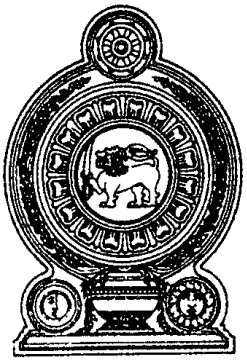

THE

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DIGEST

Page

4th accused contended that the evidence adduced against their clients is hardly sufficient to bring home a conviction while the State argued the contrary.

There is no gainsaying that the case against the 1st accused depended solely on circumstantial evidence. The President's Counsel strenuously argued that the alleged circumstantial evidence adduced against the 1st accused, did not warrant his conviction. He contended that each and every incriminating circumstance was not firmly established and the circumstances did not collectively lead to an irresistible conclusion that the 1st accused is guilty. The learned Deputy Solicitor General (DSG) met this argument with admirable opposition and I propose to consider it shortly.

Before considering the other submissions made for and against the 1st accused, a brief reference should be made to the mode of representation jointly exercised by the accused. The learned DSG specifically referred us to the apparent conflict of interest that was inherent between the 1st accused and 2nd to 6th accused. Throughout the trial, the 1st accused denied the truth of the allegation leveled against him and was heard to complain that he too was a victim of the crimes, almost to the same extent and degree as in the case of his brother, sister-in-law, uncle etc.

What is necessary at this crucial juncture is to ascertain as to whom the 1st accused accused of having committed the atrocities. The material available on this aspect of the matter shows that his complaint was against none but the intruders who entered residing house. It was never his position that the 3rd, 4th and 5th accused were not the intruders or who perpetrated the crimes as alleged by the prosecution. Therefore, it

can safely be assumed that the 1st accused does not dispute that the intruders who entered their house and terrified the entire household including the 1st accused and his wife are the 3rd, 4th, and the 5th accused.

As has been submitted by the learned DSG, a President's Counsel had appeared for 1st to 6th accused from 14th December 2000 to 8th September 2005 in the High Court, although it was obvious that there was a serious conflict of interest between the 1st accused and others. Upon a perusal of the record of the Magistrate's Court, it appears that a President's Counsel (presently deceased) has appeared for 1-6 accused throughout the non-summary proceedings and cross examined the witnesses for the prosecution on the footing that the 1st to 6th accused are not responsible for the crimes committed and the eye witnesses were making a false allegation on that matter. This line of defence taken up in the non-summary proceedings jointly by all 6 accused is diametrically opposed to the complaint of the 1st accused who ought to have determined to bring the culprits to book.

It is of much importance to note that the conflict of interest among the accused in reality had existed from the very moment of the incident and had continued up to date. According to the prosecution the 3rd to 5th accused have perpetrated a cold blooded murder and the rest of the crimes. The 1st accused maintained that the intruders inflicted injuries on him, robbed him of cash (the amount of which he has not disclosed up to date) escaped from the scene of offence in the vehicle forced to be driven by him at gunpoint and in short responsible for his current predicament. Surprisingly, the 1st accused had so far not expressed whether in his opinion the 3rd to 5th accused were the actual culprits who are responsible

for the crimes committed nor has he said anywhere that it is not the 3rd to 5th accused who committed the crimes and forced him to drop them back in the double cab, **although he had ample opportunity to disclose his stand on that matter, in his statement to the police or finally in his dock statement.** (Emphasis is mine)

In the circumstances, it could safely be assumed that the 1st accused has indirectly admitted the stand of the prosecution that the 3rd, 4th and 5th accused were concerned with the commission of the crime. In that frame of mind, it is difficult to understand as to the basis on which the 1st accused could have reposed confidence in his Counsel who had also taken instructions to defend the 3rd, 4th and 5th accused. This is a grave incriminating circumstance that should have been taken into consideration as an item of evidence against the 1st accused.

The joint representation entered by a single Counsel applies to the 3rd, 4th and 5th accused *vice versa*. In this background, the prosecution has invited us to take notice of this unusual arrangement made to represent the accused by one single Counsel, as a relevant fact against them as well in determining their degree of responsibility in the commission of the crimes. Considering the extreme unusual conduct of the 1st accused and other, I am of the opinion that it constitutes strong incriminating evidence falling into the category of subsequent conduct of the accused.

I have stated that a President's Counsel had appeared for all the accused in the High Court until 08.08.2005. It is thereafter that the appearance had been marked separately for the 1st accused and others. After this date until the conclusion of the trial, the same President's Counsel continue to

enter his appearance for the 1st accused and quite surprisingly his junior in the case, ceased to be his Junior Counsel and took over case of the other accused. This clearly shows that the cure provided was even worse than the disease. The conspiracy between the 1st accused and the others, particularly the 4th accused is quite apparent from this arrangement. This being relevant to the fact in issue, cannot be ignored in determining the degree of culpability of the accused. As this is borne out by the record of the Magistrate Court and High Court none can say that it is not proved to the required standard.

