DE SARAM
v.
THE REPUBLIC OF SRI LANKA

SUPREME COURT
S. N. SILVA, CJ.,
BANDARANAYAKE, J.,
EDUSSURIYA, J.,
YAPA, J. AND
J. A. N. DE SILVA, J.
SC APPEAL NO. 1/2001
HC COLOMBO TRIAL-AT-BAR
NO. 120/2000
FEBRUARY 26 AND MARCH 01 AND 05, 2002

Penal Code – Murder – Section 296 – Accomplice – Corroboration of accomplice's evidence – Section 114 (b) of Evidence Ordinance – Statement under section 27 (1) of Evidence Ordinance – "Fact" discovered in consequence of information received form the accused – Section 3 of Evidence Ordinance.

The appellant and another person (who was acquitted at the trial) were indicted with murder at a trial by a High Court at Bar. The appellant was convicted of murder of a woman called Sewwandi on or about 02. 09. 1999. The appellant had developed a relationship with a married woman with a small child. The deceased turned down an offer of marriage with another and the accused showed no inclination to get married to her. Notwithstanding such situation, the accused used to follow the deceased who had in the meantime joined the Army. The accused visited Anuradhapura Army Camp where the deceased was posted and on a false representation that her father was hospitalized brought her to a house in Batuwatta and confined her there for a month. During that period there had been quarrels between the accused and the deceased. Witness Sajani Ratnayake said that even in her presence the accused assaulted the deceased so badly that she (the witness) fainted.

On the day of the murder the deceased was alone at her house in Ragama when her mother left the house. On her return the mother (Piyaseeli) found her missing and informed the Police. The same day at about 2 or 3 p.m., the accused had met witness Sanjeewa and said he had killed a person. The accused also fetched witness Piyalal and threatened to kill them with a pistol if they did not help to bury the body. Later that night the accused took the witnesses to a house in Ganemulla where the body of the deceased lay; and there told witness Sanjeewa that he (the accused) had killed "Sewwandi akka" (which was how that witness had referred to the deceased).

They removed the deceased's body which was under a bed. The deceased had been strangled with a strap of a sling. Thereafter, the body was taken in a van to the land of the accused's father which was surrounded by a high protective wall. The accused made the witness to dig a grave, covered the body with a bedsheet and buried it having trampled down an arm which was protruding with his foot. About a week later in the presence of witness Sanjeewa the accused held a shramadana and cleared the land, put the shrubs on the grave with some tyres and burnt the same. The graphic description by the witnesses of the concealment of the body was fully supported by the medical evidence and the findings of the Police.

The body was recovered by the Police on statements made by the witnesses and the accused.

Held:

(1) Witnesses Sanjeewa and Piyal were not accomplices. They were not guilty associates in the offence of murder or helpers in the commission of criminal acts constituting the offence charged or lesser or kindred offence of which the accused could be found guilty on the same indictment. All that they did was to participate in removing the body and concealing it. The accused said in his dock statement that one Bandara had killed the deceased and had her buried in his father's land to implicate him (the accused); and the witnesses had helped Bandara. The High Court rejected this defence in its entirety. In view of the fact that the witnesses were not accomplices in the circumstances of the case, the question of corroboration required by section 114 of the Evidence Ordinance did not arise.

(2) The fact that the police learnt from the two witnesses Sanjeewa and Piyalal where the body was buried did not take the same information given by the accused out of the purview of section 27 (1) of the Evidence Ordinance; for the basis of admissibility of the accused statement was not that the accused confessed to the crime but the fact that he knew where the deceased's body was buried. Evidence of the accused's information was therefore admissible under section 27 (1) of the Evidence Ordinance.

(3) As regards the criticism that the prosecution had failed to exclude the inference that the 2nd accused was responsible for the murder, the High Court held that the evidence only established her presence at the scene and not participation in the crime; on the contrary the evidence against the accused included a confession to witness Sanjeewa that he had killed the deceased. Hence, the point urged was devoid of any basis.

