**MUNIRATHNE AND OTHERS**

**v.**

**THE STATE**

COURT OF APPEAL
YAPA, J. (P/CA)
KULATILAKE, J.
C.A. 194-200/94
HC COLOMBO 5402/94
SEPTEMBER 5, 11, 12, 18, 19, 2000
OCTOBER 3, 4, 5, 18, 19, 2000
NOVEMBER 7, 8, 2000

*Penal Code - S.32, S.140, S.146, Dock Identification - Reliability, Attendant Circumstances - Evidence Ordinance S.114(f).*

The Accused Appellants were indicted on three counts viz: under S.140 Penal Code, under S.355 read with S.146 Penal Code, and under S. 355 read with S.32 Penal Code. The accused Appellants were convicted on all three counts.

On appeal, it was contended (i) that the evidence of dock identification by the Prosecution witness ought not to have been relied upon by the trial Judge (ii) that the trial Judge failed to analyse and evaluate the evidence adduced.

**Held :**

Kulatilake J.,

> "Jurists on evidence have expressed the view that it is undesirable and unsafe for the Court to rely upon the identification of an accused in Court for the first time or dock identification, the reason being that a witness may think to himself that the Police must have got hold of the right person and it is, so easy for a witness to point to the accused in a dock."

(1) Since the Prosecution has failed to relieve its burden of establishing circumstances which not only establish the first Accused Appellant's guilt but are also inconsistent with his innocence, we do not think this is a fit case where "Lord Ellenborough principles" could be safely applied.

(2) Some of the circumstances relied upon by the prosecution are either demonstrably unreliable or fallacious, whilst others are merely suspicious circumstances.

"Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt....."

(3) One LR has been cited as a witness for the prosecution. He was the driver of the Jeep, and document P2 established that he had been driving the vehicle from the time it set off until its return, he would have been the best evidence. In the attendant circumstances of this case, Court is entitled to apply the presumption set forth under S.114(f) Evidence Ordinance.

Appeal from the Judgment of the High Court, Colombo.

**Cases referred to:**

1. *R vs. Howick* - 1970 - Cr. LR. 403.
2. *Regina vs. Turnbull and Another* - 1977 QB 224 at 228.
3. *Gunaratne Banda vs. The Republic* - S.C. 132 - 136/76 H.C. Kegalle 79/75 SCM 2.3.1978.
4. *R vs. Lucas* - 1981 2 All ER 1008.
5. *R vs. Cockraine* - Gurney's Report 479.
6. Queen vs. Kularatne 71 NLR 529 at 556.
7. *Queen vs. M.G. Sumanasena* - 66 NLR 350 at 351.
8. *Francis Frazer, Robert Warren* - 40 Cr. Appeal 160 at 162.
9. *Rex vs. Burdett* - 1520 4 B and Aldermans Reports 95.
10. *Kankanamaratchilge Gunadasa vs. The Republic* - CA 121/95.

Ranjith Abeysuriya P.C., with Ms. Priyadharshani Dias and Ms. Dinusha Mirihana for 1st Accused Appellant.

D.S. Wijesinghe P.C., with N. Abeyratne for 2nd - 4th Accused Appellants.

Dr. Ranjith Fernando with Ms Anoja Jayaratne and Ms. S. Munasinghe for 5 - 7th Accused Appellants.

C.R. de Silva, P.C., Solicitor General with Sarath Jayamanne S.S.C. for Attorney General.

*Cur. adv. vult.*

January 26, 2001
**KULATILAKA, J.**

In this prosecution the accused-appellants were indicted on three counts. The first count alleged that the accused-appellants were members of an unlawful assembly the common object of which was to abduct Mirissa Galbokka Hewage Wasantha Bandula, on 20.8.1990 an offence punishable under Section 140 of the Penal Code. In the second count it was alleged that the accused-appellants whilst being members of the said unlawful assembly had abducted the said Wasantha Bandula with the intent to murder or with the intention that he may be put in danger of being murdered an offence punishable under Section 355 read with Section 146 of the Penal Code. In the third count they were charged with the abduction of the said Wasantha Bandula on the basis of common intention, an offence punishable under Section 355 read with Section 32 of the Penal Code.

