were bound to infer that the poison was in the food served by her, if the defence failed to call Cicilin to negative that inference.

On any realistic basis, Cicilin was not a witness available to the defence. On the contrary, the prosecution should have called her, and their failure to do so resulted in a serious deficiency in the proof of the prosecution case.

On the question whether the 3rd accused-appellant's conduct was unusual, the defence pointed out that up to a period of about three weeks before this incident, food cooked by both—the 3rd accused-appellant and Cicilin—was eaten by everyone in the house. It was thereafter that the deceased preferred to eat Cicilin's food only and the 2nd accused-appellant, too, told Achini not to take food cooked by the 3rd accused-appellant to her mother. But there was no definite evidence that the 3rd accused-appellant was told, or that she knew, that food cooked by her should not be taken to the deceased.

We are of the view that the prosecution has failed to exclude the reasonably possible inference that the poison may have been in food served by Cicilin.

There is then the vital evidence of Achini. She had stated in Court that after Cicilin had served some food—the details of which she could not remember—the 3rd accused-appellant took her by the hand into her kitchen and served bilin achcharu once from a small dish and again from a pot, and also some fish. It was strongly urged, particularly by the Counsel for the 3rd accused-appellant, that the jury had acted unreasonably in accepting this evidence. He pointed out that Achini's evidence against the 3rd accused-appellant grew from nothing (in her statement to the police X1) to a conscious and deliberate act, in her evidence in Court. He pointed out instances when, in denying previous

statements, she was obviously untruthful and a number of other infirmities, which it is not necessary to deal with in detail, as a result of which it was submitted no reasonable jury could have acted on her evidence. But these matters must have been placed before the jury and we would have been slow to interfere on those grounds alone. There were, however, certain submissions made regarding non-direction and misdirection on Achini's evidence which have to be examined. The learned trial Judge himself referred to Achini's evidence as very much cast in doubt and said that on certain matters her evidence was quite unreliable or inexplicable. There was the statement (X1) which she made on the night of her mother's death to a police officer who was obviously trying to find out the persons who had served food on the deceased's plate that afternoon. Achini had said then that Cicilin dished out rice, wattakka, beans, mellun and radish, and added, " I found fish and bilin achcharu dished out to be taken to the dining table and I served the fish and bilin achcharu from the dishes and served myself, and brought and handed over to mother." This is indeed a a very vital contradiction of her evidence in Court. It excludes the 3rd accused-appellant altogether. Achini denied having made that statement.

The learned trial Judge told the jury that it could not be explained in that way, or that the police made some mistake. In order to " counter ", as the learned trial Judge put it, this statement, the prosecution produced the evidence given by Achini at the inquest next morning marked Y1 where she had stated that after Cicilin served rice, wattakka, etc., she (Achini) went to the other kitchen and the 3rd accused-appellant served into the same plate fish and bilin achcharu. At the argument in appeal learned Counsel for the 3rd accused-appellant submitted that Y1 and her evidence at the magisterial inquiry Y3 were admitted by the learned trial Judge " in rebuttal ". The record at page 916, where the learned trial Judge says that he allows Y3 in rebuttal, and the use of the word " counter " in the charge in relation to Y1, lends support to this argument. Both Y1 and Y3 were produced as part of the prosecution case before it was closed. It was pointed out that evidence in rebuttal can only be led after the defence has been closed, vide section 237 (1) of the Criminal Procedure Code. But though inadmissible under that section, learned Crown Counsel submitted that the statements were admissible under section 157 of the Evidence Ordinance. It was argued by the defence that Y1 did not corroborate Achini's evidence that she was held by the hand and taken into the kitchen, but contradicted it. We think, however, that Y1, in substance, corroborates her position in Court that the 3rd accused-appellant served food on to her plate in her kitchen. There is some technical merit in the objection taken that Y1 was not properly produced. It was a statement made to the Coroner (who also happened to be the Magistrate); proceedings before the Coroner do not form part of the Magistrate's Court record. In this instance, it appears that it had been accidently bound with the Magistrate's Court

proceedings, and sent up to the trial court. The inquest proceedings, therefore, were not strictly in the proper custody of the Clerk of Assize, and the Coroner should have been called to prove it. But the objection, in our view, to the admission of Y1 is only technical.

In regard to X1, the learned trial Judge placed before the jury the possibility that in her distress that night Achini may have been inaccurate. In regard to Y1 he said (at page 994) "So the prosecution tells you, you must hold that what is said here is true because that is what Achini told the Magistrate in the morning." This statement is correct, but he did not give any specific direction to the jury relating to the legal framework within which statements like Y1 and Y3 made outside the Court of trial could be used. In *Golder, Jones and Porrit*[1], though the facts were different—in that the statement was contradictory and a wrong direction was given—it was held, "that when a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the Jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, but should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act." We think that these remarks apply to any previous statement made outside Court. The jury, in the absence of directions, may very well have thought that, however unreliable Achini's evidence in Court may be, her evidence next morning at the inquest (Y1) (or later at the non-summary inquiry Y3) was *substantive evidence* on which they could act. In our view, there was a non-direction on this point which was vital in the circumstances of this case.

There is another matter affecting the manner in which the jury was directed to assess Achini's credibility on which a great deal of argument was addressed to us. The learned trial Judge told the jury that if they were satisfied that there was arsenic on the plate, and the poison had been introduced through the food, then there was a killer at work in the house. He then invited the jury to consider how a killer, who desired to poison a single member of a large household, would work. He placed before them three theories :

(1) The killer could put the poison into a chatty or pot before the food was cooked and get it served from that pot.

(2) He could do so after the food was cooked.

(3) He could put the poison into a vessel into which some of the food had been dished and see that the victim was served from that vessel.

We are in agreement with the submissions made by Counsel for the appellants that such an approach to Achini's credibility is fraught with danger. When faced with the difficulty of choosing one hypothesis in preference to another, the jury would only be too strongly inclined to

[1] *(1961) 45 Criminal Appeal Reports 5.*

follow the one recommended by the trial Judge, despite the strongest direction that they were free to ignore it and act on their own. They would also be tempted to adopt it if that particular hypothesis provided a positive answer to the question, " who was the killer in the house ? " without leaving the matter in doubt. Hoffmann, South African Law of Evidence, page 31, says, " All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of facts is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred."

