GUNAWARDENA

V.

THE REPUBLIC OF SRI LANKA

COURT OF APPEAL
COLIN–THOME',J. (PRESIDENT) ATUKORALE, J. AND TAMBIAH, J.
C.A. NO. 35/80 – H. C. GAMPAHA 28/78
MAY 27, 28 AND 29, 1981
JUNE 1, 3, 8, 9, 10, 11, 15, 18 AND 19, 1961

Charge of murder · circumstantial evidence – evidence of behaviour of police dog – reference to provocation in the absence of evidence – compromise verdict – conjecture and suspicion.

Very convincing expert evidence should be placed before a Court which is invited to conclude that the mere behaviour of a police dog by itself renders the existence of any relevant fact in a criminal trial so highly probable or improbable as to justify the application of s.11(b) of the Evidence Ordinance. In every case it would be necessary for evidence to be received about the training, skill and habits of the particular dog and its handler, and of the fact that each human being has a different scent or odour which is liable to be picked up by well trained dogs. The handler should be shown to be well experienced in regard to the characteristics of the particular dog in question. However there are two fundamental difficulties. The uniqueness of scent appears to be by no means so clearly established as, for instance, that of finger prints. Furthermore the reliability and aptitude of dogs for this type of work varies.

However an important clue may be discovered by an animal which would point to the identity of the offender. But in such a case it is the positive evidence brought to light rather than the manner of its discovery that constitutes relevant and admissible evidence of the offender's guilt.

A warning by the Judge to the jury against bringing a compromise verdict is nullified by the Judge himself speculatively suggesting to the Jury the possibility of provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The accused should be tried on the evidence and on the evidence alone.

In a case resting on circumstantial evidence the judge in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt must give a further direction in express terms that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are –

(a) consistent with the guilt of the accused; and

(b) exclude every possible explanation other than the guilt of the accused.

In a case of circumstantial evidence the facts given in evidence may, taken cumulatively be sufficient to rebut the presumption of innocence, although each fact, when taken separately may be a circumstance of suspicion. Each piece of circumstantial evidence is not a link in a chain for if one link breaks the chain would fall. Circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three stranded together may be quite sufficient.

When no *prima facie* case has been made against an accused, he need not offer an explanation. It is open to the accused to rely safely on the presumption of innocence or on the infirmity of the evidence for the prosecution.

If the cumulative effect of the totality of the evidence is one of suspicion, however grave, it is an insufficient basis for conviction, and cannot take the place of positive proof.

The Court of Appeal does not sit to retry cases thereby usurping the functions of the jury. If there has been no misdirection, no mistake of law or no misreception of evidence, the verdict of the jury will not be upset on the ground that the verdict is unreasonable. This is however not an inflexible rule. If the Court thinks that verdict is, on the whole, having regard to everything that took place in the Court of trial, unsatisfactory, then the Appeal Court will interfere.

Cases referred to:

(1) H. N. Gunawardena v. The Republic 78 NLR 209.
(2) S. Rathinam v. The Queen 74 NLR 317, 326.
(3) Kanapathipillai v. The Queen 57 NLR 397.
(4) R v. Haas (1962) 35 DLR 172.
(5) Patterson v. Nixon (1960) S.C. (J) 42, 49.
(6) M. J. Fernando v. The Queen 54 NLR 255, 258.
(7) Mancini v. The Director of Public. Prosecutions 1942 AC 1, 12.
(8) Mc Greevy v. Director of Public Prosecutions (1973) 57 Cr. Ap. Reports 424.
(9) Ducsharm 1955 O. R. 824.
(10) Hodge (1938) 2 Lew. 227, 228.
(11) Plomp v. The Queen (1963) 11 – CLR 234, 252.
(12) Regina v. Enall 176 ER Nisi Privy 853.
(13) The King v. Gunaratna 47 NLR 145, 149.
(14) R. v. Burdett (1820) 4B & Ald. 161, 162.
(15) Isar Singh v. Emp. 7 SLR 109.
(16) The Queen v. M. G. Sumanasena 66 NLR 350.
(17) Wallace (1931) 23 Cr. Ap. R. 32.
(18) Aladesuru v. The Queen [1956] AC 49.
(19) Curly v. U. S. 81 US App. D. C. 389.
(20) Gardiris Appu v. The King 52 NLR 344.
(21) M. Nandaratne v. The Republic S. C. 61–63/77.
H. C. Avissawella: S. C. Minutes of 26.7.1978.
(22) Ebert Silva v. The King 52 NLR 505 (P.C.)
(23) The Queen v. Kularatne 71 NLR 529, 532.
(24) Frederick Barnes (1942) 28 Cr. Ap. R. 141, 142.
(25) Peeris Singho v. The Queen 52 NLR 173.

