In the Privy Council.

No. 14 of 1952.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

BETWEEN

THE ATTORNEY-GENERAL OF CEYLON ... ... *Appellant*

AND

KUMARASINGHEGE DON JOHN PERERA ... ... *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

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AND

KUMARASINGHEGE DON JOHN PERERA ... ... *Respondent.*

RECORD OF PROCEEDINGS

In the Supreme Court.

No. 1 (A). Indictment, 3rd August, 1951.

No. 1.

(A) Indictment.

S.C. 16.

Magistrate's Court, of Badulla.

Case No. 11357.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

(Criminal Jurisdiction.)

Midland Circuit, District of Badulla, Session 1951.

At a Session of the said Supreme Court in its Criminal Jurisdiction for the Midland Circuit, to be holden at Kandy in the year of our Lord One thousand Nine hundred and Fifty One.

THE KING

Versus

KUMARASINGHEGE DON JOHN PERERA.

you are indicted at the instance of Sir Alan Edward Percival Rose, K.C., His Majesty's Attorney-General, and the charge against you is :

That on or about the 29th day of July 1950 at Bogahamaditta, in the

In the Supreme Court.

No. 1 (A). Indictment 3rd August, 1951—*continued.*

division of Badulla, within the jurisdiction of this Court, you did commit murder by causing the death of one R. M. Kumarihamy of Bogahamaditta ; and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

This 3rd day of August 1951.

Sgd. A. C. M. AMEER,
Crown Counsel.

Kandy.
27.8.51.

To this Indictment The Prisoner pleads " I am not guilty." 10

Sgd. P. KATHIRAVELUPILLAI.
C.A.S.C. Kandy.

Monday the 27th day of August One thousand Nine hundred and Fifty One.

No. 1 (B). Verdict, 3rd September, 1951.

(B) Verdict.

The unanimous Verdict of the Jurors sworn to try the matter of accusation in this case is that the prisoner is guilty of the offence of murder —Sec. 296 C.P.C. and add a rider for mercy in view of the age of the accused.

Sgd. P. KATHIRAVELUPILLAI. Sgd. Illegible.
Foreman. 20

Monday the 3rd day of September One thousand Nine hundred and Fifty One.

On this Indictment the sentence of the Court, pronounced and published this day, is that the Prisoner be taken hence to the Bogambara Prison in Kandy and on Saturday the 13th day of October, 1951 within the walls of the said prison be hanged by his neck until he be dead.

Sgd. P. KATHIRAVELUPILLAI,
C.A.S.C. Kandy.

3.9.51.

No. 1 (C). **(C) List of Productions and List of Witnesses.** 30

[*Not printed.*]

S.C. No. 16. M. C. Badulla No. 11357. In the Supreme Court.

THE KING

Vs.

KUMARASINGHAGE DON JOHN PERERA.

Proceedings.

Date trial commences : August 27, 1951.

Adv. H. A. WIJEMANNE, C.C. for the Prosecution.

Pr. CHARITA RANASINGHA with Adv. G. MUDANAYAKE (assigned) for the defence.

Charge : (*vide* Indictment page 1).

Plea : Not guilty.

English-speaking Jury empanelled, sworn, affirmed.

(Cpt. T. MEDONZA is challenged by the Crown and he stands down.)

On the motion of Crown Counsel the large sketch without key is handed to the Jury.

Crown Counsel opens case and calls :

PROSECUTION EVIDENCE.

Prosecution Evidence. No. 2.

No. 2.

Evidence of W. W. Samaranayake.

W. W. Samaranayake, 27th August, 1951. Examination.

WALTER WIJETUNGE SAMARANAYAKE : affirmed, 18 years ; unemployed ; Uduwara.

To COURT : I have not left school. Neither do I attend school. I attend the Government Senior School at Welagedera.

EXAMINATION-IN-CHIEF. At the time of this incident I was in the 7th standard. The deceased, Kumarihamy, was my mother. L. C. W. Samaranayake was my father. My sister, Kamalawathie, was about 21 or 22 years of age at the time of this incident and she was married to one Abeyasekera and lived in a separate house which was as far away from our house as the witness-box is from the Kachcheri (137 feet). The other members of the family are myself—I come after Kamalawathie who is the eldest— ; Cyril, 17 years of age ; Nandawathie, 16 years of age, Quintus, 11 years of age ; and Gladwyn, 9 years of age, who was the youngest. My father was a tea-maker but at the time of this incident he

In the Supreme Court.

Prosecution Evidence.

No. 2. W. W. Samaranayake, 27th August, 1951. Examination—*continued.*

was unemployed. He had not retired at that time. He was about 50 years of age. My father had last worked as a tea-maker on Teeniyagalla Estate. My mother was about 45 years of age. I had known the accused from 1945. At the time of this incident the accused was living in a separate land at the bottom of our land. I lived with the other members of our family in the same house. My father bought the land on which this house stands in, I think, 1946. He bought the land from the accused's wife's younger sister. I am aware of a case filed in the District Court of Badulla by the accused against my father in respect of this very land. As a result of that case my father had to pay Rs. 500/– to the accused. After that case my father got possession of this land. My father went into occupation of the house about 2 years prior to this incident. After my father came into occupation of this house there had been trouble between my father and the accused. There were cases in the Magistrate's Court between the accused and my father. My father put up a foundation close to the main house after he came into occupation ; he wanted to put up another room. At the time of this incident that foundation was about 3 feet high.

To COURT : Our house is between Badulla and Hali-Ella and 2 miles from Badulla.

EXAMINATION *continued* : This foundation 3 feet high was by the new room that had been built. On the morning of the 26th July last year all the inmates of the house were at home.

To COURT : The boundary between my father's property and the accused's property is a stone fence. There is a footpath which leads from the Bandarawella-Badulla Road through my father's property. That goes through my father's property to the accused's property. The accused used to use that path to get to the main road.

EXAMINATION *continued* : There was another route from the accused's house to the high road. That route is not through our land. Both routes are equi-distant. The accused habitually used the path through our garden. On the day of this incident I was getting ready to compete for the under 19 Sports Meet at Badulla. This was a Saturday. Cyril, my younger brother, and I had to be at Badulla at 10 a.m. We were on our way to the sports ground. On the way we saw the bull which had forgotten to tie. We took the bull with us down the garden to tether it. It was a cart bull. It was not possible to tether it in the meadows. We intended to ask mother to look after the bull till we returned and we intended to cut some grass. Cyril and I took a gunny bag and a knife to cut the grass, and went down the garden. (Shown P44.) This is the knife. I cannot remember whether it was Cyril or I who carried the knife. (Shown P45.) It was a gunny like this. We shortened the rope and tied the bull to a guava tree close to some cassava plants. That tree to which we tied the bull is as far away from the accused's house as the witness-box is from the screen (82 feet). The cadju tree shown in the sketch is closer to the accused's house than the guava tree to which we tied the bull. We started cutting grass. I asked Cyril to put

the grass into the gunny bag and I went to seize the bull. While I was untying the rope it got entangled in the nose string of the bull, and the bull dragging me got into the accused's garden on the other side of the stone fence. I placed my foot against the stone fence and pulled the rope to prevent the bull from going further. I called out to Cyril and with his assistance managed to pull the bull into our garden. While we were taking the bull into our premises, Banda, a boy, who was on the other side, started pelting stones. I do not know who Banda is to the accused but he lives in the accused's house. He pelted stones in our direction and I do not know whether he pelted the stones at us or at the bull. Having taken the bull into our garden one of us tied it to a kapok tree. I asked my brother to fill the gunny bag and I went home. This was about 9 a.m.

EXAMINATION *continued.* On the way I plucked a guava fruit and I was eating it and singing and going home. Then, Banda threw another stone. As he pelted the stone I was passing a spot between a jak tree and orange tree. I heard the report of a gun and I felt something on the back of my body and felt benumbed. I cannot say whether I fell. Then, I heard another report of a gun. Then, I saw Cyril about 11 feet away from me.

(TO COURT: Banda was throwing stones at us from the accused's garden. We did not throw stones at Banda.)

When I saw Cyril fallen I saw the accused who was by the cadju tree loading the gun with a cartridge. (P1 shown.) It was a gun like this.

(TO COURT: That was the first time I saw the accused that day. That cadju tree is on the boundary of our land.)

Then I started to run in the direction of our house. As I ran I heard another report of a gun. No pellets from that shot struck me. I went up to the foundation and got on to the foundation when my mother came up and pulled me on to the foundation. Mother came out of the house up to the foundation. Then I heard another report of a gun. As a result of that shot mother got thrown away from the foundation. I did not see who fired that shot just before mother fell. That sound of that shot came from a distance. As mother fell I jumped into the house and looked and saw this accused come running up towards our house with a gun. At that time the accused was nearer our house than when I saw him near the cadju tree. At that time the accused had not passed the cadju tree. I cannot say how far away from the foundation the accused was at that time. I ran into the house.

(TO COURT: At this time I had received injuries on my back.)

I went home and sat down near the door within the house. I waited there for a short while and went up to my mother to see what had happened to her. Then I saw Solomon Perera, the accused's son, with a long hoop iron. As I was getting out of the house I received another shot on my side. I could not bear up the injury and so I ran to the middle room and fell on a camp cot. (Shown P46.) It was a cot similar to this. I was feeling thirsty and so I walked with difficulty supporting myself and came to the room

In the Supreme Court.

Prosecution Evidence.

No. 2. W. W. Samaranayake, 27th August, 1951. Examination—*continued.*

where I was at first and got on to the bed. While I was on the bed I heard other reports of the gun from the front of our house. I cannot say the number of the shots I heard. A short while later my sister Kamalawathie came crying to the room and fell there. I did not see Kamalawathie that morning till I saw her at that time. I do not know whether she was injured because I could not get up. As I was in pain I kept some pillows against my body. Then I heard another report of the gun. While I remained on the bed I heard the sound of footsteps as if somebody was coming into the house. Then Kamalawathie raised cries saying, " don't harm me, don't cut me." I was laying on my face and I felt somebody holding my head and saying, " that fellow's work is finished." It was not the accused who felt my head. That is all I know. I did not see my father being shot. When I left home to cut grass my father and Nandawathie were at home. I did not see Nandawathie being injured. At this time I was wearing this shirt (shown P29). I do not remember making a statement to the police at the hospital. When I regained consciousness I was at the hospital. I pointed out to the police the spot where I was when I was shot and the spot where Cyril was when he was shot. I pointed out all the spots relating to the facts when I mentioned.

Cross-examination.

CROSS-EXAMINED : I am now 18 years old. I have no birth certificate. I was a student in the 7th standard. Our school was to participate in this sports meet. Sometimes I go walking to school and sometimes I go on a bicycle pillion. We were asked to go to the sports meet at 10 a.m. We intended to borrow a bicycle and go to the sports meet.

Q. You have told the police that it was Nandawathie who went to cut grass and you followed ?—*A.* I cannot remember that. I told the police that Cyril accompanied me.

Q. You have said, " I saw him before I left to untie the bull and cut grass " ?—*A.* I did not say that I last saw him when I went to untie the bull.

At the time I made my statement I used to bleed.

(To COURT : I was in hospital for one month.)

I told the police in my statement about the stone throwing.

Q. I put it to you you deliberately omitted the stone throwing because all the stone throwing was done by your party ?—*A.* No, we did not throw stones and we did not say anything.

Q. It is a subsequent afterthought that you now say that Banda threw stones ?—*A.* I deny that. My brother is one year younger than I. None of the stones struck us. We did not remonstrate or speak a word. We were under the impression that they were throwing stones at our bull because it was a butting bull. Our father came to this property in 1946. My father did not file a case immediately after he came there. L. C. W. Samaranayake is my father.

Q. In 1946 your father filed a case against this accused and his wife in the District Court ?—*A.* I am not aware of it.

(To COURT : I do not know the details of this litigation.)

My father had to pay the accused Rs. 500/–. It was after that that there was ill-feeling between the accused and our family.)

Q. From 1946 to 1950 there were a series of cases between the two families ?—*A.* I only know of cases up to 1948. I was charged in June 1948 by the accused's wife with criminal intimidation. That case was compounded. There were several other cases and all those cases were compounded. No case went to trial.

Q. In that case I mentioned you, your father and William Singho were charged ?—*A.* Yes.

Q. You were charged on the 18th of September, 1948, with your father and William Abeyesekera for committing mischief by throwing stones and breaking the tiles of the accused's house ?—*A.* Yes. That case was compounded.

I know that the accused was in hospital at time for one month and 24 days with an injury on the head. That was not as a result of pelting stones. My father and several others were also in hospital as a result of a quarrel. The accused's son was also in hospital. In that case the police filed action against both parties. That case was settled. I am not aware that in March, 1949, the accused was in hospital for 11 days with injuries on his cheek. I do not know that the accused's wife was in hospital for 5 days in November, 1948.

Q. In that case your father and others were charged ?—*A.* I know that there was a case.

My father was not charged for having exposed his person to the accused's wife. Before my father bought this land, the land on which the accused's house stands and our land were one land belonging to the same family. My father bought it from the accused's sister-in-law.

Q. Quite contiguous to this footpath you extended your house and put up a foundation ?—*A.* We obtained a decree from Court to close the road.

Q. I put it to you your father obstructed the accused's path to his house and put up a foundation ?—*A.* No.

Q. In 1948 the accused filed a case in the Village Tribunal, Badulla ?—*A.* There may have been a case but I do not know about it.

Q. In that case the accused said that your father blocked the road and caused him great inconvenience ?—No answer.

Q. I put it to you that on the day in question all of you were flinging stones at the house of the accused ?—*A.* I deny that. I do not know if the Inspector found stones on the zinc roof of the accused's house and in the compound and front verandah of his house.

Q. The Inspector found a picture broken in the accused's house and pieces of glass on the floor, an arm chair chipped, tiles broken, marks of stones on the wall and pieces of chunam and dust on the floor.—*A.* No answer.

Q. In the lower Court you implicated the accused's son ?—*A.* I came out with the truth.

In the Supreme Court.

Prosecution Evidence.

No. 2. W. W. Samaranayake, 27th August, 1951. Cross-examination—*continued.*

Q. You told the police that the accused's son came to the scene with a sword ?—*A.* Yes.

Q. You told the Police " John Perera was with a gun. His son Solomon was behind him and their servant Banda was with the son. These two had nothing in their hands " ?—*A.* I did not say that.

My brother Abeyesekera or brother-in-law was a Fiscal's peon but he is not employed now.

You know that Fiscal's peons are past masters of fabricating false evidence ? I do not know that.

Q. Did you tell the police that Abeyasekera was nowhere there at the spot ?—*A.* I said he was there.

Q. You told the police that he came long after the shooting ?—*A.* That is not what I said.

Q. Do you say the police have incorrectly recorded your statement ?—*A.* I am unable to say that.

Q. I put it to you you are not coming out with the whole truth in this case ? I am speaking the whole truth.

That morning I did not climb a tree and sustain injuries. I have never fallen from a tree. That morning I first saw the accused when he was near the cadju tree. That was after I had sustained injuries. At the time I received the injuries I did not see the accused. That shot which injured me came from the direction of the accused's house. I heard the second shot after I was injured.

(To Court : Before I saw the accused I heard two shots.)

I am unable to say if I fell when I received the shot. I did not look round to see who fired at me. After the report of the gun I saw Cyril fallen. It was then that I saw the accused. He was loading the gun and moving. At that time he was on our land. When the first two shots were fired I cannot say where the accused or anybody else was standing. Our house is on a higher elevation, about 3 feet higher, than the accused's house. There is a slight gradient from our house to the accused's house. The inmates of the accused's house are his wife, daughter-in-law, two grand children, a young girl, the servant Banda, and sometimes there are others also.

Q. On the day in question when you were throwing stones this accused had gone with that young girl and Banda to the river to bathe ?—*A.* I deny that.

Q. And when the accused was coming towards his house the intensity of the stone throwing became greater ?—*A.* There is no necessity for him to come in the direction of our house to go to his house from the river.

Q. Then, the accused heard your father say " we are not afraid of that piping fitted to a piece of wood " ?—*A.* No.

Q. Then the stone throwing became greater ?—No.

Q. It was then that the accused acted in the manner he did by firing at all of you ?—*A.* I deny that the incident occurred in that manner.

Re-examination.

Re-examined. The case in the District Court in which the order was that the accused was not entitled to a right of way was the result of an

action filed by the accused. I do not know which case that was. I was in school at the time. On a certain New Year's Day there was some trouble and thereafter the accused and others did not use that road and thereafter the accused filed that case about the right of way. For about two years before this incident the accused had stopped using that road. That road over our land branches off when it reaches the accused's land and the other portion continues. That is the road which I said would lead to the Village Committee road. The inmates of the accused's house would not make use of that road to reach the river but others going to the river would use that road. It is impossible to pelt stones from our garden into the accused's house because the house is below a wall. The house of the accused is about five feet below the level of our garden.

(To Court :- I am unable to say whether anybody in our house can throw stones only on to the roof of the accused's house and not in the house itself.)

Court adjourns for ten minutes.

No. 3.

Dr. M. L. Corera.

Dr. M. L. CORERA, Sworn.

District Medical Officer, Ratnapura.

In July last year I was the Judicial Medical Officer, Badulla. I held a post mortem examination on the body of Kumarihamy Samaranayake on the 29th of July last year at 1.45 p.m.—roughly four hours after death. The body was identified by Quintus Samaranayake the son of the deceased and A. M. Banda a friend. The deceased was 39 years old, she was fairly well nourished and at the time she was dressed in cotton underwear and a jacket and cloth. Shown silk jacket P27. This is the jacket she was wearing and (P28 shown) is the petticoat. Externally I found gunshot injuries, on the back. There were 8 entrance pellet wounds on the back and on the left arm. (Indicates position of injuries.) Nos. 1 to 7 were on the back and the 8th on the back of the elbow. Of these 8, Nos. 5 and 6 had corresponding exit wounds on the back half inch to the right of the entrance wounds. Four exit wounds were found in front of the body on the left side corresponding to injuries Nos. 2, 3, 4 and 7 on the back. There were no entrance wounds in front. No. 1 was almost at the back of the neck. A pellet of this was found five inches away to the right under the skin. It was removed and handed to the Police. There was a pellet also of exit wound of injury No. 5 almost embedded in the exit, and another was removed from the No. 8. Shown P24. These are the pellets. (Pellets and sketch attached to the post

In the Supreme Court.

Prosecution Evidence.

No. 3. Dr. M. L. Corera, 27th August, 1951. Examination—*continued.*

mortem report are handed to the Jury.) I conducted the post mortem just behind the house. There are tears on the jacket P27 corresponding to the wounds and so with the petticoat P28. I handed P24, P27 and P28 to the Police. Internally there was a fracture of the 3rd rib on the right side two inches from the middle line. There were perforations through the upper lobe of the lung on the left side. In the liver the mid region was reduced almost to pulp. The spleen was reduced to pulp. There were two through and through perforations through the stomach wall. Those injuries had been caused by the pellets which passed through the body. Death would have been almost instantaneous. No one would have saved her. The injuries were necessarily fatal. The necessarily fatal injuries went through the lung, liver and spleen. The injury to the stomach need not have been necessarily fatal as she could have been alive for some time. Without attention she would have died. The cause of death was due to haemorrhage and shock from multiple gun shot injuries to the lung, stomach, liver and spleen. I am unable to say whether she could have walked a little distance. I would have expected her to have sustained those injuries very near to where she had fallen down. I produce my post mortem report P28 and swear to its accuracy. There were no abrasions to indicate she had fallen down. She was also dressed in a cloth. The shot must have been fired from behind and from the left of the deceased.

(To COURT: She must have been fired at from a distance of something over 20 feet. I can only give the minimum distance. I did not perform any experiments. If the shot was fired from a distance of less than 20 feet I would have expected singeing and tattooing.)

CROSS-EXAMINATION: Nil.

(To COURT: I know the boy Walter who gave evidence this morning. He was admitted to hospital where he was for 33 days. I saw him on the evening of the incident and he was very bad and unable to make any statement at all and as far as my recollection goes his dying deposition was recorded. On the 1st of August he was conscious. I had seen him several times and he became conscious and was able to speak. For some time after he became conscious he would have been in great pain, especially due to the injury on the back which was suspected having penetrated into the lung. He also had gun shot injuries on the back. Walter had most of his injuries in front.

(The Jury retire at this stage on the direction of His Lordship.)

(To COURT: Walter had 33 injuries. All but one were in front.)

The Jury is recalled at this stage.

Walter had one fairly large injury on the back on the right hand side but he had a number of injuries in front on the side as well.

Proctor for the accused states he is satisfied with this and does not wish to lead evidence with regard to the injuries on the others.

No. 4.

A. M. Kiri Banda.

In the Supreme Court.

Prosecution Evidence.

No. 4. A. M. Kiri Banda, 27th August, 1951. Examination.

A. M. KIRI BANDA, Affirmed, 48.

Tea boutique keeper, Bogahamaditta.

The distance from my house—my boutique to the deceased's house is about ten chains. My boutique is on the main road in the direction of Badulla, from the deceased's house. I am not a relation of the deceased nor of the accused. I have known both parties for a long time. I knew the deceased's people for about five years and the accused and his people for about ten or 15 years. The deceased's people were new comers. There was ill-feeling between the accused and the deceased. I remember the day in question, the 29th of July. Shortly before this incident I was on my way to Haliella walking along the main road. I had to go past the deceased's house. It was about 8 or 8.30 when I approached the deceased's house and I heard the report of a gun in the garden and following the report I heard a voice say, " Oh, my son was shot at." I identified the voice as that of the deceased, the mother of this boy. Then at the same moment I got to the edge of the road and looked in that direction and I saw the deceased Kumarihamy going about two fathoms from the house, down the garden. I saw the deceased get out of her house and I saw John Perera this accused with a gun in his hand coming towards her.

(To COURT: By that time the accused was well inside the deceased's land.)

EXAMINATION-IN-CHIEF *continued.*

When the accused was about three fathoms from the deceased he shot at the deceased who fell immediately on receipt of the shot, without making any noise. The accused and the deceased were approaching each other when the accused from a distance of three fathoms levelled the gun at the deceased and she turned and just then the accused fired the gun. The deceased fell at the same spot. No sooner the deceased fell, the accused broke open the gun, took a cartridge from his waist and loaded the gun again. Shown P1 gun. It was one like this which the accused had. No sooner the accused loaded the gun he walked in the direction of the house of Samaranayake. As the accused was walking in the direction of the deceased's house, Samaranayake had just got on to the compound from his house and as he stepped on to the compound the accused went and shot at him at once and Samaranayake fell in the compound immediately on receipt of the shot. Having seen these two people falling for the gun shots I went to the Police Station at Badulla. I started to walk but on the way I met the Welimada Bus which comes there at 9 and entered it and went and made a complaint at the Police Station. Along with the Police Officers in the Police Van I returned to the scene.

In the Supreme Court.

Prosecution Evidence

No. 4. A. M. Kiri Banda, 27th August, 1951. Examination—*continued.*

(To Court: I made a statement to the Police. I am unable to say whether it was recorded or not.)

Examination-in-chief *continued.*

I had only proceeded about two or three fathoms when I heard another gun shot at the same spot coming from the direction of the deceased's house. That was the only gun shot I heard as I left the scene. After I reached the spot I went into the house along with the Police Officers. I pointed out to the Police the spot from where I saw the shooting, where the deceased was at the time she was shot and where Samaranayake was shot and also where the accused was. When I returned to the scene with the Police I saw Walter lying injured inside the house. At the time I saw the deceased being shot I did not see Walter. Apart from the accused and the deceased I did not see anybody else there.

Cross-examination.

Cross-examined: I live two miles from Haliella. I was born there. The accused was an outsider and since he took up residence here I know him. I have known the accused for about 25 or 30 years. I do not know what transpired before I heard the shot. I do not know what happened before I heard the shots.

Q. You saw the accused. He looked as if he had run amok ?—*A.* With the gun in hand the accused came directly to the deceased's garden as if he were a lunatic. I did not see any stones being pelted. The accused was in Samaranayake's own compound when he fired at him. I did not see anything in Samaranayake's hand. I saw him getting out of the house. Yes, I was in a state of alarm, but I was looking on from the edge of the road. I could see with mathematical precision what a person had in his hand and what he was doing. Had I seen stones being pelted I would say so. I am not an interested witness.

(To Court: I have no special interest in either of the parties to this unfortunate tragedy.)

I know that accused's family and deceased's family were at daggers drawn. I know the road leading from Badulla road to accused's house passing deceased's house. That road too had been obstructed by the deceased.

Q. That was the road accused used ever since he came to reside there ? . . . . Although accused used that road he had no right of way to that road and there was some litigation over that road.

I do not know for how long accused used that road. I did not give evidence in the case over the right of way and I do not know in what Court that case was heard. I knew there was a case and these people were going about for that case. My boutique is about 10 chains from deceased's house and about 12 chains from accused's house. There was litigation between accused and deceased's people over land disputes. I know there was litigation over the right of way too and accused did not succeed in it and according to the decree that road was closed. I did not make particular inquiries about the litigation.

Q. Accused was in hospital twice as a result of injuries inflicted by deceased ? . . . . I know that both parties were in hospital.

At the time of this incident I was on my way to Hali-Ela and after I heard the report of a gun I stopped and looked and thereafter I went to the Police. When I left the scene for the police the accused had just finished shooting Samaranayake and was on the compound. I saw accused on the compound. I was not angry with accused. I did not question accused.

(To COURT : I was not in the habit of questioning people with guns in their hands.)

RE-EXAMINED. I identified the body of the deceased at the post mortem examination.

(To JURY : *Q.* Even after two people were murdered how is it that you did not make any attempt to disarm the man ? . . . . When a man is shooting people as if he was destroying dogs how could I go up to him ?)

In the Supreme Court.

Prosecution Evidence.

No. 4.
A. M. Kiri Banda
27th August, 1951.
Re-examination.

No. 5.

J. M. Mutu Banda.

No. 5.
J. M. Mutu Banda,
27th August, 1951.
Examination.

J. M. MUTU BANDA : Affirmed. 40, cultivator, Bogahamaditta.

I live about ¼ mile from deceased's house. I am not related to accused or deceased. I have known accused for about 20 years and the deceased for about 4 years. I was on good terms with accused and deceased too. I remember the day of this incident. That day, shortly before this incident, I was driving my cattle to tether them and took the road across the tea estate that adjoins deceased's land. The place where I tethered my cattle is about 2 or 3 chains from the deceased's garden. I was returning after tethering my cattle and I heard the report of a gun from the direction of accused's house. I went up to the boundary of the tea estate and looked in the direction from which the report of the gun came. I saw deceased coming out of the house and going about 2 fathoms saying " Oh my child." Then this accused shot at deceased. At the time accused shot deceased, she was on a foundation that was in the compound of her house and accused was about 2 or 3 fathoms from deceased when he shot her. Deceased fell down the foundation after the shot. Accused went further in the direction of Samaranayake's house. Then I saw a small boy running towards the road saying " Bass is coming with the gun run." I did not know who that boy was at that stage. Another person came out from inside that house and accused went up and shot him too. At the time that person was shot he had just stepped out of the house. At that stage I could not identify the man who was shot. He was a male adult. I went to inform the

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Prosecution Evidence.

No. 5.
J .M. Mutu Banda, 27th August, 1951.

Badulla Police in a car which I came across. As I was going towards the police I met the police van going and I returned in the same car. I know last witness Kiri Banda. I first saw Kiri Banda in the company of the police. From the place where I saw the incident I could not see anybody on the road because of the trees and foliage and the place where I was, was lower than the road. Later I found that it was Samaranayake who was shot. Samaranayake was lying in the same spot where he was shot. That boy who asked that person to run as accused was bringing a gun, was Quintus. I made a statement to the police and pointed out the spot where I was, the spot where deceased and the other people were and the spot where accused was.

Cross-examination.

CROSS-EXAMINED. Last witness Kiri Banda is a relation of mine but he is more an acquaintance than a relation. I do not know whether last witness is a very good friend of the Samaranayake family.

Q. As a matter of fact Samaranayake's son-in-law Abeyasekera is living in the house of a relative of Kiri Banda, one B. M. Perera ?— *A.* I know that Abeyesekera is living in the house of B. M. Perera. Kiri Banda is not related to B. M. Perera. B. M. Perera is married to Kiri Banda's elder sister's daughter. I was about 40 yards away from the scene of fire.