It is clear that the learned trial Judge thought that the third was the one and only hypothesis, and expressed that opinion, to use his own words, " in very strong language ". He rejected the first two theories as they involved the risk of people other than the intended victim being poisoned. It was urged, with much force, that this rejection was made on grounds which were not compelling, for, in either of the first two theories, the poisoner could have thrown away the rest of the food in the chatty or pot after the victim's plate was served and if there had been a conspiracy with the cook, a small chatty could have been used, so that little food would have been wasted. The learned trial Judge then went on to say that if the jury accepted the third theory as correct—*then Achini's evidence in Court must be true.* The proposition was conveyed to the jury in the following terms (at page 1000) :—

> " If somebody wants to put the poison on the plate of one person, to poison that one person only in that house ..... if somebody wants to do that, how would he set about it ? Gentlemen, the only way that the killer would set about it is to have it served, either serve it himself or see that it is served from a separate vessel on to the plate.
>
> If you are sure, purely on a rational basis, forgetting all the people in the accused's family, that this is the way, the only way that this could have been done—that is precisely what Achini tells you—if you, applying your intelligence carefully, have to come to an irresistible conclusion, you have to consider how the poisoner would act. If the only irresistible conclusion is that it had to be put in a separate vessel, and from that vessel put on the plate, then you have the point. I think that is precisely what Achini tells you.
>
> You have then the point, the reasonable point that what Achini tells you is inherently credible. If you are convinced that this is the only way that this could have been done, then Achini is saying no more than what had happened."

Achini's evidence was that food prepared by Cicilin had been put on to dishes from the chatties in which they were cooked when Achini took her mother's plate into the kitchen, and Cicilin served food on to the plate from the remaining food in the chatties. It is possible that the poison may have been introduced into the food remaining in one of the chatties and served on to the plate of the deceased. In this way, poison could have been put into the food consumed by the deceased without food that was served on to the dishes that went to the table being affected. Thus, the only way that this could have been done was *not* that spoken to by Achini; and accordingly no inference could be drawn that Achini was speaking the truth on the basis that the way she spoke to, was the only possible way. The learned trial Judge added a little later (at page 1004): " I think I have expressed an opinion very strongly in this matter in the last 10 or 15 minutes. I will warn you again. I have suggested one way in which you can solve this problem by asking yourselves whether this is the inevitable means of doing this, and if you are sure that this is the one necessary way to achieve the transaction of poisoning, you then, perhaps will have no difficulty in believing Achini who just says, ' Sopia served '. "

It was urged by Counsel for the 3rd accused-appellant that the third theory was quite consistent with Achini's statement to the Police set out in X1 being true and her evidence in Court being false. (The evidence led in the case indicated that Achini usually served food for her mother from the table and if the 2nd accused-appellant was present she would tell her what foods should not be served.) It was submitted that the killer could easily have placed the poisoned food on the table so that Achini would serve it herself as she said she did in X1. The only risk was that Achini may not take food from that particular dish. But, on the other hand, if Achini's version was true, the killer ran, what Counsel called, a triple risk. As the prosecution alleged that the deceased had asked Achini not to bring food cooked by the 3rd accused-appellant, if the killer had planned to get the 3rd accused-appellant to serve the poisoned food, then Achini may refuse to let her serve the food, or if that was forcibly done, she may refuse to take the food to her mother, or she may take the food to her mother and tell her what the 3rd accused-appellant had done and that would lead not merely to a failure of the plan but to its discovery. It was submitted, therefore, that the strong suggestion to the jury to test Achini's evidence on the basis of the third theory being the correct one was a misdirection, and we are in agreement with that submission.

There is a passage, dealing with a submission of Counsel for the 1st accused-appellant a little later in the summing up which may, to put it at its lowest, have been misunderstood by the jury. Learned Counsel for the 1st accused-appellant had contended that if, as suggested by the prosecution, food cooked by the 3rd accused-appellant was not usually

taken by Achini to her mother, then the poisoner would take into account that routine and introduce the poison through Cicilin rather than the 3rd accused-appellant. The learned trial Judge said (at page 1006):

> "Mr. Ponnambalam in this connection refers to the fact that everyone in the house knew that the deceased's food was served from the dishes on the dining table. Also, that everyone in the house knew that food cooked by Sopia would not have been taken by Achini to her mother. And, Mr. Ponnambalam says, therefore, anyone who planned to put poison in the deceased's plate would have taken account of that routine and fitted the plan to that routine. They would not have made a plan contrary to that routine. They would not have made a plan according to which the food would be served in the kitchen and the achcharu, the poison would be served by Sopia. That is what Mr. Ponnambalam says. Mr. Ponnambalam says that somebody who knew the routine in the house, and who wanted to poison the deceased would have planned differently. *But, gentlemen, what has happened in this case? This somebody who wanted to poison the deceased has got it done in this way. That is the fact* ..... *But it has happened in this way. It seems to me, gentlemen, if it has happened this way, it was planned this way.*"

Counsel for the appellants contended that, having developed a favoured theory, the learned trial Judge had inadvertently, at this stage, slipped into the error of looking upon the theory as a fact. On the other hand, learned Crown Counsel argued that the learned trial Judge, when he said, "This somebody who wanted to poison the deceased has got it done this way. That is the fact" meant, "That is the evidence of Achini." But, it was Achini's evidence which was being tested, and it is futile to deal with an argument that her evidence is untrustworthy by saying, "But Achini says so."

We have, however, to consider the impact of these words on the jury in the context in which they were used. We are of the view that it is very likely that the jury accepted Achini's version in Court only because it fitted the third theory, and believed that on that evidence the presence of arsenic in the food served by the 3rd accused-appellant was not merely a possible inference but that it was an established fact. We think there is a misdirection in the passage quoted above.