(4) The evidence as to the quarrels the accused had with the deceased and the fact that the accused had assaulted the deceased during the period

she was detained at Batuwatte did not amount to leading evidence coming within the purview of section 32 (1) of the Evidence Ordinance as contended by the defence counsel. Such evidence amounted to direct evidence of quarrels and assaults.

Hence, the statements made by the deceased to witnesses on such occasions did not vitiate the conviction of the accused whether they were admissible or not under section 32 (1) of the Evidence Ordinance.

Cases referred to :

1. *King v. Peiris Appuhmay* – 43 NLR 412.
2. *Queen v. Ariyawanthe* – 59 NLR 241.
3. *Attorney-General v. Seneviratne* – (1982) 1 Sri LR 303.
4. *Karuppiah Servai v. The King* – 52 NLR 227.
5. *Pulukuri Kottaya v. Emperor* – (1947) AIR PC 67 at 70.
6. *Piyadasa v. Queen* – 72 NLR 434.
7. *Etin Singho v. Queen* – 65 NLR 353.
8. *Queen v. Kularatne* – 71 NLR 529.

APPEAL from the judgment of the High Court Trial-at-Bar.

Ranjit Abeysuriya, PC with *Mrs. Dinusha Mirihana*, *Miss Lanka de Silva* and *Leo Perera* for accused-appellant.

Priyasath Dep, PC Additional Solicitor-General with *Achala Wengappuli*, *Mohan Seneviratne* and *Haripriya Jayasundera*, State Counsel for Attorney-General.

Cur. adv. vult.

April 05, 2002

SARATH N. SILVA, CJ.

This is an appeal filed in terms of section 451 (3) of the Code of 1
Criminal Procedure Act as amended by Act No. 21 of 1988, from the conviction and sentence imposed on the accused-appellant by the High Court, after a Trial-at-Bar. The Trial-at-Bar commenced on information exhibited to the High Court by the Attorney-General. The charge that was made against the accused-appellant and the other

accused (who was acquitted at the end of the trial) was that on or about 02. 09. 1999 at Kendaliyaddapaluwa, Ganemulla, they committed the murder of Ranasinghe Aratchige Don Enoka Sewwandi an offence punishable under section 296 of the Penal Code. 10

The deceased was 24 years old at the time of her death and had served a brief period as a soldier in the Sri Lanka Army at Anuradhapura. She was last seen alive in her parental home at Pahala Karagahmuna on the Ragama-Kadawatha Road. Her mother, Lalitha Piyaseeli, stated in evidence that when she left the house at about 9.00 am on 02. 09. 1999 the deceased was asleep in her room and there was no one else in the house. When she returned from her place of work, the front door was locked and the key was near the door mat. The deceased was missing. Later, a complaint was made to the Police.

The accused-appellant was arrested by Inspector of Police 20 Samudrajeewa of the Western Province Special Investigations Unit at Peliyagoda, who was in charge of the investigations, on 01. 03. 2000. He made a statement to the Inspector that he could point out the place where the body of the deceased was buried in the compound of his father's house at Kurukulawa, Ragama. On 03. 03. 2000 pursuant to an order made by the Magistrate, the place was excavated, in the presence of the Magistrate and the Judicial Medical Officer (JMO), Colombo South, Dr. Ananda Samarasekera, and the putrified body of the deceased was found. According to the JMO death could have been caused approximately 6 months before. The cause of death 30 was determined as a fracture of the left hyoid bone caused by manual strangulation. The JMO found marks on the neck which could have been caused by pressure being applied by tightening a strap of a sling bag. The compound of the premises in which the body was buried, was protected by an eight-foot wall and a person had to pass through more than one gate to reach the place of burial. All the houses in the compund were owned by the father of the accused and some of them were tenanted. These are the basic facts of the case for the prosecution.

