THE ATTORNEY-GENERAL
v
POTTA NAUFER AND OTHERS
(AMBEPITIYA MURDER CASE)

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
UDALAGAMA, J.
DISSANAYAKE, J.
AMARATUNGA, J. AND
SOMAWANSA, J.
S.C. APPEAL (TAB) 01/2006
9TH OCTOBER, 2006

Murder – Sections 294, 295 – Application of common intention, section 32, Penal Code - Offence of conspiracy, section 113(a), Evidence Ordinance – Section 10, section 120, section 27, section 134 – Utilization of D.N.A. evidence.

The 1st accused was charged on counts of conspiracy to murder High Court Judge, Mr. Ambepitiya, abetment of murder of Mr. Ambepitiya, and abetment of murder of Police Inspector Upali Ranasinghe. The 2nd, 3rd, 4th and 5th accused were charged on counts of conspiracy to murder Mr. Ambepitiya, murder of Mr. Ambepitiya, and murder of Inspector Upali Ranasinghe.

After trial the accused were convicted and sentenced in respect of the charges made against them.

Held:

(1) In a case of conspiracy there is no legal requirement regarding a mode of concurrence in the common purpose or the manner in which such concurrence may be established by the prosecution. To establish conspiracy it is possible that there could be one person around whom the rest resolve.

Per Shirani Thilakawardane, J.

".....Although an agreement is at all times the essence of conspiracy it does not necessarily contemplate a physical meeting of the conspirators or prior contract and correspondence between or among the accused as being an essential or necessary ingredient to prove a charge of conspiracy ...."

(2) There must be proof against each conspirator that he had knowledge of the common plot and design although it is not necessary that each should be equally knowledgeable in this regard.

(3) Section 10 of the Evidence Ordinance embodies the principle that when various persons conspire to commit an offence the acts done by one in reference to the common intention are considered to be the acts of all.

(4) In a case of murder against all the accused, where the accused are sought to be made liable on the basis of section 32, of the Penal Code, the common intention must necessarily be a murderous common intention. While each of the accused may have a similar intention with a common object in view, it does not attract the application of section 32 of the Penal Code.

(5) The principle underlying section 27 of the Evidence Ordinance is that the danger of admitting false confession is taken care of as the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.

(6) 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.

(7) The motive which induces a man to do a particular act, is known to him and to him alone. Therefore the prosecution is not bound to prove a motive for the offence to prove a charge. However, the presence of a motive is extremely relevant in establishing the *actus reus* or *mens rea* or both in most criminal cases. Nevertheless, criminal intention sustains responsibility and the law does not go behind proved intention to investigate motive.

(8) When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

Per Shiranee Thilakawardane, J:

".....When faced with contradictions in a testimonial of a witness the Court must bear in mind the nature and significance of the contradictions .... The Court must 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..."

(9) The Courts in Sri Lanka have applied the principle commonly known as "*Ellenborough dictum*" in *Rex* v. *Lord Cochrane* (1814) Gurney's Report 479 hand in hand with the principle set out in Woolmington V.DPP (1935 AC 462).

Per Shiranee Thilakawardane, J:

".....While the judgment in *Cochrane's* case provides the basis for the development of the law in this area, the principle attached has undeniably evolved far beyond its roots in the statement 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 ...."

Per Gamini Amaratunga, J:

".....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 ...."

Cases referred to:

(1) *Cooray* (1950) 51 NLR 433.
(2) *Kanagaratnam* (1952) 47 CLW 42.
(3) *Meyrick* 21 Cr. AR 94.
(4) *Sundaram* (1943) 25 CLW 38.
(5) *Queen* v *Liyanage* (1965) 67 NLR 193.
(6) *Don Sunny* v *Attorney-General* (1998) 2 Sri LR.
(7) *Pieris* v *Silva* (1913) 17 NLR 139.
(8) *King* v *Attanayake* (1931) 34 NLR 19.
(9) *Barendra Kumar Ghose* AIR (1952) PC 1.
(10) *Mudalihamy* (1957) 59 NLR 299.
(11) *Ranasinghe* (1946) 47 NLR 373.