The 1st accused-appellant is a doctor and had in his dispensary, in a locked cupboard the key of which was with his dispenser, two bottles of Liqua Arsenicalis, which is a compound of arsenic known as Potassium Arsenite as distinct from Sodium Arsenite and white arsenic.

The finding of arsenic in the dispensary of a doctor is not in itself an incriminating circumstance, but, of course, it is a circumstance to be taken into consideration, for there was the opportunity for using it.

If the arsenic found in the internal organs of the deceased was Potassium Arsenite, it would indeed be a relevant fact which would tell against the 1st accused-appellant. The opinions of two " experts "—Dr. Fernando, Professor of Forensic Medicine, University of Ceylon, and Mr. Satkunanandan, an Assistant Government Analyst—was led by the prosecution in an effort to prove that the potassium found in the stomach of the deceased was in excess of the quantity one should find in the stomach of a " normal " person, and that, therefore, the inference that Potassium Arsenite was used could reasonably be drawn. As a good deal of argument was addressed to us on the evidence of these two witnesses, we might deal with that evidence at this point.

Mr. Satkunanandan found 730 milligrams of potassium in the stomach of the deceased and its contents. But neither he, nor Dr. Fernando, knew the quantity of potassium which one would expect to find in the stomach of a normal person. This quantity must depend, to a large extent, on the nature of the food a person has taken shortly before the examination.

After the conclusion of the non-summary inquiry by the Magistrate, Mr. Satkunanandan had examined the potassium content in the stomachs of seven deceased persons, whose antecedents were unknown, and on these figures Dr. Fernando thought that 200 milligrams as the quantity of potassium to be expected in the stomach of the deceased was a " generous estimate ". It is hardly necessary to emphasize that this is not a scientific method of ascertaining any fact. Dr. Fernando said that the method was " empirical " and not scientific, and both witnesses were agreed that they would not contribute an article to any scientific paper commending any inference on the basis of the experiment made with the seven stomachs. It was clear that neither of these witnesses claimed to be an expert competent to express an opinion in this field. To this 200 milligrams Dr. Fernando added 390 milligrams (it should have been 380) which, according to a textbook written by one Jacobs, would be the quantity of potassium one might find in four ounces of rice, which was the quantity Dr. Fernando found in the deceased's stomach at the postmortem examination. He thus made up a total of 590 milligrams, which was deducted from the 730 milligrams, and it was suggested that the excess of 140 milligrams might have found its way into the deceased's stomach in combination with arsenic. If, in his conclusions, he had allowed for the deceased having taken one more ounce of rice (she had, in fact, vomited a part of her meal) and also taken into account (had he known) the potassium content in the vegetables and fish taken with the rice and some coffee taken later the total to be deducted from the 730 milligrams might well have been much higher, and left no excess at all, and on this basis potassium arsenite might have been eliminated altogether. Counsel for the 3rd accused-appellant also argued that on an analysis of the evidence of these two witnesses, the use of potassium arsenite must be excluded. Mr. Satkunanandan

analysed the potassium arsenite found in the bottle P23 and ascertained the proportion of arsenic and potassium in that liquid. He found in the internal organs of the deceased 633 grains of arsenic. He expressed the view that if potassium arsenite had been taken by the deceased there must be a minimum of 176 grains of potassium (which would be over and above the normal quantity which he did not know and which was a matter for medical opinion). His evidence on the point (at page 450 of the record) is as follows :—

" Q. You cannot say whether the potassium found was extraneous to the normal potassium contents of the body ?

A. That will be a medical opinion.

Q. You cannot say ?

A. Yes. "

As pointed out earlier, the potassium extraneous to the normal potassium content even according to Dr. Fernando was 140 milligrams, i.e., less than the minimum of 176 milligrams referred to by the Analyst. The learned trial Judge himself, in the course of Dr. Fernando's cross examination, remarked (at page 623), " His estimate of the potassium in this case seems to be no more an expert's estimate than one I can make."

We agree with the submission of the Counsel for the 1st accused-appellant that the large volume of evidence of these two witnesses on this topic would have tended to mislead the jury and its effect would have been damaging and prejudicial to the 1st accused-appellant.

Witnesses like Doctors and Analysts usually preface their evidence with a list of their qualifications and experience (as they did in this case) and there is the danger that a jury would look upon anything said by them as based on expert knowledge. Such a witness should not be permitted to express an opinion on any matter in a field where he has no expert knowledge, and if such an opinion has been expressed before it is found that it is outside his sphere of specialized knowledge, then we think that a trial Judge should give a clear direction to the jury to categorically disregard that opinion altogether. In this instance, the learned trial Judge dealt with this evidence at some length, and invited the jury to consider whether they could not agree with that opinion. He said (at page 1013) : " As I told you, it is not expert testimony. He has worked out something which you could have yourselves worked out. I have given you the figures and the question is, firstly, do you agree with Professor Fernando whose figure Mr. Ponnambalam did not challenge that this is a commonsense, reasonable estimate ? That is all that Professor Fernando claims (it) to be although he found more arithmetically, he says this is only a rough estimate. It is arbitrary." The opinion was, therefore, commended to the jury who were invited to form an opinion themselves on criteria which was not scientific.

Wills, on Circumstantial Evidence, 7th Edition, says (at page 176) "The reasonable principle appears to be that scientific witnesses as such shall be permitted to testify only on such matters of professional knowledge or experience as have come within their cognizance, or as they have learned by their reading, and to such inferences from them or from other facts provisionally assumed to be proved as their particular studies and pursuits specifically qualify them to draw; so that the jury may thus be furnished with the necessary scientific criteria for testing accuracy of their conclusions and enabled to form their own independent judgment by the application of those criteria to the facts established in evidence before them." Here, an important part of the criteria was such that the experts themselves considered unworthy of recommendation as a scientific fact. It was far too dangerous for the jury to take these figures into account in arriving at any conclusion. Sodium arsenite was eliminated on the ground that there was no colouring found. Agro chemicals, particularly weed killers, commonly contain this compound and those substances are usually coloured, according to the information that Dr. Fernando had received from certain importers of these substances. But when the question was specifically put to him (at page 551) whether he could say that uncoloured sodium arsenite could not be obtained in Ceylon, he admitted that he did not know. White arsenic was eliminated on the ground that no "particles" were visible to the naked eye of the Assistant Government Analyst. No microscopic examination was made, and in this context, Dr. Fernando thought in one part of his evidence that the use of potassium arsenite was probable. Our attention was drawn to the real effect of Dr. Fernando's evidence (at page 510) which is as follows :—

"Q. Because from the very rough estimate that you have been able to act on 730 is somewhat excessive ?