To establish the guilt of the 1st accused the prosecution heavily relied on an alleged motive as an item of relevant evidence. In criminal proceedings, the prosecution is not bound to assign or establish a motive behind a criminal act. In terms of Section 8 of the Evidence Ordinance, any fact which shows or constitutes a motive or preparation for the commission of a crime is relevant. As far as the 1st accused is concerned, on the fact of the facts established, it may appear upon a cursory glance, that he is a victim of the crimes perpetrated and not involved in a conspiracy to commit them.

If there was lack of motive on the part of the 1st accused his claim that he is one of the victims of the crimes perpetrated by 3rd, 4th and 5th accused would appear as faultlessly genuine, for the combination of lack of motive and tainted facts in a state of confusion on, would create a reasonable doubt of high degree as to the guilt of the 1st accused. According to the authorities, although the prosecution is not required to establish a motive, once a cogent and intelligible motive is established, that fact considerably advances and strengthens the prosecution case.

As stated by Channel, *J in Rex vs. Ellwood*[7] (cited with approval in *Queen vs. Kularatne*[8] at 534) (see Cross on Evidence at page 28) "There is a great difference between absence of proved motive and proved absence of motive."

As far as the 1st accused in this case is concerned, there was evidence of motive against him but he never took upon himself to prove absence of motive (despite his not being bound). To look at it from another angle the 1st accused never challenged the evidence regarding the alleged existence of motive.

The prosecution witnesses have attempted to unfold in this case, a strong motive which prompted an angry reaction by the 1st accused to be instrumental in the commission of the offences in question. The factual background of the motive as disclosed by the prosecution is that the virtual complainant was engaged with his father as partners in manufacture of linen and undergarment. They had commenced business in the year 1966. After the death of the father in the year 1970, the virtual complainant carried on the business as the sole proprietor for a short period. Thereafter, in the year 1972 – 73 he had accepted the 1st accused as a partner. In 1984, they incorporated "Thusitha Industries Private Ltd" and the two brothers became its sole shareholders. After its formation, the company obtained a loan of Rs. 13,000,000/- and the industry was developed utilizing the loan so advanced. The virtual complainant has persistently accused the 1st accused of siphoning off a large sum of money from the company for his own use. With this money he had purchased vehicles etc. The 1st accused has drawn money from the company without it being properly sanctioned to purchase also a house at Melder place. The aggregate sum of money so drawn by the

1st accused from the company is estimated to be in the region of 3 million in the year 1986-87.

The virtual complainant has also blamed the 1st accused of having directly obtained monies due to the company from its debtors and spending the same for his own use without crediting it to the company's account. The 1st accused is also alleged to have registered the trade name of the business "Diamond" in his personal name. Above all, the 1st accused is said to have started a rival business of manufacturing and selling products similar to those that were manufactured by "Thusitha Industries Private Limited."

The 1st accused is alleged to have sold machinery belonging to the company without proper approval. The virtual complainant has complained against him on this matter to the lending institution which ultimately appointed a member to be on the Board of Directors to prevent the recurrence of such acts. These are some of the controversies that had developed into a grave animosity between the two brothers and resulted in the virtual complainant to have recourse to legal remedy.

Over the death of their mother, both brothers were at loggerheads. Due to this disagreement the 1st accused had even complained to Narahenpita police against the wife of the virtual complainant, accusing her of giving an overdose of medicine to his mother. According to the 1st accused drug overdose was the immediate cause of his mother's death.

Due to the above state of affairs, there can be no doubt that the two brothers mutually would have gone through the bitterest experience in their life as against each other and their relationship too would have been irremediably

damaged, both in regard to their personal affairs and business transactions.

As has been indirectly submitted by the Learned President's Counsel, inasmuch as one can argue that the 1st accused would possibly have been behind the entire fate of misfortune that befell Samarasinghe family, there is nothing to prevent a counter allegation being leveled against the virtual complainant that the charge made against the 1st accused was fabricated or merely conjectural by reason of the prejudice the virtual complainant had towards the 1st accused owing to the displeasure. In other words the 1st accused attempted to show that the motive concerning him is a double-edged weapon. It is in this background the learned President's Counsel submitted that the disputes existed between the two brothers in fact caused damage and annoyance not to the 1st accused but to his brother (Nimal) and are in fact, if at all, a motive for the brother to act against the 1st accused.

In this respect, I wish to emphasize that the motive sought to be established against the 1st accused, if looked at it from the correct perspective, would appear on the face of it to be exceptionally strong and very much relevant. Even though the High Court Judge appears to have proceeded to conjecture on certain matters, the fact that the prosecution established a strong case against the 1st accused especially on a possible motive cannot be ignored. Taking into account all these matters, in my opinion, there is no difficulty in believing the existence of a strong motive, behind the back of the 1st accused to harm the virtual complainant and his wife. As such the motive undertaken to be established by the prosecution has been proved beyond reasonable doubt. The conduct of the 1st accused subsequent to the commission of the

offences undoubtedly inculpates him. Such conduct of him relates back to the moment immediately after the commission of the offence and extends up to a considerable length of time. The mass of evidence from official witnesses such as Doctor De Alwis and IP Munidasa supported by the evidence of Karunaratna as to his meeting of the 1st accused on his return after having dropped the culprits and the election of the 1st accused a counsel who defended the other accused throw enough light as to his exact mentality and culpability.

