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It is clear that the case against each person must be considered separately and that the application of section 32 of the Code is attracted only upon the fusion of the relevant *mentes reae* by reference to a common intention. While Sri Lankan courts have consistently held that mere presence at the scene of the crime does not by itself support an inference of common intention. Basnayake, C.J. in *Vincent Fernando*[20] has clarified that this principle does not extend to a person whose act of standing and waiting is itself a criminal act in a series of criminal acts done in furtherance of the common intention of all. Reference is made to the observations of Lord Summers in *Barendra Kumar Ghose,(supra)* that *"even if the appellant did nothing as he stood outside the door it is to be remembered that in crimes as in other things they also serve who only stand and wait."*

In the instant case the existence of a conspiracy to murder Mr. Ambepitiya between the 2nd, 3rd, 4th and 5th accused and the 1st accused having been established, the question of motive on the part of the 2nd to the 5th accused does not arise. What remains to be seen is whether the actions of the 2nd to the 5th accused correspond to the requirements of common intention as detailed above.

It is clear that the 2nd to the 5th accused traveled together to the scene of the crime in a van driven by prosecution witness Susantha Pali and that they had planned their route to the scene of the crime and the timing of their arrival, based on communications addressed to them by the 1st accused. It is also evident that they lay in wait near the Otters Sports Club, a place proximate to the residence of Mr. Ambepitiya, biding their time until the correct time and opportunity to commit the murder of Mr. Ambepitiya arose and was intimated to them by the 1st accused. DNA evidence obtained from the sample of vomit collected from the Otters Sports Club area based on information received from witness Susantha Pali and analyzed by Dr. Maya Gunasekera conclusively places the 3rd accused in the Otters Sports Club area.

This fact is corroborated by the evidence of the van driver Susantha Pali, who has stated conclusively that the 2nd to the 5th accused got into his van around 12.40 p.m. and having made several previous stops along the way, directed that the van be parked near the Otters Sports Club where the accused waited, passing their time by consuming more liquor and that the 3rd accused vomited. The witness stated that at a particular time, he was specifically instructed to proceed along Sarana Road and about 100 yards ahead the accused instructed him to turn

into a by-lane. The witness stated that he saw a person dressed in a white shirt and a pair of black trousers standing next to a car and that he was asked to halt the van. It is clear from the evidence that all the accused jumped out of the van and shortly after the sound of gunshots was heard. The witness was ordered to get down from the vehicle and all the accused made their escape in the van.

It is pertinent at this stage to point out that Susantha Pali has clearly identified the 2nd to the 5th accused through an identification parade held on 29.11.2004 and that the fingerprints of the 3rd and 5th accused were found on the vehicle by the Registrar of Fingerprints.

It is abundantly clear from the evidence that the 2nd to the 5th accused were joined in a shared intention to commit the murder of Mr. Ambepitiya and that the provisions of section 32 of the Penal Code are applicable in this case with respect to establishing the liability of the accused for the murder of Mr. Ambepitiya.

With respect to the contention of the defence that there was no common murderous intention on the part of the 2nd to the 5th accused to cause the death of IP Upali Ranasinghe, it has been submitted by the prosecution that this contention runs contrary to the provisions of section 295 of the Penal Code.

Section 295 of the Code provides that: "*If a person by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.*"

Section 295 of the Code deals with transferred intent. It is recognized that if the accused intended to kill one person but in fact killed another, a conviction of murder may be upheld. In *Edwin*[21] *where the accused fired at A, intending to cause his death but instead killed B who was not intended to be killed, the accused was guilty of murder.*

It has been established that the 2nd to the 5th accused were bound and entwined by a common murderous intention to cause the death of Mr. Ambepitiya. The operation of the provisions of section 295 against the accused transfers this intention to the killing of IP Upali Ranasinghe even if the accused had not entertained an intention to cause his death.

It is relevant that IP Upali Ranasinghe was the official body guard attached to Mr. Ambepitiya. As this was a premeditated murder, the accused would have reasonably foreseen that in order to commit the murder of Mr. Ambepitiya, they would be inevitably be forced to engage with and kill IP Upali Ranasinghe who was the armed escort of Mr. Ambepitiya. This was the only conceivable way in which they could have made a safe gateway. There is no doubt that the accused clearly anticipated and conspired to commit the murder of IP Upali Ranasinghe as evidenced also by the use of two weapons during the shooting by the accused.

On application of the scope and ambit of the law contained in section 295 of the Penal Code and the reasonable inference evidenced from the facts of the case we find the accused guilty of the charges against them.

The next argument put forward by the defence was that the trial at bar erred in accepting and acting upon the bald opinion of the finger expert and failed to arrive at an independent opinion on the evidence. It is clear that the evidence of the Registrar of Fingerprints was not considered by the trial at bar in isolation but in conjunction with the position of other officials in the Fingerprint Department and also of the totality of the evidence in the case. The court has also considered the position of the defence counsel for the accused gathered in the course of the cross-examination. It is not tenable to impute a failure to apply judicial principles to the conduct and conclusions of the trial at bar based merely on the acceptance of the evidence and reasoned opinion submitted by the Registrar of Fingerprints. It is pertinent that in response to cross-examination, the Registrar of Fingerprints has clearly stated that the methods employed relative to the discovery and analysis of fingerprints in the instant case were more than sufficient to make a conclusive and positive identification of the accused whose prints had been detected.

A challenge has also been made to the veracity and proper conduct of the identification parade as a further ground of appeal. It was contended by the defence that the identification by Susantha Pali and Achala Wijerama was flawed in that the witnesses were concealed from the judicial officer. It was submitted that this deviation from standard procedure raises doubts regarding the true identity of the witness and militates against the veracity and validity of the identification against the accused.

We find that there is no merit in this argument, as both witnesses have testified in court with regard to their identification through an identification parade and no objections were raised by the defence at that point. Furthermore according to the witnesses they had the opportunity, occasion and chance to identity the accused in terms of the events as it had transpired at the time. It is clear from the evidence and notes of the parade that the witnesses were isolated prior to their participation in the parade and there is no evidence whatsoever that they were exposed to photographs of the accused prior to the identification. Mere suggestions of these to the witnesses are unfounded on facts and not tenable in law.

Anonymity before the accused is a privilege afforded by law to any witness participating in an identification parade. However the proceedings maintained by the magistrate contemporaneously, evinces and proves the participation of the witnesses in the parade. The identification parade notes and report were prepared under the supervision of court and constitute judicial and official acts and these are matters of record in court. In terms of section 114(d) of the Evidence Ordinance, there is a presumption of regularity afforded to such record and this can only be rebutted by evidence. No evidence to rebut this presumption has been placed before court. Therefore the submission of the defence counsel on this matter is not justifiable.

The final ground of challenge is that the trial at bar erred in failing to consider the legal principles related to section 27 recoveries in its application to the instant case.

Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of an officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

The principle underlying this section is that the danger of admitting false confessions is taken care of as the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. The fact discovered shows that so much of the section as immediately relates to it is true. (Vide, Coomaraswamy, Vol.1, p. 440).

In *Queen* v *Albert*[22] and *Queen* v *Jinadasa*,[23] the court has stressed that the information must relate distinctly to the fact discovered. A clear nexus must exist between the information given by the accused

and the subsequent discovery of a relevant fact. In *R* v *Krishnapillai*[24] the court has also stressed that such a statement cannot be considered as a confession of guilt of the offence itself.

In the instant case we find that the trial at bar has duly adhered to the legal principles underlying a section 27 recovery. The information relating to the recoveries has not in any way been treated as confessions and relevant inferences and conclusions have been duly drawn from the recovered items.

The issue related to the evidence of Inspector Vedasinghe with respect to the recovery of mobile phone No. 108 is that he failed to mention the number of the phone in the B report. However, IP Vedasinghe has made a mention of the number 108 in his own notes and in the return entry at the police station, and this fact has not been challenged by the defence. Contemporaneous notes made by him which have been examined by court, negates the allegation of the defence that mobile phone No. 108 was not recovered from the 2nd accused.

A further issue repeatedly raised by the defence relates to the actual possession of mobile phone No. 108 by the 2nd accused at the time the offence was committed. The defence submits that possession at the time of recovery does not *per se* lead to an inference regarding possession and use on the day of the murder. In this regard they point to the failure of the prosecution to lead evidence from the registered and previous owners of the mobile phone 108, Mr. Dilip Kumara and Lasantha in order to establish that the phone had been passed on to the 2nd accused prior to the relevant date.

However, failure on the part of the prosecution to call evidence from the relevant persons in order to further clarify the possession of phone No. 108 with the 2nd accused, is not negated as the finding that the phone was in fact possessed by the 2nd accused, recovered from his possession and was carried by the group consisting of the 2nd, to the 5th accused on their journey to the scene of the crime.

Documentary evidence linking the call made and received by No. 108 to and from phone No. 418 throughout the relevant date, maps out the route taken by the accused based on the coverage received and recorded by different transmission towers. This considered together with witness testimonies and DNA evidence which places the accused at the different points and places indicated by the tower reports

conclusively proves that the phone No. 108 was in the possession of the 2nd accused and was carried aboard the vehicle driven by Susantha Pali which transported the accused to the residence of Mr. Ambepitiya.

The defence has submitted separate written submissions on behalf of the 4th accused on the ground that no evidence of his involvement exists apart from the identification of Susantha Pali.

It is important to remember that in terms of section 134 of the Evidence Ordinance, the criminal charges against an accused can be proved by one witness alone, if the evidence is cogent, convincing, accurate and credible and if on that evidence the ingredients of the charge could be proved beyond a reasonable doubt.

It is also important to note in this regard that while the presence of fingerprint evidence conclusively proves the presence of a person at a particular place, the reverse of this principle is not true; in that the absence of fingerprint evidence of the fourth accused on the van driven by Susantha Pali or on the empty bottle of arrack recovered from Steam Boat Restaurant does not preclude the presence of the accused at the designated places.

It is also relevant that the testimony of Susantha Pali was credible in light of its consistency and corroboration through independent forensic evidence and also due to its coherence and accuracy. The evidence of this witness, Susantha Pali with regard to the 2nd, 3rd and 5th accused has been conclusively corroborated by both documentary and oral evidence. Furthermore, the undisputed documentary evidence provided by phone records maintained by Celltel Lanka Pvt. Ltd. also corroborates the evidence of Susantha Pali. The testimonial trustworthiness of this witness has been further enhanced by its consistency with the statements of all other relevant prosecution witnesses including Achala Wijerama on all material aspects of the case.

This establishes the accuracy, ability and credibility of this witness to also make a positive identification of the 4th accused and there is no reason whatsoever to disbelieve him on this. Especially as the identity of the other three accused by him under the circumstances, afforded him the same scope and opportunity to identify the 4th accused as well. And therefore his evidence as to the identity of the 4th accused can be accepted as credible evidence of a positive identification.

Furthermore the record shows that no objection was made regarding the conduct of the identification parade at the time by the defence counsel. The witness has stated clearly that he identified the accused and that the police did not tutor him before his participation in the identification parade. It stands to reason that if the police were to tamper with the identifying witness Susantha Pali, they would do the same with witness Achala Wijerama in order to strengthen the prosecution case against the 4th accused.

The absence of such tampering, considered together with the fact that Susantha Pali is an independent witness with no prior connection or relationship with the accused and that he is not guided by any ill feeling towards the 4th accused or the other accused, leads to the conclusion that his identification of the 4th accused was credible and acceptable under the relevant circumstances of this case and is proved beyond any reasonable doubt.

The sequence of events disclosing the participation of the 4th accused and the unfolding of the narrative of events as evidenced through this witness shows that the 4th accused too acted together with the 2nd, 3rd and 5th accused with the same degree of complicity and the charges against him too have been proved beyond a reasonable doubt.

In respect of the charges of conspiracy against the accused and those of abetment to murder against the 1st accused, it is pertinent to examine the evidence specifically linking the 1st accused to the crime committed by the 2nd to the 5th accused. The prosecution case against the 1st accused is entirely circumstantial and reliance was placed on the motive of the 1st accused, his possession of phone No. 418 which, except for the call made to Tilak, was in constant and almost exclusive contact with No. 108 possessed by the 2nd to the 5th accused, while they were on their planned journey to murder Mr. Ambepitiya.