Q. Just as you could not see anything on the high road because of the foliage you could not see the scene of firing because of the foliage ? . . . I was on an uphill and I could see the scene.

When one looks from the road towards the house the house of deceased is downwards on a slope. I could clearly see deceased's house from where I was. I did not see Kiri Banda on the road. As soon as I saw this I ran to the road and wanted to go to the police.

Q. Even at that time you did not see Kiri Banda ? . . . I have no recollection. I was not concerned about any particular person at that time.

I saw Kiri Banda coming with the police. When I saw Kiri Banda I did not exchange information with him.

(TO COURT : I went to the police station in a hiring car that was going towards Badulla. I stopped that car and told the driver I wanted to go to the police and give information about the shooting. I did not know the driver of that car before but I told him what I wanted the car for.)

CROSS-EXAMINATION *continued.* I do not know what transpired before the shooting and I cannot say whether there was stone throwing or not. I came up hearing the report of a gun. My attention was focussed on the gun shots. I said deceased dropped from the foundation after the shot.

Q. The previous witness said that deceased got down from the foundation and was advancing towards the accused ? . . . That is not so.

Q. Deceased came down the flight of steps to the compound and it was then that she was shot according to the last witness but according to you deceased was standing on the foundation and she dropped down from the foundation when she was shot ? . . . Yes.

(To Court : The foundation is in the compound and deceased was shot when she was on the foundation.)

Cross-examined *continued.* I did not at any time see deceased Kumarihamy go towards the accused. I could have seen if there was anything in deceased's hand. I said a warning was given to an adult inmate of deceased's house to run away.

Q. In spite of that the father got out of the house ? . . . No answer.

Q. Do you concede that Samaranayake had nothing in his hand ?— *A.* I am unable to say whether he had anything in his hand.

(To Court : I saw nothing in Samaranayaka's hand.)

Cross-examination. *continued.*

Cross-examined *continued.* In the lower court the accused's son too was implicated and he was discharged by the Magistrate.

Re-examination.

Re-examined. Before deceased was shot deceased was coming out of the house saying " oh my son " then she was shot.

Court adjourns for the day.

1 p.m.

No. 6.

L. B. Warnasooriya.

No. 6.
L. B. Warnasooriya,
28th August, 1951.
Examination.

28.8.51. 9.30 a.m.

L. B. WARNASOORIYA. Affirmed. Inspector of Police, Passara.

On the 29th July last year Abeyesekera came at 9.40 a.m. to the Police Station at Badulla and made a statement which I recorded. I was getting ready to go to the scene when the witness A. M. Kiri Banda arrived about 9.45 a.m. He gave me certain information but I did not record a statement from him at that time. Abeyesekera, A. M. Kiri Banda, S. I. Gunasekera and P. C. Dharmaratna accompanied me in the van to the scene which is about 2 miles from the station. I arrived there between 9.55 and 10 a.m. There were 75 to 100 persons gathered on the road. Nandawathie was there with injuries. In consequence of what she told me I sent P. C. Dharmaratna back to the Police Station, and I got a gun and approached the accused's house under cover. I first went along the Badulla-Bandarawella road. I then turned into the old road. Then in view of what Nandawathie told me I decided to go by a different route to the accused's house, from behind and from a side of the accused's house. I continued towards Bandarawella and took the footpath and came from behind and from a side of accused's house. I went right up to the house and called out to the accused. He came out. He was unarmed. I asked him to get the gun and I entered the house with him. He produced the

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Prosecution Evidence

No. 6. L. B. Warnasooriya, 28th August, 1951. Examination—*continued.*

gun P1 (shown) from a corner of the house. I smelt the gun. It was smelling of burnt gun powder and there was fouling in it. I am used to firearms myself. I formed the impression that P1 had been recently fired. I pointed out to the officer who made the sketch the place from which the gun was taken by the accused. (At this stage on the motion of Crown Counsel the Jury are handed the copies of the sketch showing the accused's house, marked Sk1B to Sk8B.) That is the spot G in that sketch. The accused produced the licence P59 (shown) before me. That is in the accused's name. I took the accused into custody and handed him over to sub-Inspector Gunasekera. I made observation of the scene. I went to the deceased's house along the footpath. I found the body of Cyril Samaranayake in the back garden of the deceased's house at R in the large sketch. I went further up and found the body of Kumarihamy at J in the large sketch. J is below the foundation. (At this stage copies of photograph No. 4 from booklet marked P54A to P54G containing photographs is shown to the jury on the motion of Crown Counsel. Crown Counsel states that he would be proving all the photographs except photograph No. 3). These photographs were taken under my supervision. X in photograph 4 is J in the sketch. X in the photograph is the place where the body of Kumarihamy was found. The foundation drop is about 3 feet. There are no steps. There is a door leading from the house to that foundation. That is shown in photograph 4. Kumarihamy's body was 8 feet from the foundation. The door marked H in the large sketch is the door shown in photograph 4. There was no blood at the place where Kumarihamy lay fallen. There was blood on her garments. I produce marked P7 and P8 the blood stained leaf and twig respectively which I found at the spot marked y in the large sketch 10 feet away from Kumarihamy's body. There was blood in Kumarihamy's hand. There was no weapons in her hand ; there were no stones. There was blood at the spot R in the large sketch where Cyril Samaranayake was lying. He was dressed in a pair of shorts and the upper part of his body was bare. He had no weapons in his hands. I produce marked P13 the spent cartridge case which I found near his body at the point T. P13 was smelling of burnt gun powder. L. C. W. Samaranayake was lying dead at the point A in the large sketch. There was blood at that spot. I produce marked P11 another empty cartridge case which I found at B in the large sketch. A to B is 7 feet. Apart from that there were 6 card-board waddings near his body. They are indicated in small rectangles near the spot A in the large sketch. I produce those waddings marked P2. I did not find any stones or weapons near L. C. W. Samaranayake's body. Kumarihamy's body was at J. g was shown by Walter as the place where Kumarihamy stood when she was shot at. g to J is 8 feet. (At this stage on the motion of Crown Counsel the photograph No. 2 is handed to the Jury.) The position of L. C. W. Samaranayake's body is shown in photograph No. 2.

10 20 30 40

To COURT : Photograph No. 2 shows the front view of the deceased house facing the main road. Photograph No. 1 does not take in any portion

of the spot where Kumarihamy was lying. It would be more towards the left. The flat bit in photograph No. 1 shows the foundation. (At this stage photograph No. 1 is handed to the jury.) The front door is the front door near which the husband of Kumarihamy was lying. As one faces that photograph, on the left one sees the foundation beyond which, further to the left, the body of Kumarihamy was lying.

EXAMINATION *continued.* The position of Cyril's body is shown in photograph No. 6, red B in the photograph. That photograph also shows the accused's house. (At this stage on the motion of Crown Counsel photograph No. 6 is handed to the Jury, without the observations at the bottom.) I found no stones or weapons near Cyril's body.

TO COURT: In photograph No. 6 the part of the deceased's compound nearest to the accused's house stands well above the accused's house. The extent of the drop is 4 feet 3 inches.

EXAMINATION *continued.* In fact the accused's house faces a different direction. There is a short wall, 3 feet 10 inches in height, in the verandah of the accused's house and that is shown in photograph No. 8. (On the motion of Crown Counsel photograph No. 8 is shown to the Jury.) There is one step, I think it was a large stone, leading from the verandah to the compound of the accused's house.

TO COURT: Photograph No. 7 was taken from the front compound of the accused's house by some one standing 4′ 3″ below the deceased garden. This was a camera with a high tripod.

EXAMINATION *continued.* (At this stage on the motion of Crown Counsel photograph 7 without the observations at the bottom is handed to the jury.) That photograph shows the foundation by the deceased's house on the right hand side looking at the picture. I produce marked P31 the bamboo branch with pellet marks which I found at X in the large sketch, by the boundary fence. The branches of P31 were cut off so that it could be sent to the Government Analyst.

TO COURT: P31 is shown in photograph 7—it is the tall thing—the one in line with the very end of the deceased's house.

EXAMINATION *continued.* (At this stage on the motion of Crown Counsel copies of the sketch marked Sk1A to Sk8A are handed to the jury, sketch showing deceased's house.) I produce marked P3 two cardboard waddings and two felt waddings which I found at L in the deceased's house. I produce marked P4 ten cardboard waddings in the centre bed room indicated by the triangles in the sketch. I produce marked P46 the camp cot I found inside the house at H. There was a large amount of blood in the camp cot and there was a pool of blood on the floor under the camp cot. At this stage on the motion of Proctor for the defence the jury retire.

Mr. Ranasingha states that he does not know whether this part of the evidence of the witness is relevant to the charge relating to the murder of

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No. 6. L. B. Warnasooriya, 28th August, 1951. Examination—*continued.*

Kumarihamy; that is to say the evidence with regard to the spots at which the other deceased persons were found and the fact that the witness found blood at those spots. Such evidence would prejudice the accused in his trial for the murder of Kumarihamy.

COURT: By your cross-examination of the witnesses you have suggested that this act took place as a result of grave and sudden provocation by all these people coming up towards the accused's compound and pelting stones at the accused. Therefore, is not the evidence showing that those persons were found dead at spots from which they could not have thrown stones of some materiality ?

Mr. Ranasinghe conceded that that is so. He states that while he appreciates the fact that it is difficult in a case of this nature to disassociate certain facts from the others he would earnestly appeal to his learned friend to confine himself to the facts connected with the murder of Kumarihamy.

COURT: I am quite sure he will do that, and I shall tell the jury at the proper time to what limited extent those facts have been referred to.

THE JURY RETURN.

Same witness. EXAMINATION *continued.* On the same bed H I found S.S.G. Pellets which I produce marked P37. I went to the other bedroom, that is the bed room by the foundation and I found Kamalawathie lying injured there at the spot marked G in the small sketch of the deceased's house. She was bleeding and she was alive, I found the witness Walter Samaranayake lying injured on the bed J. He too was alive but he did not speak. He was injured and was bleeding. I got Kamalawathie and Walter removed to hospital immediately. Immediately I got to the scene I sent Nandawathie to hospital—she was on the road. I produce marked P6 another pellet that I found at F in the small sketch of the deceased's house. I found a trail of blood from the entrance of the house up to the camp cot H and from there again up to G where Kamalawathie was lying. There was also blood all over the rear bed. I produce marked P29 a shirt with blood stains and pellet marks on it which I found in the rear bed room. I produce marked P50 a blood stained pillow which I found on the camp cot at H. I produce marked P47 a blood stained mat which I found on the bed J in the rear bed room. I produce marked P48 and P49 two other blood stained pillows which I found. I produce marked P45 a gunny bag which I found in the garden near the jak tree. There was green grass inside P45. I produce marked P44 a knife which I found inside P45. There were blades of grass and there was sand sticking on to the knife P44 which indicated to me that it had been used for cutting grass. I produce marked P9 two spent cartridge cases which I found at the spot H in the small sketch of the accused's house, in the front verandah of the accused's house. I produce marked P10 a spent cartridge case which I found being chewed by an infant in the accused's house. I produce marked P12 another spent cartridge case which I found at f in the large sketch in front compound of the accused's house. I produce marked P35 another spent cartridge case which I found

when I visited the scene two days later, that is on the 30th, in the company of the Government Analyst at N in the large sketch behind the deceased's house. I produce marked P36 wadding which I found at Z in the large sketch by the boundary of the accused's fence. I produce marked P14 wadding which I found at U in the large sketch in the front compound of the accused's house. I produce marked P32 one card board wadding which I found 4 yards away from the orange tree at the spot L in the large sketch. I produce marked P33 another cardboard wadding which I found in the back garden of the deceased's house between the orange tree and the jak tree at M in the large sketch. I also produce marked P34 wadding which I found at Q. I recorded the statements of all the witnesses. I recorded the statement of Walter Samaranayake on the first. He was not in a fit condition to make a statement at first. I recorded Kiri Banda's statement at 1.45 p.m. on the same day at the scene. I recorded Muttu Banda's statement at 2 p.m. on the same day at the scene, I pointed out to the constable who made the sketch the spots I have referred to.

Cross-examination—

CROSS-EXAMINED. I did not know the accused before this incident. The accused was a carpenter. Before this incident I had been 7 months at Badulla but most of the time I had been away attending Courts in Colombo and I have no personal knowledge of the disputes between the accused and the deceased family. It is possible for a person standing at t in the large sketch (that is the spot from where Kiri Banda says he saw the incidents) to have seen what was going on at J. I tested this myself.

Q. But one does not get a straight view ?—*A.* Not a straight view but one who is inquisitive could see.

Q. Photograph No. 6 indicates the nature of the vegetation of that area ?—*A.* The type of vegetation there is thicker than the type of vegetation between t and J. Photograph No. 3 shows vegetation more like the type of vegetation which a witness at the point t would see when looking towards J. Spot b is the spot from which Muttu Banda is alleged to have seen the incident. From b one could have a clear view of what was taking place at the spot J, without speaking. Muttu Banda would have been in a position to have a clearer view then Kiri Banda. Abeyesekera was a witness in the lower Court. The Magistrate took Abeyesekera into custody but I do not know for what reason; I think it was for trying to interfere with the witnesses. He was bailed out. This accused's son was an accused in the lower Court. It was alleged that he was seen at the scene with a sword in his hand. (Shown P13.) It was a sword like this. The accused's son was discharged in the lower Court. Altogether I found 7 spent cartridges at the scene four of which were in the accused's compound. Of those four, two were in the verandah, one with the child and one in the compound. Between the accused's garden and the deceased's garden there is a live fence with gaps here and there. Photograph No. 7 shows the boundary, and even photograph No. 6 shows the boundary. The foreground in photograph No. 7 is the accused's compound. In that you have a view of the deceased's house which is on a higher elevation. Deceased's garden is 4 feet 10 ins. higher

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No. 6. L. B. Warnasooriya, 28th August, 1951. Cross-examination—*continued.*

but the house is still higher. Along that boundary fence there are a number of jak trees. On this day I did not find any jak fruits plucked. I found a pepper creeper pulled down. That pepper creeper was at the point z on the boundary. There was small piece of the pepper creeper pulled down. I found no jak fruit plucked anywhere at the scene. I found no pepper seeds. I do not know how that pepper creeper came to be pulled down. I did not see an abandoned well. I found 3 tiles broken in the accused's house. Photograph No. 6 shows that part of the accused's house consists of a zinc roof and the other part is tiled. One can see the tiled roof in photograph No. 6. A person standing in the deceased's garden near the boundary could have thrown stones and broken those tiles on the roof of the accused's house. In the wall of the front verandah of accused's house, I found as if stones had struck the wall. Photograph No. 8 shows a stag's head on the wall. On that wall I found such marks. I collected all the stones I found. I produce marked P60 the stones I found in the front compound of accused's house. I found 4 stones in the front verandah of accused's house marked P64. I picked up stones on the zinc roof also.

(To Court: The accused's compound was not a stony ground. It looked as if these stones were thrown there. A person standing in the deceased's garden near the boundary could not have thrown those stones into the accused's verandah. That was impossible unless the person who threw the stones entered the accused's compound.)

Photograph No. 6 shows where those stones were in the verandah they were towards the coconut tree. There were marks on the inside walls of the verandah and that is why I say it is not possible for a person standing in the deceased's garden to throw stones and cause those marks. Those marks are all over the wall and the highest mark was about $6\frac{1}{2}$ feet above the ground. Photograph No. 6 shows the body of the deceased Cyril. The footpath is not very clear in that photograph. There were gaps in the fence to come from the deceased's garden to the accused's compound. I collected 4 stones from the zinc roof of the accused's house marked P61. In the left compound of the accused's house I found 3 stones marked P62. In the left room of the accused's house I found 3 stones marked P63. In that room I found the picture broken and the glass on the floor. That is the picture P67. Photograph No. 8 shows that picture. The picture could not have been broken by a person throwing a stone from the deceased's garden unless with great difficulty. To get to that picture one has to go through the door shown in the photograph. The flash of the torch shown in that photograph indicates that broken picture. To damage that picture one has to come to the accused's compound and throw a stone. I found similar stones in the deceased's garden also. I did not see an armchair chipped.

Q. Your impression was that the accused's house received a stone throwing of a veritable nature ?—*A.* I cannot give my impression.

Spot X in the accused's garden shows that the line of fire was from the accused's garden. From the spent cartridges I found in the accused's

compound the possibility is that some firing took place from the accused's compound, and the other circumstances point to the fact that some firing took place from the deceased's garden. People who are used to reloading cartridges carry with them the empty cartridges. The accused's front verandah has a half wall. Photograph No. 8 shows that half wall. From the doorway shown in photograph No. 8 one can see the front compound of accused's house. That photograph was taken from somewhere near the spot f from the sketch. From that doorway one can see a portion of the area shown in photograph No. 6. When I called the accused he came straightaway without showing any signs of resistance and when I asked for the gun and licence he gave them to me. I recorded the accused's statement at the Police Station. Spot J is the place where the deceased Kumarihamy was lying fallen. From the entrance of accused's house the spot J is about 100 feet, and the spot R about 45 feet. The vegetation in the deceased's garden is not so thick as the vegetation in the accused's garden. I searched the accused's house for any more live cartridges. There were no more live cartridges on the table. When I got to the spot there was a large crowd of people on the road. Not one of them was allowed to come to the scene except those who were invited to come to the spot to give evidence. The Magistrate did not call upon the crowd to come forward and give evidence. A number of constables were posted at the scene to prevent people from coming on the scene and interfering with anything on the spot while I carried out investigations. I picked up the productions before the Magistrate came and also while he was holding the inquiry. Walter Samaranayake made a dying deposition to the Magistrate on the day of the incident. When I got there the inmates of the accused's house were the accused's wife, daughter-in-law, the daughter, a servant boy and 2 small children. Accused's wife did not appear to be sick.

(To Court : I recorded the statement of Walter Samaranayake at the hospital.)

Q. Did Walter Samaranayake tell you in his statement that it was Nandawathie who went to cut grass ?—Yes.

Q. Referring to Cyril did he say in his statement, " I saw him last just before I left to untie the bull and cut grass " ?—*A.* Yes.

Q. Does he make any mention of any stones having been thrown at them or at their compound from the accused's compound ?—*A.* No.

Q. He has referred in his statement to the accused's son Solomon ? —*A.* Yes.

Q. Did he say in his statement, " John Perera was with a gun. His " son Solomon was behind him and their servant Banda was with the son. " These two had nothing in their hands " ?—*A.* Yes.

Re-examined. I recorded Walter Samaranayaka's statement at the hospital at 3.40 p.m. on the 1st. He was in pain at the time. On the day in question I was at the scene from 10 a.m. till 6.25 p.m. During all that time the scene was guarded. After I got to the scene I was satisfied that nobody had the opportunity of tampering with anything to which I have spoken at the scene or introducing anything. There were 2 constables

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Prosecution Evidence.

No. 6. L. B. Warnasooriya, 28th August, 1951. Re-examination—*continued.*

guarding the scene till the Government Analyst arrived on the 30th. The height of the roof of accused's house from the ground is 7 feet 6 inches. The gap between the half wall and the roof is 3 feet 8 inches. The marks on the front wall of accused's house were $6\frac{1}{2}$ feet at the highest and about $2\frac{1}{2}$ feet at the lowest. A person throwing stones from the deceased's garden could not have caused those marks. The height of the damaged picture was 5 feet 10 inches. I have not made a note of the height of the door. One cannot damage that picture unless he came up to the half wall of accused's house and threw stones. The ground opposite the accused's house is stony and there were stones similar to the ones I found. On the outer side of the half walls or on the top there were no marks of stones. The accused had no injuries.

(To COURT: None of the inmates of the accused's house was injured.)

FURTHER CROSS-EXAMINED with permission. On the floor of the verandah of accused's house there was dust and chunam.

To COURT: I did not find any marks of anything like a bull being dragged into the accused's compound. I would not have expected to find such marks.

To CROWN COUNSEL: I found a bull tied to a tree in the back garden of the deceased. It was tied to a guava tree between s and y. The cotton tree was near that at the spot w.

No. 7. J. W. Batstone, 28th August, 1951. Examination.

No. 7.

J. W. Batstone.

11.30 a.m.

J. W. BATSTONE, sworn.

Police Constable No. 2144. Badulla Police. I went with Inspector Warnasooriya to the scene on the 29th of July last year and I helped in the inquiry. Under the body of the deceased L. C. Samaranayake I found one felt and cardboard wadding which I produce marked P21. Shown. These are the productions. I also found in the rear garden of the deceased three pieces of cardboard wadding which I produce marked P23. They were at 'O.' I was present at the post mortem examination on the body of the deceased Kumarihamy and the Judicial Medical Officer handed me three pellets marked P24 which I produce and also the clothes of the deceased the silk jacket P27 and the petticoat P28. I pointed out the spots where I found the cardboard wadding to the constable who made the sketch.

Cross-examination.

CROSS-EXAMINATION. When I went there I noticed a large crowd.

(To COURT: The crowd was on the road.)

CROSS-EXAMINATION *continued.* There is a footpath leading to the accused's and the deceased's garden. There were no people inside the house to see what had happened. Yes I had to ask the people to get away.

(To COURT : shown sketch—When I arrived the people were collected along what is marked as the Old Road. I did not see any people inside the deceased's house when I arrived. I was there from 10 a.m. till sometime in the afternoon. During that time no people were allowed into the deceased's compound.)

CROSS-EXAMINATION *continued.* At the time I went to the deceased's house everyone had been taken to the hospital by the Police. I went to the scene with Mr. Perkins the A.S.P.—later on. The Inspector was at the scene holding the inquiry when I got there with Mr. Perkins.

RE-EXAMINATION. Nil.

No. 8.

L. B. Warnasooriya (recalled).

L. B. WARNASOORIYA, recalled by Court, re-affirmed.

(To COURT) : I was the first Senior Police Officer at the scene. I went there with S. I. Gunasekera and P.C. 883 Dharmaratne. The last witness came later with Mr. Perkins the A.S.P. Between 10.20 a.m. and 12.50 I found the productions the wadding etcetera on the deceased's compound. The witness Abeyesekera came on to the deceased's compound as I was entering it and he was turned back. Having arrested the accused I came up to the deceased's compound and then Abeyesekera was turned back immediately with the child. He was not allowed to tamper with anything.

Proctor for the accused states he does not wish to put any questions to the witness.

No. 8a.

W. R. Chanmugam.

W. R. CHANMUGAM, sworn, Government Analyst, Colombo.

I visited the scene of this offence on the 30th of July, sometime in the morning. I have no record of the actual time. The scene was guarded when I went there. I examined the scene myself and I found the cartridge P35 somewhere near the spot N. It was behind the deceased's house.

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Prosecution Evidence.

No. 8a. W. R. Chanmugam, 28th August, 1951. Examination—*continued.*

I was there when some of the waddings were found just between N and K the orange tree. We were looking for these at that spot. On the 21st of August last year I received certain productions in this case. They were brought to me by P.C. 5035 Tissera. There were 7 parcels, marked A to G respectively and they were sealed with the seal of the Minor Badulla Court and the seals were all intact. Parcel A contained P1, parcel B contained the productions P2 to P14 parcel C contained productions P15 to P29, parcel D contained P30, parcel E contained P31, parcel F contained the productions P32 to P37 and P42 and parcel ' C ' contained P43 the sword.

P1 was one 16 bore S.B.B.L. gun bearing No. 477547, P2 consisted of six pieces of cardboard wadding P3—two felt waddings and a cardboard wadding P4—10 cardboard waddings and a felt wad, P5, two pellets, P6—one pellet, P7—one blood stained twig, P8—dried blood stained jak leaf. P9—two empty 16 bore Eley Kynoch cartridges, P10—one chewed empty 16 bore Eley Kynoch cartridge, P11—one empty 16 bore Eley Kynoch cartridge, P12—One empty 16 bore Eley Kynoch cartridge, P13—one empty 16 bore Eley Kynoch cartridge—P14—three pieces cardboard wadding, P15—one blood stained kitchenknife, P16—one pellet, P17—one green taffeta jacket, P18—one blue bodice, P19—one flowered petticoat with pellet marks, P20—one flowered cloth with pellet marks, P21—one felt wad and one cardboard wadding, P22—one pellet, P23—three pieces wadding. P24—three pellets P25—one blood stained shirt, P26—one petticoat, P29 one brown striped shirt with pellet marks, P30—one stump or orange tree with pellet marks, P31—one dried bamboo branch with pellet marks, P32—one cardboard wadding with the figure 2 and the word ' Buck.' P33—one cardboard wadding, P34—one cardboard wadding with the figure 2 and the word ' Buck ' and another piece of cardboard wadding, P35—one sixteen bore empty Eley Kynoch cartridge, P36—one card board wadding, P37 five pellets, P42—two pellets and P43—a sword.

On examining the barrel of P1 traces of spent smokeless powder residues were identified in it. It was not found possible, however, to state when P1 was last fired. The gun had not been cleaned since last fired. In regard to the spent cartridges P9 to P13 and P35, the marks on these were compared with experimental rounds fired from P1 and were found to agree with them. I produce an enlarged photograph-micro, P52, showing the comparison marks on one of the spent cartridges in P9 with those on one of the experimental rounds fired from P1. I am of opinion that the spent cartridges P9 to P13 and P35 were all fired from the 16 bore S.B.L. gun P1. I took the photomicrograph myself. The distorted metal slugs in P5, P6, P16, P24 and P37 x correspond in weight, size and type to standard S.S.G. Slugs from factory loaded cartridges used in breach loading guns. S.S.G are a heavy type of slug. The heaviest is S.G. and then S.S.G. There are about 13 pellets in an S.S.G. cartridge. The waddings P2, P3, P4, P14, P21, P23, P32, P33, P34 and P36 are all 16 bore in size and of the type found in a standard 16 bore Eley Kynoch cartridge. The shot impressions on one of the pieces of wadding in P2 indicated to me that it came from a cartridge loaded with No. 4 shot, and the impressions on some of the

wadding in P4, P21, P32, P33, P34 and P36 indicated to me that they came from cartridges loaded with S.S.G. slugs. In regard to the silk jacket P27 and the petticoat P28, they had characteristic tears and holes made by a gun shot. I found human blood on P27 and P28. I found human blood on the twig P7.

(To COURT: I cannot say from what tree P7 came. It was a tiny branch with one leaf.)

EXAMINATION-IN-CHIEF *continued.* An examination of the four marks in the areas marked n red by me on P30 indicated that they had the characteristic appearance of having been caused by medium-sized slugs such as S.S.G. slugs. An examination of the area marked in red by me on P31 revealed that it had the characteristic appearance of having been caused by a medium-sized slug such as a S.S.G. slug. P31 is a branch of the bamboo tree at X. There was a spread of 12 inches as deposed to by the Medical officer who conducted the post mortem examination on the deceased Kumarihamy and that spread can be produced by a minimum range of about 40 feet. That is from the muzzle end of the gun to the target.

(To COURT: I was present when the doctor gave evidence and for the purpose of my experiments it was on the basis of that evidence that I carried out my experiments.)

EXAMINATION-IN-CHIEF *continued.* I was following the evidence and I examined the scene. The deceased is alleged to have fallen at the spot J on the sketch. The assailant must therefore have been within a minimum of 40 feet. The shot that killed her could not have been fired from the accused's compound because you cannot get a direct view of J.

(To COURT: I examined the accused's compound. There was no place from the accused's compound or from his house from which a person could have shot a person standing at J or near J because I am taking into consideration the pellet marks that were found near the orange tree near K and those marks were on a particular side. So if you took the line of fire as somewhere near J, she might have fallen a few feet from J and take the orange tree and draw a line, the line would have been somewhere in this direction—witness indicates on the sketch. From my examination of the scene and my knowledge of Ballistics I say the line of fire is one which passes through the orange tree K and a spot at or near J.)

EXAMINATION-IN-CHIEF *continued.* The assailant must have stood at a minimum distance of 40 feet There are 13 pellets in a S.S.G. and according to the doctor's post mortem report she has received only 8 entrance wounds—so five pellets must have missed her. That is why I am unable to give the maximum distance. If all thirteen pellets had hit her then you can positively say what the maximum distance would have been. The portion of the body where she received the injuries presents a small target. Owing to the nature of the terrain there it was not possible to have shot from here right up to that distance. In this case some of the pellets have found an exit. The penetrating power of a pellet would depend, especially

In the Supreme Court.

