

JAYASINGHEGE WIMALARATNE ALIAS
WIMALE MUDALALI AND OTHERS

v.

THE ATTORNEY-GENERAL
(SHYAMA DEDIGAMA CASE)

COURT OF APPEAL.

GUNASEKARE, J. (P/CA)

J. A. N. DE SILVA, J.

C.A. 60-62/95

H.C. COLOMBO CASE NO. 4844/91

JANUARY 20, 21, 22, 24, 27, 28, 29, 30,

FEBRUARY 3, 6, 7, 10 AND 12, 1997.

Criminal Law – Conspiracy – Common intention – Unlawful assembly – Robbery – Murder – Rape – Sections 113(b), 102, 140, 146, 32, 380, 296 and 364 of the Penal Code – Code of Criminal Procedure Act, Section 160(3).

1. It is open to the Attorney-General to rely on evidence given at the non-summary inquiry to include in the indictment a charge in respect of an offence which was not read to the accused at the non-summary inquiry by the Magistrate – Section 160(3), Code of Criminal Procedure Act.
2. Where a conditional pardon had been given to an accomplice who had however resiled from his statement and made material omissions in his evidence before the Magistrate but there was his statement to the Magistrate which was of a concessionary nature, failure to bring the grave discrepancy to the notice of the trial Judge will not affect the prosecution case especially where the witness was not questioned about the omission at the trial.
3. Where the evidence of the accomplice is corroborated in a material particular by the evidence of an independent witness, this fact will sustain the acceptance of the accomplice's evidence particularly where there is no denial of such independent witnesses, statement when the accused concerned (5th accused) made his dock statement. Hence the conviction on the conspiracy charge under Sections 113(b) read with sections 102 and 380 can stand.
4. The medical evidence established that death was due to asphyxia following strangulation of the neck using a ligature. Suicide was ruled out. There was also evidence of rape by more than one person.
5. The circumstantial evidence supported the charges of unlawful assembly with the common object of committing robbery as well as the charges of robbery on the basis of common intention also the charge of murder based on common object (Count 4) but not the charge of murder (Count 6) based on common intention.

6. Taking into account the fact that the 3rd and 4th accused were dead when the trial was taken up, the identity of the person or persons who committed rape cannot be established. Hence the conviction of the 1st and 2nd accused for rape cannot stand.

APPEAL from conviction entered by and sentences imposed by the High Court of Colombo.

Ranjith Abeysuriya, P.C. with Miss. Dilanthika Navaratne and Miss Priyadarshani Dias for 1st and 5th accused-appellants.

Dr. Ranjith Fernando with Miss. Kishali Pinto Jayawardena and Miss Radhanika Peiris for 2nd accused-appellant.

C. R. de Silva, Additional Solicitor-General with Kapila Waidyaratne, Senior State Counsel and Miss Nimnaz Mohamed, State Counsel for the Attorney-General.

Cur. adv. vult.

April 28, 1997.

GUNASEKARE, J. (P/CA)

In this case five accused Jayasinghege Wimalaratne alias Wimale Mudalali, Karunapedige Wickramaratne alias Kumara, Horathalpedige Sunil Thilakasinghe alias Gunatilleke, Karunage Jayasinghe alias Jemis Banda and Pushpasena Kapugeekiyana were indicted with one Mudalige Don Jayasena with having committed the following offences:

1. That between 1st January 1984 and 25th February 1984 at Kegalle that the accused conspired to commit robbery of jewellery and other property in the possession of Shyama Nandani Dedigama punishable under Section 113(b), read with Sections 102 and 380 of the Penal Code.

2. That on or about 25th February 1984 at the place set out in count No. 1 and in the course of the same transaction that the accused were members of an unlawful assembly the common object of which was to commit robbery of jewellery and other property in the possession of Shyama Nandani Dedigama punishable under Section 140 of the Penal Code.

3. That at the time and place set out in count No. 2 and in the course of the same transaction that one or more members of the unlawful assembly aforesaid other than 5th accused committed robbery of jewellery and other property in the possession of Shyama Nandani Dedigama and committed an offence punishable under Section 380 read with Section 146 of the Penal Code.

4. That at the time and place set out in count 2 and in the course of the same transaction that one or more members of the unlawful assembly aforesaid other than the 5th accused committed murder by causing the death of Shyama Nandani Dedigama and committed an offence punishable under Section 296 read with Section 146 of the Penal Code.

5. That at the time and place set out in count No. 2 and in the course of the same transaction that the 1st, 2nd, 3rd and 4th accused along with Mudalige Don Jayasena committed robbery of jewellery and other property in the possession of Shyama Nandani Dedigama and committed an offence punishable under Section 380 read with Section 32 of the Penal Code.

6. That at the time and place set out in count No. 2 and in the course of the same transaction that the 1st to 5th accused together with Mudalige Don Jayasena committed murder by causing the death of Shyama Nandani Dedigama punishable under Section 296 read with Section 32 of the Penal Code.

7. That at the time and place aforesaid and in the course of the same transaction that the 1st accused committed rape on Shyama Nandani Dedigama punishable under Section 364 of the Penal Code.

8. That at the time and place aforesaid and in the course of the same transaction that the 2nd accused committed rape on Shyama Nandani Dedigama punishable under Section 364 of the Penal Code.

9. That at the time and place aforesaid and in the course of the same transaction that the 3rd accused committed rape on Shyama Nandani Dedigama punishable under Section 364 of the Penal Code.

10. That at the time and place aforesaid and in the course of the same transaction that the 4th accused committed rape on Shyama Nandani Dedigama punishable under Section 364 of the Penal Code.

Since the 3rd and 4th accused were dead by the time the trial commenced on 22.3.93 the indictment was appropriately amended and the trial proceeded against the 5th accused-appellant in his presence, and against the 1st and 2nd accused-appellants in their absence. It is to be noted that whilst the trial was proceeding that the 1st accused-appellant surrendered to the learned High Court Judge on 14.5.1993 after the case for the prosecution and defence had been closed at a time when counsel for the 5th accused-appellant was addressing the jury, and the 2nd accused-appellant had surrendered to the learned High Court Judge after the verdict and sentence had been pronounced.

At the end of the trial the jury by their unanimous verdict found the 1st accused-appellant guilty of counts 1, 2, 3, 4, 5, 6 and 7 in the indictment, the 2nd accused-appellant guilty of counts 1, 2, 3, 4, 5, 6, and 8 of the indictment and the 5th accused-appellant guilty of count 1 of the indictment.

After the conviction of the accused-appellants the learned Trial Judge imposed the following sentences:

1. 1st accused-appellant to
 - 10 years R.I. on count 1.
 - 06 months R.I. on count 2.
 - 10 years R.I. on count 3.
 - Death on count 4.
 - 10 years R.I. on count 5.
 - Death on Count 6.
 - 20 years R.I. on count 7.