Dr. Colvin R. de Silva with N. V. de Silva for the accused-appellant
Ananda Amaranath, Senior State Counsel, for the Attorney-General.

Cur adv vult

August 5, 1981.

COLIN THOME, J.

This case has had an abnormally chequered history. The appellant was charged with having committed murder by causing the death of M. G. Somawathie alias Soma Perera on 15.5.1973, at Galenbindunuwewa, an offence punishable under section 296 of the Penal Code.

The appellant has had three trials on the same charge and has been through three appeals. The first trial was held from 10th October to the 25th October, 1974, in the High Court of Kandy. At the conclusion of this trial he was found guilty of the charge by an unanimous verdict of the jury and was convicted and sentenced to death. In appeal a re-trial was ordered as the trial Judge had misdirected the jury on circumstantial evidence and the deductions to be drawn from the failure of the accused to testify: *See H. N. Gunawardena v The Republic.*[1]

At the re-trial, also held in the High Court of Kandy between the 6th July and 13th July, 1976, before a different Judge, after a few of the main prosecution witnesses had given evidence counsel for the appellant applied to the Judge to direct the jury to return a verdict of not guilty, on the basis that the evidence led so far as well as the rest of the evidence did not disclose that the appellant committed the offence. After hearing the submissions of defence counsel and State counsel the trial Judge held that there was no evidence upon which the jury could find the appellant guilty. Before a verdict was made and an order of acquittal was entered in the indictment the Court adjourned to enable the Attorney-General to move in revision if he decided to contest the order.

The learned Attorney-General made an application for revision of the order of the trial Judge and the Supreme Court, consisting of a Bench of five Judges, while regretting the hardship caused to the appellant, directed a second re-trial as the trial Judge had prematurely discharged the accused before the conclusion of the prosecution case which he had no power to do. Supreme Court Application No. 503/76– H. C. Kandy No. 67/74– decided on 3.9.1976. In the course of the judgment the Supreme Court considered *S. Rathinam v. The Queen*[2] where it was held that in the history of the Court of Criminal Appeal in this country an accused person has never been tried on a third occasion under the proviso to section 5(2) of the Court of Criminal Appeal Ordinance. In the instant case the second trial was abortive.

The third trial, conducted in the High Court of Gampaha, lasted one month and eight days, from the 3rd July to the 11th August, 1978. At the conclusion of this complicated case on circumstantial evidence after 45 witnesses had given evidence the jury retired at 12.45 p.m., and returned with their verdict only 35 minutes later. They held that the appellant was guilty of culpable homicide not amounting to murder on the basis of grave and sudden provocation. In the meanwhile the appellant had spent one year and two months in the death cell and a further three years in the remand jail making a total of four years and two months in jail. The learned trial Judge took these matters into account and after convicting the appellant sentenced him to four years rigorous imprisonment.

The appellant was a Police Sergeant at the Galenbindunuwewa Police Station at the time of the incident. The deceased and he had become lovers around 1968. In 1968 he was stationed at Mahawela, in the Matale District, and had gone to the deceased's house in Mahawela to investigate a complaint of burglary made by the deceased's husband James. After this initial meeting the appellant and the deceased carried on a clandestine affair and she became his mistress and thereafter had sexual relations with him both in Mahawela and Kandy. They used to exchange letters and over a period of about a year, at irregular intervals the appellant had sent her small sums of money by postal order. There were nine postal orders for Rs. 5/- each and 4 of Rs. 10/- each. The last postal order was dated 7. 2. 1973.

Somawathie alias Soma Perera was born in the village of Bamunudeniya in the Matale District. She was given in marriage by her parents at the age of 16 to one James and she bore him three children. She was a good looking woman but her marriage to James did not last long. After a time she left him and became a servant in various houses and did not visit her parental home often.

Mrs. A. A. Hulathuwa, a school teacher, said that Soma Perera was her employee from 6.6.1971 to 13.2.1972. Soma Perera's last employers were Seemon Singho and his wife Irene Ranasinghe.

According to Irene Ranasinghe the deceased was not in any financial difficulty and when she left her house on 13.5.1953 she borrowed Rs. 5/- from her. The deceased had been employed for about one year under her. She had been ill and she said she would get well and come back. That was the last time Mrs. Ranasinghe saw her.

