Appeal No. 34 of 1949.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN—

KANNANGARA ARATCHIGE DHARMASENA
alias BAAS *Appellant*

— AND —

THE KING - *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal, by Special Leave, (a) against a judgment of the Court of Criminal Appeal of Ceylon, dated the 16th March, 1949, dismissing the Appellant's appeal against this conviction on the 3rd February, 1949, at the Sessions of the Supreme Court of Ceylon, sitting at Colombo, on two charges, viz.: Conspiracy to Commit Murder and Murder, and (b) against his said conviction. p. 339. p. 335.

2. By an Order dated July 28th, 1949, Special Leave to appeal *in forma pauperis* to His Majesty in Council was granted. p. 344.

3. The Appellant was charged and tried together with one Beatrice Maude de Silva Seneviratne (hereinafter referred to as the Second Accused). The Indictment, dated 18th June, 1948, contained three Counts, as follows:— p. 1.

(1) That between the 1st and 8th day of November, 1947, at Nugegoda and Kotahena in the district of Colombo, you did agree to commit or act together with a common purpose for or in committing an offence to wit the murder of one Govipolagodage pp. 1-2.

Dionysius de Silva Seneviratne of No. 107, College Street, Kotahena, and that you have thereby committed the offence of conspiracy to commit murder in consequence of which conspiracy the said offence of murder was committed; and that you have thereby committed an offence punishable under Section 113B read with Sections 296 and 102 of the Penal Code.

(2) That on or about 7th November, 1947, at Kotahena in the district of Colombo, and in the course of the same transaction as set out in Count (1) above, you Kannangara Aratchige Dharmasena alias Baas did commit murder by causing the death of the said Govipolagodage Dionysius de Silva Seneviratne; and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

(3) That between the dates mentioned in Count (1) above, you Beatrice Maude de Silva Seneviratne did abet the said Kannangara Aratchige Dharmasena, alias Baas, the first accused, in the commission of the offence set out in Count (2) above which said offence was committed in consequence of such abetment and that you have thereby committed an offence punishable under Section 296 read with Section 102 of the Penal Code.

4. The said Govipolagodage Dionysius de Silva Seneviratne was the husband of the Second Accused.

pp. 3-6. 5. Before the trial opened, Counsel for the Second Accused, strongly supported by Counsel for the Appellant, made an application that the two accused should be tried separately, each Counsel claiming that his client would be seriously prejudiced if tried together with the other accused. This application was refused.

pp. 6-7. The Appellant submits that the learned Judge erred in refusing to grant him a separate trial and that by reason thereof he was gravely prejudiced and suffered a substantial miscarriage of justice.

p. 4. 6. The essence of the case against the Appellant was stated by Crown Counsel, prosecuting, while addressing the Court in opposition to the said application for separate trials, as follows:—

"It is essentially the case for the prosecution that the first "prisoner" (that is the Appellant) "caused the death of the "deceased upon the abetment by conspiracy of the second "prisoner."

And—

p. 5. "The case for the prosecution is that the first accused was a "tool in the hands of the second accused, who stood to benefit "by the death of the deceased."

7. The trial took place on various dates from 4th January, 1949, to 3rd February, 1949, before R. R. Crossette Thambiah, Commissioner of Assize. Oral evidence (with exhibits) was adduced. pp. 8-281.

8. The prosecution evidence against both accused was circumstantial. Briefly, it was alleged against the accused (1) that the Second Accused wanted to get rid of her husband because of matrimonial difficulties between them and because she was in need of money and stood to gain financially by his death; (2) that the Second Accused decided to use the Appellant for her purpose of getting rid of her husband and that the Appellant was a convenient tool for the Second Accused's purpose because he was a friend of the deceased and bore the deceased no grudge and suspicion was therefore not likely to rest upon him; (3) that the Second Accused planned the murder with the Appellant and, in particular, paid a visit to the Appellant at his house on the day before the murder and that the two accused there and then made the arrangements for the murder and agreed together that it should be committed by the Appellant; (4) that the Appellant went to the deceased's house on the day following the Second Accused's visit to him, while the Second Accused was out at work, and there killed the deceased by stabbing him with a knife, having first got rid of the deceased's domestic servant, one Alice Nona, a cook-woman, by telling her to go out; and (5) that the Appellant then fled from the scene of his crime.

9. The Appellant did not give evidence himself but called witnesses, including his wife, who gave evidence to prove that the Appellant was at home on the day the deceased was murdered. p. 182. p. 198.