At the trial, the High Court Judge of Colombo sitting without a jury convicted all the accused-appellants on all three counts. On count one they were sentenced to a term of six months rigorous imprisonment and to a fine of Rs. 500/-. On count two they were sentenced to a term of ten years rigorous imprisonment and to a fine of Rs. 10,000/- and on count three they were sentenced to a term of ten years rigorous imprisonment and to a fine of Rs. 10,000/-. All the sentences were to run concurrently. The accused-appellants have appealed against their convictions and sentences.

The prosecution case which gave rise to these convictions are as follows:

Wasantha Bandula was witness Chandrasiri's brother. Chandrasiri was constructing a house on a ten perch block of land and by 20.8.1990 only two rooms had come up. From Talwatugoda one has to proceed along the Jayawardenapura Hospital road and on reaching a by road named Welipara

proceed further up to locate this partly built house. Chandrasiri occupied one room and was living there all by himself. Occasionally his brother Wasantha Bandula happened to come there and sleep in the other room. On 20.8.1990 Wasantha Bandula had come there along with his friend Wasantha Kumara carrying with them some dinner packets. Chandrasiri had retired to bed early after his dinner whilst Wasantha Bandula and Wasantha Kumara were still having their meals. It was around 10.30 p.m. Chandrasiri was awakened on hearing some foot steps inside the house. When he came out of his room he found a number of persons inside the house. They had come in search of his brother Wasantha Bandula. At that point of time the intruders were inquiring from his brother Wasantha Bandula about a car taken away by him from Ratnapura. Thereupon they got hold of him and took him away. Chandrasiri had followed the abductors on his motor cycle along with Wasantha Kumara in the direction of the new Parliament. On their way they found a car and a jeep parked opposite the new Parliament. They saw Namal Silva inside the car signalling them to go away. When Chandrasiri stopped the motor cycle two persons had come and assaulted both of them. Whereupon they had bolted leaving the motor cycle behind. Later they came back and removed the motor cycle. Chandrasiri noted down the number of the jeep. It was bearing No. 32 Sri 7311. The following morning he informed about this incident to his sister Padma Ponnamperuma. She in turn had seen the Superintendent of Police Ratnapura Sirisena Herat with a lawyer friend Bodipala Kasthuriaratchchi and complained to the Superintendent of Police about the incident and had given the number of the jeep as well. One month later on 23.9.1990 a formal complaint had been lodged at the Talangama police station by Chandrasiri wherein he formally disclosed the number of the jeep. Thereafter investigations had been conducted by the Criminal Investigations Deapartment. Apparently the jeep bearing No.32-7311 was a jeep belonging to the Ratnapura police at that point of time.

The prosecution has adduced the evidence of Chandrasiri, Wasantha Kumara and Namal Sugathadasa Silva to establish the act of abduction, and the involvement of the accused-appellants in the crime and that it was in the jeep bearing No.32-7311 that the accused-appellants had abducted Wasantha Bandula. To establish the fact that the involvement of the jeep bearing No.32-7311 in the abduction of Wasantha Bandula was brought to the notice of the Superintendent of police Sirisena Herath, the prosecution led the evidence of Padma Ponnamperuma, Lawyer Bodipala Kasthuriaractchi and the mother of Chandrasiri, and in order to establish that the abductors had taken away Wasantha Bandula in connection with a car alleged to have been stolen from Ratnapura, the prosecution relied heavily on the testimony of Karunaratne a garage owner from Galle. Further the prosecution relied on document P1 which was the running chart of the jeep bearing No.32-7311 maintained by P.C. 15633 Lionel for the period 20.8.1990 to 22.8.1990, the document P2 which was the out-entry of 20.8.1990 and document marked P3 which was the in-entry of 22.8.1990 for the same vehicle in its effort to implicate the accused-appellants in the abduction. These entries have been entered in the relevant Information Book by the first accused. However, it is significant that the prosecution did not call P.C. Lionel the driver of the jeep even though his name was in the list of witnesses for the prosecution.