2. 2nd accused-appellant to
 - 10 years R.I. on count 1.
 - 06 months R.I. on count 2.
 - 10 years R.I. on count 3.
 - Death on count 4.
 - 10 years R.I. on count 5.
 - Death on count 6
 - 20 years R.I. on count 8

5. 5th accused-appellant to
 - 10 years R.I. on count 1.

The sentences on the 1st and 2nd accused-appellant on counts 3 and 5 were to run concurrently.

According to the evidence, the deceased Shyama Nandani Dedigama had been a 47 year old small made spinster who had been living with her unmarried sister at the Dedigama Walauwwa on Circular Road, Kegalle with a Watcher called Heenbanda Dissanayake who was occupying an outhouse of the Walauwwa. The Walauwwa had been located on a land of about 7 acres on top of a hill. It had a verandah, on two sides several bed rooms, bath rooms, corridors and a Meda Midula. One could approach the Walauwwa by driving up a hilly tarred road and also by climbing up a flight of 24 steps leading from the tarred road to the front compound. The unmarried sister who usually lived with the deceased had been away hospitalised in the Kegalle Hospital for several days prior to the date of this incident which happened to be the night of 25th February 1984.

The watcher Heenbanda testified at the trial that the deceased Shyama Dedigama was a teacher at St. Mary's Convent Kegalle and it was customary for her to get up at about 4.30 or 5 a.m. and leave for school at about 7 a.m. On the early hours of morning on 26.2.1984 he had noticed that the lady had not got up as usual and although he called out to her from near her bedroom window there had been no response. Therefore he had gone to the house of a neighbour one Mrs. Suraweera and inquired from her as to whether Shyama had come there. Saying that she had not come to her house Mrs. Suraweera had telephoned one Mr. Alex Dedigama the brother-in-law of the deceased who was living in Colombo. He had requested the watcher to speak to him and instructed the watcher Heenbanda to go back to the Walauwwa and see inside the Walauwwa and make inquiries for the lady. Heenbanda had thereupon accompanied a gentleman who were living close by and upon making inquiries had found a door which led to a corridor from the verandah ajar. On proceeding inside the house he had noticed Shyama Dedigama lying dead sprawled on the floor in between her bedroom and the bathroom near the dining hall. He had come back to Mrs. Suraweera's house and informed her as to what he had seen. Mrs. Suraweera had again telephoned Mr. Alex Dedigama who was in Colombo who had asked her to inform the Police. Mrs. Suraweera had requested Heenbanda to

go back to the Walauwwa stating that she would notify the police. Heenbanda had gone back to the Walauwwa and on the police being informed they had arrived at the Walauwwa a short while later.

Inspector Mahinda Jayaweera who was the Officer-in-Charge of the Crimes Division of the Kegalle Police Station had arrived at the scene at about 7.30 a.m. with a police party on receipt of information from Mrs. Suraweera. The Dedigama Walauwwa which was the scene of crime had been about two miles from the Kegalle Police Station. When he arrived at the scene the watcher Heenbanda had been present. He had noticed the front door ajar and the key of the said door in the key hole which gave him the impression that the door had been opened from inside. He had noticed the body of the deceased lying on the ground in between her bedroom and the bathroom near the dining hall. The body had been face upwards and the nightdress that she was wearing had been raised above her waist. There had been blood stains in between the legs and a fluid like urine under the body. The bedroom which appeared to be the one occupied by the deceased had been ransacked. The clothes and the dresses in the wardrobe had been thrown about. An empty bottle of Henessey Brandy had been lying on the bed. The window of the bedroom has had four panes, two glass panes inside and two wooden panes which opened outside. There had been nine iron window bars on the window two of which had been wrenched off from outside. The two iron bars which had been wrenched off had been found about 10 feet away near a water tank. He had instructed Sub-Inspector Kapilaratne to take photographs of the scene. I.P. Jayaweera had got down officers of the Finger Prints Bureau to dust for finger prints, palm prints and foot prints and also got down the police dogs from the kennels in Kandy to assist him in the investigation. Whilst at the scene he had taken steps to have the Magisterial Inquiry and the Post-Mortem Examination on the body of the deceased conducted by the J.M.O., Kandy. According to his evidence the investigations into the crime had thereafter been taken over by the Criminal Investigations Department.

The medical evidence in the case was that of Dr. P. H. Rajapaksa J.M.O., Kandy. He had visited the Dedigama Walauwwa to conduct the Post-Mortem Examination on the body of the deceased Shyama

Dedigama at about 12 noon on 27.2.1984 on the orders of the Acting Magistrate, Kegalle. He had found the body of the deceased face upwards on the floor between the bedroom and the bathroom near the dining hall. Her dress had been raised up to her waist. The chest had been exposed. He had observed a ligature made out of the hem of a nightdress around the neck of the deceased with one knot. He had observed stains like blood on her inner thighs in the vaginal region and urine underneath the body. Having made his observations he had conducted the Post-Mortem Examination after the body was identified.

According to his evidence there had been an injury on the neck on the front side which was similar to a groove which had resulted from the exertion of pressure on the neck by tightening the ligature 'P21' round the neck. The Hyoid bone had been fractured and cartilages had been snapped. The lungs had been distended fully as a result of asphyxia. There had been a tear in the hymen over the posterior aspect (5 O' clock position). This had extended to the vagina. A microscopic examination of the vaginal smears that was taken had showed the presence of dead spermatozoa. The cause of death according to medical evidence had been due to asphyxia following manual strangulation of the neck using a ligature. According to the opinion of Dr. Rajapaksa strangulation would have been done by one or more persons and he also positively excluded the deceased having committed suicide. The medical evidence also revealed that the deceased had been raped by one or more persons prior to her death.

Consequent to investigations being taken over by the C.I.D., I.P. Amunugama as he was then, had been in charge of the investigations. According to him the investigations into this case had been entrusted to the Criminal Investigations Department by the I.G.P. on 9.3.1984 and he under the directions of A.S.P., Hettiarachchi given on 9.3.1984 had commenced investigations on 10.3.1984. According to his evidence after he commenced his investigations he had detailed some of his private informants to different areas in the Island to gather information. He also had got down the notes of investigations from the Kegalle police and examined them. On 6.6.1984 on receiving information he had left the C.I.D. office with A.S.P., Hettiarachchi and P.C. 1582 Weerasinghe to check on it and on 11.6.1984 at 4.30 a.m. he had arrested the 1st accused Wimalaratne