The prosecution relied on the evidence of the mother of the deceased, Lalitha Piyaseeli, to reveal certain matters regarding the relationship the accused had with the deceased culminating in the deceased returning home one day in late June, 1999 at about 7.00 pm, saying that she escaped from a place where the accused-appellant had kept her in concealment. There is direct evidence regarding the accused-appellant taking the deceased away from the Army camp at Anuradhapura in late May, 1999, on the pretext that her father was in hospital after meeting with an accident and her being kept in concealment for about a month in the house of one Kalumalli, at Batuwatta, which emanates from witness Sajani Ratnayake, a colleague of the deceased in the Army.

The deceased had been associated with the accused from about 1996 having got to know him when she went to work at the Singer Sales outlet at Kadawatha. It appears that this relationship had been fraught with quarrels between the two and the accused had assaulted the deceased on certain occasions. The deceased turned down an offer of marriage from another and the accused showed no inclination to get married to her. It was in this context that her parents encouraged her to join the Army and she commenced her period of training of 2 months at Diyatalawa on 01. 02. 1999. The passing out parade was on 11. 04. 1999, at which she won several special awards on merit. Her mother attended the event with her brother and an aunt. The deceased and two witnesses referred to hereafter, also came there, separately, which shows that the accused maintained contact with her during that period as well. After she was posted to the Army camp at Anuradhapura, she came home for a few days and when she was returning, the accused got her to stay with him for one more day. Thereafter, the accused took her away from the Army camp under a false pretext, as noted above, before she was posted on active duty. During the period of about one month when she was kept in concealment at Kalumallie's house as stated above,

there had been quarrels between the two and on one occasion she inflicted an injury on herself with a knife. Witness Sajani Ratnayake, the colleague from the Army, contacted the accused by phone and with difficulty managed to meet the deceased on one occasion during this period. She stated that even in her presence the accused assaulted the deceased so badly that she (the witness) fainted.

In the period of two months that lapsed after her returning to the parental home, the evidence reveals two occasions on which they met. Once, when she sought his assistance to open a new account at the Bank. On the other occasion he had visited the house and quarrelled with her regarding an affair her brother was having with a girl said to be a relative of the accused. The accused-appellant had in the meanwhile developed a relationship with the 2nd accused, a married woman with a small child and he was living with them in a house at Genemulla, being the place where the body of the deceased was seen by the two main witnesses for the prosecution, Sanjeewa and Sumith Piyalal.

These two witnesses, the former being a driver of a three-wheeler and the latter, a mason, had been known to the accused for some time. They accompanied the accused to Diyatalawa to attend the passing out parade of the deceased and later to Anuradhapura, firstly to drop her at the Army camp and to bring her back. On this occasion the deceased was kept one day at Sumith Piyalal's house, before being taken to Kalumallie's house, as stated above. From that point the narrative of events is picked up by these two witnesses when they say that the accused sought their assistance to bury the body of the deceased. The contention of the prosecution is that this took place on 2nd September, being the day on which the deceased disappeared from her parental home.

According to Sanjeewa, the accused-appellant met him at about 2 or 3 pm, at the place where his three-wheeler was parked for hire

and stated that he had killed a person. He sought assistance of the witness to dump the body into a grave in the cemetery by raising a concrete slab of a grave. The witness lives close to a cemetery. When the witness refused to help the accused, he had gone in search of the other witness, Sumith Piyalal, but apparently failed to make contact. Later, Sanjeewa himself went in search of Sumith Piyalal and met him on the way. When Sanjeewa informed Sumith Piyalal about the request made by the accused, the latter had looked at him wide-eyed, with fear. At that stage, the accused-appellant came to the place where they were, in a van and walked upto them armed with a pistol. He accused Sanjeewa of having conveyed the information to Sumith Piyalal and said that if he could have done that so fast, before the night was out, the whole village would know of it. He said that both should come to bury the body that night itself, if not he would kill them. He said that he would pick them (being neighbours) at 8.00 pm. At the given time the accused-appellant came in a van fitted with fully tinted glass, first to Sanjeewa's house and when the latter came out dressed in a white shirt he was asked to change into a shirt of another colour. Sumith Piyalal who was wearing a sarong was also to change his clothes and he changed into a trouser and a banian. Thereafter, the accused picked up some other friends of his including one Bandara (to whom reference will be made later) and went to a funeral house of a relative. The accused and the others got down at the funeral house leaving the two witnesses in the van. At about 11.30 pm., the accused came to the van saying that he was going to bring some cigarettes and drove to the house at Ganemulla where the body of the deceased lay. According to Sanjeewa, before entering the house the accused said that he had killed "Sewwandi Akka". The witness has referred to the deceased at all stages as "Sewwandi Akka". Both witnesses have stated that only the 2nd accused was in the house at that time. The accused had taken them to a room where there was a bed in the center and when the bed was removed, they saw the body of the deceased which lay face downwards, clad