When the defence was called for in terms of Section 200 of the Code of Criminal Procedure Act No.15 of 1979 the first accused-appellant made a dock statement denying the charge whilst the rest of the accused-appellants opted to remain silent.

The main ground urged by the learned President's Consel who appeared for the first accused-appellant with which learned President's Counsel who appeared for the second, third and fourth accused-appellants and the learned senior counsel for the fifth, sixth and seventh accused-appellants associated themselves was, that the evidence of dock identification by the prosecution witnesses ought not to have been relied upon by

the learned trial Judge in convicting the accused-appellants in view of the dangers inherent in such means of identification. Secondly, the learned President's Counsel submitted that the learned trial Judge has failed to analyse and evaluate the evidence adduced by the prosecution in the proper perspective and thereby misdirected himself in law. On a perusal of the evidence adduced by Chandrasiri, Wasantha Kumara and Namal Silva, it appears that the main endeavour of the learned counsel who appeared for the accused-appellants at the trial had been to assail their credibility with regard to the dock identification.

Jurists on Evidence have expressed the view that it is undesirable and unsafe for the Court to rely upon the identification of an accused in Court for the first time or dock identification, the reason being that a witness may well think to himself that the police must have got hold of the right person and it is, so easy for a witness to point to the accused in the dock. In this connection vide Cross on Evidence 6th Edition page 44-45; Archbold - Criminal Pleadings, Evidence and Practice 2000th Edition paragraph 14-2, 14-10 page 1303-1304; Phipson on Evidence 15th Edition 14-17 page 321 and also *R vs. Howick*[1] *In Regina vs. Turnbull & Another*[2] at 228 Lord Widgery referring to the evidence of visual identification, had this to say "such evidence can bring about miscarriages of justice and has done so in few cases in recent years." Regard to the evidential value of dock identification in this country - Wijesundera, J had to make the following observation in his judgment in *Gunaratne Banda vs. The Republic*[3].

> "The other witnesses identified the accused for the first time at the trial in the dock. Again it has been repeatedly said even in the recent past by this Court, in more cases than one that this type of evidence is worthless and, if I may add, no useful purpose will be served in leading such evidence."

The virtual complainant in this case Chandrasiri testified at the trial that on 20.8.1990 around 10.30 p.m. the abductors, seven in number, carried away his brother from his house in his presence. For the first time he identified in Court all the seven accused-appellants in the dock when giving evidence on 6.7.94. That was after an elapse of nearly 4 years from the date of the incident. Under incisive cross-examination, when he was confronted with his police statement he conveniently shifted his original position and said that he could not properly see three of the abductors for the reason, they within few minutes jumped out of the window of the room where Wasantha Kumara and Wasantha Bandula were to sleep that night. Further he retracted his evidence in regard to the number of the abductors when he admitted that the number he had given in his police statement was six. Hence, his evidence at the trial on this vital point is per se contradictory. Wasantha Kumara who was having his meals with Wasantha Bandula at the time of abduction spoke of the presence of only four persons inside the house who he identified as the first, second, fourth, and the seventh accused-appellants for the first time in the dock after four years. But very strangely despite the fact that he stood close to Chandrasiri at that point of time did not speak of three persons jumping out of the window.