alias Wimale Mudalali near the Nittambuwa bus stand and brought him to C.I.D. Headquarters in Colombo at about 7 a.m. for questioning. Having interrogated him he had recorded the statement of the 1st accused commencing at 8 a.m. Thereafter he had proceeded with the 1st accused to the boutique of one Selliah Sittambaram at 177, Sea Street, Colombo 11 at 6.20 p.m. to check on his statement. In consequence of his statement he had discovered two pieces of gold which had been melted weighing 11 1/2 sovereigns (which was produced marked 'P35'), 75 white stones removed from a pendant marked 'P36' and two rubies marked 'P19' at the trial. Thereafter I.P. Amunugama had proceeded with the 1st accused to Kegalle and in consequence of his statement had recovered jewellery weighing 11 sovereigns and 6 1/2 manchadies consisting of necklaces, bangles and rings from a jewellery shop called 'Fashion Gold House' which was produced at the trial marked 'P23', 'P24', 'P25', 'P26A,B,C,D', 'P27A,B', 'P28' and 'P29' and recorded the statement of its owner Mohamed Lafir Mohamed Niyaz. He had left the Fashion Gold House at 10 p.m. and reached the house of the 1st accused at 11 p.m. at Deewala, Pallegama. At the house of the 1st accused in consequence of a portion of the statement of the 1st accused marked 'P39' he had recovered two small blue coloured gems which had been wrapped in a small piece of cloth concealed in a crevice in a stone retaining wall. The piece of cloth was produced marked 'P30A' and the two blue coloured stones marked 'P40'. Having recovered the above said items he had come to the C.I.D. office that night and had the 1st accused produced before the Magistrate, Colombo the following morning.

On further investigations being done I.P., Amunugama had arrested one Mudalige Don Jayasena alias Captain at about 10.30 a.m. on 15.6.1984 near the Kirulapone bridge and had taken him to the C.I.D. office at 11 a.m. He had been produced before A.S.P., Hettiarachchi who had interrogated him and recorded his statement. Having recorded the statement of Jayasena, I.P., Amunugama had proceeded with Jayasena to Kegalle for further investigations. They had returned to Colombo that night and gone back to Kegalle the following day to check on Jayasena's statement and thereafter produced him before the Magistrate, Colombo on 17.6.1984. According to I.P., Amunugama the 5th accused had been

arrested at Kegalle at about 6.30 a.m. on 17.6.1984 and produced before the Magistrate after his statement was recorded. The 2nd, 3rd and 4th accused had been arrested on 12.6.1984 by Sub-Inspector Pahalage on the instructions of I.P., Amunugama and produced before the Magistrate after their statements were recorded.

On 19.6.1984 I.P., Amunugama had visited the office of the Government Analyst and had a discussion with Mr. Wijesekera the Government Analyst and had requested that two officers be released to assist him in the investigations. On the morning of 20.6.1984 I.P., Amunugama had accompanied Assistant Government Analyst, Peiris and Scenes Investigating Officer, Jayaweera of the Government Analysts Department to the house of one Alex Dedigama in Colombo and obtained the keys of the Dedigama Walauwwa from his wife and proceeded to Ratnapura. Having met the Magistrate, Ratnapura I.P., Amunugama had taken charge of a screw driver with a red handle ('P19') and a pentorch ('P31') which had been produced before the Magistrate's Court by the Nivithigala Police on an earlier occasion along with the 1st accused. From there I.P., Amunugama had proceeded to Kegalle with the officers of the Government Analyst's Department and met the Proprietor of Hameed Stores and recovered the bill book 'P18' and the statements of Yusuf Mohamed Yusuf, Abdul-Hameed Mohamed Kaleel had been recorded. Thereafter I.P., Amunugama had gone to the Dedigama Walauwwa accompanied by the officers of the Government Analyst's Department and the other police officers. According to him this was the first visit that he had paid to Dedigama Walauwwa during the course of the investigations. He had examined the Dedigama Walauwwa after opening its doors from the keys he had obtained from Mrs. Dedigama in Colombo and prepared a sketch of the Walauwwa. He had examined the window 'P3' from which the robbers are alleged to have gained entry and thereafter had it removed to be produced in the case after examination by the Assistant Government Analyst. On an examination of the room that was alleged to have been occupied by the deceased Shyama Dedigama he had found a housecoat made of some chintz cloth which had a hole in it. This housecoat had been made out of some material that bore a resemblance to the piece of cloth in which the two blue coloured gems had been wrapped and concealed in the crevice of the retaining wall of the 1st accused premises. He had

taken the housecoat 'P30' into custody. Mr. Jayaweera of the Government Analyst's Department had taken photographs of the room, the Walauwwa and its vicinity on his directions. Having examined the scene he had come back to Colombo. Thereafter he had forwarded the housecoat 'P30' for comparison, examination and report with the piece of cloth 'P30A' recovered from the crevice in the retaining wall of the 1st accused's land to the Government Analyst through the Magistrate.

T. W. P. Peiris the Assistant Government Analyst giving evidence at the trial stated that he accompanied Inspector Amunugama and C. Jayaweera the Scenes Investigating Officer and some other Police Officers on the instructions of the Government Analyst on 20.6.1984 to assist the Criminal Investigations Department in their investigations and went to the Dedigama Walauwwa at Kegalle. On their way to Kegalle they first proceeded to the Ratnapura Magistrate's Court from where Inspector Amunugama had taken charge of a screw driver ('P19'). When they reached the Dedigama Walauwwa he had first examined a window from which the robbers are alleged to have entered the premises. He had noticed that some pressure had been exerted to lever the window pane. Two of the iron bars of the window frame appeared to have been wrenched off. He himself had taken photographs of the window pane and the window frame and thereafter had the window panes and the window frames removed for further examination. The photographs taken by him were produced as 'P44' and 'P45' and the window was produced as 'P3'. He was of opinion that pressure had been exerted on the window pane in order to lever the pane to open it which could have been done with the screw driver 'P19'. He further testified that on examination of a bed room inside the Walauwwa which was alleged to have been occupied by the deceased he had noticed a housecoat with a floral design on the bed. On examination of the said housecoat he had found that a small piece had been torn off. He had photographed the same which photograph was produced as 'P46'. He had instructed the police to take charge of the housecoat for further investigations. This housecoat was produced as 'P30'. This housecoat had been forwarded through the Magistrate's Court for examination and report. The Government Analyst was of the opinion that the piece of cloth 'P30A' recovered by Inspector Amunugama in which two blue coloured stones had been wrapped

and concealed in a crevice in the retaining wall of the 1st accused's land had been torn off from the housecoat 'P30'.

Mohamed Kaleel Proprietor of Hameed Stores, Kegalle giving evidence at the trial identified the bill book 'P18' as a bill book that belonged to his shop and stated that he handed it over to the officers of the Criminal Investigations Department during the course of their investigations. Mohamed Nawaz of Hameed Stores in his evidence stated that he wrote bill No. 54640 on 25.2.84 after selling a screw driver for a sum of Rs. 8.50. Mohamed Yusuf Noor Mohamed a cashier of Hameed Stores, Kegalle in his evidence stated that he accepted a sum of Rs. 8.50 from the 1st accused who was known to him as Renuka Mudalali on 25.2.84 as payment for a screw driver sold to him by salesman Mohamed Nawaz.