(12) *Wilson Silva* v *The Queen* (1969) 76 NLR 414.
(13) *In re. Asappu* (1948) 50 NLR 324.
(14) *Mahabub Shah* AIR (1945) PC 118
(15) *Ekmon* (1962) 67 NLR 49.
(16) *Appuhamy* (1960) 62 NLR 484.
(17) *Punchi Banda* v *The Queen* (1969) 74 NLR 494.
(18) *Wasalamuni Richard* v *The State* (1973) 76 NLR 534.
(19) *Weerasinghe* v *Kathirgamathamby* (1957) 60 NLR 87.
(20) *Vincent Fernando* v *Clock* (1963) 65 NLR 265.
(21) *Edwin* v *Check* (1943) 44 NLR 297.
(22) *Queen* v *Albert* (1960) 66 NLR 543.
(23) *Queen* v *Jinadasa* (1960) 59 CLW 97.
(24) *R* v *Krishnapillai* (1968) 74 NLR 438.
(25) *Gangaram* v *Emperor* 62 IC 545.
(26) *Hazarat Gulkhan* v *Emperor* AIR (1928) Cal. 430.
(27) *Emperor* v *Balram Das* 49 Cal 358.
(28) *Shree Kanthiah Ramyya* v *State of Bombay* AIR (1955) SC 287.
(29) *Queen* v *Buddharakkita* 63 NLR 451.
(30) *R.* v *Palmer*
(31) *Bharwada Bhogibhai Hirjabhai* v *State of Gujrat* (1983) Cri. L.J. 1096.
(32) *R* v *Lord Cochrane* (1814) Gurney's Report 479.
(33) *Prematillake* v The *Republic of Sri Lanka* (1972) 75 NLR 506.
(34) *Woolmington* v *DPP* (1935) AC 462.
(35) *Mawaz Khan* v *R.* (1967) AER 80 PC.
(36) *King* v *Gunaratne* (1946) 47 NLR 145.
(37) *Illangathilleka* v *Republic of Sri Lanka* (1984) 2 SLR 38.
(38) *Seetin* v *The Queen* (1965) 68 NLR 316.
(39) *Commonwealth* v *Webster* 5 Cush, 316, quoted in Amir Ali's Law of Evidence, 59 Mass - 5 Cush 295, Mcguire - Evidence -Cases and Materials.
(40) *Inspector Aroundstz* v *Pieris* 10 CLW 122.
(41) *The King* v *Wickremasinghe* 42 NLR 316.
(42) *The King* v *Pieris Appuhamy* 43 NLR 412.
(43) *The King* v *Seeder Silva* 41 NLR 344.
(44) *The Queen* v *Sumanasena* 66 NLR 350.
(45) *R* v *Burdett* (1820) 4 Barnwell and Anderson 95 at 120.
(46) *McQueen* v *Great Western Rail Company,* 1875 LR 10 QB 569.
(47) *Somaratne Rajapakse and others* v *The Attorney-General* SC Appeal 2/2002 (TAB) c. minutes of 3.2.2004.
(48) *Queen* v *Santin Singho* (1962) 65 NLR 445.
(49) *Richard* v *The State.*

APPEAL from the judgment of the High Court of the Western Province.

R. Arsakularatne, PC with *W. Batagoda, J. Koralage* and *R. de Silva* for the 1st accused-appellant.

Dr. Ranjith Fernando with *Ms. S. Munasinghe* for the 2nd to 5 accused-appellant.

C.R. de Silva P.C.,S.G. with *Sarath Jayamanne* DSG and *Ms. H. Jayasundara*, SSC for the Attorney-General.

Cur.adv.vult.

December 8, 2006

SHIRANEE THILAKAWARDANE, J.

This appeal has been preferred against the judgment of the Trial at Bar dated 04.07.2005, in High Court Colombo case No. 2365/2005.

The 1st accused was charged on counts of conspiracy to murder High Court Judge, Mr. Ambepitiya, abetment of murder of Mr. Ambepitiya, and abetment of murder of IP Upali Ranasinghe. The 2nd, 3rd, 4th, and 5th accused were charged on counts of conspiracy to murder Mr. Ambepitiya, murder of Mr. Ambepitiya, and murder of IP Upali Ranasinghe. The accused were found to be guilty of all counts preferred against them and accordingly convicted and sentenced.

At the appeal the counsel for the appellants relied on several grounds of appeal, including the failure of the prosecution to establish the charge of conspiracy beyond reasonable doubt, the wrongful application of sections 10 and 27 of the Evidence Ordinance, the improper application of section 32 of the Penal Code and the application of the non-existent *Ellenborough dictum* to the accused. It was also submitted that the trial at bar erred in attaching a probative value to the identification parade evidence, in its appreciation of the opinion of the fingerprint expert and in its failure to attach significance of the infirmities related to the recovery of Nokia phone number 0722716108 (hereinafter referred to as 108) from the 2nd accused. It was further submitted on behalf of the 1st accused that the trial at bar erred with respect to the question of motive, and misdirected itself in the appreciation of evidence given by Tilak Sri Jayalath.

It is pertinent at this stage to examine the evidence against the accused with respect to the several charges against them.

The 1st witness for the prosecution case, Susantha Pali, was the driver of van No. 253-0882 who was employed as a van driver for the Leads Cab Service. At about 12.30 p.m. on 19.11.2004, the witness was instructed by his office to pickup some passengers from a place proximate to the Elphinston Theatre. The witness arrived at the Elphinston Theatre at 12.40 p.m. and was flagged down in front of the theatre by a man who identified himself as the person who had hired the van. About 10 minutes later he, together with three other persons got into the van. One person was seated in front alongside the driver and the other three were seated in the passenger seats in the rear of the vehicle. Having thereby had the opportunity to clearly see the passengers, the witness subsequently identified the 2nd, 3rd, 4th and 5th accused as the persons who traveled in his van on 19.11.2004, at an identification parade conducted on 29.11.2004. He specifically identified the 3rd accused as the person who first stopped the van, and the 5th accused as the person who sat in front alongside the driver's seat and was even able to describe the fact that he wore a gold chain around his neck. This witness also made a dock identification of the four accused at the trial.