Namal Silva who had accompnied the abductors to Chandrasiri's house that night made a dock identification of the first, fourth and the seventh accused-appellants. But very strangely he could not identify the person who was with him inside the car throughout the journey, nor could he identify the person who had held him by his hand when he directed that person to Chandrasiri's house after getting down from the car near Chandrasiri's house. He had seen two of the abductors assaulting Chandrasiri and Wasantha Kumara when they stopped their motor cycle on the new Parliament road. Are we to assume that only the figures of the first, fourth and the seventh accused-appellants were recorded in his memory, whereas his memory had failed in respect of those who happened to be around him at the time of the incident? About the number of

persons who took part in the abduction Chandrasiri spoke of six or seven, Wasantha Kumara four and Namal Silva could not remember. Hence, on this vital issue the evidence of Chandrasiri, Wasantha Kumara and Namal Silva were not only per se contradictory but also inter se contradictory. These discrepancies and inconsistencies lead us to the conclusion that the evidence of dock identification by these witnesses are demonstrably unreliable and as such cannot be acted upon. Hence the intrinsic value of their evidence of dock identification is reduced to nought. Apart from this a doubt arises that even if the figure of a particular person or what he did get recorded in the memory of a witness whether it could hold good for a period of 4 years. Even though the prosecution endeavoured to establish that the abductors had come in the jeep bearing No.32-7311 blue in colour, the evidence of Chandrasiri and Padma Ponnamperuma on that point turned out to be a damp squib for the reason that Superintendent of Police Sirisena Herath categorically denied that Padma Ponnamperuma gave him the number of the jeep in which the abductors were alleged to have come on 20.8.90 in search of Wasantha Bandula. The police officer in fact proceeded to state that Padma Ponnamperuma did not even mention any involvement of the Ratnapura police in the abduction of her brother Wasantha Bandula. Vide pages 150 and 152 of the record.

Further Sub Inspector Palitha Rohan Siriwardena under cross-examination by the defence testified that Chandrasiri in his statement made on 20.8.90 has not stated that he followed the abductors and managed to obtain some particulars near the Parliament. Vide pages 251 to 252 of the record.

At this juncture it is appropriate to note that, at the commencement of the hearing a Senior State Counsel appeared for the Hon. Attorney-General. But after the learned counsel for the accused-appellants concluded their submissions, learned Solicitor-General entered his appearance for the Hon. Attorney-General along with the Senior State Counsel. In the course of his argument the learned Solicitor-General indicated to Court

that he does not wish to press the case against the 2nd to the 7th accused-appellants. Albeit, he proceeded to make a painstaking effort to keep alive the conviction of the first accused-appellant.

The learned Solicitor-General endeavoured to support the conviction of the first accused-appellant on the basis that the prosecution has presented highly incriminating circumstantial evidence against him. He also contended that the prosecution has established an intentional and deliberate lie uttered by the accused-appellant outside Court which factor would corroborate the prosecution case. Finally he contended that since the prosecution has made out a case against the first accused-appellant for him to answer, his failure to do so would warrant the trial Judge to draw an adverse inference that he arrived at against the first accused-appellant.

In his submissions the learned Solicitor-General advanced his propositions based on a number of circumstances namely; a) that the first accused-appellant had been on a special assigment at the Security Co-ordinating Unit of the Ratnapura police from 16.8.90 until 28.8.90 to investigate into the involvements of the crime suspect Sunil Hettiarachchi alias Sarath Silva who had already been handed over to the Ratnapura police in August 1990 by the Eheliyagoda police; b) that Wasantha Bandula who had been abducted on 20.8.90 was a person wanted in connection with that investigation. On this point the learned Solicitor-General relied upon the evidence of DIG Sirisena Herath and Inspector Wijeratne Banda; c) that the first accused-appellant and his team of police officers had set off from the police station on 20.8.90 on a crime investigation as was evident from the document marked P2. This entry was relied upon by the learned Solicitor-General as corroborative evidence to bolster up Chandrasiri's testimony that the abductors when they pounced upon Wasantha Bandula had questioned Wasantha Bandula about a car he had removed from Ratnapura and that the abductors had questioned Chandrasiri as well whether he was aware of a car his younger brother had in his possession; d) that the first accused-appellant and his