10. The Second Accused gave evidence and called witnesses. Her defence was, briefly, a complete denial of the alleged conspiracy and that she did not know who had killed her husband. pp. 201-279.

11. The Appellant respectfully invites attention to the following matters:—

(1) Apart from the evidence of the said W. A. Alice Nona, P.W. 24, there was no evidence that the Appellant was in the house of the deceased on the day of the murder. pp. 39, 44-45.

(2) Three witnesses, P.W. 35, P.W. 36 and P.W. 37, claim to have identified the Appellant as he was running away from the scene of the murder. This evidence is however highly suspect in view of the fact that the Appellant was brought to the Identification Parade of 8th November, 1947, at which these witnesses identified him after being in custody at a Police Station for twelve hours and the three witnesses concerned were pp. 99, 105, 109.

brought to the Identification Parade from another Police Station nearby.

(3) One Richard Fernando, who was shown the Identification Parade on 8th November, 1947, pointed to someone in the parade other than the Appellant as "the man who came running "towards him from the direction of the deceased's house."

p. 110. (4) The witness P.W. 38 who it is alleged saw the Appellant and spoke to him when the Appellant was some distance away from the scene of the murder was shown an Identification Parade on 10th November, 1947, although this witness was available on 8th November, 1947. This witness it appears gave his statement at the outset of the Police investigations, yet his name is not mentioned in the Police Report filed in the Magistrate's Court on 8th November, 1947. The productions—a coat and a purse—referred to by this witness as having been dropped by the Appellant when running away were not on the list alleged to have been filed in the Magistrate's Court on 8th November, 1947. The Appellant submits that the evidence of this witness is tainted and that this witness was brought in by the Police after Richard Fernando had failed to identify the Appellant. There is no evidence to establish the ownership of the coat and the purse.

p. 171.

(5) The weapon used to murder the deceased, it was alleged, was a knife detached from a herb cutter but it is in evidence that this knife did not fit the curved split-head of the herb-cutter produced by the Prosecution as the instrument from which the knife had been detached. The Appellant submits that herb-cutters are found in practically all parts of Ceylon and that the instrument produced does not necessarily belong to the Appellant, and it ought not to be inferred that it does merely from the fact that the Appellant possessed a medicinal herb shop.

(6) Evidence was led for the Prosecution to show that the murderer left behind an umbrella and a pair of slippers in the house of the deceased. These vital productions it appears were not listed with the Police Report filed on 8th November, 1947, and neither article was sent to the Finger Print Expert for his report. Throughout the proceedings in the Magistrate's Court, no mention was made of the pair of slippers although one slipper was found under the body of the deceased. No mention was made of the umbrella until, about one and a half months after the murder, a Police Officer making investigations referred to it. The Appellant's wife in her evidence said that the Police removed an umbrella and a pair of slippers from the Appellant's house and that the productions at the trial were similar to the things which had been so removed.

(7) The finger and palm prints found at the scene of the murder did not tally with the finger and palm prints of the Appellant and in a case where so many productions were shown to the jury, it is respectfully submitted that there was no incriminating evidence whatsoever.

(8) Although the distance from the Appellant's house to the scene of the murder is about 8 miles, there is no evidence to prove that the Appellant did either go to the scene of the murder from his home or return home from the scene of the murder, although the transport routes go through the City of Colombo.

12. The learned Judge, in his charge to the jury, concentrated on the evidence relating to the charge of Conspiracy to Commit Murder. On the charge of Murder he recounted generally the evidence tendered by the Prosecution without dealing with the discrepancies, improbabilities and belatedness of vital portions of this evidence, particularly the important matter of the productions in relation to this charge. On the question of motive he said: p. 292.
"At the same time where in a case of circumstantial evidence a "motive is relied upon as a part of the chain of circumstances in the "case for the prosecution, it is your duty as prudent men to "examine it." As against the Second Accused "the Crown alleges p. 292.
"(a) matrimonial incompatibility between her and her late husband "and (b) a state of indebtedness on her part the only solution of "which, according to the Crown was the removal by death of her "husband" and in regard to the Appellant "the case for the prosecu- p. 297.
"tion under this head is that in fact there was no reason at all why "he should have killed his good friend the deceased. The prosecu-"tion says that even if you accept the whole of the deposition of "Maihamy, it only proves that the first prisoner had reached the "state of bitterness, not with the deceased but with the second "prisoner. There is nothing in the case, the prosecution submits, "to show that there was anything but the friendliest feelings between "the deceased and the first prisoner. They say it is none other than "a case where the man was bewitched into this crime by this p. 297-298.
"woman." This position was elaborated by the Trial Judge thus: "In an English case, the Lord Chief Justice of England in justifying "a joint trial of more than one prisoner said this: *prima facie*, it "appears to the Court that where the essence of the case is that the "prisoners were engaged in a common enterprise, it is obviously "right and proper that they should be jointly indicted and jointly "tried, and in some cases it would be as much in the interests of the "accused persons as of the prosecution that they should be. Suppose "for instance, that the defence of one was that he or she was acting "under the positive duress of the other, it would be obviously right "that they should be tried by the same jury who might see in one