The accused informed the witness that they were traveling to Moratuwa, and detailed the route to be followed in proceeding to their specified destination. The first stop was at the John de Silva Theatre at around 1.00 p.m. where the accused alighted from the van. The witness observed that the 3rd accused was engaged in a conversation over a mobile phone. The accused informed the witness that a person they referred to as 'Sir', whom they alleged was a director of video tele-dramas, was late, and that they were traveling to Moratuwa to meet this person. At around 1.15 p.m. the accused got back into the van and the witness was directed to drive them to a restaurant, later identified by the witness as the 'Steam Boat' restaurant situated on Kynsey Road, approximately 100-200 metres from the Borella cemetery roundabout.

The witness entered the restaurant together with the accused, and was seated in a room to the left of the entrance. According to this witness, the accused requested that they be served food that

could be prepared in a hurry and also consumed half a bottle of Arrack together with their food. The witness as the driver of the vehicle had understandably refrained from drinking any alcohol at the restaurant.

It is relevant that the police recovered this empty bottle of Arrack on the same day, after the incident, from the 'Steam Boat' restaurant and the fingerprints of the 2nd and 3rd accused were identified on the bottle. It is important to note that this recovery of the fingerprints took place after the incident had taken place and before any of the accused had been taken into custody.

The witness stated that once the bill was settled by one of the accused, they got back into the van and the journey was resumed. However, on the way, this witness was asked to halt at a bar near the Castle Hospital on Castle Street, where they bought another 1/2 bottle of arrack. On the direction of the 5th accused who was seated in front, the witness parked around 50 metres past the Otters Sports Club on Sarana Road, where the accused thereupon, consumed this alcohol. The witness observed the 3rd accused vomiting near the wall where the van was parked. He also observed that the accused were in constant communication over a mobile phone during this time.

About 15 to 20 minutes later, the accused suddenly got back into the van and ordered the witness to drive ahead and turn down a road to the left. Driving down this road, the witness observed a car parked in a garage nearby and a person standing next to the car in a white shirt and black trousers. Soon after, the witness was ordered to stop the van and all the accused simultaneously jumped out of the vehicle. According to this witness, the sounds of gunshots were heard moments later. Immediately following the shots, the 2nd to the 5th accused returned to the van hurriedly and the witness stated that the 5th accused thereupon ordered the witness to get out of his vehicle. Fearing for his life, the witness complied promptly, abandoned the van and sought refuge in a building site nearby. He used a phone available at the site, to inform his office of what had transpired. It is noteworthy that the shooting took place approximately at 3.15 p.m. on the same date.

The witness stated that he walked back to the scene of the shooting around 5 to 10 minutes later and observed that his van

was missing. He again contacted his office and requested that they inform the police about the loss of his van and the shooting. The van was later found by police, abandoned near the Elvitigala Flats along the Baseline Road. Police investigations conducted on this abandoned vehicle revealed several fingerprints. It is significant that the fingerprints of the 3rd and 5th accused were later identified on the vehicle, as it confirms that the accused definitely traveled in the vehicle as testified by this witness.

Later, on the same day, the witness retraced his journey with the 2nd to 5 accused for the benefit of IP Vedasinghe, the Investigation Officer in charge, and pointed out to him the place where the van was parked and the 3rd accused had vomited as well as the Steam Boat Restaurant where they had consumed the half bottle of Arrack and their meal. IP Vedasinghe contemporaneously collected a sample of vomit from the place pointed out by the witness, and the empty bottle of Arrack, containing the aforesaid fingerprints was recovered from the Steam Boat Restaurant.

It is of extreme relevance to the integrity of the investigation and the authenticity of the evidence collected that at the point of recovery of both the empty bottle and the identification of prints from it, as well as collection of the sample of vomit, and the recovery of the prints on the van that no arrests had been made or the accused identified in relation to the murder. Therefore the timing of the recoveries effectively rules out the possibility of any subsequent introduction, tampering or tainting of this forensic evidence, in order to deliberately and falsely implicate the accused.

The trustworthiness of the witness's statement has not been assailed under cross-examination. In his responses during cross-examination the witness stated that he had participated in the identification parade and that he was not introduced either to the accused or shown pictures of the accused prior to his participation in the said parade. Also the witness explained that he was able to remember the accused clearly due to the special and unusual circumstances surrounding their hire, during the time leading up to and after the shooting. The frequent stops made by them on their journey would reasonably have provided the witness with ample time to closely observe the accused, enabling such a positive identification.