in a black tight skirt and a blouse with a strap of a sling bag tightened round the neck. The accused-appellant removed the strap which was round the neck and gave it to the 2nd accused. The two witnesses and the accused-appellant carried the body to the van. The accused carried the head and the upper part of the body and the witnesses held on to the trunk and the legs. They found that the deceased had passed urine and faecal matter. They went in the van to the accused's father's premises entering the compund enclosed by the eight-foot wall through three gates and the accused selected a spot where there were some cinnamon bushes to dig a grave. He carried a penlight torch and was armed with a pistol when he walked upto the spot. He brought 2 mammoties, a pickaxe, a shovel and other implements from the garage of his father's house and dug a grave 2 1/2 to 3 feet deep. The two witnesses and the accused had taken turns in digging and removing the soil. A mammoty had broken in the process. The van was taken as near as possible to the grave. They carried the body and the accused dumped the body into the grave. A bedsheet was put over the body and they covered it with soil. At this point the right hand of the deceased was protruding and the accused having failed to push the hand down with the mammoty, stamped on it with his foot and covered it with soil. About two weeks later, the accused arranged a shramadana with several of his friends, including witness Sanjeewa, to clear the compund. The shrub that was cleared was put over the area of the grave and the accused put some tyres as well and set fire to it. The Police and the JMO found traces of this burning of the site when the body was exhumed six months later.

The graphic account given by the two witnesses as to the state of the body, the ligature round the neck, the clothes, the depth of the grave, the bedsheet being used to cover the body, the protruding right hand and as noted above, the burning of the site, is fully supported by the findings testified to by the JMO and the Police. There is no doubt that they did in fact participate in the removal and burial

of the body. This part of their evidence is not even challenged by the defence. The suggestions made to these witnesses and the dock statement of the accused, is on the basis that they did these acts at the behest of Bandara referred to above, who killed the deceased and buried her body in the compound to implicate the accused due to enmity arising from an undisclosed reason. The High Court has for reasons stated rejected this defence in its entirety.

Learned President's Counsel for the accused-appellant raised four points which he contended vitiates the trial and moved for a trial *de novo.*

The four points urged by counsel are –

(i) that witnesses Sanjeewa and Sumith Piyalal who gave evidence on conditional pardons, were accomplices and there is no corroboration of their evidence as required by law. The High Court erred in treating the witnesses as not being accomplices and alternatively in acting on evidence that did not constitute corroboration as being adequate corroboration of the evidence of these witnesses;

(ii) that the High Court erred in admitting in evidence a portion of the statement of the accused, made to the Police regarding the place of burial of the body, in terms of section 27 (1) of the Evidence Ordinance, when the same information was available to the Police from the two witnesses, Sanjeewa and Sumith Piyalal;

(iii) that the case being based on circumstantial evidence, the prosecution failed to exclude that the other person present at the scene, *viz* the 2nd accused could have committed the murder.

(iv) that several witnesses have testified to statements made by the deceased to them which are not relevant in terms of section 32 (1) of the Evidence Ordinance.