A. It is a little above what I would expect. It is possible that it could have been used. I cannot say that it was by any means used."

He was referring to the use of Potassium Arsenite.

The learned trial Judge, dealing with this evidence, told the jury (at page 1016) : "That evidence, therefore, gentlemen, the evidence of the Analyst and Professor Fernando leaves us only with this. That having regard to the Analyst's examination, the question for you, gentlemen, is, was it an efficient examination ? Was it the sort of examination which would be done anywhere in any civilized progressive country ? Did he do such an examination ? If so, can you rely implicitly on him ? Only for this, not that it was potassium arsenite. He does not say so only for this, that probably it was, that it could have been and it was more probable than the others."

In our view, the direction to the jury to infer from the evidence of these two witnesses, that the use of potassium arsenite was *more probable* was, with respect, a misdirection, and it is impossible to say that the jury was

not vitally influenced to draw the conclusion that it was the 1st accused-appellant who supplied the arsenic. Counsel for the 1st accused-appellant also complained that some evidence based purely on conjecture had been placed before the jury which must have influenced their verdict against his client. One of the bottles found in the dispensary (P23) contained 13 to 14 grams of Liqua Arsenicalis. There was no evidence as to when this liquid had been purchased except the 1st accused-appellant's statement from the dock that it had been purchased in about 1950 and had been used for mixtures that he had prescribed. The label on the bottle (P23) was a very old one. But *on the assumption* that this bottle was full on or about 9th of April a conjecture—it was really nothing more—was made by the Analyst that the amount of arsenic obtainable from the quantity missing would account for the quantity of arsenic found in the internal organs of the deceased.

The evidence of Dr. Fernando in a field, where he was competent to express an opinion, was that the poison could have been taken shortly before, with, or shortly after, the mid-day meal. It was the case for the prosecution that the poison was contained in the food that the deceased had eaten that afternoon. To establish this, the prosecution relied very heavily on the evidence of the Analyst that seven millionth of a gram of arsenic was found on the plate from which the deceased is alleged to have eaten her food. We cannot agree with the submission of learned Crown Counsel, when, in answer to certain important contentions relating to this evidence made by the appellants, he said that the plate and the arsenic found on it were of little importance, because suicide (so he claimed) had been excluded. The presence of arsenic on the plate was prominently placed before the jury, both in the evidence and in the summing up and would undoubtedly have influenced their verdict. In fact, the learned trial Judge referred to this point as the first basic fact in the case.

There was evidence that the deceased had vomited several times—that the vomit matter contained arsenic—that her daughters Achini and Sulari held vessels like tins and basins into which she vomited—that they helped her to the bath room and changed her soiled clothes. The quantity of arsenic found on the plate was microscopic, and Counsel submitted that the plate could have been contaminated in " a hundred different ways ". Achini had stated in evidence that her mother *usually* washes the plate she eats from and places it on a rack. There was no evidence whatsoever as to who washed the plate on this day or who placed it on the rack or when that was done. According to Achini, it was found on the rack next morning. It is quite clear that the learned trial Judge was strongly of the view that the minute trace of arsenic must have come from the food, and nowhere else. He told the jury that the first thing a person does when he finishes eating is to wash his fingers, and then wash the plate. Dealing with suggestions made by the defence he told the jury that if the children got vomit on their fingers

when helping their mother, they would wash their hands. Though he told the jury that it was a matter for them to decide, he made his own view clear. With all respect to that view, the learned trial Judge had overlooked the fact that there was no evidence at all as to who washed the plate on that day or placed it on the rack, or whether it was placed on the rack before the deceased started getting sick. All this was assumed. That is clear from this passage (at page 972): "Now, gentlemen, in regard to that matter, you will remember the evidence. The evidence is that this plate had been washed, and one of the tasks which an old girl of Holy Family and Ladies College had to do was to wash her plate. *Well, she had washed it and kept it on the rack.*" And, again, "But if that plate was found exactly where it should have been *where the mother had left it*, is it a reasonable possibility—it is a matter for you to decide—is it a reasonable possibility to think that somebody will touch that plate and then go away, touch it, leave it and go away? That is a suggestion." As stated earlier, the learned trial Judge *did* tell the jury more than once that on this point, as on others, they alone were the judges of fact and that this was a matter for them to decide. But in a case of circumstantial evidence, particularly one like this where the evidence (except of motive) is far from clear and unambiguous, the jury would be only too willing to follow the Judge as to the inferences which they are told could reasonably be drawn from the evidence. The suggestion by the defence that the arsenic may have got on to the plate in some way other than the food, having regard to the circumstances, was severely criticised by the learned trial Judge. He told the jury (at page 975) "Did she finish this operation of washing? No. It is for you to ask yourselves whether it is a possibility which has been conjured up by a fertile imagination, whether there is any commonsense, any real possibility, any real likelihood that such things as are suggested could have any possibility that they happened. That is enough. If you think that such a possibility could have happened —you are the judges of fact—you hold in favour of the defence." In our view, the direction to the jury to consider the possibility of the plate being contaminated by some means other than the food served on it, *only* on the basis that the deceased had washed her plate and placed it on the rack and that she had done so before she started getting sick, was a misdirection as it is unsupported by the evidence.

