No. 69 of 1935.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON (ASSIZE COURT OF COLOMBO.)

BETWEEN

ALEXANDER KENNEDY - - - - - *Appellant*

AND

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

RESPONDENT'S CASE

Case for the Respondent.

RECORD.

1. This is an appeal by special leave from a Judgment of the Supreme Court of the Island of Ceylon passed on the 20th October 1934. p. 53.

2. On the 3rd September 1934 the Appellant was indicted before a Judge of the said Court and Jury of seven persons on two charges, viz. :— p. 52.

(I) With having on the 29th September 1933 committed mischief by fire knowing it to be likely that such mischief would cause the destruction of a building known as the Times Building situated at Colombo, an offence punishable under section 419 of the Ceylon Penal Code.

(II) With having on the said date committed mischief by fire intending to cause damage to leather boots and shoes and other shop goods exceeding Rs.100 /– in value an offence punishable under section 418 of the Ceylon Penal Code.

To this indictment the Appellant pleaded not guilty but after a trial extending from the 3rd September to the 20th October 1934, he was found guilty by a unanimous verdict and sentenced to six years imprisonment on each count the sentences to run concurrently. p. 525, l. 35. p. 525, l. 39.

p. 526, ll. 8–10. 3. There were in all 34 sittings of the Court each extending half an hour beyond the usual working hours. The Prosecution was conducted by the Deputy Solicitor General and the Appellant was defended by a p. 527, l. 35. King's Counsel who in the words of the learned Judge "is a recognised master in the art of criminal advocacy." In the Petition asking for special leave to appeal no complaint was made of the Judge's Summing-up.

4. The case for the prosecution was that the Appellant who was in a state of financial embarrassment on the 29th September 1933 with the object of making a claim on certain policies of insurance which he had effected, started a fire in the basement of his shop situated in the Times Building by means of petrol; that the vaporisation of the petrol created an explosive mixture which exploded in a manner not foreseen by the Appellant causing injuries to him and extensive damage to the buildidg and resulting in a fire which destroyed the greater portion of the articles on the premises.

The Appellant denied having set fire to the premises and attributed the explosion and the subsequent fire to the accidental ignition of coal gas by an electric spark which occurred as the Appellant was in the act of putting out the lights on the ground floor. A suggestion that the explosion might have been due to a mixture of marsh gas and air was advanced at one time but was not seriously pressed.

5. The Crown alleged that the Appellant was in desperate financial circumstances which provided ample motive for the crime, that he had made careful preparations for its accomplishment, and that in order that he might be able to recover under his various insurance policies sufficient money to enable him to clear off his debts and start afresh in new premises to which he was on the point of moving, he had prepared fictitious lists of non-existent stocks of skins to support his claims under his policies. The paragraphs which follow (6 to 15) summarise the evidence as to the financial position of the Appellant at the time of the fire.

p. 358, l. 3. 6. The Appellant was the sole proprietor of a store at Times Building Colombo doing business in footwear, outfitting and skins, under p. 87, l. 29. the name of Kennedy & Co. The books of the firm were not audited but balance sheets were prepared by a firm of auditors on information supplied p. 87, l. 34. by the Appellant. The assets of the firm were shown as Rs.468,397.64 Ex. P. 76, Vol. II, p. 4. at the end of 1929 and as Rs.546,258.25 at the end of 1932, but the financial Ex. P. 79, Vol. II., p. 26. position of the business as shown by the balance sheets themselves had p. 89, l. 29. considerably altered during this period. In 1931 the business, which had p. 90, l. 2. previously been profitable, suffered a loss of Rs.5,006.1 and in 1932 this loss had increased to Rs.28,952.67.

7. The volume of sales in 1929 was Rs.404,489.76 (Rs.233,558.26 skins and Rs.170,931.56 other articles). It had fallen to Rs.243,904.14 (Rs.123,869.83 skins, Rs.120,034.31 other articles)in 1931 and to Rs.156,165.67 (Rs.41,110.98 plus Rs.115,054.69) in 1932. For the nine months to the date of the fire in 1933 the volume of sales was Rs.116,445.80. The stock at the date of the fire included goods which were two years old or more. Ex. P. 76, Vol. II, p. 7. Ex. p. 78, Vol. II, p. 21. Ex. p. 79, Vol. II, p. 28. Ex. P. 80, Vol. II, pp. 32, 33. p. 181, l. 10.