Prosecution Evidence.

No. 8a. W. R. Channmugam, 28th August, 1951. Examination—*continued.*

with regard to factory loaded cartridges on the age of the cartridge. With a batch of fresh cartridges an S.S.G. would have a fair penetrating power up to about 70 to 80 feet. If they are old then at 30 to 35 feet they may not have any penetrating power at all in fact much less than that. At 70 feet the spread would be considerable but we are only taking the arc of a circle here and not a full circle. At 70 feet you will get a spread of nearly 35 to 40 inches. The shot could have been fired from anything between 70 and 45 feet. I did not take into consideration whether there was a line of fire at 70 feet.

(To COURT: Owing to the insufficiency of data in working out the maximum range of fire, particularly as the target area was small, even if the range was 70 feet, then I can account for the fact that there were entrance as well as exit wounds in some case—that it may have been a range of 70 feet but not more than that and necessarily less than that if the cartridges were not fairly new. It is by reference to the penetrating power that I would give 70 feet as the maximum if these cartridges were brand new. On this basis the firing must have taken place from well within the deceased's compound. I did not take this into consideration because the nature of the terrain may have been such that it would not have been possible at 70 feet. Even with brand new cartridges the person firing would have to be well within the deceased's compound, according to the plan. A circle with a radius of 7 inches from the spot J would be just within the deceased's compound.

EXAMINATION-IN-CHIEF *continued.* The land from the deceased's house to the accused's house is sloping slightly and undulating and there are trees in the compound. The spot J is not visible from the accused's compound. The shot could not have been fired from nearer than 40 feet unless they were old cartridges. I am referring to this particular case. In this case it would have been 40 feet.

(To COURT: The deceased Kumarihamy could not have been on the basement which was meant as a foundation at the time she was shot. The angle of fire was more or less horizontal according to the medical evidence—if both were standing. The accused's compound was very much lower. If the accused and the deceased were standing I would expect them both to be standing at very much the same level. Round about the spot J there is a very slight gradient. It is more or less flat. Photograph No. 4 gives a fair indication of the gradient of the land there.)

EXAMINATION-IN-CHIEF *continued.* I saw pellet marks on the bamboo branch. P31 could have been in the line of fire between Cyril and a person who was standing in the accused's compound.

(To COURT: Taking the line of fire which joins R and X, if a person was standing in that line of fire it was quite impossible for that person to have shot the deceased if she was standing near J. Even having regard to the angle of fire as indicated by the medical evidence, I think that apart from the question of the terrain or visibility, a person standing within the

accused's compound must necessarily have been standing on ground which was too low to cause the injuries discovered on the deceased Kumarihamy's body.)

In the Supreme Court.

Prosecution Evidence.

No. 8a. W. R. Chanmugam, 28th August, 1951. Cross-examination.

CROSS-EXAMINATION. Three cartridges and wadding were found in the accused's compound.

Q. Knowing as you do the injuries sustained by the various people in this incident, can you tell us how many of these cartridges had been used from the accused's compound ?—*A.* I can definitely account for one and that is presumably the one which got Cyril. It must have been from his compound. That is definitely from the accused's compound.

Q. You notice a cartridge was found at " f " marked P12. Can you tell us if the assailant was at " f " whether any of these injuries could have been inflicted by him on the deceased Kumarihamy or any other person ? —*A.* A shot fired at " f " could have produced those injuries on Walter, because that was spread shot. Walter was practically plastered from behind so he may have got a small portion of the shot which was fired from " f." From J to " f " according to the plan would be about 10 inches and the scale being ten feet to an inch the distance would be 100 feet. I have not explored the possibilities of whether there is any visibility from f " to J at all, and secondly " f " is on a lower elevation than J, and a person firing from " f " at a person at J is necessarily bound to shoot holding the gun upwards but according to the medical evidence the shots the deceased Kumarihamy received were more or less horizontal. There was a very clean and well-swept compound in front of this house which was definitely four to five feet below this place. I do not know what the terrain is like on the right of the accused's compound. (Witness referred to photograph No. 7) This shows the terrain round the accused's compound. At a distance of 100 feet there would be a spread of roughly 40 to 50 inches. From a distance of 100 feet I do not know what trees and other things would have been there in which case there would have been marks of this spread. At 100 feet the spread would be at least five feet —so a shot fired from here would hit something unless you had a very clear view. At a distance of 100 feet you cannot get 8 entrance wounds from a cartridge of the type used on a person's body in the area of the body which was presented. 8 out of the 13 pellets have struck the body. The spread at 100 feet would be nearly five feet. The angle varies according to the angle at which the target is presented. There was a live fence with a few gaps. The deceased's compound was on a higher elevation. The elevation was greater in front of the accused's compound and it tapered towards the right. Where the accused's house is the elevation is four or five feet. The compound below it was not so steep. From the point " f " downwards there was not that marked elevation.

Re-examination.

RE-EXAMINED. The spread of the shot would be about 4 to 5 ft. at 100 ft. At about 70 ft. the spread will be about 36 to 40 inches. The spread as described in the post mortem report is 12 inches. Shown the sketches in the post mortem report P38—That is the deceased's Kumarihamy's. The

In the Supreme Court.

Prosecution Evidence.

No. 8a. W. R. Chanmugam, 28th August, 1951. Re-examination—*continued.*

doctor has taken the measurements from here to here shows. From what the doctor says the shot definitely is fired from an angle. So the target is the left. There is a concentration of 8 out of 13 shots in a small area. If you take these 13 shots and fire them at a target the 13 shots will be distributed. The concentration here of the 8 shots is more in a small circle than a large circle. About 40 ft. is the minimum and about 70 ft. is the maximum range.

There are 4 waddings in all these cartridges. There is the over-charge wadding right in front which gives us the size of the cartridge and the maker's name. Then you have two waddings flanking what is known as the felt wadding. This over-charge wadding which bears the number will always be found within 6 ft. from the muzzle end of the gun and the other two cardboard waddings will be found anywhere beyond 6 ft. up to 10 ft. whereas the other wadding will go up to 40 ft. so that there is a regular sequence to where these waddings would drop.

(Crown Counsel states that in Kumarihamy's case the waddings found nearest to Kumarihamy were at points Q ; L ; M and O and mentions that P34 shown was found at Q, P32 at L—shown—P33 shown was found at M and P23—shown was found at O.)

P32 found at L is the portion of a cardboard wadding which might be found at a distance up to 20 to 25 ft. away. P33 found at M is an improvised thing for a felt wadding and I would expect to find it 25 ft. away from the place of firing. P23 is a portion of a cardboard wadding and the man who fired the gun was about 20 ft. behind provided there was no strong wind blowing that diverted it.

I remember the evidence about the pieces of waddings found inside the house.

Defence counsel states : We were confining ourselves to the waddings found outside and not inside.

(To Court : I am aware that waddings were found inside the house or in various portions where the deceased's house was. If all these pieces of waddings were shot by the same man I am strongly of the opinion that some shooting must have taken place from the accused's compound, and some from deceased's compound.)

Re-examined (with permission). —shown P3. That is the felt wadding and that would go up to about even 50 ft.

Shown P2. P2 would go up to about 10 ft. beyond the muzzle end—shown P4—P4 is so fragmented that it has hit an object I do not know whether it hit the deceased or any of the articles that might have been there. P4 found inside the house indicates that the shot had been fired into the house unless it was placed there by some one.

(To Court : This was a single barrel gun and after firing each shot it had to be unloaded and reloaded.

Q. So that unless the spent cartridges found in any particular place had been introduced by somebody else, it would indicate that the firing had taken place fairly near the spot where the cartridges were found ?—That is so.)

No. 9.

W. D. J. De Alwis.

In the Supreme Court.

Prosecution Evidence.

No. 9. W. D. J. De Alwis, 28th August, 1951. Examination.

W. D. J. DE ALWIS, affirmed. P.C. 1910. C.I.D. Photographer, Colombo.

On 30.7.50 I visited the scene of this incident and took certain photographs of the scene under the supervision of Inspector Warnasooriya and the Government Analyst. I produce marked P54A the photograph showing the front view of deceased's house ; also another photograph P54B of the front view of deceased's house showing the body of the deceased L. C. W. Samaranayake as indicated by pillows.

I also produce another photograph P54C showing a side view of deceased's house and the body of deceased Kumarihamy as indicated by a cross. I also produce another photograph marked P54D showing the back garden of deceased's house and the orange tree with pellet marks and the position of the body of deceased Kumarihamy.

(To COURT : The house in the distance is deceased's house.)

EXAMINED *contd.* I also produce another photograph P54E showing the back garden of deceased's house and the body of deceased Cyril indicated by a pillow and red " B." In the next photograph marked P54F is shown the body of deceased Cyril with a pillow and red " B " and the accused's house. I produce P54G a photograph showing the rear view of deceased's house from the accused's compound and the bamboo branch with pellet marks. I produce P54H another photograph showing the front view of accused's house and the damaged picture-frames as indicated by the flash of the torch. I myself developed the photographs and printed them.

CROSS-EXAMINED. Nil.

No. 10.

K. Thambipillai.

No. 10. K. Thambipillai, 28th August, 1951. Examination.

K. THAMBIPILLAI, affirmed. P.C. 2120 Badulla Police.

I visited the scene of this incident and prepared 3 sets of sketches which I produce marked Sk1—sk 8 ; Sk1A to 8A and Sk1B to 8B. The spots on the sketches were shown to me by the various witnesses. In the first sketch A is the spot where deceased L. C. W. Samaranayake was found and the spot where the felt wad P21 and another card board was found. B is where the cartridge P11 was found. J is where deceased Kumarihamy was found. K is the orange tree P30. L is the spot where the card board wad P32 was found. M is the spot where the cardboard wad P33 was found.

In the Supreme Court.

Prosecution Evidence.

No. 10. K. Thambipillai, 28th August, 1951. Examination—*continued.*

N is the spot where the cartridge P35 was found. O is the spot where 3 cardboard waddings P22 were found. Q is where the cardboard wad P34 and another cardboard wad were found. R is the spot where the deceased Cyril Samaranayake was found. S is the cadju tree. T is where the empty cartridge P13 was found. U is where the cardboard wad P14 was found. The rectangle indicates the spot where 6 cardboard waddings P2 were found. X is the spot where the bamboo branch with pellet marks P31 was found. Y is in the jak tree where the bag of grass P45 was found. Z is the spot where the cardboard wad P36 was found. f is where the cartridge P12 was found. W is the cotton tree. b is the spot where witness J. M. Muttu Banda was when he saw the first accused fire at deceased Kumarihamy and L. C. W. Samaranayake according to witness Muttubanda. e is the spot from where witness Kiribanda and witness Walter Samaranayake saw the 1st accused firing at deceased Kumarihamy. g is the spot where deceased Kumarihamy was when she was shot at by the accused according to witnesses Mutubanda and Walter Samaranayake. j is the spot where Walter Samaranayake was when he was first shot at and k is the spot where he was when he was shot at the second time. n is the spot where Walter Samaranayake was when he was shot at on the 3rd occasion. p is the spot where accused was when he shot at Walter Samaranayake the 3rd time accrording to this witness. q is the spot where deceased L. C. W. Samaranayake was when he was shot at by accused according to witnesses Mutu Banda and Kiri Banda. r is the spot where accused was when he fired at L. C. W. Samaranayake according to witnesses Mutubanda and Kiribanda. s is the spot from where accused fired at deceased Kumarihamy according to Kiribanda. t is the spot from where witness Kiribanda saw accused fire at deceased Kumarihamy and L. C. Samaranayake. y is the place where the dried blood stained twig P7 and the dried blood stained leaf P8 were found. z is where the pepper creeper was found.

O to K is 7½ ft.; S to R is 16 ft.; T to S is 11 ft.; U to W is 92 ft.; A to the rectangle i.e. the cardboard wadding is 3 ft.; K to Y is 32 ft.; U to J is 48 ft.; J to the right corner of the retaining wall is 8 ft.; I have not taken any measurements from J to the accused's compound. The sketch is drawn to a scale of 10 ft. to an inch. U to R is 35 ft.; Z to J is 38 ft.; X to Z is 3 ft. 3 ins.; T to J is 17 ft.; N to Q is 25 ft. E to G is 15 ft. b to g is 139 ft. J to R is 13 ft. k to g is 13 ft. W to K is 25 ft. n to p is 25 ft. b to r is 155 ft. r to t is 141 ft. O to J is 13 ft. M to K is 7 ft. R to T is 6 ft. U to R is 33 ft. B to A is 7 ft. L to R is 24 ft. W to Y is 23 ft. j to x is 40 ft. X to R is 27 ft. Z to R is 26 ft. X to f is 21 ft. 8 ins. R to Q is 19 ft. e to K is 7 ft. b to e is 137 ft. R to e is 43 ft. s to j is 29 ft. W to Y is 23 ft. R to m is 65 ft. K to p is 9 ft. s to t is 196 ft. y to J is 10 ft.

N to the rear left corner of deceased's house is 12 ft.

S to the boundary fence between deceased's garden and accused's garden is 6 ft.

R to the left corner of accused's house is 34 ft.
B to front wall of deceased's house is 6 ft.
From the first piece of wadding P2 to the last piece of wadding of P2 is 12 ft.
The height of the retaining wall, i.e. the foundation, is 4 ft. 8 ins.
J to the right corner of retaining wall is 8 ft.
X to the boundary fence is 3 ft. 7 ins.
X to the left front corner of accused's house is 16 ft. 8 ins.
U to the corner of accused's house is 3 ft.
Q to the front door step of deceased's house is 5 ft.
From accused's house to deceased's house is 81 ft.
z to the end of the footpath is 43 ft.

In regard to the sketch showing the deceased's house, F is the spot where the pellet P6 was found; G is the spot where the deceased Kamalawathie was found lying; H is the spot where the camp cot P46 was found and on which five pellets P37 and the blood stained pillow P50 were found.

J is the spot where the bed on which the injured boy Walter Samaranayake was found lying and on which the mat P47 and the pillows P48 and P49 were found.

K is the spot where the shirt P29 was found with blood stains and pellet marks.

L is the spot where the two cardboard waddings and the felt wad P3 were found.

The triangles indicate the places where the waddings P4 were found. From the first to the last triangle is 10 ft.

In regard to the sketch of the accused's house; B is the wall on which the picture frame P67 was hanging.

C is the room in which 3 stones P63 were found.

D is the front verandah where 4 stones P64 were found.

E is the front compound where P60 a large number of stones were found.

F is the side compound where 4 stones P64 were found.

G is the spot from where accused took the gun P1 according to the Inspector.

H is the spot where 2 empty cartridges P9 were found.

I affirm to the accuracy of the sketches.

CROSS-EXAMINED. Nil.

Court adjourns for the day. 1.20 p.m.

In the Supreme Court.

Prosecution Evidence.

No. 11.
L. B. Warnasooriya, 29th August, 1951 (recalled).

No. 11.

L. B. Warnasooriya (recalled).

29.8.51. 9.30 a.m.

Crown Counsel moves to recall the Inspector.

Inspector WARNASOORIYA, recalled. Re-affirmed.

To CROWN COUNSEL : Yesterday I referred to the orange tree at K on the large sketch. I found pellet marks on that tree. I cut off that portion of the orange tree and I produce it marked P30.

The lowest pellet mark was 2′ 3″ from the ground and the highest pellet mark was 3′ from the ground.

Defence PROCTOR : No questions. 10

To COURT : I first met the witness Muttu Banda at the scene when he came forward as a witness upon the A.S.P. addressing the crowd, but on my way to the scene I remember a car proceeding towards Badulla stopping as if some one wants to speak to me. I asked them to turn back. I cannot say whether he was in that car

To CROWN COUNSEL : I recorded Muttu Banda's statement at 2 p.m.

Crown Counsel moves to have read in evidence :

(1) the deposition of A.C.M. Sheriff, record keeper, M.C. Badulla

(2) the deposition of W. M. A. Tissera, P.C. 5035, Badulla 20

(3) the statement of the accused before the Magistrate.

Read by Clerk of Assize.

CROWN COUNSEL CLOSES HIS CASE.

The Jury retires on the direction of the Court.

COURT : Mr. Crown Counsel, I do not know whether you wish to refer to this one point. I notice that in cross-examination the Inspector admitted that Walter Samaranayake made no mention in his statement to the Inspector that any stones were thrown at him, and it was suggested to Walter that his evidence that stones were thrown was a complete afterthought. I take it that if statements are put in on the ground of 30 inconsistency, they are also admissible to prove that the witness made a consistent statement on the same point. I say that because I see that Walter Samaranayake did in fact refer to stones in his dying deposition to the Magistrate. Crown Counsel states that the particular section under which a dying deposition could be admitted does not catch up this statement.

DEFENCE EVIDENCE.

No. 12.

S. N. K. Agnes Nona.

S. N. K. AGNES NONA, affirmed, 50 years ; wife of accused.

Bogahamaditta. I am now residing at Dehigahawatte and I have been there for about 30 to 35 years. I was born on that land. After my marriage I went and lived in the town area and my father continued to live on that land. My father fell ill and we returned to that land. My father died and we got possession of that land. That was 35 years ago. In 1936 the deceased purchased the land on which we lived at the time of this incident from my mother and younger sister. That is the land Bogahawatte. The land which the deceased bought and the land on which we lived originally formed part of one land. Though the deceased bought that and my son lived in the house. The deceased then filed a case on 10.10.46 in the District Court of Badulla, case No. 8333, against me, my husband and my son for ejectment. In my answer I claimed Rs. 1600/– being the value of improvements effected to the land. The case was settled on my being awarded Rs. 500/–. The decree was on 22.7.47. The deceased paid that money after 3 months. From that time the deceased's family and our family have not been on good terms. During the period 1946 to 1950 there were no less than 7 cases between the deceased's family and our family. On 2.6.48 I filed a case in the Magistrate's Court of Badulla against L. C. W. Samaranayake, Walter Samaranayake and William Singho accusing them of having committed criminal intimidation on me. On 16.3.49 my proctor withdrew that case in view of the orders made in other cases. On 2.6.48 in case No. 6315 of the Magistrate's Court of Badulla the Police filed a case against L. C. W. Samaranayake for having exposed his person in an indecent manner to my annoyance. On 16.3.49 that case too was withdrawn in view of the orders, made in M. C. Badulla cases Nos. 6147 and 6109. On 14.4.48 there was a serious incident between our family and the deceased's family. The deceased's people came on to our land and created trouble on that occasion. On that occasion my husband sustained a serious injury on the head and some injuries on his back and shoulder, and my son received a knife injury on his forehead. This incident took place in our compound.

Q. In the course of the fight L. C. W. Samaranayake too sustained an injury ?—*A.* I do not know how that happened.

Then the Police filed case No. 6109 against L. C. W. Samaranayake and another case against my husband and one Handy Singho. Those were the two cases that were ultimately settled. In view of the settlement in those cases all the other cases were withdrawn.

(In answer to His Lordship Mr. Ranasingha states that his instructions are that those cases were filed on 17.4.48.) As a result of that injury

In the Supreme Court.

Defence Evidence.

No. 12. S. N. K. Agnes Nona, 29th August, 1951. Examination—*continued.*

my husband was in hospital for 26 days. After he was discharged from hospital he continued to take treatment from the dispensary. In all, he took treatment for about 2½ months. That injury was about 1 or 1½" in depth. Some cotton had to be embedded into it. My husband is about 65 years of age.

Q. As a result of this head injury did you notice any change in his temperament ?—*A.* There were moments when he was not in his proper senses, and he was suffering from piles.

My husband is a bit short of hearing.

Q. What do you mean when you say he was at times not in his proper senses ?—*A.* There were moments when he showed restlessness and excitement.

Q. How was he in his behaviour towards you ?—*A.* At times he used to quarrel with me. When I spoke good of him he got angry at times. When I spoke bad of him too he got angry.

Q. Was he very irritable ?—*A.* All that happened after that injury.

Subsequent to this, my husband was again in hospital for 6 or 8 days as a result of a slap received in the course of an attack made upon him by L. C. W. Samaranayake and his two sons who were coming from Badulla. I do not know the actual date of that incident but that was also settled with the other cases I have already mentioned. As a result of injuries caused to me by L. C. W. Samaranayake, Walter and Cyril I had to be in hospital for 6 days. I was injured on the forehead as a result of stones being pelted. On 18.9.48 the Police filed case M. C. Badulla No. 7018 charging Walter, L. C. W. Samaranayake, and another with having pelted stones at my house and damaging the tiles.

To COURT : *Q.* Was anyone prosecuted for assaulting you ?—*A.* May have been charged but I cannot remember, I was injured as a result of the stone throwing.

On 21.3.49 that case was compounded and the accused were discharged. I have made several complaints to the headman and to the Police against L. C. W. Samaranayake and his family. In July 1948 the deceased L. C. W. Samaranayake blocked the path that we had been using for years. My husband filed a case in the Rural Court of Badulla in October 1948 complaining that on 14.10.48 about 4 p.m. the road had been blocked. Prior to that I had made representations to the Government Agent and to the D.R.O. My husband is a carpenter. He has worked for the Government Agent, the District Judge and other people. In the Rural Court case my husband was referred to a competent court as the Rural Court had no jurisdiction where a right of way was concerned. That was on 15.2.49. After that my husband did not go to a competent court.

Q. You had to give up that right of way ?—*A.* We did not give up that right of way.

We were contemplating filing an action regarding that when all these troubles that were then pending were over. At the time of this incident we used to go across the river and along the railway line. That was a long and circuitous route. After October 1948 we were prevented from using

the right of way which goes past the deceased's house. Until the time of this incident my husband continued to do his carpentry work. Mr. Holmes, Government Agent, Badulla, visited my house in the company of his wife and children to inspect some articles of furniture that had been made by my husband. They came to my house across the deceased's land by avoiding the brambles and thorns that had been put to obstruct the path. There is a well in our land. From the time we were prevented from using that road we started using that well. That well is actually in our compound. We are not using that well now. The deceased's family filled up the well with dirt and rubbish and removed the rope and pulley and we had to get water from the Badulla Oya after that. In order to do that we had to go about ½ mile. On the day of this incident my daughter Anulawathie Perera, her two children, Banda, a servant and my husband left for a bathe. My husband went to look after the children while the others bathed. I was having fever and I took my medicine. I got out into the compound to be in the sun. I heard the sound of something falling. I looked in that direction and saw Cyril Samaranayake on the jak tree plucking fruits. That jak tree is in our compound. Walter Samaranayake was at the foot of the tree. Having plucked the jak fruit Cyril cut the pepper creepers on the tree and Walter was pulling those creepers down. The pepper creepers were on the jak tree. I went a short distance towards them and asked them as to why they were cutting the pepper creepers and pulling them down and I asked them to go away. This jak tree is near the boundary of the land. Then L. C. W. Samaranayake came up to the boundary of his land and asked me what business I had to question them. Kumarihamy was also there. They abused me using the word " tho." Samaranayake and his wife told the sons to pelt stones at me. By that time Cyril had come down the tree. They pelted stones. I am unable to say who pelted stones but it was Walter and Cyril who pelted stones. I went into the house and remained with my son's child. They continued to pelt stones after I went into the house. No stone caught me—I rushed inside. I addressed Walter and Cyril when I was at a spot about 7 feet away from the entrance to my house. After a short while the noise of the pelting ceased. My husband and others had not returned yet. Servant Bande came with water before the others. I did not tell him anything. He left to get some more water. He went on his own. I did not send him back. A short while later Bande and the accused came. Before that I heard voices, " There the costaya is coming " He is the fellow we want." They abused in filthy words and restarted pelting stones. Accused came into the house running from the back. Pelting of stones increased. The children started crying. The accused took the gun. I worshipped him and asked him not to take the gun and shoot. He told me, " No, don't be afraid. I am only going to shoot " into the air to frighten them." The accused pointing the gun into the air fired a shot. He was standing in the verandah of his house then. The abuse increased. The deceased's party said, " We are not going to get " afraid of a piece of piping fixed on to a piece of wood. I will eat you."

In the Supreme Court.

Defence Evidence.

No. 12. S. N. K. Agnes Nona, 29th August, 1951. Examination—*continued.*

The accused then kept the gun in the corner of the house. The deceased's party came on to our compound and pelted stones. I saw that.

(To Court: The people who entered our compounds were Cyril and Walter.)

I heard the picture frame breaking. When the stones were being thrown the children were in the house shouting. I went to the kitchen side and I heard the splinters of the picture frame falling to the ground. At that time my husband was also in the kitchen with me and the children. When I heard the splinters of the frame falling I went up and looked and then I saw Cyril and Walter in our compound.

(To Court: When I saw Cyril and Walter I saw the deceased Kumarihamy, Nandawathie and Kamalawathie on the boundary, and I saw L. C. W. Samaranayake coming up with a knife and with his sarong tucked up.)

I saw them coming up when I was inside the house and looking. I was frightened of the stones and I did not get out. When I saw these people coming the accused had rushed out and I heard the firing of shots. I heard 3 or 4 shots. I did not go out.

(To Court: When the firing started the abuse and the stone throwing stopped. I did not see the accused going out with the gun.)

Then, the accused came to the house, left the gun on the table and asked for some water from the children. It was then that I saw the accused. After that the accused was seated on a bench till the police came. I produce marked D1, certified copy of proceedings in D. C. Badulla case No. 8333, D2, certified copy of proceedings in M.C. Badulla case No. 6316, D3, certified copy of proceedings in M.C. Badulla case No. 6315, D4, certified copy of proceedings in M.C. Badulla case No. 7018 and D5, certified copy of proceedings in Rural Court Badulla case No. 1239.

Cross-examination.

Cross-examined. The cases that were brought by me and the accused were against Samaranayake, Walter and Abeyasekera. Those cases brought charges of criminal intimidation and causing hurt. I did not bring any charge of criminal trespass against them. I did not bring any case against Kamalawathie, Kumarihamy or Nandawathie. We had implicated Cyril also along with his father, brother and brother-in-law. There were 2 or 3 cases against Cyril also. After the cases were settled in March 1949, there were no other cases. I do not know whether the police moved to bind over both parties. The two proctors on either side and the Inspector settled the police case and in consequence of that all the other pending cases were settled.

Q. After the settlement of those cases did Samaranayake make any complaint to the Village Headman against the accused?—*A.* I do not know that. There was no such complaint against me. After the settlement of the cases the next incident was this shooting incident. Samaranayake bought the land from my mother and sister. I was not opposed to their selling the land, and in fact, I was not aware of the sale. After the land

was purchased Samaranayake brought an action to get possession and we claimed compensation. It was not after the settlement of the cases that Samaranayake went into occupation of the land.

(To COURT: In the case brought by Samaranayake he was given possession and asked to give compensation to us). After the compensation was paid the dispute between the accused and Samaranayake was over the road which was blocked. About a year had elapsed since the road was blocked. The accused is a little hard of hearing.

(To COURT: The accused will not be able to hear what I am saying from the witness box).

The river to which my husband went this morning is about half a mile from our house. He went to the river at about 8 or 8.30 a.m. but I cannot say how long before the incident it was. The only inmates of the house at the time they had left for the river were myself and that little child who is about 2 or 2½ years old.

(To COURT: That was the child who was chewing the cartridge at the time the police came.)

The first thing I saw on this day was Cyril plucking a jak fruit from our tree which was on the boundary. That was the only day they came to pluck fruits from our tree. They did not claim that tree. We possessed that tree always. The deceased's people had never plucked fruits from that tree before this. It was said that fruits were plucked from the other trees also but I saw only one fruit being plucked. When the police came I do not know where that jak fruit was, but the people who came there said that there were other jak fruits plucked on the land and that jak fruits had been cut in their house.

(To COURT: By the time the accused came home from the river Cyril had come down the jak tree and he was abusing and throwing stones.)

I made a statement to the police. It was read and explained to me and I signed it.

Q. In that statement you did not refer to any jak fruits being plucked by Cyril ?—*A.* I cannot remember. I did not point out to the police any jak fruits because at that time there were no jak fruits. I do not know who had removed them. The accused fired only one shot into the air from the verandah. The other shots I heard were close by but I cannot say from where they were fired. From the sound of the shots I gathered that they were fired from close quarters. I heard 3 or 4 shots. All those shots were fired from the close vicinity of our house. I cannot remember having heard shots from a distance. The child was chewing the cartridge after the shooting.