team had thereafter proceeded to Galle on 21.8.90 in order to discover the car stolen by Wasantha Bandula from Ratnapura. In support of this fact the learned Solicitor-General relied upon the testimony of Karunaratne a garage owner from Galle. Karunaratne testified that Wasantha Bandula had given a stolen car for repairs and he knew Wasantha Bandula was a person connected to the on-going case. He further testified that the first accused-appellant had come to his garage on 21.8.90 in a jeep, blue in colour and removed the car given to him by Wasantha Bandula; e) that at the trial Karunaratne described the first accused-appellant as a dark tall person and proceeded to make a dock indentification. The first accused-appellant wanted him to come to the Ratnapura police on the 25th at 12 o'clock and accordingly he went to the Ratnapura police accompanied by lawyer Premaratne Tiranagama on 25.8.90 but was turned away as Inspector Muniratne was not available.

Referring to the dock identification the learned Solicitor-General submitted that the first accused-appellant is a man of "imposing personality" and as such once seen it is not easy to forget him. The learned Solicitor-General invited Court to look at the first accused who was present in the well of the Court. Taking this to his advantage the learned President's Counsel in his reply made the first accused-appellant to stand up in the well of the Court and we observed that he is a six footer and of dark complexion.

Referring to P3 which is the "in entry" made by the first accused-appellant, the learned Solicitor-General submitted that no entry had been made there by him regarding the car he had removed from Karunaratne's garage. The counsel contended that P3 is a false entry and therefore this Court should consider P3 as a lie uttered outside Court. For this proposition he relied upon the principles laid down by Lord Lane in *R vs. Lucas*[4]. He also referred us to document marked P1 which is the running chart of vehicle No. 32-7311, the vehicle in which the first accused-appellant and the police party had left Ratnapura police station on 20.8.1990 as shown by the "out entry" P2.

The learned Solicitor-General laid emphasis on these documents for the Court to draw the inference that the first accused-appellant and the police party had in fact gone to the house of Chandrasiri on 20.8.1990 around 10 o'clock, abducted Wasantha Bandula and thereafter had proceeded to Galle on the following day in search of the car Wasantha Bandula had handed over to the garage owner Karunaratne. It was further submitted that in view of the strong incriminating evidence adduced by the prosecution witnesses there is an evidential burden cast on the first accused-appellant to explain away such incriminating facts established by the prosecution against him. He referred us to the principles laid down by Lord Ellenborough in *Rex vs. Cockraine*[5].

The learned Solicitor General's principal submission is that inferentially the cumulative effect of proof of each of these circumstances would be to establish the guilt of the first accused-appellant. Albeit, it would be our concern to examine each of these circumstances the learned Solicitor-General boldly asserted and see for ourselves whether the inferences leading to the guilt of the first accused-appellant are the only rational inferences that could have been drawn in the circumstances and that they are irrestible inferences. Vide the judgment of Sirimane, J, Alles, J, and Samerawickrame, J in *The Queen vs. Kularatne*[6] at 556.

Reacting strongly to this line of arguments adverted to by the learned Solicitor-General the learned President's Counsel for the first accused-appellant submitted that it is highly improper to invite the Court to speculate on matters for which there is no evidence. Learned counsel reiterated the fact that the learned trial Judge's finding of guilt was based solely on the dock indentification and for justification he had sought refuge in the demeanour and deportment of prosecution witnesses. With regard to the fact that the 1st accused-appellant's special assignment to investigate the involvement of the crime suspect Sunil Hettiarachchi, the learned counsel referred us to the evidence of Inspector Wijeratne Banda who has testified that

he was in charge of this investigation but it was because he went on leave that the first accused-appellant was sent to act for him. Vide page 169 of the record. Referring to the submission that Wasantha Bandula was a person wanted in connection with the investigations, the counsel pointed to the very specific and relevant question on this point put to Wijeratne Banda by the prosecuting State Counsel and the answer given by the witness Wijeratne Banda which is to the following effect.