There was another contention relating to the plate (P7) raised by the Counsel for the appellants which cannot be lightly brushed aside. The prosecution had to prove beyond reasonable doubt that the plate on which the Analyst found a trace of arsenic was the plate on which the deceased had her last meal. It was urged by the defence that this fact was not proved. The evidence on this point is as follows: at the trial the Analyst produced the plate (P7) on which he found the trace of arsenic. The plate had been brought to him on 18th April 1967 by Police Constable Balasuriya whose deposition was read. The Police Constable had got it along with the other productions in the case from the Record-keeper of the Magistrate's Court whose deposition was also read. On 10th April

1967 Inspector Padawita had asked Achini for the plate on which her mother had taken her mid-day meal. The defence raised the objection that the Inspector's evidence relating to the plate amounted to a statement made by Achini to him in the course of an inquiry under Chapter 12 of the Criminal Procedure Code, and was inadmissible in view of the provisions of section 122 (3). But we take the view that the fact that the Inspector asked for the plate, describing what he wanted, and Achini produced one, is a circumstance which may lead to an inference that Achini produced what she thought the Inspector wanted. At the trial the plate produced (P7) by the Analyst was not shown to the Inspector. It was not shown to Achini either though other productions were shown to her. Its identity was left to be inferred. We wish to observe that in a criminal case the identity of productions must be accurately proved by the direct evidence, which is available, and not by way of inference. There are many known instances where mistakes have been made in regard to productions in cases. We have to face the unpleasant fact that due to lack of space and proper storage facilities in Magistrate's Courts, productions in cases are piled up in tiny dilapidated rooms without order or method. Though we have examined the evidence on the footing that the trace of arsenic was found on the plate of the deceased, we must agree with the contention of the defence that the evidence placed before the jury in regard to the identity of the plate was inconclusive.

At this point we might deal with certain other submissions made on behalf of the 1st accused-appellant with reference to his subsequent conduct. The prosecution relied on three matters relating to such conduct as indicative of guilt.

Firstly, there was the evidence of one Mrs. Nanayakkara that the 1st accused-appellant, who was at the Y. M. B. A. at about 6 p.m. on that day, had, on receipt of a telephone message, left the place making a remark that his wife was vomiting. This remark was relied on as evidence which pointed to guilt. There was also a remark which the 1st accused-appellant is alleged to have made to one Mrs. Gunasekera that he did not know what the sisters were up to. The second remark could well be understood. As the learned trial Judge told the jury, the deceased's sister's visit was an unusual one and he had come to know by then that the police had come to his house. In regard to the remark about his wife vomiting there was the evidence of Achini that when her mother was vomiting upstairs she came down and told the 1st accused-appellant, who was seated at the dining table, that her mother was sick. She also said in evidence that her mother " continued to vomit ". There is no evidence that the vomiting could not have been heard downstairs. It would indeed have been a very remarkable thing if the 1st accused-appellant did not know that his wife had been vomiting that afternoon. The learned trial Judge in his charge dealt with this matter in the following way (at page 1034): " But there is this other remark, as I

told you, that the prosecution tells you that his knowledge that the wife was vomiting is only explicable on the basis that he knew that there was some reason why she should vomit." And, later, " . . . . it (the prosecution) relies on these remarks which were made and it relies on the evidence and on the statement of the doctor which shows that he could not have known from anybody—certainly I do not say could not have known from anybody—certainly I do not say could not have known. There is no evidence that anybody told him about the vomiting, no evidence that from the downstair room in the front part of the house he would have heard this lady vomiting in the back regions upstairs. So that the prosecution suggests that that remark, to put it at its highest I suppose, is a suspicious matter, that he should have made that remark. It is one of the small circumstances which the prosecution says you should add to that collection of which I spoke." In his statement from the dock, the 1st accused-appellant did not say that he had heard his wife vomiting. One would not expect him to refer to such a thing in such a statement. From the fact that there is *no evidence* that vomiting could be heard downstairs, it has been assumed that it could *not* be heard. We think that the jury should have been directed—as the learned trial Judge did in regard to the first remark—that on a proper evaluation of the evidence, no inference at all could have been drawn against the 1st accused-appellant from this remark.

The next point was a telephone message, which a police constable said he received at about 4.55 p.m. from the 1st accused-appellant inquiring for the A.S.P. or the Inspector. There is no record of that message or the time at which it was received. The constable had said that he remembered the approximate time as a complaint had been made shortly after, relating to this same matter. The 1st accused-appellant, in his statement from the dock, had said that he had telephoned the police at about 6.45 p.m.. But assuming that the constable was right, one could hardly look upon this evidence as a circumstance from which one could draw a reasonable inference pointing to guilt. The suggestion that the 1st accused-appellant, having committed a crime, was trying to contact the A.S.P. or one Inspector Elias, who was one of his many free patients, in order to get some assistance from them is too far-fetched. In regard to this evidence the learned trial Judge said (at page 1031): " I think Crown Counsel suggested—I am certainly not going to endorse that suggestion that there was anything suspicious in the fact—that he wanted to speak to Elias, but there is this fact. Why did he telephone at all? . . . . . So, gentlemen, if you are convinced beyond reasonable doubt that that 'phone call was made, does it not suggest that the accused had some reason? . . . . . and the prosecution suggests that the reason is that he had some knowledge about what was happening upstairs and that it was in that connection that he 'phoned." Here again, we think that the jury might have been told that it would be unfair to speculate on the reason for this call and draw any inference adverse to the 1st accused-appellant.

On this point, it was further urged by the defence that a good deal of inadmissible evidence was led which must have prejudiced the jury against the 1st accused-appellant.

