[COURT OF CRIMINAL APPEAL]

1972 *Present :* **G.P.A. Silva, S.P.J. (President), Wijayatilake, J., and Walgampaya, J.**

L. S. PREMATILLEKE, Appellant, *and* THE REPUBLIC OF SRI LANKA, Respondent

C. C. A. APPEAL NO. 70/72, WITH APPLICATION NO. 59

S. C. 117/72—M. C. Matara, 51785

Trial before Supreme Court—Non-summary proceedings prior to 22nd May 1972—Election by accused to be tried by an English-speaking jury—Commencement of trial after new Constitution of Sri Lanka (Ceylon) came into operation on 22nd May 1972—Wish of accused then to be tried by a jury proficient in Sinhala—Empanelling the Sinhalese jury from among those summoned for service as English-speaking jury—Irregularities in procedure—Summing-up in Sinhala—Interpretation of it into English—Whether the proceedings were vitiated by the irregularities—Court of Criminal Appeal Ordinance (Cap. 7), Proviso to s. 5 (1)—"Substantial miscarriage of justice"—Constitution of Sri Lanka (Ceylon), ss. 7, 9, 11, 11 (6)—Criminal Procedure Code, ss. 224, 224 (7), 254, 257, 261, 281—Evidence—Validity of conviction based on circumstantial evidence—"Accomplice"—Limitations of the right of the Court of Criminal Appeal to look into Police Information Book or the non-summary proceedings.

The indictment was originally served on the accused-appellant on 26th February 1972. On 22nd May 1972 the Constitution of Sri Lanka (Ceylon) came into operation. Section 7 of the Constitution enacted that the Sinhala Language shall be the official language of Sri Lanka as provided for in the Official Language Act, No. 33 of 1956. As an immediate switch over to Sinhala in all respects in all the courts was quite impracticable, an Order was published on 23rd May 1972 under the provisions of Section 11(6) of the Constitution permitting, as a transitional provision, the continued use of the language in which proceedings in any Court were conducted immediately before the commencement of the Constitution.

The accused had elected, at the stage of his committal by the Magistrate, an English-speaking jury for his tral. When the trial commenced on 19th June 1972, the Judge inquired from Counsel for the Defence whether the accused wanted to continue with his election to be tried by an English-speaking jury and was told that the accused wished to have his case conducted in Sinhala. At that time an English-speaking jury, for which the accused had originally elected, were present in Court in compliance with the summons served on them. The Judge stated that he wished to verify from the jurors whether they were able to understand proceedings in Sinhala. Accordingly, as each of six jurors was drawn and came up to the jury box, the Judge put certain questions to him and satisfied himself from the answers given by the juror that he could speak, read and write Sinhala. In regard to the seventh juror, who was a Sinhalese by race and an English Trained Teacher, the only question put to him by the Court was whether he read the Sinhala newspapers and the reply was in the affirmative.

The summing-up was in Sinhala, and it was interpreted into English in the hearing of the jury.

Held, (i) that a reasonable inference that could be drawn from Section 7 of the Constitution coupled with the Order of 23rd May 1972 was that courts were ordinarily expected to conduct proceedings in Sinhala if they were competent to do so.

(ii) that there was no merit in the contention that the seventh juror, much less any other juror, did not have the language qualification regarding proficiency in Sinhala as contemplated by Section 254 of the Criminal Procedure Code. Even assuming that one of the jurors did not have the requisite qualification, Section 281 of the Criminal Procedure Code precluded the invalidation of the verdict by reason of that defect.

(iii) that, although, after the accused wished to be tried by a Sinhalese panel of jurors, the requirements of Section 257 and related Sections, read with Section 224, of the Criminal Procedure Code were not complied with and there was no specific provision for the trial Judge to indulge in the inquiry which he resorted to, the verdict could not be set aside on this ground in as much as the accused had a jury of his choice and in view of the new constitutional background in consequence of which Sinhala had to be the language of the Court of trial and English was only permissive for the conduct of proceedings. The irregularity of empanelling the Sinhalese jury from among those summoned for service as a jury proficient in the English language did not cause any "substantial miscarriage of justice" within the meaning of the proviso to Section 5(1) of the Court of Criminal Appeal Ordinance. The interpretation into English of the Judge's summing-up was only a superfluous procedure and did not in fact cause confusion in the minds of the jury, despite some discrepancies.

The proviso to Section 5(1) of the Court of Appeal Ordinance does not permit the Court to allow an appeal if, notwithstanding a wrong decision on any question of law or on any other matter, the Court considers that no substantial miscarriage of justice has actually occurred. In the present case there was no good ground to refrain from applying the proviso after considering both the evidence and the substantially correct summing-up as well as the procedure not specifically authorised by the Code.

Held further, (a) that a conviction could be based upon the telling evidence of a mass of eloquent circumstances when such circumstances remain unexplained by the accused.

(*b*) that the evidence of an eye-witness to an offence need not necessarily be regarded as that of an accomplice requiring corroboration merely because he is a belated witness and was a suspect in the custody of the Police when he made his statement to the Police implicating the accused.

(*c*) that the Court of Criminal Appeal would be acting improperly if, in allowing an appeal or altering the verdict of the jury, it is influenced by a detailed perusal of the Police Information Book or the non-summary proceedings which the jury had no opportunity at all to consider, except in a rare case where there has been a substantial miscarriage of justice owing to some vital material escaping all concerned during the trial which, had it been before the jury, would, in all probability, have made a difference to the verdict.

APPEAL against a conviction at a trial before the Supreme Court.

G. E. Chitty, with *G. E. Chitty* (Jnr.), *Asoka Abeysinghe* and *J. Muttiah* (assigned), for the accused-appellant.

N. Tittawella, Deputy Solicitor-General, for the State.

Cur. adv. vult.

December 8, 1972. G. P. A. SILVA, S.P.J.—

The accused-appellant in this case was indicted with having committed the murder of one Dinis *alias* Gunadasa on the 13th of April, 1970, and was convicted by a verdict of 6 : 1 of that charge. The course that the trial took gave rise to several important matters of law which were raised by counsel for the appellant apart from the substantial grounds of appeal relating to the charge to the jury. I shall therefore deal with these matters in the first instance.