"Q. Was Wasantha Bandula a wanted person in connection with the investigations?

A. According to the report such persons were wanted."

Counsel posed the question: "On this answer can one say with precision and certainty that Wasantha Bandula was a wanted person in connection with the investigations pertaining to the involvement of the crime suspect Sunil Hettiarchchi?" We do agree with the President's Counsel that this answer given by the Inspector of Police is a vague answer and of less evidential value. It was pointed out by the learned counsel that none of the police witnesses spoke of a stolen car involved in this investigation (vide evidence of Wijeratne Banda p.167), DIG Sirisena Herath, at (p.144) and ASP Neville Padmadeva at (p.191 of the record). Referring to the learned Solicitor-General's submission that Chandrasiri's evidence lend support to the prosecution case that Wasantha Bandula was abducted in connection with a car stolen from Ratnapura, it was pointed out by the learned President's Counsel that this position cannot be accepted because according to the evidence of Sub Inspector Palitha Rohan Siriwardena, Chandrasiri in his first statement to the police has not stated about questioning by the abductors about a car stolen from Ratnapura either from Wasantha Bandula or him. It was further contended that if there was such questioning there is no reason why Chandrasiri failed to disclose such a vital matter to his sister Padma Ponnamperuma, lawyer Kasthuriarachchi and the mother of the deceased for they did not speak of Chandrasiri telling them anything about

questioning him and Wasantha Bandula by the abductors about a car stolen from Ratnapura. Hence it was contended that this submission of the learned Solicitor-General on this point is not supported at all by the evidence in the case. These counter arguments raised by the learned President's Counsel merit serious consideration by this Court.

In the attendant circumstances of this case, we are tempted to reiterate the wise observations made by Basnayake, CJ in *The Queen vs. M.G. Sumanasena*[7]. It is to the following effect:

> "Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence..... The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence."

The counsel further argued that the dock indentification of the first accused-appellant by Karunaratne suffers from the same inherent weakness attributed to the dock identification of the other accused-appellants by Chandrasiri, Wasantha Kumara and Namal Silva. In view of the visual observations we were induced to make in the course of the argument by both counsel and the reference to the first accused-appellant as a man of "imposing personality", we are persuaded to make a decision on this point. One of the important guidelines set forth by Lord Widgery, Chief Justice in *Regina vs. Turnbull & Another*(supra) at 228 when examining circumstances in which the identification by a witness came to be made is to see whether there was any material discrepancy between the description of the accused given to the police by the witness when first seen by him and his actual appearance. In *Francis Fraser, Robert*

*Warren*[8] at 162 the Lord Chief Justice remarked that "where a crown witness gives evidence on oath in direct contradiction of a previous statement made by him which is in the possession of the prosecution it is the duty of counsel for the prosecution at once to show the statement to the Judge." Lord Widgery, Chief Justice also sounded the same remark at page 228 in Regina vs. Turnbull & Another (supra). Hence in the interests of justice we perused that portion of the statement relating to the description made by witness Saputantrige Karunaratne to the CID on 25.5.92 recorded by Inspector Kumarasinghe (vide page 318 of the record) which is to the effect that the person was about 5' 7" tall, fat and of fair complexion. Hence we see a material discrepancy between the description of the accused-appellant by Karunaratne in his police statement and his actual appearance which we ourselves observed at the instance of counsel. On this point alone we are inclined to reject the evidence of Karunaratne that it was the first accused-appellant who removed the car from his garage on 21.8.90.

The learned Solicitor-General attempted to justify the dock identification by Karunaratne made after four years on the basis that Karunaratne possessed a "photographic memory" of this whole episode. In the absence of any scientific evidence whereby we will be satisfied that Karunaratne did possess a "photographic memory" and that the elapse of a long period did not inhibit his memory of identifying the first accused-appellant, we are unable to agree with this over anxious proposition.