"person a harmless or nervous looking little man or woman and in "the other a person they might deem capable of forcing his "co-prisoner against his will into assisting in a crime." The Trial
p. 298. Judge continued as follows: "I told you that under our definition of "proof you as the Court are entitled to take into account all the "matters before you. You have seen the second prisoner for your- "selves. If the second prisoner should make up her mind to exercise "her fascination upon the other prisoner, to lay before him a plan "which, so far as they could envisage it, was foolproof, without any "possibility of either of them being caught, do you think he was the "man who was likely to be able to resist such a request from such "a quarter? It is entirely for you" The Appellant submits that these passages, standing as they do in the most prominent part of the summing-up, namely, immediately before the résumé of the other aspects of the case, must have had a very considerable impression on the minds of the Jury and prejudiced them as against both accused. That they are completely erroneous and misleading is established beyond question in the decision reached in the re-trial of the Second Accused (see paragraph 19 hereof).

13. The learned Trial Judge's summing-up placed the existence of the alleged conspiracy prominently before the Jury again and again:
p. 303. "Some of you have probably read books dealing with crime. You will "remember that it is always the efforts of the author of such books "to invent what they are pleased to call the perfect crime, that is "to say, a crime so committed that there is no possibility of detection. "The Crown says that the second prisoner conceived in her mind "in those days what she thought was a plan for a perfect crime. In "the first place the man selected by her to do the deed was the good
p. 303. "friend of the victim." "The man selected by her was a man who "was under her influence, and in addition she would be in a position "to raise his cupidity by suggesting that out of the eventual gain "some portion of it may go to him." "The prosecution submits that
p. 307. "the stage was rapidly being set for the final stage of this terrible "drama. The victim had returned to the scene of the slaughter. "Now it only remains to put the plan carefully conceived among the "two of them into swift execution." "We have considered whether "the fact that the two co-conspirators, as alleged by the prosecution "were living so far apart was also a drawback to their plan, one at "Kotahena and the other at Nugegoda. It is obvious that living so "far apart, communication between them was not always easy. "Some sudden hitch in a plan that might have been concocted could "not be as easily adjusted as it might be if the other co-conspirator,
p. 307. "shall we say, was living in the house next." After referring to a
p. 308. possible hitch in the plan based on an incident alleged to have occurred a few days before the murder, the Trial Judge observed:

"He had come to kill; he did not expect the child to be there. Should "he kill the child too? Don't let us be carried away with the utter "horror of the possibility of such an idea being made ascribable to "a fellow human being. We are here to deal with the facts as we "find, with the inferences as we think can be reasonably made. A "man who agrees to kill is after all a killer. If he has said he would "carry out his part of the plan it is because he has that type of mind. "He can shoot at one human being or wield his knife at another "human being." The Appellant submits that these passages are completely erroneous and misleading in view of the decision reached in the re-trial of the alleged co-conspirator (see paragraph 19 hereof). *A fortiori*: the Appellant submits, in view of the way in which the trial was conducted and the nature of the learned Judge's charge to them, that once the Jury decided to convict both accused of conspiracy in the first trial, the Jury could not and would not have considered the nature and weight of the evidence in respect of the charge of murder alleged to have been committed in pursuance of the conspiracy and that on the whole facts the Jury might have fairly and reasonably have found the Appellant not guilty in a separate trial.

14. On 3rd February, 1949, the verdict was given, the Appellant being found guilty on the 1st and 2nd Counts and the Second Accused guilty on the 1st Count. The Jury did not consider the 3rd Count. Both accused were sentenced to death. p. 335. p. 336.

15. Both accused appealed to the Court of Criminal Appeal and on 16th March, 1949, the said Court dismissed the Appellant's appeal and quashed the conviction of the Second Accused and ordered a new trial for her. pp. 339-340.