It is useful to enumerate the circumstances which led to this situation. The original indictment the parties to which were the Queen and Sarath Prematilleke, and which was served on the accused was sent in the name of Her Majesty's Attorney-General on the 26th of February, 1972. On the 22nd May, 1972, this country adopted and enacted through the Constituent Assembly of the People the new Constitution called the Constitution of Sri Lanka (Ceylon) to be in operation with immediate effect. Section 7 of this Constitution enacted that the official language of Sri Lanka shall be Sinhala as provided for in the Official Language Act, No. 33 of 1956 which stated, *inter alia*, that the Sinhala Language shall be the official language of Ceylon ; Section 9 required all laws to be enacted in Sinhala and Section 11 made it obligatory for the language of all the Courts and Tribunals empowered by law to administer justice to be in Sinhala and for the maintenance of all their records in Sinhala. Section 11 contained a proviso permitting the National State Assembly to provide otherwise in the case of institutions exercising original jurisdiction in the Northern and Eastern provinces, and, for the purpose of this case, it is unnecessary to embark upon an interpretation of this proviso.

While subsequent sub-sections of Section 11 enable translations into Sinhala or Tamil in certain circumstances, even the word "English" does not find a place in this section. It is only by implication that the use of English may be said to have some place in judicial proceedings in that the provisions in Section 11(6) empower the Minister in charge of the subject of Justice, with the concurrence of the Cabinet of Ministers, to issue any Order or Direction permitting the use of a language other than Sinhala or Tamil by a Judge or other State Officer administering justice in any Court or Tribunal. Such an Order was in fact made and published in Gazette Extraordinary No. 2 of 23rd May, 1972 the very next day after the promulgation of the new Constitution, permitting the continued use of the language in which proceedings in any Court, Tribunal, Board or Institution were conducted immediately before the commencement of the Constitution. It will be noted that even this Order does not compel but only permits the use of the language used immediately before the Constitution. If therefore English was used for the conduct of proceedings in any Court before the 22nd May, it could have been continued thereafter. The effect of the Section however is that the use of Sinhala is made obligatory in Courts of law by the Section itself and a Court which used English earlier, while maintaining its records in Sinhala, was permitted to continue to use English if it wished. Paragraph (3) of the Order makes it fairly clear that the Order was intended as a transitional provision to be modified or revoked by a further Order and that the object of this Order, which, in the circumstances, was both prudent and timely, was to prevent a dislocation of work in the Courts. As an immediate switch over to Sinhala in all the Courts of the Island was quite impracticable, the issuing of this Order by the Minister of Justice on the 23rd May itself was absolutely necessary. However, a reasonable inference that may be drawn from the Section coupled with the Order is that courts were ordinarily expected to conduct proceedings in Sinhala if they were competent to do so.

The trial Judge in the instant case no doubt took this view when he commenced the hearing of this case on the 19th of June, 1972, and the step he took would have attracted much less criticism had he not adopted the somewhat inconsistent procedure of having his Sinhala charge interpreted into English and such interpretation, we are informed by the Deputy Solicitor-General, was done in the hearing of the jury. The procedure he followed clearly indicates an effort to comply with the constitutional provision and the decision he reached is therefore not open to any serious objection. He had however to contend with certain provisions of the Criminal Procedure Code relating to Supreme Court trials and it is the course he adopted to reconcile these provisions with the requirement of the Constitution that attracted the first major criticism of counsel for the appellant. The learned Deputy Solicitor-General who assisted the Court on behalf of the State, preliminarily to meeting this argument, made out a strong case for this Court to approach this question and the matters surrounding it in the background of the fundamental consideration that this Court will not interfere with a verdict of a jury

even if there are any errors of law in procedure or otherwise if no substantial miscarriage of justice has actually occurred as a result of such errors.

From the first question that the trial Judge asked from the defence counsel at the very inception of the case it is clear—and it was indeed common ground even in this Court—that the accused had elected an English-speaking jury for his trial at the stage of his committal by the Magistrate. It is also clear from the Judge's question that he took the precaution of asking counsel to inquire from the accused whether he wanted to continue with his election to be tried by an English-speaking jury as he had originally done, in which event the case will be conducted in English. It is important to note that the trial Judge did not even indicate any preference on his part to conduct the trial in Sinhala nor make any such suggestion to counsel for the defence. Indeed, if there was any indication it was to the effect that if the accused elected to do so "the trial will be conducted in English". The answer of counsel for the defence, which must be presumed to have been given after consulting the accused was :

"He wishes to have his case conducted in Sinhala."

From the next observation of the trial Judge it would appear that an English-speaking jury, which the accused had originally elected for, were present in court having been duly summoned to serve and that the trial Judge wished to verify from the jurors whether they were able to understand proceedings in Sinhala. Thereafter, the inference to be drawn from the record of proceedings is that, as each juror was drawn and came up to the jury box, the trial Judge put certain questions to him in order to satisfy himself of the juror's ability to understand the proceedings in Sinhala. It is also an irresistible inference from the answers given by the jurors that the learned trial Judge had, presumably from the Clerk of Assize and/or the Fiscal, obtained some information of the proficiency in Sinhala of each of the entire panel of jurors who were summoned to serve during the period when this case was taken up. From the questions addressed to each of the jurors and the answers supplied by them it is a reasonable presumption that six of the seven jurors empanelled for the trial could not only speak, read and write Sinhala—which qualifications among other things, made them liable to serve on a Sinhala panel of jurors in terms of Section 254 of the Criminal Procedure Code but that they had a working knowledge in Sinhala. In regard to the other juror, the only question put to him by the Court was whether he read the Sinhala paper and considerable time was taken up by counsel for the appellant, among his numerous other arguments, to persuade this Court that this question and answer alone did not show that this juror had the requisite qualifications regarding proficiency in Sinhala as contemplated by Section 254 of the Criminal Procedure Code. To my mind, one can conceive of a case where a person is a fluent speaker in a particular language but is altogether unable to read or write that language. One has almost to take leave of one's senses

however to conclude that a person who can read the newspapers in a particular language cannot speak that language. A slightly less degree of unrealistic imagination would perhaps enable one to infer that a person who can read the newspapers cannot write that language ; but I do not think that a Court can reasonably take such a view regarding this one juror about whom there has been this controversy, having regard to the following among other reasons :—