Turning to the factual background, the virtual complainant had met a lawyer to discuss matters regarding the business dispute with the 1st accused and returned home around 8.30-8.40 PM. The security officer was on duty at that time. Right at that moment, the double-cab belonging to the 1st accused had been parked unusually under the mango tree, instead of its usual place, i.e in front of the garage. The virtual complainant having then gone to the bedroom originated a phone call to Edward Gunaratna, Attorney-at-law and discussed for nearly 10 to 15 minutes about the dispute he had with the 1st accused over the business. Thereafter, he had gone to the bathroom and come back in 10 minutes. While combing hair, he heard a Sound. The witness was emphatic that when he was in conversation with Edward Gunaratne, Attorney-at-law over the phone, the 1st accused left in his double cab and came back almost at the same time when he heard the noise of a glass falling. Soon after, he had rushed into the dining room, to find a man of the height of 5' 2" armed with a knife and in mask with an injured elbow standing. The witness then went on to describe as to what took place in the room occupied by his uncle. There, he had seen two people armed with pistols threatening his uncle, aunt and the security guard.

The man armed with the knife forced the witness, his wife and daughter to sit on the settee and Buwaneka to sit where his wife and the security guard were seated. The two intruders with pistols had entered the room of the complainant's daughter then searched the almirah for valuables but were disappointed to find none inside.

Narrating further details, the witness said that the man with the black pistol went towards the room of the 1st accused. The man with the black pistol went through the bathroom and entered the witness's room. He then demanded the witness and his wife to come into that room and they were forced to open the almirah. The man with the black pistol removed his mask and started to search for valuables in the cupboard.

The person with the silver colour pistol brought the 1st accused and hit him twice or thrice. Then the 1st accused requested "to give whatever the things they had" "තිබෙන ඔදයක් දීලා ඉවර කරගන්න" and upon this the wife of the witness responded saying "we have given all what we had" and told the witness "it is your brother who is behind this incident".

Having taken the jewellery the two men armed with pistols brought the witness, his wife and daughter to the dining area. Both men removed their masks and put them in their pocket and searched the cupboard once again. The witness was asked to open the safe for the second time also. When it was opened they searched it and found cash on the upper deck to the value of 60 to 70 thousand.

Recounting the most bitter experience that traumatized the witness and his wife, Nimal went on to say that they were asked to sit on the long settee on another occasion and the man with the knife (5th accused) plastered the mouths of his wife and Buwaneka. The gunmen (3rd and 4th accused) asked

them to proceed to the room again. At that stage, the 1st accused told them to leave the child and go. He (1st accused) took the child and gave it to one of the employees. Then the witness and his wife went into the room. Inside the room accused removed the masks and put them into the pockets and ordered the witness and his wife to sit on the floor. After obeying the orders the witness pleaded with accused not to harm their lives. The accused said that, if they were to behave as they were told, no harm will befall on them. The 3rd accused scolded the witness. While the witness and his wife were lying on the floor face downwards, then the witness was shot. He did not see as to who shot him. There were no outsiders in the room at that time other than the 3rd and 4th accused. As the witness was shot his wife said why did you then tell us that we won't be harmed? Then the witness heard sounds of two more shots and then felt blood falling on to the carpet and someone breathing up and also some liquid like substance falling on his body.

The fact that the double cab of the 1st accused having been parked at an unusual place looked large in the course of the argument. By this the prosecution was trying to make out that the 1st accused had conspired with the 3rd 4th and 5th accused the commission of the offence, and the vehicle was parked unusually to facilitate the transportation of the cuplrits to the residence and back. The learned President's Counsel has contended that the learned High Court Judge was not justified in having adverted to the fact of parking of the vehicle in that manner thereby imputing a sinister motive to the 1st accused. According to the principal eyewitness for the prosecution the 1st accused usually drops his servants at night. As such the learned High Court Judge has erred himself when he expected an explanation from the 1st accused as to what made him park the vehicle under the Mango tree.

As regards the 1st accused leaving the house shortly before the arrival of the intruders and returning almost with the arrival of the intruders, the learned HCJ concluded that the intruders had been transported in the double cab belonging to the 1st accused. There was no direct evidence that the intruders were transported by the 1st accused. However, relying on the circumstances spoken to by the main witness, the learned High Court Judge has inferred that the intruders could have been transported by the 1st accused. There are several reasons which have contributed towards this conclusion. To begin with the witnesses have clearly spoken as to the security arrangement that was in operation at the premises where the incident had taken place. It is common ground as between the 1st accused and the prosecution that to enter into this premises one has to come through the main gate which is manned by security personnel during day and night. Then, the issue centres round as to how intruders found their way into the compound without being noticed by the security guards. Learned President's Counsel has submitted that the fact that the security guard being taken into custody by the intruders and sound of breaking glass heard by the main witness and one of the intruders being seen with bleeding injury are suggestive of the intruders overpowering the security guard to enter the premises and breaking a glass pane to enter the house. There was no evidence of the security guard being overpowered by the intruders. The security guard had not sustained any injuries. According to the evidence led at the trial it appears that the security guard had been attracted into the house by the noise created by the intruders.