The appellant was married. At the time of the incident he lived with his wife and children in the married officers quarters close to the Police Station. After the insurgency in 1971 the Police Station and living quarters of 28 to 30 police officers were surrounded by a 6 foot high barbed wire fence and two sentries patrolled the compound day and night. The fence had about seven strands of barbed wire. There was a gap in the fence which was between the singlemen's barracks and P. C. Tennekoon's quarters. This gap was also between two culverts on the road opposite the Station.

On the 13th May, 1973, the deceased left Colombo. It is not known where she spent the 13th night. She spent the 14th night with Seelawathie at Matale. Then she took a bus from Kandy at 2. p.m. on the 15th and travelled to Kekirawa. By a coincidence, or by arrangement, the appellant also got into the same bus at Kekirawa at 7 p.m. bound for Galenbindunuwewa. The appellant was returning to his station after giving evidence in two Court cases at Kegalle.

The bus arrived at Galenbindunuwewa at 8.15 p.m., according to the log-sheet P61 maintained by the driver Piyasena. He had entered the time in the log-sheet shortly after the bus arrived at the bus stand and the passengers had left the bus. This vital document was one of the few contemporaneous records of time produced in this case where time was such a crucial issue. For some inexplicable reason this document surfaced for the first time during the third trial, in the middle of the cross-examination of W. K. A. Wijesundera Depot Inspector, C. T. B., Rambukkana, when he was being needled by defence counsel on the time of arrival at Galenbindunuwewa. He boarded a bus at Kandy bounded for Kekirawa on 15.5.1973 at about 2 p.m. The deceased boarded the same bus and sat in the same row. He remembered her because of an incident that occurred in the bus. Her umbrella was missing and there was a commotion. The deceased searched the parcels of every passenger for her umbrella. This incident revealed that the deceased was a daring sort of woman.

At Kekirawa at about 7 p.m. Wijesundara saw the appellant board the bus and he sat immediately behind the driver's seat. He did not speak to the deceased. Eventually the bus arrived at Galenbindunuwewa at about 8.15 p.m. At the earlier trial he said that the bus arrived at 8.30 p.m. claiming that he checked the time from his watch. The deceased had a suitcase and she was wearing a green nylex saree and a short sleeved white jacket. He saw the deceased and the appellant leave the bus and proceed along the Sippukkulama road. He was unable to say whether they

went together or one behind the other. On the following day he heard that the body of a woman was lying on the bed of the tank at Galenbindunuwewa. He went there at about 9. a.m. and identified the body as that of the woman who travelled in the bus with him the previous afternoon.

The case for the prosecution rested wholly and substantially on strands of circumstantial evidence. According to the prosecution the appellant had a strong motive for killing the deceased. She had embarrassed him, a married man, by arriving at Galenbindunuwewa on the 15th May. He murdered her at the spot where her body was found by strangling her between 8.30 p.m. and 9 p.m. on the 15th. Thereafter he scattered her clothing and other particles to simulate a sexual assault on her and robbery.

In order to establish the charge the prosecution relied on a small group of witnesses who testified to the movements of the appellant and the deceased prior to her death and to the movements and conduct of the appellant after her death. The case for the prosecution was that when the witness Punchi Banda Seneviratne alias Korossagolle met the appellant on the road opposite the Police Station on the 15th between 8.30 p.m. and 9 p.m., the deceased had already been murdered. The prosecution leant heavily on the medical evidence for corroborating this thesis.

The body of the deceased was discovered by Jamaldeen Mohamed on the following day, the 16th May, at 7.30 a.m. on the tank bed. According to the sketch the body was found at point 16. Police driver Sirisena's quarters were opposite this spot about 140 yards away. The appellant's quarters were about 40 yards north of Sirisena's quarters. Mohamed was a herdsman and that morning when he took his herd of cattle to graze on the tank bed he discovered the body. The body was tied to a nithul tree. There was a suitcase close to the body and it was opened. He informed P. C. Tennekoon about this discovery. Later others came to see the body including S. I. Rodrigo and the appellant. The appellant examined the articles in the suitcase. He also examined an earring box in the suitcase and took a receipt from it. The appellant asked him whether he could read Tamil as the receipt was in Tamil. He read the name "Soma Perera" on it. The name of the shop at Matale was also on the receipt. Thereafter, the appellant put the receipt into his pocket. P. C. Tennekoon was present at that time. In his statements to P. C. Palamure at the Galenbindunuwewa Police Station on the 16th May and to the C.I.D. on the 13th June, he made no mention of the fact that the Police Sergeant put the receipt into his pocket.