Regarding the first point set out above, as to the evidence of the witnesses described by learned Counsel as accomplices, I note that 190
the relevant provisions of the Evidence Ordinance are contained in sections 133 and 114 (*b*). Section 133 states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Section 114 sets out instances in which a court may presume the existence of certain facts. These instances are generally described as rebuttable presumptions. In terms of illustration (*b*) to section 114, the court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. 200

Therefore, the first matter to be considered is whether the two witnesses, Sanjeewa and Sumith Piyalal should be considered as accomplices.

Coomaraswamy in his book titled "*The Law of Evidence*" Vol. II, Book I at page 364, states as follows :

> "For the purposes of section 114 (*b*), it may be said that an accomplice is one concerned with another or others in the commission of crime."

He cites with approval the following passage from Wharton on *Criminal Evidence* 11th Ed. Vol. II at page 1229 – 210

> "An accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission

of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was an admitted participant in a related but distinct offence. To constitute one an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission."

The Additional Solicitor-General submitted that a person who has merely assisted in the disposal of the body of a deceased in respect of whom a charge of murder is made, cannot be considered as an accomplice within the meaning of section 114 (*b*) of the Evidence Ordinance. He relied on the judgments of the Court of Criminal Appeal in the cases of *King v. Peiris Appuhamy*,[1] and *Queen v. Ariyawanthe*.[2]

On the other hand, learned President's Counsel for the appellant, submitted that the category of persons who may be considered as accomplices has been widened in the decision in *Attorney-General v. Seneviratne*.[3]

I note that the cases relied on by the learned Additional Solicitor-General are directly in point.

In the case of *King v. Peiris Appuhamy* (*supra*) at page 418, Howard, CJ., observed as follows :

"Even assuming that after the murder had been committed the witness had assisted in removing the body to the pit and that he could have been charged with concealment of the body under section 198 of the Penal Code that was an offence perfectly independent of the murder and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly. The witness was

therefore not an accomplice and the rule of practice as to corroboration had no application to the case."

In the case of *Queen v. Ariyawanthe* (*supra*) at page 243 Basnayake, CJ., obeserved as follows :

"Now the burden of proving a witness to be an accomplice, for the purpose of inducing the jury to presume that he is unworthy of credit unless corroborated in material particulars, is upon the party alleging it."

He went on to hold that a person who had participated in the event after the murder had been committed is not a guilty associate in the 250 crime of murder with which the accused was charged.

In the case of *Attorney-General v. Seneviratne* (*supra*), relied on by learned President's Counsel for the accused-appellant, Soza, J. has made the following observation (at page 329) :

"There may be occasions when an accomplice though a *particeps criminis* cannot be charged with the same offence. His guilty participation may not go far enough for this. Further, it does often occur that an accused person though charged with a particular offence is found guilty only of a lesser or kindred offence. More properly, therefore, an accomplice is a guilty associate whether as perpe- 260 trator or inciter or helper in the commission of the criminal acts constituting the offence charged or a lesser or kindred offence of which the accused could be found guilty on the same indictment."

It was submitted that an accused who is indicted for a charge of murder could be convicted of an offence under section 198 of the Penal Code in connection with the disposal of the body. Counsel relied on the judgment in the case of *Karuppiah Servai v. The King.*[4]

in support of this proposition. It was submitted that the combined effect of the judgment of Soza, J. in Seneviratne's case and the judgment in Servai's case, is that an offence of disposal of the body should 270
be taken as "lesser or kindred offence" to one of murder and that a person who could be convicted of the offence of disposal of a body in terms of section 198 of the Penal Code should be considered as an accomplice in a case where the accused is charged with murder.