It is also important to note that the witness had no knowledge or relationship with the accused prior to 12.40 p.m. on 19.11.2004, and that his relationship with the accused up to the time when he was ordered off the vehicle was cordial. No suggestions, alternatives or reasons were even suggested or adduced under cross-examination that gave any reason whatsoever for the witness to have falsely implicated any of the accused. Therefore this witness is an entirely disinterested witness whose credibility and testimonial trustworthiness was not only untouched by the extensive cross-examination, but rather enhanced by the lack of any motive on his part to falsely implicate any of the accused.

The testimony of Susantha Pali was corroborated on material aspects by that of Harshani Perera, an employee of the Leeds Cab Service, who stated that the van driven by Susantha Pali was connected to the base phone number 071-2349273. The informant, who identified himself as Nalaka, asked her not to call for the indicating number and informed her that four people would be traveling in the van and that they had to carry a small box with them. She then informed Susantha Pali of the hire, and asked him to pickup the passengers from outside the Elphinston Theatre. After the incident, a call was received by fellow employee Surangi Arunila by which communication Susantha Pali informed the office that the persons travelling in van No. 253-0882 had committed a murder.

The next witness called by the prosecution was Achala Wijerama, a waiter at the Steam Boat Restaurant. He stated that as part of his daily routine he had removed all empty bottles from the previous day and cleared the crates for the business of the new day. He observed the arrival of a group of five men aged around 30 years, between 1.15 p.m. to 1.30 p.m. who seated themselves in a room to the left of the entrance. He identified three of them subsequently as the 2nd, 3rd and 5th accused.

This witness stated that the accused ordered half a bottle of arrack, soda, coke and lunch. The bar order form (BOT) and the kitchen order form (KOT) relevant to the orders placed by his group were produced in evidence. The witness observed that with the exception of one person, all others in the group, consumed liquor. Importantly, the witness also observed a black bag placed on the lap of one of the accused.

This witness stated that after he cleared the table he placed the empty arrack bottle in a crate, and that he had handed over the same bottle to the police later, on the same day. The witness had confirmed that there were no other customers between 11.00 a.m. and 2.00 p.m. at the Steam Boat restaurant who ordered alcohol on 19.11.2004 and therefore the empty bottle handled by the accused was the only one in the crate. This eliminates even the possibility of confusion or any contamination of the evidence. The witness also identified Susantha Pali who accompanied the police to the Steam Boat Restaurant at around 7.00 p.m. on the same day, as the person who had sat with the accused and refrained from consuming any alcohol. This witness thereby corroborated even such minute details of the evidence as given by witness Susantha Pali.

The defence has failed under cross-examination of this witness or by any other evidence to assail the credibility of the witness Achala Wijerama. He positively identified the 2nd, 3rd, and 5th accused. The witness has categorically denied any tutoring by the police prior to his participation in the identification parade. It stands to reason that had the witness been tutored he would have also identified the 4th accused at the identification. While the failure of the witness to identify the 4th accused does not preclude the latter's presence and involvement, it does however, contribute to the genuineness and credibility of the witness's testimonial creditworthiness.

There is no evidence or facts placed before court to rebut the presumption of regularity and legitimacy, attached to the conduct of the identification parade by the police officers in charge. Importantly the witness's statements have been corroborated by fingerprint evidence, 'real' evidence. Furthermore there is patent consistency in the statements and evidence given by both, this waiter Achala Wijerama and Susantha Pali, where all material details as to the events that had occurred have been corroborated.

The evidence of Inspector Vedasinghe is that he obtained and studied the Mobile Transmission Report from Celltel Lanka Pvt. Ltd. and identified a pattern of incoming and outgoing calls at or about the time of incident on phone number 108. His investigations revealed that a person by the name of Dilip Kumara living in

Gunasinghepura owned the mobile number 108. Upon questioning the said Dilip Kumara, it was found that the mobile was given to a person named Lasantha. Further investigations tracing the possession of this phone through this Lasantha, led the police to the 2nd accused.

The 2nd accused was arrested at his residence on 25.11.2004 and at the time of his arrest, had in his possession a 9mm Browning pistol marked as T3P1 and a mobile telephone and Rs. 34000 in cash. Upon placing a call from the recovered phone to the phone of his fellow officer, Inspector Vedasinghe identified the number of the phone recovered as No. 108. Based on information provided by the 2nd accused, which was recovered under section 27 of the Evidence Ordinance, Inspector Vedasinghe also recovered a wembley Mark IV revolver marked as T3P4, a Smith and Wesson's revolver marked as T3P2 and a locally manufactured revolver marked as T3P5 and some live cartridges, which were concealed in a house situated in Mabima, Heiyantuduwa.

The 3rd accused was arrested on 26.11.2004 and at the time of his arrest the police recovered an Armenias type revolver marked as T3P3 from his possession. The 5th accused was arrested at about the same time. The 4th accused was arrested on 26.11.2004 in Wattala.