(His Lordship then proceeded to examine the evidence of several witnesses and continued).

The main submissions of learned Counsel for the appellant were:—

1. That the time of killing had not been precisely established; It had been assumed without any evidentiary basis that the deceased was already murdered between 8.30 p.m. and 9. p.m. on the 15th when Korossagolle met the appellant on the road;

2. That the circumstantial evidence fell far short of establishing the charge beyond reasonable doubt and the verdict of the jury was based on sheer conjecture and was unreasonable, and, in any event, could not be supported having regard to the evidence;

3. The motive for killing the deceased had not been even remotely established;

4. The appellant's defence was glossed over in the charge to the jury and not fully emphasized. There was no proper analysis of the evidence by the trial Judge and the jury had no assistance from him how to approach the unsatisfactory and ambiguous evidence of the medical witnesses;

5. There was fabrication of evidence by some of the police officers who were witnesses in the case;

6. The jury was confused and in spite of the Judge directing them not to bring a compromise verdict, that was the very verdict they brought;

7. The trial Judge directed the jury in a way which opened for the them the door to conjecture; There was not a tittle of evidence of grave and sudden provocation.

The case for the prosecution was that the appellant and the deceased alighted from the bus at about 8.15 p.m. on the 15th and walked one behind the other at a normal pace from the bus stand to the main entrance of the police station. The distance from the bus stand to the junction, according to Wijesundera, was about 220 yards. The distance from the junction to the main entrance to the police station was about 230 yards, making a total of about

450 yards. The appellant and the deceased parted company, at the main entrance after presumably a 5 to 10 minute walk from the bus stand. Sometime later, it is not known how many minutes later, one can only assume it was about 8.30 p.m., the deceased was seen by Udabage and Charlis Baas walking alone slowly on the road opposite the barracks. in the meanwhile, according to the prosecution, the appellant had gone to the police station and made inquiries about letters and then gone to his quarters, which were about 260 yards from the police station, and changed into khaki shorts and a white shirt. After that he met the deceased again somewhere on the road outside the police station shortly after Udabage and Charlis Baas met her. He may have gone to the road through the gap in the barbed wire fence. It was located between the singleman's barracks and P. C. Tennekoon's quarters. There was not an iota of evidence that any police officer or any of the sentries who patrolled the compound or anyone else on the road saw the appellant meet the deceased in this manner. The prosecution then surmised that the appellant took the deceased through the gaps in the fence round the paddy field opposite Police Driver Srisena's quarters and then took her to the tank bed presumably arriving there at about 8.35 p.m. The prosecution theorized that the appellant lured her there pretending to want to make love to her. Then he knocked her unconscious with a fist blow on the eye and strangled her. After having done so he set the stage to simulate rape and robbery.

The distance between appellant's quarters via the gaps in the fence and where the body was found was about 280 yards. The watch and two exercise books were found about 66 yards north of the body and the deceased's handkerchief was found about 500 yards south of the body.

According to the medical evidence the deceased was a well nourished woman who could have resisted an attack and raised cries which could have been heard at the police barracks but no cries were heard there. According to Dr. Amarasekera, it would have taken about 10 minutes to strangle the deceased. The onerous burden on the prosecution, therefore, was to establish beyond reasonable doubt that the appellant in bright moonlight and with the lights of the police station falling on the road and on the paddy field opposite the barracks had boldly taken a woman, not his wife, to the tank bed without being seen by police officers, sentries and people passing along the road.

Korossagolle is the solitary witness who brings the appellant outside the premises of the police station after he had gone there

earlier at about 8.25 p.m. Korossagolle in all probability met the appellant on the road at about 8.50 p.m. as the appellant had to return to his quarters change his clothes and go past Tennekoon's quarters at 9 p.m. to the police station. Korossagolle saw the appellant coming along the road from the direction of the 20 acre colony. There was nothing suspicious about his conduct and appearance. He walked normally, he was not excited, he did not try to hide or avoid Korossagolle, and he did not appear to be tired like some person soon after a very strenuous physical and emotional ordeal. There was no evidence that there were blood-stains on his clothes. He did not come across the paddy fields from the direction where the corpse was later found nor was he seen trying to creep through the gap in the barbed wire fence in a great hurry to get to the police station to establish an *alibi*.