(To COURT: Before the day of the shooting there were no empty cartridges in our compound or verandah.)

This gun was never used for 2 or 3 months before this incident. The accused did not bring any empty cartridges to the house when he returned after the shooting.

In the Supreme Court.

Defence Evidence.

No. 12.
S. N. K. Agnes Nona, 29th August, 1951.
Cross-examination—*continued.*

(To Court : When I saw the accused placing the gun on the table I did not see him bringing or having any live or empty cartridges.)

I did not see him taking any cartridges when he left the house. When he returned from the river I saw him loading the gun with a cartridge which he took from the drawer. There were other cartridges in that drawer but I do not know how many because he used to keep that drawer locked and he keeps the key with him. I did not see him taking any other cartridges from that drawer. I was frightened at that time and I was with the children. I did not see the accused going to the deceased's garden.

Q. Did you tell the police in your statement, " then my husband " chased after Samaranayake with the gun in the direction of " Samaranayake's house " ?

(Counsel for the accused objects to this statement that this does not relate to the death of the deceased Kumarihamy.)

(Court : It is led for the limited purpose of showing that the shooting of the deceased Kumarihamy took place from the deceased's garden. The question is allowed by Court.)

A. I may have said so to the police.

Q. If you have said so to the police would it be correct ?—*A.* I do not know. I did not say so. The accused rushed to our compound.

Q. Then, after that, did you tell the police in you statement " I lost sight of them " ?—*A.* I did not say that.

Q. Did you further say, " I then heard the report of a gun " ?—*A.* I said that.

Q. Then, is it correct to say that you heard the report of the gun from the deceased's compound ?—*A.* I cannot remember that.

After the accused came home from the river I saw Cyril and Walter. They were then on the mound. When I looked out on hearing the picture frame breaking I saw Cyril and Walter in our compound and the others were in the deceased's compound near a coconut tree. At that time the accused was in the house. The accused also rushed out when I looked on hearing the sound of the splinters of the picture frame falling. When the first shot was fired Cyril and Walter were not in our compound but on the mound near the coconut tree where the others were. All of them were throwing stones from there even after the first shot. The accused fired the second shot about a minute or two after the first shot. Between the first shot and the second shots there was no time for Kumarihamy and Kamalawathie to run into the house. I said that the accused had an injury on the head. There was a case over that and that was settled. It was a serious injury.

Q. Do you know that you cannot compound a grievous hurt case ?—*A.* I do not know that, but I can prove that it was a serious injury.

He was in hospital for 26 days as a result of that injury. After much appeal Mr. Blaze who appeared for them in that case settled the case.

Re-examined. Nil.

To COURT : I know the bull which belonged to the deceased's people. I did not see that bull that day. At the time of the incident the accused was a carpenter. At that time he was working for a gentleman on Atampitiya Estate. He did not do much work during that period. He did his work at home. The accused used to go out shooting hare and doves. Before the shooting he used to go out like that sometimes once a fortnight, sometimes twice a week, and sometimes once a month. Accused got a gun licence from the Government Agent on the 2nd December, 1949. At that time he was fit enough to go out shooting birds and hare. That was after he returned from the hospital after he was cured of that head injury. Though he went out shooting sometimes he did not bring any game home.

No. 13.

H. M. Kalu Banda.

29th August, 1951. 11.30 a.m.

H. M. KALU BANDA. Affirmed.

Village Headman, Dikwella.

The accused lives in my Wasama.

Q. Now is he a man of good character ?—*A.* Except that he has had cases he had not been implicated for any other thing. The only cases he had were with those Samaranayake people.

Yes he has made several complaints to me against the Samaranayakas. The last complaint he made against them was on the 14th of July, 1948 and it was in regard to the obstruction of the right of way. After that he has not made any complaints. The accused's wife has done so.

(To COURT : I have recorded those complaints.)

EXAMINATION-IN-CHIEF *continued.* The complaints were that Samaranayake and his children, five in all, were pelting stones.

(To COURT : The date of that last complaint was the 1st of May, 1948. That was her last complaint. Yes it was earlier than the accused's last complaint to me.)

EXAMINATION-IN-CHIEF *continued.* Prior to that no complaints had been made to me but complaint had been made to the Police. I know the road from the Badulla road leading to the accused's house past the deceased's house. I know there was a Rural Court case. I gave evidence.

In the Supreme Court.

Defence Evidence.

No. 13.
H. M. Kalu Banda, 29th August, 1951.
Examination — *continued.*

I deposed to the fact that the roadway had been used by the accused's people for the past 30 years.

(To COURT : I know there was a civil case about the land and a decree was entered in that case—subject to paying compensation in a sum of Rs. 500/– to the accused and his wife, Samaranayake was declared the owner of the land and the plantation. I do not know whether that decree reserved no right of way to the accused or any member of his family.)

EXAMINATION-IN-CHIEF *continued.* After the Rural Court case I have seen the accused taking a path through a tea estate. It is a much longer and more circuitous route than the other which was a direct one. When going through the tea estate the accused has to pass Tombs on his way. Before the closing of this path the accused took his water from a spout which is on the other side of the cart road. Since the closing of the path they say they bring water from the river which is about half a mile from his house. There is a well on the boundary between the accused's and the deceased's land. That well is not being used by the accused's people. Leaves and other rubbish had fallen into that well and it was abandoned.

(To COURT : I know personally that the accused was in hospital on two occasions, as a result of receiving injuries.)

I do not know whether the accused's wife was also in hospital, with injuries. I do not know that the accused charged one B. M. Perera in the Rural Court over this right of way and got him fined.

Cross-examination.

CROSS-EXAMINATION. I received only two complaints—one from the accused and the other from his wife. Yes I held an inquiry regarding these complaints. No cases were filed as a result. They were trivial complaints and I asked the parties to live in peace. I have to issue a serial report in respect of a serious crime like grievous hurt.

(To COURT : I received no complaint in regard to injuries received by the accused as a result of which he was in hospital.)

CROSS-EXAMINATION *continued.* Even if the Police received a complaint in regard to a case of grievous hurt the Police asked me to send a serial report. I received no such information from the Police to send them a serial report. I did not see the accused in hospital but I heard he was there in consequence of injuries received.

COURT : Does either side wish for summons on the Badulla hospital to get particulars of the dates on which the accused was in hospital ? I will so arrange it if the defence wishes it ?

Proctor RANASINGHE. If the prosecution disputes the fact that the accused was in hospital for any length of time.

CROWN COUNSEL. My learned friend has to prove the fact.

Re-examination—

RE-EXAMINATION. This is also a Police area and complaints go direct to the Police.

Q. Did you have occasion to make a report concerning Samaranayaka

to the Government Agent ?—*A.* No. A certain complaint of one Morias was referred to me and I had to make a report.

Q. In that report in what terms did you refer to Samaranayake ?—*A.* I said he was fairly rough man and of a certain type. That was I believe somewhere in 1949.

(To Court : When a man applies to the Government Agent for a gun licence the headman of the district has to issue a report. I knew that the accused owned a licensed gun but I do not know that he obtained a licence. If there is the renewal of a licence I do not have to report on each renewal.)

In the Supreme Court.

Defence Evidence.

No. 13. H. M. Kalu Banda, 29th August, 1951. Re-examination—*continued.*

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10 **No. 14.**

K. D. J. Perera.

No. 14. K. D. J. Perera, 29th August, 1951. Examination.

KUMARASINGHEGE DON JOHN PERERA, affirmed.

65, carpenter, Bogahamaditta.

I am the accused in this case. For the last six years I was having litigation with the deceased's family. There were a number of cases the records in some of which my wife produced in the witness-box today. I was twice in hospital—once with a head injury and then with an injury on my cheek as a result of my being assaulted by the deceased's people. My wife was also in hospital due to William Abeyasekera and others having
20 struck her on the forehead. My son was also in hospital. I have made several complaints to the Police and the Village headman against these people. Finally my road was blocked and I filed a case in the Rural Court, Badulla. I was referred to a more competent Court.

(To Court : After that there was no action filed in the District Court by either side. I fell ill and there was no way to file an action.)

Examination-in-Chief *continued.* Since I received that injury on my head (witness shows injury on top of his head) when I get angry something happens to me and get dazed and I do not know what happens to me thereafter. No sooner I am irritated I forget what happens thereafter.
30 On the 29th of July early in the morning I went somewhere. A short while after my morning tea my daughter Anulawathie was going for a bath and I accompanied her. The others in the house were my wife and my daughter-in-law who were both ill and they were sleeping in two of the rooms in the house. The smaller of my two grand children was at home and I took the elder grand child about 5 years of age, with me. We went to the river to bathe. My servant boy Banda went to fetch water. My daughter bathed and I was close-by.

In the Supreme Court.

Defence Evidence.

No. 14 K. D. J. Perera, 29th August, 1951. Examination—*continued.*

Q. Then what happened at the river ?—*A.* Till they finished their bathe I was cutting down some Rambuk with Banda. As that was being finished Banda took water home. At that stage those who were bathing had nearly finished their baths. As we were about to leave the river Banda came to the river and told me something and having heard that all of us went home. As we were going home Samaranayake, Walter, Cyril and the daughters and sons, all, including his wife and others, seeing me coming remarked " There Kos-attay—kotta—there that fellow is coming " and threw stones in the direction of our house as I was approaching the house. They were throwing stones in the direction of the house to which I was coming. I ran into the house and entered it from the kitchen side. Yes I did this to avoid the stones.

(To COURT : At that stage they were throwing stones from the mound just by our compound. Yes that is the boundary which is slightly above my compound.)

EXAMINATION-IN-CHIEF *continued.* They were pelting stones in such a way as if they were going to break down the house. In the course of this Cyril rushed into my compound and began to throw stones into the house.

(To COURT : I only noticed Cyril get into my compound. At that time I was inside the room.)

EXAMINATION-IN-CHIEF *continued.* While the stones were being thrown I was unable to move in any direction inside the house as the stones came from either side. I was dodging the stones inside the house. I had His Majesty's picture in front of my house and I heard a stone striking it and falling down and I looked at it and then my children were yelling out " Murder—here murder is being committed." This throwing of stones did not stop and I was unable to get out of the house. At that stage I had a certain feeling which I cannot describe. I had a gun by me. I loaded it with a cartridge and just fired for fun.

(To COURT : Yes one cartridge and I fired it into the air. I was inside my house at the time I did so.)

EXAMINATION-IN-CHIEF *continued.* In spite of that shot the throwing of stones did not cease but the thud of stones falling increased and I also heard the remark " You son of a whore, we are not frightened with that " piece of bamboo fixed on to a piece of wood." At that stage I heard some noise from above, in Samaranayake's land and I was then standing by a window inside my house, through which I could see Samaranayake with his sarong tucked up with a knife in hand, and Walter, coming up saying, " Take that fellow to eat that fellow." Walter at the time had a sword and seeing these people coming and Walter armed with a sword some kind of feeling came into me and I thought that no sooner they came that they would kill me and my two little grand-children will also be murdered. I was suddenly provoked and at the same time I felt serious danger to my life and I do not know what happened to me. Probably I lost control over myself and I do not know what happened at my hands or what I did I cannot now remember.

What I next remember is my being on a lounger in my house and waking up as if a man is becoming sober after being drunk. I asked for water.

Q. Now you are aware that in consequence of your shooting several deaths have occurred ?—*A.* Yes.

Q. Can you explain how you inflicted these shots ?—*A.* I am simply like this—witness makes a demonstration every time—owing to this I cannot remember.

Q. You have been for six years the victim of the deceased's people ?—*A.* Yes. Finally even my roadway was denied to me. These stones were falling on the zinc roof and made a big noise. The infants were crying and it was then that I lost control of myself. I was bringing up my eldest grand-child from its infancy.

CROSS-EXAMINATION. Yes, I gave my gun to the Inspector when he came and the licence also. Shown P59. This is that licence. I have been using this gun for over 20 years. Yes I went out shooting with this gun. I did so occasionally—once a day or once in two days. I did not go out of my garden shooting but I went round the garden very often shooting whatever I found there, such as hare and porcupine. Yes I went into the jungle also and only hare and small animals were found there. I cannot remember when I last went out shooting before this incident. I think I may have last gone out a week or a fortnight before the day of this incident. At the time of this incident I had 15 or 16 cartridges in my house. I had not counted them. Yes on the day of the incident prior to the shooting. I had No. 4 and S.G. cartridges. I did not have any S.S.G. cartridges. No, I am unable to say if I had any of them. The cartridges I had contained heavy shots. Whenever I ran short of cartridges and go to the bazaar once a week or once a fortnight or so I used to buy some. I last bought cartridges some months before this incident.

(To COURT : I use No. 4 and S.G's for shooting hare. I use the same for porcupine. I use the same kind of cartridges for birds also).

CROSS-EXAMINATION *continued.* Yes No. 4 shot. It is suitable for shooting birds. I never had S.S.G. cartridges. I had only No. 4 shot—shown P37. This type of slug—shown—was not in this type of cartridges but these cartridges contained smaller pellets. The only kind I had were of this kind—referring to the empty cartridge—i.e. No. 4 cartridges. I am not suggesting that the S.S.G. slugs which have been produced in this case have been introduced into the case. (Shown P9.) I say they are of this kind but No. 4 which are issued even for shooting dogs in the Badulla area. I refer to cartridges of this type which contain No. 4 shot. I cannot say what these cartridges P9 contained. These were No. 4 cartridges. I believe there were the letters S.G. or S.S.G. on top of the cartridges also .

(To COURT : With my 20 years experience of shooting I know what type of shot must be used for shooting birds and animals, but I normally bring No. 4 shot. Of this type the No. 4 cartridges I bought I think bore

In the Supreme Court.

Defence Evidence.

No. 14 K. D. J. Perera, 29th August, 1951. Cross-examination—*continued.*

the letters S.G. or S.S.G. also. I am so experienced with the gun that I can at night even hit the target I fire at and I can also repair guns.)

CROSS-EXAMINATION *continued.* Yes I know that S.G. cartridges are used for big game and so with S.S.G. I had even some cartridges which had bullets but I did not go out in search of big game. It was only after the incident that I realized what happened. While I was on the lounger I saw three or four live cartridges on the table itself. The Inspector and others took charge of those. There were I believe three or four which were taken. That morning I had 15 or 16 cartridges. I cannot now remember the number of cartridges I fired or what I did. Before the shooting I saw Kumarihamy as I was coming. They were all near the mount or bund in a group. That was the last time I remember seeing her and after that I do not know what happened. All the people there remarked "Take that fellow to eat, etc. etc." I am a bit short of hearing and I cannot say if Kumarihamy said anything at all. All of them were in a group. The adults, youths, young women and the children were there. All were throwing stones. I cannot definitely say that Kumarihamy herself threw stones but when I looked in that direction and found stones coming towards the house I took cover. When I took the gun the second time I cannot remember where Kumarihamy was.

(TO COURT: I can remember taking my gun the second time.)

CROSS-EXAMINATION *continued.* I may have taken the cartridges. They were on the table—in the drawer and I cannot remember how I took them. The drawer was not locked. It is left open. I cannot remember if I had any empty cartridges when I came. I am unable to say at what time the incident took place. We had tea at about 8 a.m. and went to the river and returned in about an hour. Even after the gun was fired stones were thrown. As I was in the corner of the room I could not see who threw those stones. In regard to Cyril I heard his voice pelting stones from the compound—the front compound of my house. It was difficult to see the people from where I was. At the time I fired the first shot into the air I saw Cyril only in the front compound of my house. I saw as if another was there. I cannot exactly remember who was there. Even after the first shot was fired Cyril threw stones into the house and he did so even before the first shot was fired. My servant boy Banda having come with me was in the house and I cannot say where exactly he was. My daughter and Banda must have been in hiding in the kitchen or somewhere.

Q. I suggest to you that a bull belonging to Walter and Cyril broke loose and came into your compound ?—*A.* I did not see a bull coming into my compound.

Q. Thereafter I suggest to you that the bull was taken back by the two boys ?—*A.* I did not see that being done.

Q. At that stage I suggest to you that Banda threw some stones at the bull which was being taken away by Walter and Cyril to their garden, and perhaps Walter and Cyril too threw stones ?—*A.* That is not so.

Q. At that stage you brought out the gun and shot Walter first and then Cyril ? . . . No.

Q. And thereafter you ran up to the house of deceased and shot the occupants of the house ? . . . I do not know what happened.

Q. I put it to you that you were fully aware of what you did ?—No.

Q. You tried to fabricate evidence by throwing stones on your house and on your roof ? . . . No. They have been pelting stones at my house continually for the last 5 years.

The injury on my head was caused in 1947 by Samaranayake, Walter and William and the police filed a case in respect of that incident for coming into my house, pelting stones and causing injuries to our heads. I do not know on what charges the police filed that plaint. The injuries were not caused with stones. The injuries were the result of striking me with swords, etc.

Q. Who struck you with swords ? . . . Behind me were Samaranayake, Walter and William and I got the blow. I cannot say who struck me with the sword.

(To COURT : The blow was dealt on me from behind and there was blood all over my body and I regained consciousness in hospital about 4 or 5 days later. 6 days after I found myself in hospital.)

CROSS-EXAMINED *contd.* I was in hospital about 26 days.

(To COURT : What was the charge, attempted murder or grievous hurt ? . . . I do not know what the charge was.)

CROSS-EXAMINED *contd.* *Q.* You did not tell your Proctor that you were struck with a sword.—*A.* I cannot remember.

The injury on my head was caused on 14.4.47. Including the case arising out of the blow on me with a sword, there were 7 cases filed by the Police pending. The Police Inspector, and Proctor and all advised me to settle the case saying there was no use sending those people to jail and I had sympathy on them and compounded the case.

(To COURT : Samaranayake and his people were also four days in hospital.)

CROSS-EXAMINED *contd.* My head injury was very serious and I was almost dying. I have still a certificate from the Doctor and had to take treatment even after leaving hospital.

Q. I suggest your head injury was not a serious injury because if a case was filed for a serious injury that case cannot be compounded ? . . . I cannot say how it happened.

No application was made for that case to be compounded but while the case was being heard it was compounded.

RE-EXAMINED. Nil.

(COURT : Did I understand you to say that you have a medical certificate about that injury ? . . . Not that I have it. I saw the doctor making a circle and issuing a report to the police as a result of that head injury.

Q. You saw that certificate being issued on the day you were admitted to hospital with your head injury ? . . . No answer.

In the Supreme Court.

Defence Evidence.

No. 14
K. D. J. Perera, 29th August, 1951.
Cross-examination—*continued.*

Re-examination.

In the Supreme Court.

Defence Evidence.

No. 14 K. D. J. Perera, 29th August, 1951.

Q. Who was the Doctor who attended on your head injury ?—*A.* It was Doctor Silva who was the Chief Doctor at the time. As I had to attend Courts I was discharged from hospital.

Q. Since then have you consulted any other Doctor ? . . . It was thereafter that I took treatment from hospital for about 3 months.

Q. That will be about the middle of June or July 1948 ? . . . Yes.

Q. Since then have you consulted any other Doctor ? . . . While I was in the remand jail I consulted the Doctors there.

Q. Have they been treating you ? . . . I had my own medicinal oil which I used. If I did not apply that on my head I get a pain.

Q. Did you see Cyril lying there after you went with the gun ?—*A.* At that stage I did not see.

Q. At what stage did you see ? . . . I saw Cyril lying after the Police came. Cyril was lying a little this side of the cadju tree and a little away from Cyril I saw Kumarihamy's body towards my garden near a kapok tree.

Q. Every time a man fires your gun he had to expel the used cartridge and re-load it ? . . . Yes.)

Court adjourns for the day. 12.50 p.m.

No. 15.

No. 15. Application for Witness Summons, 30th August, 1951.

Application for Witness Summons.

30.8.51. 9.30 a.m.

Mr. CHARITA RANASINGHE, Proctor for the Defence, states that he has perused the records of the cases and makes application for the issue of summons on Dr. C. W. A. de Silva to speak to the injuries sustained by K. D. John Perera who was examined by him on the 15th April 1948 and on the Superintendent of the Badulla Hospital to produce or cause to be produced the bed head ticket of K. D. John Perera who was an inmate of the Badulla Hospital from about 14th April 1948.

Crown Counsel has no objection.

His Lordship allows the application.

His Lordship directs that if either the defence or the prosecution makes a request for the accused to be examined by the doctor the necessary arrangements will be made for the examination to be made at the Remand Jail.

Court adjourns for the day.

31st August, 1951.

31.8.51. 9.30 a.m.

Counsel for the Defence states that Dr. C. W. A. de Silva is ill in the Colombo hospital and unable to attend Court, and therefore, he wishes to call Dr. Atukorale to speak to the fact that Dr. de Silva is ill.—Allowed.

No. 16.

Dr. A. W. Atukorale.

In the Supreme Court.

Defence Evidence.

No. 16. Dr. A. W. Atukorale, 31st August, 1951. Examination.

Dr. A. W. ATUKORALE, affirmed. House Officer, General Hospital, Colombo.

I know Dr. C. W. A. de Silva. He is at present the Visiting Physician of the Civil Hospital, Kurunegala. He is sick and unable to attend Court. He has a lung abscess and he is in hospital since the 3rd of August. He will not be able to attend Court for a considerable time.

CROSS-EXAMINED by Crown Counsel : Nil.

10 TO COURT : Previously he had suffered from coronary thrombosis.

No. 17.

Order.

No. 17. Order, 31st August, 1951.

Counsel for the accused states that he desires that portion of the deposition of Dr. de Silva in M.C. Badulla Case No. 6109 relating to the injuries found on K. D. John Perera (accused in the present case) to be read in evidence, under Sec. 33 of the Evidence Ordinance.

ORDER.

Counsel for the defence moves that the evidence of witness Dr. C. W. A. de Silva who is unable to attend Court owing to illness and who will not be 20 able to attend Court for some considerable time should be admitted under Sec. 33 of the Evidence Ordinance. The purpose of this witness' evidence is to speak to certain injuries sustained by this accused on 14th April, 1948. Although it is doubtful whether the provision of Section 33 do apply strictly to this case, I think and learned Crown Counsel agrees with me that in the interests of justice that the evidence should be admitted.

No. 18.

P. Kathiravellupillai.

No. 18. P. Kathiravellupillai, 31st August, 1951. Examination.

P. KATHIRAVELLUPILLAI, affirmed. Clerk of Assize, Kandy.

TO COURT : I produce the record in M.C. Badulla case No. 6109 in 30 which the accused and certain others were accused. In the course of the proceedings in that case Dr. C. W. A. de Silva, J.M.O. gave evidence. In the course of Dr. de Silva's evidence he stated as follows : " I also examined

In the Supreme Court.

Defence Evidence.

No. 18. P. Kathiravellupillai, 31st August, 1951. Examination—*continued.*

John Perera (that is the accused in the present case) on 15.4.48 at about 8 a.m. He had 5 injuries.

(1) Multiple incised wounds on left side of head of varying lengths, scalp deep.

(2) 3 incised wounds on centre of top of head 2″ long each, with depressed fracture of bone underneath.

(3) 3 parallel incised wounds on outer side of upper part of left arm three inches long each, skin deep.

(4) 2 parallel incised wounds across left shoulder blade 4″ long each, skin deep.

(5) 2 parallel incised wounds on back of left shoulder 3″ long each, skin deep.

He also said in the course of his evidence that the accused was in hospital for 24 days, and also that the injuries could have been caused by a sharp cutting weapon. (This record in M.C. Badulla case No. 6109 is marked D6.)

CROSS-EXAMINED. Nil.

(Counsel for the accused states that he would produce through the same witness the other records of cases.)

TO COUNSEL FOR THE DEFENCE: I also produce the records in M.C. Badulla 6147, in which L. C. W. Samaranayake and 2 others were charged with causing grievous hurt to K. D. John Perera. The date of that offence was 14th April 1948. (This record is marked D7.) Both this case and the earlier case were withdrawn after some time. I also produce the record in M.C. Badulla case No. 7728 in which the charge is one of voluntarily causing simple hurt under section 314. The date of that offence is 2.1.49. That case was for causing hurt to K. D. John Perera. That case was filed by the Police and withdrawn by the police. (This record is marked D8.)

No. 19.
Dr. R. H. Peiris.

No. 19. Dr. R. H. Peiris, 31st August, 1951. Examination.

Dr. R. H. PEIRIS, sworn. House surgeon, Civil Hospital Badulla.

I was summoned to produce the Bed Head ticket No. 2936 relating to the admission of K. D. John Perera, this accused, who was admitted to the Badulla hospital on 14.4.48. The Bed Head tickets are no longer available but the records of the hospital show that the accused whose age was given as 50 was admitted to the hospital on 14.4.48. His examination showed a depressed fracture of the parietal bone of the skull. He underwent an operation on the 15th of April, 1948 and was discharged from hospital on 8.5.48. (This document produced by the doctor is marked D9).

CROSS-EXAMINED. Nil.

Defence closed.

No. 20.

L. B. Warnasuriya (in rebuttal).

In the Supreme Court.

No. 20. L. B. Warnasuriya, 31st August, 1951 (in rebuttal).

Crown Counsel calls in rebuttal.

L. B. WARNASURIYA, recalled, re-affirmed.

I recorded the statement of the accused's wife Agnes Nona on 29.7.51 at 4.50 p.m. After recording the statement I read and explained it to her, but she did not sign it. In the course of her statement she said, " then my " husband chased after Samaranayake with the gun in the direction of "Samaranayake's house. I lost sight of them. I then heard the report of " a gun." I produce an extract of that portion of the statement marked ' X.' In that statement she did not refer to any jak fruits having been plucked by Cyril.

CROSS-EXAMINED. *Q.* When you say ' read and explained ' you mean it is just a formality ?—*A.* Not in my case.

Evidence in rebuttal closed.

Counsel for the defence addresses the Jury.

Crown Counsel addresses the Jury.

Adjourned for the day.

No. 21.

Charge to the Jury.

3rd September, 1951—

Accused present.

Same Counsel.

No. 21. Charge to the Jury, 3rd September, 1951.

Court sums up the case to the Jury.

GRATIAEN J.

Gentlemen of the Jury—You have listened with very close attention all last week to the evidence which has been placed before you by the prosecution as well as by the defence. You have also listened to the very careful, and, if I may say so, to the very helpful addresses of counsel for the defence and also of learned Crown Counsel. Please remember all the submissions and points which were placed before you by these gentlemen, and if I do not refer to all those facts again in my charge do not assume that what has been argued before you is not worthy of your attention.

My function as the presiding Judge is to give you my directions on all questions of law which are necessary for your guidance. As you no doubt

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

are aware, you must assume that my directions on all legal questions are correct. If I have the misfortune to misdirect you on any questions of law there is a higher tribunal which can set my errors right. You must realise that having listened to my legal directions and having also considered the questions of fact which I shall indicate to you as seeming to require your consideration, you are the sole judges of fact. You all remember the oath which each of you took when the trial commenced, and it is your duty to give your verdict, a true verdict, according to the evidence which you have heard at this trial.

This is a very serious case which you are trying, and I do not doubt that you will enter upon your task with a proper sense of your responsibilities. You are jurors who, in a sense, represent society and the verdict which you will return is the verdict of society which you represent. You have your duty to society and, at least an equally important duty to the prisoner whom you are trying.

Gentlemen, let me at the outset place before you the past events which form the background to this tragic episode which has been placed before you at the trial.

You will remember that the accused and the Samaranayake family were neighbours since about the year 1946. They resided in two adjacent properties, which had originally formed one common property, belonging to the family of the accused's wife. In 1946 or thereabouts, the man Samaranayake purchased that portion of the property to the north, from the mother and the sister of the accused's wife. If you accept the evidence, the transaction seems to have taken place without the knowledge of the accused's family, or, at least, without the knowledge of the accused and his wife. After the purchase by the Samaranayakes there were civil proceedings in which Samaranayake asked that he should be placed in possession of the property and for that purpose he wanted an order of Court ejecting the accused, and, I think, his family. The accused and his wife counter-claimed that the property was their own and that they had prescribed to it. In the alternative, they also asked that if Samaranayake should be declared to be the owner of the property, for which he had paid valuable consideration, that the accused should be awarded some amount representing compensation for the improvements which he had effected. Well, in due course, that trial came to an end. Samaranayake was declared to be the owner of the property, subject to the payment of Rs. 500/- as compensation to the accused for the improvements which the accused had effected. That amount of compensation apparently was paid, according to the accused's wife, about three months later. So that Samaranayake presumably entered upon the property, as owner, somewhere towards the latter part of 1947. . . . It seems fairly clear that his arrival as purchaser of this property led to a good deal of ill-feeling between the two families. That seems to be amply proved by the series of criminal proceedings which were instituted by one party or the other during the year 1948. For instance, it would appear that about the 14th April 1948 there was a serious clash between the two parties as a result of which the police prosecuted both

sets of participants in the quarrel. People from both sides seem to have been admitted to hospital in view of the injuries which each had sustained in that unfortunte clash. There was another case in which the accused's wife prosecuted Samaranayaka and the young lad, Walter, for criminal intimidation and apparently the police also prosecuted Samaranayaka for indecent exposure with the intention of humiliating the accused's wife. There has been evidence placed of the pelting of stones by some members of the Samaranayake family at the accused's house.