16. On 26th March, 1949, the Court of Criminal Appeal gave their reasons for quashing the conviction of the Second Accused ordering a new trial. The Court commented unfavourably upon certain questions put by the Trial Judge to the Second Accused, and upon the extent and nature of his examination of the Second Accused, and stated (*inter alia*) as follows:— pp. 339-343. p. 343.

"It is, of course, always proper for a Judge—he has the "power and it is his duty at times—to put such additional "questions to the witnesses as seem to him desirable to elicit the "truth. The part which a Judge ought to take while witnesses "are giving their evidence must, of course, rest with his "discretion. But with the utmost respect to the Judge, it was, "I think, unfortunate that he took so large a part in examining "the Appellant. Though he was endeavouring to ascertain the "truth, in the manner which at the moment seemed to him most "convenient, there was a tendency to press the Appellant on

"more than one occasion. The importance and power of his "office, and the theory and rule requiring impartial conduct on "his part, make his slightest action of great weight with the "Jury. If he takes upon himself the burden of the cross- "examination of the accused, when the government is repre- "sented by competent Counsel, and conducts the examination "in a manner hostile to the accused and suggesting that he is "satisfied of the guilt of the accused, as some of the questions do, "the impression would probably be produced on the minds of "the Jury that the Judge was of the fixed opinion that the "accused was guilty and should be convicted. This would not "be fair to the accused, for she is entitled to the benefit of the "presumption of innocence by both Judge and Jury till her guilt "is proved. If the Jury is inadvertently led to believe that the "Judge does not regard that presumption, they may also "disregard it.

"Mr. Widemanne contends that the Judge was at the "moment referred to (p. 529) endeavouring to get an explana- "tion from the accused and thus to help her—he points to the "question which followed these words. On the other hand, "there is the next question. The effect of a few isolated "questions to which objection can well be taken may not be "such as to disturb a verdict where there is evidence to support "it, and a fair and proper charge, but the number and nature of "the questions may far outweigh the good that is capable of "being done by the use of the phrase, 'it is a matter for you.' "An act of this kind of the Judge comes within the very wide "words 'any other ground' (Section 5 (1), (II)) so that the "appeal should be allowed accordingly as there is or is not a "miscarriage of justice. There is such a miscarriage of justice "when the Court is of opinion that the examination of the "accused by the Judge may reasonably be considered to have "brought about that verdict, and when, on the whole facts and "without this attitude of the Judge, the Jury might fairly and "reasonably have found the Appellant not guilty. Then there "has been not only a miscarriage of justice but a substantial one "because the Appellant has lost the chance which was fairly "open to her of being acquitted (12), and as the Court has power "to grant a new trial, an order to that effect should be "made (13)."

p. 340. 17. The Court of Criminal Appeal also gave their reasons for dismissing the Appellant's appeal. With regard to his conviction
p. 340. on the 2nd Count (Murder), the Appeal Court said: "Even without "the evidence of Alice Nona there was ample evidence in the case to "establish the guilt of the First Accused." The Appellant submits

that the record of the evidence shows that the Appeal Court erred in so finding. As for the 1st Count (Conspiracy) the Court said: "It is not necessary to discuss the question of his conviction on the "other Count." The Appellant submits that adequate reasons were not given for the dismissal of his appeal and that the said Court failed to consider the prejudice created in the minds of the Jury by the Appellant being tried jointly with the wife of the deceased and by the remarks of the learned Trial Judge to the Jury with regard to the Second Accused and the alleged relationship between her and the Appellant. The Appellant further submits that the Court of Criminal Appeal erred in allowing the Appellant's conviction on the 1st Count of the Indictment to stand while quashing the conviction of the Second Accused on the said 1st Count. p. 340.

18. The re-trial of the Second Accused took place on 20th April, 1949, before the Hon. E. A. L. Wijewardere, C.J. The said Indictment dated 18th June, 1948, was amended for the purpose of the re-trial and (as so amended) contained only two Counts, as follows: pp. 372-385. p. 372.

(1) That between the 1st and 8th day of November, 1947, at Nugegoda and Kotahena in the district of Colombo, Kannangara Aratchige Dharmasena alias Baas and you did agree to commit or act together with a common purpose for or in committing an offence to wit the murder of one Govipolagodage Dionysius de Silva Seneviratne of No. 107 College Street, Kotahena, and that you have thereby committed the offence of conspiracy to commit murder in consequence of which conspiracy the said offence of murder was committed; and that you have thereby committed an offence punishable under Section 113B read with Sections 296 and 102 of the Penal Code.