Comparison and analysis of the weapons recovered from the 2nd and 3rd accused with the empty casings and bullets recovered at the crime scene by the Government Analyst Department, confirmed that the empty casings had been fired from the 9mm Browning pistol marked as T3P1 that was recovered from the possession of the 2nd accused and the Wembley Mark IV revolver marked as T3P4, that was recovered in consequences of information provided by the 2nd accused under section 27 of the Evidence Ordinance.

IP Vedasinghe who gave evidence on these matters, under cross-examination vehemently denied any suggestion that the pistol and revolver had been introduced by the police to implicate these accused falsely. This bald suggestion however was not founded on any fact that emerged in the evidence of his or any other witness. The imputation of this suggestion was therefore not grounded on any evidence whatsoever and is therefore not

tenable. Furthermore had the police been interested in planting such evidence, a much stronger case could have been made out even against the 4th accused whose conviction was based solely on the credible identification, and the cogent, convincing, trustworthy and un-assailed testimony given by the witness Susantha Pali.

The Government Analyst report stated that the aforesaid weapons that were recovered based on the statement of the above mentioned accused were identified to be in good and working condition and included as a "gun" in terms of the definition contained in section 2(a) of the Fire Arms Ordinance.

The expert witness on ballistics, explosives and firearms, from the Government Analyst Department, Mr. Gamini Gunatillake, a renowned authority on this subject, in his evidence detailed the manner in which a bullet can upon analysis be accurately forensically matched with the gun from which it was fired. He detailed that the barrel of each gun has certain unique features and markings, invisible to the naked eye, which casts an imprint upon the bullet and the empty casing upon firing, leaving unique tracings, which could consequently be matched.

The witness stated that in the instant case, he was able to identify conclusively that the empty casings marked as T2BA1, T2BA2, T2BA3, T2BA4, T2BA5, T2BA6 and T2BA8, were fired from the 9mm Browning pistol marked as T3P1. He also identified that the bullet marked as T2nd N1 was fired from the same browning pistol marked as T3P1 and that the bullet marked as T2nd N2 was fired from the Wembley Mark IV revolver marked as T3P4.

This testimony gains additional testimonial trustworthiness in the light of IP Vedasinghe's evidence above, that these relevant weapons which were consistent with the markings on the empty casings, and bullets recovered from the scene of the crime were recovered from the possession of the 2nd accused and in consequence of information provided by him under section 27 of the Evidence Ordinance.

Also significant and of substantial probative evidential value is the evidence of the Registrar of Fingerprints and other officers attached to his bureau who testified to the discovery of fingerprints

on the vehicle No. 253-0882 and the bottle of arrack recovered from the restaurant. Both the vehicle and the bottle were found and recovered on the same day as the murder, before any of the accused had been taken into custody, thereby completely militating against any fabrication by the police. The Registrar of Fingerprints stated that the prints of the 3rd and 5th accused were identified on the vehicle and the 2nd and 3rd on the empty bottle. The Registrar of Fingerprints was categorical in his assertion that the procedure and technique employed in the lifting and identification of prints was accurate and sufficient to confirm the identity of the accused.

The Judicial Medical officer, Mr. Alwis identified the cause of death of Mr. Ambepitiya and Mr. Ranasinghe Arachchige Upali as the cerebral laceration caused by the discharge of bullets from a rifled firearm. In this sense a rifled firearm is a weapon equipped with a grooved bore as distinguished from a smooth bore such as a shotgun. This evidence was accepted under section 420 of the Criminal Procedure Code. His report as to the number, location and possible sequence of the bullets wounds on the victim's bodies has not been challenged by the defence.

DNA evidence given by Dr. Maya Gunasekera of Genetech was conclusive in matching the DNA from the sample of vomit collected from near the Otters Sports Club with that of the 3rd accused, thereby placing him definitely in the Otters area, and further confirming the testimony of Susantha Pali.

The record shows that the witness is highly specialized in her field and has vast experience in the area of DNA typing. Her expert evidence is accepted as credible evidence on account of her experience, expertise, the precautions taken to ensure the safety of the sample to prevent contamination and maintain the authenticity of the material and credibility of the findings. It is also relevant that the high standard of technology and procedure maintained by Genetech where the tests were conducted, also contributes to the acceptability of her evidence in this case.

In order to gain a proper understanding of the relevance of DNA evidence to this case, it is important to have a degree of familiarity with the technical process of DNA extraction and analysis. Detailing the basis and method of DNA extraction, the witness stated that DNA evidence is based on the fact that human beings are made of

cells. Within each of these cells there is an area called the nucleus, which contains chromosomes. There are 23 pairs of chromosomes in every cell. These chromosomes are made up of a chemical known as deoxyribonucleic acid also known as DNA. DNA is a long thread like polymeric molecule that is made up of units known as nucleotides. These nucleotides are in turn made up of a sugar molecule, a phosphate molecule, and a nitrogenous base. There are four different types of nitrogenous bases. The sequence in which these bases are arranged differs from individual to individual.

DNA contains all the information that is necessary for the structure and the function of the cell and thereby the entire individual. DNA is known as genetic material because it is inherited from the parents of an individual.

