65, 1936

No. 55 of 1935.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

STEPHEN SENEVIRATNE - - - - - *Appellant*

AND

THE KING - - - - - - - - - *Respondent.*

Case for the Respondent.

RECO

RESPONDENT'S CASE

1. This is an appeal by special leave from a Judgment of the Supreme Court of the Island of Ceylon delivered on the 14th day of June 1934 whereby the Appellant was convicted of murder and sentenced to death. The sentence was subsequently commuted to one of rigorous imprisonment for life. p. 379.

2. The Appellant was indicted before a Judge of the said Court and a Jury of seven persons on the charge of having on the 15th day of October 1933 murdered his wife an offence punishable under Section 296 of the Ceylon Penal Code. p. 5.

He was found guilty by a verdict of five to two. One of the five recommended the prisoner to mercy. p. 6.

3. The case for the prosecution was that the deceased had died as the result of chloroform administered to her by the Appellant on the morning of the 15th October 1933. The case for the defence was that the deceased had committed suicide by the self-administration of chloroform. It was also suggested by the defence that the object of the deceased in administering chloroform to herself might have been merely to frighten the Appellant and that death by misadventure may have resulted. There was a further suggestion that death might have been the result of an overdose of aspirin taken by the deceased.

4. In addition to the grave issue involved in this case a question of importance arises as to the position of the Crown with respect to witnesses called by the Prosecution when the evidence of such witnesses is not relied on or, in the opinion of the Prosecution should be discredited. In the Island of Ceylon the question as to the duty of the Prosecution to put before the Court all the material evidence at their disposal does not appear to have been conclusively decided, and whereas in the earlier rulings of the Supreme Court it has been held incumbent upon the Prosecution to put before the Court the whole of the material evidence at their disposal particularly when there is room for the suggestion that persons not called as witnesses by the Crown would contradict the testimony of those who are so called, later rulings appear to have modified the extent of the duty but it remains a proper and usual practice for the Prosecution to call all witnesses whether favourable or unfavourable to the Crown's Case. This practice is favourable to and is favoured by the Defence as it gives the defending counsel the final speech to the Jury and also the right of cross-examining all witnesses.

5. In this case the Crown in fact called all the material evidence at its disposal. Of the fifty-two witnesses who gave evidence, all of them were called by the Crown.

6. Shortly stated, the evidence called as aforesaid was to the following effect :—

(1) The Appellant and the deceased were married in 1923. They had one son Terence born in 1924. A second child born in 1927 had died a few days after birth.

(2) For a period of about five years preceding the deceased's death there had been constant quarrels between the Appellant and the deceased. There was evidence that they disagreed on " almost every subject." Two major causes of disagreement appear to have arisen over the sale of property and over a servant girl by the name of Jessie.

(3) At the time of the death of the deceased the deceased and the Appellant were living in a house known as " Duff House " in Colombo but occupied separate suites of rooms. A maid servant slept every night in the deceased's bedroom.

(4) On the evening of Saturday 14th October 1933 a Mr. and Mrs. George de Saram dined with the Appellant and the deceased. According to Mr. and Mrs. de Saram nothing abnormal occurred, although there was a suggestion that the deceased did not appear to be very pleased when she learnt that the Appellant and Terence

had that day visited the house of a Mrs. Francis Seneviratne the wife of the Appellant's brother, with whom she was apparently not on good terms. p. 70, l. 15.

Before the de Sarams left, which they did at about 10 p.m. it was arranged that they the deceased and the Appellant should go together, starting about 7 o'clock on the following Monday morning (16th October) to visit an estate which Mrs. de Saram was to inspect with a view to purchase. The intention was to " make a day of it " and Mrs. de Saram and the deceased were each to bring some eatables. p. 65, l. 22.

(5) After the departure of Mr. and Mrs. de Saram, the deceased went to the Appellant's suite, and after about a quarter of an hour, returned to her own quarters. Before retiring for the night, the deceased spoke to the governess Mabel Joseph about making some pattis for the proposed visit to the estate on the Monday. She also gave her 25 cents for the collection at church, which Mabel Joseph had asked permission to attend early on the following morning. p. 70, l. 11. p. 33, l. 37.