A. S. P. Rajaguru of Ambalangoda, to use his own words, "was directed to take charge of the inquiry", and, in fact, did so. On arriving at the scene that night he questioned the 1st accused-appellant, who, it is alleged, told this officer that he (the 1st accused-appellant) had tried to contact Inspector Elias and the A. S. P., Galle, and that the telephone wires were out of order. (It was suggested in cross-examination, and in the statement from the dock of the 1st accused-appellant, that the A. S. P. had misunderstood him on account of an impediment in his speech.) It was submitted for the 1st accused-appellant that this was a statement made in the course of an inquiry under Chapter 12 of the Criminal Procedure Code to which the provisions of section 122 (3) would apply. Learned Crown Counsel contended that a police officer referred to in section 122 (3) was an officer in charge of a police station or someone deputed by him as set out in section 121 (2). We did not think that a narrow interpretation should be placed on the words "a police officer" in section 122 (3). To do so would be to defeat the very purpose of that section. The officer in immediate control of a police station is usually the Inspector attached to that station, but there are other officers who are, in one way or another, in charge of a police station in so far as the investigations are concerned, *e.g.*, an Assistant Superintendent of Police of the town, the Superintendent of Police of the District, the Inspector-General of Police and his Deputies. Any officer in a police station is bound to carry out an order given by a superior officer, and all the provisions of the section can be defeated if a Superintendent of Police, for instance, orders a particular officer at a station to carry out the investigations. In the two cases cited to us, this point did not directly arise for consideration. In *Buddharakhita's case*[1] it was held, obiter, that a police officer, who is not empowered to investigate cognizable offences under Chapter 12 may not legally act under that Chapter though he is attached to the Criminal Investigations Department. In *Tambiah's case*[2] the Privy Council held that the protection of section 122 endures "during the course of the investigation" *i.e.*, from the time when the investigation starts to the time when it ends and the report is made under section 131 of the Criminal Procedure Code. In that case, too, the status of the officer investigating the crime did not arise. We are of the view, as stated earlier, that the term "any police officer" in section 122 is not restricted to an officer in charge of a station or one deputed by him. A statement made in the course of an inquiry under this section can only be used for the limited purpose permitted by that section, *viz.*, to contradict the person making it if he subsequently says something different. It cannot be used to form the basis for an inference that the *conduct* of the person who made it was suspicious.

[1] *(1962) 63 N. L. R. 433.*

[2] *(1965) 68 N. L. R. 25.*

Other evidence was then led to establish that the statement (assuming that it had been correctly recorded) was untrue, and a number of witnesses was called to show that the telephone lines were not out of order at that time. In our view, all this evidence was inadmissible, and its reception would have, undoubtedly, prejudiced the jury.

Thirdly, there was the fact that the 1st accused-appellant left for Kondadeniya late on the previous night, met a priest there, from whom he got a talisman and returned home about 2 p.m. on the day in question.

As the learned trial Judge told the jury, the evidence showed that this was a family which believed in charms. The deceased, too, had made preparations to get a charm for herself at about this time. The inquiry in regard to alimony in the divorce case was approaching. Crown Counsel suggested that this trip was made by the 1st accused-appellant to provide an alibi for himself. If that were so, it is hardly likely that he would return to the scene so close to the time when the offence is alleged to have been committed; and to say that the plan assumed that the deceased would go to her sister's place as usual on that day and die there, is to think that though he was a doctor, he would not know how soon the poison he had provided would act. However that may be, there was, on this point, the evidence of Dr. Grero led by the prosecution rather early in the case which had not been referred to in the charge. According to Dr. Grero, the priest whom the 1st accused-appellant went to meet had come to his residence at Galle and the 1st accused-appellant had met him there between the 25th and 30th of March, 1967, so that the trip could have been arranged for that day at that meeting as stated by the 1st accused-appellant in his statement from the dock. The trip may perhaps be looked upon as a suspicious circumstance, but certainly not one which is inconsistent with innocence. The learned trial Judge told the jury that it was " a very strange thing that the 1st accused made this all-night journey on the day before the 9th April in order to get a talisman for his protection. " He did not place the evidence of Dr. Grero and the statement of the 1st accused-appellant before the jury on this question. We think the direction on this point was inadequate.

At the hearing before us, Crown Counsel urged another matter, which has not been referred to at all in the summing up, as indicative of guilt.

In the course of his statement from the dock, the 1st accused-appellant has said that the stock of Liquid Arsenic is kept in a large bottle (P23) and for convenience of dispensing poured into a small bottle (P19). The Analyst has stated that the liquid in the larger bottle (P23) was less than the normal strength as it contained ·8 per cent. arsenic instead of 1 per cent. He had also stated what the proportion of arsenic and potassium was in the smaller bottle (P19); there was slightly less of potassium. Assuming that he meant that the liquid in (P19) was of normal strength, we

think it would be unreasonable to draw an inference unfavourable to the 1st accused-appellant. There was no evidence as to whether this liquid if kept, for instance, in a larger bottle which was open or ineffectively closed would diminish in strength when part of the same liquid in a securely closed small bottle would retain the normal strength. If indeed the prosecution relied on this difference in strength in the liquids contained in the two bottles as having any significance, the matter should have been probed further. They might, at least, have called the dispenser in whose custody these two bottles were. We think that it would be unreasonable, from the difference in strengths, to draw the inference that the statement from the dock was false. Nor is it a reasonable inference, as Crown Counsel suggested, that the arsenic solution in (P19) had been procured at a different time and used to poison the deceased. In fact, the suggestion for the prosecution was as stated earlier, that some part of the solution in the larger bottle (P23) had been used.

As regards the 2nd accused-appellant, there was evidence of motive, that she generally supervised the kitchen and ordered meals, that there were bottles of bilin achcharu in her room, and that the 3rd accused-appellant, an old servant, slept in that room. It may be mentioned here that the Analyst found no arsenic in the bilin achcharu in her room or in the fish or bilin achcharu found in the 3rd accused-appellant's kitchen. There was no evidence at all of any overt act done by her (2nd accused) which the prosecution relied upon to suggest guilt.

We think that there was no sufficient evidence against the 2nd accused-appellant from which a reasonable jury could draw an inference of guilt against her.