An individual's genetic constitution is unique in so much as there are no two individuals who have the same DNA. By analyzing DNA of an individual it is possible to say that the chance of finding another person with matching DNA is less than one in a trillion. This is analogous to hand fingerprinting techniques and that is why DNA fingerprinting has received the degree of acceptability which is similar to hand fingerprinting in courts the world over.

Any two individuals are 99% genetically similar. However there is around 1% of a person's genes which differs from individual to individual. This is known as polymorphic DNA. In the analysis of DNA a scientist examines parts of the DNA in which individuals differ from one another. These are called genetic loci or locations, which are hyper variable, as they, vary from individual to individual. One such type of hyper variable is known as short tandem repeats (STR). By analyzing these STR a scientist is able to distinguish one individual from another.

The analysis of short tandem repeats involves the counting of the number of repeating units at a given genetic location. The number of repeating units at a given location varies from person to person. For example at a particular STR location one person may have 3 repeating units and another may have 5 repeating units. Each of these are known as alleles. Therefore we would say that a person has allele 3 and another person has allele 5.

In order to determine which allele a person has, the scientist must first extract DNA from some biological material of an individual. After DNA extraction is done, the DNA is subjected to a

process known as polymerase chain reaction (PCR). In this technique the scientist is able to select particular STR locations and make a large number of copies of that genetic location. Subsequently the scientist is able to analyze this copied DNA and determine how many repeats there are at that STR location. This is done by a process known as, Gel Electrophoresis. During Gel Electrophoresis the copied DNA runs through a gel matrix under the influence of an electric current. The STR alleles separate inside this matrix according to their repeat numbers (size). By reading the DNA pattern on this gel it is possible to measure the size of the STR alleles and thereby record the DNA pattern. From this the scientist can determine which alleles a person has. A scientist would analyze a minimum of nine such STR locations.

The combination of alleles at all 9 locations can be expressed as a series of numbers, which is known as that person's DNA profile. This is unique to that individual and is the basis of identifying persons based on biological material. (This DNA profile is given in the DNA report sent to courts) When two DNA profiles match, it is necessary to express the possibility of having another person in the population who might have this same DNA profile. The scientist usually expresses this in terms of a probability value. This is known as the match probability.

With regard to the biological evidence subjected to DNA analysis by her, the witness stated that when the sample was received it was first placed in the fridge and subsequently two aliquots (samples) were taken; one onto a piece of filter paper and the other onto a cotton bud.

The sample of vomit was taken for analysis because it was expected to have human cellular material in it. When a person vomits, undigested food moves out of the stomach through esophagus and the mouth. During this passage cellular material from the inner well (mucus membrane) of the stomach, esophagus and mouth may come out with the vomit. This cellular material would contain mostly epithelial cells. Therefore, DNA extracted from these epithelial cells can be subjected to DNA analysis.

Firstly, DNA is extracted from these cells. This extraction was performed using a DNA extraction kit. Utilizing the chemicals that are found in this kit, DNA was extracted from the filter paper, and

cotton bud, which contained the vomit. After DNA was extracted, it was subjected to polymerase chain reaction (PCR). The PCR products were further analyzed, in order to determine the STR alleles in the sample. From this it was possible to obtain a DNA profile of the person whose vomit was analyzed.

This procedure was followed for two samples of vomit in order to determine which sample was better and the amount of DNA subjected to PCR was also varied in order to obtain optimal results. (The amount of DNA-2.5, 5.5, and 7.5 micro liters) Eleven such STR locations were analyzed for this sample of vomit and the DNA pattern obtained was photographed and the digital images were stored in the laboratory computers. At the same time the DNA profile was also determined and recorded in a record book maintained by Genetech.

Pictures of the DNA profiles were shown in court. In the first picture it was possible to observe the DNA pattern at 3 STR loci. The 3 STR loci are named, CSF1PO, TPOX and TH01. It was determined that at the STR locations CSF1PO alleles number 11 and 13 were present. At TPOX alleles number 9 and 10 were present. At TH01 alleles number 8 and 9 were present. This profile was obtained for the first vomit sample.

The second vomit sample was tested for these same three STR loci and was found to be identical. Subsequently the second vomit sample was also further tested for a total of 11 STR loci.

Males have a Y chromosome, which is not found in women. The analysis of the Y chromosome makes it possible to compare the DNA of two males. The Y chromosome analysis was performed on the vomit sample, and it was determined that this vomit originated from a male individual.

Based on the above findings a report was submitted to court. This report contained the DNA profile obtained from the vomit sample. A request was also made to the magistrate to produce blood samples from any suspects in this case in order to compare with the DNA profile obtained from the vomit sample.