The evidence of Tilak Sri Jayalath is crucial and decisive to the prosecution case in that it establishes that at or about the relevant time leading up to and when the murders were committed, the phone No. 418 was possessed by the 1st accused on 19.11.2004. The witness claims that he enjoyed a long-standing close business relationship with the 1st accused and that he travelled regularly in the vehicle belonging to the 1st accused. The witness established that his phone number was 0714926707 (hereinafter referred to as 707) and that the connection had been issued to a person by the name of Miskin and subsequently

handed over to him. The witness confirmed that he alone was the user of 707. The witness also confirmed the home number of the 1st accused as number 2332630 and his mobile number of habitual use as No. 077-3118195.

According to his evidence this witness had traveled to Hambantota passing Suriyawewa and Ambalantota with one Sunil Gamage who had arrived from Japan with his traditional dancing troupe. For this purpose the witness had borrowed a vehicle belonging to the 1st accused. The witness stated that he was on his way back to Colombo when he received a call from the 1st accused on 19.11.2004, at around 2.40 p.m. while he was in Hanwella. The records produced by Mobitel Lanka Pvt. Ltd. and Celltel Lanka Pvt. Ltd corroborates this statement of the witness. The witness observed that the number 418 from which the call was made was not the usual number used by the 1st accused, but states that he could easily identify the voice of the 1st accused as they have been in regular phone contact, and by virtue of their long standing friendship.

The witness stated that he informed the 1st accused that he would return the vehicle to the 1st accused upon his arrival in Colombo. The witness also stated that he called the 1st accused on his home phone number upon returning to Colombo. He informed the 1st accused that he was going to the Katunayake Airport and that he would return the vehicle upon his return to Colombo.

The only issue raised on behalf of the 1st accused was that the witness had mentioned his location when receiving the call from 418 as Dondra in his initial statement to the police and that this was later changed to Hanwella. The witness himself has admitted to this mistake on his part, and explained that this omission was due to his frequent trips to the south and his habit of traveling along the Ratnapura route as well along the coast, which led to the confusion regarding his location at the relevant time.

It must be borne in mind that the first statement to the police by this witness was made two and a half months after the receipt of the phone call from the 1st accused on the day of the murder of Mr. Ambepitiya. The statement was recorded only after the receipt of the contemporaneous phone records from Mobitel Lanka Pvt. Ltd, where police investigations on these records had led the police to this witness.

The testimony of Tilak is corroborated by documentary evidence produced by Mobitel Lanka Pvt. Ltd. by which it is apparent that several calls have been made between the witness and the 1st accused. Phone records of No. 707 produced by Mr. Mahinda Jayasundara, Manager Switching, Mobitel Lanka Pvt. Ltd. confirm the various locations where calls were either made or received on this phone. The witness, Tilak was able to convincingly identify each of the calls made or received on No. 707. The records clearly show that the phone was being carried from Tissamaharama via Embilipitiya-Ratnapura to Colombo. It also shows the call made by the witness to the land phone of the 1st accused at 7.47 p.m. in close proximity to the Colombo Cricket Grounds situated in Colombo 07. The witness has also initiated a call from the Katunayake area at 10.01 p.m. on 19.11.2004.

The information evidenced by these records confirms the statement made by the witness Tilak and the credibility of the witness's testimony regarding the identity of the caller on 418 as the 1st accused. The pattern of this closer relationship between the 1st accused and this witness, a fact not controverted by evidence, becomes a basis to rule out any reason of fabrication of evidence against the 1st accused by this witness.

Having established that phone No. 418 was within the possession of the 1st accused, the prosecution went on to prove that the 1st accused was in constant contact with the 2nd to the 5th accused through communications made on No. 418 to No. 108, possessed by the accused traveling to the residence of Mr. Ambepitiya in the van driven by Susantha Pali.

Documentary evidence in this regard had been provided by Celltel Lanka Pvt. Ltd. regarding the calls received by phone bearing No. 108 from another phone bearing No. 418. The collection and preservation of data regarding their customer's communications and the technology that facilitates the identification of the location of both the caller and the receiver based on tower technology has been critical evidence in proving the conspiracy between the 1st accused and the rest of the accused.

The prosecution led the evidence of telecommunications expert Mr. Rasika Mallawa, employed by Celltel Lanka Pvt. Ltd. The record reveals that Mr. Mallawa was vastly experienced in the telecommunications field. He received his Electronics and Telecommunications Engineering degree at the University of Moratuwa, and Master of Business

Administration from the University of Sri Jayawardenapura. He is a member of the Institution of Engineers in Sri Lanka, UK and USA. He began his career handling transmission, and at the relevant time was manager of planning and network quality for Celltel Lanka. He stated that he had overall experience and knowledge in all aspects of the mobile communication network.

In order to fully comprehend the relevance of phone records and location identification, to the facts of the case it is necessary to be possessed with a basic knowledge of the nature and functions of a mobile communications network. Explaining this manner and function, Mr. Mallawa stated that under the GSM system (Global System for Mobile Communication) Celltel provides 2 systems to its customers; the post paid and the prepaid system. A SIM card or (Subscriber Identity Module) is issued to the subscriber by the mobile service provider upon conclusion of the contract. The SIM card contains the subscriber number and this card is essential to operate a mobile phone.

Under the post-paid system, the subscriber has to sign a contract with the service provider and a monthly bill will be issued to the subscriber. The subscriber is required to submit documentary information or proof of billing in the form of utility bills and a deposit as a condition for the operation of the connection. All documents are maintained with the contract ensuring that the registered person is the actual person using the connection. The identity and the authenticity of the purchase customer is ensured for billing purposes and in order to keep a tracking record of the identity of the user, the phone calls he has made and payments made are recorded. A postcard user is considered by the company to be a registered user.

In contrast the pre-paid system does not require such documentary proof and can be issued by any authorized dealer who at the time was only required to maintain a copy of the contract. As the prepaid user can purchase airtime without disclosing identity there is a greater degree of anonymity in the case of a pre-paid user. A point of importance is that under the pre-paid system, the service provider would not provide a detailed bill and the same would not be available even upon a request made by the subscriber. But it is important to note that records are maintained nevertheless and released only to restricted authorities like the police. This should not therefore lead to a false impression that unlike in the case of a post-paid connection, no record is maintained of the calls made or received upon a prepaid phone. The witness has also

testified that call charges on a postpaid connection are cheaper than those on a prepaid connection.

The relevance of this testimony is that a prepaid connection would be the preferred communication of a person who did not wish for his communications to be tracked. However this witness has categorically stated that though details are not released to the customers the company always maintains a record of all calls made and received on both the prepaid and the postpaid systems.

Explaining the process of mobile communication the witness stated that, the human voice is modulated and transmitted by the mobile phone through the conversion of analogue to digital and is transmitted by the antennae contained in the mobile phone via radio waves through sectors logged on to base stations. Each base station has approximately 3 sectors. The transmission of the voice waves takes place through that sector of a base station/ tower passing connected base station via micro waves to the mobile switching centre. The mobile switching center records every act of operating a mobile telephone.

Through this system the mobile phone is constantly connected to the aforementioned path of transmission, which records automatically as it transmits. As all service providers such as Mobitel, Telecom, Suntel etc. are all connected to the Celltel Mobile switching center it is important to note that every call made and received by a mobile phone passes through and is recorded by the mobile switching center, which analyses the number and determines whether the call is meant for a Celltel subscriber. Information recorded includes the calling number, receiving number, duration of the call, identity of the tower or base station, and the time and date of the call.

Transmission through the mobile switching center also assist in the tracing of the geographical path traveled by the radio waves through the towers. Both the geographic location of the caller and the receiver in the case of mobile phones is traceable and in the case of a non-mobile phone there is a listing of the number recorded at the mobile switching centre.

With the concentration of subscribers especially in urban areas the coverage area of a tower or base station is smaller. However away from urban areas i.e.Hanwella, Dondra the cell radius would be between 8km to 10km. The relevance of this is that it is possible to state with certainty that the mobile phone from which the calls were made or received was within the geographic location of a particular base station,

based on coverage. In urban areas the location can be pinpointed with greater accuracy, as each tower covers a smaller perimeter. The cell radius itself being divided into sectors intensifies accuracy, each sector having a unique identity, which pinpoints the location with exactitude and is recorded together with other data.

This witness, Mr. Mallawa submitted a report on calls made and received by No. 418 from 08.11.2004 to 20.11.2004. Based on this report it is apparent that on 19.11.2004 a total of seven calls were made to No. 108, and one call was made to No. 707. The first call made at 08.07.44 was covered by Sector 01 of the People's Park tower and corresponding No. 108 was covered by Sector 02 of the Panchikawatte tower, placing the owner of No. 108 at the Elphinstone Theatre or in a place between the theatre and Borella. Sector 01 of the Commercial Bank tower covered the second call made at 09.07.19, and Section 01 of the Borella tower covered corresponding No. 108. The third call at 09.48.03 was covered by Sector 03 of the People's Park tower and corresponding No. 108 was also covered by Sector 03 of the People's Park tower placing the phone in the area surrounding the court premises. Sector 01 of the People's Park tower covered the fourth call at 12.38.30, and corresponding No. 108 was covered by Sector 02 of the Panchikawatte tower placing the accused in the Elphinstone Theatre and Maradana Junction area. Sector 01 of the Panchikawatta tower covered the 5th call at 14.03.46, and corresponding No. 108 was covered by Sector 03 of the Borella tower, placing the phone in the vicinity of Viharamahadevi Park and the John de Silva Theatre. This evidence corroborates the statement of Susantha Pali.

Significantly the 6th call at 14.39.26 was made to No. 707 possessed by prosecution witness Tilak. No. 418 from which the call originated was covered by Sector 01 of the People's Park tower and Mobitel records indicate that the corresponding No. 707 was in the Hanwella area at the time the call was received. Records of this call are significant as they conclusively corroborate the testimonial of Tilak.

Th next call made from No. 414 to No. 108 was at 15.06.28. Sector 01 of the People's Park tower covered this call and corresponding No. 108 was covered by Sector 03 of the Nawala tower, which placed the 2nd to the 5th accused near the Otters Sports Club area. This evidence also, corroborates the testimony of Susantha Pali. The call of the day was made at 16.34.23 and was covered by Sector 03 of the People's Park tower and corresponding No. 108 was covered by Sector 03 of the

Kaduwela tower, which placed the phone near the Malabe-Kaduwela area. It is pertinent that the 2nd accused from whose possession the mobile phone No. 108 was recovered was a resident of the Malabe area as per the testimonial of Inspector Vedasinghe.

This witness identified the No. 108 on a phone which was produced before him in court in a sealed envelope. The witness also testified that IP Vedasinghe had inquired after the serving sector over the Otters Sports Club area, which was identified by the witness and confirmed by the Inspector as sector 03 of the Nawala tower. The inspector had also obtained a report of all calls which went through sector 03 of the Nawala tower between 2.00 p.m. and 5.00 p.m. on the relevant date 19.11.2004. Upon examination of these calls the expert witness was able to testify to the recurrence of calls between a set of numbers, namely No. 108 and No. 418. Once the pair was identified, the movement of the mobile phone bearing one number and the corresponding number could be traced via the cell sites. A report on communications through sector 01 of the People's Park tower between 2.15 and 3.30 p.m. also revealed the same combination of numbers.

It is evident that several calls were made between No. 418 and No. 108 and that No. 108 was moving from location to location. Call details reveal a systematic pattern of calling over the relevant time period. The regularity of calls between No. 108 possessed by the 2nd to the 5th accused and No. 418 possessed by the 1st accused, leads to a reasonable finding that the parties were known and connected to each other and precludes a sudden and random call made by a stranger. Considered together with all the evidence, the geographic area traversed by the mobile phone which is tracked and evidenced by technological evidence in the form of independent phone records maintained by the phone company, corroborates the path indicated by the prosecution witnesses.

A report on calls made by No. 418 between 14.11.2004 and 20.11.2004 reveal that 32 of the 49 calls made from No. 418 were made to No. 108. The majority of the 9 remaining calls made, related to the operational function of the phone, such as balance, language etc. It is apparent from the evidence that No. 418 was maintained by the 1st accused for almost exclusive communication with No. 108 possessed by the 2nd to the 5th accused over the relevant time period. The only exception being the single call made on No. 418 to No. 707 possessed by the prosecution witness Tilak.