(6) That night a maidservant named Alpina slept on a mat in the deceased's room, and Mabel Joseph and the boy Terence slept in an adjoining room with an intercommunicating door between the two rooms.

(7) During the night Alpina was awakened by the deceased who called her and asked her to close the shutters because it was raining. Later on the deceased again called her but did not require her to get anything, though Alpina saw the deceased drinking some water, which she did without getting out of bed, as the water was presumably from the glass of cold water which Alpina had placed on the " teapoy " beside the bed before retiring to rest. p. 18, l. 13. p. 18, l. 20.

Apart from these incidents, nothing unusual occurred during the night, and so far as Alpina was able to say, the deceased did not leave her bed during the night.

(8) About 6 o'clock the following morning Alpina got up. At that time the deceased was apparently sleeping on her back with an arm over her forehead. After Alpina had been to an adjoining bathroom she saw, on re-entering the deceased's room that the deceased had turned and was lying with her face towards the wall and with her hand on her face. p. 18, l. 42. p. 19, l. 3. p. 19, l. 12.

After this Alpina went to the kitchen, and Mabel Joseph left for church at about 6.30. p. 19, l. 22.

(9) While Alpina was working in the kitchen, Seemon (otherwise known as Seelas), a domestic servant of about 15 years of age,

and Simon Perera, the driver of the Appellant's car, told her that they had heard a sound from the deceased's room as though the deceased was calling for her. On going to the deceased's room she found that the door opening from the deceased's room through
p. 19, l. 24. which she had gone out, and which she had left slightly ajar, was
p. 20, l. 32. closed. She pushed the door open and on entering she smelt
p. 21, l. 24. what she described as the smell of " something like poisonous oil "
p. 20, l. 46. in the room, and saw the deceased lying crosswise on her back on the bed with her legs hanging down, and her head towards the wall. She said that as she entered, the Appellant entered from
p. 21, l. 34. another door leading from the child's nursery. A few words passed between them, and both went towards the bed. Alpina then went to raise the deceased's head and the Appellant took up a book with which to fan the deceased. She said in her evidence at the trial that before she had succeeded in raising the deceased's head the Appellant told her to go and get a bottle of brandy.
p. 21, l. 45. When she had brought the brandy the Appellant sent her off a number of times to get hot water bottles with which she and the
p. 25, l. 18. Appellant tried to revive the deceased. She said that later she also helped the Appellant to " foment " the deceased until the arrival of the doctor.

Alpina further stated that while attending to the deceased
p. 22, l. 17. she noticed a handkerchief near the hand of the deceased. This she removed and put away with some soiled linen which was sent to be washed three days later.

She also stated that on the following Monday (16th October)
p. 26, l. 28. she discovered an empty smelling salts bottle (Exhibit P.4:
p. 161, l. 2. cubic capacity 4/7 oz.) and handed it to the Appellant.

(10) The boy known as Seelas stated that shortly before he heard a sound from the deceased's room which sounded to
p. 44, l. 26. him as if she was calling " Alpino " he saw the Appellant and a boy named Martin feeding the fowls at the back verandah. He said that at the time he actually heard the sound he was
p. 43, l. 18. working in the pantry, and heard the Appellant talking to Martin.

Martin who is apparently rather deaf heard no sound proceeding from the deceased's room but he stated that the Appellant
p. 58. was with him on the back verandah; that shortly afterwards he saw Alpina going from the kitchen in the direction of the deceased's bedroom, and about that time he saw the Appellant
p. 306, l. 23. still on the back verandah.

Another servant, Banda, who stated that at the time of
pp. 48 to 50. these events he was sweeping the front verandah, gave evidence

to the effect that the Appellant could not have been on the front verandah at the time when the sound from the deceased's room was heard.

On the other hand, the evidence of three other Witnesses Mr. and Mrs. Leo de Alwis and Mr. Felix Jayawardene was that the Appellant had himself stated to them that he was in fact on the front verandah when he heard the sound. p. 104, l. 43. p. 138, l. 29. p. 133, l. 42.

One of the most important issues in the case was whether the evidence of these servants, which if believed established an alibi, was or was not reliable.