8. The Appellant possessed no cash or liquid assets. The assets (which consisted almost entirely of stock in trade) appearing in the balance sheets for the years 1929 to 1932 and also in a balance sheet prepared for 1933 up to the date of the fire exceeded in paper value the amounts of the liabilities. They disclosed, however, not only a continuous fall in sales but also increasing indebtedness on overdrafts to the National Bank of India upon which the Appellant relied largely for finance. At the end of 1929 the Appellant owed the National Bank of India Rs.5,359.97 at the end of 1931 Rs.116,942.16 and at the end of 1932 Rs.144,091.78. At the latter date he also owed Rs.111,778.68 to trade creditors and a sum of Rs.98,847.38 to other persons making total liabilities of Rs.210,626.06. Ex. P. 76, 77, 78 and 79 Vol. II, pp. 4–28. Ex. P. 80, Vol. II, pp. 39–31. p. 88, l. 4. p. 89, l. 2. p. 89, l. 46. Ex. P. 79, Vol. II, p. 25.

9. At the beginning of 1933 the Appellant had two accounts with the National Bank of India namely (A) a general account (called the No. 1 Account) on which his overdraft stood at Rs.83,972.83 and (B) a No. 2 Account on which he had an overdraft against the value of skins sent to London on consignment. This overdraft stood at Rs.60,118.95 on the 1st January 1933. p. 57, l. 40. p. 57, l. 29. p. 57, l. 41.

10. The Appellant proceeded to England on leave in January 1933. Shortly before he went Mr. Graham, the Manager in Ceylon of the National Bank of India requested him to reduce the overdraft on the No. 1 Account to Rs.50,000. He also told the Appellant that the No. 2 Account had been outstanding a considerable time and the Appellant made him understand that there were in London sufficient skins awaiting realisation to meet the overdraft. The Appellant promised to dispose of the skins on arrival in London. p. 57, l. 42. p. 58, l. 1. p. 58, l. 8. p. 58, l. 15. p. 60, l. 35. p. 58, l. 16.

11. On the 18th April 1933 the overdraft on the No. 1 Account was temporarily increased to Rs. 100,000 by the Bank. In April 1933 Messrs. Campbell Bros. Carter and Co. Ltd. (hereinafter referred to as "Carter & Co.") a firm with which the Appellant had extensive dealings, agreed to accept bills drawn by the Appellant against shipping documents up to £10,000, and, to enable the Appellant to purchase skins for shipping, the National Bank of India on the 28th April 1933, opened a separate No. 3 Account on which the Appellant was granted an overdraft of Rs.10,000. Between the end of April 1933 and the date of the fire the National Bank of India from time to time wrote to the Appellant asking p. 58, l. 30. p. 59, l. 10. Ex. P. 28 (2), Vol. II, p. 101.

Ex. P. 84 (10), Vol. II, p. 109. Ex. P. 84 (5), Vol. II, p. 76. Ex. P. 28 (1), Vol. II, p. 97.

him to refrain from exceeding the limits of the overdrafts granted to him. The Bank also pressed him to reduce the overdraft on No. 1 Account and to liquidate the overdraft on the Number 2 Account.

Ex P. 20 (15), Vol II, p. 75.

12. On the 11th July 1933 the Bank wrote to the Appellant reminding him of a promise made to the London Office to reduce the overdraft on the No. 1 Account to Rs.50,000 by the end of December 1933 and requesting him to do so gradually. In the same letter they reminded him of his promise to liquidate the No. 2 Account on arrival in England and asked him for a statement of the skins then in England awaiting disposal. They further informed him that the overdraft on the No. 3 Account should not be allowed to become " dormant." No reply having been received to this letter the Bank repeated their request for a statement of the skins then in England on the 15th July and again on the 15th August but no replies were received.

Ex. P. 20 (16), Vol. II, p. 76. Ex. P. 84 (8), Vol. II, p. 81. p. 60, l. 24.

Ex. P. 41 (1), Vol. II, p. 84.

13. The National Bank on the 18th August put on record in a letter written to the Appellant that they were " quite at loss to understand " a statement made by the Appellant verbally that day during a call that " part of the skins relating to the No. 2 Account " were then in Colombo. They repeated their request for a statement of the skins relating to the said Account, asked where they were, and what their value was and put on record their surprise at hearing that part of the skins were in Colombo. In the same letter they also put on record a promise by the Appellant to liquidate the No. 2 Account at the beginning of September. In reply the Appellant on the 19th August sent a statement of skins to be shipped during September in liquidation of the No. 2 Account and also attempted to give an explanation as to why the skins were not in London. The Bank replied on the 21st August that they were unable to follow the explanation and requested repayment of the No. 2 Account at an early date.

Ex. P. 56, Vol. II, p. 85. Ex. P. 41 (3), Vol. II, p. 88.

p. 381, l. 5. Ex. P. 41 Vol. II, (29), p. 95.