(1) the name of the juror is Udugampola and this Court comprising three Judges born in this country would not be permitted to hold that Udugampola is not a Sinhalese by race ;

(2) by profession, he is an English Trained Teacher and it is incredible if, with the Official Language Act in force from 1956 and with his habit of reading the Sinhala newspapers, he lived in a world of his own not taking cognizance of the accent placed on Sinhala after this Act, the requirement to attain a certain standard of proficiency in Sinhala on pain of stoppage of increments—a matter which must have been highlighted repeatedly in the very Sinhala newspapers which he used to read ;

(3) the high improbability of his having followed the suicidal policy of not acquiring at least some degree of proficiency in Sinhala and running the risk of being discontinued from service with the imminent possibility of education in this country switching over completely to the two streams of Sinhala and Tamil only with English having no place.

Apart from the highly inherent improbability of a trained teacher who reads the Sinhala newspapers being unable to speak and write that language and the above reasons which militate against the contention of counsel that the trial Judge's questioning did not show that Mr. Udugampola answered the requirements of Section 254 of the Criminal Procedure Code, a Court has necessarily to take a look at the other circumstances in regard to this submission. The observation of the trial Judge that preceded the empanelling of jurors that he will have to verify from the jurors whether they were able to understand the proceedings in Sinhala must be presumed to have been heard by the jurors who were seated in the well of the Court. They witnessed the wholo exercise that the Court was going through and would have followed the questions put by the trial Judge and the answer of counsel. It can fairly be assumed therefore that, the juror concerned being an English trained teacher, would have had sufficient sense of responsiblity to inform the trial Judge if he was not proficient enough in the Sinhala language to be able to understand the proceedings. He did not do so. There is also the circumstance that defence counsel, Mr. Sumita Dahanayake, did not raise any point or make any complaint regarding the insufficiency of Mr. Udugampola's knowledge of Sinhala at any stage of the trial proceedings, nor has such a point been taken up in the petition of appeal among the grounds, even though a complaint was sought to be made or at least suggested

in regard to the inadequacy of the Sinhala of the trial Judge in conveying certain legal concepts relevant to this case. These reasons persuade us to the conclusion that there is no merit in the complaint that the juror Udugampola, much less any other juror, did not have the language qualification that was necessary for them to serve in a Sinhala panel of jurors.

It is perhaps relevant to mention in this connection that Section 281 of the Criminal Procedure Code precludes the invalidation of any judgment or verdict *inter alia* owing to a defect, error or disqualification of a juror. This provision shows that even if one juror had some disqualification due to an error in the jury list prepared by the Fiscal, a judgment arrived at by a jury which includes such juror cannot be held illegal. Much less therefore can the verdict in this case be set aside, even if one of the jurors is not proved to have had the requisite qualification in view of what I have stated regarding juror Mr. Udugampola.

I come now to the other criticisms regarding the jury which too were not raised either at the trial or in the grounds of appeal. I must say here that the Deputy Solicitor-General deliberately refrained from taking up the objection that counsel for the appellant was not entitled to raise matters not stated in the petition of appeal. It was submitted by learned Counsel for the appellant that the right that an accused enjoyed for an election of a jury was denied to the appellant. The argument proceeded on the basis that when Counsel for the Defence, after consulting the accused, stated in the trial court that the accused wished to have the case conducted in Sinhala, the accused in effect elected to be tried by a Sinhalese panel of jurors, having by implication withdrawn his election to be tried by an English (speaking) Jury at the non-summary inquiry. He was thereafter entitled to a trial by a Sinhalese Jury as provided for in section 257 and related sections, regarding the qualifications and disqualifications for being jurors, read with section 224 of the Criminal Procedure Code. The preparation of jury lists in English, Sinhalese and Tamil was a function that devolved on the Fiscal. The preparation of a panel of jurors to be summoned for attendance and service as jurors at any criminal sessions should be done by an appropriate officer of the Court before a Judge of the Supreme Court in terms of section 261 of the Criminal Procedure Code. Such panel can therefore be prepared from each of the lists of English, Sinhalese or Tamil, as the case may be, furnished by the Fiscal. When the accused in this case in effect elected that his trial should be before a Sinhalese jury, such a jury should have been summoned for service and seven of them should have been empanelled for the trial of the accused in terms of section 224(1). It was thus wrong for the trial judge, without following this procedure, to convert as it were an English panel of jurors to a Sinhalese panel in the way he did and the trial which proceeded thereafter was illegal. That the trial judge did not have, in law, any power to question jurors as to their competence in Sinhala and that there was no guarantee of the jurors having truthful answers to the judge also formed part of this submission.

There is, of course, no doubt that the foregoing provisions which Counsel for the Appellant referred to were not complied with in this case and that there was no specific provision for a trial judge to indulge in the inquiry which he did. But the question as to whether the verdict should be set aside on this ground is one which demands the consideration of a series of other matters which I shall endeavour to deal with presently.

In considering this matter, it is necessary to remember the salient fact that six of the jurors were on their own answers given to the judge—I have no reason to think that the answers were false—qualified to serve as Sinhalese jurors and to be included in the list of Sinhalese jurors prepared by the Fiscal in terms of Section 257 and that the questions put by the judge helped to elicit material which went far beyond the information that the Fiscal would have ordinarily had regarding the language qualification of the jurors for the purpose of inclusion in the Sinhalese list of jurors. In regard to the seventh juror Mr. Udugampola too, for the reasons stated above, if one takes a realistic view, it is most unreasonable to think that he would not have been able to speak, read and write the Sinhala language or that he would not have known sufficient Sinhala to understand the Sinhala proceedings. The second consideration to bear in mind is that, even though Section 254 contains the words requiring ability to speak, read and write, the purpose intended to be served thereby is that only a person who can understand and follow the proceedings in a particular language, English, Sinhalese or Tamil should be called upon to serve on such a jury.