At the conclusion of his argument, learned Counsel for the 3rd accused-appellant submitted that there were misdirections as to how the jury should deal with circumstantial evidence. Certain passages read in isolation may be open to some criticism. But there are others which are quite impeccable. It is unnecessary to quote these passages in detail, as we are of the view that on a reading of the whole of the directions relating to circumstantial evidence, there is no misdirection on this point. Perhaps, the only prejudice that may have been caused was the failure to direct the jury that each accused was entitled to have the case against him or her considered separately from the others. Learned Counsel for the 3rd accused-appellant pointed out that the charge always assumed that the 3rd accused-appellant knew that there was some foreign matter, either a charm or a poison, in the food she served. The possibility that she knew nothing of the presence of any foreign matter was not placed before the jury.

Counsel for the 3rd accused-appellant next complained against the manner in which the indictment was amended. The indictment, in this case, was amended after both the prosecution and the defence were closed, and Crown Counsel had completed his address to the jury. Counsel complained that there was no time for any of the accused-appellants to consider whether they should now give evidence, or call witnesses or whether witnesses for the prosecution should be recalled and cross-examined—as the addresses proceeded forthwith.

We agree that before a charge is amended, particularly at a late stage the defence should be given an opportunity of making their submissions on the point (see *Rodrigo v. The Queen* [1]). Thereafter, if the amendment is made, before the Judge decides whether or not to proceed with the trial immediately under section 172 or 173 of the Criminal Procedure Code, the defence should be consulted again. But, in this particular instance, having regard to the nature of the amendment (the 2nd accused-appellant was dropped from the second and the third charges)—and as no application had been made by the prosecution or the defence under section 176 of the Criminal Procedure Code to examine any witness with reference to such amendment,—and having considered the submissions made by Counsel—we are of the view that no prejudice had been caused to the appellants on this ground.

The next point raised by Counsel for the appellants related to the directions given in regard to the statement from the dock of the 1st accused-appellant. It was a long statement in which the 1st accused-appellant protested his innocence, gave his version of some of the matters on which the prosecution had led evidence and said, *inter alia*, that he never touched the bottles of arsenic in his dispensary, or that he took part in any plot to kill his wife.

Though there is no statutory provision for it, the right of an accused to make an unsworn statement from the dock has been recognized by our Courts for many years (see *The King v. Sittambaram* [2]) and is now part of the established procedure in our criminal courts.

In *Buddharakhita's case* [3] it was held (at page 442) 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 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."

We are in respectful agreement, and are of the view that such a statement must be looked upon as *evidence* subject to the infirmity that

[1] *(1952) 55 N. L. R. 49.* [2] *(1918) 20 N. L. R. 257.*
[3] *(1962) 63 N. L. R. 433.*

the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(*a*) If they believe the unsworn statement it must be acted upon,

(*b*) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and

(*c*) That it should not be used against another accused.

In this case the learned trial Judge referred to it in the early part of his charge when dealing with the telephone call of the 1st accused-appellant to the police and said that the prosecution can make use of it. But he made no reference to it at all until the conclusion of his charge, when Crown Counsel reminded him of that statement. Thereupon, he told the jury that this statement was not evidence, but that it can be taken into account as a circumstance. In the manner in which it was dealt with, it is likely that the jury thought that they were not called upon to pay any attention at all to that statement.

Another point raised by the appellants was that the learned trial Judge had failed to explain the nature of the charges, particularly the charge of conspiracy, to the jury. We have considered this submission, and though the charge relating to conspiracy was not dealt with in much detail, we are of the view that the essence of the charge was adequately explained to the jury.

There is, then, the complaint relating to directions in regard to the possibility of suicide.

There is, of course, no burden on the defence to explain how the deceased had taken poison. But, as in most cases, where death ensues from a single dose of poison, the possibility of suicide arises. In this instance—as Counsel put it—it was " a live issue in the case ". From the cross-examination of prosecution witnesses, particularly Achini and the deceased's sister Mrs. Suriyawansa, it was established that about two years prior to her death, there was a time when the deceased was shouting from her room and from near her window—that she had been taken to a nursing home, and treated by a psychiatrist who had to see her daily—and that ultimately she had to be given what is known as " shock treatment ". It was also proved that within about a couple of months of her death, she herself had been in fear of a " nervous breakdown "—a term often used to describe mental state rather than a physical illness. It is clear from the record that the learned trial Judge was very strongly opposed to any suggestion of suicide. But, as a matter of law, the prosecution had to exclude, beyond reasonable doubt, that possibility ; and whether they had done so or not was a question of fact which the jury had to decide. It is not a question that could be decided by an admission or a concession by one or more of the Counsel appearing in the case. In the first part of his charge relating to this matter the learned trial Judge

categorically withdrew this issue from the jury. He said (at page 977): "Now, a great deal of time and my patience, I think, was spent on evidence about mental depression, delusion, hallucination and so on. Mr. Ponnambalam has explained, quite rightly, that it was the duty of the defence to probe the possibility of suicide.

Court: Mr. Ponnambalam, correct me if I am wrong. (Apparently, the Defence Counsel remained silent.)

I think he has now conceded that suicide is out in this case. I will not, gentlemen, therefore, repeat all the reasons which Crown Counsel has mentioned against the suicide theory, but there are one or two matters that struck me, her conduct after this meal, her statement to her sister, her urgency to be taken to the hospital; she said so in so many words, 'If I am taken to the hospital quickly, my life may be saved.' As I said, as the matter is not really in dispute, I do not propose to spend more time on it, but no doubt, gentlemen, you will realize that there is no question in this case that this lady was determined to live; she was determined to live meaning, fight for her life, for her living conditions, for her status and for her children. *So, there is no question of suicide. Bear that in mind.*"