14. In the middle of September 1933 the Appellant received a letter dated the 23rd August from Carter & Co. to the effect that the position with the Bank was " becoming rather acute " and that from what they had gathered at the London Office, no further facilities under their shipping credit (referred to in paragraph 11 above) would be granted to the Appellant until the No. 2 Account had been liquidated.

Ex. P. 28 (5), Vol. II, p. 115. p. 62, l. 14.

15. No skins were in fact shipped up to the date of the fire although the Bank had reminded the Appellant on the 22nd September of his promise to liquidate the No. 2 Account by the end of the month. On the 29th September 1933 the day of the fire the overdraft on the No. 1 Account had not been substantially diminished and stood at Rs.97,895.17 the overdraft on the No. 2 Account was Rs.18,998.6 and on the No. 3 Account Rs.9,546.66.

16. The evidence relating to the Appellant's insurance policies and to the preparation which in the Crown's submission had been made by him for making claims thereunder is summarised in the following paragraphs (17 to 24).

17. Prior to the fire the Appellant had taken out the following Insurance Policies on articles lying at his shop in the Times Building Colombo. All were in force at the date of the fire :—

(I) 18th September 1929 a policy for Rs.75,000/- with the Caledonian Insurance Company, covering his general stock and fittings (but not covering skins). p. 77, l. 38. Ex. P. 74, Vol. II, p. 155.

(II) 15th April 1931 a policy for Rs.250,000/- with the Manchester Insurance Company Rs.231,500 of which covered his general stock and also his stock of skins. The amounts of cover for general stock and skins were in the proportion of the value of the one to the value of the other. p. 79, l. 23. Ex. P. 73, Vol. II, p. 166. p. 137, l. 30.

(III) 21st April 1932, a policy for Rs.175,000/- with the Commercial Union Assurance Company covering his general stock and fittings (but not covering skins). p. 81, l. 36. Ex. P. 82, Vol. II, p. 145.

(IV) On the 17th July 1933 he took out a policy with the Commercial Union Assurance Company for Rs.125,000/- covering skins; in view of previous business done between the Appellant and the Insurance Company the skins insured were not inspected. p. 82, l. 22. Ex. P. 83, Vol. II, p. 176. p. 82, l. 17. p. 82, l. 21.

18. After the fire viz., on the 4th October 1933, the Appellant being in hospital as the result of injuries received, his wife handed to Mr. Watkins, an Accountant of the firm of Watkins, Ford & Co. who had prepared balance sheets for the Appellant, a file (P. 39) purporting to show that there had been in the basement of the Appellant's premises at the time of the fire, skins of the value of about Rs.130,000/-. This file was handed to Mr. Ross, the Assessor of the Insurance Companies on the 20th or 21st October 1933 and the Appellant made a claim (based on the figures contained in it) of Rs.124,000/- in respect of skins. p. 412, l. 21. Vol. II, p. 37. p. 132, l. 39. p. 366, l. 40.

19. At the trial considerable importance was attached by the Prosecution to this file P.39. It was in the handwriting of the Appellant's book-keeper, Classen, who stated that he had compiled it, shortly after the Appellant's return from England in July 1933 from material on pieces of paper which the Appellant gave him. Classen wrote the entries up at different times and the Appellant told him that he had drawn a policy of insurance for the stocks in the Basement of the Times Building and that the insurance men would be coming along to examine the stocks. The signs against the different items (such as T.C.) were put on by Classen on the Appellant's instructions but Classen was not told what they meant. Classen p. 147, l. 32. p. 148, ll. 6–18. p. 148, ll. 36–43. p. 149, ll. 16–19.

also said that the Appellant took the figures from a " rough stockbook "
p. 153, l. 28. p. 157, l. 42. which he kept in his own possession and of which Classen although he had been the Appellant's book-keeper for over six years had never seen the inside. The Appellant admitted that he had supplied Classen with material
p. 387, l. 10. on pieces of paper for the preparation of P.39. He said that he obtained the
p. 387, l. 17. p. 387, l. 22. material from a book which contained a record of stock received and stock despatched, and which he kept in a drawer. This desk and the book with
p. 149, l. 18. other files were said to have been burnt by the fire. Other books, namely a ledger, the daily sales journal and the petty cash book of the business
p. 163, l. 19. were found undamaged by the fire in a safe.

p. 387, l. 22. The Appellant stated that though the stock-book was of great value to him he did not as a rule put it into the safe, and that it was necessary to have P.39 prepared in order that he might have certain information
p. 387, l. 12. required by him in a concise form.

p. 91, l. 34. p. 96, l. 42. 20. Mr. Watkins, the accountant, who had prepared balance sheets on figures of stock supplied by the Appellant said that he had never seen a stock-book, and knew from the manner in which queries had been dealt with that no stock-book had existed.