In this connection I might observe, even though it is not necessary for the purpose of this case, that if a person is qualified in terms of language to serve on a Sinhalese jury as well as a Tamil jury or English, Sinhalese and Tamil jury, the proviso to Section 257 does not appear to be intended to disqualify him from serving on two or all three such juries, if he is willing to do so. For, the proviso deals with only *liability* to serve. The last few words of this proviso " unless such person, with the leave of the presiding judge, shall consent thereto " taken in conjunction with the preceding words strongly indicate that a person, qualified in more than one language, may serve on more juries than one but is not liable or compellable to serve. The idea contained in the section appears to proceed on the assumption of a possible reluctance on the part of persons qualified to serve as jurors and, for that reason, the law imposing a liability on such persons to serve, at the same time not imposing too heavy a liability by obliging him to serve on more juries than one for the only reasons of being proficient in more than one language. I have hardly any doubt that there may be several persons proficient in more than one language, who are anxious to serve on a jury for reasons of their own, whose names are forwarded to the Fiscal in different lists and whose names are therefore included by the Fiscal in more than one list that he prepares even without knowing that he is doing so. If such inclusion has taken place in a case where the person is unwilling to serve on more than one jury the words of the proviso referred to would enable him

to claim exemption from the Court on the ground that he is not liable to serve.

Yet another matter which must be remembered in this discussion is that, in an extreme case where a sufficient number of jurors is not available for a trial as a result of too many being challenged, the gap in the jury may even be made up, in terms of Section 224(7) of the Criminal Procedure Code, of several bystanders as are by law not disqualified. This provision shows that there is no special legal sanctity requiring any juror to go through the unavoidable sieve of the Fiscal but that a procedure has been laid down to provide the machinery for ensuring that there should be present in Court, when a trial is taken up, a certain number of qualified persons to serve on a jury of the accused's choice.

The question then broadly is whether the accused in this case in fact had a jury of his choice. Having regard to the foregoing considerations, in particular, the possession in every juror of the requisite qualifications in Sinhala to serve on a Sinhalese panel and the participation by the accused and his counsel in the trial, not by reason of an enforced consent, but out of a desire willingly expressed and without a word of objection at any stage up to the argument before this Court, the answer has to be in the affirmative.

Mr. Chitty supported the submissions on this point by citing to us the Privy Council decision in the case of *Hemapala v. The Queen*[1], 65 N.L.R. 121 in which it was held that the accused having elected to be tried by an English-speaking jury, the conduct of the trial partly in Sinhala so contravened the Criminal Procedure Code as to amount to a miscarriage of justice. The Counsel in that case addressed the jury in Sinhala without an interpretation into English and there was no certainty from the record that the evidence given in Sinhala was translated into English in the hearing of the jury. The gentlemen of the jury through the foreman were questioned by the trial judge whether they were sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and their answers as well as the addresses and the foreman replied in the affirmative. The counsel for the defence too stated that he could understand the proceedings in Sinhala. Their Lordships of the Privy Counsel in advising Her Majesty to allow the appeal did not hold that the trial was a nullity but expressed the view that there were good grounds for holding that the way in which it was conducted resulted in withdrawing from the accused a protection which the court was designed to secure, citing with approval the following observation from Lord Goddard in *R. v. Neal*[2] (1949) 2 K.B. 590 ; (1949) 2 A.E.R 438 :—

> "There is no doubt that to deprive an accused person of the protection given by essential steps in Criminal Procedure amounts to a miscarriage of justice and leaves the Court no option but to quash the conviction."

[1] *(1963) 65 N. L. R. 121.* [2] *(1949) 2 K. B. 590 ; (1949) 2 A. E. R. 438.*

It must however be stated that, so far as our courts were concerned, the trial judge, who was no less a person than the present holder of the office of President of the Court of Appeal of Sri Lanka as well as the office of President of the International Commission of Jurists, considered the course he took at the commencement of the trial as one which would not have resulted in any injustice to the accused and so did three out of the five Judges of this Court which heard the appeal in the first instance.

As the facts relating to this aspect in the instant case differ considerably in several respects from those of the *Hemapala Case* this Court is not compelled to decide whether it is bound by an earlier decision of this Court consisting of five judges (though divided as 3:2) or by the Privy Council decision. Having regard to the abolition of appeals to the Privy Council and the provisions of the present Constitution, however, the question arises whether we are now bound by decisions of the Privy Council, even though they would have strong persuasive force. I say so, of course, with the utmost deference to Their Lordships of the Privy Council and with a deep sense of gratitude to them for their undoubtedly high legal erudition which has immeasurably assisted and influenced the judicial thinking of generations of judges of this country in the past.

Mr. Tittawella pointed out some of the differences between the *Hemapala Case* and the instant case, namely, that each juror was not questioned in the *Hemapala Case* in regard to his proficiency while it was done in this case and that it was not the accused but the defence counsel who consented to the conduct of proceedings in Sinhala in that case while it was not so in the instant case. On a reading of the reproduction in the Privy Council judgment of what transpired before the trial judge in that case it seems to me that there are more significant differences between what transpired in the *Hemapala Case* and this case which distinguish one from the other. I give below the portion reproduced in the Privy Council judgment :—

" May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them ? "

Foreman : " Yes, My Lord. "

" And also address of Counsel if it is made in Sinhala ? "

Foreman : " Yes. "

" Mr. Tampoe (who was Defence counsel), are you able to follow the proceedings in Sinhala ? "

Mr. Tampoe : " Yes, My Lord. "

" You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer. "

While these were the questions and answers in the *Hemapala Case* in the instant case the question asked from Counsel to answer which he was requested to consult his client was whether the accused wanted "to continue with his election in which case the case will be conducted in English". The answer of Counsel could in these circumstances only have meant that the accused desired to change his election and have his case tried in Sinhala. This answer to my mind produced the essential difference in this case, namely, that the accused was tried by a jury empanelled in accordance with and not contrary to his choice. Had these been the questions and answers in the *Hemapala Case* and had they preceded the empanelling of the jury, coupled with every juror having been questioned in some detail as to the Sinhala proficiency which he possessed, in contrast to the foreman's answer in the *Hemapala Case* on behalf of all the jurors that they were sufficiently conversant with Sinhala to be able to understand well the answers to questions and the addresses of counsel, I doubt very much whether the Privy Council could or would have held that the protection which the Code was designed to secure, namely, the election to be tried by an English speaking jury, was withdrawn from the accused. If such a finding was not possible as in the instant case, the basis on which the Privy Council decided that the procedure amounted to a miscarriage of justice would have been absent and I venture to think that the decision which depended on this crucial question (as would appear from their argument at page 123) would have been otherwise.