If Udabage and Charlis Baas met the deceased at about 8.30 p.m. then the appellant and the deceased would have reached the tank bed at about 8.35 p.m. the earliest or even later.

According to the prosecution, the appellant had to kill the deceased, then set the scene to simulate a sexual assault and robbery and then rush back to his quarters to change his clothes and hurry to the police station to establish his alibi, and to make his 'In-Entry' at 9.05 p.m. He had to do all this in, at most, a brief 15 or 20 minutes. The appellant had to cover considerable distances to achieve this object. If he murdered the deceased at P16 then he had to go south to P14, which was 500 yards away to drop the handkerchief. He had then to come back the same distance of 500 yards and then go to P18, which was 66 yards north of point P16 and then came back 66 yards to return to his quarters via the gaps at P37 and P36, and change into his black trousers and white shirt. It is incredible that a man who had been through such a traumatic experience would not have revealed signs of stress and strain when he met Korossagolle. All these circumstances in favour of the appellant had not been adequately stressed to the jury by the trial Judge in his charge. In fact, Korossagolle went on to say that after he met the appellant, the appellant proceeded in the direction of the police station and not in the direction of his house through the gap in the fence. An important defect in Korossagolle's evidence is that he did not mention in his statement to the police that he saw the appellant wearing khaki shorts and a white shirt when he met him on the road. He was the only witness to speak to this significant detail. It was a police touch suggested the defence. This aspect of the defence was not referred to in the charge to the jury.

Assuming that Korossagolle did meet the appellant on the road between 8.30 and 9 p.m. there was no conclusive evidence that the deceased was dead at that time. She may well have been killed later, perhaps at 11 p.m. on the 15th or at 2 a.m. on the 16th, or later. The assumption that when Korossagolle met the appellant the deceased was already dead had no basis. The attention of the jury was not drawn to this crucial aspect of the case by the Judge in his charge.

Several unsatisfactory features of the medical evidence were not adequately analysed in the charge to the jury. According to Dr. Ratnavadivel's postmortem report, the deceased would have died between about 24– 36 hours before the postmortem examination began at 11 a.m. on the 17th. This would mean, that she would have died between 11 p.m. on the 15th and 11 a.m. on the 16th and if that was so, the prosecution case would have collapsed *ab initio*. At the police conference which Dr. Ratnavadivel attended on the 23rd June, 1973, he did not change his opinion about the time of death, but 1½ years later when he gave evidence at the first trial in the High Court of Kandy he took the defence completely by surprise when he stated for the first time that the deceased may have been killed between 8.30 p.m. and 11 p.m. on the 15th. At the 3rd trial he made a further change and stated that she may have been killed between 8.30 p.m. on the 15th and 2 a.m. on the 16th. Professor Amarasekara, who had examined the body several weeks later, stated categorically that when one goes beyond the 24 hour limit, it is difficult to fix the time of death precisely; but towards the tail-end of his evidence abandoning what he said earlier he stated that death would have occurred at or about 8.30 p.m. on the 15th. The impact on the jury of this altered opinion coming at the tail-end of the Professor's evidence must have been incalculable. The attention of the jury was not carefully drawn to the very unsatisfactory discrepancies and the groping uncertainty in the evidence of the medical witnesses on the vital issue of the time of death. The two doctors, however, agreed that taking into account the totality of the injuries of the deceased coupled with the fact that seminal stains were found on the torn under-skirt of the deceased they could not rule out the possibility that a sexual assault was attempted on the deceased.

Sub-Inspector Rodrigo claimed that the appellant came to the police station at about 7.57 p.m. on the 15th. His evidence was destroyed by the production of the log-sheet P61 which revealed that the bus bringing the appellant and the deceased arrived at 8.15 p.m. The trial Judge directed the jury that ultimately State Counsel had to jettison the evidence of Rodrigo on that point and

Rodrigo may have been making a mistake. In our view, the Judge should have gone further and reminded the jury that the position of the defence was that this evidence had the hallmarks of a fabrication and that when P. C. Wijesekera stated that the appellant came to the police station at 9.15 p.m. or 9.20 p.m. that night he was similarly fabricating evidence to widen the interval of time between the appellant's first and second arrival in the Charge Room to give him a bigger margin of time for strangling the deceased. If Tennekoon's evidence was true that the appellant went past his quarters at 9 p.m. in the direction of the police station then it is manifest that Wijesekera was giving false evidence.