The value of the stock of skins in Colombo at the end of 1932 as
p. 96, l. 25. shown in the balance sheet was Rs.12,140/21; adding thereto the value of skins purchased, and deducting therefrom the value of skins exported,
p. 96, l. 37. Mr. Watkins arrived at the figure of Rs.14,060/17 as being the value of the
Vol. II, p. 37. skins at the date of the fire. P.39 showed the existence of skins of the value of Rs.110,494/73 in excess of this amount. Mr. Watkins stated that if
p. 97, l. 11. skins of the value appearing in P.39 had been bought their cost would have appeared in the books.

21. The Appellant's explanation of this position was that in
p. 357, l. 25. addition to the stocks of skins shown in the balance sheets he had a " private stock " of skins which he kept at his bungalow, the bulk of which he removed from his bungalow to his business premises shortly before the
p. 357, l. 32. p. 358, l. 3. p. 371, l. 38. fire. He put the value of these goods at Rs.98,454/–. In this connection it is to be observed that the Appellant admitted that there was no difference
p. 394, l. 7. between Kennedy & Co. and himself. He also stated that 90% of the stock of skins which he had kept uninsured at his bungalow were removed to the Times Building Basement shortly before the fire and insured, although that building was said to be specially fire-proof and is described in the policy as " constructed of walls of brick roof of steel with timber boarding
Ex. P. 83, Vol. II, p. 177. covered with asbestos cement sheeting."

p. 357, l. 8. 22. The Appellant who admitted that he never had any liquid capital, and had neither stocks shares nor a bank account, stated that he was able to increase his private stock of skins by " writing down " his

stocks and showing less profits than he actually had. Compelled to admit that no cash could have come into his hands by writing down stock the Appellant stated that he took skins from Kennedy & Co. and put them into his private stock after marking down prices. In cross-examination he stated that the proceeds of sale of skins from private stock were credited to Kennedy & Co. and that he adjusted accounts by putting Kennedy & Co. skins into private stock. p. 374, ll. 29, 39. p. 372, ll. 20–30.

23. Another remarkable document relied upon by the Crown was P.32 the original of which was deposed to by one S. A. Perera. This witness was the sole Proprietor of a business named Wewelduwa Tanneries and supplied skins to the Appellant, who had no interest or business relations with Perera other than those of a customer. He kept the skins at his tannery six miles from Colombo and in July 1933 the Appellant sent him a stock of skins worth about Rs.20,000 for brushing. About mid-July Perera called at the Appellant's shop for payment and the Appellant gave him a rough note of skins which he asked him to copy. Perera duly made a copy of the document including the descriptive title " Wewelduwa Tanneries Consignment Stock with Messrs. Kennedy & Co. against possible sales." The words " Wewelduwa Tanneries " were torn off a letter head belonging to him and pasted on the outside of the file. The rest of the Document P.32 is in Perera's handwriting copied from the rough notes provided by the Appellant. This document purports to show a total stock of skins worth Rs.98,454.03 consigned to Kennedy & Co. and this stock was identical with the part of the stock marked T/C appearing in P.39. In fact no skins of Perera's were ever deposited with the Appellant who retained in his own possession P.32 although after the fire it was not produced by the Appellant in support of his claim and was only discovered by the police when searching a safe in the Appellant's house. Vol. II, p. 36. p. 117, l. 37. p. 116, l. 10. p. 115, l. 43. p. 117, l. 6. p. 117, ll. 11–13. p. 117, l. 15. p. 117, l. 30. Vol. II, p. 36. p. 117, l. 26. p. 117, ll. 6–10. p. 118, l. 28. p. 321, l. 42.

24. In the submission of the Crown P.32 was originally prepared with the fraudulent intention of supporting P.39 as evidence of the existence of skins which were non-existent in order to substantiate fraudulent claims under the Appellant's insurance policies. Both documents were it was submitted wholly fictitious and were prepared in anticipation of a pretended destruction by fire of stock which in fact never existed.

25. When the foregoing documents had been prepared the Appellant about the 23rd August acquired two tins of petrol in the following circumstances. He possessed two motor cars for which he usually purchased petrol direct from the pump from a firm named Walker & Co. with whom he had an account. On the 23rd August he instructed an employee named Hossen to make a cash purchase of two 2-gallon tins of petrol from Walker & Co. and to bring them to his bungalow. Hossen succeeded in doing so, though not without difficulty, as two visits to Walker & Co. were necessary pp. 200–201.

at 9.30 a.m. and 2 p.m. although he (Hossen) was suffering from fever and a bad leg at the time and had called at the Appellant's bungalow in order to ask for sick leave. The petrol was supplied in tins of a recent pattern and the Appellant substantially admitted this transaction as deposed to by Hossen.

p. 240, l. 19.
p. 362, l. 9.