Mohamed Niyaz the proprietor of Fashion Gold House, Kegalle in his evidence at the trial stated that on 28.2.1984 that the 1st accused who was also known to him as Renuka Mudalali for about one and a half to two years prior to that day came to his shop and sold some items of Jewellery weighing 11 sovereigns and 6 1/2 manchadies including a pendant and a Pethi male 26 inches long for a sum of Rs. 20,215/- for which payment was made in instalments of Rs. 10,000/-, 5,000/- and 5,215/- on three occasions. He melted the jewellery that was sold by the 1st accused and turned out new items of jewellery and that on 11.6.84 officers of the Criminal Investigations Department questioned him and that he handed over 11 items of jewellery that was made by him after melting the jewellery sold to him by the 1st accused to the said officers.

Chief Inspector R. M. L. Norbert Banda the Officer-in-Charge of the Kuliypitiya Police Station testifying at the trial stated that in March 1984 that he was the Officer-in-Charge of the Nivithigala Police Station and that on the night of 11.3.1984 that he went on a mobile petrol with Police Sergeants 7197 Dayawansa, 2516 Udawerella and Police Constables 9820 Jayatilleke, 7955 Ratnasara, 9497 Premaratne and several others in the Pinkanda Karavita area on the Nivithigala Kalawana Road. At about 3.30 a.m. on 12.3.1984 he noticed a person standing by the side of the road with a parcel in his hand. On questioning him he stated that he was waiting for a Colombo bound

bus, and all of a sudden he started to run whereupon he was chased and apprehended. On examining the parcel there was Rs. 7140 in coins and a bottle of scent. Concealed in his waist there was a pentorch and a screw driver. He took him into custody on suspicion and had him produced in the Magistrate's Court of Ratnapura. The pentorch and the screw driver too were handed over to the Magistrate's Court, Ratnapura. On a subsequent occasion the screw driver 'P19' and the pentorch were taken over by officers of the Criminal Investigations Department in his presence from the Magistrate's Court.

Mudalige Don Jayasena alias Captain who was arrested by Inspector Amunugama of the C.I.D. on 15.6.1984 and was named as an accused testified at the trial as a witness consequent upon a Conditional Pardon given by the Attorney-General. According to his evidence he was a native of a village called Kalapugama close to Wadduwa. He had been employed in the Salvation Army and had been stationed in the village of Deewala in Kegalle from about 1980 and had been living in the official quarters assigned to him by the Salvation Army with his family. He had given some money to one Neville Fernando who was living along Rest House Road in order to secure a job abroad. On the way to Neville Fernando's house he has had to pass the house of the 5th accused Pushpasena Kapugeekiyana a Surveyor by profession. One day in the middle of 1983 when Jayasena was on his way to Neville Fernando's house the 5th accused had beckoned him and when he went to his house on that occasion the 5th accused had given him a glass of orange juice and told him that he wished to meet him to discuss a certain matter and wished to know where the 5th accused could meet him. When he inquired as to what it was about the 5th accused had told him that he would tell him later and wished to know a place where he could meet him. Jayasena had then replied that he could be found near Kegalle Florists on Kalugalla Road and left the house of the 5th accused. A couple of days later when Jayasena in the company of the 1st accused Wimalaratne was on his way to the Kegalle Courts he had seen the 5th accused driving down in his black Austin car from the Court house. On seeing him the 5th accused had stopped the car and called him and told Jayasena that he would like to meet him soon. Jayasena thereupon had told the 5th accused that he could meet him

near the Kegalle Florists and the 5th accused had gone away. Three or four days later when Jayasena was near Kegalle Florists the 5th accused had come there in his car in the evening and signalled him to come and driven a little distance away and stopped the car. When he went there the 5th accused had requested him to get into the car and driven to a lonely spot passing the hospital. He had stopped the car and asked Jayasena as to whether he could undertake to chase away a mad woman who was giving him trouble from a house which was being occupied by her. The 5th accused had also told Jayasena that there was about one and a half lakhs in cash in the house and some items of jewellery which could be easily taken. The 5th accused had also told him to tie up the lady's hands make it appear that rogues had entered the house so that the lady would get frightened and leave the house. The 5th accused had disclosed that the house in question was the Dedigama Walauwva on being questioned by Jayasena. Further it was Jayasena's evidence that the 5th accused had told that if the job was successful that he would be given Rs. 25,000/- and if it was not that he would be given Rs. 1000/-. Jayasena had thereupon told the 5th accused that he cannot agree to the request made but would inform him after consulting the 1st accused Wimalaratne. Thereafter the 5th accused had given him Rs. 50/- and told him that if he was agreeable that the job should be done early. After this conversation Jayasena had been dropped near the Kegalle Florists and the 5th accused had gone away.

The same evening Jayasena had met the 1st accused (Wimale Mudalali) near the Kegalle town and conveyed what the 5th accused had told him. The 1st accused had agreed to undertake the job and told Jayasena that the matter should be attended early. Two or three days later the 1st accused had met Jayasena at the Kegalle town and told him that he would come with some people two days thereafter in order to carry out the task undertaken. Two days thereafter when Jayasena was near the Kegalle market at about 4.30 or 5.00 in the evening the 1st accused had come and met him. Together they had gone into Hameed Stores and purchased a screw driver about 10 inches long with a red wooden handle. When he was proceeding towards the hospital along with the 1st accused Jayasena had seen Banda (the deceased 4th accused) following them about 10 to 15 yards behind. The 1st accused had then told Jayasena to go ahead

along the road and into a tea boutique. Jayasena had stayed near the Mawanella bus halt. When he was there he had seen the 1st accused coming along with Tilake (the deceased 3rd accused) Kumara the 2nd accused and Banda the deceased 4th accused towards the bus halt. The 1st accused had then suggested to him that they should proceed slowly. The five of them had gone towards the Dedigama Walauwwa and reached the flight of steps leading to the Walauwwa at about 9 or 9.30 p.m. near the flight of steps they had changed their clothes and the 1st, 2nd, 3rd and 4th accused had climbed the flight of steps and got on to the compound of the Walauwwa. Jayasena had remained near the flight of steps to keep watch and had seen the others going towards a window of the Walauwwa. About one and a half hours later the 1st accused had come to the place where he was and told him 'where man the stuff that you said was not there "කො මන් එම බිහිසු බඩු මොකවත් නැත" to which he had replied 'all right I will ask him.'