It is also relevant that although the 1st accused was in possession of another mobile phone bearing No. 195 which was a post paid connection with cheaper call charges, he consistently refrained from using this phone to make contact with the mobile phone No. 108 possessed by the 2nd to the 5th accused. The only logical and tenable explanation of this unusual conduct is that the 1st accused believing wrongly, that phone records were not obtainable on pre-paid connections, and wishing to conceal his contact with the 2nd to 5th accused, the actual killers of Mr. Ambepitiya, used phone No. 418 which was a pre-paid connection, despite being in possession of the other phone.

Retired Registrar of the High Court Colombo, Liyanathanthri Gamage Munasinghe, has given evidence with respect to motive. The witness stated that he served as the Registrar of the High Court during the period 5.11.2004 to 29.02.2005. According to his evidence the Attorney-General prosecuted the 1st accused on a charge of murder in case bearing No. 693/2001 and the case was heard by High Court Judge, Mr. Ambepitiya. During the course of the trial a witness informed the judge that he had been threatened by the accused in the case. Based on this allegation, Mr. Ambepitiya ordered that the 1st accused be taken into custody, and refused a bail application submitted by the 1st accused-appellant. However the 1st accused was enlarged on bail by the Court of Appeal for a sum of Rs.20,000.00. Following this ruling of the Court of Appeal, Mr. Ambepitiya expressing his obvious disappointment with the decision, enlarged the 5th accused on bail for a mere sum of Rs.100.00.

The prosecution intimated to Mr. Ambepitiya that a key witness in the prosecution case was unable to give evidence as he had left the country. The prosecution sought permission to remedy this situation by leading the evidence of this witness in a previous judicial proceeding. This application by the prosecution however, was strenuously contested by the counsel for the accused as they claimed that allowing the testimony of this witness would have serious implications on the fate of his clients.

In considering the application of the prosecution, Mr. Ambepitiya has stated that before allowing the application, he would only permit evidence to be taken to establish that the witness had gone abroad. This statement by the presiding Judge, Mr. Ambepitiya would have raised a powerful impression in the minds of the accused that the judge

would no doubt hold in favour of the application made by the prosecution. It is important to note that a verdict on this application would have been of critical importance to the accused as according to his counsel, the fate of the accused depended on the testimonial of this witness. The accused was well aware that a finding of guilt by Mr. Ambepitiya would undoubtedly result in his long term incarceration in jail.

When considering as a whole, the previous decision given by Mr. Ambepitiya on the issue of bail against the 1st accused, and in light of his statement relative to the application which was of crucial importance to the accused, it is reasonable to suppose that the accused functioned under a strong belief that Mr. Ambepitiya was strongly biased against them and that such bias may determine the outcome of not only the present application but also the final decision of the Court. It is relevant that the application of the State was set for inquiry of the court. It is relevant that the application of the state was set for inquiry on 23.11.2004 and that Mr. Ambepitiya was murdered on 19.11.2004.

We find that the above facts display reasonable grounds for the accused to arrive at a conclusion that Mr. Ambepitiya definitely intended to rule against him in the application set for decision on 23.11.2004 and this would be a most tenable and credible motive for the 1st accused to enter into a conspiracy to murder Mr. Ambepitiya on 19.11.2004, before that decision could be given by him.

However in appeal it has been submitted on behalf of the 1st accused that the trial at bar misdirected itself on the question of motive as there were many others who shared the same motive against Mr. Ambepitiya. It was contended that the prosecution had failed to establish a sufficient motive for the offences charged.

Motive has been defined as *'that which moves or influences the mind'*. An action without a motive has been considered to be an effect without a cause. It has been defined in *Gangaram* v *Emperor*[25] as something so operating upon the mind as to induce or to tend towards inducing a particular act or course of conduct.

With respect to the relevance of motive to a criminal case, it has been stated with clarity that the existence of a motive is not a wholly essential ingredient in the prosecution case. There is no requirement therefore for the prosecution to prove a motive or the adequacy of a motive in order to prove a charge. The motive, which induces a man to do a particular act, is known to him and him alone.Therefore the

prosecution is not bound to prove a motive for the offence, though, it can suggest a motive and when it does so, the judge may examine the motive so suggested. [Vide, Wood Renton J. in 1906 – Jaffna Sessions, Case No. 1 cited in Coomaraswamy, p.224 and *Hazarat Gulkhan* v *Emperor*[26]. In *Emperor* v *Balram Das*[27] the court held that where there is clear evidence that a person has committed an offence it is immaterial that no motive is proved, or that the evidence of motive is unclear. According to a judgment of the Indian Supreme Court in *Shreekanthiah Ramayya* v *State of Bombay*[28] has held that a conviction is possible without any motive being disclosed.

Though motive is not in itself necessary, the presence of motive is extremely relevant in establishing the *actus reus* or *mens rea* or both in most criminal cases. It is mostly relevant and significant on the question of intention as in the case of *Queen* v *Buddarakkita*[29]. In *R* v *Palmer*[30], Lord Campbell CJ has observed that there is no necessity to establish the adequacy of the suggested motive. "*.... the adequacy of motive is of little importance. We know from the experience of criminal courts that the most atrocious crimes of this sort have been committed from very slight motives...*"

It is important in this context to distinguish between motive and intention. Austin has adopted the attitude that "intention is the aim of the act and motive is the spring" [*Lectures on Jurisprudence*, 4th Ed., 165] motive can be defined roughly as the reason why the intention is entertained. Motive in this sense is a compelling or propelling psychological factor. However, criminal intention sustains responsibility and the law does not go behind proved intention to investigate motive. [As per, GL Peiris, Criminal Liability in Ceylon, 2nd Ed., 31]

In the instant case, the prosecution has advanced a possible motive for the actions of the 1st accused with respect to his spoken displeasure regarding what he may have perceived as bias shown against him by Mr. Ambepitiya. A credible motive does not carry with it the added burden of being exclusive to the accused alone. While many may have a motive to carry out an offence; which is usually the case in situations of perceived unfair treatment or bias, not all persons similarly affected would take the same course of conduct. The fact that the 1st accused was not the only person to be affected by the deliberations of Mr. Ambepitiya as suggested by the defence, does not in any way detract or preclude from the credible motive put

forward by the prosecution, especially when considered in light of the plethora of evidence produced by the prosecution case.

A further ground put forward by the defence was regarding the failure of the trial at bar to properly evaluate the evidence of IP Vedasinghe with respect to the recovery of mobile phone No. 108 from the 2nd accused. The contention on behalf of all the accused has been that the trial at bar failed to consider the failure on the part of IP Vedasinghe to record the number of the phone as No. 108 in the B report. However it has been established beyond any doubt that this evidence was disclosed and that IP Vedasinghe did record and make an entry regarding the recovery of the phone bearing this number both in his own notes as well as in his return entry in the information book extracts kept at the police station. If his intention in omitting the number from the B report was to falsely implicate the accused, it stands to reason that he would not have mentioned the same in his own notes and the return entry as such action would be counterproductive to his purported intention. The defence has not raised objection to the presence of the number in both the return entry and in his personal notes.

This confusion has also been clearly explained by IP Vedasinghe who stated that this omission was the result of an honest mistake and oversight on his part. We find this explanation tenable and credible and that this mistake does not militate against the validity of the recovery of the phone No. 108 made from the possession of the 2nd accused.

The defence has also drawn the attention of court and submitted, that the trial at bar erred in failing to properly evaluate the evidence of Tilak Sri Jayalath and has disregarded the contradictions evident between his statement in court and his initial statement to the police. It is apparent from the record that the only contradictions relate firstly to his statement to the police concerning his location at the time of receiving the call and secondly his testimony that he had commenced his travel on 16.11.2004.

The reliability or credence of witness testimonials is generally tested on the grounds of testimonial trustworthiness, accuracy, veracity and coherence as well as the creditworthiness of the witness. Corroboration through other oral and documentary evidence contributes significantly towards the credibility of a witness testimonial.

When faced with contradictions in a witness testimonial the court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness. The court must also come to a determination regarding whether this contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead court.

Too great a significance cannot be attached to minor discrepancies, or contradictions as by and large a witness cannot be expected to possess a photographic memory and to recall the exact details of an incident. As observed by Thakker, J. of the Indian Supreme Court in the case of *Bharwada Bhiginbhai Hirjibhai* v *State of Gujarat*(31), "*...it is not as if a video tape is being replayed on the mental screen.* "Furthermore, it must also be borne in mind that the powers of observation differ from person to person.

With regard to the exact time and location of an incident, or the time and duration of an occurrence or conversation, most people make their estimates by guesswork on the spur of the moment at the time of interrogation. It is unreasonable to expect a witness to make extremely precise and reliable statement on such matters. This depends largely on the sense of time and location of a person, which again varies from person to person. A witness may also get confused regarding the sequence of events or his actions, which took place over a particular time span. Particularly when a statement is recorded after the lapse of considerable time following the incident, it is likely that the witness may genuinely get confused and mixed up regarding specific details of the incident or occurrence.

Confusion is also a likely result when the incident itself was of a seemingly innocuous nature, and not obviously connected with a crime or offence. In such cases a material witness is unlikely to have attached the same significance to the incident at the time of occurrence as he or she may later come to attach in retrospect, and this may lead to some minor discrepancies when recalling details of the incident.

Therefore court should disregard discrepancies and contradictions, which do not , go to the root of the matter and shake the credibility and coherence of the testimonial as a whole. The mere presence of such contradictions therefore, does not have the effect of militating against the overall testimonial creditworthiness of the witness, particularly if the said contradictions are explicable by the witness. What is important is

whether the witness is telling the truth on the material matters concerned with the event.

With respect to the first contradiction regarding his location at the time of receiving the call, the witness Tilak has explained to court that his confusion on his location at the time of receiving the call from the 1st accused on phone number 418, was caused due to his frequent travels down South and his habit of alternately travelling back on either the Ratnapura route or the coastal road. The mistake was aided by the fact that his statement was first recorded almost two and a half months after the receipt of the call, and that at the time the call was received, he would not have placed any importance to his communications with his friend, the 1st accused with whom he was in frequent contact.

It is important to note that the evidence of Tilak given in court is corroborated and confirmed by the documentary evidence produced by Mobitel Lanka through the witness Mahinda Jayasundara. The phone records prove conclusively that he was in fact in Hanwella when he received the call from phone No. 418. It is also relevant that Tilak being a friend and business associate of the 1st accused had no reason to falsely implicate him in the murder of Mr. Ambepitiya and IP Upali Ranasinghe and the defence did not in cross-examination even make a suggestion to this effect.

With regard to the second contradiction, Mobitel records prove that Tilak was in Tissamaharama on the 18th and 19th of November 2004. The mistake regarding the date of his departure has no bearing on the evidence of Tilak and a mistake to this effect does not militate against the testimonial creditworthiness of his evidence in light of the whole of his evidence and his explanation as to why he traveled to Tissamaharama on the dates mentioned and the other documentary evidence of the phone records that corroborates his evidence.

It is indeed incongruous that given the weight attached to this particular witness's testimonial that the opposing counsel has not raised any other challenge to the credibility of his testimony. Tilak's statements as to his friendship with the accused, his standing as an disinterested witness, the content of his conversation and the fact that a call was made from No. 418 to his phone No. 707 was never challenged by the counsel for the 1st accused. The crux of his evidence, linking the number 418 proving the possession and use of that phone by the 1st accused at or about the time of the murder, has not been challenged by the cross-examination and in its substance and content can be considered as accurate and credible evidence.

In these circumstances, we find that the two contradictions apparent in the testimonial of Tilak are honest mistakes not intended to mislead court or falsely implicate the 1st accused. Furthermore, mistakes as to the witness's location at the point of receiving the call, and the date of travel are certainly not fatal and do not go to the root of his testimonial. The witness has convincingly and reasonably explained the contradictions.

Therefore, we find that the testimony of witness Tilak is both credible and trustworthy and can be regarded as truthful evidence given to court.

In considering the submission by the defence for the 1st accused regarding the wrong application of the **Lucas principle** to the facts of the instant case, it is noted that while the argument was raised by the prosecution with regard to the failure on the part of the 1st accused to produce the mobile phone bearing No. 418 despite a request made by IP Vedasinghe to this effect, the trial at bar has not applied the said principle against the accused. Therefore reference to the **Lucas principle** is only limited to a submission on the part of the prosecution and has not been applied by court against the accused.

The final ground of appeal submitted on behalf of the 1st accused is that the trial at bar erred in its application of a non-existent dictum of Lord Ellenborough to the facts of the instant case. The contention in this regard is that the said dictum of Lord Ellenborough does not form part of the judgment in *Rex* v *Lord Cochrane*(32) and therefore the trial at bar erred in its application of the principle to the instant case.