I see yet another basic difference which one cannot overlook in arriving at a decision on this matter, namely, that the Hemapala trial took place when the Language of the Courts Act No. 3 of 1965 was in operation and when the Court of trial had not been declared a Court which should conduct proceedings in Sinhala. The resulting position was that English was the lawful language of that Court. In the instant case, as I have stated earlier at the commencement, Sinhala had to be the language of the Court of trial and English was only permissive for the conduct of proceedings. The interpretation to be given to the legality of the trial in the instant case has therefore to be viewed in a different light and against a fundamentally different constitutional background.

The above considerations do not enable us reasonably to take the view that despite the agreed irregularity, if I may say so, of empanelling the Sinhalese jury from among those summoned for service as an English jury, any miscarriage of justice has occurred. Far less can it be said that any "substantial miscarriage of justice has actually occurred" from this irregularity, to use the very words of the proviso to Section 5 of the Court of Criminal Appeal Ordinance. In view of the proficiency of the jury in Sinhala no such miscarriage of justice could have occurred in this case even if Sinhala only had been used throughout the proceedings. The complaint therefore that the addresses were not interpreted into English ceases to have any justification. The interpretation into English of whatever part of the proceedings, which could have been conducted in

Sinhala only was a superfluous procedure which resulted in certain adverse comments which would not have been otherwise available to the appellant.

In order to condense this judgment as far as possible I have refrained from referring to all the other judgments which counsel submitted for our consideration in the course of their argument on this point.

I shall now very briefly state the facts of the case which would be relevant for a consideration of the submissions relating to misdirections in the charge. The prosecution case was apparently presented as one depending on the direct evidence of the witness Hewalankarage Sirisena, supported by Premawathie and Kusumawathie (the widow of the deceased) in regard to the movements of the accused and his association with the deceased on the night on which the deceased was alleged to have met his death. For a consideration of the main principle involved in this case I should however wish to confine myself first to the examination of the circumstantial evidence and not to take into account the evidence of Sirisena and Premawathie for that purpose.

Kusumawathie, the widow of the deceased, a woman of 25 years of age, stated that the accused's father was the owner of an estate of about 60 acres on which the deceased used to work as a labourer. There is some doubt as to the frequency of the employment but the impression one forms on the whole of the evidence is that he had casual employment on this estate in cinnamon peeling and other work and that he ceased to work as it was difficult to recover the wages. She had known the accused whom she called Sarath Mahattaya for about 3 or 4 years and for about 6 months prior to this incident he had been "associating" with her in the absence of her husband. We do not know what word was used by counsel and the witness in Sinhala to indicate what this association was. However, when one considers her evidence that he used to associate with her ; that he spent 10–15 minutes or half an hour on each occasion ; that he came in the absence of her husband and that, even on the fateful night when he returned alone after taking her husband away, he did not associate with her (adding the voluntary answer "my children were awake" to the question whether the accused made a request), there is no room to doubt that the association meant sexual intimacy. On the night of the 13th April, the Sinhalese New Year Day, the accused, who was after liquor, came to her house at about 9 or 10 p.m. and left with the deceased who was bare-bodied except for a chintz cloth sarong which he wore similar to the one found on the skeleton that was discovered by the Police 6 days later in thick jungle within a quarter mile from the house of the deceased, the other house closest to the place being that of the accused. The deceased wore this sarong—or one similar to this in design though newer—from the 11th April when he got a present of it from his mother for the Sinhala New Year. The accused, who left with the deceased, came back to her house at about 2 a.m.—it must be

remembered that she was not giving the time of the clock—without the deceased and, to a question from her, replied that he had given drinks to the deceased and that the latter was sleeping in a vacant house. The accused came again at about 7 a.m. on the 14th and, when she informed him that her husband had not returned, his reply was that the deceased may not come home and may have gone to his village because she abused him when he came after liquor and asked her not to look for him. She added that the husband never took liquor. If that was true it is clear that the accused's statement was an absolute fabrication. Among the other things that the accused told her on the 14th morning was that she should not tell anyone that he took her husband away. On the 14th itself she went to her mother at Penatiya to inquire if the deceased came there and not finding him there decided to look for him at his parent's house at Maliduwa. At the bus halt or near it the accused met her and asked her not to look for the deceased as he will come home and to tell the Police if she was questioned that the deceased left home at 4 a.m. On the 15th she went to the road with her child to take bus to go to Maliduwa to look for the deceased. As nine buses passed her way, without accommodation perhaps, she came back home and went with her children to the mother-in-law's house at Maliduwa the next day and with the mother-in-law and Jayasena, a brother of the deceased, she came to the Weligama Police Station on that day and made a statement in which she admittedly suppressed the fact of accused having taken the deceased away at 9 or 10 p.m. on the 13th, her excuse being that she complied with the accused's request. The other items of supporting evidence came from Jayasena, the deceased's brother, who confirmed Kusumawathie when he said that he had seen the accused at the deceased's house earlier. He also stated that he returned to Akuressa with his mother on the 17th after going to the Weligama Police with his sister-in-law and, the accused who went past them in a car at Akuressa, stopped the car and came up and asked his mother " what did Kusumawathie tell you ". There was also an important item of evidence which appears to have transpired incidentally when Police Sergeant Ahamath gave evidence, namely, that when he went on the 14th April to inquire into a case of hurt of Ananda and Sunil Prematileka, two brothers of the accused, as he went past the house of the deceased, he saw the accused running away or walking fast from the deceased's house into the jungle. The Sergeant was not looking for the accused nor had he occasion to question him regarding the injuries on his brother.