I have to note at the outset that in Seneviratne's case, relied on by learned President's Counsel, Soza, J. had not dealt with the two judgments referred to above, where it was specifically held that a person who has merely assisted in the disposal of the body is not an accomplice. Soza, J. referred to a perpetrator, inciter or helper, 280
in the commission of the criminal acts constituting the offence charged or lesser or kindred offence, which the accused could be found guilty on the same indictment. The category of persons referred to by Soza, J. are those involved in the commission of the criminal acts constituting the offence. The reference to "lesser or kindred offence" cannot encompass an offence under section 198 of the Penal Code, which relates to causing the disappearance of evidence of the offence that has been committed. This is an entirely different species of offence, where the *mens rea* is "the intention of screening the offender from legal punishment". The words used by Soza, J. should be 290
restricted to offences of the same kind or which may be lesser in gravity. The *mens rea* of an offence under section 198 referred to above shows that it is not a lesser of kindred offence in relation to the offence of murder. Servai's case is authority for the proposition that a person indicted with murder, could be convicted for the offence of causing the disappearance of the body under section 198 of the Penal Code by applying section 182 of the Criminal Procedure Code (section 177 of the present Code of Criminal Procedure Act). It would be far fetched and an artificiality to import that reasoning to expand the category of persons who should be considered as accomplices. 300

In this case the clear evidence is that the two witnesses, Sanjeewa and Sumith Piyalal, were not in any way perpetrators, inciters of helpers in the commission of the offence of murder. There is no question of any lesser of kindred offence which could arise for consideration on the facts of this case. Certainly, the accused cannot be convicted of an offence under section 198 of the Penal Code which relates to causing the disappearance of evidence to screen an offender. The assistance of the two witnesses was sought by the accused, according to the evidence, after murder had been committed. They arrived at the house at Ganemulla late that night, several hours after the deceased had been done to death. Therefore, I am of the view that the decisions in the cases of Peiris Appuhamy and Ariyawanthe (*supra*) will apply and the two witnesses should not be considered as being accomplices. This conclusion is consistent with the definition of an accomplice as contained in the passage from Wharton on *Criminal Evidence* cited above.

In the light of the foregoing finding, it is not necessary to consider the further submission of learned President's Counsel as to the need to look for corroboration in material particulars as required by section 114 (*b*) of the Evidence Ordinance.

The next point urged by the learned President's Counsel relates to the application of section 27 (1) of the Evidence Ordinance, in terms of which a portion of the statement made by the accused to Inspector Samudrajeewa was led in evidence.

Section 27 (1) of the Evidence Ordinance reads as follows :

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The submission of learned President's Counsel is that the information regarding the place of the burial of the body of the deceased had been disclosed to the Inspector by the two witnesses referred to above, before the accused was questioned regarding the murder. On that basis it was submitted that the "fact" regarding the place of burial was known to the Police and it could not be contended that this was discovered in consequence of information received from the accused.

It appears that the submission is based on a misconception of the provisions of section 27 (1) of the Evidence Ordinance. This section has to be read in the light of section 25 (1) which mandates that no confession made to a police officer shall be proved as against a person accused of any offence.

The rationale of the proviso in section 27 (1) is that even a confessional statement to a police officer, which is outside the pail of evidence, could be proved where it contains information that is confirmed by the discovery of a fact. The word "fact" appearing in the section should be construed in the light of the definition in section 3 which states, : " 'Fact' means and includes –

(*a*) any thing, state of things, or relation of things capable of being perceived by the senses;

(*b*) any mental condition of which any person is concious".

It is seen that a fact is not mere object or article but something that is capable of being perceived by the senses or a mental condition of which a person is conscious.

Coomaraswamy in his *Law of Evidence* Vol. I, page 446, has made particular reference to the distinction that should be drawn between a fact that is discovered and an object that may found. He has stated :

"thus, the fact referred to in this section, may be any fact as defined in section 3 of the Ordinance as opposed to "fact". The object discovered may be the body of the injured person, the property stolen, bloody clothes, the weapon with which injury was inflicted or some other material evidencce of the offence".

This distinction between the discovery of a fact and the finding of some object is clearly brought out by the Privy Council in the decision in the case of *Pulukuri Kottaya v. Emperor*[5] where it was observed as follows :

"It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that : 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But, if to the statement, the words be added, "with which I stabbed A", these words are inadmissible since they do not relate to discovery of the knife in the house of the informant".