The Ellenborough dictum contained in *Lord Cochrane's* case and as adopted and developed by courts today provides that *"No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearance which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest."*

When dealing with this contention it is pertinent to delve briefly into the facts of *Lord Cochrane's* case. The charge in this case was that the accused conspired to spread false rumors of the death of Napoleon

Bonaparte and of peace with France in the belief that this would lead to an increase in government funds and securities in the country and create a false market for government securities. The accused then planned to sell their stake in the securities and funds at the inflated price thereby committing large-scale fraud on the public. Upon conclusion of the trial, Lord Chochrane stated before court that important evidence with respect to his innocence had not been brought forward by him at the time of trial and pleaded that he be granted a new trial.

While the dictum in its modern form is not present in the judgment, a basic reading of the text sheds light on the context in which the principle was borne out. The pith and substance of the judgment reflects key elements of the dictum attributed to him, but which has no doubt over the years been adopted by courts in different jurisdictions and through this process evolved into its modern form.

Sri Lankan courts have for the most part applied the principle that while, suspicious circumstances alone do not relieve the prosecution of the burden of proving the guilt of the accused beyond reasonable doubt, the existence of a telling evidence of a mass of circumstances, which remain unexplained by the accused, could result in a finding of guilt against the accused. [Vide, *Prematilleke* v *The Republic*(33). Thus courts in Sri Lanka have applied the principle commonly known as the Ellenborough principle hand in hand with the principle set out in *Woolmighton* v *DPP*(34), which provides that the burden of the proof in a criminal trial is on the prosecution and remains so throughout the trial. The principle of expecting an explanation of damning circumstances does not displace the principle of *Woolmington (supra)* and it is applied only when the prosecution has established a strong *prima facie* case.

In *Mawaz Khan* v *R.*(35) it was held that where the circumstantial evidence taken together with the setting up of a false alibi by the accused persons might determine the guilt or innocence of the accused in the absence of an explanation. This court has held in *King* v *Gunaratne*(36) that in cases of circumstantial evidence the facts taken cumulatively might be sufficient to rebut the presumption of innocence; although each fact when taken separately may be a circumstance only of suspicion, particularly in the absence of an explanation. In recent times this court has shown a greater tendency towards expecting an explanation of telling circumstances as evidenced by the decision of the court in *Illangatilleke* v *Rep.*(37). In *Seetin* v *the Queen*(38) the court

pronounced that a party's failure to explain damning facts cannot convert insufficient evidence into *prima facie* evidence but it may cause *prima facie* evidence to become presumptive. Whether such a conversion takes place would depend on the strength of the evidence in order to meet the high standard of proof required for criminal cases. In the same case Fernando, J. observed that the above principle is *not a principle of evidence but a rule of logic.*

A similar sentiment has also been uttered by Shaw, J. in *Commonwealth* v *Webster*(39), quoted in *Ameer Ali's Law of Evidence* where he based his judgment on the rationale that where a strong case has been established by the prosecution with proof of circumstances establishing the charge beyond a reasonable doubt, failure of the accused to explain incriminating circumstances would tend towards sustaining the charge.

The principle has acquired a high precedent value in Sri Lanka through its application and endorsement by this court in a plethora of cases as a rule of logic as well as evidence. While the judgment in *Cochrane* provides the basis for the development of the law in this area, the principle attached has undeniably evolved far beyond its roots in the statements of Lord Ellenborough. This court is not prepared to halt the development of the law through a deliberate and regressive step in the opposite direction to the march of the law in this field.

It is however pertinent that a prerequisite to the application of the principle is the requirement of a strong *prima facie* case against the accused to be established by the prosecution . On the instant case, it is evident that a strong case has been established against 1st accused, based on his motive conclusive evidence on his possession of phone number 418, and his continuous communication with the other accused throughout 19.11.2004 and the exclusive use of No. 418 to communicate with No. 108 despite possession of a home phone number as well as a post paid connection bearing number 195. It is also relevant to the prosecution case that no further calls were received by No. 418 after 4.30 p.m. on 19.11.2004.

It was within the purview of the 1st accused to provide a tenable explanation for his communications with the 2nd to the 5th accused while they were on their way to commit the murder of Mr. Ambepitiya. Instead the 1st accused has associated himself with a patently false defence in an attempt to distance himself from the actual killers of Mr. Ambepitiya, and his co-conspirators, the 2nd to the 5th accused.

In light of the gamut of cogent, convincing, and credible evidence produced against the 1st accused, as referred to above, it is evident that the charges preferred against him have been proved beyond a reasonable doubt.

We have considered the judgment of the trial at bar and the evidence and argument submitted by both sides. We find that there are no infirmities in the judgment of the trial at bar, and we are satisfied that the trial at bar has adequately dealt with the evidence of the witnesses who had testified regarding the involvement of each of the accused in the conspiracy and murder of Mr. Ambepitiya and IP Upali Ranasinghe.

Therefore, upon evaluation of the evidence as a whole we are able to conclusively confirm the conviction of the accused of the offences charged against them.

We see no reason to interfere with the conviction and sentence of the accused-appellants and therefore we affirm the conviction and sentence of the accused in respect of the charges made against them.

The Appeals of the accused stands dismissed and the conviction and sentence imposed by the trial at bar is affirmed.

UDALAGAMA, J. – I agree.
DISSANAYAKE, J. – I agree.
AMARATUNGA, J. – I agree.
SOMAWANSA, J. – I agree.

Appeals dismissed.

GAMINI AMARATUNGA, J.

I have had the advantage of reading the judgment of Tilakawardane, J. in draft and whilst agreeing with the reasons and conclusions set out therein on the merits of these appeals, I wish to specifically deal with one of the arguments addressed to us by the learned President's Counsel for the 1st accused-appellant. The learned President's Counsel vehemently criticized the trial Judges' reference to the dictum of Lord Ellenborough in *Lord Cochrane and others,*(32) at 479. In considering the cumulative effect of the evidence against the 1st accused appellant, the trial Judges in their judgment have referred to the dictum of Lord Ellenborough and to the decisions of the appellate Courts of Sri Lanka where this dictum had been applied in appropriate circumstances to support conclusions reached against accused persons.

Hon. Tilakawardane, J. has dealt with the learned President's Counsel's submission on the use of Lord Ellenborough's dictum and my observations on the same matter are in addition to what is stated in the judgment of Tilakawardane, J. In order to place the learned trial Judges' reference to the dictum of Lord Ellenborough in its proper context, it is necessary for me to give a brief account of the evidence available against the first accused-appellant.

According to the evidence led by the prosecution mobile phone 072-2716108 (referred to as phone 108) was recovered by IP Vedasighe from the 2nd accused. On 19.11.2004, the date on which the murder of Mr. Ambepitiya was committed, mobile phone 108 had received seven calls given from mobile phone No. 072-3323418 (referred to as phone 418). According to the records of the mobile phone company the calls received by phone 108 from phone 418 had been made at the following times. 1st call 8.07 a.m., 2nd call 9.17 a.m., 3rd call 9.48 a.m., 4th call 12.38 p.m., 5th call 14.03 p.m., 6th call 15.06 p.m., 7th call 16.34 p.m. According to the evidence, Mr. Ambepitiya and Mr. R.A. Upali were gunned down around 15.15 p.m. The sixth call from phone 418 to phone 108 was nine minutes before the killing. At the time of the last call from 418 to 108 (16.34 p.m.) the killers have accomplished their task. When the last call was received by phone 108, the geographical location of phone 108, as indicated by the records of the phone company, was Malabe-Kaduwela area. The 2nd accused from whom phone No. 108 was recovered by the police was resident in Malabe. After the last call from phone 418 to 108 at 16.34 p.m., there were no contacts between phone 418 and 108. This evidence clearly indicate that on 19.11.2004 the person who used phone 418 was in constant contact with phone 108, later recovered by the police from the 2nd accused-appellant.

Witness Susantha Pali, the driver of the vehicle in which the killers reached the residence of Mr. Ambepitiya, has positively identified the 2nd accused-appellant as one of the persons who travelled in his vehicle and this identification finds support from the presence of the 2nd accused-appellant's finger prints on the empty arrack bottle recovered from the Steam Boat Restaurant.

The evidence of the Govt. Analyst was that empty casings found at the scene of crime had been fired from the pistol (recovered by the police from 2A) and the revolver that was recovered by the police in consequence of information given by the 2nd accused-appellant.

According to the evidence of Susantha Pali, he had seen the persons travelling in his vehicle using a mobile phone. The evidence from the records of the mobile phone company with regard to the geographical location of phone No. 108 at the time it received the 3rd, 4th and the 5th calls from phone 418 support Susantha Pali's evidence with regard to the details of the journey from the time he picked up the 2nd to 5th accused-appellants at Maradana. Thus the available evidence lead to the irresistible inference that the persons who travelled in Susantha Pali's vehicle on 19.11.2004 had with them mobile phone 108 throughout their journey along with Susantha Pali.

Evidence relating to the identity of the person who had access (to say the least) to phone 418 came from Thilak Sri Jayalath, a good friend of the 1st accused-appellant. The witness knew the 1st accused-appellant for a long period of time and the witness was in the habit of talking to the 1st accused-appellant over the telephone. He could easily recognize the voice of the 1st accused appellant. On 16.11.2004, the witness had borrowed a 'Sunny' car from the 1st accused-appellant to travel to the southern part of Sri Lanka along with a friend who had come from Japan. On 19.11.2004 on his return journey to Colombo in the car borrowed from the 1st accused-appellant, the witness had received a call to his mobile phone No. 071-4926707 (707 phone) from phone 072-3323418 at 2.40 p.m. The caller was the 1st accused-appellant. Thilak had recognised the 1st accused-appellant's voice very well. The latter had inquired from Thilak about the return of the vehicle and Thilak in response had indicated to the 1st accused-appellant that he was on his way to Colombo and would contact 1A once he reached Colombo. Phone 072-3323418 used by the 1st accused-appellant to call Thilak was not a number familiar to Thilak who knew the numbers of the land phone and the mobile phone used by the 1st accused-appellant. According to Thilak's evidence he was passing Hanwella area at the time he received the 1st accused-appellant's call which originated from phone 418. The fact that phone 418 had been used to contact Thilak's mobile phone 707 at 2.40 p.m. on 19.11.2004 and that at the time of the said call phone 707 was in the area of Hanwella has been proved from the records of the mobile phone company.

There was no apparent reason for Thilak, a long standing close friend of the 1st accused-appellant to give false evidence against the latter. His evidence positively establishes that it was the 1st accused-appellant who called Thilak's 707 phone at 2.40 p.m. on 19.11.2004 and the records of the mobile phone company positively established that

that call originated from phone 418, which according to the evidence was the phone used on 19.11.2004 to maintain contacts with phone 108.

The time of the call from phone 418 to 707 (2.40 p.m.) is important. It is pertinent to note that according to the evidence available from the records of the mobile phone company, the 5th call from phone 418 to 108 was at 2.03 p.m. The call to Thilak by the 1st accused-appellant from the same phone 418 had been made 37 minutes after the 5th call from phone 418 to phone 108. This positively establishes that at 2.40p.m. on 19.11.2004, the 1st accused-appellant was in possession of phone 418. The sixth call from phone 418 to phone 108 had been made at 3.06 p.m., just 26 minutes after the call to Thilak and just nine minutes before the assassins gunned down Mr. Ambepitiya and his police security officer.

The prosecution had led evidence to suggest a motive for the 1st accused-appellant to be displeased with the manner in which Mr. Ambepitiya handled the case where the 1st accused-appellant along with others, stood charged for committing the offence of murder.

The evidence led by the prosecution establish beyond reasonable doubt that phone No. 418 used to maintain a constant contact with phone No. 108 which was with the killers of Mr. Ambepitiya, was in the hands of the 1st accused-appellant at 2.40p.m. on 19.11.2004, just twenty nine minutes before the sixth call from phone 418 was given to phone 108 and just 35 minutes before Mr, Ambepitiya and the other were gunned down. The only evidence to link the 1st accused-appellant with phone 418 is the evidence of Thilak with regard to the call he had received at 2.40p.m. on 19.11.2004 from the 1st accused-appellant. The fact that phone 418 had been used to contact Thilak's phone 707 is confirmed by the records maintained by the mobile phone company and the same records establish the connection between phone 418 and 108 on 19.11.2004. Although the connecting link between the 1st accused-appellant and phone 418 is the single telephone call given to Thilak, this link is established beyond reasonable doubt and a Court can safely and confidently act on such evidence. What matters is the testimonial trustworthiness of the evidence and the weight of such evidence.