Now, gentlemen, there were four or five cases of this kind in all, and if one looks at the records of these cases which have been produced before you I must confess for myself that they make very distressing and disturbing reading for this reason : it is of the very essence of criminal justice that whoever is alleged to have transgressed against the law should be speedily brought to trial and the case disposed of. These frequent postponements of serious cases perhaps merely leads to more ill-feeling. And we find apparently that not one of these cases, although they were instituted by the police, and although grave charges were preferred against one side or the other, went to trial ; and on the 16th March 1949 all the cases seem to have been settled in some manner which one finds it difficult to justify. Cases of grievous hurt were apparently compounded in some way which, as far as I can see and as far as learned counsel can see, is not justified by our laws of criminal procedure. However, that is not a matter with which you are directly concerned, although one is left to speculate now whether the tragedies in regard to which all this evidence has been placed before you would have occurred if the outcome of those earlier prosecutions had been different.

While those cases were pending there was another case in the Rural Court where the accused claimed a right of way or shall I say an alleged right of way, over Samaranayake's property which had been blocked or interfered with in some way by the Samaranayakes, and this led to further ill-feeling. There was no judicial inquiry into that case because the Rural Court, very properly in my opinion, referred the parties to a competent court of jurisdiction which could decide whether or not the right of way claimed by the accused did in fact exist. One thing seems clear enough—if I may say so in passing—that is that the decree in the original civil case declaring Samaranayaka entitled to the property did not reserve to the accused any such right of way. However, that is a matter which is being placed before you only as indicating the background of the later episode.

As far as I can see there seems to have been no actual litigation between the parties after the 16th March 1949. There is no evidence of any complaint having been made by one side or the other to the police or to the village headman after March 1949. As far as I can recollect the last litigation between the parties was the case of simple hurt where the accused complained that he had been assaulted in January 1949. And the accused's wife told you when she gave evidence that after the criminal cases were settled in March 1949 the next serious event was the tragedy which occurred in July 1950. There has been I think some little evidence alleging that the

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

Samaranayake family polluted a well in the accused's land. Be that as it may, both sides are agreed that the feelings between the accused's family and Samaranayaka's family were extremely strained.

Well, now we come gentlemen to the 29th July, 1950, when in the morning a very serious episode took place. You, gentlemen, are concerned only with returning a true verdict according to your conscience as to whether the accused did in fact commit the murder of the woman Kumarihamy, or if he did not commit murder whether he was guilty of any offence in respect of the admitted death of Kumarihamy. So that as the sole judges of the facts you have to give your most earnest and careful consideration to certain specific issues of fact relating to Kumarihamy's death. When you retire to consider your verdict you must ask yourselves the following question: Did the accused and nobody else shoot Kuramihamy thereby causing her death? The next question for you to decide is: Did the accused shoot Kumarihamy voluntarily? Thirdly, if both those earlier questions are answered in the affirmative, did the accused have a murderous intention when he caused the death of Kumarihamy? If so, the accused would be guilty of murder, unless the defence proves circumstances justifying his act, or circumstances which the law recognizes as mitigating the offence, or as a further alternative, if the defence can satisfy you on a balance of probabilities that even if the accused committed the act he was not criminally responsible for what he did at that time.

Now, this, gentlemen, is the case for the prosecution. The Crown alleges that there was first of all a preliminary incident when Walter and Cyril, who is now dead, tried to remove the bull which had escaped into the accused's compound as a result of which, according to the Crown, a servant boy, Banda, whom neither side has called, threw stones at Cyril and Walter.

Walter asserts that there was no retaliation as far as he and Cyril were concerned, but learned Crown Counsel has suggested to you that Walter's version on that point is, perhaps, somewhat exaggerated. The Crown suggests that it is possible and even probable that what really happened was that Walter and Cyril did retaliate and did throw stones at either Banda or the accused's house. The case for the Crown is that whatever happened the accused lost his temper, he fired at Walter and Cyril, and it is suggested that the firing did take place, in the first instance, while the accused was still in his compound, but the Crown says after those preliminary incidents were over, namely the shooting of Walter and Cyril, the accused crossed the boundary and then ran amok. The Crown says that while he entered Samaranayake's property the accused fired more shots and as a result he caused the death of Kumarihamy, and the Crown says that Kumarihamy was intentionally and deliberately shot by the accused with the intention of causing her death. The Crown asks you to accept that view, which I have summarised, as substantially the truth.

Now, the defence has placed its own version and the defence is that the entire Samaranayake family was concerned in unlawful acts, in pelting stones at the accused's house and causing him the gravest possible provoca-

tion. Now, the accused relies on those acts of provocation and the accused admits that he did, at least, fire one shot with the gun P1. He says that that shot was fired in the air, and then he brought the gun back. He says the provocation not only continued but was intensified, and as a result of that and because of the head injury which he had sustained earlier, his brain, so to speak, snapped, and he says he does not know what happened. He says he completely lost his memory, and as I understand the defence, the accused's position is that even if he caused the death of Kumarihamy he did so when he was not in a state of mind when he could be regarded in the eyes of the law as responsible for his actions. He says he was influenced not only by the intense provocation but also by a fear for his life and his family and also by a fear as to the possibility of serious damage being caused to his property. He also takes up the position that he was incapable of forming a criminal intention at all. For those reasons, he says that he must be acquitted, or that at the worst, by reason of the grave and serious provocation he received he cannot be found guilty of murder but only of culpable homicide not amounting to murder. In the same way he also asks for a verdict of acquittal because he acted in defence of life and property. As an alternative to that plea he says that he exceeded that right and he asks for a verdict of culpable homicide not amounting to murder.

Gentlemen, it is not possible for me to stress sufficiently this fact. We are trying the accused for the alleged murder of Kumarihamy but there has been placed before you evidence that other members of Kumarihamy's family were also killed or seriously injured in the same transaction. Now, as a general rule, evidence of that kind should not and is not placed before a Jury which is only concerned with certain material facts in the vital issue, namely the alleged murder of a particular individual. But here the Crown has considered it necessary, and it is their duty, to place before you circumstances relating to the killing or wounding of other members of Samaranayake's family. The Crown has considered it its duty to place before you that evidence because if those other facts were completely shut out the Crown would, in its submission of the case, be placing an unintelligible and incomplete picture of what took place. Those other facts relating to the killing or wounding of other members of the family were placed before you because they are so closely and inextricably mixed up with the killing of the deceased Kumarihamy, and all those facts form a chain of circumstances which are relevant to the vital issue which you are called upon to decide, and that vital issue is whether the accused in fact murdered Kumarihamy.

Now gentlemen, let me caution you that the facts relating to the killing of the other members of the Samaranayake family can only be given, in the eyes of the law, a limited relevancy. For instance, it would be quite wrong for you to approach your task in this way. You cannot say to yourselves " Well the accused must have killed the other members of the " family—he must have intentionally killed the other members of the " family, therefore he must have killed Kumarihamy, and also, he must have " intentionally killed her with a murderous intention in his heart." You

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No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

cannot say to yourselves " The man who killed the others was a wicked, " evil person, with a predisposition to murder, therefore we must find him " guilty of the murder of Kumarihamy as well."

The only way in which you can properly approach your task is this, gentlemen. Ask yourselves whether the evidence which has been placed before you convinces you that he and nobody else killed Kumarihamy and that he did so not by accident because the gun went off, but deliberately and intentionally. Finally, you must ask yourselves whether you are convinced that he killed her with a murderous intention in his heart. For the purpose of deciding whether the accused had a murderous intention in his heart when he shot Kumarihamy, if in fact he did shoot her, the question of whether he intended to kill Samaranayake or Cyril or any other member of the family, is a circumstance which you must exclude from consideration. Just remind yourselves constantly gentlemen, that you cannot pay regard to the fact of the killing of those other members of the family for the purpose of deciding whether he had the intention to kill Kumarihamy as well.

Now to what extent is it really relevant that you should consider, for instance, the fact the Samaranayake was also shot. Let me tell you one factor on which the Crown is entitled to rely. You see, there is a tremendous conflict between the story which the Crown has presented to you and the story which the defence has presented to you. The suggestion of the defence is that even if the accused was responsible for the shooting of Kumarihamy, he did so at a time when he was well in his own compound, and that he acted under grave and sudden provocation which he had received at that point of time from all the members of Samaranayake family, including Kumarihamy.

Now, the Crown says that that is not the truth at all. The Crown says, and the Crown seeks to convince you, that whatever might have happened earlier, the accused entered Kumarihamy's compound went up to her and shot her deliberately at a time when she was giving no provocation at all. Therefore, the question is important, and must be decided by you, gentlemen, as to where the accused probably was or certainly was, when the firing of Kumarihamy took place. Therefore, the Crown says that they desire to disprove the defence version by proving in more than one way that the accused was in fact in Kumarihamy's compound when he shot her and, for that purpose, the Crown is entitled to place before you evidence to show that the accused was in fact in the compound of Kumarihamy, at or about that time, and that immediately after he had fired at Kumarihamy he had gone even further into the compound and shot Samaranayake at the place, where according to the Police Inspector, his corpse was found lying. That is one matter in respect of which the alleged shooting of Samaranayake, by the accused, has a limited relevance.

Let me now, gentlemen, draw your attention in greater detail to the evidence which has been placed before you. Do not forget that this tragedy occurred on the 29th of July last year, so that the oral evidence which has been placed before you is the testimony of people who are speaking

to some facts, which they allege are within their personal knowledge, not a month ago but 13 months ago. Place yourselves gentlemen in the position of a person who was anxious, as a truthful eye-witness, to place the Court in full possession of the facts which are within his knowledge at the time. To begin with there is the passage of time which has elapsed between the incident and the date of giving evidence here. Remember also that even a truthful eye-witness would be speaking to his impression of very rapid moving events. There are difficulties which even a truthful person must encounter, the difficulties of accurate perception and accurate narration of the facts. There are handicaps, from which people suffer, of being unable to assess distances with accuracy or precision. There is the fact that impressions must necessarily to some extent be blurred by a lapse of time. There is the human tendency of honestly believing, after reconstructing the whole scene in one's minds, that what one believes must have happened did in fact happen. There is the tendency, which is human, of eye-witnesses to compare notes with one another as to what each saw. There are all those difficulties, and so far as I have only placed before you the difficulties of a person who intends and undertakes to speak the truth, the whole truth and nothing but the truth. There are other persons who it may be, while anxious to speak the truth in some respects, are tempted in matters which they might regard as incriminating them, to throw a veil over part of the story. Then again, of course, you have the fact that there might be witnesses who speak to a series of events which are utterly untrue. For instance, learned Counsel for the defence has asked you to regard Kiri Banda and Muttu Banda as witnesses of that type. Not, he suggests, that they had any personal previous animosity against the accused, but that they are convinced in their own minds that the accused had committed a serious crime and that therefore their consciences were sufficiently elastic to permit them to come before you and give false evidence of what they did not see, but what they believe must probably have happened Well, how are you going to assess the credibility of these witnesses whom you have heard ? All that I can suggest to you is that you should apply your commonsense, your knowledge of the habits of village witnesses, and that you must test what each person has said in the light of any inconsistency which has been proved, or in the light of any discrepancy between the testimony of one witness and another ; and you must also look in some cases for any confirmation of what a witness has said from the real evidence or the incontrovertible evidence which has been placed before you.

This case, gentlemen, has lasted for a whole week. As you are yourselves human beings it may well be that at a certain stage you would have formed early impressions as to what must have happened. Some of these impressions might have been rejected by you as the case progressed ; other impressions might have been strengthened or confirmed as the case progressed ; but remember that what really matters is the verdict which you are able to return after having heard counsel and after having previously heard all the evidence, and it is then that you must give your earnest consideration to the case in all its aspects before you finally decide what you believe must have happened.

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

You will remember, gentlemen, that your foreman asked a very early witness, I think it is Kiri Banda, a question, and the foreman put the question in this way: If you saw two people murdered why did you not rush up and try to disarm the accused? Well, that was a very pertinent question, and if I may say so, whether the witness was speaking the truth or not, he gave a very pertinent and relevant answer. But what is important to remind yourselves is this, and in fact I am sure that this is the true position: I cannot believe that that question was intended to indicate, or in fact intended, that the foreman at that early stage decided that the accused was guilty of murder.

Now, gentlemen, I have indicated to you what my functions are as the presiding Judge and I have also indicated what your functions are as the sole judges of the facts. Remember, gentlemen, that there is a very heavy burden cast on the Crown when it asks you for a verdict that the accused was guilty of murder or any other crime. You start with the presumption of innocence. You must presume that, unless the contrary is conclusively established, the accused who stands in the dock is innocent of the crime which has been preferred against him, and that presumption can only be removed if the Crown places before you evidence of a very convincing character. By that evidence of a convincing character the Crown must establish beyond reasonable doubt that all the ingredients of the offence have been established. There is no burden cast on the accused to prove that the ingredients of the offence of murder have not been established. That is a cardinal principle of criminal justice which has over a century ago been transplanted from English soil and has firmly taken root in our country.

The burden is on the Crown to establish the commission of the offence by the accused beyond reasonable doubt. What does that mean? All it means is this: that the evidence must be of such a convincing character against the accused that after giving your most anxious consideration to the case in all its aspects you must be sure in your minds that the evidence which you have heard at the trial has clearly convinced you of the man's guilt. There must be a conviction in your minds which some judges describe as an abiding conviction; that is to say, you must not only be sure today that the evidence has established the prisoner's guilt but you must also be sure that on the next day you will be still of the same opinion. If you have any honest substantial doubts as to whether the accused is guilty or not those doubts must necessarily be resolved in favour of the accused.

Ask yourselves, gentlemen, what are the facts which you are confident have been established against the accused. Then ask yourselves what are the inferences which those facts justify you in drawing against the accused.

I have told you, gentlemen, about the presumption of innocence. There is another circumstance on which the defence relies. The defence has led some evidence before you to indicate that the accused apart from these unhappy quarrels with the Samaranayake family bore a good character. Well that is also a circumstance which must be taken into account in his favour. It is for you to decide how much weight you should

attach to that circumstance. If, of course, the evidence is of so convincing a nature that you are convinced firstly that the accused shot Kumarihamy and secondly that you may properly draw the inference that he intended to kill Kumarihamy, then the fact that he had a previous good character will not help him very much. It is for you to consider the case in all its aspects and to say how much weight you are prepared to place on that circumstance.

Remember once more that the evidence which you must accept or reject is the evidence which was given by the witnesses before you in the witness-box at this trial. You will remember that in the case of certain witnesses either the prosecution or the defence has told you that the witness said one thing in the witness-box but has previously made a different statement to the police when they were investigating this matter. Now you cannot act on what a witness told the police because it is not substantive evidence. It is, however, of value to assist you in deciding whether the witness was consistent or inconsistent in what he said. Let me give you one example. You will remember that the accused's wife told you that she saw her husband returning with his gun after he had shot one person and that afterwards she heard further firing which seemed to be in the close vicinity of her own house but that she did not see her husband nor did she see what happened. Crown Counsel cross-examined her and led evidence to show that she had told a different story to the police that very day, that she said that at a certain stage she saw her husband—let me give you the exact words because it is very important.

She told the police, " then my husband chased after Samaranayake " with the gun in the direction of Samaranayake's house." And later, she said, " I lost sight of him and then I heard the report of a gun."

Now, gentlemen, those statements which she had earlier made to the police are not statements on which you can act upon. For instance, in arriving at your verdict, you cannot say " Well, she told the police that " her husband chased after Samaranayake and therefore the truth must " be, as the prosecution suggests, that the accused entered Samaranayake's " compound and fired at Kumarihamy as well." Those earlier statements can only be taken into account for the purpose of testing whether she could be relied on as a truthful witness. You see the point, and it is important that you should note that you can only use those contradictory statements for the purposes of testing the consistency of what the witness said here.

Before I come to the details of the evidence I want you to remember one more circumstance. Remember gentlemen, that every person of the age of discretion, unless the contrary is proved, is presumed to be sane. You, therefore, start with the presumption that the accused is capable and was capable of knowing and appreciating the nature of his acts, and was capable of knowing and appreciating that what he did, if he did it, was an offence. I will have to return to that aspect of the matter later in view of one of the defences, but remember, you start with the presumption of sanity. It is not necessary for the Crown to prove that the accused was sane. Indeed, you cannot say to yourselves, " only a mad man could " have behaved in the way the accused did, and therefore, he is not to be

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951—*continued.*

" blamed." There is a great difference in behaving like a lunatic and being a lunatic. So, you start with the presumption that the accused was perfectly sane, and was capable of appreciating the consequences of his actions.

Now, gentlemen, you must consider the evidence which has been placed before you by the prosecution and the defence. I have made certain suggestions to you as to how you should approach that evidence. Remember also, gentlemen, that you must make allowances for the accused's evidence. You must test his evidence as that of any other witness but you must not lose sight of the fact that he has been thirteen months on remand, and similarly, you must make allowance for his wife who would naturally be conscious of the fact that her husband is on a serious charge.

How are you going to approach the evidence of what is alleged to have happened on the day in question ? I suggest for your consideration that you should start with the incontrovertible facts which were admittedly spoken to by disinterested persons whose evidence has not been challenged. I suggest that you should first take the opinions of expert witnesses like Dr. Corera and Mr. Chanmugam which have not been challenged. What is the real evidence in the case, placed before you which the defence did not really challenge, of persons who, you consider, were distinterested witnesses and who had no interest in the incident at all ?

Very shortly after the incident the Sub-Inspector arrived at the spot and what did he find ? Let me invite your attention to the large sketch. The Inspector tells you that—I hope I will be corrected if I am wrong—he found the corpse of Kumarihamy at the spot J a few feet away from the foundation. She had some blood on her hand, and at the spot " Y " near " J " he found a blood stained twig and a leaf, and the Government Analyst to whom they were sent, said he found human blood on them. He also found at K an orange tree with pellet marks which were 2 feet 3 inches at the lowest point and about 3 feet or 3 feet 6 inches at the highest point. At N he found a spent cartridge, and near O he found some wadding which was produced marked P23. He also saw wadding at Q, L and M. He also told you that he did find a bull tethered to a tree somewhere between W and Y. You then see the spot marked Y. There he found a gunny bag and cut grass to which, you remember, Walter spoke, and the knife was also found there.

Dr. Corera tells you that he held a post-mortem examination on the deceased Kumarihamy. There were eight entrance wounds on the back and two exit wounds at the back. There were four exit wounds in the front indicating that the pellets had gone right through the body. Dr. Corera removed four pellets from the body and it therefore follows that four pellets had gone right through the body. According to Dr. Corera the spread was about 12 inches. You will remember seeing the sketch, gentlemen, attached to Dr. Corera's post-mortem report. Let me just show it to you again. Perhaps you may wish to take it away with you when you retire, but let me show it to you now. (His Lordship holds the sketch up so that the jury may see it.) You see, gentlemen, the spread

of 12 inches was calculated by the doctor by taking into account all the entrance wounds which you see on the body, but the prosecution do not say all the pellets had entered either her back or the back of her left arm directly from behind, so that Mr. Chanmugam the Government Analyst states that although in one sense the spread was 12 inches, if you take into account the angle of fire it may have been rather less. If you see what I mean, if you take a circle of 12 inches and if you turn that circle a little, as the body must have been turned in the opinion of both the doctor and Mr. Chanmugam at the moment when she was shot, that circle seems to get rather smaller.

Now these pellets gentlemen which Dr. Corera removed from the body were S.S.G. slugs from a factory made cartridge such as that spent cartridge M. Apparently these factory made cartridges containing S.S.G. cartridges usually contain 13 pellets, so that 8 had struck the body and 5 had missed the body. There was no evidence of singeing, so that from a medical point of view Dr. Corera says that the woman must have been fired at from a distance which was not less than 20 feet. On the other hand, Mr. Chanmugam, who is an expert in Ballistics, tells you that in his opinion the minimum range of fire would have been 40 feet.

Dr. Corera tells us that death was almost instantaneous—must have been instantaneous—and he says that he would expect that the woman must have fallen very near to the place where she was standing at the time when she was shot.

The Police Inspector went to the house of the accused who handed him the gun P1 for which the accused himself had a licence. It was a single barrelled gun, and the Inspector says that when he took charge of it there was clear evidence that it had been very recently fired. The gun was then sent to the Government Analyst who reports that, although he cannot say when it was last fired, it was clear this gun had not been cleaned since it was last fired.

Mr. Chanmugam has told you what deductions he was able to draw from his various examinations and experiments.

Now, if you believe Mr. Chanmugam then you will accept his opinion that these S.S.G. pellets which were found in the body of Kumarihamy must have been originally contained in cartridges such as the spent cartridge found at M, and that not only that cartridge, but a number of other cartridges which were discovered—I shall tell you where they were discovered at a later stage—must have been fired from the gun P1 which belongs to the accused.

Mr. Chanmugan, if you believe him, has drawn certain other deductions as well. He tells you that if these factory made cartridges were quite new the penetrating force of the S.S.G. pellets is such that the woman must have been shot at from a distance of not more than 70 feet away. Mr. Chanmugam also examined the lie of the land in the accused's compound, which is, it seems, on a lower level than the land on which Kumarihamy must have been standing when shot at, and Mr. Chanmugam's opinion is that she could not have been fired at from that lower level. Indeed if

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you take the maximum possible range of 70 feet—which assumes that they were new cartridges—even then it seems impossible, or at least, extremely difficult, to find any spot in the accused's compound which was only 70 feet away from the spot J. or a spot very near there.

The theory of Mr. Chanmugam, and the theory which the Crown asks you to accept, is that this woman must, at the time when she was shot, have been standing near the spot where the blood stained twig was found and that she fell at the spot J.

Now Mr. Chanmugam has also expressed the opinion that the angle of fire must have been practically horizontal, that is to say, that the person who was firing at Kumarihamy must have been standing on ground at more or less the same level as the ground on which she was standing, and therefore it makes it very improbable that the person who fired could have shot at her when he was standing on a lower level, and you will remember that from the deceased's compound to the accused's compound there is a drop of about 4 feet 3 inches in some places and a little less in others.

Mr. Chanmugam also expresses the opinion that in view of the fact that there were pellet marks on the orange tree at K, that the orange tree very probably must have been somewhere between the person who fired and the woman who was shot, so that the line of fire would be through K to some spot near J, or small " y " as the case may be, where the blood-stained twig was found.

Although it is for you to decide, as far as I can understand the case, it seems almost certain that the injured woman could not have been facing the man who fired at the exact moment when she was struck because she has been wounded in the back. So that, if in fact she was facing the man who fired at her just before she was shot, perhaps some human instinct must have caused her, if she saw the man levelling the gun at her, to turn and then she must have received the shot from behind and from a side.

Now, gentlemen, let me direct your attention to the other matters which were found in the sketch. The Inspector says that he found the corpse of Samaranayake lying at A (large sketch) and he also picked up a spent cartridge (P11) at B (large sketch). A good deal of wadding was also found near the corpse. Further down nearer to the accused's house he found the corpse of Cyril at R (large sketch) and there was a spent cartridge at T (large sketch). As a result of the experiments which he performed Mr. Chanmugam says that all these cartridges in his opinion must have been fired from or could have been fired from the gun P1.

How did those spent cartridges come to be there and how did all that wadding which was found in various places on the deceased's land come to be there ? It is important for you to consider whether you can confidently exclude the possibility that the spent cartridges and the wadding were not wickedly introduced by somebody before the Inspector arrived on the scene. If one realizes the fact that the spent cartridges must have been fired from the gun P1 by somebody, and if the gun was loaded, fired and re-loaded on a number of occasions by a person who was standing in the accused's compound, then how did some of those cartridges and that wadding which the Inspector discovered come to be found in the deceased's

land at various spots ? The Inspector tells you that he at least took what precautions were possible to prevent the members of an inquisitive crowd who were gathered at the road from interfering with his investigations or introducing anything which was not there at that time. Well, can you confidently exclude the possibility that an inquisitive or wicked person had found some of these spent cartridges and wadding on the accused's land, picked them up and placed them in various places on the land of Kumarihamy ? If you can confidently exclude the possibility of such a wicked introduction, then the Crown asks you to infer that somebody fired the gun at a certain stage while he was on Kumarihamy's land, expelled the spent cartridge, reloaded, fired again and did that more than once— in fact on as many occasions as you find spent cartridges on Kumarihamy's land. The Crown asks you to take the view that whoever shot Kumarihamy, once again reloaded the gun P1, went further up and shot Samaranayake while he was standing at A, and then, having expelled the cartridge P11, shot somebody else as well. I have told you gentlemen that there were spent cartridges which were also found on the accused's land. So that there are clear indications that at some stage a man in fact did fire P1 when he was standing in the compound of the accused or in the house of the accused.

Now, gentlemen, who was the person who shot Kumarihamy ? That is the first question you must ask yourselves. As far as the accused is concerned he admits ownership of the gun. He admits that at least on one occasion, at the commencement, he did fire that gun, and his wife says, she does not dispute the fact, that after she heard a number of shots the accused returned with the same gun and put it on the table in the room. What happened, and who used that gun, during the interval ? Those are questions which you must answer for yourselves.

The accused tells you that his mind is a complete blank. Is that probably true or possibly true ? If so you must give effect to it. His learned Counsel who led his evidence asked him this question, " Do you " now realise that in consequence of your shooting several deaths have " occurred " ? Those were the very words employed by his own counsel. The answer to that was " Yes." But, gentlemen, if the position really is that the accused does not know, well it would not be fair to accept that answer as an admission of firing, because if his mind was a blank he himself was merely drawing an inference as to what must have happened. You will not regard that as an admission of firing unless of course you are convinced that he is not speaking the truth when he tells you that he does not know what happened.

Gentlemen, the Inspector found two spent cartridges at H (small sketch) in the verandah of the accused's house. Another was found at F (large sketch). You see the spot, it is in the compound, and apparently one cartridge was being chewed by his little grand child. One thing seems to be clear : possibly four but at least three cartridges seem to have been fired by somebody who was either on the accused's verandah or in his compound. It would be only three if you think it is possible that the child was chewing

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an old cartridge. As far as I can see it is not really necessary in this particular case to decide whether three or four shots were fired on the premises.

As I said the case for the Crown is that the accused having fired some shots entered the deceased's land and shot the deceased Kumarihamy and that the accused also fired other shots before returning home with the gun. You will remember that Cyril's body was found at R and that pellet marks were found at the bamboo tree at X in the accused's compound, so that there is a strong probability that Cyril was shot by somebody from the accused's compound because the line of fire would be in a line which joins R to X.

Now, gentlemen, considering the oral evidence of the eye witness or of the alleged eye witness, are you from an examination of all the evidence convinced that the story of the Crown is the correct theory, namely, that some shots were fired from the accused's compound and some shots were later fired by a person who had entered Kumarihamy's compound ? One thing may be regarded as clear enough, namely, that if somebody, having first shot Kumarihamy near J, later fired at Samaranayake when he was near A, the shooting of Samaranayake could not possibly have taken place from somewhere near the accused's compound. So that if you are driven to the irresistible conclusion that the man who shot Samaranayake was a man who entered the deceased's land, do you think it is equally irresistible from the evidence that the person who shot Kumarihamy shot her at a time when he had entered the deceased's land ?