Then Jayasena had told the 1st accused 'it is time to go now, at that' stage the 4th accused Banda had come there and said that there was nothing. He had then asked Banda to call the others and Banda had thereupon gone to call them. When Banda went to call the others the 3rd accused Thilake had come there. A short while thereafter the 2nd accused Kumara had come back with the 4th accused Banda. Jayasena had not seen anything in the hands of the 1st, 2nd, 3rd, or 4th accused nor had he seen anything being concealed in their waists either. Having come there they had dressed themselves and at that stage the 1st accused had stated 'I will go, these chaps have only come to have sex with women'. Thereafter they had come back towards the hospital and from there they had got into a stream and come along the stream to avoid being seen by anybody and a short while later they had reached the Dharmapala Vidyalyaya and had been chatting for about half an hour there. According to him whilst they were chatting, the 1st accused again had said that there was nothing in the house to which he had replied that they had been promised Rs. 1000/- and that he would go and collect it the following day. From there they had departed promising to meet the following evening. He had gone home at about 2.30 or 3 in the morning and the others had gone towards their village Deewala. According to Jayasena he had got up at about 9 or 10 the following morning and rested for some

time after he had his breakfast. He had left home at about 3 or 3.30 having had his lunch with the intention of meeting the 5th accused, towards Kegalle Florists. On the way near a boutique called the Pinnagolla Kade Jayasena had learnt that the lady in the Dedigama Walauwwa had been killed. As he was proceeding towards the lonely spot where he had met the 5th accused earlier the 5th accused had come in his car and asked him to get in and without saying anything the 5th accused had given him Rs. 10,000/-. When he questioned him as to why the 5th accused had replied that the balance would be given the following day and asked him to come the next day to collect the balance. Having collected Rs. 10,000/- which the 5th accused had given Jayasena he had gone back to the Kegalle town and met the 1st accused near a Barber saloon and there had handed over the Rs. 10,000/- given to him by the 5th accused to him. The 1st accused had taken Rs. 5,000/- and returned the balance Rs. 5,000/- and told him that when he gets the balance to distribute that equally amongst the others and he had left for home. The following day as agreed he had come near the hospital junction and waited for the 5th accused. The 5th accused had come to the lonely place where they had met earlier in his car and given Jayasena another Rs. 5,000/-. When he inquired for the the balance Rs. 10,000/- due, the 5th accused had told him that he did not get the money and that it would be given in a weeks time near the playground road. Three or four days thereafter when Jayasena was on his way to see Neville Fernando he had met Police Sergeant Premaratne who had questioned him about the robbery and the killing of Shyama Dedigama. He had got frightened and left for Wadduwa having given Rs. 2,000/- each to the 2nd, 3rd and 4th accused. Having spent two days in Wadduwa, Jayasena had got back to Kegalle where his family was and for sometime had been shuttling between Wadduwa and Kegalle. One day, on the 15th of June 1984 when Jayasena was waiting for a bus at Kirulapone in order to go to Athurugiriya to meet a friend he had been arrested by Inspector Amunugama and taken to the 4th floor of the C.I.D. and produced before A.S.P. Hettiarachchi who had informed him that they knew everything as everything had been disclosed by the 1st accused Wimala Mudalali. Thereafter he had been questioned and his statement had been recorded. After recording the statement he had been produced before the Magistrate. Subsequently, a Conditional Pardon had been given to him by the Attorney-General and had given

evidence at the non-summary inquiry and at the trial against the other accused having accepted the Conditional Pardon conferred.

Jayantha Perera an Aurvedic Physician testifying at the trial stated that he commenced his practice in 1974 at Kegalle and shifted to a village in the Kegalle District called Hettimulla in 1979. When he was practising in Kegalle he had engaged the services of the 5th accused Pushpasena Kapugeekiyana in order to get a survey done of one of his properties. He had also come to know Mudalige Don Jayasena alias Captain who used to come to collect money for the Salvation Army once a month. About 5 months prior to the killing of Shyama Dedigama the 5th accused had come to meet him and inquired from him as to whether he knew as to where Captain (Jayasena) lived. He had replied that he did not know but that he may be found in the Kegalle town. The 5th accused had told this witness that he was looking out for Captain in order to have some people who were in occupation of a house on rent chased out and the household goods removed and inquired from him as to whether captain was suitable for the job. After he said that Captain may be found in the Kegalle town the 5th accused had gone away. Several months after the killing in the Dedigama Walauwwa officers of the C.I.D. had questioned him and recorded his statement.

After the case for the prosecution was closed the 5th accused-appellant (who was the only accused present during the course of the trial) made a statement from the dock. In his statement from the dock he stated that he was a Government Surveyor till he retired in 1963; thereafter that he practised as a Licensed Surveyor and a Court Commissioner. One day in the early part of June 1984 that some officers of the C.I.D. including Mahinda Hettiarachchi A.S.P. and B. S. Amunugama came to see him and wanted an appointment with him in order to record a statement in connection with the killing at the Dedigama Walauwwa. He made an appointment and awaited their arrival but the officers did not come. On 13.6.1984 that Inspector Amunugama and A.S.P., Hettiarachchi came to his house and Inspector Amunugama went into his office room and examined the documents in the room. He took some documents from the room and took him away stating that a statement had to be recorded from him. He was taken to the C.I.D. Office and questioned. At the C.I.D. office

he was tortured. For the first time he saw Jayasena when he was shown to him by A.S.P. Hettiarachchi in the C.I.D. office. He had never seen Jayasena before nor had he ever come to his house. After recording a statement he was produced before a Magistrate on the 17th. In connection with the violation of his fundamental rights he filed an application No. 80/84 in the Supreme Court and the Supreme Court made Order in his favour and directed A.S.P., Hettiarachchi and I.P. Amunugama to pay him compensation in a sum of Rs. 10,000/- with costs. Further he stated that he is married with three children, the elder boy being an Accountant the second a Superintendent of an estate and the third a girl who was school going. He was never in want of money. He was a social worker and the President of the Lions Club, Kegalle. He denied any complicity in this crime.

At the hearing of this appeal Mr. Ranjit Abeysuriya P.C. who appeared on behalf of the 1st accused-appellant and the 5th accused-appellant submitted that the conviction of the 1st accused-appellant in respect of count 1 to 7 and the conviction of the 5th accused-appellant in respect of count 1 cannot be sustained. It was Learned President's Counsel's contention that the conviction of the 1st and the 5th accused-appellants was founded on the evidence of Mudalige Don Jayasena alias Captain who was a self-confessed accomplice who testified on a Conditional Pardon conferred by the Attorney-General. He submitted that at the non-summary inquiry the 1st charge against all the accused was that they between 1st January 1984 and 25th February 1984 conspired to commit murder by causing the death of Shyama Dedigama as well as to commit robbery of cash and jewellery that were in her possession and that this charge would have been based on the statement of Jayasena which was recorded by the police upon which the Conditional Pardon was tendered by the Attorney-General. However, at the non summary inquiry the accomplice Jayasena had resiled from the statement and made no mention of the fact that the 5th accused-appellant had engaged the services of Jayasena to commit murder and instead had engaged him to chase off a mad lady who was in occupation of a house stating that she was a troublesome lady who should be frightened by tying up her hands and feet by staging a robbery which would result in her leaving the house and lured him to undertake the assignment by stating that

there was about one and a half lakhs in cash and jewellery of great value in her possession.