The only reasonable and irresistible inference deducible from this evidence is that the 1st accused-appellant was in possession of phone

418 at 2.40 p.m. If phone 418 changed hands either before or after 2.40 p.m., it is a matter well within the knowledge of the first accused-appellant. In the absence of a reasonable explanation from the first accused appellant on this matter, the Court is entitled to come to the logical conclusion that the first accused-appellant remained in possession of phone 418 before and after 2.40 p.m. on 19.11.2004. In view of the evidence of the prosecution relating to a possible motive of the first accused-appellant to be displeased with Mr. Ambepitiya and in the absence of a reasonable explanation from the first accused-appellant with regard to the possession of phone 418 before and after 2.40 p.m. on 19.11.2004 the Court is entitled to draw the legitimate inference that the first accused-appellant had possession of phone 418 before and after 2.40 p.m. on 19.11.2004. Court is also entitled to infer from the fact of possession of phone 418 that the first accused-appellant had in fact used it on 19.11.2004 to contact phone 108.

With regard to the possession of phone 418 on 19.11.2004 Thilak's evidence is damning, against the first accused-appellant. When such damning evidence is produced before a Court against an accused person who stands charged with a capital offence, what is his natural reaction when it is in his power to offer evidence to explain that the circumstances relied on by the prosecution to establish his guilt are explicable consistently with his innocence?

It was in this context that the trial Judges have referred to the dictum of Lord Ellenborough which I set out below:

> **"No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but nevertheless if he refuses to do so, where a strong *prima facie* case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious appearance which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest."** ***R v Lord Cochrane and others (supra).*** **As quoted by E.R.S.R. Coomaraswamy – Law of Evidence, Vol. I page 21.**

The first reference in Sri Lanka to the dictum of Lord Ellenborough is found in *Inspector Aroundstz* v *Peiris*(40) where Mosely J. quoting a passage from Wills on Circumstantial Evidence (7th edition) stated as

follows:

> **"Lord Ellenborough said that no person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but nevertheless if he refuse to do so where a strong *prima facie* case has been made out and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious appearances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest." *Rex* v *Lord Cochrane and others, (supra).***

In the above case the Court applied the dictum in a case which depended on circumstantial evidence. Subsequently this dictum was referred to and applied in *The King* v *Wickramasinghe*(41), *The King* v *Peiris Appuhamy*(42) and *The King* v *Seeder Silva*(43).

In *The Queen* v *Sumanasena*(44) where the trial Judge referred to the accused's failure to explain suspicious circumstances proved against him, Basnayake, CJ. delivering the judgment of the Court of Criminal Appeal stated as follows:

> **"The words quoted by the learned Judge appear to us to be the words attributed to Lord Ellenborough in the case of *Rex* v *Lord Cochrane and others.* The report of the trial in which he expressed those observations is not available in any of the libraries in Hulftsdorp and it is therefore not possible to ascertain the context in which it was stated. In view of the fact that this opinion was expressed by Lord Ellenborough in 1814 before the Criminal Evidence Act and at a time when an accused person had no right to give evidence on his own behalf, it is unthinkable that he thereby intended to impose on the accused a burden which the law did not permit him to discharge. It would appear from the fact that *Rex* v *Cochrane and others* is not referred to in the recent editions of such authoritative text books on evidence as Taylor and Phipson that the dictum of Lord Ellenborough is no longer good law even in England. In our opinion the doctrine of Lord Ellenborough has no place in the scheme of our criminal law." (P. 352).**

The learned President's Counsel for the 1st accused-appellant submitted that,

i. There was no case called Lord Cochrane and others and that the case in which Lord Cochrane was charged as the 2nd accused was the case of *R.* v *De Berenger and others.* This position is in fact correct.

ii. Gurney's shorthand report of the case does not contain the words attributed to Lord Ellenborough by Wills in his work on Circumstantial Evidence.

iii. The words attributed to Lord Ellenborough appears to be a "creation of Wills" and that it "appears to be a fabrication of Wills."

The learned President's Counsel therefore submitted that there was no dictum called 'Ellenborough dictum', that it is not a part of the law of Sri Lanka and that in subsequent cases of *Prematilake* v *the Republic of Sri Lanka(supra)* and *Illangatilaka* v *Republic of Sri Lanka(supra)* the Courts have not considered the views of Basnayake, C.J. in *Queen* v *Sumanasena*(46) and that the judgments beginning from the case of *Inspector Aroundstz (supra)* right up to the present day which applied the dictum of Lord Ellenborough are judgments *per incuriam..*

However, the learned President's Counsel has conspicuously and significantly omitted to refer to the judgment of T.S. Fernando, J. in the case of *The Queen* v *Seetin(supra)* where T.S. Fernando, J., having referred to the above quoted passage of Basnayake, CJ. in *Queen* v *Sumanasena, (supra)* fully dealt with the views of Basnayake, CJ. in the following passages:

> **"I agree, with great respect, that it would be wrong to attribute to any Judge an intention to impose on an accused person a burden which the law did not permit the latter to discharge. But it seems to me necessary to point out that the words used by Lord Ellenborough on the occasion in question did not refer to a failure of the accused to give evidence but only to offer evidence which was in his power to offer. Even in 1814 an accused, although not competent to give evidence himself, was not denied the right (a) to call witnesses and (b) to make an unsworn statement from the dock. The comment in Lord Cochrane's case came to be made in respect of the failure of the accused to call as his witnesses his servants to explain suspicious features in the case which told against him. *What has been referred to above as the dictum of Lord Ellenborough is, if I may say so, not a principle of evidence but a rule of logic.* It is therefore not surprising that this**

dictum is not ordinarily to be met with in books on Evidence." (emphasis added)

"I have already observed above that in the year 1814 Lord Ellenborough was commenting in *Cochrane's* case on the failure to offer evidence of persons other than the accused and not to a failure of the accused to give evidence himself. Even on an assumption (which is not warranted) that the dictum was wrong at the time it was delivered, I fail to see what justification there was for the court to observe as it did in *Sumanasena's* case *(supra)* that" it is no longer good law even in England." There is now no bar in England to an accused person giving evidence and, again with much respect, it is in my opinion quite erroneous to say that that dictum is not good law in England. It is good law there even as it is here in Ceylon. Chief Justice Shaw's words which the Court in *Santin Singho's* case adopted with approval express in different language the same rule as was set out by Lord Ellenborough, and, if Lord Ellenborough's dictum was bad law, the words of Chief Justice Shaw should also have been held to be enunciating bad law."

The words of Chief Justice Shaw in *Commonwealth* v *Webster* referred to by T.S. Fernando, J. are as follows:

"Where probably proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to contrary conclusion is to be considered though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge." (Quoted in *Seetin's* case) (*Commonwealth* v *Webster (supra),* Maguire – Evidence – Cases and Materials –)

There are other judicial dicta in England which are substantially similar in effect to the dictum of Lord Ellenborough. In *Rex* v *Burdett* (45) and *Alderson* at 120 (reprinted in Vol. 106 English Reports) Abbot, CJ.

stated as follows:

> "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction if the conclusion to which the *prima facie* case tends be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?"

The trial Judges have quoted the above dictum of Abbot, CJ, at 195 of their judgment when they considered the effect of the first accused-appellant's failure to offer an explanation to the evidence which connected him to phone 418.

Again in *McQueen* v *Great Western Rail Company*(46) at 574 Cockburn, CJ. stated as follows:

> "If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that *prima facie* case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury, and not a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the *prima facie* case. But that always presupposes that a *prima facie* case has been established; and unless we can see our way clearly to the conclusion that a *prima facie* case has been established, the omission to call witness who might have been called on the part of the defendant amounts to nothing."

The above judicial pronouncements reflect the consenses of judicial opinion on the effect of an accused person's failure to offer an explanation in the circumstances referred to in those passages. What those learned Judges have indicated in their pronouncements is the process of reasoning of a prudent trier of fact, well informed of the relevant legal principles, in the circumstances referred to in those pronouncements. In short they indicate the use of logic and common sense in the process of reasoning.

Commenting on the present legal position of Sri Lanka E.R.S.R. Coomaraswamy in his Law of Evidence Vol. I page 21 has made the

following observation:

> "The recent tendency of the Supreme Court of Sri Lanka also appears to be to expect an explanation of telling circumstances, though the failure that is commented on is the failure of the accused to offer evidence and not to give evidence himself. *A party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive.* Whether *prima facie* evidence will be converted into presumptive evidence by the absence of an explanation depends upon the strength of the evidence and the operation of such rules as that requiring a specially high standard of proof on a criminal charge". (emphasis added)

The correct legal view appears to be that, in civil and criminal proceedings alike, whereas a party's failure to testify must not be treated as equivalent to an admission of the case against him, it may add considerably to the weight of the latter.

The learned President's Counsel for the first accused-appellant in his written submissions tendered to this Court has stated that the words attributed to Lord Ellenborough in Wills' circumstantial evidence appears to be "a creation of Wills" and "a fabrication of Wills." This treatise by Wills on circumstantial evidence was first published by the late William Wills in 1838. The favourable reception it received from the legal profession is evident from the fact that between 1838 and 1902 there had been five editions. In the preface of the first edition in 1838 the author has stated as follows.

> "It has not always been practicable to support the statement of cases by reference to books of recognised authority, or of an equal degree of credit; but discrimination has uniformly been exercised in the adoption of such statements; and they have generally been verified by comparison with contemporaneous and independent accounts. A like discretion has been exercised in the rejection of some generally received cases of circumstantial evidence, the authenticity of which does not appear to be sufficiently established".

The editor of the fifth edition 1902 was Sir Alfred Wills, Knt., one of His Majesty's Judges of the High Court of Justice. Lord Ellenborough's dictum appears at page 256 of the 5th edition. If there was no such dictum in existence, the editor who held high judicial office in England

would not have allowed a non-existent dictum to remain in this book.

In their judgment the learned trial Judges have referred to the recent decision of this Court in the case of *Somaratna Rajapakshe and others* v *the Attorney-General*[47] *(Chrishanthi Coomaraswamy murder case)* where Dr. Shirani Bandaranayake. J, having set out the main items of circumstantial evidence led at the trial against the accused-appellants considered the effect of the failure of accused-appellants to offer any explanation with regard to such items of circumstantial evidence. The trial Judges have quoted the following passages from the judgment of Dr. Shirani Bandaranayake, J:

> "With all this damning evidence against the appellants with the charges including murder and rape, the appellants did not offer, any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct, there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him. As pointed out in *Queen* v *Santin Singho*[48] if a strong case has been made out against the accused, and if he declines to offer an explanation although it is in his power to offer one, it is a reasonable conclusion that the accused is not doing so because the evidence suppressed would operate adversely on him. The dictum of Lord Ellenborough in *R.* v *Lord Cochrane (supra)* which has been followed by our Courts *R.* v *Seedar Silva (supra)*, *Q* v *Santin Singho (supra)*, *Premathilake* v *The Republic of Sri Lanka (supra)*, *Richard* v *The State*[49], *Illangatilake* v *The Republic of Sri Lanka (supra)* described this position in very clear terms."

> Thereafter having quoted the dictum of Lord Ellenborough, Dr. Shirani Bandaranayake, J. proceeded to state as follows:

> "On a consideration of the totality of the evidence that was placed before the Trial at Bar and the judicial evaluation of such evidence made by the Judges, the appellants have not been able to establish any kind of misdirection, mistake of law or misreception

of evidence. In such circumstances, **taking into consideration the position that there is no principle in the law of evidence which precludes a conviction in a criminal case being based entirely on circumstantial evidence and the fact that the appellants, decided not to offer any explanations regarding the vital items of circumstantial evidence led to establish the serious charges against them, I am of the view that the Trial at Bar has not erred in coming to a finding of guilt against the appellants."** (emphasis added).

The passage quoted above perfectly fits into the facts of this case where the case against the first accused-appellant rested entirely on circumstantial evidence. In the absence of an explanation from the first accused-appellant in respect of the damning item of evidence available against him, the learned trial Judges were perfectly justified in adopting the rule of logic embodied in Lord Ellenborough's dictum in deciding the guilt of the first accused-appellant.