(2) That between the dates mentioned in Count (1) above, you did abet the said Kannangara Aratchige Dharmasena alias Baas in the commission of the said murder which said offence was committed in consequence of such abetment; and that you have thereby committed an offence punishable under Section 296 read with Section 102 of the Penal Code.

19. The only witness called at the re-trial of the Second Accused was the said Alice Nona. The said witness was so manifestly unreliable that, in the course of her cross-examination, the Jury, on the learned Judge's invitation, informed the learned Judge that they were unable to accept her evidence, and rejected it. Thereupon the learned Judge stated to the Jury: "If that is your view the rest of "the evidence on which the Crown relies, for example motive, "subsequent conduct of the accused, etc., even if accepted, is not "sufficient to support a conviction. Do you wish to proceed with "the case further?" The Jury intimated that they did not wish to p. 385. p. 385.

p. 385. proceed further, a verdict of Not Guilty was found and the Second Accused was discharged. The Court ordered the said Alice Nona's *batta* to be forfeited.

20. The Appellant submits that as the Second Accused has been found Not Guilty of the Conspiracy with the Appellant with which
p. 372. she was charged in the 1st Count of the Indictment (as amended for
p. 1. her re-trial), the verdict against the Appellant of Guilty of the said Conspiracy, on the same Count (that is, the 1st Count of the Indictment before amendment) ought to be quashed.

21. The Appellant further submits that as the Second Accused has been found Not Guilty of the said Conspiracy, and therefore it cannot be said that the Appellant was guilty of the said Conspiracy,
p. 2. the Appellant's conviction of Murder on the 2nd Count of the said Indictment, (i.e. before amendment) ought to be quashed, because the said 2nd Count alleged that the Appellant committed the said murder "in the course of the same transaction as set out in Count (1) "above," i.e. in the course of the said alleged Conspiracy.

pp. 39-75. 22. The Appellant further submits that it is manifest from (a) the evidence given by the said Alice Nona in his trial and (b) the evidence given by her at the re-trial of the Second Accused and (c) the decision reached at the said re-trial, that the said Alice Nona was a false witness and that the whole of her evidence at the Appellant's trial was unreliable and ought to have been rejected and ought now to be rejected, and that his said conviction ought to be quashed. The Appellant submits that without the evidence of the said Alice Nona he would never have been convicted on either the 1st or 2nd Counts, notwithstanding the statement in the Judgment
p. 340. of the Court of Appeal to the contrary (see paragraph 17 hereof) particularly in view of the fact (referred to above, in paragraph 11 hereof) that without her evidence there was no evidence that the Appellant was in the house of the deceased on the day of the murder.

The Appellant humbly submits that the appeal should be allowed, with costs, for the following among other

REASONS.

(1) BECAUSE the Appellant ought to have been granted a separate trial and his objection to being tried together with the Second Accused ought not to have been overruled, and the Appellant was gravely prejudiced by being tried together with the Second Accused.

(2) BECAUSE the evidence of Alice Nona was entirely unreliable and ought to have been, and ought now to be, rejected.

(3) BECAUSE the learned Trial Judge conducted the trial in such a way and charged the Jury in such terms as to create prejudice against the Appellant in the minds of the Jury.

(4) BECAUSE the criticism by the Court of Criminal Appeal of the learned Trial Judge's conduct of the trial, including his method of examination of the Second Accused applies in fact, and ought to have been applied by the Court of Criminal Appeal to the case of the Appellant as well as to the case of the Second Accused and his said conduct is a ground upon which the Appellant's conviction ought to have been quashed.

(5) BECAUSE the Appellant's conviction on the 1st Count ought necessarily to have been quashed by the Court of Criminal Appeal when the said Court quashed the conviction of the Second Accused on the said Count; and the Appellant's conviction on the 2nd Count ought therefore to be quashed.

(6) BECAUSE the Appellant's conviction on each Count ought to be quashed in view of the decision reached in the re-trial of the Second Accused and her acquittal in her said re-trial; and because her said acquittal entirely undermines the case against the Appellant.

(7) BECAUSE the verdict against the Appellant was unreasonable and cannot be supported having regard to the evidence.

(8) BECAUSE the Appellant has suffered a substantial miscarriage of justice by reason of his said conviction.

(9) BECAUSE the Appellant's said conviction was wrong and the said Court of Criminal Appeal erred in dismissing his appeal.

G. GRANVILLE SHARP.

RALPH MILLNER.

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CASE FOR THE APPELLANT.

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