Even if these items of circumstantial evidence alone coupled with the medical evidence that the skeleton showed 6 or 7 necessarily fatal injuries formed the only basis of the case for the prosecution, if a jury was prepared to accept Kusumawathie's evidence, despite her original false representation to the Police which could have been well understood having regard to

her relations with the accused, I venture to think that a reasonable jury properly directed could have convicted the accused. The evidence justifying a conviction could be summarised as follows :—

(1) identity of the body from the fact that the skeleton was found within ½ mile from the house of the deceased, in a highly decomposed condition, covered with a sarong of the same pattern that the deceased wore (as confirmed by the Government Analyst) and that the skeleton did not have anything on the upper part of the body, the deceased having left home on the 13th night wearing only a sarong,

(2) the accused being the last person who was seen with the deceased and the fact that the accused took the deceased away on the night of the 13th when death could have occurred,

(3) the sexual intimacy of the accused with the deceased's wife and the inherent motive of the accused who would have wished to get the deceased out of his way so as to have Kusumawathie for himself without any impediment.

(4) The most incriminating items of evidence of his conduct in :

(*a*) telling Kusumawathie one falsehood at 2 a.m. of the 14th regarding the deceased,

(*b*) telling Kusumawathie a second falsehood about the deceased on the morning of the 14th,

(*c*) asking Kusumawathie not to disclose that he took the deceased away,

(*d*) telling her on the 15th that the deceased will come back and not to look for him,

(*e*) inquiring from the deceased's mother what Kusumawathie told her,

(*f*) running away to the jungle from the deceased's house on the 16th when, if he was innocent, he should have been waiting for an opportunity to meet the Police to assist them in regard to the cases of his brothers who were seriously injured on the 14th.

Reminding myself of the famous dictum of Lord Ellenborough in the case of *Rex v. Lord Cockraine and others*[1], I would even say that, when the telling evidence of this mass of eloquent circumstances remained unexplained by the accused, no reasonable jury could have returned any verdict other than that of guilt.

This however was not the principal case that the prosecution had. It was a case of direct evidence of Sirisena, who was presented admittedly as a belated witness who came forward to testify only after the accused

[1] *Gurney's Reports 479.*

was arrested on the 19th April, together with the evidence of others who supported the movements of both Sirisena and the accused. The evidence which I have just summarised was only sought in aid to buttress the case of direct evidence.

Counsel for the appellant persistently criticised the misdirections of the trial Judge in calling a skeleton a body ; in not referring to the discrepancy between the doctor's evidence and that of Kusumawathie in regard to the age of the person whose skeleton was found, namely that the doctor's limit was that he was between 25 to 30 years and Kusumawathie's evidence that he was 24 ; in not referring to the difference in colour of the sarong even though the pattern was similar ; in the complete absence of qualifications of the doctor to speak about the age of maggots which was the main factor from which he fixed the time of the death and such other matters which are questions essentially for the jury and every detail of which no trial Judge can reasonably be expected to go into. We feel certain that even if the trial Judge has omitted a detailed examination of these matters in his charge counsel would undoubtedly have referred to them and there was sufficient evidence on these matters in which a reasonable jury could be satisfied that the body—or, to avoid inaccuracy, the skeleton—was that of the deceased Dinis *alias* Gunadasa.

Sirisena's evidence, coupled with the support it received from Premawathie regarding the meeting of Sirisena and the accused at about 8.30 or 9 p.m. on the 13th, was that accused, who was the worse for liquor that night, called him to go with him, went some distance, asked him to stop and, having left him, came back to the place with the deceased. From that spot which was along a footpath the three of them walked further, accused leading and the deceased behind him and Sirisena last. While proceeding the accused asked Gunadasa whether he could carry two bunches of plantains which the accused had cut to the accused's smoke room and the deceased consented. They walked some further distance and the accused asked him to stop and proceeded with the deceased, for a short distance but within his sight. They talked something in whispers and suddenly the accused started attacking the deceased on his chest with a kris knife that he carried in his hand. The deceased shouted " Budu Mahattayo don't kill me, I have done no harm to you ". Then the accused struck the deceased with his hand and the deceased fell and the accused went on stabbing him on the neck. He then drew a cross with the knife on the deceased's chest and said " go and live with Kusumawathie " and the deceased was dead. The accused thereafter went to a well and washed the blade of his knife, then kept the knife on Sirisena's chest and said " If you whisper anything about the incident I will come to your house and shoot you ". Sirisena swore, as required by the accused, that he would not disclose this to anybody and through fear he disclosed the fact only after the accused was taken into custody.

It was submitted that there was a serious non-direction in regard to the evidence of Sirisena which amounted to a misdirection which vitiated the verdict. The submission was based on the premise that Sirisena was either an accomplice or was in the position of an accomplice or that he was in custody as a suspect when he made his statement to the Police and that he would therefore have had the same reasons as an accomplice to implicate someone else and extricate himself and consequently that his evidence should not be acted upon without corroboration. Coupled with this was a submission that he was admittedly a belated witness and that he had also a motive to falsely implicate the accused having regard to the evidence elicited in cross-examination. In regard to the latter submission we find some directions in the charge and a clear direction to the jury to acquit the accused if they could not accept his evidence. We find these directions adequate for the purpose.

There are clearly no directions in the charge on the basis of Sirisena being an accomplice. It is therefore necessary for us to examine whether Sirisena was either an accomplice or was at least in the position of an accomplice. We have examined this question very closely and we feel unable to find in Sirisena any of the attributes of a *particeps criminis* or a guilty associate in the crime that we would expect to find before treating him as an accomplice. The learned trial Judge too would, we feel, have taken the same view and that may be the reason why he pointed out to the jury the other infirmities of Sirisena and refrained from addressing such a direction. We cannot therefore say that there was a misdirection in this regard. While it is correct that the question whether a witness is an accomplice may often turn out to be a question of fact for a jury there must transpire in the case certain facts on which a jury can be called upon to consider that question. If such facts are absent, a trial Judge has no jurisdiction to direct a jury to consider the question, much less to give directions on the necessity for corroboration of the testimony of an accomplice.

Even if he should have been so treated, it is necessary to consider the further question whether there is in fact corroboration of his story. If there was, the question would arise whether a reasonable jury could have returned any other verdict than what they did if the non-direction complained of had in fact been given. It seems to me that there is at least one important item of corroboration of Sirisena's evidence. For, according to the medical evidence, the skeleton which was regarded as that of the deceased was that of a person who had died of several stab injuries in the region of the neck. The evidence of Sirisena being that the accused inflicted one injury on the chest and after the deceased fell went on stabbing him on the neck would furnish corroboration of his story on this important matter.