A blood sample was received, which was taken from the suspect Sampath Thusahara Wijewardena Abeywickrame. About 2 ml of blood had been collected into a plastic tube and had been placed in an envelope and the envelope had been duly sealed with sealing

wax. The seals were found to be intact. The blood sample had been drawn by the JMO Colombo, and was accompanied by a letter from the office of the JMO signed by Dr. Alwis. RM Abeyrathne Rajapakse delivered the sample. Genetech sent a letter of receipt and acknowledgement to the magistrate and Mr. Rajapakse signed the same. It is clear that the chain of transmission of the sample precluded any tampering with the sample.

Subsequently DNA was extracted from the blood sample and subjected to polymerase chain reaction (PCR) and Gel Electrophoresis and the STR alleles at 12 STR locations were determined. From this it was possible to obtain the DNA profile of the suspect. The DNA profile was then compared with the DNA profile obtained from the vomit sample. This comparison was given in a table in the report submitted to courts. It was found that the alleles in all the tested loci in the vomit sample were identical to the alleles in the samples of blood.

Explaining the conclusive nature of her findings the witness stated that the match probability was calculated as one in four hundred and seventy nine trillion. As the entire world population is about 7 billion, this number far exceeds the number of people in the world. Therefore, it can be concluded that no other random person could have the same DNA profile. These findings were included in the final report, which was also signed by Dr. Gaya Ranawake and Mr. Ruwan Illeperuma and duly authenticated and produced in court.

The sample of vomit and the remaining sample of blood from the suspect have both been stored in the deep freezer at Genetech and are available for examination.

During cross-examination this witness stated that although it is good if the biological material does not contain any other organisms, the DNA test analyses specifically human DNA and therefore the inclusion of microbial DNA will not hinder the test. However the inclusion of another human beings DNA will cause complications in the testing.

This witness also stated that while there can be human DNA on the road where the vomit was found this could be easily detected. In the vomit sample it was found that there was DNA only from one person. At a given STR locus there can be only a maximum of 2

alleles. If there are more than 2 alleles, it can be said that there is a mixture of DNA from more than 1 person. During this analysis, they did not detect more than 2 alleles in any of the STR loci.

Furthermore, this witness clarified that the process of Gel Electrophoresis is carried out on a gel, which is on a glass plate. When the blood sample was analyzed, the gel which contained the DNA from the vomit sample was not present, since the gel is destroyed and the glass is cleaned, once the analysis is over. However prior to destroying the gel, it is read and the alleles are determined and recorded. Therefore when the blood sample was analyzed, the alleles in the blood sample were also similarly read and compared with the alleles that had been recorded for the vomit sample. This was recorded in the DNA typing record book.

This evidence clearly establishes that the vomit found at the place pointed out by Susantha Pali belonged to the 3rd accused and confirms and corroborates the evidence of Susantha Pali, confirming that he was with the accused and had the knowledge that he had vomited at the spot pointed out by him, thereby affording him the clear opportunity to make the identification of the accused subsequently.

Thus it has been proved beyond a reasonable doubt from the aforesaid witness, testimonies that there exists a strong sequence of evidence linking the accused with the murder of Mr. Ambepitiya, and of IP Upali Ranasinghe.

Considering the grounds of appeal submitted on behalf of the 2nd to the 5th accused, the first submission was that the trial at bar erred in its application of the charge of conspiracy to the instant case. It was submitted that the trial at bar erred in not holding that the prosecution had failed to establish the charge of conspiracy against the 2nd to the 5th accused.

The offence of conspiracy is defined under section 113(a) of the Penal Code as; *"If two or more persons agree to commit or abet or act together with a common purpose for or in committing or betting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence as the case may be."*

The essence of conspiracy lies in the common agreement or concurrence or accord of minds, which is arrived at between the accused. This view was endorsed by Gratiaen, J. in *Cooray*(1) and it was reiterated in *Kanagaratnam*(2), where Choksy, J. summarized the principles laid down in *Cooray* as follows: *"Under our law as it now stands it is the agreement per se to commit or abet a criminal offence which is intended to be penalized, whether or not an overt act follows the conspiracy, so long as the existence of the conspiracy can be proved .... the common concurrence of minds – of more minds than one – with a view to achieving an object which is an offence under our law that constitute criminal conspiracy under the Penal Code.".*

While agreement is at all times the essence of conspiracy it does not necessarily contemplate a physical meeting of the conspirators or prior contact and correspondence between or among the accused as being an essential or necessary ingredient to prove a charge of conspiracy. There is no legal requirement regarding a mode of concurrence in the common purpose or the manner in which such concurrence may be established by the prosecution. In a case of conspiracy it is possible that there could be one person around whom the rest revolve. [Vide *Meyrick*(3) cited with approval by Gratiaen, J. in *Cooray*]. The prosecution must simply establish an agreement to act together with a common purpose for or in committing an offence. Hearne, J. in *Sundaram*(4) has stated explicitly that; "*the gist of the offence of conspiracy is agreement*".