(11) While the events referred to in sub-paragraph (9) were taking place in the deceased's room Simon, the cook, came to the door. He was told by the Appellant to fetch Mr. Bandaranayake, an uncle of the deceased, and Dr. Paul. Simon started out with the driver Simon Perera in the car at 6.40 a.m. Mr. Bandaranayake not being at home Mrs. Bandaranayake arrived at " Duff House " at about 7 a.m. According to the driver, Simon had not told him Dr. Paul was to be fetched until they were on the way back to " Duff House." Mrs. Bandaranayake said that when she entered the deceased's room the Appellant without inquiry whether the doctor had arrived, asked her to fetch him, and that she went off immediately in the car. Dr. Paul arrived about 7.30 a.m. and found life extinct. p. 56, l. 31. p. 52, l. 24. p. 52, l. 19. p. 72, l. 39. p. 177, l. 34.

(12) According to Dr. Paul's evidence when he arrived the Appellant who was on the bed got off the bed and left the room. Dr. Paul said he believed that the Appellant asked him to examine the deceased. Dr. Paul examined the room and found a bottle of aspirin (Exhibit P.3) containing " about half a dozen tablets " by the side of the bed. He said he thought he saw and examined an empty smelling salts bottle (Exhibit P.4) referred to in sub-paragraph (9) above, but later stated in the course of his evidence that he could not say that it was there or that he had examined it. Mrs. Bandaranayake was present with Dr. Paul during the examination of the room. She did not see Dr. Paul examine the Exhibit P.4. Mr. Leo de Alwis stated that he searched the room carefully soon after Dr. Paul had left but had not seen Exhibit P.4. p. 181, l. 14. p. 178, l. 45. p. 180, l. 4. p. 179, l. 35. p. 73, l. 40. p. 105, l. 20.

(13) On coming out of the room Dr. Paul met the Appellant in the hall. Dr. Paul thought he had changed his pyjamas. On inquiry as to what had happened, the Appellant said that he was standing on the verandah waiting for the morning papers when he heard a scream coming from the direction of his wife's apartments. He ran up thinking his son had put his head between p. 180, l. 33. p. 180, l. 38.

the railings of his bed and was unable to extricate himself. He saw his son sleeping and ran into his wife's room where he saw her lying across the bed. He called for the servants and tried to revive her with brandy and hot water bottles. On being asked whether she had taken anything the Appellant said the deceased had the previous night complained of a headache and that he had given her a bottle of aspirin nearly full. The bottle which had been found in fact contained only a few tablets.

p. 180, l. 7. (14) Dr. Paul noticed marks on the face of the deceased which at the time were not as pronounced as they were later in the day. On being questioned about these marks the Appellant said that he had rubbed brandy on, and applied hot water bottles to the face.

p. 181, l. 12.

(15) After receiving the above-mentioned information from the Appellant about the aspirin and thinking that there were only a few tabloids left in the bottle which, according to the Appellant's statement had been given to the deceased nearly full, Dr. Paul thought that death was due to an overdose of aspirin and that the Appellant's explanation about the marks was possible. He telephoned to the Coroner, informed the police and gave information also to Leo de Alwis, the brother of the deceased. Dr. Paul issued a certificate of death later that day ascribing death to cardiac syncope. He said he did so on learning from the Police that they did not suspect foul play, and at the request of the Police that a certificate should issue. The deceased was buried on the 16th. Before the body was buried it was embalmed by injection of formalin in the femoral arteries by Dr. Milroy Paul the son of the Dr. Paul above mentioned. Between the morning of the 15th and the burial the marks on the face of the deceased became more pronounced.

p. 182, l. 19.

p. 182.

(16) Leo de Alwis the brother of the deceased stated that on the 15th October in the afternoon about 4 p.m. the Appellant stated to him that he had purchased chloroform about two months previously for some veterinary purpose. At first the Appellant stated it must be in his cupboard and afterwards suggested that it might have been sent to his estate at Chilaw. Upon Leo de Alwis insisting that a search should be made the Appellant examined a cupboard in which medicines were kept in his room. Although the Appellant stated later to other witnesses that he had purchased an ampule of chloroform, the Appellant unstoppered several bottles and smelt the contents, and then said that the chloroform was not there. At that time no suggestion was made by the Appellant as appears to have been done later by him, that he had entrusted the chloroform to the deceased.

p. 106, l. 3.

p. 121, l. 2.

p. 106, l. 10.