The 1st accused in his dock statement has not dealt with the allegation relating to his leaving the premises in the double-cab shortly prior to the arrival of the intruders. He neither

admitted nor denied the allegation. Had he left the premises for a genuine cause, he could have stated it in his unsworn dock statement which constitutes evidence. It is very important both for the prosecution and the 1st accused, as his having left the premises at that crucial point of time provides circumstantial evidence to strengthen the prosecution case that it is he who had transported the intruders into the compound avoiding a security check or security identification. On the other hand if he did not leave the residence as alleged by the prosecution witnesses to transport the intruders into the house, he could have very well denied such allegation in the statement, for it is one of the serious allegations leveled against him in the form of an item of highly incriminating evidence. Further, when Nimal was under cross examination on behalf of the 1st accused no question was put or suggestion made about the double cab being parked under the mango tree for an innocent purpose, as was urged by the President's Counsel. No doubt the learned HCJ has seriously misdirected himself with regard to law when he stated in the judgment that the 1st accused was obliged to explain that the intruders did not have his cooperation to enter the house. By this erroneous finding and unsubstantiated observation, the learned trial Judge has misapplied the burden of proof and thus failed to appreciate the well-recognized concept of burden of proof and evidential burden. Nonetheless, in the light of the overwhelming evidence adduced against the 1st accused, the misdirection on the part of the learned HCJ appear to me as a mere instance of overstating the reasons for his conclusion.

Even though Buwenaka says that the 1st accused was assaulted twice or thrice by the intruders, surprisingly there were no injuries on his body suggestive of such an attack.

As narrated by Buweneka it appears to be an assault by a friendly hand. These are matters that should be duly taken into consideration in weighing the prosecution case. The fact that the wife of the 1st accused had not been harassed by the intruders in any manner speaks for volumes as to the aim of the intruders who kept on harassing the virtual complainant, his wife and others and not the wife of the 1st accused or the 1st accused himself. This is a strong incriminating circumstance that has to be taken into consideration.

The 1st accused was in the double-cab for quite some time with the intruders when he was forced to transport them. In the dock statement the 1st accused has not mentioned a word about their wearing masks inside the vehicle. Even if they did wear masks inside the vehicle, the 1st accused could have disclosed in the dock statement his ability or failure to identify them. The failure on the part of the 1st accused to disclose his position, as to whether he is able to identify the other accused or not points to a strong incriminating circumstance relating to a conspiracy to commit murder, attempted murder etc.

To be fair by the 1st accused, at this stage it is pertinent to observe the failure on the part of the prosecution to lead the evidence of the security guard who was on duty at the time of the incident. No reasons whatsoever have been given for such failure. The 1st accused has contended that the failure to lead such evidence attracts the presumption set forth in section 114 F of the Evidence Ordinance. Taking into consideration the role played by the security guard and the extent to which he has been harassed by the intruders, undoubtedly the security guard had been one of the material witnesses in the attended circumstances of the case. As such the failure

on the part of the learned Judge to consider the application one way or the other in terms of Section 114F of the Evidence Ordinance may have deprived the accused of the opportunity to cross examine him on the matter. However, it is to be noted that the accused had not made any application to have his evidence led even without the prosecution calling him. If the accused was so certain that the security officer would have testified in favour of the accused they could have made an application to the learned HCJ to call them as a witness or to direct the prosecution to call him. If the accused had missed this opportunity they could have yet called him as a witness for the defence, they were so keen to have its evidence placed before court. The accused had not elected any of the above options.

It is well settled law that the prosecution is not bound to call all the witnesses whose names appear on the indictment as witnesses for the prosecution. Under the Evidence Ordinance to presume that a particular witness was not called because his evidence would be adverse to the prosecution is a presumption of fact and discretionary in nature. To draw this presumption an important qualification is to satisfy the trial judge that the witness concerned is necessary to unfold the narrative that is withheld by the prosecution and the failure to call such a witness is a vital missing link in the prosecution case. I do not think the accused have established the pre-requirements to draw the adverse presumption on this matter. Further, the security guard employed by "Thusitha Industries Private Ltd" is an employee of both the virtual complainant and the 1st accused. To call him to testify on the matter either against or in favour of his employer (the 1st accused or the virtual complainant) would have put him into severe embarrassment. For these reasons, I am not

disposed towards the invitation of the learned President's counsel to draw an adverse inference against the failure to call the security guard as a witness.

Another grave error in the judgment stems from the conclusion that the intruders had been dropped near Sri Jayawardenapure campus at 10.P.M. By this the learned Judge surmised that the said place was crowded at that time and imagined that the intruders were not worried about getting down at a crowded place as they were not scared of the 1st accused. Based on this conjecture the learned Judge thought that it stands to logic to conclude that the 1st accused was sharing a common intention with the other accused. Even though this finding is not supported by evidence, it has not had the effect of being prejudicial to the accused, since the other evidence against the 1st accused is overwhelming.