26. The Appellant stated that he had purchased this petrol for cleaning some skins which were then at his bungalow, that S. A. Perera (mentioned in paragraph 7 (II)) who happened to call the same day told him that there was a better way of cleaning skins and that as Perera cast " covetous eyes " on the tins he handed them to him, although the petrol would have been useful to the Appellant himself as he owned two cars. Perera's evidence was to the same effect. He however put the incident in his evidence in chief as happening in July, admitted the possibility of a mistake under cross-examination but in re-examination confirmation of his original statement appears to follow from his statement that the alleged gift was about two weeks after the 13th July, the date on which he wrote P.32.

p. 362.
p. 363, l. 3.
p. 396, ll. 30–35.
p. 120, l. 32.
p. 127, l. 7.
p. 120, l. 32.
p. 122, l. 26.
p. 127, l. 3.
p. 120, l. 34.
p. 126, l. 44.

27. On the morning after the fire at the Appellant's premises i.e. the 30th September a fireman digging in the debris found on the ground floor of the Appellant's shop a suitcase and two petrol tins of the same recent pattern as Walker & Co. had supplied. One of them contained about five cubic centimetres of petrol and the other a small quantity of a non-inflammable substance and possibly some water. In explanation of the discovery of the petrol tins on the premises after the fire the Appellant advanced the conjecture that they might have been left behind for safe custody by a customer of the shop and evidence was called to show that the practice on the part of " up country " customers of leaving suitcases in shops was not unknown.

p. 241, l. 40.
p. 298, l. 40–45.
p. 367, ll. 20–24.
p. 440, l. 10.

28. The foregoing summary indicates it is submitted that there was ample evidence for the consideration of the Jury in support of the submissions of the Crown :—

(A) That by the 29th September the financial embarrassment of the Appellant was such as to furnish him with a powerful motive to destroy his stock and make a fraudulent claim under his insurance policies.

(B) That between July and September the Appellant was engaged in preparing records which it was open to the Jury to find were fictitious records, of stock of skins which had never previously been insured, which had never appeared in any of his books or accounts and which in fact never existed.

(c) That the Appellant had acquired in an indirect and unusual way a quantity of petrol and that neither his account of how he disposed of the tins nor the evidence offered by the Defence of how two similar tins came to be found on the premises was worthy of credence.

29. It now remains to consider (in paragraphs 30–42) the circumstantial evidence dealing with the fire which occurred on the evening of the day when the Appellant had been making final arrangements for the removal of his stock to new and very much larger and more expensive premises at the Colombo Stores. p. 355, l. 43—p. 356, l. 7.

30. The premises in the Times Building occupied by the Appellant consisted of a basement, ground floor and a first floor. The entrances to the premises from outside were on the ground floor. On the 29th September 1933 the Appellant spent most of the day between the Times Building and his new premises at the Colombo Stores. He went home for dinner at 8 p.m. returned about 8.45 finished work for the day at the Colombo Stores about 10.40 and went to the Times Building about 10.50. The Appellant's wife was with him and his motor-car and chauffeur were waiting outside the building in Main Street. At 10.50 all the employees except Hossen had left, and the Appellant sent Hossen off to get a bottle of soda water from a boutique nearby. After Hossen had returned and had given the Appellant the soda water he put the bottle and glass on one of the desks near the door and then left at about 10.55. Thereafter the Appellant was the only person in the shop or basement. All the doors except the vestibule door on the ground floor were closed, and all the basement lights had been put out by one Sangaran at about 10.30. The two halves of this door had been brought together and one half had been bolted. The watcher Mahat, who happened to be passing about this time saw Hossen take in the bottle of soda water. Mahat stood outside the vestibule door talking to Mrs. Kennedy (who was at the door) when the Appellant, who had come out a little earlier re-entered saying he would be going away in a few minutes after drinking the soda. A few minutes later there was a loud explosion and all the lights in the building went out. The electrician in charge of the sub-station for the District fixed the time of the explosion at 11.5 p.m.

p. 364, l. 40.
p. 365, l. 28.
p. 227, l. 9.
p. 229, l. 43.
p. 410, ll. 31–38.
p. 203, l. 36.
p. 204, l. 6.
p. 203, l. 28.
p. 397, l. 39.
p. 192, ll. 33–40.
p. 366, l. 2.
p. 214, l. 27.
p. 224, l. 1.
p. 214, ll. 24–30.
p. 224, l. 2.
p. 291.
p. 292.