The Judge failed to direct the jury that J. Mohamed had made no mention in both his statements to the police that the appellant had put the receipt found in the earring box into his pocket. The Judge in his charge mentioned Tennekoon's failure to inform Rodrigo at the scene that the appellant had in his possession a receipt which was a clue to the identity of the deceased. The omission of Tennekoon, a police officer, and a trained observer, to do so affected his creditworthiness. This was not fully urged in the charge.

The trial Judge when dealing with the entry made by the appellant at 9.05 p.m. omitted to point out to the jury that this writing had not been forwarded to the Examiner of Questioned Documents for an expert opinion whether the writing revealed signs of excitement. This was the only item of evidence the prosecution relied on to show that the appellant was excited because he had shortly before that committed the offence. The lay jury had to decide this important issue without the guidance of an expert.

The prosecution suggested with regard to the deceased's handkerchief that the appellant dropped it at P14 with the two keys and a five cents coin attached to it on the following day when he accompanied the handler of the dog. This again was another theory put forward by the prosecution which was not supported by an iota of evidence. If the object, as suggested by the prosecution, of the appellant was to scatter the articles of the deceased in order to simulate rape and robbery, it is inconceivable that he would not have scattered the handkerchief together with the other articles of the deceased on the same night. If is incredible that he would have preserved the deceased's handkerchief overnight and dropped it in broad daylight in the presence of police officers and a crowd of inquisitive spectators. The prosecution claimed that Rodrigo searched the scene on the 16th and did not find this

handkerchief. It was, however, not put to Rodrigo at the trial that he searched the area around P14 500 yards away from the body. This aspect of the evidence was not fully and fairly put to the jury by the Judge.

Evidence was led at the trial that on the 16th the appellant accompanied the police who was the handler of the dog. Evidence was led that the dog went to the compound of Edirisinghe Baas' shed and from there went to the bund of the tank and returned to Edirisinghe Baas' compound. The handler of the dog was not called to explain the behaviour of the animal. The trial Judge after having permitted evidence of the dog's behaviour later directed the jury to ignore this evidence in view of Gratiaen J's *obiter dictum* in *Kanapathipillai v The Queen*[3] at 398, that it may be safer for the present to leave such evidence out.

There was evidence that the appellant openly accompanied the handler and the dog to Edirisinghe Baas' carpentry shed. There was no evidence that he tried to avoid going with the handler and the dog. There was also no evidence that after the dog was given the scent of the blouse that tied the hands of the deceased that it led the handler to the appellant. These were all matters from which inferences could have been drawn favourable to the appellant.

In *Kanapathipllai v The Queen* (supra) it was held that very convincing expert evidence should be placed before the Court which is invited to conclude that the mere behaviour of a police dog by itself renders the existence of any relevant fact in a criminal trial so "highly probable or improbable" as to justify the application of section 11(b) of the Evidence Ordinance.

It is common knowledge today that dogs can be specially trained to assist in the detection of crime and that for a long time have been one of the best known instruments of crime detection. As Gratiaen J., stated in the above case:—

> "An important clue may be discovered by an animal which would point to the identity of the offender; but in such a case, it is the positive evidence brought to light rather than the manner of its discovery that constitutes relevant and admissible evidence of the offender's guilt."

Cross on Evidence, 5th Edition, at page 55, stated that there does not appear to be any fully reported English case on the admissibility of the evidence of the behaviour of tracker dogs. "If,

after being taken to the scene of a crime, a dog picks up the scent and leads those in charge of him to the accused, a useful piece of retrospectant circumstantial evidence may have been brought into existence." Such evidence, although disallowed in South Africa on account of the danger of misunderstanding the dog's behaviour, has been received in Canada, Scotland, Ireland and New Zealand. It would in every case be necessary for evidence to be received about the training, skill and habits of the particular dog and its handler, and evidence of the fact that each human being has a different scent or odour which is liable to be picked up by well trained dogs.

In the Canadian case of *R. v Haas*[4] the British Columbia Court of Appeal held that evidence that an accused person had been tracked by dogs was in principle admissible and not excluded by the hearsay rule. Wilson J. A., said that such evidence should be put before juries" with the utmost care and the fullest sort of explanation by the presiding judge." The handler should be shown to be well experienced in regard to the characteristics of the particular dog in question. "He could give evidence as to the training of the dog and the behaviour of dogs generally in regard to the tracking of persons and he can simply state what happened on the occasion in question."