The learned Judge states that involvement of the 1st accused with the crimes is confirmed by the words uttered by the 1st accused to the deceased and his brother requesting them to give away whatever they had to finish it off. Parties impliedly agree that what was meant by this utterance is to give whatever belongings they had to get rid of the problem. On a perusal of the judgment, what appears to me is that the utterance made by the 1st accused is an attempt to demonstrate the leniency shown by the intruders in not plastering the mouth of the 1st accused. Hence, it cannot be considered as being erroneous.

According to Nihal the 1st accused requested the deceased to "give over the child," but Buweneke's version was that it is an intruder who ordered that the child be handed over. Without assigning any reason the learned Judge accepted that it is the 1st accused who requested the handing over of the

child and then proceeded to surmise that the 1st accused knew that Deepika was taken into the room to be shot. This has clearly influenced the learned Judge to an unfair and unreasonable opinion of the 1st accused. However, even after excluding this finding as being unduly prejudicial to the 1st accused, yet there is a large volume of proved circumstantial evidence against the 1st accused.

Karunaratna alleged that the 1st accused handed over an envelope yellow in colour containing cash. Significantly, Nimal has not seen such an occurrence. Two matters arise for consideration with regard to this allegation. Firstly, witness Karunaratna has not made any mention of the alleged cash transaction to the police in his statement. The learned President's Counsel contends that in the light of this important omission Karunaratna should not have been believed at all.

Karunaratna was in his seventies and in a state of shock when the incident took place. Therefore he stated that he may have by an oversight omitted to mention this to the police. The question one has to address at this point is the extent to which Karunaratna can be believed on this matter. There was no allegation that Karunaratna bore any animosity towards the 1st accused. As far as Karunaratna is concerned both Nimal and Anuruddha are his nephews and his explanation appears to me as plausible.

The 1st accused did not deny in his dock statement that he handed over an envelope containing money to the intruders. On the other hand he admitted having handed over such an envelope. Karunaratna on the other hand has testified on matters that are favorable to the 1st accused and virtual

complainant as well. A clear proof of this is the reference he made to the 1st accused being manhandled by the intruders. More importantly, the 1st accused admitted in the dock statement that he handed over an envelope without conceding that it constituted payment to the intruders. In the circumstances, no prejudice appears to have resulted against the 1st accused, by reason of the contradiction arising from the evidence of Karunaratna.

Another piece of incriminating evidence against the 1st accused is the presence of two linear injuries on his upper right hand 5 inches long and other 7 inches long. Quite significantly, they were parallel injuries. According to the medico legal report, there had been two superficial linear cuts placed parallel to one another on the outer aspect of a right upper arm one measured 7" long and the other 5" long. Dr Nadeshan was the Judicial Medical Officer attached to Colombo South Hospital during the relevant period. According to Doctor LBD Alwis whose medical competence has been admitted by the accused, two injuries on the 1st accused could have been self-inflicted. The 1st accused has been examined by Doctor Nadaraja and report issued by him was produced through Doctor Alwis as the former was beyond seas at the time of the trial. According to the report of Doctor Nadaraja the 1st accused has been admitted to hospital on 13.2.1089 around 9.50 pm and he has been examined on 14.2.1989 at 3.30pm., to be precise 17 hours after the incident. According to Dr. Madaraj who had testified before the learned Magistrate at the non-summary inquiry, the 1st accused has told him that he was attacked by robbers with knife around 9.30 p.m. on 13.2.89. The doctor has not found any defensive injuries on the body of the 1st accused.

At this stage it is useful to examine the evidence of IP Munidasa who visited the 1st accused at Ward No 20 of Kalubowila Hospital at 11.30 p.m. on 13.03.1989, i.e on the day of the incident. According to Dr. Alwis the 1st accused has sustained two superficial (skin deep) injuries on his right arm. When Buwaneka pointed out the injuries to the 1st accused soon after he returned home, he immediately responded by saying "ඒකට කමක් නැහැ" meaning "it doesn't matter". This clearly shows that the injuries were not that serious and the 1st accused himself treated them as being absolutely trivial and the presence of those injuries had not bothered him at all. If the 1st accused was actually attacked by the intruders who travelled in his double-cab, upon Karunaratna pointing out the injuries to the 1st accused, he should have promptly told him as to how he sustained them. For reasons of his own he has totally suppressed this information from Karunaratna. He has not even told IP Munidasa, as to how he came by those injuries. This provides a revealing insight into the possible ulterior motive behind the 1st accused having opted to be an inmate patient of the hospital apparently without any such necessity, at the time when his presence at his residence was absolutely necessary. He has found the hospital as the safest place of shelter immediately after the incident. As far as the prosecution is concerned, this undoubtedly points to another incriminatory circumstance connecting him with the crime.

As observed earlier the 1st accused has not shown any interest to complain the matter to the police. When IP Munidasa visited him at 11.30. p.m. on the day in question, the 1st accused had been asked by the inspector of police whether he was prepared to give a statement. The response shown by the 1st accused to this suggestion was totally unsatisfactory.