Perhaps, it may be of some assistance if I ask you to look at the photographs. The first photograph shows a front view of the deceased's house. That photograph was taken, I think, from the direction of the road which is away from the accused's house. On the left as you look at the picture you find that foundation which is also shown in the sketch. It was, apparently, somewhere towards the doorway that the body of Samaranayake was found. Now, have a look at the second picture. That is the same front view of Kumarihamy's house and the pillows and the mat in front shows the position of Samaranayake as he was found by the Inspector. Now, the third picture, No. 4, which was produced before you, shows marked X in red as the place where Kumarihamy's body was found. That is the same as J in the Main sketch. And you can see for yourselves that new wing of the house which was constructed. The fourth picture marked No. 5 is a helpful picture. (Counsel for the accused states that this picture has not been produced. Crown Counsel submits that all the photographs were produced except No. 3. Counsel for the defence has no objection to photograph No. 5 being shown to the Jury.)

Now, gentlemen, in that photograph No. 5, you see in the distance the accused's house standing on a lower elevation than the deceased's house. Then, you see a handkerchief tied to a tree. That is the orange tree with pellet marks, and the pillow shows the position of the deceased Kumarihamy.

If you will now turn to photograph No. 6, gentlemen, you there see the house of the accused also, clearly on a lower elevation than the land of

Kumarihamy and at B is the spot where the corpse of Cyril was found. Then if you now look at photograph No. 7. That is a picture taken by somebody standing on the compound of the accused's house, at a lower elevation, and at a distance you find the house of the deceased. Then comes the last photograph which, of course, is a photograph of a certain section of the accused's house and through that doorway you see a light. That is apparently the spot where the picture inside the house was supposed to have been damaged.

Now let me return, gentlemen, to the evidence. I have spoken to you of what I called the real evidence—the facts as they have been spoken to by the Police witnesses or the doctor or by Mr. Chanmugam. We now come to the oral evidence of people who claim to have been eye-witnesses to the tragedy.

The witnesses called by the Crown are Walter, Kiri Banda and Muttu Banda. There is also the evidence of the accused and the accused's wife whom the defence called.

Now, Walter's evidence, gentlemen, has been attacked by the defence as the evidence of an untruthful witness. The defence says that he is really one of the people who was primarily responsible for what happened, by reason of the provocation he and Cyril caused to the members of the accused's family, but Kiri Banda and Muttu Banda are not members of either family, I would suggest that in the first instance you consider the evidence of these two outsiders, Kiri Banda and Muttu Banda, because gentlemen it is really an extremely important matter that you should decide for yourselves whether Kiri Banda is substantially, at any rate, a witness of truth. Ask yourselves what impression he made on you as a witness during the fairly short time when he gave evidence before you last week. Are you convinced, at any rate, that he was not deliberately lying ? Are you convinced, even if his evidence was unreliable in regard to the details of what exactly he observed because he was telling you really what impressions he formed in regard to these swift moving events, that he was not deliberately lying ? Are you convinced that he really was there and did see something of what he tells you he saw from there ? He was standing at that spot " T " near the old road. He tells you gentlemen that he was walking towards Hali-ella on some transaction of his own when he heard, first of all, a gun shot and then heard a woman crying out " Oh my son is shot at," and he says the voice was the voice of Kumarihamy. He says that he saw her going out of her house and walking about two fathoms away from the house, and he says he saw the accused approaching her with a gun in his hand and that at the time he was well within the deceased's compound. Are you convinced, gentlemen, that Kiri Banda was in fact standing at or near the spot " T," and that he did identify the accused walking towards the house of this woman and approaching her with a gun in his hand ? Are you convinced that at least that is true ? He tells you that he saw the accused level his gun at Kumarihamy. Are you convinced that he did see that ? He tells you that he saw the accused shoot at the deceased who fell immediately on receipt of the shot, and he tells you that

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in his opinion—and after all any assessment of distance is a matter of opinion—that the distance between the accused and Kumarihamy at the time when she was shot was only three fathoms, Now that assessment, even if it was an honest assessment, is quite a wrong assessment. That is clear enough because it has been proved by Mr. Chanmugam, if you believe him, that the distance could not have been less than 40 feet. But are you convinced that he is telling you substantially what he actually saw, viz., the accused and nobody else level the gun at this woman and fire at her, when they each could see the other, and he tells you this gentlemen, also, that after the woman was shot he saw the accused unload and re-load his gun and then walk towards Samaranayake's house and he saw him once again shoot at Samaranayake.

Now that point is important, gentlemen, on the question at least of identity, if you believe that he did see the man on the land, firing first of all at Kumarihamy and then going towards Samaranayake's land and then again shooting at Samaranayake. It is for you to consider whether he was a witness of truth and not a deliberate perjurer giving evidence against a man standing his trial on a charge of murder. Then it is for you to decide whether there is any possibility of his having mistaken the identity of the man who fired at Kumarihamy.

Now, gentlemen, he claims that he has no interest in either family at all, and he claims, gentlemen, that he reacted as any person in his position would have reacted. He says it was a terrible thing and he rushed at once to inform the Police at Badulla and he tells you that he went in the Welimada Bus and rushed off to the Police station. You will remember that he is supported to that extent by the Inspector. The Inspector says that he received certain information, first from a man called Abeysekera, the son-in-law of the deceased, but that very shortly afterwards, and quite independently, Kiri Banda rushed up to the Police Station and at that time the Inspector was preparing to come in the Police van to the scene of this tragedy, and he says he had no time then to record the statement of Kiri Banda then and there, but that he took Kiri Banda with him. So that, at least, Kiri Banda, if he had decided to rush to the Police and perjure himself, must have made that decision at a very early stage, but you will remember, this, gentlemen, that the defence . . . You will remember, this, though it was not put to Kiri Banda, the defence suggested to Muttu Banda and it was admitted by him, that his son-in-law, Abeysekera, lived in the house of Kiri Banda's eldest sister's daughter. It is suggested by the defence that Abeyskera, who apparently had made a very bad impression on the Magistrate who conducted the magisterial inquiry into this tragedy, had interfered with the witnesses and got hold of Kiri Banda and brought him forward as a witness. The question is whether you think that is even remotely possible. It is suggested that Kiri Banda was influenced by Abeysekera and that Kiri Banda, who is also a relation of Muttu Banda, had in some way put up Muttu Banda to speak falsely to what Muttu Banda says he saw. On questions of fact of that nature there is very little help that I can give you. Really the question is, what sort of impression

did he create in your minds ? Are you convinced that he is a witness of truth ? If you are so convinced that he is a witness of truth the question is what inference you are prepared to draw from those facts.

Then we come, gentlemen, to the suggestion of the defence that a person standing at the spot T could not have at all have been able to see what Kiri Banda claimed to have seen. On that point the Inspector says that he carried out a test and that although the view was not perfect or ideal, a man who was inquisitive could have seen what Kiri Banda claimed to have seen.

Next we come to the evidence of Muttu Banda. He claimed to have seen certain matters from the spot b (large sketch) near that tea garden. There again the Inspector says that he carried out a test and he says that Muttu Banda was in point of fact in a better position to have observed things than Kiri Banda. Muttu Banda's story is that he heard the deceased coming out of his house crying out " Oh my child," or words to that effect and that she was shot when she was actually, in his opinion, standing on the foundation in that compound. He too says he identified the accused as the man who shot her and that he was standing at a range of two or three fathoms from her at that time. Here again, gentlemen, it is really a question for you to decide whether you believe that Muttu Banda is a person who actually did see the shooting. It is clear enough that even if he intended to tell you the truth certain impressions of his cannot be correct. It is very unlikely or quite out of the question that the woman was standing on the foundation when she was shot, and it is impossible that the range of firing was only two or three fathoms. But on the other hand are you convinced that he did see the accused going up towards this woman with a gun and firing at her ? Muttu Banda himself says that immediately after that he saw a young boy crying out some words like " There, Baas is coming with a gun," a warning to the inmates in the house, and he saw a man, whom at that point of time he could not identify, emerge from the house and the accused shot him too. How does Muttu Banda say he reacted to this ? He too rushed up to the police. He saw a car going towards Badulla and he stopped the car and asked for a lift and went off towards the police station ; but he says that before he reached Badulla he saw the police van coming to the scene and therefore he turned round and returned himself.

Both of these people made statements to the police that afternoon. There are certain discrepancies between the version of one witness and another, but the main point is whether you are convinced that they were witnesses of truth trying to tell you what they actually saw, but giving perhaps an imperfect description of what they say they saw. Gentlemen, if you have any doubt, any honest doubts, as to whether they were witnesses of truth or not, well you must reject their evidence altogether and consider whether there is any other evidence upon which you can confidently act against the accused.

Then we come to Walter's evidence which has been attacked. It will be fair, in regard to certain matters at least, perhaps in regard to all matters, to view his evidence with some caution because he has been accused by the

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defence as having acted in an unlawful manner during the earlier incidents. What does he tell you ? He says that all that really happened was that there was this bull which escaped into the accused's compound. Then, he says, Banda threw stones at him and there was the first shot which was fired and he was injured in the back. Then he says there was a second shot which he says he heard and he saw Cyril falling. Then he says he saw the accused reloading his gun near the cadju tree and then he heard a shot but nobody was struck. He rushed up towards his house. His mother pulled him up to the foundation, and then there was a fourth shot and his mother was thrown away from the foundation. Those are the impressions which he says he received with regard to the mother. Obviously certain details must be regarded as inaccurate, but the question there again is whether he was substantially speaking the truth. Are you convinced that he did see the accused inside his garden with the gun in his hand and firing more than one shot ? And is he speaking the truth when he says that after some shots, that is for the fourth shot, he saw his mother falling down dead ?

Then, gentlemen, we come to the accused's version and to his wife's version of what they saw. Perhaps it would be convenient if we adjourned for ten minutes at this stage.

(10 minutes interval)

Now, gentlemen, as against the evidence led for the prosecution you have the version of the accused and his wife. You must take that version of theirs into account. Are you convinced that the accused, whatever may have happened earlier, did enter Kumarihamy's land having fired previous shots at two others, reloaded the gun, and when the deceased came out of the house, levelled the gun at her and shot her dead ? Was it a voluntary act of shooting at a selected human target in the sense that it was not an accidental firing but a deliberate firing ? Was it an act which was committed of his own free will ? Was it a conscious act ? Are you convinced that having entered their land he was loading the gun, firing, unloading and firing again ? The accused says, " I do not know what " happened." He says, " I got a certain feeling " and I take it the effect of his evidence is that he was going about like a person in a daze, like a sleep walker, like a person who was completely oblivious of what he was doing. The Crown says he was acting consciously, he was acting voluntarily, and even if he acted under provocation his acts were those of a man who knew what he was doing, and the Crown asks you to reject as fantastic his statement that he was acting mechanically. The Crown asks whether people can act in this mechanical manner, not once but more than once.

If you are convinced that his act was a voluntary act of shooting at a selected human target, then you must ask yourselves whether he had a murderous intention. The effect of his evidence is, as I understand it, that he was really temporarily insane at the time. The Crown asks you to reject that theory and to hold that he was a man who had a murderous intention being a person who had, admittedly, previous experience of firearms, knowing the kind of cartridge he was using on a human target

and realising the fact that he was firing at a distance of 70 feet or less. Gentlemen, 70 feet is a little longer than an ordinary cricket pitch.

What inference could you draw from all the facts which you are convinced have been established in this case ? A man is guilty of murder if he voluntarily causes the death of another and if he causes death either intending to kill that person, or at least with such an intention that the kind of injuries which he intends to inflict is sufficient without medical intervention to bring about death.

How is it possible for judges of fact to gauge a man's intentions ? We have no precise scientific instruments to assist you in that matter, but there is a rule of common sense which jurors are permitted to apply, namely, that a person may be presumed to have intended the obvious consequences of his actions. If you start, gentlemen, with the presumption that the accused was sane, then the Crown invites you to draw the presumption in this case that he must have intended the inevitable consequences of his actions, and the Crown says you would be justified in drawing that presumption here because, applying the ordinary rule of common sense, the Crown says there is no justifiable ground for any other conclusion. This presumption is a presumption you are only entitled to apply after taking all the facts into consideration. If you have any doubts in your minds as to whether the accused had a murderous intention in his mind, even if you are convinced that he voluntarily shot at the deceased, you cannot find him guilty of the offence of murder. If you are convinced on that point, namely that he had a murderous intention, then he would be guilty of murder unless he was justified in what he did or unless there were mitigating circumstances which would reduce his offence, in the eyes of the law, or unless he was insane or temporarily insane at the time.

The Crown must prove the ingredients which constitute the offence of murder beyond reasonable doubt, but once those circumstances have been proved, then the burden shifts to the accused to prove the existence of circumstances of mitigation or justification or the fact that he was insane or temporarily insane at the time.

It is not necessary for an accused who undertakes any of these defences, which are special defences, gentlemen, to establish his defence beyond reasonable doubt. It is sufficient if he places before you evidence which is of such a kind that you think, on a balance of probability, that his defence has been established.

Now, do you think that on the facts of this present case you would be justified in assuming that the accused did intend the natural consequences and the inevitable consequences of his actions, assuming that they were his actions ? There is the medical evidence which you must not lose sight of. According to Dr. Corera, who conducted the post mortem examination, there were perforations through the upper lobe of Kumarihamy's lung ; the mid-region of her liver was reduced almost to pulp ; the spleen was reduced to pulp, and there were two through and through perforations of the stomach wall. The doctor tells you that death must have been almost

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instantaneous, and that no medical or surgical skill could possibly have saved her life in view of the injuries to which he has spoken.

If, on an examination of all the evidence which has been placed before you, you still entertain any honest substantial doubts as to whether the accused had a murderous intention, gentlemen, then a verdict of murder is out of the question. In such an event, if you are convinced that the accused did voluntarily commit the act of firing which did cause Kumarihamy's death but he had no murderous intention, then learned Counsel for the defence will agree with me that subject to the special defences which have been placed before you, which I shall deal with in a moment, he, at least, knew and should have known the inevitable consequences of his actions. In that case he would be guilty, gentlemen, of culpable homicide not amounting to murder but not of murder. The difference between those two offences is the difference between knowledge of the consequences of the act and the intention to bring about those consequences.

Let us now deal with each of those special defences which have been placed before you. First of all, I will deal with the defence of insanity. The accused you will remember has proved that on the 14th of April, 1948, he had sustained an obviously rather severe head injury which caused a depression of his skull and which necessitated his being an inmate of the Badulla hospital for some 24 days. He tells you that since that misfortune whenever he gets angry something happens to him, something indefinable. He gets dazed, and he does not know what happens to him thereafter. He says as soon as he is irritated he forgets what happened thereafter. He tells us that on this occasion, on the morning of the 29th of July, 1950, as a result of the entire Samaranayake family pelting stones continuously at his house and acting in the manner which you will remember he related to you, he was gravely provoked. He says there was a tremendous noise going on and the wailing of children and suddenly his brain snapped, " I do not remember what happened thereafter. Probably I lost control " of myself. I do not know what happened at my hands, or what I did. " What I next remember is waking up as if a man is becoming sober after " being drunk."

We have not had any medical evidence as to whether this head injury could have brought about the state of physical or mental condition to which the accused has spoken, but you have his evidence and, to some extent, it is supported by the evidence of his wife. If you think that that evidence is probably true, viz. that whenever he gets irritated his old physical injury produces a certain result so that the man does not know what he is doing at all, what effect would you give to it ? It would be sufficient if he satisfied you that it was probably true. It is not necessary that he should establish it beyond reasonable doubt.

Now, gentlemen, if you believe that that evidence is probably true, do you think it is also probably true that the accused was incapable of forming any criminal intention ? Do you think it is probably true that he

was merely acting by reason of his physical and mental infirmity like a sleep-walker, or a person who was acting quite mechanically and quite unconscious of what he was doing in fact, or of what would be the consequences of what he was doing ? If he knew what he was doing at the time that he did it, then even if it is true that he now forgets what he did, the defence naturally would not be established. If he acted in a rage and on some sort of irresistible impulse which made him intentionally kill the woman, then, gentlemen the mere fact of his having run amok is not sufficient to establish the defence of insanity. But, if it is probable that at the time he fired at the deceased he was labouring under such a defect of reason or disease of the mind which was induced by this earlier physical injury, so that he did not know the nature or the quality of his act, then gentlemen if you think that that is probable let me tell you that he has proved circumstances which rebut the existence of the murderous intention and, in fact, also rebutted any theory that he did commit any crime at all.

Do you think it is probable that even if he did know what he was doing that he did not know, owing to his defect of reason and diseased mind that what he was doing was wrong ? Even then, the defence would be established. If you think that he was temporarily insane at the time, and if you think those are the probabilities of what occurred on this occasion, then gentlemen he has rebutted the presumption that at the time he possessed a sufficient degree of reason so as to make him responsible for what, in the case of a sane man, would amount to a crime. It is not sufficient, gentlemen, to establish the defence of insanity that a man proves to you that he sometimes does things which he cannot help doing if he knew that he was doing it and if he knew the consequences of what he was doing and if he knew it was a crime. The fact that he was the victim of some form of irresistible impulse is not a kind of defence which our law recognizes.

Now, if you think the probabilities are that he was suffering from an insanity of the kind which I have described to you then what would be the verdict ? In view of his defective reasoning and in view of his disease of the mind, assuming you think that that is the true position, he would not be guilty of any offence at all. In fact he must be found not guilty by your verdict, but naturally the law in its wisdom will not permit a man who has established a defence of that kind to leave the dock a free man and walk about in society where perhaps he will be a danger to himself and to others as well. Your verdict would be, gentlemen, that he is not guilty but that you hold that at the time he is alleged to have committed this offence he was by reason of unsoundness of mind incapable of knowing the nature of the act alleged, and constituting the offence or that his act was wrong or contrary to law. Your verdict should specifically state whether or not he committed the act so that other provisions of our Criminal Procedure Code might be applied.

Gentlemen, the Crown takes up the position and invites you to take the view that this part of the accused's story that he was suffering from

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

some form of insanity at the time is totally false. The Crown points out that there is no medical evidence to support the consequences or alleged consequences of this head injury although there is clear evidence to support the fact that he was injured on the head. The Crown points out, gentlemen, that since April, 1948, or May, 1948, when he left hospital he was continuing to actively engage himself in his trade as a carpenter, that he indulged regularly, according to his own admission, in his pastime as a person who shot hare and doves, and that he applied to the authorities for a gun licence. The Crown points out that in many matters he seems to have a fairly good memory as to what occurred on this day. He has given many details with regard to the stone throwing and so on, and the Crown also points out to all these earlier litigation which took place until March, 1949. The Crown relies on the fact that according to his own admission, even if something snapped in his brain at a certain point of time, he has a clear recollection of the firing of the first shot at least when he seems, if his evidence is true, to have acted extremely rationally. He says he fired a gun into the air merely to frighten these people who were committing unlawful acts against him and his property. His wife and he are both agreed on one part of the story, that he not only fired merely in order to frighten the people but that he definitely stated to his wife that that was his sole intention at the time. Is it probable that within a fraction of a second after that his mind went a complete blank enabling him, without knowing the nature of his actions or the consequences of his actions, to go about the place, if you believe that that is what happened, loading the gun, firing, unloading, loading and then firing again and so on? Is it probable that his brain snapped so soon after what he remembers having happened? I am referring again to his version of the admitted firing of the first shot.

Gentlemen, if you think it quite improbable that he was insane in the sense which I have explained to you then what shall be your verdict? As I have said if you are not convinced in your minds that he had a murderous intention in his heart, then on the basis that he must at the very least have known the inevitable consequences of his actions he would be guilty of culpable homicide not amounting to murder. But if you are convinced that he did have a murderous intention, is there any ground on which you would be justified in claiming that nevertheless he was not guilty of murder? Now there are two further defences which have been submitted to you and which must be fairly considered by you if you are convinced that he had a murderous intention.

The first defence is that nevertheless his offence should be reduced to one of culpable homicide not amounting to murder on the ground that there was grave and sudden provocation of a kind which in the eyes of the law is sufficient to reduce the offence. Now, gentlemen, the accused must satisfy you on a balance of probability that there was grave provocation, that the provocation was sudden, and that the provocation was of such a kind that he was deprived of his power of self-control at the time he fired the shot. It is also very important that you should note this; that in the eyes of the

law the defence of grave and sudden provocation pleaded by a man who is charged with murder is only available if he satisfies you on a balance of probability that the provocation was caused by the person who was killed, or at least that, if somebody else caused the provocation, the victim who gave no provocation at all himself was merely killed by mistake or accident. You see, gentlemen, if a man causes grave and sudden provocation to a person the person provoked cannot under the influence of that provocation claim any leniency from the law if he intentionally kills not the person who provoked him but his wife or somebody else. I shall read to you two illustrations which deal with this matter. They are to be found in our Penal Code. The first illustration is this.

" A, under the influence of passion excited by a provocation given by " Z, intentionally kills Y, Z's child. This is murder, inasmuch as the " provocation was not given by the child, and the death of the child was " not caused by accident or misfortune in doing an act caused by the provocation." The other illustration given is as follows :

" Y gives grave and sudden provocation to A. A, on this provocation " fires a pistol at Y, neither intending nor knowing himself to be likely to " kill Z, who is near him, but out of sight. A kills Z. Here A has not " committed murder, but merely culpable homicide."

Well, let us apply a theory of that kind to a possible view of this case. If you think the possibilities are that the woman herself caused provocation by pelting stones at the accused's house and that he intentionally caused her death by firing, you would be justified in bringing a verdict of culpable homicide not amounting to murder provided you think the provocation given was sudden and was sufficiently grave. But, if you think the probabilities are that, whoever gave the provocation she herself gave no provocation, and that the accused, under the influence of provocation given by others, walked up towards her house and when he met her, intentionally fired at her knowing she had given no provocation, then he would be guilty of murder if he had a murderous intention. If you take another possible view, if you think the provocation was extremely grave but was given by Samaranayake or one of his sons, and that the accused under the influence of that provocation fired the gun at Samranayake or Walter and by accident shot the deceased Kumarihamy, then he would be guilty of culpable homicide not amounting to murder. Well, gentlemen, you will remember the version given by the accused and his wife. Do you think that version is probably true or substantially true ? First of all, was there any stone throwing at all or any abuse at all to which Kumarihamy was a party ? The defence says she was not only present at the stone throwing incident but that she joined in the abuse, or at least, identified herself with those who caused that provocation. The prosecution says it was quite false and that the deceased woman was in her own house attending to her normal domestic affairs until she walked out and was shot when she came out of the house. But, if you think the defence version is probably true and that the deceased herself gave provocation, or at least, clearly identified herself with it by being present with those who gave the provocation, then only will this particular defence arise.

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

Now, gentlemen, the police have said that when the Inspector arrived on the scene there were a number of stones on the roof of the accused's house and that some tiles were broken, some stones were in the house and that the picture in the house was smashed. As I understand the case for the Crown, even though Walter may have been lying to the extent that they gave no provocation at all, the Crown suggests that there has been a good deal of exaggeration by the defence, that after the firing and before the police came a number of additional stones were introduced and a scene was prepared to give the police the impression that there was more provocation than what actually took place. It is for you to decide what view of the matter was probably true. Another question you will have to ask yourselves is this. Assuming that there was some provocation and assuming that the deceased Kumarihamy was a party to that provocation or was, at least, sufficiently identified with it, it is probable that, after the first shot was fired, the Samaranayake family including the deceased Kumarihamy was so bold and so defiant as to continue with the provocation in spite of the threat which would have been so eloquently communicated by the firing of the gun. It is probably true that after the first shot was fired, instead of running away, some of the sons were actually bold enough to enter the accused's compound and throw more stones into the accused's house so that they were able to smash the picture and damage the walls of his house ? Is it possible that Samaranayake was so bold and courageous that he scoffed at the gun which had already been fired and went into his house and returned with a knife, and I believe, Walter is alleged to have come with a sword mocking at the gun while his father remarked " We are " not afraid of that piece of pipe fixed to a piece of wood." You will bear all those matters on the question of provocation.

You have to decide, first of all, what was the kind of provocation given if there was any provocation at all. Gentlemen, in considering that question you have to ask yourselves, first of all, whether Kumarihamy had anything to do with that provocation, and if that is answered in the affirmative whether the kind of provocation was so grave and sudden as to deprive the accused of his power of self-control. As I have already said, if you think it highly improbably that Kumarihamy gave any provocation at all or identified herself with any provocation, and if you think it probable that, even if others gave the provocation, he intentionally levelled the gun at Kumarihamy who gave no provocation at all, if you are convinced of that part of Kiri Banda's evidence. I do not see how any kind of provocation could arise at all in law.

But, if you think she probably did give the provocation you will have to ask yourselves how soon after the provocation was given was she shot ? Because, after the first shot was fired if she probably ran away into her own house in fear and later emerged only when she discovered that her son had been shot and that she came out there, if you think that the accused like any rational man, had had quite sufficient time to cool down after the provocation, then you must ask yourselves whether the provocation, was sudden, not only grave, but sudden, at the time of the killing.

That is why even if you think that the defence version is probably true about that provocation, it is of some importance in deciding whether the provocation was sudden provocation that you should ascertain, as the Judges of fact, whether the shooting took place immediately after the provocation was given, or some little time afterwards, when the persons who had provoked had run away in fear ; because then you must consider whether the man acted under the influence of the provocation or really acted in a spirit of revenge.

Then, you must also ask yourselves gentlemen assuming that you think that the accused's version is probably true, was that provocation sudden, and was the provocation grave ? Now, gentlemen, provocation is grave if it is the kind of provocation which would be deeply resented by an ordinary person of the class of society to which the accused belongs, and, in considering that aspect of the matter, if you think it probable that the head injury from which the accused was suffering since 1948, did, in fact, at any rate, render him more irritable, that is a circumstance which you would be justified in taking into account. Then, gentlemen, you must also ask yourselves whether the manner in which he showed his resentment of the provocation was violently disproportionate to the kind of provocation which you think was probably given.

You see I can merely indicate to you certain general principles of law which are applicable to this matter, but it is for you, as the judges of fact, to decide for yourselves whether there probably was provocation and, if so, what was the nature of that provocation, and then you must ask yourselves whether the kind of provocation actually given was the kind of provocation which you as reasonable men would regard as sufficiently grave to militate the actual killing of the woman by firing at her with a gun. I cannot help you very much on this matter gentlemen on the facts because you are the judges of fact. You have heard two versions and you must ask yourselves, having considered all the versions, what probably did happen, and whether there was probably any provocation at all. For instance, if a little boy mischievously throws a few stones at a house, I think you will perhaps, as the judges of fact, take the view that to shoot that boy dead would be entirely out of proportion to the kind of provocation given ; but you must decide what probably happened and then ask yourselves whether the mode of resentment was violently disproportionate or not to the kind of provocation.

Before leaving the question of provocation it is right that you must remember that the defence relies on what is called cumulative provocation, that is to say, that from 1946 the Samaranayake family were almost torturing the accused's family, and that even if the alleged stone throwing and the abuse on this particular date was an isolated matter which a person would normally not have resented so deeply, the fact, according to the defence, is that they had previously been tortured, and that this incident was the last straw. Well, if you believe that, that is also a matter which must be taken into account.

Then I come to the next defence gentlemen. The accused says that

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

if he acted as the prosecution suggests, although he cannot remember here the last action of which he is conscious, it is not only the provocation which I have dealt with, but natural fear and a desire to protect his own person and the person of the other inmates of his house from a possible assault or grievous injury at the hands of the Samaranayake family, and that is perhaps, he says, why he may have shot, although he cannot remember.

Well, there again, gentlemen, it is for you to ask yourselves whether it is probably true that after the first shot was fired and the accused went into his house, as he says he did, that the Samaranayakes continued with their attack and came into his compound with knives and swords, or whatever the accused says were in their hands. If so, is it probable that he was influenced by fear of grievous injury to himself and the other members of the family ?

If you think that story is probably true, it seems quite reasonable to say that the man would apprehend at least grievous injury to himself and to the others of the house hold, if not death itself. Then the question is, is it probably because of that circumstance that he fired ? Or again is it probable gentlemen that Kumarihamy herself was a person at whose hands he feared injury to himself. There again you come back to the question :— Was she probably present at the time of this alleged earlier episode ? Or, are you convinced that the truth is that she was really in her house and had nothing to do with this earlier incident at all ?

Gentlemen, if a man invades my house with a deadly weapon like a knife and sword, the law gives me the completest right to defend myself against that person, provided that my sole intention is to defend myself and not to use that occasion to take my revenge on that man or on somebody else.