As Lord Justice Clerk said in *Patterson v Nixon*:[5]

> "The value and significance (of such evidence) is bound to be a question of circumstances in each particular case, and the evidence given as to what the dog did, and as to its skill and reliability has to be weighed just like any other evidence."

However, there are two fundamental difficulties. The uniqueness of scent appears to be by no means so clearly established as, for instance, that of finger prints. Furthermore, the reliability and aptitude of dogs for this type of work varies.

On the question of motive there was no evidence that the relationship between the appellant and the deceased had deteriorated at any stage. There was no evidence that she threatened him with exposure or abused him on the 15th. On the other hand, there was evidence that he had carefully preserved two letters she had written to him and kept them in a file in his kit-box. There was no attempt by him to destroy these letters.

Attention was drawn to the fact that he did not speak to her in the bus. He had been identified by the driver and the conductor

and addressed as "Ralahamy" by them. It was not likely in that situation that he would have openly associated with his mistress in the bus. Similarly, the fact that he may have at the scene withheld information that he knew the deceased may have been for the same reason. We agree with the submission of Counsel for the appellant that the motive for killing the deceased had not been even remotely established. From the mere fact that she came to Galenbindunuwewa it cannot be assumed without supporting evidence that she embarrassed the appellant to such as extent that he killed her.

The failure fully and fairly to deal with important points in favour of the appellant resulted in non-directions amounting to serious misdirections. At the end of his charge the trial Judge cautioned the jury against bringing a compromise verdict. Having cautioned the jury more than once on these lines, the Judge nullified the effect of this direction by directing the jury as follows:—

> "Now take the accused's case. He was a Sergeant who had been paying money to this woman; who probably was carrying this millstone round his neck for some long time; and she comes to see him at Galenbindunuwewa. Then probably they decide to go and talk things over in the tank bed; and then she provokes him; and he did this under great provocation.

There was not a tittle of evidence to support the above direction. In *M. J. Fernando v The Queen*[6] (Per L. M. D. de Silva, J.,) it was held that the jury should not be directed in a way which opens for them the door to conjecture. This is necessary not only in order that the case for the defence may not be prejudiced but also in the interests of the prosecution. In the instant case this is precisely what the trial Judge did and in spite of his earlier and subsequent directions not to bring a compromise verdict, that was precisely what the jury brought. The trial Judge by suggesting an unsustainable element of evidence rendered the verdict founded on that element unreasonable and unsustainable.

As Viscount Simon Observed in *Mancini v Director of Public Prosecutions.*[7]

> "Taking , for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the

jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would lead to confusion and possible injustice if either judge or jury went outside it."

Judging by the verdict of the jury the passage referred to in the Judge's charge had the effect of inviting them to speculate as to a provocative incident which was not supported by the evidence. We hold that there was a grave misdirection in this passage.

It was submitted by learned Senior State Counsel that the House of Lords in *Mc Greevy v Director of Public Prosecutions*[8] page 424 adopted the decision in the Canadian case of *Ducsharm*[9] that there was a distinction between the rule regarding circumstantial evidence and the rule as to reasonable doubt and that a Judge should separate his direction as to the one from his direction as to the other. Learned State Counsel went further and made the novel submission that *Mc Greevy v D. P. P.* (supra) has decided that in a case of circumstantial evidence the burden of proof on the prosecution has been made lighter than it was before.

The House of Lords in this case considered the dictum in *Hodge*[10] where Alderson, B., said in summing-up to the jury that the case was made up of circumstances entirely and that, before they could find the prisoner guilty they must be satisfied, "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the person was the guilty person." This dictum which came to be known as the "rule" in *Hodge's case* has been followed in most countries in the Commonwealth, including Sri Lanka, for decades.

Lord Morris observed that :—

"The singular fact remains that here in the home of the common law *Hodge's case* has not been given very special prominence; references to it are scant and do not suggest that it enshrines guidance of such compulsive power as to amount to a rule of law which if not faithfully followed will stamp a summing-up as defective. I think that this is consistent with the view that *Hodge's case* was reported not because it laid down a new rule of law but because it was thought to furnish a helpful example of one way in which the jury could be directed in a case where the evidence was circumstantial."

In the Australian case of *Plomp v The Queen*[11] Menzies J., said that the customary direction was not something separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt. The giving of the particular direction stemmed from the more general requirement that proof must be established beyond reasonable doubt.

The House of Lords in *Mc Greevy v D. P. P.* (supra) held that in cases of wholly circumstantial evidence no duty rests upon the Judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to give a further direction in express terms that this means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are :—

(a) consistent with the guilty of the defendant; and
(b) exclude every possible explanation other than the guilt of the defendant.