It was an opinion on a question of fact very strongly expressed, as the learned trial Judge was entitled to do, but, with much respect, we think the passage contained a clear misdirection. The learned trial Judge himself had realized this at a later stage in the charge, for an effort has been made to correct this error. But in doing so, the learned trial Judge referred to all the grounds on which the prosecution sought to exclude suicide, and made no reference at all to a single item of evidence relating to the mental instability of the deceased which formed the basis of the suggestion. He said (at page 1038): "It is the duty of the prosecution to exclude suicide affirmatively. I think I told you that the matter had been conceded, but nevertheless there is a burden on the prosecution to exclude suicide. The prosecution has sought to do that by saying there is evidence upon which Crown Counsel says: 'Here was a lady who was determined to live.' You remember she had made arrangements to go down to Colombo to interview her lawyers. She was taking a small gift for Mr. Thiagalingam. She had arranged to get an amulet or talisman for herself. She said, on what turns out to be her death-bed, 'Take me to hospital so that my life can be saved.' Perhaps Mrs. Suriyawansa, to her lasting regret, might be thinking that if not for this unfortunate fact of a divorce action, this lady might have been quickly removed and we would not be sitting here if her life was indeed saved. *I think gentlemen, you will have no difficulty in excluding suicide.*"

It is impossible to say that this passage would have removed the effect of the earlier misdirection. Indeed, it is most probable that in their deliberations, the jury gave no consideration at all to the possibility of

suicide, and this undoubtedly would have greatly influenced them to accept the third theory and the evidence of Achini.

Our attention was drawn by Crown Counsel to the decision in *Plomp v. The Queen*[1]. In that case Plomp was charged with the murder of his wife by drowning her. Dixon, C.J., dealing with the facts in that case, said that, "it would put an incredible strain on human experience if Plomp's evident desire to get rid of his wife at that juncture ..... were fulfilled by her completely fortuitous death". Crown Counsel submitted that those remarks were applicable to the facts of this case.

We cannot agree. The facts in that case can easily be distinguished. Menzies, J. set out the facts, which are shortly as follows: The deceased met with her death when she was in the sea alone with her husband at dusk. There was evidence that the surf was not dangerous, and that the deceased was a good swimmer. There were no eye-witnesses and the only account of what happened was given by the husband. He gave two versions. One was that when he and the deceased were about waist deep in the sea he suddenly felt an undertow which swept him off his feet; another version was that a wave struck him and knocked him down and he saw his wife "sucked under a wave". He went to her aid but was only able to slip his hand in the shoulder strap of her bathing costume which broke, and he lost sight of her. When her body was found, the bathing costume was hanging down with both straps unbuttoned. The only mark on the deceased's body was a superficial abrasion on the forehead which could have been caused by contact with the sand. There were no marks on Plomp's body. The medical evidence showed that she had been breathing when she was drowning and that death was due to asphyxia which would probably have taken 4 to 5 minutes. Having set out these facts, Menzies, J. said, "Were what I have just stated the only evidence, I do not think, that it would have sufficed to warrant the appellant's conviction for murder ....." He then dealt with the other evidence referred to as "motive" but which went beyond that. It was proved that Plomp's statement that he was very happily married was false, that he had formed an association with a young woman, that he had told her that his wife was dead, and a few days before his wife's death he had introduced the young woman to one of his children as their "new mummy"; that a day or two after his wife's death, he had made arrangements to marry the young woman and when the Registrar-General refused to perform the ceremony before the inquest on his wife's death he had taken the young woman to live in his house as his mistress; he had lied about their relationship and had got her to lie to the police about that relationship. He had told the Minister, who objected to his marrying the young woman, that he was not concerned about the inquest—that the police were satisfied that the drowning was accidental—and added, "I am the only witness to the drowning, and if I claim privilege and

[1] *(1963) 110 Commonwealth Law Reports 234.*

refuse to give evidence, that is the end of the inquest." It was with reference to these facts that the remarks quoted above were made. We think that the facts in this case are quite different.

Quite apart from the misdirections referred to above, which in our opinion must have prejudiced the appellants, we are unanimously of the view that the verdict of the jury is unreasonable, and in any event that it cannot be supported having regard to the evidence. We have reached this conclusion on the basis that there was a case to go before the jury.

Lastly, there is the question whether the learned trial Judge should have given a direction to the jury at the close of the case for the prosecution under section 234 (1) to return a verdict of not guilty. That section casts a duty upon the trial Judge to direct the jury to acquit, if he is of opinion that there is no evidence that the accused has committed an offence. This provision is in accordance with the principle underlying a criminal trial by judge and jury that matters of law are for the Judge to decide and matters of fact for the jury. It does not appear to us to be a departure from that principle. It has always been considered that the question whether there is no evidence upon an issue is a question of law. Thus, in cases where an appeal is given on a matter of law, a plea that there was no evidence to support a determination is always permitted to be raised as a question of law. Whether there is sufficient evidence or whether the evidence is reasonable, trustworthy or conclusive, or, in other words, the weight of evidence is a question of fact. Accordingly, the Judge has to decide whether there is evidence upon the different matters which the prosecution has to prove in order to establish the guilt of the accused. It is for the jury to decide whether those matters are proved by such evidence and guilt established. Thus, in a case, which the prosecution seeks to prove by direct evidence, the Judge has to decide whether there is evidence upon the different matters required to be proved to establish the commission of the offence and the jury has to decide whether it believes that evidence and whether the evidence accepted by them establishes those matters to their satisfaction. In a case of circumstantial evidence, the Judge has to decide whether there is evidence of facts from which it is possible to draw inferences in regard to the matters necessary to establish the guilt of the accused. It is for the jury to decide what facts are proved and whether it is prepared, in the circumstances, to draw from them inferences in regard to guilt and whether in all the circumstances those inferences are the only rational inferences that may be drawn or are irresistible inferences.

It appears to the majority of us, there was, in this case, evidence of facts from which a jury may possibly have drawn inferences in regard to matters necessary to establish guilt of each of the accused. The majority of us are, therefore, of the view that the learned trial Judge was right in

not giving a direction under this section to the jury to acquit the accused at the end of the prosecution case.

There still remains the question whether the inferences that the jury appears to have made are the only rational inferences that could have been drawn in the circumstances or whether they are irresistible inferences. We are unanimously of the view that the material placed before the jury fell far short of evidence on which a reasonable jury could have concluded that the only rational inference that could have been drawn was one of guilt. Accordingly, we have taken the view that the verdict of the jury cannot be supported having regard to the evidence.

We quash the convictions and acquit the appellants.

Appellants acquitted.