If you think, gentlemen, that it is quite untrue that Samaranayaka was there with one deadly weapon and Walter with another, and if you think that it is quite untrue that he shot because of his terror for his own life, then the defence fails, but, if you think that the probabilities are that he shot only to defend himself and the inmates of his house, then he should be acquitted altogether, because the law has given him that right, because with great respect I do not see how it can be suggested that a man has exceeded the right of self-defence if he fires at a person who is about to kill him, especially having warned that person by having fired into the air only to find that that person continues to attack. So that it seems to me, gentlemen, that, on that version given by the accused, he would have been entitled to have caused the death of the man at whose hands he feared injury, grievous injury, to himself and to the others. Well, gentlemen, is that probably true ? Where was Samaranayake at the time when he was shot ? Is it probably true that Kumarihamy had anything to do with this threatened attack on the members of that household ? Where was she at the time the accused fired at her ? All those are questions you must answer for yourselves before supplying the legal principles. If on the other hand you think that he probably did shoot only for the purpose of defending himself and the other members of his household but that, although his sole

intention was to act in self-defence, he nevertheless exceeded the right of self-defence, then it seems to me that he would be entitled to ask for a verdict at your hands that he was guilty only of culpable homicide not amounting to murder, because he exceeded the right of private defence. You are only concerned with the question of the alleged murder of Kumarihamy. There she was lying dead without any weapon in her hands, and remember where she was shot, gentlemen, on the back and from a side. Do you think it probable that she was shot because the accused, at the time when he fired the shot, genuinely feared for his life or the life of his wife and grandchildren at her hands ? If you think that he fired at somebody who actually attacked him but by accident fired at her he would not be guilty of murder. But if he intentionally levelled the weapon at her and shot her from a distance of not less than forty feet but not more than seventy feet, what are the inferences you can draw ?

It has been suggested, gentlemen, that he was acting in defence of his property, it has been suggested that if he did shoot on that later occasion, although the accused himself says he cannot remember, he did so when all these enormous stones were hurled on to his roof and house causing grave damage to his property, and that therefore he shot in defence of his property. But if you think that whatever might have happened earlier it is not probable that he shot Kumarihamy at a time when he feared any further damage to his property, then the defence would seem to fail because the right of private defence of property ceases after the danger to your property has disappeared. If you think that the probabilities are that there had been some invasion of his property which called for defensive measures on his part, but that thereafter seeing the gun the whole family ran away and made good their escape, our law would not be so unwise as to permit a man to go on firing at people who are running away in terror having committed mischief.

Well, gentlemen, as I have already told you the question really resolves itself into this : What are the facts which you believe the Crown has established beyond reasonable doubt ? What are the inferences which you are convinced you may justifiably draw from those proved facts ? If you think that on a balance of probability the accused was not at all insane on this occasion, and if you are convinced that he deliberately fired at this woman intending to shoot her with a murderous intention in his heart, then you would be justified, in fact you are in duty bound to do so, to return a verdict that he was guilty of murder, unless you think that he justifiably acted in self-defence in which case you would acquit him ; or unless you think the probabilities are that he exceeded the right of private defence, in which case you will find him guilty of culpable homicide not amounting to murder ; or unless you think he acted under the influence of grave and sudden provocation, in which case you would be justified in bringing in a verdict of culpable homicide not amounting to murder, provided that you think the probabilities are that this woman herself gave the provocation, or, had identified herself with the provocation, or, in the alternative, that the probabilities are that the other members or certain of the members of

In the Supreme Court.

No. 21. Charge to the Jury, 3rd September, 1951— *continued.*

the family gave the provocation and that he killed this woman purely by accident or mistake intending to cause injury only to those who actually provoked him. If you think the probabilities are that he was suffering from some temporary insanity at the time he must be acquitted, but you must in returning your verdict state whether in your opinion he did or did not commit the act which caused the death of Kumarihamy.

COURT TO COUNSEL : Are there any other points which you can think of?

CROWN COUNSEL : No.

DEFENCE PROCTOR : No.

COURT TO JURY *continued* : If you require any further assistance please come back. It is an anxious and difficult case. Remember the presumption of innocence. Remember the heavy burden on the Crown. Remember also that if the Crown has established the ingredients of the offence beyond reasonable doubt then the burden of proving any circumstances of mitigation or exculpation is on the accused to satisfy you by a balance of probability that those circumstances existed.

JURY RETIRE.

The Jury retire at 12.32 p.m. and return at 12.50 p.m.

True copy. Certificate in Form VIII forwarded to the Registry, Court of Criminal Appeal.

No. 22. Verdict, Rider and Sentence, 3rd September, 1951.

No. 22.

Verdict, Rider and Sentence.

By a unanimous verdict the Jury find the accused guilty of murder.

FOREMAN : In view of the accused's age we wish to add a rider recommending him for mercy.

In answer to Court Crown Counsel states that in the accused's statement to the Police (which Crown Counsel could not prove) the accused had given his age as fifty years.

The prisoner is informed of the verdict and the rider of the jury.

On being asked whether he has any cause to show why sentence of death should not be passed on him, the prisoner at the Bar states :—

" My native place is about 40 miles away from Colombo. I came to " Badulla when I was about 15 years old. I was not conducting any " profession when I was in Badulla. I had learnt some work in Moratuwa " and having gone to Badulla I joined the Commercial Company and worked

" At Walkers and the P.W.D. as head ' Baas ' (in all those places). While " I was working there Mr. Kindersley was at one time the Government " Agent. I had worked for several Government Agents including the " present Government Agent in Colombo, Mr. Holmes when he was at " Badulla. The certificates I have received are here. A certificate from " Mr. Holmes is also here. I have borne a good character and have not " even been fined five cents. I had never been involved in any case or " quarrels. I lived a peaceful life, got married and was making my living " continuing my profession. In 1936 this Samaranayake purchased a " portion of our land and came there. Samaranayake is a man from " Odoweera about 4 miles from our place at Bogahamaditta. He had been " driven from his village because his wife Kumarihamy was misbehaving " in that village during the time of the Military, and fæcal matter was " thrown at their house and they were driven away from their village. " Having been driven from their native place I know they lived in 4 or " 5 places. Then they came into this vacant house which was haunted. " I rendered all the assistance I could while they were occupying that " house. Samaranayake was jobless after he left the Military.

" From the time Samaranayake came to occupy that vacant house he " started giving me trouble by pelting stones, abusing me and quarrelling " with me. I had made daily complaints to the headman and the Police " and he had been warned about 10 or 12 times. It was thereafter that " he came to occupy the land in question which was mine. Without my " knowledge he had purchased that land from my mother-in-law and other " relations. I did not allow him to possess. He filed cases. On 20.6.50 " I made a complaint to the police because when I was away on an estate " these people had quarrelled with my family. On 16.8.50 I made a " complaint at the police station. In the case in which I received an " injury on my head, I, my wife and even a grand child of mine who is " present in Court, were assaulted. I could not go along the road. When " they saw me going along the road they cursed me. They had about " 7 or 8 people in their family. I was alone and had the support of my " only son. I have a grown up daughter in my house. The people in the " village are the relations and are interested in them. In all my cases " against Samaranayake the lawyers and Inspectors of Police told me that " these people were sure to go to jail and told me they would not allow " any quarrels to take place thereafter and I sympathised with Samarana- " yaka. Even at that stage Samaranayake's wife created trouble in the " Court and the Court Sergeant and the Proctor sent her away. Thereafter " there were no quarrels for about 2 or 3 months. After that they started " pelting stones and I have made complaints in respect of that at the Police " Station and to the village headman. And every time I go to make a " complaint I am told ' Baas you can make a complaint and go,' and " nothing is done thereafter. On the day in question when I was going to " the police station the Inspector who is present in Court wrote down " something. At that stage Inspector Dhanapala was on a lounger. I told " Inspector Dhanapala, ' Sir, you are the person who is responsible for

In the Supreme Court.

No. 22. Verdict, Rider and Sentence, 3rd September, 1951— *continued.*

" ' having destroyed this family.' Then the Inspector said, ' Baas, is it " ' myself ? It is Mr. Blaze who is responsible.'

" Just before I was taken to prison at about 7 p.m. the statement was " recorded by the Inspector. From that time I have been having lot of " patience and enduring all this. I have an unmarried daughter at home. " That daughter used to worship me saying, ' father, that is the way you " ' should endure and have patience.'

" Having received such injuries on my body I sympathised with them. " They are people who wear European costumes. As these people were " giving me immense trouble I at one stage decided to sell my properties " and get away. Whenever a prospective buyer comes and inspects my " land, Samaranayake used to go after him and tell him not to buy the " land as it belongs to a lot of co-owners. If any man were to visit my " place in respect of a marriage proposal for my daughter Samaranayaka and " his wife used to say ' Oh, you are getting down trousered people.' About " one or two months before this case Samaranayake had a row with my " son. When I spoke roughly to my servant girl Samaranayake spoke " roughly to me to say I abused him. They are not Kumarihamy's. " Sometimes they used to expose their naked persons for about 10 minutes. " Samaranayake's wife stays in the kitchen which is on a higher elevation, " gets up on a chair and exposes her naked person. Even her daughter " used to behave like that. I am not a man who wishes to commit murder " or crime. This is the only case in which I have been implicated. All my " certificates are here. I have led a good life. I have appeared before " Mr. Kindersley and Mr. Thanie. On this day I am unable to account " how this happened at my hands. Even the boy was returning from the " river I did not take notice of the stone throwing as it was a common " occurrence. When I went to my house I found Kumarihamy and her " boys pelting stones and abusing and it was with difficulty that I managed " to get into my house. When the stones were being pelted into my house " I got into a corner of my house. Considering my good character, con- " sidering the position I have been in, considering the family with which " I have been burdened and considering my age I beg that Your Lordship " be pleased to have mercy on me."

COURT TO PRISONER: I have no discretion with regard to the sentence, but what you have said will be communicated to the proper authorities.

Sentence of Death is passed on the Prisoner at the Bar.

Execution of sentence is fixed for Saturday, 13th October, 1951.

No. 23.

Application for Leave to Appeal.

No. 23. Application for leave to Appeal, 5th September, 1951.

IN THE COURT OF CRIMINAL APPEAL.

Criminal Application No. 85 of 1951.

REX *v.* K. D. JOHN PERERA.

(Supreme Court Second Midland Circuit, 1951.

Case No. 16/M. C. Badulla 11357 of 1950.)

NOTICE OF APPEAL OR APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION OR SENTENCE.

To the Registrar of the Court of Criminal Appeal.

Name of Appellant : Kumarasinghege Don John Perera.
Offence of which convicted : Murder.
Sentence : Death.
Date when convicted : 3rd September 1951.
Date when sentence passed : 3rd September 1951.
Name of Prison : Bogambara, Kandy.
I the above-named Appellant hereby give you notice that I desire to appeal to the Court of Criminal Appeal against my conviction on the grounds hereinafter set forth on page 2 of this notice.

(Signed) or (Mark)

K. D. JOHN PERERA (in Sinh).
(*Appellant*).

Signature and address of witness attesting mark.

Illegible, *Jailor, B.P.*

Dated this 5th day of September, 1951.

The Appellant must answer the following questions :—

Question.	*Answer.*
Did the Judge before whom you were tried grant you a Certificate that it was a fit case for Appeal ?	No.
Do you desire the Court of Criminal Appeal to assign you legal aid ?	Yes.
If your answer to this question is " Yes " then answer the following questions :—	
(a) What was your occupation and what wages, salary or income were your receiving before your conviction ?	Carpenter— Rs. 45/– per mensem.

In the Court of Criminal Appeal.

No. 23. Application for leave to Appeal, 5th September, 1951—*continued.*

	Question.	*Answer.*
	(b) Have you any means to enable you to obtain legal aid for yourself ?	No.
	(c) Is any Proctor now acting for you ? If so, give his name and address.	Yes.
3.	Do you desire to be present when the Court considers your case ?	No.
4.	Do you desire to apply for leave to call any witnesses on your appeal ?	
	If your answer to this question is " Yes " you must obtain Form XXVI, fill it up, and forward it with this notice.	

GROUNDS OF APPEAL OR APPLICATION.

1. The verdict of the Jury is unreasonable and cannot be supported on the weight of evidence adduced in this case.

2. It is respectfully submitted that the minds of the Jury have not been adequately directed to the defence of cumulative provocation.

3. The admission of evidence by the Crown in regard to the deaths of Kamalawathie, Cyril and L. C. W. Samaranayake has prejudiced the defence of the accused in regard to the charge of murder of Kumarihamy.

(The grounds of appeal were drawn by Mr. Adv. G. Mudannayake, of Kandy.)

No. 24. Further Grounds of Appeal, 9th and 11th October, 1951,

No. 24.

Further Grounds of Appeal.

4. That the learned trial Judge misdirected the Jury on the law relating to provocation in Ceylon.

5. The learned trial Judge misdirected the Jury in that he failed to direct them on the law relating to the exception of sudden fight.

Sgd. V. S. A. PULLENAYEGUM.
Counsel for the Appellant.

No. 25.

Preliminary Judgment.

IN THE COURT OF CRIMINAL APPEAL.

Application 85 of 1951.

S.C. 16/M.C. Badulla 11357.

REX *v.* K. D. J. PERERA.

Present: NAGALINGAM J., GUNASEKERA J. and DE SILVA J.

Counsel: Dr. COLVIN R. DE SILVA with V. S. A. PULLANAYAGUM for accused-appellant.

BOYD JAYASURIYA, C.C. for A.G.

Heard on: 15th October 1951.

NAGALINGAM J.

We adjourned the hearing of this case as we found that we were divided in regard to our judgment.

The point that has arisen in this case, namely, whether under our law the mode of resentment should be regarded as a relevant factor in determining the question of the gravity and suddenness of the provocation given to an accused person was decided by the majority of the Court in the affirmative in case No. 58 of 1951 with Application 84 of 1951, S.C. 15/M.C. Kurunegala 454, but the majority, too, arrived at their decision on different grounds.

In the present case the majority of us have taken the view that the decision in the above case needs to be reviewed as we entertain doubts as to the correctness of the decision.

We are unanimously of the view that the further hearing of this case should be continued before a fuller Bench.

As the matter of the constitution of the Bench is one for the Chief Justice, let the case be submitted to him for his orders.

Sgd. C. NAGALINGAM,
President.

In the Court of Criminal Appeal.

No. 26.

Judgment.

No. 26. Judgment, 29th November, 1951.

IN THE COURT OF CRIMINAL APPEAL.

Application 85 of 1951.

S.C. 16/M.C. Badulla 11357.

REX

v.

K. D. J. PERERA

Present : NAGALINGAM S. P. J. (President), GUNASEKERA J. PULLE J. SWAN J. DE SILVA J.

Counsel : COLVIN R. DE SILVA with K. C. DE SILVA, V. S. A. PULLENAYAGUM and R. S. WANASUNDERA for Appellant.

R. R. CROSSETTE-THAMBIAH K.C., Solicitor-General with with H. A. WIJEMANNE, Crown Counsel and N. T. D. KANAKARATNE, Crown Counsel for Attorney-General.

Argued on : 15th, 16th, 19th and 20th November, 1951.

Delivered on : 29th November, 1951.

NAGALINGAM S. P. J.

Appellant in this case was convicted of the murder of a woman named Kumarihamy and was sentenced to death. His appeal came in the ordinary course before a Bench of three Judges but as there was a difference of opinion in respect of the point of law argued which was identical with that considered in the case of *Rex* v. *Naide*, Appeal 58 of 1951 with application 84 of 1951, C.C.A. Minutes 10.10.51, which was itself the subject of dissenting judgements, and as the majority of the Court thought that the case of *Rex* v. *Naide*, Appeal 58 of 1951 with application 84 of 1951, C.C.A. Minutes 10.10.51, was wrongly decided, the argument was adjourned for its resumption before a fuller Bench, and on the orders of My Lord the Chief Justice the appeal has now been argued before a Bench of five Judges. The question whether the Bench as constituted is a Full Bench or not has been canvassed by the learned Solicitor General ; we shall advert to this point after dealing with the main question that arises on this appeal.

The question that arises is whether certain passages in the summing up contain a misdirection of such a character as to vitiate the conviction. It has been said that in dealing with the exception relating to grave and sudden provocation the directions given by the learned trial Judge to the Jury set out the law in terms much wider than those warranted by the language of

exception 1 to section 294 of the Penal Code. It is conceded, as Counsel for the defence was bound to do, that there are other passages in the charge to the Jury which lay down the law quite correctly and in consonance with the principles underlying the exception referred to. But it has been contended that towards the close of the summing up the learned Judge rather pointedly referred to certain aspects which he thought were proper to be considered by the Jury in arriving at a decision as to whether there was sudden and grave provocation or not but which would have tended to lead the Jury astray in their deliberations.

Before I set out the passage complained of, it would be well to make a very brief survey of the facts as presented to the Jury insofar as they are material for a proper understanding of the point of law discussed. The case for the prosecution in essence was that the prisoner deliberately aimed at and shot and killed the deceased woman who was the wife of a neighbour of his with a gun. There was evidence that there was enmity between the family of the deceased woman and that of the prisoner over a period. The defence story, stated very compendiously, was that the members of the deceased woman's family consisting of herself, her husband and two sons aged seventeen and eighteen, pelted stones at the house of the appellant; thereupon the appellant, who was the owner of a licensed gun, shot gun, with a view to scaring away the aggressors discharged it from the verandah of his house into the air; but far from taking any notice of the firing of the gun, the aggressors intensified the stone throwing, accompanying their action with filthy abuse directed towards him. The prisoner says that at that stage he was suddenly provoked and that he did not know thereafter what happened to him; his surmise was that he had probably lost control over himself and did not remember what happened thereafter.

On these facts the defence set up a plea based on sudden and grave provocation with a view to reduce the offence of murder to one of culpable homicide not amounting to murder. It was in regard to the considerations that should be taken into account for the purpose of determining whether there was grave provocation given to the prisoner that the learned Judge, after dealing quite fully and properly with various matters, delivered himself of the passage following, to which exception is taken :—

> " Then, gentlemen, you must also ask yourselves whether
> " the manner in which he showed his resentment of the provocation
> " was violently disproportionate to the kind of provocation which
> " you think was probably given.
>
> " You see I can merely indicate to you certain general
> " principles of law which are applicable to this matter, but it is
> " for you, as the judges of fact, to decide for yourselves whether
> " there probably was provocation and, if so, what was the nature
> " of that provocation, and then you must ask yourselves whether
> " the kind of provocation actually given was the kind of provoca-
> " tion which you as reasonable men would regard as sufficiently
> " grave to mitigate the actual killing of the woman by firing at

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" her with a gun. I cannot help you very much on this matter " gentlemen on the facts because you are the judges of fact. You " have heard two versions and you must ask yourselves, having " considered all the versions, what probably did happen, and " whether there was probably provocation at all. For instance, " if a little boy mischievously throws a few stones at a house, " I think you will perhaps, as the judges of fact, take the view that " to shoot that boy dead would be entirely out of proportion to " the kind of provocation given; but you must decide what " probably happened and then ask yourselves whether the mode " of resentment was violently disproportionate or not to the kind " of provocation."

It will be noticed that both at the beginning and end of this passage the learned trial Judge expressly directs the Jury to consider whether the retaliation was not altogether of an outrageous nature in comparison with the provocation the prisoner may have received. Can it be said that one reading this passage or hearing this passage read would not gain the impression that what was emphasised was that where the mode of resentment was so totally disproportionate to the provocation given the benefit of the plea that the prisoner had acted under sudden and grave provocation would be, to put it at the highest, of little avail to him.

The learned Solicitor General, however, urged that what the learned Judge intended to convey by the passage and what the passage does convey was to ask the Jury to consider whether the violently disproportionate resentment did not indicate that the accused far from having lost was in possession of his powers of self-control when he retaliated, and alternatively, whether they did not think that the gross disparity between the retaliation adopted by the prisoner and the provocation that may have been given to him disclosed a spirit of revenge rather than a lack of self-control. There are no express words in the passage to support either of the interpretations placed by the learned Solicitor General nor can any such connotations even be gathered from the language used, if one construes the passage according to the natural and ordinary meaning of the words employed therein. It cannot, however, be too strongly emphasized that the import of a passage such as this has to be ascertained by the ordinary effect it would have on the minds of the Jurors who hear the words spoken, and that only once, and not by reference to a laboured gloss that may be placed on it by refinements thought out with assiduity by highly developed minds. We are unanimously of the view that the passage clearly and in unmistakeable terms invited the Jury to discount the plea of sudden and grave provocation if they thought that the mode of retaliation was so disproportionately outrageous compared with the provocation that may have been given.

The next question is whether this is a proper direction under our law. The learned Judge would appear to have adopted the language of the Lord Chancellor, Viscount Simon, in *Mancini's* case, 1942 A.C. 1, where

the noble Lord, adverting to this aspect of the law of provocation under the English Law, said :—

> " In short, the mode of resentment must bear a reasonable " relationship to the provocation if the offence is to be reduced " to manslaughter."

That this is the English Law there cannot be the slightest doubt, proceeding as it does from the highest judicial tribunal in the realm. That a direction to the Jury on these lines would be essential for constituting a proper and adequate charge to an English Jury cannot be doubted, for the Lord Chief Justice of England, Lord Goddard, in *Duffy's* case, 1949, 1 A.E.R. 933, expressly approved the charge in that case which contained the following instruction :

> " Secondly, in considering whether provocation has or has " not been made out, you must consider the retaliation in " provocation—that is to say, whether the mode of resentment " bears some proper and reasonable relationship to the sort of " provocation that has been given. Fists might be answered with " fists but not with a deadly weapon, and that is a factor you " have to bear in mind when you are considering the question of " provocation."

The principle that under the English Law the mode of resentment should be considered in regard to the provocation given for the purpose of ascertaining whether the offence that was committed was one of murder or manslaughter is very old, and Viscount Simon's language quoted above can be traced to Foster's Crown Law, p. 292 :

> " In fact the mode of resentment must be in reasonable " proportion to the provocation to render the offence man- " slaughter."

The reasoning adopted by English lawyers for holding that an offence that would otherwise be murder is reduced to manslaughter where provocation is given to the slayer is set out in the summing up of Keating, J., in the case of *Welsh*, 11 Cox 336 :

> " Whenever one person kills another intentionally he does it " with malice aforethought. In point of law the intention signifies " the malice. It is for him to show that it was not so by shewing " sufficient provocation which only reduces the crime to man- " slaughter because it tends to negative malice."

How provocation negatives malice is explained by the Lord Chancellor, Viscount Simon, in *Holmes'* case, 1946 L.R.A.C. 588 :

> " The whole doctrine relating to provocation depends on the " fact that it causes or may cause a sudden and temporary loss of " self-control whereby malice, which is the formation of an " intention to kill or to inflict grievous bodily harm, is negatived. " Consequently, where the provocation inspires an actual intention " to kill such as Holmes admitted in the present case, or to inflict

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" bodily harm, the doctrine that provocation may reduce murder " to manslaughter seldom applies."

To appreciate the full significance of this statement of the law, one should realise what it was that Holmes admitted and to which the Lord Chancellor makes reference. The admission is to be found in the answer given by Holmes to the question put in cross-examination to him, " When you " put your hands round that woman's neck and gave pressure through " your fingers you intended to end your wife's life, did you ? " The answer was, " Yes."

The principle underlying the English Law, therefore, is clear and unambiguous that the provocation given must be such as to deprive the accused person of his self-control to such an extent that he causes death without forming or having an intention to kill. It is then and then only that the offence is one of manslaughter and not of murder. But on the other hand, if it is established or clear from the evidence that though provocation of howsoever grievous a kind may have been offered, nevertheless, if it could be shewn that the accused caused the death with an intention to kill, the offence is one of murder and not manslaughter. This is one of the fundamental differences between our Law and that of England, and we shall advert to it more fully presently.

Although the expression " the offence of murder is reduced to manslaughter " is used in English judgments, its use there is in a sense different from that in which we use the expression under our Law that the offence of murder is reduced to culpable homicide not amounting to murder. Under English Law, the two offences are distinct in the sense that the essential elements necessary to constitute them are different ; in the case of murder, there must be an intention to kill, in the case of manslaughter, no such intention can exist. Under our law, however, an intention to kill is an essential element in both the offences of murder and culpable homicide not amounting to murder.

The basis, therefore, on which the English Law proceeds to hold that in a case where provocation may have been given the use of a deadly weapon such as a knife in reprisal and the consequent killing would not constitute anything less than murder would appear to proceed on the ground that though the person provoked may have lost his self-control he would not have been incapable of having or forming an intention to kill ; and where a deadly weapon was used in resenting, say, a blow with the fist, the use of the deadly weapon was proof positive that the accused person had not lost his power of self-control so as to deprive him of forming an intention to kill, and in fact the use of a deadly weapon itself was the best proof that there was a definite and deliberate intention to kill.

Another view is suggested by the following passage from the judgment of the Lord Chancellor, the Viscount Simon, in *Mancini's* case (supra) where, it would be remembered, the person who was killed, namely Distleman, struck the accused, Mancini, with his hand or fist and the accused pulled out a dagger and stabbed Distleman fatally :

" . . . . the only knife used in the struggle was the appellant's " dagger, and this followed Distleman's coming at him and aiming " a blow with his hand or fist. Such action by Distleman would " not constitute provocation of a kind which could extenuate " the sudden introduction and use of a lethal weapon like this " dagger, and there was therefore . . . . no adequate material " to raise the issue of provocation."

Stress should be laid on the word " extenuate " in this passage, for this is the key which opens the door revealing the existence under English Law of another basis for holding that where the mode of resentment is out of all proportion to the provocation, the plea of provocation is not established, and that is that the question of resentment having to be reasonable in comparison with the provocation given is an independent element in regard to the law of provocation and not one that could properly be co-related to the loss of self-control. The Lord Chancellor may have formulated this principle for the reason that it is impossible to deny that a violent retaliation may be the surest indication of the very grave nature of provocation received by the assailant. The more self-control is lost—and therefore the more exception 1 applies to the case—the more likely are numerous injuries to be inflicted." (Per Young C.J. in the case of *Hussein*, 1939 A.I.R. Lahore 471.)

It has, however, been said at the bar that the violent mode of retaliation may in certain circumstances show the very opposite of a lack of self-control. It is rather difficult to subscribe to this proposition. The retention of self-control cannot be deduced solely either from the deadly nature of the weapon used or from the brutal nature of the attack made by the incensed assailant ; but if either or both these factors be accompanied by circumstances disclosing that the assailant had time to cool after receiving the provocation and before he launched out the attack or that after receiving the provocation he had deliberately selected or acquired a lethal weapon, such an inference may be possible.

Under the English Law, therefore, if one were guided by the pronouncement of Viscount Simon in the House of Lords in *Mancini's* case (supra) contained in the second of the citations from that judgment, the position is inescapable that the dictum that the mode of resentment must be in a reasonable proportion to the provocation engrafts an additional element to that law in regard to the plea of provocation, and that the plea would fail where retaliation is out of proportion to the provocation given ; the underlying principle being that an average Englishman is expected to control his passion and not let himself give way to excesses. It is on this view of the matter that it has been laid down in English Law that mere words, however insulting and irritating, are never regarded as gross enough to found a plea of provocation. " As a general rule of law, no provocation " of words will reduce the crime of murder to that of manslaughter "—per Blackburn J. in *Rothwell's* case 12 Cox 145. See also the cases of *Holmes* (supra) and *Lesbini* 1914 3 K.B. 1116.

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Our law, however, in regard to the matters so far considered is quite different. In the case of *King* v. *Coomarasamy* 1940 41 N.L.R. 289, on a case stated under Section 355 of the Criminal Procedure Code, a Bench of three Judges held that mere abuse unaccompanied by any physical violence would be sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder. This case was followed in *King* v. *Kirigoris* 1947 48 N.L.R. 407 which came up before this Court in 1947. That was a case where the provocation relied upon consisted only of words of abuse ; the trial Judge told the Jury to consider whether the act of killing was not of " an outrageous nature and beyond all proportion " to the provocation," and this Court held that

> " the charge is subject to this criticism, namely, that it may have " led the Jury to believe that mere abuse or insult by words or " gestures may never be regarded as sufficient provocation to " support the plea of grave and sudden provocation. This is " not the law of Ceylon."