(17) To another witness, one Harry Dias Bandaranayake, the Appellant on the morning of the 16th admitted that he had an ampule of chloroform, but did not know whether it was in the house or at Chilaw, but no suggestion was made by him that the chloroform had been handed to the deceased. p. 94, l. 14.

(18) Charles Seneviratne, brother of the Appellant, stated that on the 16th October the Appellant told him that two and a half months previously he had bought an ampule of chloroform for amputating a buffalo's leg, that he had given it to the deceased for safe keeping and that there was a possibility of its being on the estate at Chilaw. He said also that the Appellant had told him that the deceased used chloroform for toothache. p. 98, l. 44. p. 100, l. 36.

(19) The Appellant on the 17th handed to Leo de Alwis a handkerchief bearing the monogram of the deceased as one found that day in the room of the deceased. p. 106, l. 38.

(20) Evidence was given by one Henry Perera, who was in charge of the Appellant's estate at Chilaw, that a buffalo had been found with its leg broken on arrival at the estate that the leg had been amputated 15 or 20 days later; that the Appellant who had seen the lame animal had not said he would send any medicines from Colombo and had not asked the witness to keep him informed of the progress of the animal; that no medicine for the buffalo had in fact been sent to the estate. It further appeared from Perera's evidence that the Appellant had visited the estate about one and a half or two months before the deceased's death and had then learnt of the amputation of the buffalo's leg. Four or five days after the death of the deceased the Appellant accompanied by his brother Charles Seneviratne visited the estate, but had not made enquiries about the chloroform or examined the almirah where medicines were usually kept. p. 147.

(21) There was evidence that the deceased had stated that she was dissatisfied with life and a certain amount of hearsay evidence that she had threatened to commit suicide but there was no direct evidence of her having said this to any of the witnesses.

There was no evidence of any attempt on her part to commit suicide. There was evidence also that the deceased was very fond of her child and anxious about his future. There was no evidence that the deceased had left a last Will. On an intestacy a half share of the immovable property of the deceased would have devolved on the Appellant and the remaining half on the child. There was evidence that the deceased was possessed of immovable property. p. 103, l. 35.

There was some evidence that the deceased had had some conversation with reference to suicide and chloroform with Charles Seneviratne. Dr. Paul said that at both the confinements
p. 153, l. 19. of the deceased chloroform had been administered to her. There was evidence however that no chloroform had been left over from the last confinement in 1927.

7. In consequence of information received by the Police the body was exhumed and a post-mortem held on the 7th November 1933 by the Judicial Medical Officer Dr. Nair. Doctors S. C. Paul, Milroy Paul, R. L. Spittel, J. S. de Silva, Hill, Karunaratne and Mr. Collins the Deputy Government Analyst were present, and all gave evidence at the trial with the exception of Dr. Hill who was away from the Island but his evidence given before the examining Magistrate was read.

p. 187, l. 25. 8. Among other signs found at the post-mortem there were marks on both sides of the face, round the chin, on the tip of the nose, two eyelids and right eyebrow.

Most of the medical evidence was to the effect that these marks were due to burns caused by chloroform.

p. 209, l. 45. There were also marks on the arms, a mark caused by a blister as
p. 211, l. 10. well as two other marks on the left thigh.

Dr. Nair expressed the opinion, when giving his evidence, that the
p. 210, l. 27. marks on the right arm were ante-mortem and had been caused by violence of some kind applied to the arm. The Pathologist, Dr. Karunaratne was
p. 299, l. 40. of opinion that the marks on the arms had been caused before death, or within two to four hours after death, by pressure or by an irritant. He did not think hot water bottles were likely to have caused them.

9. No questions were put specifically to the medical witnesses as to whether in their opinion the case was one of homicide or suicide. They however gave a considerable amount of evidence from which the jury were invited to come to a conclusion on that issue.