31. Mahat deposed that soon after the explosion he saw the Appellant emerging from a door marked D in Exhibit P.24 which stood at the head of a spiral staircase and also of a chute connecting the ground floor with the basement. This door opened on Duke Street which ran along one side of the Appellant's premises. The main door of the premises and several glass windows faced Main Street which ran along another side of the premises. The Appellant stated in evidence that he could not say

p. 214, l. 44.
Vol. III, No. 12.
p. 225, ll. 38–40.

p. 366, l. 28. whether he came through the Duke Street door or through one of the broken front windows facing Main Street, although he had previously stated to the p. 399, l. 34. police that he came out by the former. Much discussion at the trial was directed to the question of the exact point of egress but in fairness to the Appellant it must be admitted that he was undoubtedly badly dazed by the explosion and might not have had an accurate recollection of his movements. p. 350, l. 24. It was possible after the fire to go up and down the spiral staircase. A Vol. III, No. 12. portion of the ground floor shaded red on P.24 had collapsed apparently cutting off access to the landing of the spiral staircase from the remaining p. 337, l. 13. portion of the ground floor. If the Appellant came out of the Duke Street door and the collapse had taken place before he did so he must necessarily have come out from the basement or from some point on the spiral staircase. The Appellant could have come from the basement by way of the spiral staircase out of the other (vestibule) door only if the collapse occurred after he crossed the floor. But by whichever door he emerged the Appellant p. 228, ll. 19-25. was found by the Witness Owen in a dazed condition at the bend of the p. 338, l. 43. building between Duke Street and Main Street. He was taken to Hospital and found to be suffering from severe burns on the face, hands and ankles. p. 249, l. 1. The explosion was followed by a fire which was brought more or less under control in about an hour and a half.

32. The Appellant said that after bolting half the door he went to the switchboard to switch off the lights. He put the tumbler switches off p. 366, ll. 5-15. with his left hand and had his right hand on the main switch when a flash occurred. He was unable to say whether this was before or after he had put out the main switch but evidence as to the condition of the main switch after the fire showed that it had not in fact been put out. He put up his hands to protect himself. He recollected that his socks were burning and after that his mind became blurred.

p. 339, l. 30. 33. The medical evidence led by the Crown was to the effect p. 425, l. 4. p. 436, l. 24. that the injuries to the Appellant were consistent with his encountering p. 348, l. 18. a flame and that an electrical spark could not have caused them. In particular there was evidence that the injuries to his hands were consistent with the ignition of an inflammable liquid which was on them.

34. After the fire it was discovered that very extensive damage p. 267. had been caused to the building. Several walls had fallen down. The ground floor consisted of a concrete slab and the portion of this which was p. 270, l. 10. over the basement had cracked in places; in others it had given way and p. 273, l. 32. p. 57, l. 8. fallen into the basement. The condition of the building after the fire p. 444, l. 26. indicated that the main explosion, if, indeed, there were more than one, pp. 292-8. originated in the basement. A considerable amount of evidence was called p. 299. by the prosecution as to the condition in which the electrical apparatus in pp. 325-333. the Appellant's shop was found which it is submitted negatived the

suggestion that an electric spark or flash coming into contact with gas either on the ground floor or in the basement could have caused the explosion. All the lights in the basement had been switched off by 10.30 p.m. There was evidence that the electrical cables in the basement were lead covered and that the various fuses on the circuit would have blown before a short circuit could have melted the lead. It was consequently not possible for a fault in the wires in the basement to have ignited gas.

p. 192, l. 33.
p. 327, ll. 35–46.
p. 328, ll. 23–30.

35. According to Mr. Small, an architect called by the prosecution, it was possible to calculate the upward explosive pressure exerted from the basement on the ground floor only on that portion of it which formed a verandah. He was of opinion that a pressure of *264 lbs. to the square foot or *2 lbs. to the square inch was sufficient to destroy the verandah slab. He gave the cubic capacity of the basement as 16,881 cubic feet.

p. 275, l. 44.
* *Sic.*
p. 272, l. 46.
p. 266, l. 33.

36. Mr. Collins, the Government Analyst stated that the vapour of 2 gallons of petrol if evenly distributed through the air in a room of about 16,800 feet cubic capacity would not explode, but that if as might well be the case it were in a pocket mixed with one or two thousand cubic feet of air in a proportion between 1.5 and 6 per cent. (petrol to air) it would form a highly explosive mixture. Under ideal conditions he thought that two gallons of petrol could produce a pressure of 32 lbs. to the square inch, which would be ample to cause the damage which occurred. Mr. Grey, the engineer in charge of the Government Factory at Colombo deposed that the explosion of petrol mixed with air could produce a pressure of 20 to 30 lbs. per square inch, and he verified the theoretical conclusions of the chemist by experiment.

p. 300, l. 40.
p. 301, l. 15.
p. 306, l. 44.
p. 317, l. 42.