He further submitted that it was the paramount duty of the prosecuting counsel to have brought this grave discrepancy in the statement of Jayasena to the notice of the learned Trial Judge in the interest of justice. We are unable to agree with this contention of Learned President's Counsel for the reason that it transpired that in addition to this statement on which a Conditional Pardon was given that the witness had also made a statement to the Magistrate which was of a confessional nature. It is to be noted that these statements were available not only to learned Trial Judge but to learned Defence Counsel and to Prosecuting Counsel as well. But no questions appear to have been asked from witness Jayasena as to why no reference was made by him in his evidence at the non summary inquiry regarding a contract to kill the lady as disclosed in his statement. It appears to us that the Attorney-General had placed reliance on the evidence given by Jayasena at the non summary inquiry in framing the 1st count in the indictment and support for this course of action is to be found in Subsection 3 to Section 160 of the Code of Criminal Procedure Act. This Section reads thus:

"The Attorney-General may, subject to the provisions of this Code relating to the joinder of charges, substitute or include in the indictment any charge in respect of any offence which is disclosed by the evidence taken by the Magistrate notwithstanding that such charge was not read to the accused by the Magistrate"

Therefore the submission made by the President's Counsel that there was no basis for the 1st count in the indictment in our view has no merit.

The jury appears to have accepted the evidence of the accomplice Jayasena which has been referred to earlier in this judgment without any hesitation in finding the 1st accused-appellant guilty on counts 1 to 7 of the indictment and the 5th accused-appellant guilty on count 1.

- Jayasena in his evidence recounted the conversation the 5th
- accused had with him and the events that took place that led to the

commission of the offences set out in the indictment. The jury appears to have rejected the denial of the 5th accused made by way of a dock statement as regards meeting Jayasena and the conversation he had with him as deposed to by Jayasena.

The evidence of Jayantha Perera appears to lend some support to the evidence of accomplice Jayasena in regard to the fact that the 5th accused was looking out and making inquiries for a reliable person to have a lady who was in occupation of a house ejected by force and specially asked him as to whether Captain alias Jayasena was a reliable person to entrust a job of that nature. This had been about 5 months prior to 28.2.1984. Although the 5th accused made a lengthy dock statement denying any complicity in this crime and also that he came to know Jayasena for the first time when he was confronted with Jayasena in the C.I.D. Office and he came to know the 1st to 4th accused only after this case was instituted in the Magistrate's Court. He does not anywhere deny the conversation he is alleged to have had with Jayantha Perera as deposed to by him nor does he even attempt to contradict the testimony of Jayantha Perera. Thus Jayasena's evidence in regard to the conversation the 5th accused had with him appears to have been accepted by the Jury which tends to be supported by the evidence of Jayantha Perera that the 5th accused was looking out for Jayasena and making inquiries as to whether he was a suitable person to entrust the task of having a lady evicted from a house.

The medical evidence in the case is that Shyama Dedigama had been strangled to death. At the time of the examination of the body prior to the Post-mortem examination Dr. Rajapaksa had found a ligature around the neck made out of a rolled portion of the lower margin of nightgown with one knot secured in front. Pressure had been applied by pulling the two ends of the ligature by one or more persons which has resulted in a fracture of the superior cornue of the hyoid bone and an extravasation of blood underneath the thyro-hyoid muscles. The cause of death was due to asphyxia following strangulation of the neck using a ligature. At the Post-mortem examination Dr. Rajapaksa also has found a tear of the hymen over the posterior aspect at the 5 o' clock position extending to the vagina. Examination of the vaginal smears had revealed dead spermatozoa.

According to medical evidence the deceased had been raped more than one person.

In regard to the submissions of the Learned President's Counsel that the conviction of the 1st accused-appellant in respect of counts 1 to 7 cannot be sustained, we have examined the evidence with great care and are inclined to agree with his contention only in so far as counts 6 and 7 are concerned.

Although according to the medical evidence it appears that the deceased had been raped, the question arises as to who can be found responsible according to the evidence led by the prosecution. As observed earlier in this judgment the 3rd and 4th accused were dead at the time of the trial. According to the evidence of Jayasena when he was waiting near the flight of steps for about one and a half hours the 1st accused had come there and told him that there was nothing in the house as stated by him. A short while later the 4th accused (since dead) had come there and repeated that there was nothing in the house. Thereafter the 4th accused Banda had been sent to call the others. Shortly thereafter the 3rd accused had come there and then the 2nd had returned in the company of Banda who went to call him. It is at this stage according to the evidence of Jayasena that the 1st accused had said "These chaps have come to go near the women". (meaning that they had come to have sex). In our view even if Jayasena's evidence is accepted the 1st accused cannot be found guilty of the offence of rape as the benefit of that part of the evidence of Jayasena which is favourable to the 1st accused should be given to him and we therefore acquit him of that count.

Since the 3rd and 4th accused were dead at the time of the trial in our view on the evidence of Jayasena the identity of the person or persons who committed rape cannot be established for he does not claim to have seen any one of the accused having sexual intercourse with the lady in the Walauwwa and since the identity of the person or persons who committed rape has not been established the conviction of the 2nd accused on count 8 too, in our view, cannot be sustained. Therefore we set aside the conviction of the 2nd accused-appellant on count 8 and the sentence of 20 years R.I. imposed in respect of thereof and acquit him of the said charge.

The evidence in regard to the two counts of murder against the 1st accused namely the 4th based on unlawful assembly and the 6th based on common intention being circumstantial we have given our anxious consideration to the submissions of Mr. Abeysuriya and examined the evidence of Jayasena and the medical evidence with great care which are the two items of evidence relied upon by the prosecution to establish them. On the medical evidence we are satisfied that the death of Shyama Dedigama had been caused by an unfriendly hand for Dr. Rajapaksa positively and conclusively excludes the deceased having committed suicide. Who then strangled her to death? This was the question that had to be answered by the jury on the evidence.

According to Jayasena when he was keeping watch from near the flight of steps, having accompanied the 1st, 2nd, 3rd and 4th accused to the Dedigama Walauwwa at about 9.30 p.m. on 28.2.1984 he had observed them going towards a window of the Walauwwa. About one and a half hours later the 1st accused had come back to the place where he was followed by the others and they had left the Dedigama Walauwwa along byways and along a stream. The following evening when he was on his way to meet the 5th accused near a boutique called the 'Pinnagolla Kade' he had learnt about the death of the lady in the house.