This case would also appear to be the first in our reports where an attempt was made to guide a Jury in its deliberations in respect of a plea of provocation along channels as in the present case. It is true that this Court did not express its disapproval of such a course but on the contrary would tacitly appear to have adopted it. But neither did it expressly decide the point ; for as set out earlier, it disposed of the appeal on the ground that the charge may have amounted to a direction that words alone would not be sufficient to constitute grave provocation.

Under our law, what has to be established by a prisoner who claims the benefit of exception 1 to Section 294 of the Penal Code are : (1) that he was given provocation (2) that the provocation was sudden (3) that the provocation was grave (4) that as a result of the provocation given he lost his powers of self-control (5) that whilst deprived of the power of self-control he committed the act that resulted in the death of the victim. Our law recognises further, as stated earlier, that although the prisoner may have lost his powers of self-control he need not be bereft of an intention to kill, and this is clear from the wording of Section 294 and that of exception 1. If we deal with the class of cases where under the section intention is one of the essential elements of the offence of murder, it will be seen that in regard to that class there is nothing in the exception to denote that that intention to kill should be modified or removed before the exception could be applied. What is more, Section 297 of the Code expressly contemplates the case where culpable homicide not amounting to murder may be committed with the intention of causing death.

This, as stated earlier, is a fundamental difference between the law of England and the law of Ceylon ; so that if the mode of retaliation is to be taken into consideration as under the English Law for the purpose of negativing malice, which is the intention to kill, the application of such a principle to the determination of the question whether under our law the offence is one of murder or culpable homicide not amounting to murder

would be indefensible for, as pointed out in our law, in both the offences of culpable homicide not amounting to murder and murder, an intention to kill very often is an essential element. If, on the other hand, one adopts the later view of Viscount Simon and holds that a violent mode of resentment cannot be regarded as an extenuation of the offence of murder, that is a consideration foreign to us, as such an idea is totally absent and altogether unexpressed in the language of the exception.

There are other differences between our law and the law of England in respect of the offences of culpable homicide not amounting to murder and manslaughter, but it is unnecessary to pursue them for the purpose of this case. It is sufficient, however, to observe that the differences noticed are sufficiently marked and so clearly divergent that the indiscriminate application in every detail of the principles underlying the one system of law to the other would result inevitably in a miscarriage of justice.

That the differences have been deliberately introduced because of the differences in the temperament, nature and habits of the two peoples there can be little doubt. People of this country are generally unable to exercise the same degree of control over themselves as Englishmen would appear to be able to do. It is a common experience of Judges in this country who preside at Assizes to have cases before them time and again of prisoners who have committed killing by knives carried on their persons while under a sense of provocation given by a blow with hands or even words of abuse. The learned Solicitor General conceded that if we uphold the passage in the charge to the Jury complained of as embodying a correct principle under our law sentences of death would have to be passed more often not only in these cases but the field in which sentences of death would have to be passed would be widened ; he, of course, added that such a result cannot be permitted to have the slightest influence in ascertaining the law ; with this last observation we emphatically agree. But, of course, if the law be such, it certainly would be a matter for the Legislature to step in and prevent, if it thinks proper, death sentences from being passed more frequently. Fortunately, however, there is no need for the Legislature to concern itself with any amendment of the law, for we are satisfied that the cases of *King* v. *Coomarasamy* and *King* v. *Kirigoris* (supra) lay down the law precisely and in consonance with the principles underlying the provisions of the Penal Code.

Bearing in mind, therefore, that under our law neither the presence of an intention to kill would preclude the formulation of a successful plea based on grave and sudden provocation nor that words by themselves would not be sufficient to cause provocation, let us proceed to an analysis of each of the requisites necessary under our law to be proved by a prisoner who claims the benefit of exception 1.

In the first place, it would be necessary to ascertain what is meant by provocation. Provocation, according to the dictionary, would be any annoyance or irritation, and for our purpose it must be defined as anything that ruffles the temper of a man or incites passion or anger in him or causes

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a disturbance of the equanimity of his mind. It may be caused by any method which would produce any one of the above results—by mere words which may not amount to abuse or by words of abuse, by a blow with hands or stick or club or by a pelting of stones or by any other more serious methods of doing personal violence.

The next requisite is that the provocation must be such as to bring it within the category termed sudden, that is to say, that there should be a close proximation in time between the acts of provocation and of retaliation —which is a question of fact. This element is of importance in reaching a decision as to whether the time that elapsed between the giving of provocation and the committing of the retaliatory act was such as to have afforded and did in fact afford the assailant an opportunity of regaining his normal composure, in other words, whether there had been a " cooling " of his temper.

The third element is that the provocation should be grave. That is the element with which we are concerned particularly in this case. Provocation would be grave where an ordinary or average man of the class to which this accused belongs would feel annoyed or irritated by the provocation given to the extent that he would, smarting under the provocation given, resent the act of provocation or retaliate it. It is entirely dependent upon the act of the provocator and cannot be said to be based upon the nature or mode of resentment adopted by the person provoked in giving expression to his resentment. That this is so will be clearly appreciated if one took an illustration. Take, for instance, the case of one Muslim putting a piece of hog's flesh on a plate off which another Muslim was dining. Could it be said that if the diner retaliated by mauling the provocator with hands the provocation would be regarded as grave but if the retaliation took the shape of stabbing and killing the provocator with a dagger which the person provoked had on his person, the provocation would not be regarded as grave but only as venial ? The lack of reasoning underlying the determination of the gravity of provocation by reference to the nature or mode of the retaliatory act becomes manifest ; if one went further, and if in the former case, assuming that the person provoked got hold of the provocator with hands and dashed him on the ground and killed him, would the provocation yet be grave ? Is the answer to depend upon a view as to whether the act of killing was or was not out of proportion to the provocation given ? If this be the proper method of approach to solve the question, then, if the view be taken that the act of retaliation was grossly out of all proportion to the act of provocation, the offence would have to be murder, while if the contrary view be taken the offence would only be culpable ho- icide not amounting to murder. Here, it would be noticed that the element of gravity of provocation is completely ignored and the act of provocation is weighed against the actual act of retaliation in order to decide the issue.

The exception does not countenance the application of such a test. It would have been simple enough if the Legislature was so minded to have very effectively stated that where the mode of resentment is shown to be

out of all proportion to the provocative act, the benefit of the plea should not be available, and added it to the existing provisos to the exception as an additional one. In truth and in fact the grave and sudden provocation given cannot be weighed against the retaliatory act but can and must only be taken into consideration to determine whether it would in the opinion of the Jury have been sufficient to cause the ordinary man of the class to which the accused belongs to lose his temper. The gravity and suddenness of provocation has no other bearing or relevancy under our law in regard to this exception.

If the answer to the question posited as to whether the provocation would have been grave and sudden in the case of the average man referred to—be in the affirmative then the presence of the next factor must be considered, and that is the fourth requisite, namely, whether as a result of the grave and sudden provocation given the person provoked was deprived of his power of self-control. It has to be stressed that the exception itself expressly refers to the offender being deprived of his power of self-control, and in view of this express reference to the offender, it would be altogether unwarrantable to hold, as contended for by the learned Solicitor General, that one must first determine in this instance too whether the average man under contemplation would himself have been deprived of his power of self-control as a result of the provocation given before determining whether the offender himself did in fact lose his power of self-control. We are of opinion that once the conclusion is reached that the provocation, taking the case of the given average man, was grave and sudden, the next question that need receive the attention of the Jury is whether the prisoner himself, as a result of the provocation received, did lose his power of self-control, it being immaterial whether the "average man" would or would not have lost his power of self-control.

The final element which has to be established under our law in claiming the benefit of the exception is that the prisoner did cause the death whilst he was in that condition which has been described as a state of deprivation of the power of self-control. As remarked earlier, the fury with which the retaliation may be accompanied or the brutality of the retaliatory act or the deadly nature of the weapon used may all be pointers enabling one to conclude that the prisoner had completely lost mastery over himself, or in other words, that he had no powers of self-control left; but that is not to say that he had not an intention to kill.

It will thus be noticed that there is no room under our law for taking consideration the mode of resentment, or rather the violently disproportionate mode of resentment, in determining the question whether the provocation given was either grave and sudden or whether there has or has not been loss of self-control.

The majority of us, that is to say, all but one of us, are therefore of the view that the invitation to the Jury to approach their task of determining whether the provocation was sudden and grave by reference to the test whether the mode of retaliation was violently disproportionate to the kind of provocation given cannot be justified under our law and would have

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tended to direct the Jury to apply their minds to false issues in the case, thereby resulting in serious prejudice to the prisoner.

The majority of us are also of the view that the appeal against the conviction should be allowed. We therefore set aside the conviction but in terms of Section 5 (2) of the Court of Criminal Appeal Ordinance order a new trial.

There remains for disposal the question whether the Bench as now constituted is a Full Bench, and if so, what are its powers, and in particular whether it has the right to overrule a previous decision of the Court of Criminal Appeal.

The learned Solicitor General contended that the term "Full Bench" can only be applied to a Bench of all the Judges comprising the Court and further urged that a Bench consisting of a smaller number would be bound by a previous decision of the Court though that decision may have been pronounced by a Bench of three Judges. He called attention to Section 2 (1) of the Court of Criminal Appeal Ordinance which expressly constitutes the Chief Justice and all the Puisne Justices as Judges of the Court of Criminal Appeal, and proceeded to suggest that unless all the nine Judges who constitute the full complement of the Supreme Court sat to hear the appeal, the Bench could not be deemed to be a Full Bench. In view of the provision in subsection 4 of the same section that a Judge who presided at the trial should not sit at the hearing of the appeal, the learned Solicitor General modified his contention and was content to submit that all the Judges save the Judge who tried the case should take part before it could be said that a Full Bench was constituted. The reasoning underlying this concession is that the Judge who presided at the trial is not qualified to be a member of the Court of Criminal Appeal where that Court is summoned to hear the appeal from a verdict passed at a trial presided over by him.

There is no reason why a similar reasoning should not be permitted to operate in regard to every other disqualification which renders it impractical or improper for a Judge of the Court of Criminal Appeal to take part in the hearing of an appeal. If this reasoning be allowed to operate, as indeed it must be, a Judge in whose name the indictment runs cannot possibly take part at the hearing of the appeal. Apart from the five Judges who constitute the present Bench and the present Chief Justice who was Attorney-General at the time of presentment of the indictment and in whose name the indictment runs and the Judge who presided at the trial of the case there is only one other Puisne Judge now functioning in an acting capacity in the Supreme Court. The question whether an acting Judge of the Supreme Court could preside in the Court of Criminal Appeal appears to have been ruled in the negative by the Privy Council in the case of *Butler*, 1939 3 A.E.R. 12; so that all the available Judges exclusive of those disqualified have sat at the hearing of this appeal; and if the meaning to be attached to the term " Full Bench " is to be construed in this manner, the present Bench is a Full Bench. But we do not think that any such construction should form the basis of our decision on this point.

In England the Court of Criminal Appeal is composed of the Lord Chief Justice and the nineteen Judges of the King's Bench Division, making a total of twenty Judges. But even so, a Bench of five Judges has been referred to as a Full Bench, even as Benches of seven and thirteen Judges have been similarly referred to. The case of *Benjamin Myro Smith* came first before the Court of Criminal Appeal consisting of a Bench of three Judges, when the Lord Chief Justice reserved a point of law that arose in that case for argument before a " Full Court " XIV C.A.R. 74; the appeal was in fact thereafter argued before a Bench of five Judges, Ibid 81. In contrast to this is the case of *Charles Leslie Norman*, L.R. 1924, 2 K.B. 315, in which the appeal first of all came before a Bench of three Judges, was thereafter adjourned for hearing before a Bench of five Judges and later was reargued before a Bench of thirteen Judges. In fact in 1941, *Mancini's* case (supra) is stated by Viscount Simon in his judgment to have gone up to the House of Lords from a decision of a Full Bench of the Court of Criminal Appeal consisting of five Judges. It will thus be seen that though in 1924 no less than thirteen Judges heard an appeal, even as late as 1941, to a Bench of five Judges of the Court of Criminal Appeal the appellation of Full Bench was applied by the highest judicial authority.

Quite recently the case of *John William Taylor*, 1950, 34 C.A.R. 138, was heard in appeal by a Bench of seven Judges and the Court was described as a Full Court by the Lord Chief Justice himself. There is an interesting observation in that case as regards what should be deemed to be a Full Court. The Lord Chief Justice said :

> " A Court of appeal usually considers itself bound by its own " decisions or by decisions of a Court of co-ordinate jurisdiction. " For instance, the Court of Appeal in civil matters considers " itself bound by its own decisions or by the decisions of the " Exchequer Chamber and, as is well known, the House of Lords " also always considers itself bound by its own decisions. In " civil matters it is essential in order to preserve the rule of *star* " *decisis* that that should be so but this Court has to deal with " the liberty of the subject, and if this Court found on recon- " sideration that in the opinion of a Full Court assembled for " that purpose the law had been either misapplied or misunderstood " and that as a result a man had been deprived of his liberty, it " would be its bounden duty to reconsider the case with a view to " determining whether he had been properly convicted."

The Lord Chief Justice thereafter proceeded to hold that the case of *Tresnor*, 1939, 27 C.A.R. 35, was wrongly decided.

The principle to be gathered, therefore, would appear to be that where a Bench is constituted of any number of Judges but more than the minimum quorum that is necessary to constitute the Court, a Full Court would be constituted, provided the Judges assembled for the purpose of reviewing or reconsidering a previous decision of the Court. This view has been adopted by this Court as would be apparent from an examination of the

In the Court of Criminal Appeal.

No. 26. Judgment, 29th November, 1951—*continued.*

cursus curiæ. In 1947, a Bench of five Judges of the Court which heard the case of *Velaiden*, 1947, 48 N.L.R. 401, expressly overruled the decision of this Court in the case of *Punchibanda*, 1947, 48 N.L.R. 313. The case of *Jinadasa*, 1950, 51 N.L.R. 529, was heard in 1950 before a Bench of five Judges of this Court, and that Bench expressly dissented from the judgment in *Haramanis'* case, 1944, 45 N.L.R. 532, which was decided. in 1944.

We are therefore of the view that the present constitution of the Bench constitutes it a Full Bench. A Full Bench of the Court of Criminal Appeal is not bound by a previous decision of the Court delivered by a Bench that cannot be regarded as a Full Bench and has power to disapprove, dissent from or overrule such a previous decision. The majority of us are of opinion that the case of *Rex.* v. *Naide* (supra) was wrongly decided and overrule the majority decision in that case.

C. NAGALINGAM,
President.

No. 27. Decree, 29th November, 1951.

No. 27.

Decree.

GEORGE THE SIXTH, by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith.

IN THE COURT OF CRIMINAL APPEAL.

Application No. 85 of 1951 for leave to appeal from a conviction dated 3rd September 1951 under section 4 (b) of Ordinance No. 23 of 1938.

REX

versus

KUMARASINGHEGE DON JOHN PERERA
Accused-Applicant.

S.G. Case No. 16 of the 2nd Midland Circuit, 1951.

M.C. Badulla No. 11357.

Counsel for Appellant: Mr. Advocate COLVIN R. DE SILVA with Messrs. Advs. K. C. DE SILVA, V. S. A. PULLENAYAGUM and R. S. WANASUNDARA.

Counsel for Respondent: Mr. Advocate R. R. CROSSETTE-THAMBIAH, K.C., S.-G., with Messrs. Advs. H. A. WIJEMANNE, C.C. and N. T. D. KANAKARATNA, C.C.

In the Court of Criminal Appeal.

No. 27. Decree, 29th November, 1951—*continued.*

This application having come before :—

The Hon. Mr. CHELLAPPAH NAGALINGAM, K.C., Senior Puisne Justice, President,
The Hon. Mr. EDWIN HERBERT THEODORE GUNASEKARA,
The Hon. Mr. MARSHALL FERNANDO SYLVESTER PULLE, K.C.,
The Hon. Mr. VERNON LOUIS St. CLAIR SWAN, and
The Hon. Mr. HETHUMUNI AYADORIS DE SILVA, C.M.G.,

Judges of this Court, for hearing and determination on 15th, 16th, 19th and 20th November, 1951.

It is considered and adjudged that the application of the accused-applicant be and the same is hereby allowed. His conviction for murder and death sentence are hereby set aside and a new trial is ordered (*vide* annexed sheets).

Witness The Hon. Mr. CHELLAPPAH NAGALINGAM, K.C.,
Senior Puisne Justice, President.
The Hon. Mr. EDWIN HERBERT THEODORE GUNASEKARA,
The Hon. Mr. MARSHALL FERNANDO SYLVESTER PULLE, K.C.,
The Hon. Mr. VERNON LOUIS St. CLAIR SWAN, and
The Hon. Mr. HETHUMUNI AYADORIS DE SILVA, C.M.G.,

Judges of this Court, at Colombo, the 29th day of November in the year of Our Lord One thousand Nine hundred and fifty one and of Our Reign the Fifteenth.

(Signed) CLARENCE DE SILVA,
Registrar, C.C.

In the Privy Council.

No. 28. Petition for Special Leave to Appeal, 14th February, 1952.

No. 28.

Petition for Special Leave to Appeal.

IN THE PRIVY COUNCIL.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON.

Between

THE ATTORNEY-GENERAL OF CEYLON ... ... *Petitioner*

and

KUMARASINGHAGE DON JOHN PERERA ... ... *Respondent.*

To the Queen's Most Excellent Majesty in Council :

The Humble Petition of the above-named Petitioner Sheweth :

1. That Your Petitioner on behalf of the Crown desires special leave from a decision of the Court of Criminal Appeal of Ceylon delivered on the

In the Privy Council.

No. 28. Petition for Special Leave to Appeal, 14th February, 1952—*continued.*

29th November 1951, which allowed by the majority of four judges to one an appeal by the respondent against his conviction at his trial before Mr. Justice Gratiaen and a jury on the 3rd September 1951 of the murder of a woman named Kumarihamy. The Court did not quash the respondent's conviction and direct a judgment of acquittal to be entered, but ordered a new trial as the Court is entitled to do " if they are of opinion " that there was evidence before the jury . . . upon which the accused " might reasonably have been convicted but for the irregularity upon which " the appeal was allowed."

2. That although a petition for special leave to appeal in a criminal case by or on behalf of the Crown is unusual, Your Petitioner submits that the decision of the Court of Criminal Appeal in the present case lays down the law of Ceylon in respect to provocation in a matter inconsistent not only with authority which the Court ought (in Your Petitioners' submission) to have followed, but with the provisions set out in section 294 of the Penal Code. Your Petitioner submits that Your Majesty in Council has full power to admit an appeal from the Court of Criminal Appeal, especially in a case where a new trial has been ordered on the ground of a mis-direction of law. Your Petitioner contends that the trial judge accurately stated the law and that the decision of the Court of Criminal Appeal if it is not reviewed on appeal " tends to divert the due and orderly administration of the law " into a new course, which may be drawn into an evil precedent in future."

3. That the Court of Criminal Appeal was established by Ordinance No. 23 of 1938. Section 23 of the Ordinance is as follows :—

> " Section 23. Nothing in this Ordinance contained may or " shall take away or abridge the undoubted right and authority " of His Majesty to admit or receive any appeal from any Judg- " ment, decree, sentence or order of the Court of Criminal Appeal " or the Supreme Court on behalf of His Majesty or of any person " aggrieved thereby in any case in which and subject to any " conditions or restrictions upon or under which, His Majesty " may be graciously pleased to admit or receive any such appeal."

4. That Kumarihamy was the wife of one L. C. W. Samaranayake. Samaranayake, with his Wife, the deceased woman, and his five children, Walter, Cyril, Nandawathie, Quintus and Gladwyn, lived on an adjoining plot of land to that on which the respondent lived with his family. There had been much ill-feeling between the two families, and on the 29th July 1950 the respondent shot and killed Kumarihamy, Samaranayake, Cyril and Nandawathie, and he wounded Walter. He used a single-barrelled 16 bore breach-loading gun. He was brought to trial before Mr. Justice Gratiaen, as above stated, when he raised the defence that he had acted in self-defence. He further pleaded that he was insane when he did the act, and furthermore that he acted under a sudden and grave provocation. The jury after a full summing up by Mr. Justice Gratiaen, returned a verdict of guilty.

5.—No point now arises on the pleas of insanity and self-defence. The respondent, however, appealed to the Court of Criminal Appeal and the only ground on which his appeal was argued was that Mr. Justice Gratiaen had wrongly directed the jury that the defence of provocation could not succeed and the charge of murder could not therefore be reduced to culpable homicide not amounting to murder unless the action of the respondent taken by him in consequence of the provocation was reasonably commensurate with the degree of provocation offered to him. It was argued on behalf of the respondent that in so directing them, the learned judge had relied in particular upon a previous decision of the Ceylon courts, namely *Rex* v. *Naide* Appeal No. 58 of 1951, which by a majority laid it down that the law of Ceylon as to provocation was identical with the law of England, and accordingly the plea of provocation could not succeed if the force used by the respondent was wholly disproportionate to the provocation offered. The respondent's counsel argued that the reasoning in *Rex* v. *Naide* was erroneous in that under the law of Ceylon it was not requisite that the force used by the respondent should be commensurate with the provocation, and he referred to section 294 of the Penal Code of Ceylon which (he argued) sets out all the ingredients of this defence without any requirement that the force used should not be out of proportion to the provocation offered. The provocation on which the respondent relied consisted of insulting language and behaviour and stone-throwing.

6.—That the Court of Criminal Appeal, which, when the respondent's appeal first came on for hearing before it consisted of three learned judges, after hearing argument adjourned as they found themselves in disagreement as to the submissions made on behalf of the respondent, and the presiding judge reported the matter to the learned Chief Justice in order that he might convene a fuller court to hear the appeal. The learned Chief Justice then convened a court of five judges and the appeal was re-heard. On the re-hearing as stated, the Court of Criminal Appeal upheld the submission made on behalf of the respondent by a majority of four judges to one and ordered that there should be a new trial.

7.—That the relevant parts of section 294 of the Penal Code are as follows :—

294—Except in the cases hereinafter excepted, culpable homicide is murder—

Firstly— If the act by which the death is caused is done with the intention of causing death ; or

Secondly—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or

In the Privy Council.

No. 28. Petition for Special Leave to Appeal, 14th February, 1952— *continued.*

Thirdly— If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death ; or

Fourthly—If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

ILLUSTRATIONS

Exception 1. Culpable homicide is not murder if the offender while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos :

Firstly—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

ILLUSTRATION

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a Fiscal's Officer. A is excited to sudden and violent passion by the arrest and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage and to cause him to kill Z puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed culpable homicide, but A is guilty of murder.

Exception 4—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation—It is immaterial in such cases which party offers the provocation or commits the first assault.

8.—That Your Petitioner humbly makes the following submissions :

(1) That *Rex* v. *Naide* rightly decided that in the material respects the law of Ceylon with regard to provocation is identical with that of England, and accordingly Mr. Justice Gratiaen rightly directed the jury that the defence of provocation could not succeed if the jury were of opinion that the force used by the respondent was wholly disproportionate to the provocation offered to him.

(2) That under the law of Ceylon in order that the crime of murder should be reduced to culpable homicide not amounting to murder, it is requisite that the act of the accused person should not be disproportionate to the provocation under which he acted.

(3) That the conflict between *Rex* v. *Naide*, following as it does the English decisions, and the judgment of the Court of Criminal Appeal in the present case, is a conflict upon a principle of great general public importance which it is desirable to have finally determined by Your Majesty in Council.

(4) That the Court of Criminal Appeal had no power to over-rule their previous decision in *Rex* v. *Naide* which was fully binding on the Court notwithstanding that a court of five judges was convened to hear the respondent's appeal.

In the Privy Council.

No. 28. Petition for Special Leave to Appeal, 14th February, 1952—*continued.*

(5) That on the evidence the respondent had clearly failed to bring himself within Exception 1 of section 294 of the Penal Code.

YOUR PETITIONER THEREFORE HUMBLY PRAYS that Your Majesty in Council may be graciously pleased to grant Your Petitioner special leave to appeal against the said judgment of the Court of Criminal Appeal of Ceylon dated the 29th day of November 1951 and to make such further or other order as to Your Majesty in Council may seem just.

AND YOUR PETITIONER WILL EVER PRAY, etc.

Sgd. FRANK SOSKICE,
FRANK GAHAN.

No. 29. Order in Council granting Special Leave to Appeal, 24th March, 1952.

No. 29.

Order-in-Council granting Special Leave to Appeal.

AT THE COURT AT CLARENCE HOUSE.

The 24th day of March, 1952.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT.	LORD ISMAY.
LORD PRIVY SEAL.	SIR ALAN LASCELLES.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 10th day of March, 1952 in the words following, viz. :—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of Ceylon in the matter of an Appeal from the Court of Criminal Appeal of Ceylon between the Petitioner Appellant and Kumarasinghage Don John Perera Respondent setting forth (amongst other matters): that the Petitioner desires special leave to appeal from a Judgment of the Court of Criminal Appeal dated the 29th November 1951 which allowed by the majority of four Judges to one an Appeal by the Respondent against his conviction at his trial before Mr. Justice

No. 29. Order in Council granting special leave to Appeal, 24th March, 1952—*continued.*

Gratiaen and a jury on the 3rd September 1951 of the murder of a woman named Kumarihamy : that the Court did not quash the Respondent's conviction and direct a Judgment of acquittal to be entered but ordered a new trial : that the Petitioner submits that the decision of the Court of Criminal Appeal in the present case lays down the law of Ceylon in respect to provocation in a manner inconsistent not only with authority which the Court ought (in the Petitioner's submission) to have followed but also with the provisions set out in Section 294 of the Penal Code : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment of the Court of Criminal Appeal dated the 29th November 1951 and for such further or other Order as to Your Majesty in Council may seem just :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof (no one appearing in opposition thereto) Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Criminal Appeal of Ceylon dated the 29th day of November 1951 :

" AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Court of Criminal Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed and obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

F. J. FERNAU.

Statutory Statement of Accused.

Statutory Statement of Accused, 21st March, 1951.

STATUTORY STATEMENT OF ACCUSED.

" I am not guilty."

Deposition of A. C. M. Sheriff, 15th March, 1951.

Deposition of A. C. M. Sheriff, Record Keeper, M. C. Badulla.

DEPOSITION OF A.C.M. SHERIFF, RECORD KEEPER, M.C. BADULLA.

A.C.M. SHERIFF. Affd. Record Keeper, Badulla M.C. On 19.8.50 I packed the seven parcels A to G in the presence of P.C. 5035 Tissera and handed the same to him with the seals of this Court intact to deliver them to the Govt. Analyst. Parcel A contained P1, B contained P2 to P14, C contained P15 to P29, D contained P30, E contained P31, F contained P32 to P37 and P42. G contained P43. I received on 23.8.50 the receipt of the Govt. Analyst of 21.8.50. (P69). On 13.1.51 I received all the productions I sent in six parcels. The seals of the Govt. Analyst were intact. They were brought by P.C. Tissera. The report No. 201 (C/951) of 12.1.51 of the Govt. Analyst was received (P70) on 16.1.51 by registered post.

XXD. Nil.

Sgd. A. C. M. SHERIFF.

Sgd. P. MALALGODA,
Magistrate 15/3.

Deposition of W. M. A. Tissera, 15th March, 1951.

Deposition of W. M. A. Tissera, Police Constable 5035, Badulla.

DEPOSITION OF W. M. A. TISSERA, POLICE CONSTABLE 5035, BADULLA.

W. M. A. TISSERA. Sworn. P.C. No. 5035, Badulla Police. On 19.8.50 the productions in this case were packed and sealed by the last witness in my presence in seven parcels marked A to G. I took charge of the parcels with the seals intact and handed them to the Govt. Analyst with the seals intact. I was given receipt P69 by the Govt. Analyst. Again on 13.1.51 I brought back the productions in 6 parcels and handed the parcels to the Record Keeper M. C. Badulla with the seals intact.

XXD. Nil.

Sgd. W. M. A. TISSERA.

Sgd. P. MALALGODA,
Magistrate 15/3.

In the Privy Council.

No. 14 of 1952.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON.

BETWEEN

THE ATTORNEY-GENERAL OF CEYLON ... ... *Appellant*

AND

KUMARASINGHEGE DON JOHN PERERA ... ... *Respondent.*

RECORD OF PROCEEDINGS

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