For the reasons set out above I reject the learned President's Counsel's submission that there is no dictum called the dictum of Lord Ellenborough; that the words attributed to Lord Ellenborough is a fabrication by Wills; and that the views expressed by Lord Ellenborough is not a part of the law of Sri Lanka.

Appeal dismissed.

KUMARASINGHE
v
DINADASA AND OTHERS

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE, J. AND
MARSOOF, (PC) J.
S.C. (APPEAL) NO. 56/2002
FEBRUARY 07TH, 2006

Registration of Documents Ordinance, No. 23 of 1927 – Fraud and collusion within the meaning of section 7(2), Evidence Ordinance – Presumption under section 144 considered.

The defendants claimed title to the same land on deeds emanating from a common owner on the basis of prior registration. The plaintiff disputed the claim of the defendants on the ground that the said claim frustrates for the reason of fraud or collusion in obtaining the said deeds or securing prior registration thereof by the defendants.

The main question considered by the Supreme Court was whether the benefit of registration that has accrued to the defendants-appellants can be negated by the application of section 7(2) of the Registration of Documents Ordinance.

Held:

(1) The plaintiff in order to seek benefit under section 7(2) has either to establish fraud or collusion.

Whether the plaintiff had established fraud or collusion is entirely a matter for the District Judge to decide on the evidence unfolded in Court. At the end of the case for the plaintiff, if the defendants choose to keep quiet then they do so at great risk.

(2) If fraud had to be proved on a balance of probability the failure on the part of the defendants to give evidence could be held against them.

A Civil Court when considering a charge of fraud requires a higher degree of probability than that it would require in establishing negligence.

Per Nihal Jayasinghe, J:

"Even though it is unnecessary to establish collusion beyond reasonable doubt all the items of evidence point to the fact that the registration of the deed of the plaintiff in the wrong folio was as a result of a collusive arrangement between Podisingho and the defendants."

Per Nihal Jayasinghe, J:

> "In the teeth of damning evidence it was inconceivable that the defendants could have given evidence and subjected themselves to cross-examination."

Cases referred to:

1. *Lairis Appu* v *Kumarihamy* 64 NLR 97.
2. *Arumugam* v *Arumugam* 53 NLR 490.
3. *Ferdinando* v *Ferdinando* 23 NLR 123.
4. *Hornel* v *Neuberger Products Ltd.* 1957 1QB 247.
5. *Bater* v *Bater* 1956 3 AER 458.
6. *Ceylon Exports Ltd.* v *Abeysundera* 35 NLR 417.

APPEAL from the judgment of the Court of Appeal.

L.C. Seneviratne, P.C. with *Lal C. Kumarasinghe* for defendant-respondent-appellant.

Gamini Marapana, P.C. with *Navin Marapana* for the plaintiff-appellant-respondent.

Cur.adv.vult.

May 18, 2007

NIHAL JAYASINGHE, J.

Plaintiff-appellant-respondent (hereinafter referred to as the plaintiff) instituted action for a declaration of title to the land described in the first schedule to the plaint and for an enjoining order, interim injunction and the permanent injunction restraining the defendant-respondent-appellants (hereinafter referred to as defendants) from entering the said land, disputing the title and possession of the plaintiff and alienating the said land.

The defendants claimed title to the same land on deeds emanating from a common owner which they maintained were duly registered and claimed title to the said property as against the plaintiff on the basis of prior registration. The defendants further claimed damages from the plaintiff for unlawful possession of the said land and for restoration of possession. The plaintiff disputed the claim of the defendant based on prior registration by contending that the said claim is defeated on account of fraud or collusion in obtaining the subsequent instrument or securing prior registration thereof. The plaintiff relied on section 7(2) of the Registration of

Documents Ordinance. The matters that arose for determination therefore were whether -

(1) the defendants were entitled to the benefits of prior registration of their deeds over that of the plaintiff; and

(2) the said claim of prior registration has been defeated on account of fraud or collusion in obtaining the said instruments or securing prior registration thereof.

The learned Additional District Judge held against the plaintiff on both grounds aforesaid and dismissed the plaintiffs' action. The plaintiffs appealed to the Court of Appeal and the Court of Appeal by its judgment dated 22.03.2002 allowed the appeal and directed that judgment be entered in favour of the plaintiff-appellant as prayed for in the plaint with costs. It is against this order that this appeal has been referred to this Court.

The main issue which has to be determined by this Court is whether the plaintiff can obtain relief under section 7(2) of the Registration of Documents Ordinance.

It is admitted between parties that one Podisingho Weerasinghe was at one time the owner of the land in suit on Deed No. 2143 (P2) of 10.04.1991 attested by Pinto Moragoda, Notary Public. It is also admitted between parties that the said Weerasinghe by Deed of Transfer No. 70636(P3) of 14.05.1991 attested by Jayasekera Abeyruwan transferred the said land to the plaintiff for a consideration of Rupees One Million. It is also admitted that the said Weerasinghe thereafter on 11.07.1991 and 10.08.1991 purported to convey the same land to the 1st to 4th defendants-appellants on Deeds Nos. 13499, 13571 respectively.

The said 1st to 4th defendants on 20.08.1991 by Deed No. 624 sold the said land to one Chandrapala who on 08.11.1991 by Deed No. 704 sold the same land to the 1st to 4th defendant-appellants and the 6th appellant.

It is also admitted that as at the date of execution of Deed No. 70636 in favour of the plaintiff the deed on which the said Podisingho got title i.e. Deed 2143 (P2) had not yet been registered and that in view of the delay in registering the said deed the registration of the plaintiff's Deed No. 70636 (P3) was also held up.

As Deed No. 2143 (P2) was yet to be registered the notary who executed deed No. 70636 (P3) the said Jayasekera Abeyruwan, Notary Public specifically appended that the said Deed No. 70636 (P3) should be registered in the same folio as Deed No. 2143(P2). It has to be stated here that Deed No. 2143 (P2) dated 10.04.1991 had been tendered for registration on 12.02.1991 and registered on 25.06.1991 in folio B682/57. That Deed No. 70636 (P3) dated 14.05.1991 was tendered for registration on 23.05.1991 and registered on 27.08.1991 in folio B 683/073 with no cross reference to folio B 682/57. Deed No. 13499 on 11.07.1991 has been registered in folio 682/201 cross referenced to folio B 682/57 and Deed No. 15371 dated 10.08.1991 registered in folio 682/203 cross referenced to folio B 682/57. That Deed No. 13571 dated 10.08.1991 registered in folio B 682/203 cross referenced to folio B 682/57. Deed No. 624 dated 20.08.1991 registered on 06.11.1991 in folio B 682/57. It appears that at the time Deed No.70636 (P3) was registered Deed No. 2143 (P2) has already been registered to folio B 682/57 and despite specific instructions contained in Deed No. 70636 (P3) by the Notary Abeyruwan, it was not registered in the same folio as Deed No. 2143 (P2). However, all subsequent deeds drawn up by the original owner in favour of the defendant-appellants have been registered in the correct folio. Thus, as set out before, the question to be determined by this Court is whether the benefit of registration that has ensured to the defendant-appellants can be negated by the application of section 7(2) of the Registration of Documents Ordinance. That there was fraud or collusion in the delay and/or improper registration of Deed No. 70636 (P3).

The plaintiff in order to seek benefit under section 7(2) has either to establish fraud or collusion. In *Lairis Appu* v *Kumarihamy*[1], it was held by Lord Devlin that for the purpose of section 7 of the Registration of Documents Ordinance there must be "actual fraud in the sense of dishonesty", and that mere notice of prior registration is not enough. It was also held that "the words 'in obtaining such subsequent instrument' in section 7 of the Registration of Documents Ordinance do not exclude the case of a collusion between the transfer or and the transferee." In *Arumugam* v *Arumugam*[2] the vendor having sold his share in the property had

placed the vendee in possession. Thereafter the vendor having discovered that the Deed of Sale has been registered in the wrong folio sold it to another who promptly had his deed registered in the correct folio. His Lordship held that there was collusion. Court followed a dictum of Betram CJ., in *Ferdinando* v *Ferdinando*[3] where it was stated that there was collusion within the meaning of the Registration of Documents Ordinance where the evidence establishes the joining of two parties in a common trick. Gratiaen, J. stated further that

> *"human ingenuity is such that the categories of fraud and collusion are far too varied to permit any comprehensive definition which would fit every possible case which might a rise for adjudication between competing instruments affecting land under the Registration of Documents Ordinance. The provisions of section 7(2) are by no means confined to transactions where some fiduciary relationship exists or where the subsequent purchaser to whom fraud or collusion is imputed is proved to have taken an active part in the earlier sale over which he claims priority. If any person knowing that his proposed vendor had effectively parted with his interest in a property in favour of someone who has entered into possession of the property as its lawful owner, nevertheless, and in the hope of taking advantage of some recently detected flaw in the registration of earlier deed purports to purchase from that vendor certain right in the property which have already been disposed of, he is guilty of 'collusion' within the meaning of section 7(2) of the Ordinance. The law does not grant benefit of such prior registration to transactions of this kind."*

Mr. Marapana, President's Counsel in support of his submission that the defendants are guilty of both fraud and collusion argued that the notary who attested the Deed No. 70636 (P3) had clearly indicated therein that it should be registered in the same folio as the Deed No. 2143 (P2) and that the officials of the Land Registry and Podisingho Weerasinghe were aware of. He submitted further that according to the Deputy District Registrar of Land, Kurunegala Deed No. 2143 (P2) had been tendered for registration on 12.04.1991 but that due to a fault that the relevant 'Paththuwa' had

not been set out it was to be sent by the registered post to the said Weerasinghe on 20.06.1991 and mysteriously the said Weerasinghe had come to the Land Registry the very next day and had personally taken delivery of the deed which was supposed to be sent to him under registered cover, filed an appeal in the Registrar of Lands in Colombo and obtained an order in his favour and got the deed registered on 25.06.1991 in folio 682/57.

Mr. Marapana, President's Counsel adverting to the evidence of the District Deputy Registrar that when a deed is sent for registration and subsequently returned due to some flaw in it all the details regarding the said deed are entered in the folio maintained for it. It is only the relevant details about the transfer are left blank until such time the flaw is corrected and the deed sent back for registration. Mr. Marapana urged very strenuously that at the time the Deed No. 70636 (P3) was registered i.e. on 27.08.1991 in folio B 683/173 the details of the Deed P2 were already entered in the relevant folio, and there is no reason why the officials of the Land Registry could not have followed the lawful instructions on Deed No. 70636 (P3) and entered it in the same folio in which the details of P2 already were. But what the officials of the Land Registry chose to do was to register Deed No. 70636 (P3) in a different folio totally disregarding the notary's detailed instructions. There was no explanation forthcoming from the witnesses of the Land Registry as to why the express instructions given by the Notary Abeyruwan were not followed.

It is relevant at this point to advert to the evidence of one Dayananda who gave evidence before the learned District Judge. He had stated that the defendants had said to him that this land in question has already been sold to a gentleman in Minuwangoda and that they could resell the said land before the registration is effected by the purchaser from Minuwangoda. That he does not want to get involved in transactions and that he only required the money that he had advanced to Weerasinghe. Dayananda had stated in his evidence that the defendants discussed among themselves that they should get the property written in their names, in order to recover the monies they had advanced to Weerasinghe, despite the knowledge they had that the property had already been sold to the plaintiff. The learned President's Counsel went on to

submit that the conduct of the defendants cannot be considered mere notice and that there was a concerted effort on the part of the defendants to get another deed in their favour before plaintiff's deed was registered. Learned President's Counsel submitted that the conduct of the defendants and the said Podisingho clearly established beyond doubt that they acted not only fraudulently but also in collusion and has support of reasoning in both *Lairis Appu* v *Kumarihamy* and that of *Arumugam* v *Arumugam*. Mr. Marapana invited attention of Court to the fact that none of the defendants gave evidence to controvert the evidence of Dayananda or to explain their conduct.

Mr. L.C. Seneviratne, President's Counsel for the appellant submitted that it was unnecessary for the defendants to have given evidence for the reason that fraud had to be proved beyond reasonable doubt and since that has not been proven to that degree the defendants were not obliged to give evidence to contradict Dayananda's testimony.