Count 4 of the indictment was that the 1st and 2nd accused along with the deceased Sunil Thilakasinghe alias Gunatilleke, (3A) Karunage Jayasinghe alias Jemis Banda (4A) and Jayasena committed the murder of Shyama Dedigama in prosecution of the common object of the unlawful assembly set out in count 2 or that the members of the said unlawful assembly knew to be likely to be committed in prosecution of the common object. Jayasena's evidence that the 1st to 4th accused went towards the window of the Walauwwa and returned after one and a half hours has been accepted by the jury. Even if one or more of them had caused the injuries that resulted in the death of Shyama Dedigama then all the others who were members of that unlawful assembly would attract liability for the killing if the killing had been done by one or more of them irrespective of his or their identity as long as they were members of that unlawful assembly. On the evidence of Jayasena which had been accepted by

the jury one cannot say with any sense of definiteness that the killing had been done in the prosecution of the common object of committing robbery. However, it can be reasonably inferred that when the four accused who were members of the unlawful assembly went to commit the robbery that they knew it to be likely that death may be committed and therefore we are of the view that there was a basis for the jury to have convicted the 1st accused for murder in respect of count 4 in the indictment and accordingly we affirm the conviction of the 1st and 2nd accused of count 4 and the sentence of death imposed for the said count.

Count 6 for murder was based on common intention and the prosecution relied on the self same evidence of Jayasena to establish that charge as well. In order to attract liability under Section 32 the act of one accused should be made attributable to the others and there must be a sharing of a common murderous intention. On the evidence of Jayasena which had been accepted by the jury the identity of the person or persons who strangled Shyama Dedigama has not been established. The burden is always on the prosecution to establish the identity of the person who committed the criminal act and that his partners in the crime shared the required intention. On the evidence of Jayasena we are of the view that this burden has not been discharged. At the finding of guilt of the 1st accused for murder in regard to count 6 cannot be sustained. Therefore we set aside the conviction of the 1st accused on count 6 and the sentence of death imposed in respect of that count.

However, the position in regard to count 5 the charge of robbery based on Section 32 is different. It was the uncontradicted evidence of Jayasena that when he was waiting near the flight of steps keeping watch he had seen the 1st, 2nd, 3rd and 4th accused going towards a window of the Walauwva. About one and a half hours later the 1st accused had come near the place where he was and stated 'where man the stuff you said was not there in the house'. A short while later others too had come there and all of them had left the premises. Three days later the 1st accused had sold jewellery weighing 11 1/2 sovereigns to Sittamparam of Sea Street, Colombo and about 6 days later he had sold jewellery weighing about 11 1/2 sovereigns to Fashion Gold House, Kegalle. Two gems wrapped in a piece of cloth

torn off from a dressing gown found in Shyama Dedigama's room was found concealed in a crevice in a retaining wall of the 1st accused land for which no explanation had been adduced by him. The circumstantial effect of these items of evidence is that 1st accused at least had entered the Dedigama Walauwwa on the night in question and the presence of the 2nd, 3rd and 4th in the company of the 1st cannot in any way be taken to be an innocent presence. Thus the 2nd, 3rd and 4th could equally be liable for the acts of the 1st on the basis of common intention and the conviction of 1st, 2nd, 3rd and 4th on count 5, in our view, was justified and is supportable on the evidence. Thus we see no reason to interfere with the conviction and sentence of the 1st and 2nd accused-appellants on that count.

We have examined the charge of the learned Trial Judge to the jury relating to the principles of circumstantial evidence, unlawful assembly and common intention and we are of the view that the directions are adequate and cannot be faulted otherwise than those relating to the applicability of the principles relating to common intention in respect of count 6.

Mr. Abeyesuriya also urged that the learned Trial Judges' directions to the jury in regard to how they should consider the evidence of Jayasena, the accomplice were erroneous. Associated with him was Dr. Ranjith Fernando who appeared for the 2nd accused-appellant. Dr. Fernando submitted that the learned Trial Judge erred and misdirected the jury by stating that the evidence of Jayasena was that the 2nd accused entered the house along with the 1st, 3rd and 4th when in fact the evidence was that he had seen the four of them going towards the window. This being a case of circumstantial evidence the only inference that could be drawn from the evidence of Jayasena is that those who went towards the window had entered the house. No explanation has been given by the 2nd accused to the effect that he did not participate in these offences or that he had not entered the Walauwwa that night. The evidence of the police namely that of Inspector Jayaweera of the Kegalle police who was the first police officer who had visited the scene in the morning of the 26th of February 1984 had found the window pane levered and two window bars wrenched off. This is also supported by the evidence of the Assistant Government Analyst, Peiris. These items of circumstantial

evidence deposed by Inspector Jayaweera and Assistant Government Analyst Peiris are indicative of the fact that somebody had forced open the window and gained entry into the Walauwva through the window. This being the state of evidence one cannot seriously complain of the directions of the Judge at pages 69, 76, 88, 89, 101, 134, 183, 192 and 208 that the persons who went towards the window had entered the house in the absence of an explanation from them.

It was next submitted by Dr. Fernando that the learned Trial Judge erred in law by failing to direct the jury to look for corroboration as a rule of prudence that had now become virtually a rule of law and submitted that in the charge that the learned Trial Judge had laid an unusual stress on the point that corroboration of the evidence of an accomplice is not an essential requirement and the jury could have convicted on the uncorroborated evidence of Jayasena the accomplice if they believed him and chose to do so. We have examined the charge to the jury made by the learned Trial Judge and find that the learned Trial Judge had on several occasions drawn the attention of the jury to look for corroboration even if they accepted Jayasena's evidence without any hesitation. For instance at page 29 of the charge having stated "that it was open for the jury to have convicted the accused on count 1 on the evidence of Jayasena alone if they took the view that Jayasena was a truthful witness". The learned Trial Judge had proceeded to state as follows:

"Even if you accept that count 1 has been proved beyond reasonable doubt on the evidence of Jayasena if you take the view that it is not advisable to convict the accused in respect of count 1 then consider as to whether Jayasena's evidence has been corroborated by other evidence; what then is corroborative evidence? Corroborative evidence is this type of evidence. That means it must be some independent evidence which tends to support that Jayasena's evidence is true. That evidence must be such that it is not dangerous to convict on Jayasena's evidence if Jayasena's evidence has been corroborated on a material point by some independent evidence then it is open to you to act on Jayasena's evidence". Again at page 44 and 45 after having referred to the evidence of Jayantha Perera the learned Trial Judge has stated as follows: "If you accept Jayasena's evidence beyond reasonable doubt you may hold that the

1st count has been proved. Sometimes you may think that since Jayasena is an accomplice that even if you accept Jayasena's evidence beyond reasonable doubt that it is appropriate and advisable to consider as to whether his evidence has been corroborated by some additional and independent evidence. I have referred to the evidence of Jayantha Perera. Sometimes if you have no doubt whatever regarding the evidence of Jayasena then it is not necessary to look for independent evidence which supports his evidence. However, if you think it is advisable to look for corroboration of Jayasena's evidence from some independent evidence you may do so". At page 84 the learned Trial Judge proceeded to state as follows: "I told you that Jayasena was an accomplice. According to Jayasena he himself had participated in the robbery. It may be that Jayasena stated that he did not see any of the accused taking away any items of gold jewellery or any other thing because he wanted to show you that he was least involved. The important question for you to consider is this? Jayasena stated that it was this crowd that entered the Dedigama Walauwwa that night. Do you accept that beyond reasonable doubt? Having considered as to whether the evidence of the accomplice has been corroborated by some independent evidence or not if you take the view that the accomplice is trying to minimise his involvement and it is safer for you to look for corroboration you may do so. However, the law does not state anywhere that you should not accept the evidence of an accomplice if it is not corroborated by some independent evidence.