10. While the majority of the medical witnesses were agreed that the death was due to the application of chloroform there was considerable difference of opinion on the question whether the post-mortem revealed the presence or absence of asphyxia at death. The answer to this question was not conclusive of the question of homicide or suicide. According to the evidence homicide was possible with or without accompanying asphyxia. The absence of asphyxia was an indication that death had taken place from syncope soon after the chloroform was applied. The presence of asphyxia signs indicated that death had not taken place so quickly after

the application of chloroform whether self-administered or not. There was evidence that the prolonged application of chloroform to the skin was so painful as to be unbearable.

11. Medical opinion was divided also on the inferences as to homicide or suicide to be drawn from the configuration of the marks on the face.

12. There was evidence that it was difficult for a person to commit suicide by inhalation of chloroform without a mechanical contrivance. Dr. Spittel thought it was " quite impossible " for a person to commit p. 269, l. 15.
10 suicide by clasping a handkerchief saturated with chloroform to the face.

13. According to Dr. Spittel assuming that the sound which came from the room of the deceased was an articulate cry, it was the cry of a p. 270, ll. 20-36.
person in a conscious state and not a sound produced by a person under the influence of chloroform. Dr. Spittel thought that the cry was an indication of homicide.

14. Medical evidence was agreed that if the deceased had taken aspirin on the night preceding the death it could not have been eliminated from the system by the morning. There was evidence that no aspirin was present in the system at the time of death, and that if it had been
20 present it would have been unaffected by the treatment to which the body had been subjected between the time of death and the time of examination. There was other medical evidence that death was not caused by aspirin. None of the medical witnesses expressed or inclined to the view that death was caused by aspirin.

15. Under Section 120 of the Ceylon Evidence Ordinance No. 14 of 1895 a person accused of crime may give evidence on oath or affirmation on his own behalf. Under Section 155 of the Criminal Procedure Code of Ceylon Ordinance No. 15 of 1898 at the preliminary investigation made by a Magistrate, a person charged with an offence has the right to make a
30 statement which is taken down and read in evidence at the trial. The Appellant made such a statement and it was put in in evidence by prosecuting Counsel and was read at the trial. The accused, though he was entitled to do so if he chose, did not give evidence on his own behalf, nor was any evidence called by the Defence.

16. The statutory statement made at the preliminary investigation before the Police Magistrate by the Appellant on the 10th February 1934 p. 4.
(after it would seem most of the witnesses had given evidence) was as follows :—

" I am not guilty. This is either a case of suicide or
40 " accidental death. I was on the verandah where the chickens

" were when I heard a groan. I went through the house into the " child's room and examined him. He was asleep. I then " passed on to the deceased's room. I saw her lying across the " bed as if in a swoon and I went to her assistance. As I entered " the room Alpina also came in through another door. Previous " evening my wife was upset over my going with my son to my " sister-in-law Mrs. Francis Seneviratne's house. My wife had " expressly requested me not to go there. My wife's mind had " been poisoned against Mrs. Francis Seneviratne by Mrs. Leo de " Alwis by false and malicious statements. I had told my wife " that I would inform Mrs. Francis Seneviratne of those statements " and leave it to her and her father Mr. Freddie Dias Bandaranaike " to deal with Mrs. Leo de Alwis. This had caused uneasiness to " my wife. When I handed her the bottle of aspirin the night " preceding her death she asked me whether I had carried out " that evening my threat of informing Mrs. Francis Seneviratne. " I said I had and she would see the results soon. She replied " you would repent and went towards her room. I did not see " her again till I saw her lying across the bed the next morning. " Deceased had on previous occasions threatened to commit " suicide when upset either by starving herself or taking poison. " My wife had knowledge of chloroform and she had been chloro- " formed on two occasions. When she was vaccinated by " Dr. S. C. Paul about one year ago she wished to be chloroformed " before the vaccination. I have also learnt from her that she " had on occasions used chloroform for toothache and to induce " sleep. That chloroform used may have been some that was " left over after one of the confinements or purchased by her. " In explanation of my statement that the ampule of chloroform " may be on the estate at Chilaw I wish to say that I made that " statement thinking that my wife to whom it was entrusted may " possibly have sent the ampule to Chilaw as she knew the purpose " for which I had bought it."