37. For the defence Mr. Bruce an Analyst stated that the explosion could not have been caused by a less quantity of petrol than 8.2 gallons, apparently overlooking the possibility of the formation of a pocket, and Mr. Reid an Architect gave evidence to the effect that a pressure of 35 lbs. to the square inch was insufficient to cause the damage. His estimate of the pressure at different points was very much higher than that of the Crown Witnesses. He thought that the pressure had caused an upward movement of the whole building. On this point Mr. Small while agreeing that there had been an " uplifting " of the building thought it was due to the expansion of stanchions by heat. Mr. Bruce expressed the opinion that a vapour or gas probably caused the explosion and that coal gas could have done it. Mr. Hall a second Architect called by the defence, thought however that commercial coal gas, such as was available in the pipes, could not have caused the explosion. He also stated that petrol could not have been the cause of the explosion, which he described as " a chemical explosion of a semi-high nature." He was moreover of opinion that the forces " let

p. 497, l. 10.
p. 449, l. 41.
p. 446, l. 11.
p. 447, l. 15.
p. 445, l. 9.
p. 482, l. 24.
p. 522, l. 26.
p. 496, ll. 4–20.
p. 467, l. 24.
p. 472, l. 41.
p. 472, l. 43.

p. 462, l. 42. loose " in the basement must have been such that it was not possible for a man who had been in the basement at the time of the explosion to have survived and Mr. Bruce was of the same opinion.

38. Lieutenant-Colonel Napier Clavering an officer who had served
p. 55, l. 3. for over twenty years with the Royal Engineers, called by the prosecution,
was of opinion that the explosion had not been caused by a " high
p. 55, l. 31. explosive." He stated that with a gas no local effect was produced at the seat of the explosion owing to the evenness of the distribution of pressure. He pointed out that no damage was done to the floor as would have been
p. 55, l. 10. the case had high explosive been the cause. He supported his view by 10
pointing out that the furniture " uprights " in the middle of the room
p. 314. remained upright after the explosion and it was proved in evidence that cardboard boxes in the racks were undamaged by the explosion. Mr. Small also did not think that a human being in the basement at the time of the
p. 274, l. 37. explosion would be necessarily killed. He had known of people blown through walls by explosions without being flattened out or killed and gave an instance of a straw being blown through a tree by an explosion. Mr. Collins stated that explosions produced curious results and that if the
p. 312, l. 36. Appellant had been stooping over an explosive mixture and setting fire to
p. 313, l. 13. it he would not necessarily have been destroyed. The pressure, he said, 20
would have been momentary and may have had " hardly any effect " on a human being.

39. The Crown also led evidence to negative the possibility of the
p. 301, ll. 28–46. explosion being attributable to any discernible cause other than petrol.
p. 302, ll. 1–14. A vague suggestion emerged in the cross-examination of the witnesses for the Crown that the explosion might have been of marsh gas emanating from
p. 272, ll. 20–30. the sub-soil of the basement. The thickness and impermeability of the concrete floor negatived such a suggestion and it was not persisted in by
p. 564, l. 22. the Counsel for the defence in his concluding address and was treated by the Judge without dissent, as having been abandoned. 30

40. The only remaining possibility (which was strongly relied upon by the Defence) was of an explosion of coal gas, although as has been pointed out, one of their expert witnesses discarded this as a possibility. The material facts deposed to by the Witnesses for the Crown were as follows :

41. There was no supply of coal gas to the Appellant's premises
p. 279, l. 18. but 75 to 80 feet of two-inch piping, supplying coal gas to other portions
p. 282, l. 41. of the Times Buildings, ran through the basement. Mr. Lornie, a gas
p. 281, l. 17. engineer, who examined the pipes after the fire found them undamaged

and free from leaks. He also gave evidence to the effect that the amount of gas (as appearing from the meter) consumed from the 28th September 1933 up to the time of the fire was within the average calculated from January 1933. He also said that the installation of gas was only 21 months old and that no complaints had been received with regard to it. Classen, the bookkeeper, said that he had often noticed a smell of gas but added that though he got a smell he could not say it was the smell of gas. He said he had thought it was due to the burning of waste material in the Government telephone repair shop close by. He said that at the time the smell was noticed no one attributed it to coal gas. Ogle (an assistant) stated there had not been a leakage of gas at any time. He said he had got "a smell" probably from a smelting furnace in the works close by. He had not got the smell of coal gas. Mrs. Kennedy called for the Defence said that on the day of the explosion she had got a strong smell of coal gas which she had frequently got before.

p. 282, l. 17. p. 238, l. 39 to p. 284, l. 4. p. 280, l. 4. p. 154, ll. 25–35. p. 159, l. 39. p. 173, l. 34. p. 174, l. 31. p. 179, l. 21. p. 410, l. 18.