This reasoning of the Privy Counsel was followed in the cases of *Piyadasa v. Queen*[6] and *Etin Singho v. Queen.*[7]

When the aforesaid reasoning and the definition of the word "fact" in section 3 of the Evidence Ordinance, is applied to the evidence

of this case, it is seen that the fact discovered by the Inspector from the statement of the accused was that the accused knew the place where the body of the deceased was buried. This information is confirmed by the finding of the body itself, in that place. The information given by the two witnesses to the Inspector regarding the place of burial is, of something that has been perceived by each of them, which is a fact as to their knowledge of the matter. The finding of the body, is a fact perceived by the Inspector and the JMO. What was perceived by each witness should be viewed as a distinct fact, in this manner in keeping with the definition in section 3. This would avoid the confusion which would arise if the matter is considered without reference to the definition in section 3. On this basis it cannot be contended that the information given by the witnesses to the Inspector regarding the place of burial, operates as a bar to the relevant portion of the statement being admitted in evidence, in terms of section 27 (1) of the Evidence Ordinance.

The third point raised by learned President's Counsel for the accused-appellant, is that the case being based on circumstantial evidence, the prosecution failed to exclude the other person present at the scene, *viz* 2nd accused could have committed the murder. Learned counsel cited a passage from Coomaraswamy in *The Law of Evidence,* Vol. I, at page 20 which reads as follows :

> "When in a case of circumstantial evidence, the evidence led for the prosecution lends itself to reasonable inference that either of the two persons could have committed an act, the burden is on the prosecution to exclude one person effectively if it seeks to attach responsibility for that act to the other person."

The passage cited is based on the reasoning in the case of *Queen v. Kularatne.*[8] In that case the Supreme Court held that the best way – often the only way – in which this can be achieved, is by the

prosecution calling as a witness, the person sought to be excluded. Thus, it is clear that the statement relied on by learned counsel does not apply to a situation where the prosecution has alleged that two persons have jointly committed and offence. In that situation, the question that arises for consideration, is the degree of participation of each of the accused and whether there is joint responsibility arising on the alleged basis of liability. The prosecution cannot be expected to adduce evidence excluding the 2nd accused from liability when the case was presented on the basis that both are liable for the commission of the offence of murder.

The High Court in its judgment has acquitted the 2nd accused on the basis that there is no evidence of her participation in the commission of the offence and that no inference could be drawn from the circumstantial evidence which led to the irresistible inference of guilt on her part. The finding of the Court is that the evidence only establishes her presence at the scene and not of participation in the commission of the offence, necessary to bring home liability to her. On the other hand, the evidence against the accused-appellant includes a confession made to witness Sanjeewa that he killed the deceased. Therefore, the point urged is devoid of any basis.

The final point raised by learned President's Counsel is that certain statements made by the deceased to witnesses have been deposed to by those witnesses, whereas such statements do not come within the purview of section 32 (1) of the Evidence Ordinance. These statements relate to the quarrels the accused had had with the deceased and in particular the reference to an instance where she had caused injury to herself pursuant to one such quarrel. Although these statements had been referred to in evidence, without any objection by the defence, it is seen that there is direct evidence of such quarrels and instances, in which the accused had assaulted the deceased. In particular the evidence of Sajani Ratnayake referred to

above reveals that at the time the deceased was kept in concelament at Kalumalli's house the accused assaulted the deceased so badly that she (the witness) fainted. Therefore, it is unnecessary to go into the question whether other statements of less probative value were admissible or not in terms of section 32 (1) of the Evidence Ordinance.

For the reasons stated above, I am of the view that there is no merit in any of the points urged by learned President's Counsel for the accused-appellant. The evidence referred to above establishes beyond reasonable doubt that the accused-appellant is guilty of the offence with which he has been convicted.

Accordingly, I affirm the conviction and the sentence imposed and dismiss this appeal.

BANDARANAYAKE, J. – I agree.

EDUSSURIYA, J. – I agree.

YAPA, J. – I agree.

J. A. N. DE SILVA, J. – I agree.

Appeal dismissed.