Further, the learned President's Counsel referred us to the confusion that has arisen as to the identity of the car alleged to have been stolen from Ratnapura and handed over to Karunaratne and then removed by some person on 21.8.90. There was also confusion whether Wasantha Bandula referred to as an insurance agent by Karunaratne from whom he had taken a life policy was the same Wasantha Bandula (referred to as a Wharf Clerk by Chandrasiri) who had been abducted on 20.8.90 from Chandrasiri's house. Thus the whole episode is clouded with uncertainties and inconsistencies.

R vs. Lucas (supra) dealt with circumstances in which defendant's lies told out of Court may provide corroboration against him. To apply the principles enunciated by Lord Lane in the instant case the prosecution has to prove beyond reasonable doubt that the first accused-appellant did in fact lie outside Court. The learned Solicitor-General's submission was that the first accused-appellant's failure to state in the "in-entry" P3 the fact of removing a car from Karunaratne's garage on 21.8.90 is a lie uttered outside Court. We have already rejected the dock identification of first accused-appellant by Karunaratne and also his evidence that the first accused-appellant removed a car from his garage. Hence, in these circumstances we hold that Lucas principle has no bearing or application to the facts of this case.

Since the prosecution has failed to relieve its burden of establishing circumstances which not only establish the first accused-appellant's guilt but are also inconsistent with his innocence, we do not think that this is a fit case where Lord Ellenborough principles could be safely applied. It is pertinent to reiterate with approval the observations made by Justice Abbott in *Rex vs. Burdett*[9] (referred to in *Kankanamaratchchilage Gunadasa vs. The Republic*[10].

> "No person is to be required to explain or contradict until enough has been proved to warrant reasonable and just conclusion against him in the absence of explanation or contradiction."

The learned Solicitor-General referred us to document P1 which is the running chart of jeep bearing No. 32-7311 maintained by PC Lionel Ratnasiri which document the learned trial Judge had made use of as one of the incriminating items of evidence against the first accused-appellant. According to this document for the period 20.8.90 to 22.8.90 this vehicle had covered Colombo, Mirihana, Fort, Pettah, Maradana, Dehiwela, Pamankada, Nugegoda and Galle. The learned Solicitor-General submitted that because this entry shows that the vehicle had

been to Nugegoda and Mirihana the learned trial Judge cannot be found fault with in coming to the conclusion inferentially that the vehicle had proceeded to Chandrasiri's house off Talawatugoda in order to abduct Wasantha Bandula, the reason being that the learned trial Judge was by then satisfied with the testimony of Chandrasiri, Wasantha Bandula and Namal Silva.

We have already expressed our view that some of the circumstances relied upon by the prosecution are either demonstrably unreliable or fallacious, whilst others were merely suspicious circumstances. Hence, the arm of the law cannot be stretched so far as to encompass an inference that the vehicle would have gone to Chandrasiri's house since P2 has established that the vehicle had gone to Nugegoda and Mirihana during that period. The author of P2 Lionel Ratnasiri who was the driver of jeep bearing 32-7311 had been cited as a witness for the prosecution. P2 estabIied that he had been driving this vehicle from the time it set off from Ratnapura on 20.8.90 until its return on 22.8.90. He would have been the best evidence available for the prosecution to elicit the relevant details of what took place during this period. In the attendant circumstances of this case this Court entitled to apply the presumption set forth in Section 114(f) of the Evidence Ordinance to the non production of Lionel Ratnasiri's evidence at the trial which is to the following effect:

> "That evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it."

For the aforesaid reasons we allow the appeal and we proceed to quash the convictions and sentences imposed on the accused-appellants by the learned High Court Judge. Accordingly we acquit the accused-appellants of all the charges.

**HECTOR YAPA, J. (P/CA)** - I agree.

*Appeal allowed.*