42. It is submitted that the only tenable explanation of the explosion and of the consequent fire was that put forward by the Crown, namely that the explosion occurred accidently while the Appellant, who was the only person in the building at the time, with the object of destroying his stock was setting fire to petrol which had been poured out from one of the petrol tins but which had vaporised and created an explosive mixture in the basement. In any event it is submitted that there was evidence upon which the jury might find that the fire was so caused.

43. The summing-up of Mr. Justice Drieberg occupied two days and it is clear from the Record that in many places it has been inaccurately transcribed by the shorthand writers. It is not possible here to summarise it but it is noteworthy that it was not complained of in the Petition for Special leave to Appeal. The learned Judge accurately directed the Jury upon the main legal considerations such as the burden of proof and the value of evidence of motive. He indicated no bias upon the facts which he left in every case to the Jury. He advised them in several important instances, to reject the submissions of the Crown, he invited correction by Counsel if in any particular he was wrong upon the facts and in the vital matters of the acquisition of petrol and its presence in the building he told the Jury that there was nothing intrinsically impossible or wildly improbable in the Appellant's story. Notwithstanding a summing-up which was favourable to the accused and scrupulously fair the Jury unanimously came to the conclusion that the Appellant was guilty of both the offences charged.

pp. 527–603. pp. 529–530. p. 531, l. 44. p. 540, l. 11. p. 546, l. 26. p. 577, l. 15.

44. One of the grounds on which the Appellant obtained leave to Appeal was an allegation that the foreman of the jury, K. W. Taylor, was the Director of a firm which was the local agent in Ceylon for a number

of insurance Companies and that three other jurers, F. R. Cheeves, W. R. A. McLellan and A. E. Woodall were employees of firms holding similar agencies. It was alleged that trial by a jury which included these jurors, deprived the Appellant of the substance of a fair trial by reason of the interest of the said firms in the policies effected by the Appellant and in other insurance business. In granting leave to appeal the Board directed that the Respondent should be at liberty to file affidavits in answer to the affidavits filed by the Appellant and that the Appellant should be entitled to file affidavits in reply.

45. It appears from affidavits filed by the Respondent to which no affidavits in reply have been filed :—

(A) That K. W. Taylor was a director of the firm of Messrs. Mackwoods Limited which held agencies in Colombo for the Royal Exchange Assurance Corporation and four other insurance Companies. Messrs. Mackwoods Limited receive a commission on the premiums paid to these companies and had no other financial interest in policies effected by the said companies. The Royal Exchange Assurance Corporation had an interest by way of re-insurance in the two policies issued by the Commercial
p. 617. Union Assurance Company to the Appellant, but K. W. Taylor had nothing to do with the insurance department of his firm, and was not aware at the time of the trial that the Royal Exchange Assurance Corporation had any interest in the said policies.

p. 619. (B) That F. R. Cheeves was the Superintendent of an estate
p. 631. belonging to the Lunuwa Tea and Rubber Estates Limited and had been selected for appointment by the Board of Directors of
p. 624. the said Company. Messrs. Harrison & Crossfield Limited of Colombo who were the local agents of the said Company happened also to be local agents for the Manchester Assurance Company.
p. 631. F. R. Cheeves was neither employed by, nor subject to the control of Messrs. Harrison & Crossfield.

p. 628. (C) That W. R. A. McLellan was the Manager of the tea department of Messrs. Leechman & Co. who had no interest in the policies effected by the Appellant. The said firm were local agents for insurance companies but W. R. A. McLellan had nothing to do with its insurance business.

(D) That A. E. Woodall was employed in the engineering department of the Colombo Commercial Company which had no
p. 634. interest in the policies effected by the Appellant. The said firm were local agents for insurance companies but A. E. Woodall had nothing to do with its insurance business.

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

REASONS.

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

(2) BECAUSE the Appellant was not prejudiced or deprived of the benefit of a fair and impartial trial by the inclusion in the jury of the four jurors mentioned.

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

T. J. O'CONNOR.

KENELM PREEDY.

L. M. D. DE SILVA.

No. 69 of 1936.

In the Privy Council.

ON APPEAL

From the Supreme Court of the Island of Ceylon (Assize Court of Colombo).

BETWEEN

KENNEDY - - - *Appellant*

AND

THE KING - - - *Respondent.*

Case for the Respondent.

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