According to IP Munidasa when the 1st accused had been asked whether he is prepared to make a statement the prompt reply given to the inspector of police by the 1st accused was that he was not prepared at that time to make any statement. For purpose of clarity the relevant evidence of the police inspector in its original form is reproduced below. . . .

ප්‍ර - ඔබ ඔය කළුබෝවිල රෝහලේ අංක 20 වාට්ටුවට ගියේ කීයට විතරද?

උ - රාත්‍රී 11.30 ට

ප්‍ර - කවදාද

උ - 2.13 වෙනිදා සිද්ධිය වෙච්ච දවසේම ගියේ.

ප්‍ර - ඒ අවස්ථාවේදී මේ 1 වන විත්තිකරුගෙන් කටඋත්තරයක් ලබා ගැනීමට පියවර ගත්තද?

උ - මම ඔහුගෙන් ප්‍රකාශයක් ලබාගැනීමට පුළුවන්ද කියා ප්‍රශ්න කළා. ප්‍රකාශයක් පස්සේ දුන්නොත් හොඳ නේද කියා ඔහු නිහඬ වුණා.

The words used by the 1st accused to refuse to give a statement or postpone the recording of the statement are quite significant.

The words used are පස්සේ දුන්නොත් හොඳ නේද On the occasion not only that he has refused to give a statement for no obvious reasons but suggested that it is better to give a statement later. The lack of enthusiasm shown by the 1st accused, to make a prompt complaint or to reveal information within his knowledge to the police when he had the opportunity to do so with no effort, sheds light as to the involvement of the 2st accused in the commission of the crime. This attitude of the 1st accused in my opinion creates a strong incriminating circumstance. The persistent reluctance on the part of the 1st accused to keep the authorities informed of the

commission of the crimes, by the intruders and the unusual lethargy shown by him in assisting the authorities to apprehend the culprits by providing information within his knowledge also cannot be ignored in weighing the circumstantial evidence against the 1st accused.

Quite apart from this, when IP Munidasa visited the 1st accused at the hospital on the day in question, he had observed that the 1st accused was smelling of liquor. This has compelled the trial judge to arrive at the finding that it was burden of the 1st accused to explain as to when he consumed liquor (whether prior to the incident or after). As has been submitted by the learned President's counsel this is a clear misdirection of law. The learned High Court Judge in coming to this conclusion seems to have been of the opinion that the 1st accused probably could have consumed liquor in the company of the intruders after they left the scene of offence and before he (1st accused) returned home. The learned High Court Judge's adverse observation that the 1st accused could have consumed liquor in the company of the intruders is a conjecture and therefore cannot be allowed to stand. However, what is surprising is that even though there is no burden in the 1st accused to explain or deny the allegation of having consumed liquor, he has not spoken a word in his dock statement about that matter.

As far as the eyewitnesses for the prosecution are concerned none of them stated that the 1st accused was smelling of liquor at the time the incident took place. Added to this, the 1st accused himself did not take up the position that he consumed liquor prior to the incident. When making the dock statement, the 1st accused knew very well that it had been alleged by the prosecution that he was smelling of liquor at

the hospital. As such, the 1st accused ought to have known the importance of this fact from the point of view of the prosecution. It is quite strange that yet he made no reference in his dock statement against this allegation. By reason of the above facts, the prosecution has clearly proved that the 1st accused was smelling of liquor around 11.30 p.m. and that it is unusual for him to have taken liquor at that time unless it was concerned with the commission of the offences. Therefore what is important here is not the absence of explanation as to when he consumed liquor as erroneously approached by the learned HCJ, but the proved item of evidence that the 1st accused was smelling of liquor at that moment.

As far as the incriminating evidence against the 1st accused is concerned, one other matter that has not been touched by the learned HCJ is the failure on the part of the 1st accused to make a complaint or a statement to the police, if he was aggrieved to that extent as claimed by him. Looking at it from the 1st accused point of view, the brutality of the intruders was such that it had resulted in the death of a member of his family and serious injury to his brother coupled with ruthless attack on him and his having to part with undisclosed amount of money.

The 1st accused has made an involuntary statement after the lapse of at least four days, i.e after he was arrested by police. According to the medical report he had not sustained such injuries which prevented him from making a prompt statement. Taking into account the harassment he had been subjected to by the intruders and the crimes committed on him, the 1st accused should have made a prompt complaint, forgetting all his misunderstandings with his brother, so as to facilitate the arrest of the culprits. The unaccounted delay

in making a voluntary statement by him is a grave incriminating circumstance that militates against his defence.

The 1st accused had returned home according to the prosecution around 10 PM. By that time his brother and sister-in-law had been rushed to the hospital and upon meeting Karunaratna at that time he had quite strangely failed to mention anything or comment about the incident. When Karunaratna showed him an injury on his shoulder the answer of the 1st accused was "it doesn't matter" (ඒකට කමක් නැහැ.) He had not bothered to find out the position of his brother or sister in law. On the contrary he had admitted himself at the hospital with two skin-deep injuries. This clearly shows the triviality in which the 1st accused had viewed the entire tragedy. Not only that he was un-mindful of the sudden blow on his brother and sister-in-law but he was not even assertive of his own rights either.