This case did not overrule the earlier decisions or imply that there is now a greater or lesser burden of proof on the prosecution in a case of circumstantial evidence. This authority merely states that a Judge who in addition to the usual direction about proof beyond reasonable doubt gives a further direction to the jury as in *Hodge's case*, errs in redundancy, as the particular direction stems from the general requirement and basic necessity that proof must be established beyond reasonable doubt.

Learned Senior State Counsel submitted that the jury's verdict was reasonable taking into account the totality of the evidence.

Baron Pollock observed in *Regina v Exall*[12] :—

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the rope may be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

This is also the law in Sri Lanka. In a case of circumstantial evidence the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance of suspicion; See *The King v Gunaratna.*[13]

Learned Senior State Counsel also submitted that certain items of the circumstantial evidence in the case called for an explanation from the appellant, who remained silent at the trial and did not testify.

As long ago as 1820 Abbot C. J., observed in *R v Burdett.*[14] See also Cross on Evidence (5th Edition) at pg 53:

> "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the *prima facie* case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?"

The law of Sri Lanka is the same. See *R v Gunaratna* (supra) and *Isar Singh v Emp.*[15] where it was held that in a case based on circumstantial evidence when no *prima facie* case has been made against the accused, it is open to the accused to rely safely on the presumption of innocence or on the infirmity of the evidence for the prosecution.

In *The Queen v M. G. Sumanasena*[16] it was held that in a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. See also *Wallace.*[17]

In other words, if the cumulative effect of the totality of the evidence is one of suspicion, however grave, it is an insufficient basis for conviction, and cannot take the place of positive proof.

It was also submitted by Senior State Counsel that an appeal is not by way of a rehearing, citing *Aladesuru v The Queen.*[18] *In* this case the Privy Council held that under the Nigerian Ordinance in a proper case the Court of Appeal would give leave to appeal or review the evidence if a *prima facie* case was shown that the verdict appealed from was one which no reasonable tribunal could have arrived at.

In *Curly v U.S.*[19] it was observed that:

"The functions of the jury include the determination of the

credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences from proven facts. It is the function of the Judge to deny the jury any opportunity to operate beyond its province; the jury may not be permitted to conjecture merely, or to conclude upon speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of reasonable doubt as to guilt. If the evidence is such that a reasonable juryman must necessarily have such a doubt, the Judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision for the jurors to make."

In *Gardiris Appu v The King*[20] it was laid down that:

"The Court of Appeal does not sit to retry cases, thereby usurping the functions of the jury. If there has been no misdirection, no mistake of law, or no misreception of evidence, the verdict of the jury as a rule will not be upset on the ground that the verdict is 'unreasonable.' This, however, is not an inflexible rule to be applied indiscriminately. *Each case must be decided on its peculiar facts and circumstances.* See also *M. Nandaratne v The Republic*[21] and *Ebert Silva v The King.*[22] *(P.C.)*

In *The Queen v Kularatne*[23] which was a case based on circumstantial evidence the Court of Criminal Appeal observed that it was the function of this Court of Appeal to examine the 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."

The words — "It is unreasonable or cannot be supported having regard to the evidence" — have been interpreted to mean — "if the Court thinks that the verdict is, on the whole, having regard to everything that took place in the Court of trial, unsatisfactory:" *Frederick Barnes*[24] See also *Peeris Singho v. The Queen.*[25]

The Courts have, however, interfered where the case against the appellant was not proved with the certainty which is necessary in order to justify a verdict of guilty: *Wallace* (supra). In this case it was held that the Court will quash a conviction founded on mere suspicion. The Chief Justice remarked:

> "Suffice it to say that we are not concerned here with suspicion, however grave, or with theories, however ingenious."

In the instant case, in view of the several grave non-directions on the evidence amounting to misdirections, and misdirection *per se* and as the case against the appellant was not proved with the certainty which was necessary in order to justify the verdict of guilty, we hold that the verdict of the jury was unsafe, unsatisfactory and unreasonable and cannot be supported having regard to the evidence. The jury had substituted suspicion for inference, reversed the burden of proof and used intuition instead of reason.

We allow the appeal. We set aside the verdict, quash the conviction and sentence and acquit the appellant.

ATUKORALE, J., I agree.

TAMBIAH, J., I agree.

Conviction and sentence
quashed and accused acquitted.