17. The Appellant had also made a statement to the Police and had given evidence at the Inquest on the deceased, but neither the statement nor that evidence was put before the Supreme Court or the Jury.

18. With reference to the Appellant's statutory statement it should be remembered (A) that there was no evidence (apart from the Appellant's statutory statement) that the Appellant handed the chloroform which he had purchased to the deceased, though there was a hearsay statement of Charles Seneviratne, the brother of the Appellant, that the Appellant had said so to him. (B) There was also no evidence that the deceased used

chloroform for toothache, though there was a hearsay statement of Charles Seneviratne that the Appellant had told him that she did so. (C) There was no evidence that the deceased used chloroform to induce sleep. (D) That Alpina and Mabel Joseph who were in constant contact with the deceased had not observed anything from which it could be inferred that the deceased used chloroform either for toothache or to induce sleep.

19. On the 11th June 1934 the Deputy Solicitor-General addressed the Jury on behalf of the Crown, and on the same day Mr. R. L. Pereira commenced to address the Jury on behalf of the Defence and concluded his address some time on the 13th.

20. The Judge's Charge to the Jury was commenced on the 13th June 1934 and was concluded on the 14th June 1934.

21. The transcript of the shorthand notes of the Summing-up of the learned Judge who presided over the trial which forms part of the Record of Proceedings and extracts from which appear in the Petition of the Appellant for special leave is very imperfect. The Registrar of the Supreme Court of Ceylon at the instance of the Chief Justice has drawn the attention of the Registrar of the Privy Council to this fact by letter dated the 14th February 1935. p. 312.

22. On the 14th June 1934 as hereinbefore stated the Jury by a majority of five to two found the prisoner guilty of murder, one of the majority recommending the Accused to mercy.

23. By Order in Council dated the 6th day of June 1935 Special Leave to Appeal to His Majesty in Council was granted to the Appellant against the Judgment of the said Supreme Court.

24. The Respondent submits that there was ample reliable evidence on which the Jury could convict. In particular the Respondent will contend that the evidence supports the following propositions :—

(A) That it was established that death was due to the inhalation of chloroform.

(B) That the Appellant had an opportunity of administering chloroform and that he had chloroform in his possession.

(C) That the chloroform had not been purchased for the purpose of amputating the leg of a buffalo as suggested by the Appellant.

(D) That the bottle of aspirin P3 had not been " nearly full " on the evening of the 14th and that the statement made by the

Appellant to Dr. Paul that he had handed a bottle nearly full to the deceased was a false statement, made deliberately to mislead Dr. Paul into thinking that the deceased had died as the result of an overdose of aspirin.

(E) That there was medical evidence supporting the theory of homicide.

25. It is further submitted that the Jury were entitled to take into consideration the comment made by the learned Judge on the failure of the Appellant to give evidence.

26. It is impracticable herein to deal with the summing-up in detail, but it will be submitted that taken as a whole it was fair to the Appellant and that the attention of the Jury was drawn to all relevant points.

27. It is submitted that the Appeal should be dismissed and that the Judgment of the Supreme Court should be affirmed for the following among other

REASONS.

(1) BECAUSE there was sufficient evidence to support the conviction.

(2) BECAUSE, although all the witnesses who gave evidence were called by the Crown, it was for the Jury to decide which of such evidence as to fact or opinion was to be accepted or rejected.

(3) BECAUSE there was no misdirection of the Jury or omission by the learned Judge and, in any event, no such misdirection or omission as to mislead them when considering their verdict or to cause any miscarriage of justice.

(4) BECAUSE no injustice of a serious or substantial character has occurred either by a disregard of the proper forms of legal process or by a violation of principle such as amounts to a denial of justice.

D. B. SOMERVELL,

KENELM PREEDY,

L. M. D. de SILVA.

No. 55 of 193

In the Privy Council.

ON APPEAL

From the Supreme Court of the Island o Ceylon.

BETWEEN

SENEVIRATNE - - - *Appellan*

AND

THE KING - - - *Respondent*

Case for the Respondent

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The Solicitors' Law Stationery Society, Ltd., Law & Company Printers, Abbey House, S.W.1. WL3939B-280