The last submission made to us was that there was misdirection on the subject of intoxication. Counsel's argument was that even though the plea of drunkenness as reducing the offence was not put forward by the defence, the learned trial Judge rightly addressed the jury on this aspect as there was a considerable volume of evidence that the accused

had consumed some liquor at the time he committed the offence. Having proceeded to address them, his contention was that the trial Judge confused the jury by directing them on the question of drunkenness in a way which would have been appropriate in respect of a plea of insanity. He relied for this submission largely on the interpretation into English of the Sinhala charge which, as I adverted to earlier, was also heard by the Jury. So far as the Sinhala charge is concerned, we find that the trial Judge has dealt with this matter in some detail and directed the jury on the difference between intention and knowledge in this regard. Thereafter, having also explained to them about the lower burden that lay on the defence in establishing a circumstance that reduced the offence from murder to culpable homicide, he directed them that where an accused person at the time of the commission of this offence was so drunk as not to understand whether he was stabbing an animal or a log of wood, the law imputes to such person not the intention but the knowledge of an ordinary man. He added that, if they took the view on the facts that the accused was drunk to that degree at the time of the offence, he was entitled to have the offence with which he was charged reduced to culpable homicide. Having regard to all the directions given to the jury on this aspect, even though limitations of his knowledge of Sinhala would not have enabled him to place the matter before the jury as clearly as he might have done had he summed up in English, we are unable to say that the directions were inadequate. Here again it is useful to look at the facts bearing on the question whether the accused had a murderous intention or was incapable of forming such intention.

The following items of evidence are relevant :—

(1) Accused asked Sirisena, the witness, to stop at a certain place and from there proceeded alone in the night and brought the deceased.

(2) Thereafter all three went further until they came to a lonely spot at which too he asked Sirisena to stop and went ahead with the deceased before stabbing him.

(3) He carried a knife in his hand all the time.

(4) He pretended to the deceased that he had cut two bunches of plantains and that the deceased was required to carry them to the smoke house.

(5) After stabbing the deceased several times fatally, he put a cross on his chest with the knife and said : " Go and live with Kusumawathie ".

(6) He threatened Sirisena not to divulge the incident.

(7) He obtained a promise from Sirisena on oath.

(8) He went back alone through the jungle foot path to Kusumawathie.

(9) He uttered a falsehood of his own creation to explain the absence of the deceased to Kusumawathie.

(10) A clear motive was present on independent evidence and was confirmed by the most eloquent words of the accused after the killing—" Go and live with Kusumawathie ".

If the accused was sober enough to remember the rivalry for Kusumawathie in these most telling words, if he was sober enough to walk from Premawathie's house to a lonely spot along a jungle foot path, if he was sober enough to ask Sirisena to stop at a point and thereafter to walk by himself in the dark and inveigle the deceased to the fateful spot on a false pretext, if he was sober enough both to threaten and to obtain a promise from the only would-be witness against him and thereafter to go back to the object of his inordinate lust and to invent an explanation for the deceased's absence and if the jury believed the evidence on which these facts were based, it is inconceivable how they could reasonably have come to any conclusion other than that the accused, though under the influence of liquor, was in full possession of his senses so as to be capable of forming a murderous intention when he fatally attacked the deceased. These facts unmistakably show that, even if there was a justifiable complaint in regard to a misdirection on this topic, no reasonable jury properly directed could have returned any other verdict if the prosecution evidence was accepted.

Counsel also complained that there must have been serious confusion in the minds of the jury as a result of two charges, one in Sinhala by the Trial Judge and the other in English through the Interpreter. In this connection he went into great detail about the discrepancies existing between the two. This difficulty must have existed at all times when an accused was tried by a Sinhalese or Tamil jury in the past when the Trial Judge always summed up in English and it is also likely to occur in the future in many cases in which Trial Judges will not feel as confident in their own proficiency in Sinhala as the learned Trial Judge in this case has been. In such cases this Court will not even have before it the version of the charge that reached the jury through the Interpreter. In this case however, where the charge has been in Sinhala, and the jury listened to that charge, discrepancies in the English version will be material only if they could have created confusion in the minds of the jury—being primarily an English-speaking jury. We must agree of course that it would have been more appropriate and desirable in this case if the interpretation into English was avoided as it did not benefit either the prosecution or the defence and has served no other purpose than to invite criticism. We have given our careful consideration to the "discrepancies" referred to by Mr. Chitty but we are not satisfied that any such confusion could have been caused as alleged.

This case has brought to the forefront a consideration of the extent and nature of the powers and limitations of this Court in view of the admitted irregularities of procedure which I have referred to earlier as well as some of the criticisms of the charge. There are two important questions that call for an answer, the first, as to how this Court should approach certain errors of law which, while they savour of a technical flavour and are lacking in real substance, are nevertheless contraventions of certain provisions of law applicable to the conduct of trial before a Judge and jury in the Supreme Court, as happened in this case; and the second, as to how this Court should treat any other matter of law

which may be justifiably and successfully raised. The learned Deputy Solicitor-General has in fact invited us to consider this aspect not merely from the point of view of this case but in general in view of the recent trend to widen the scope of the powers of this Court contrary to the Statute.

It is vital to remember primarily that this Court is a creation of a Statute and, in exercising its powers it must at all times restrict itself to the powers conferred by the Statute. To travel outside it would be tantamount to a failure to appreciate the limitations imposed by the Statute which created this Court. The powers of this Court—and, by necessary implication, its limitations—are laid down with considerable precision in Section 5 of the Court of Criminal Appeal Ordinance No. 23 of 1938. This Court can allow an appeal only on three grounds :—

(1) If it thinks that the verdict is unreasonable or cannot be supported having regard to the evidence,

(2) If it thinks that it should be set aside on the ground of a wrong decision on any question of law, and

(3) If it thinks that there has been a miscarriage of justice on any ground.