The learned President's Counsel has submitted that in the instant case not a single incriminating circumstance has been satisfactorily established so as to shift the evidential burden on the 1st accused. His contention is that the displeasure regarding the business activities, misunderstanding regarding the cause of death of the mother, parking the double cab in an unusual manner, the request made by the 1st accused to the complainant and his wife to give away whatever they had and to finish it off are conjectures and misconstruction that had arisen from available evidence. There is no doubt that the learned High Court Judge has guessed certain matters as having actually existed based on mere surmises. The trial Judge has in fact unreasonably looked at the evidence and then proceeded to conjecture on certain unproven matters as well. Despite the fact it had given rise to a complaint, I am

not inclined to think that when such misconstructions and surmises are removed from the impugned judgment, there is evidence beyond reasonable doubt that the 1st accused has in fact committed the offences described under Count No. 1, 8, 9, 10, 11, 12, in the indictment.

As regards the case for the prosecution presented against the 1st accused, it must be observed that the strongest circumstantial evidence proved beyond reasonable doubt was the strong feeling of animosity the 1st accused had towards the virtual complainant and his wife. Both parties have had a very strong disagreement as regards the death of the mother. This has even led to the 1st accused to make a complaint at the police station. The gravity of the disputes of the two brothers were such, it had led to the virtual complainant to seek legal remedy to prevent the 1st accused from siphoning off the funds of the company, collecting the debts owing to the company and appropriating the same for the benefit of the 1st accused, operating a rival business, making use of the trademark for the business purposes of the 1st accused etc. The virtual complainant had consulted lawyers and returned home few hours prior to the incident. Even the lending institution being alerted on this matter, as a remedial measure the lending institution had nominated it's own representative to the Board of Directors if "Thusitha Industries Private Ltd". The 1st accused had withdrawn almost Rs 30 million without proper approval. When the entire background of the displeasure between the two brothers and the 1st accused and the deceased is considered, one cannot simply ignore that the 1st accused had a strong motive to eliminate both the virtual complainant and his wife. This clearly shows when the intruders had opened fire only on the virtual complainant and his wife when there were at least 11 people in the house at

the time of the incident. They are the virtual complainant, his wife, 1st accused, his wife, Mr and Mrs Karunaratna, 2 security guards, 2 employees and the daughter of the deceased. Quite strangely, the intruders had not harmed others to the extent they did to the virtual complainant and his wife. As a matter of fact from the conduct of the intruders it can be safely inferred the they were under the impression that both the virtual complainant and his wife has died as a result of being shot. All these facts clearly lead to the conclusion that the target of the intruders was to murder the virtual complainant and his wife. The friendly attitude shown by the intruders towards the 1st accused and his wife sheds light to the conspiracy and the connection the 1st accused has had with the intruders.

The items of circumstantial evidence relied on by the prosecution to establish the charges against 1st accused emanates inter alia from the evidence relating to the parking of the double-cab in an unusual manner, the sudden disappearance of the 1st accused immediately prior to the incident, his return almost at the same time when the intruders appeared, the fact that the vehicle was again parked unusually at the same place, and the 1st accused's failure to mention this in the dock statement. The other incriminating and circumstantial evidence proved beyond reasonable doubt against the 1st accused can be summarized as follows...

1. The strong motive arising from the serious disputes the 1st accused has had with the virtual complainant – which has not been denied in the dock statement.

2. Failure to make a complaint against the intruders.

3. Failure on the part of the 1st accused to cross examine the witnesses on the allegation that the 1st accused sud-

denly left and returned just at the time when the intruders entered the house and the failure of the 1st accused to touch on this matter in his dock statement.

4. Failure to explain in the dock statement what made the 1st accused to park his vehicle under the mango tree and on his return once again to park it at the same place.

5. Failure to give any plausible reason as to what made him to park the vehicle under the mango tree or to mention the necessity to drop the servants on the day in question as the reason for the parking of the vehicle at that point.

6. Failure on the part of the 1st accused and his wife to find their way out through the independent entrance from their room and immediately report the matter to the police or seek other assistance to defeat the aim of the intruders.

7. The 1st accused and his wife not having been plastered, as was done in the case of some of the victims of the crime.

8. The failure to provide information to the police despite the ample opportunity he had.

9. Failure to give a statement immediately even after the police officer who visited the 1st accused at the hospital, was prepared to take down the same.

10. Failure on the part of the 1st accused to mention anything about the 3rd, 4th and 5th accused in the dock statement and only referred to the 2nd accused.

11. Consumption of liquor immediately after incident

12. Self-inflicted injuries or injuries inflicted by a friendly hand.

13. The concerted efforts made by all the accused to have their defence conducted by a single lawyer during the whole of the non summary proceedings and for a considerable length of time before the High Court.

These items of evidence when taken together they lend a solid support to the conclusion that the said acts on the part of the 1st accused are neither coincidental nor is devoid of any ulterior motive.