It is my considered view that whether the plaintiff had established fraud or collusion is entirely a matter for the learned District Judge to decide on the evidence unfolded in the Court and it is not for the defendants to make that decision. At the end of the case for the plaintiff if the defendants chose to keep quiet then they do so at great risk. If as contended by Mr. Seneviratne, President's Counsel the plaintiff fell short of establishing his case then the learned District Judge who is adjudicating the issues is quite likely to hold against the plaintiff. The learned President's Counsel for the appellant conceded that if fraud had to be proved on a balance of probabilities the failure on the part of the defendants to give evidence could be held against them. The standard of proof regarding allegation of crime in civil proceedings was considered in the case of *Hornel* v *Neuberger Products Ltd.*[4] The plaintiff in that case claimed damages for breach of warranty or alternatively for fraud. The matter for determination before Court was whether a director of the defendant company had made a fraudulent misrepresentation to the effect that the machine which was the subject matter of the sale was a reconditioned machine. If the Director did so represent, there was fraudulent misrepresentation because he knew that the machine had not been reconditioned.

The Court dismissing the claim for damages for breach of warranty on the ground that the parties did not intend the Director's statement to have contractual effect, nevertheless held that it was satisfied on a balance of probabilities but not beyond reasonable doubt that the statement was in fact made and accordingly awarded damages for fraud. On appeal it was held by the Court of Appeal that on an allegation of a crime in civil proceedings the standard of proof was on a balance of probabilities. In the case of *Bater* v *Bater*(5) where Lord Denning observed that in civil cases the case must be proved by preponderance of probabilities but there may be degrees of probabilities within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of criminal nature. Even though mere notice of prior registration is considered insufficient to establish fraud as held in *Ceylon Exports Ltd.* v *Abeysundera*(6) the slightest element of moral blame in addition to notice would constitute fraud. Section 7(2) has two elements, fraud or collusion. If fraud has to be established on a balance of probabilities and quite naturally standard of proof in respect of collusion shall be the same standard of proof. The conduct of Podisingho in retrieving the Deed No. 2143 from the Land Registry suggests a strong motive to commit a fraud. It is most unusual that Podisingho the owner of the land having sold the property to the defendants and having obtained the full consideration would seek to regularize a defect in the deed and waste his time to travel all the way to Colombo to obtain an order for the registration of the deed. The element of collusion can be gathered from the conduct of both Weerasinghe and the defendants. It is in evidence that the defendants along with Weerasinghe visited the Land Registry in Kurunegala many times. That they considered various options of obtaining the monies that had been advanced to the said Weerasinghe. Obtaining a conveyance of the land in their favour and reselling it to recover their money, whilst being aware that the land has already been sold to a buyer from Minuwangoda was an option that was also considered. There was an element of urgency in obtaining the defendants deeds registered before the original

buyer could effect his registration. On the facts disclosed the irresistible inference would be that Weerasinghe along with the defendants were guilty of collusion. Even though it is unnecessary to establish collusion beyond reasonable doubt all the items of evidence points to the fact that the registration of the deed of the plaintiff in the wrong folio was as a result of a collusive arrangement between Podisingho and the defendants. The defendants when they sought to have the subsequent instrument registered were aware that the plaintiff has been placed in possession by the said Weerasinghe. In the teeth of this damning evidence it was inconceivable that the defendants could have given evidence and subjected themselves to cross examination. The Court was entitled to draw the presumption under section 114 of the Evidence Ordinance.

Mr. Seneviratne the learned President's Counsel also submitted that the defendants were aware that the instruments No. 70636 (P3) has not been registered and sought to take advantage which the defendant could rightfully do. There can be no dispute on that. But the circumstances here are entirely different. The defendants having advanced money to Weerasinghe in order to recover the said sum sought to contrive a scheme which was both fraudulent and collusive. I see no reason to interfere with the judgment of the Court of Appeal. Appeal is accordingly dismissed with costs.

TILAKAWARDANE, J. – I agree.

MARSOOF, (PC) J. – I agree.

Appeal dismissed.

SHELL GAS LANKA LTD
v
CONSUMER AFFAIRS AUTHORITY AND OTHERS

COURT OF APPEAL
SIRIPAVAN, J.
SISIRA DE ABREW, J.
CA 604/2006 (WRIT)
NOVEMBER 6, 2006
JANUARY 30, 31, 2006
MARCH 1, 2007

Consumer Affairs Authority Act, No.9 of 2003 – Sections 3 (4), 6, 7, 8 (20), 18, 52 (2) – Revision of Price – Quorum for any meeting for Members – Absence of a quorum – Implications — Delegation of power?

The petitioner's application for an upward revision of L.P. Gas cylinders – price revision – was refused by the 1st respondent – The petitioner sought to quash same.

Held:

(1) Section 3 (4) of the Act contemplates that the quorum for any meeting of the Authority shall be four members; it is mandatory that in order to have legal force any decision made by the 1st respondent authority must have been made by at least four members.

(2) The Director General cannot act as a member of the Authority – S 3 (1)

Held further:

(3) It is essential that to the lawful exercise of power, it should be exercised by the 1st respondent authority upon which such power is conferred and by no one else. The powers of the Authority cannot be delegated to the Pricing Committee, the Pricing Committee may facilitate the discharge of the functions of the Authority, but the Pricing Committee has no jurisdiction to exercise the powers of the Authority.

Application for a *Writ of Certiorari.*

Cases referred to:

1. *General Medical Council* v *U.K. Dental Board* 1936 Ch 41
2. *R.* v *Kensington* and *Chelsea Rent Tribunal ex.p. Mac Farlane* – 1974 WLR 1486 at 1490

Faiz Musthapha PC with *Chanaka de Silva* and *Javed Mansoor* petitioner.

Milinda Gunatilleke SSC for respondents.

Cur.adv.vult.

March 05, 2007

SRIPAVAN, J.

The petitioner made an application to the 1st respondent Authority in terms of section 18 of the Consumer Affairs Authority Act No.9 of 2003 seeking an upward revision of LP Gas Cylinders. The 1st respondent by its letter dated 2nd March, 2006 refused to grant the price revision to the petitioner. The petitioner now seeks a *Writ of Certiorari* to quash the said refusal contained in the document marked 'p108' on the following grounds, *inter alia;*

1) the failure to hold a proper inquiry and acting in violation of the principles of natural justice;
2) the failure to take into account relevant circumstances;
3) the 1st respondent has abused its powers conferred upon it by section 18 of the said Act; and
4) the violation of the legitimate expectation of the petitioner that the petitioner's application would be determined in accordance with the agreed pricing formula.

The petitioners in paragraph 74 of the specification averred that the decision of the 1st respondent Authority communicated to the petitioner by its letter dated 2nd March, 2006 marked 'P108a' was an abuse of the power conferred upon the said Authority by section 18. Answering the averments contained in paragraph 74 of the petition, the respondents in paragraph 35 of their statement of objections referred to the minutes of the meeting of the Authority and the attendance sheet containing the names of the members who were present at the meeting marked 'R7' and 'R8' respectively.

Section 3(4) of Act No. 9 of 2003 in its schedule contemplates that the quorum for any meeting of the Authority shall be four members. Thus, it is mandatory that in order to have legal force any decision made by the 1st respondent-Authority must have been made at least by four members. In this back ground, the Court has to consider

whether the impugned decision marked 'P108' was infact made in terms of section 3(4) of the said Act read with clause 8(2) of the schedule.

Learned Senior State Counsel appearing for the respondents submitted that the Pricing Committee "which met on 27th February, 2006 made its decision marked 'R7'. It was further submitted that the members of the Pricing Committee were also members of the 1st respondent Authority and in any event the powers of the 1st respondent Authority could be delegated to the Pricing Committee in terms of section 8(n). It is apparent from the minutes of the meeting and the attendance sheet marked 'R7' and 'R8', the Chairman of the 1st respondent Authority was not present at the meeting. Other members present were as follows:

1) Mr. Jude Fernando
2) Mr. Neville Jayawardena and
3) Ms. Rajes Nonis.

The 4th person who was present at the meeting was Ms. R.K. Jayasooriya, Director-General/Chief Executive Officer of the 1st respondent Authority.

In terms of section 52(2) of the said Act, the Director-General is the Chief Executive Officer of the Authority and acts under the direction of the Authority. Further, section 5 provides that the Director-General acts as the Secretary of the Authority. Therefore, the Director-General cannot act as a member of the Authority appointed in terms of section 3(1). Thus, the Court can safely conclude that the impugned decision was taken only by three members of the Authority.

It is essential that for the lawful exercise of power, it should be exercised by the 1st respondent Authority upon whom such power is conferred and by no one else. The extent of permissible delegation will, of course, have to be determined with reference to the terms of the statute, because if the delegation exceeds the limits set out by the statute it will be *ultra vires* leading to the invalidity of the act done by the delegate. I am unable to agree with the learned Senior State Counsel that the powers of the Authority can be delegated to the Pricing Committee. The Pricing Committee may facilitate the discharge of the functions of the Authority. But, the Pricing Committee has no jurisdiction to exercise the powers of the Authority. The Act

section 6 provides the delegation of powers to Public Officers only. A statutory power to delegate functions will not necessarily extend to everything. Thus, it has been held in the case of *General Medical Council* v *U.K. Dental Board*(1) that the General Medical Council must itself exercise its disciplinary powers over Dentists and cannot delegate them on to a Executive Committee for the purpose of its functions under Dentists Act.

There is no doubt that the actual participation of a non member of the Authority in the taking of a decision involves want of jurisdiction, conversely, the mere presence of the Director-General does not invalidate the decision if she did not participate in the decision making process. It is indeed the Duty of the Courts to ensure that powers shall not be exercised in an unlawful and arbitrary manner, when the exercise of such powers affect the basic rights of individuals. The court should be alert to see that such powers conferred by the statute are not exceeded or abused. Once it is established who constitute the Authority, it is clear that all members must participate in its decision. In *R* v *Kensington and Chelsea Rent Tribunal ex.p. Mac. Farlane*(2) Lord Widgery, C.J. recognized this principle when he said "Counsel has given us a timely reminder that under the Act, tribunal consists of a Chairman and 2 other members; he submitted quite rightly that no decision can be taken except by the tribunal so constituted."

In the absence of a quorum for the meeting of the members of the 1st respondent Authority, I hold that the decision contained in the document marked 'P108' is devoid of any legal effect. Accordingly, a *Writ of Certiorari* is issued quashing the said document marked 'P108'.

The objectives of the Consumer Affairs Authority Act No.9 of 2003 as shown in its long title is the promotion of effective competition and the protection of the consumers. Thus, the Court is duty bound to consider the general legislative policy underlying the provisions contained the Act. While the Act protects traders and manufacturers against unfair trade practices, the consumer interest shall also be given due consideration as provided in section 7 of the said Act. One of the objects of the 1st respondents Authority is to ensure that consumers have adequate access to goods and services at competitive prices. Its function includes the protection of rights and

interest of consumers and other users of goods and services and availability of quality goods and services at reasonable prices.

Therefore, exercising the discretionary powers vested in this Court, I direct the 1st Respondent to consider the Petitioner's application for the increase of the LP Gas prices in terms of the provisions contained in Act No.9 of 2003 and to take a decision in terms of the law within one month from today. The petitioner is entitled for costs in a sum of Rs.10,000/= payable by the first respondent Authority.

SISIRA DE ABREW, J. – I agree.
Application allowed.

SAMY AND OTHERS
v
ATTORNEY-GENERAL (BINDUNUWEWA MURDER CASE)

SUPREME COURT
WEERASURIYA, J.
JAYASINGHE, J.
UDALAGAMA, J.
DISSANAYAKE, J.
FERNANDO, J.
SC 20/2003 DB
HC COLOMBO 763/2003 (TAB)
NOVEMBER 12, 23, 29, 30, 2004
JANUARY 5, 2005
FEBRUARY 2, 2005

Penal Code sections 30, 31, 42, 138, 139, 146, 297, Murder - Unlawful assembly – Lucas Principle – Ellenborough dictum – discussed – illegal omission – Failure to take action – Police Ordinance section 56 – Police inaction – Exercising discretion bona fide and to the best of one's ability – Can the officer be faulted?

The case was tried against 41 accused before a Trial at Bar (TAB) upon an indictment containing 83 counts. 18 accused were called upon for their defence and at the conclusion of the trial 13 were acquitted; 5 were convicted and sentences imposed. The charges were sequel to the killing of 27 detainees and injuring 14 detainees at the Rehabilitation Center at Bindunuwewa.