This power to allow an appeal is however subject to the very important proviso that even if the Court is of opinion that the point raised in appeal might be decided in favour of the appellant, the Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. I venture to think that this proviso applies only to the 2nd and 3rd of the above grounds for the reason that no verdict should remain if the evidence does not support it.

It is with regard to the application of this proviso that the learned Deputy Solicitor-General has been at pains to submit that it has been attached to this Section so that it may be effectively used. There is force in this submission and our duties in this Court are never confined to the mere acceptance of a submission that there has been in the course of the trial a wrong decision of the trial Judge on any question of law or that something has transpired which might have resulted in a miscarriage of justice. The proviso compels us to pause at that stage and to consider whether the wrong decision of the trial Judge on the question of law or whatever else may have transpired has actually caused a substantial miscarriage of justice and empowers us to dismiss the appeal in the absence of such miscarriage of justice. The learned Deputy Solicitor-General has, while conceding that verdicts have been set aside where a miscarriage of justice has resulted in such circumstances, drawn our attention to a series of cases such as those in which there have been serious active misdirections in the charge or non-directions which amounted to misdirections and reception of irrelevant evidence of bad character of the accused in which the Court of Criminal Appeal in England refused to interfere with the verdicts returned by the jury on the ground that ultimately no substantial miscarriage of justice could have occurred. It is not necessary for me in this judgment to make a detailed examination

of all the authorities cited. Suffice it to say that the Court of Criminal Appeal in England as well as our enactment which gave birth to this Court took into account the fallibility of trial Judges, the possibility of inadvertent or erroneous misreception of evidence that may prejudice an accused and the occurrence of various other conceivable errors in the course of a case due to oversight or wrong judgment. Implicit in this proviso is an appreciation of such errors and the requirement for this Court, in the event of the occurrence of such errors, not to set aside a verdict of the jury unless this Court considered the errors to have actually resulted in a substantial miscarriage of justice. It is necessary that this Court should give full weight to every word of this proviso and to apply it when considerations exist which make its application appropriate. Such application must be active and robust and not passive and apologetic. Else this Court will cease to serve the purpose for which it was intended and become a manufactory of abstract decisions based on theoretical legal objections. It will fall into the unpardonable error of pursuing the shadow and failing to reach the substance. This is a situation which we must at all costs avoid, having before us as we do the guidance of wise pronouncements of eminent Judges both here and abroad. In this connection I can do no better than to recall the following observations expressed with such inimitably meticulous precision by the famous Viscount Simon L.C. in *Stirland v. Director of Public Prosecutions*[1] (1944 A.C. 315 at 320) the principle underlying which has never been departed from up to this date by the Courts in England or by this Court :—

> " Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the appellant. When the transcript is examined it is in evidence that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to S. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied. The passage in *Woolmington v. Director of Public Prosecutions* 1935 A. C. 462, 482, 483 where Viscount Sankey L. C. observed that in that case, if the jury had been properly directed it could not be affirmed that they would have " inevitably " come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case. The Court of Criminal Appeal has recently in *R. v. Haddy* 1944

[1] *(1944) A. C. 315 at 320.*

K. B. 422 correctly interpreted S. 4, sub-s. 1 of the Criminal Appeal Act and the observation above quoted from *Woolmington's case* in exactly this sense. "

With these observations in mind when one examines the instant case one feels strongly that the circumstances present make it eminently appropriate for the active application of the proviso. There have been admittedly some steps in procedure at the commencement of the trial which are not warranted by the Code. There has been a Sinhala charge to the jury coupled with an English interpretation which contains some substantial discrepancies in detail. There have perhaps been some directions which could have been improved on or omitted with advantage. But the crucial question remains whether, having regard to the evidence and the substantially correct charge, there has been an actual occurrence of a substantial miscarriage of justice when the jury returned a verdict of guilty or whether the procedure adopted at the trial and not specifically authorised by the Code consequent on the change of election by the accused has resulted in any denial to the appellant of the protection given by essential steps of criminal procedure as would amount to a substantial miscarriage of justice. For the many reasons which I have set out earlier, the answer to both these questions has perforce to be in the negative and we can see no good ground to refrain from applying the proviso in this case.

The appeal is accordingly dismissed and the application is refused.

Before concluding this judgment I consider it apposite to say a word or two on the principle underlying the restricted scope of this Court in appeal in contrast to the much greater latitude allowed to the Supreme Court in an appeal from an inferior Court. The principle is founded on the paramount requirement that, in grave crimes of such a nature as are tried before the Supreme Court, the decision shall be by the jury and the jury alone. This Court cannot at any time substitute itself for a jury. It can only act within its own limitations imposed by the Statute that created it subject to the overriding consideration that the Legislature, and therefore the people whose representatives form the Legislature—which term will include both the accused and the parties aggrieved—have expressed their unquestionable desire to have trials in respect of certain offences held and decided by a jury of seven fellow men. Their decisions are therefore entitled to prevail on questions of fact, even if the three Judges of this Court think otherwise and this Court will be guilty of a serious usurpation of the fundamental right of the people for jury trials whenever it inflicts on them their own judgment on facts in the teeth of the provisions of the Court of Criminal Appeal Ordinance which preclude such usurpation. This Court can never constitute itself a jury and substitute its own verdict where all the relevant evidence has been presented to the jury followed by adequate and proper directions by the trial Judge. This Court will be guilty of being guided by irrelevant considerations if and when it is influenced by material which has not been before the jury in arriving at their verdict. It will be

for instance an improper exercise of the functions of this Court to be influenced in its judgment in allowing an appeal or substituting a verdict even by a detailed perusal of the Police Information Book or the non-summary proceedings which the jury had no opportunity to consider at all, except in a rare case where there has been a substantial miscarriage of justice owing to some vital material escaping all concerned during the trial which, had it been before the jury, would, in all probability, have made a difference to the verdict. To be guided by such records as a general practice, however, would be for this Court to decide the case not only on the evidence that was presented before the jury but on other considerations as well. Such action by this Court would constitute an altogether unwarranted inroad into the functions of the jury which would amount to a complete negation of jury trial which, so long as the present state of criminal law endures, must be considered to be the clear right of both the accuser and the accused as expressed through the Legislature.

Appeal dismissed.