The dock statement of the 1st accused in this case is of much importance. He made a lengthy dock statement. A substantial portion of the dock statement covers his grievances against the virtual complainant with regard to the business matters and allegation regarding the circumstances that led to the death of the mother. Apparently not much attention has been paid in the dock statement to what happened to him in the hands of the intruders. Quite significantly, he has taken the trouble to mention his acquaintance with the 2nd accused. However no mention has been made in that statement as to the culpability of the other accused or whether he was harassed by the accused who stood indicted with him. However as a layman he could have at least stated whether he was able to identify the culprits on that day. For purpose of ready reference the relevant portion of the dock statement dealing with the incident is reproduced below.

මේ සිද්ධිය සම්බන්ධයෙන් යමක් කියනවා නම් මේ නිවසට හොරා ආපු අවස්ථාවේදී කිව්වා කියලා තියෙන දෙයක් දීලා යවන්න කියලා. තව කිව්වා මම හොරුන් කණ්ඩායම් ඇඳුම් අල්මාරියම ළඟට අරන් ගියා කියලා. මම දන්නවා සල්ලි තියෙන්නේ සේප්පුවේ කියලා. ඔවුන් මට පිස්තෝලයක් පෙන්වලා අරන් ගියේ. එමනිසා මට තියෙන දෙයක් දෙන්න, කියලා අදහස් කලේ එතකොට ඒ

අයට හිරිහැරයක් කිරීමෙන් හෝ වෙනත් කරදරයක් කිරීමෙන් වලකින නිසා. ඊට ප්‍රථමයෙන් තමා මම මුදල් එන්ලොප් එකක් දුන්නා කියලා. එම අසුවුනේ මම කලින් දවසේ අමුද්‍රව්‍ය ගැනීම සඳහා කලින් ලෑස්ති කරපු මුදල් එන්ලොප් එකක් දුන්නා කියා. එම අසුවුනේ මම කලින් දවසේ අමුද්‍රව්‍ය ගැනීම සඳහා කලින් ලෑස්ති කරපු මුදල් එන්ලොප් එකක මගේ අල්මාරියේ තිබුණා. . . මුදල් එන්ලෝප් එක මගේ අතේ තිබුනා. මාව ඇදගෙන ආවා. . විද්‍යෝදය යුනිවසිටි එක ළඟදී වාහනය නතර කරපන් කියලා කිව්වා. වාහනයෙන් බැහැලා ඇවිල්ලා මගේ අත කැපුවා. . . මම පැත්තකට වුනා. ආයෙත් ඇවිල්ලා අත කැපුවා. . . ගෙදරට ගියාම මාමා කිව්වා අත කැපිලා කියලා. . . ස්වාමීනී, මේ විත්තිකරුවන් ගැන යමක් කියනවා නම් දෙවෙනි විත්තිකරු මම හඳුනනවා. . . ඔහු මගේ මිත්‍රයෙක්. ඒ හැරෙන්න වෙන සම්බන්ධතාවයක් තිබුණේ නැහැ. මේ සම්බන්ධයෙන් මට වෙනත් දෙයක් කීමට තිබුණේ නැහැ.

In the light of the matters referred to above as to the liability of the 1st accused in the commission of the crime the circumstantial evidence without any doubt points to no alternative other than the culpability of the 1st accused. The items of evidence placed for consideration of the learned HCJ by the prosecution does not constitute mere circumstances of suspicion as contended by the learned President's Counsel.

The case for the prosecution against the 1st accused is not a mere probability or a strong suspicion but goes beyond that degree. Despite certain negligible weaknesses, the circumstantial evidence constitutes sufficient proof of the allegation levelled against against the 1st accused as to the charge of murder, attempted murder, robbery, conspiracy etc, when considered as a chain. In my opinion none of the links in that chain can be considered as broken.

For the foregoing reasons, I am of the view that count numbers 1, 8, 9, 10, 11 and 12 had been proved beyond reasonable doubt against the 1st accused and the learned

High Court judge is justified in convicting him on the said charges. The charges 2 to 7 against the 1st accused have not been proved and he is entitled to be acquitted on those charges and the sentences imposed are accordingly set aside.

The material available against the 4th accused to convict him for the charges preferred in the indictment, need to be analyzed at this stage. As stated above the exercise of the right of representation in an unusual manner, by the 4th accused along with the 1st accused is one of the factors that speak volumes as to his culpability. Upon information received from him while being in the custody of police within a period of two weeks the police had recovered a pistol. The said recovery has been proved with certainty. The said pistol was shown to the virtual complainant for purpose of identification and it was accordingly identified to be a weapon similar to what was in the hands of the 4th accused on the fateful day. According to the evidence of the government analyst P3 is a revolver and it is a gun within the meaning of the law and the two bullets recovered from the body of the deceased may have been fired from the said revolver.

As regards the identity of the 4th accused the prosecution relied on the identification parade notes which point to the 4th accused having been identified by the virtual complainant. According to the virtual complainant the intruders have removed the facemask on different occasions to facilitate a thorough search of the almirah for valuables. It is the evidence of Karunaratna that according to one of the intruders the immediate cause for opening fire on the virtual complainant and the deceased was the suspicion that they had been identified. This evidence corroborates the position of the