In appeal,

It was contended that, the evidence only established the presence of the accused-appellants at the scene, and the TAB had wrongly applied the 'Lucas principle and the Ellenborough principle'.

Held:

(1) It is settled law that mere presence of a person at the place where the members of an unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion.

(2) The finding of the TAB that the 1st accused-appellant was present at the commencement of the attack is erroneous for there was no evidence to that effect. It is not prudent to rely on the evidence of Wickremasinghe – he has given false evidence to sustain a verdict of guilt pronounced on the 2nd defendant-appellant. The visit to the camp by the 3rd defendant-appellant was motivated by curiosity on the information that the detainees were attacking the villagers.

(3) The 'Lucas principle' is that falsehood uttered in Court or outside Court by a defendant could be taken as corroboration of the evidence against a defendant. It is not justifiable to hold that the 3rd accused-appellant knew that if he told the truth, he would be sealing his fate. There was no allegation that he had given false evidence and insufficient evidence although the name he gave was false.

(4) The prosecution had failed to establish a strong *prima facie* case against the 3rd accused-appellant which warrants the application of the 'Ellenborough dictum.'

(5) There is no an illegal omission – or intentional failure to comply with the duty imposed by law by police officers. Having regard to the department orders, if the Officer-in-Charge has exercised his discretion *bona fide* and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.

APPEAL from the judgment of the Trial at Bar.

Cases referred to:

1. *Kulatunga* v *Mudalihamy* 42 NLR 331
2. *Andrayes* v *Queen* 67 NLR 425
3. *Rex* v *Lucas* 1981 2 All ER 1008
4. *Karunanayake* v *Karunasiri Perera* 82 2 SLR 27
5. *Rex* v *Cocharane* 1814 Gurneys Report 499.
6. *Inspector Arendstz* v *Wilfred Peiris* 10 C.L.W. 121

7. *R* v *Seeder Silva* 41 NLR 337
8. *King* v *Wickramasinghe* 42 NLR 313
9. *King* v *Peiris Appuhamy* 43 NLR 410
10. *King* v *Endoris* 46 NLR 490
11. *King* v *Abeywickrama* 44 NLR 254

Dr. Ranjith Fernando for 1st, 2nd and 3rd accused-appellants.

D. S. Wijesinghe PC with *Priyantha Jayawardena, Chandrika Silva* and *K. Molligoda* for the 4th accused appellant.

C. R. de Silva PC Solictor General with *Sarath Jayamanne* SSC and *P. Nawana* SSC for the respondent.

Cur.adv.vult.

May 27, 2005

WEERASURIYA, J.

This case was tried against 41 accused before a Trial-at-Bar upon an indictment containing 83 counts. For convenience 83 counts in the indictment could be classified into five groups in terms of the alleged offences based on two different principles of criminal liability, as follows:-

(1) Count 1 of the indictment alleged that on or about 25th October 2000 Bindunawewa, Bandarawela, the accused along with others unknown to the prosecution were members of an unlawful assembly, the common object of which was to cause hurt to the detainees of the Bindunuwewa Youth Rehabilitation and Training Centre and thereby committed an offence punishable under section 140 of the Penal Code.

(2) Counts 2-22 of the indictment alleged the commission of the offence of murder of 27 detainees (named in the indictment) by the members of the said unlawful assembly in the prosecution of the common object of the said unlawful assembly or was such that the members of the said unlawful assembly knew to be likely to be committed in the prosecution of the said object and thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(3) Counts 29-42 of the said indictment alleged the commission of the offence of attempted murder of 14 detainees (named in the indictment) by the members of the said unlawful assembly in the prosecution of the common object of the said unlawful

assembly or was such that the members of the said unlawful assembly knew to be committed in the prosecution of the said object, and thereby committed an offence punishable under section 300 read with section 146 of the Penal code.

(4) Counts 43-69 of the indictment alleged the commission of the murder of 27 detainees (named in the indictment) by the accused along with others unknown to the prosecution and thereby committed an offence punishable under section 296 read with section 32 of the Penal Code.

(5) Counts 70-83 of the indictment alleged the commission of the offence of attempted murder of 14 detainees (named in the indictment) by the accused along with others unknown to the prosecution and thereby committed an offence punishable under section 300 read with section 32 of the Penal code.

The prosecution led the evidence of 58 witnesses comprising officials of Bindunuwewa Rehabilitation Camp, senior Police officers in charge of the area, Army officers who came to assist the police to disperse the crowd, certain Police officers who were on duty at the time of the attack, most of the detainees who survived the attack, several villagers, Medical officers who conducted the post-mortem and medico-legal examinations in respect of the deceased and injured detainees, and Police officers who conducted investigations.

At the close of the prosecution case on 21/06/2003, 23 accused listed on the indictment were discharged on the application made by the State on the basis that there was no evidence against them. The remaining 18 accused were called upon for their defence and at the conclusion of the trial 5th, 7th, 12th, 15th,19th, 25th, 33rd , 34th, 35th, 36th, 38th, 39th and 40th, were acquitted of all the charges. 4th, 13th, 21st, 32nd and 41st accused were convicted on 1st, 2nd - 16th, 29th, 30th, 31st, 33rd, 35th- 37th, 38th, 39th, 41st and 42nd counts, and following sentences were imposed on them:-

Counts 2-16 death sentence
Count 1-6 months R.I.
Count 29-1 year R.I.
Count 30-7 years R.I.

Count 31-3 years R.I
Count 33-2 years R.I
Count 35-2 year R.I
Count 36-1 year R.I
Count 37-1 year R.I
Count 38-3 years R.I
Count 39-2 years R.I
Count 41-1 year R.I
Count 42-1 year R.I

They were also fined Rs. 1000/- each on counts 30, 31, 33, 38, and 39 of the indictment.

General comments

It is to be noted that the foregoing charges were a sequel to the killing of 27 detainees and injuring 14 detainees at the Rehabilitation Center at Bindunuwewa on 25.10.2000.

The first three accused-appellants who were residents of Bindunuwewa village, had been convicted on account of their membership of the unlawful assembly with the common object of causing hurt to the detainees of the Rehabilitation Camp and thereby attracting vicarious liability in terms of section 146 of the Penal Code in respect of the charges in the indictment.

The 4th and 5th accused-appellants being Police Officers who were on guard duty around the camp on 25.10.2000 were found guilty on the basis of the illegal omissions and positive (illegal) acts for having aided and abetted the commission of offences set out in the indictment and thereby rendered themselves to be members of the unlawful assembly resulting in criminal liability in terms of section 146 of Penal Code. Accordingly items of evidence with regard to the villagers (1st, 2nd and 3rd accused-appellants) would differ from the evidence presented by the prosecution against the police officers (4th and 5th accused-appellants). Thus the complicity of the two groups as classified above will be considered separately under two different heads in this judgment. In fact Trial-at-Bar had proceeded to examine the evidence in respect of the accused based on the same classification.

At the hearing of this appeal on the application of the learned Solicitor General, 5th accused-appellant was acquitted of all charges preferred against him.

Submission on behalf of 1st-3rd accused-appellants

Learned counsel for the above appellants submitted that the Trial-at-Bar had failed to consider the following circumstances and thereby misdirected itself in imputing vicarious liability on the 1st – 3rd accused-appellant:

(a) that the evidence led against the 1st-3rd accused-appellants only established their presence at the scene on 25/10/2000.

(b) that the evidence disclosed that there was a 'news' that Tigers were attacking the village and due to that reason there was a large gathering of villagers ranging from a minimum of 500 to 3-4 thousand at various points at various times.

(c) that the Trial-at-Bar had wrongly applied the "Lucas principle" and the "Ellenborough principle" in respect of these accused-appellants.

The situation at the Rehabilitation Camp on 24th night as a background to the Incident

On 24th night when Headquarters Inspector Jayantha Seneviratne came to the camp on the information he received that there was a commotion in the camp and that the detainees had tried to grab weapons from the officers, the villagers had assembled near the camp. They (the villagers) had received the information that Lt. Abeyratne had been attacked and injured and that the Police post inside the camp had been abandoned which were factually correct. The crowd witnessed the remnants of the Police post being removed and the detainees abusing the Police and throwing stones. The villagers had planned to stage a peaceful Satyagraha opposite the camp on the following morning, for removal of the camp. Accordingly posters were seen all over the town calling for the removal of the camp on the following morning.

The police sought the assistance of the army and Lt. Balasuriya who came with a platoon of 24 men around 8.50 p.m. dispersed the crowd and left around 1.30 a.m.

Commencement of the unlawful assembly

Evidence led at the trials reveals that the villagers had assembled on 25th morning, in large numbers. As the crowds continued to swell there were reports of traffic congestion and blocking of roads. The number of

villagers gathered on 25th morning had been estimated varying between a minimum of 500 to three to four thousand people.

The detainees were seen inside the camp by Capt. Abeyratne walking along with clubs in their hands. The detainee Asokhan had conceded that they (detainees) carried clubs, rods, iron poles, knives and axes.

The incident of stone throwing which took place on 25th morning from both sides were not considered as a threat to the detainees as conceded by Ltd. Abeyratne.

It was evident that the immediate cause for the attack by a section of the crowd was the provocative act of the detainees, in charging into the crowd with clubs, rods and stones in their hands. The crowd having retreated for a moment which reflected a moment of having got frightened, nevertheless broke into camp with all their fury from the Vidyapeeta site. It is from this point one could assert with justification the commencement of the unlawful assembly with the common object of causing hurt to the detainees.

Law relating to membership of unlawful assembly and vicarious liability

Section 138 of the Penal Code defines an unlawful assembly. For the purpose of this case it is sufficient to state that an unlawful assembly of five or more persons is designated an unlawful assembly, if the common object of the persons comprising that assembly is to commit any offence.

Section 139 of the Penal Code provides that " whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly".

The effect of this section was considered in the early case of *Kulatunga* v *Mudalihamy* (1) where it was held that the prosecution must prove that there was an unlawful assembly with a common object as stated in the charge. So far as each individual is concerned, it had to be proved that he was a member of the assembly which he intentionally joined and that he knew the common object of the assembly.

The vicarious liability imputable on the basis of being a member of

an unlawful assembly as provided for in section 146 of the Penal Code reads as follows:-

"If an offence is committed by any member of an individual assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

In terms of that section, for vicarious liability to be imputed on the members of an unlawful assembly the prosecution must prove either:-

(a) that the offence was committed in prosecution of the common object of the unlawful assembly, or

(b) that the members of the unlawful assembly knew that the offence was likely to be committed in prosecution of the common object.

(Vide *Andrayes* v *Queen* [2])

It is well settled law that mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is shown that he has said or done something or omitted to do something which would make him a member of such an unlawful assembly or where the case falls under section 139 of the Penal Code.

Dr. Gour in Penal Law of India discusses the law in respect of unlawful assembly as follows: (Vol.II page 1296-11th Edition)

> "All persons who convene or who take part in the proceeding of an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or from curiosity alone without talking any part in the proceedings are not guilty of that offence, even though those persons possess the power of stopping the assembly and fail to exercise it.
>
> "Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 I. P.C .....If members of the family of the appellants and other residents of the village assembled, such persons could

not be condemned *ipso facto* as being members of that unlawful assembly. It would be necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or been committing some overt act in prosecution of the common object of the unlawful assembly. Where the evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons like guns, spears..... axes etc., this kind of omnibus evidence has to be very closely scrutinized in order to eliminate all chances of false or mistaken implication."

Dr. Gour at page 1299 states that ".....The first thing to remember in cases of this nature is that where a large number of persons has assembled and some of them resort to violence or otherwise misbehaved it need not necessarily mean that every one of the persons present actually shares the opinions, intentions or objects of those who misbehave or resort to violence.

"In fact the possibility of some of the persons actually resenting or condemning the activities of the misguided persons cannot be ruled out. Caution should therefore be exercised while deciding which of the persons present can be safely described as members of an unlawful assembly. Although as a matter of law, an overt act on the part of a person is not a necessary factor bearing upon his membership of an unlawful assembly, in a case of this nature it will be safer to look for some evidence of participation by him before holding that he is a member of the unlawful assembly".

It would be helpful to reproduce the following passages from RATANLAL and DHIRAJLAL's Law of Crimes dealing with the same issue. (Vol.1) (24th Edition pages 598 and 599).

"It is settled law that mere presence of a person at the place where the members of unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion. Whether a person was or was not a member of unlawful assembly is a question of fact".