Another submission that was made was that the trial Judge failed to direct the jury that the accomplice's evidence under a Conditional Pardon should only be accepted if corroborated. On an examination of the charge we find that on several occasions the learned Trial Judge had adverted to the fact that Jayasena the accomplice was testifying under the Conditional Pardon with halters round his neck and that the jury should consider his evidence with great care and caution and that even if they accepted his evidence without any hesitation that they should look for independent evidence which lends support to his evidence. At page 181 of the charge the learned Trial Judge states as follows: "the necessity to look for corroboration of even a part of the accomplice's evidence by independent evidence" arises for three reasons (1) the accomplice attempts to minimise his

criminal involvement; this attempt is made by exaggerating the criminal acts attributed to the accused. (2) There is a belief that a selfconfessed accomplice is a person with an unsavoury character. That means he is a criminal. A criminal generally does not pay much regard for truth. (3) An accomplice testifies on a Conditional Pardon or with the expectation of securing a pardon. Therefore there is a general belief that he is a partisan witness in favour of the prosecution. It is for you to consider as to whether Jayasena's evidence has any one or more of the above characteristics. It is for this reason that you should consider as to whether his evidence or a material part of it has been corroborated by some independent evidence". In the light of the above directions we are of the view that this submission of the learned Counsel bears no merit.

It was also submitted that the learned Trial Judge erred by failing to direct the jury that the accomplice's evidence must at the very least be intrinsically credible before corroboration is looked for. On an examination of the charge we find that the learned Trial Judge on numerous occasions had directed the jury to look for corroboration of Jayasena's evidence from items of independent evidence even if they accepted Jayasena's evidence as being true without any hesitation and in view of the said directions we are unable to agree with this submission of the learned Counsel.

It is to be noted that Jayasena's evidence regarding the participation of the 2nd accused-appellant is not supported by any other evidence direct or circumstantial. However having regard to the state of the evidence there was no basis for the jury to have rejected his evidence in regard to the complicity of the 2nd accused in the absence of any explanation by him and we cannot say that the finding of the jury in respect of the 2nd accused was unreasonable.

On an examination of the evidence of Jayasena one does not get the impression that he was making any attempt to implicate the accused by exaggerating the acts attributed to them. He does not even say that he saw any items of stolen property in the hands of any of the accused or even noticed their having concealed any stolen goods in their person. If Jayasena wanted to he could have stated that he saw the 3rd and 4th accused who were dead at the time of trial

carrying some stolen goods with them or for that matter that even the 1st and 2nd who were absent at the trial carried stolen articles with them that night. It is for that reason that the prosecution has to rely on items of circumstantial evidence to establish the charge of robbery as well.

The final submission that was made by the learned Counsel for the 2nd accused-appellant was that the Learned Trial Judge erred by misdirecting the jury by stating as corroboration items of evidence which in law were not capable of amounting to corroboration. In our view the nature of the corroborative evidence required is some items of evidence which tend to support the version of the accomplice. In the instant case we find that the evidence of Jayasena that the 5th accused asked him to simulate a robbery by tying up the hands and feet of the lady who was giving him trouble without leaving the house is supported by the evidence of Jayantha Perera who testified that about five months prior to the murder of Shyama Dedigama that the 5th accused came to his house and asked him as to whether Captain (Jayasena) was a suitable person to have a lady who was giving him trouble ejected from a house. This item of evidence given by Jayantha Perera remains uncontradicted.

The evidence of Jayasena that the 1st accused-appellant purchased a screw driver on the evening of the 25th of February 1984 is supported by the evidence of Noor Mohamed the salesman of Hameed Stores who wrote the bill 'P18A' and that of Mohamed Niyaz and Mohamed Kaleel who testified that a screw driver similar to 'P17' was sold to Renuka Mudalali (Wimalaratne alias Wimale Mudalali) for a sum of Rs. 8.50 on 25.2.1984.

I.P., Norbert Banda's evidence also in our view tends to support Jayasena's evidence that the 1st accused had in his possession a screw driver which was purchased on the evening of 25.2.1984 for it was his evidence that when he arrested the 1st accused at about 3.30 a.m. on 12.3.1984 on the Kalawana - Nivithigala Road on suspicion he had found a screw driver concealed in his waist which had been taken charge of by him and produced before the Ratnapura Magistrate. The evidence of Sittamparam that the 1st accused who was known to him and with whom he had transacted business for a period of about one and a half years had sold items of jewellery

which weighed 11 1/2 sovereigns for a sum of Rs. 20,700/- on 2.3.1984 and the evidence of Niyaz that the 1st accused sold jewellery weighing about 11 1/2 sovereigns to him on 28.2.1984 for a sum of Rs. 20,215/- and collected that money in instalments also lends support to the evidence of Jayasena. The finding of the piece of cloth in which two blue stones had been wrapped and concealed in the crevice in the retaining wall of the 1st accused's premises on a portion of the statement made by the 1st accused to Inspector Amunugama and the evidence of the Government Analyst Peiris that on 20.6.1984 that he found the dressing gown from which the piece of cloth 'P30' in which the two blue stones had been wrapped and concealed in the retaining wall of the 1st accused premises also lends to support to the evidence of Jayasena.

On a careful consideration of the evidence led and the submissions made by Counsel for the appellants and the Learned Additional Solicitor General and on an examination of the evidence we are unable to agree with the submissions made on behalf of the appellants that the directions of the Learned Trial Judge except in so far as his directions in regard to count 6 (murder based on common intention) and the inadequate directions in regard to counts 7 to 10 (charges of rape) were erroneous or faulty. Thus we see no reason to interfere with the conviction of the 1st accused-appellant and the 2nd accused-appellant in respect of counts 1,2,3,4, and 5 of the indictment or the sentences imposed in respect thereof. Accordingly we affirm the conviction and sentence of the 1st and 2nd accused-appellants in respect of those counts. We also see no reason to interfere with the conviction of the 5th accused-appellant in respect of count 1, or the sentence of 10 years R.I. imposed on him. Accordingly we affirm the conviction and sentence in respect of him.

Subject to the variation in respect of counts 6 and 7 regarding the 1st accused-appellant and counts 6 and 8 in regard to the 2nd accused-appellant referred to earlier the appeals are dismissed.

J. A. N. DE SILVA, J. – I agree.

*Conviction and sentence on counts 6,7 and 8 set aside.
Conviction and sentence on counts 1 to 5 affirmed.*