With respect to the degree of proof, it has been held in *Queen* v *Liyanage*(5), that the question is not whether the inference of conspiracy can be drawn but whether the facts are such that they cannot reasonably admit any other inference but that of conspiracy. As the evidence in support of a charge of conspiracy is often circumstantial, the actual facts of the conspiracy may be inferred from the collateral circumstances of the case. A charge of conspiracy can often be proved only by an inference from the subsequent conduct of the parties in committing some overt acts, which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to bring them about.

This court further observed that a conjectural interpretation is placed on each isolated act and an inference is drawn from an aggregate of these interpretations. Therefore the detached acts of conspirators relative to the main design are admissible as steps to establish the conspiracy itself. The circumstances attendant on the acts of a conspirator may indicate association with others and as such these circumstances may be availed of as a valid part of the proof of a conspiracy. There must be proof against each conspirator that he had knowledge of the common plot and design although it is not necessary that each should be equally knowledgeable in this regard.

When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offences. In a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only. [Vide *Don Sunny* v *Attorney-General*[6] concerning the *Amarapala murder*].

There is no doubt whatsoever that the evidence of all the above witnesses taken as a totality and considered as a whole corresponds directly to this legal requirement for the offence of conspiracy under our legal system. Of particular relevance is the testimony of Susantha Pali wherein it was confirmed and clarified that the 2nd to the 5th accused traveled together in the van with a shared common purpose and a common intention. The call made to the Leeds Cab Service by one who identified himself as Nalaka is significant as it displays a premeditated intention on the part of the 2nd to 5th accused to travel together and to carry what they referred to as a small box with them, and this was further identified as a bag by the waiter at the Steam Boat Restaurant. This proves beyond a reasonable doubt the existence of an agreement and shared knowledge on the part of all accused.

The numerous phone conversations, delays and stops as well as documentary evidence relating to the mobile phone records of phone number 108 possessed by the accused reveal that the accused were in constant communication with another person, who was in effect directing the actions of the accused via his mobile

phone communications. This other person is later identified conclusively as the 1st accused who is linked to the actions of the 2nd to the 5th accused through credible documentary and witness evidence which will be referred to later. It is clear that the ingredients of conspiracy are met in the instant case based on the evidence against all the accused. It is apparent from the evidence that the accused were clearly in agreement and bound by a common intention and purpose to commit the murder of Mr. Ambepitiya and that the prosecution has proved this charge beyond reasonable doubt.

Another submission on behalf of the 2nd to the 5th accused was that the trial at bar misdirected itself in the application of the principles contained in section 10 of the Evidence Ordinance to the facts of the instant case.

Section 10 of the Evidence Ordinance provides that *"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said or done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by each of the persons believed to be so conspiring; a) as well for the purpose of proving the existence of the conspiracy, b) as for the purpose of showing that any such person was a party to it."*

The provision embodies the principle that when various persons conspire to commit an offence the acts done by one in reference to the common intention are considered to be the acts of all. These acts are themselves evidence of the conspiracy to be established and the part played by each conspirator in it.

In *Liyanage, (supra)* several important rules were laid down with respect to the degree of proof required for a charge of conspiracy. This court observed that, while agreement following upon intention is the essence of conspiracy, the existence of such agreement is generally proved by circumstantial evidence. It is not necessary to prove any direct concert or any meeting of the conspirators as the actual fact of conspiracy is inferred from the collateral circumstances of the case. It suffices to prove isolated acts as

steps by which conspiracy may be proved. There must be proof against each conspirator that he had knowledge of the common plot and design although it is not necessary that each should be equally knowledgeable in this regard.

Once there is *prima facie* evidence of conspiracy between certain defendants the acts and declarations of a person party to the conspiracy and done or made before it was completed are admissible under section 10 to all those who were party to it. The court also recognized that it is impossible to lay down a general rule in this regard and that each case must be judged on its particular facts and circumstances.

The principle laid down in *Peiris v Silva*(7) is that in order for section 10 to be applied there must be an antecedent finding that reasonable grounds to believe in a conspiracy exists, and this reasonable belief must be based on independent evidence. This view is supported in the case of *King* v *Attanayake*(8), where it was held that the judge should in each case determine whether reasonable grounds exist to believe that a conspiracy exists on the basis of evidence led to this effect, and the assurance of the prosecution that further evidence would be led.

In the instant case, the prosecution has clearly and beyond reasonable doubt, established the charge of conspiracy against the 2nd to the 5th accused, based on the conduct of all the accused which displayed shared intention and evidence of an agreement to commit the murder of Mr. Ambepitiya. The prosecution has also led independent documentary and oral evidence linking the 1st accused with the other accused, proving beyond all reasonable doubt the existence of such a conspiracy to murder Mr. Ambepitiya.

The evidence places the 2nd to the 5th accused together in a vehicle hired by them for the purpose of transporting themselves to the residence of Mr. Ambepitiya and in which they made their getaway upon commission of the offence. There appears to have been a communion of action between these accused evidenced by the several stops made by them along the way. What is evident therefore is a concert of events, linked through the mobile phone conversations, interlinking communication between them at a time

relevant to the commission of the offence which culminates with the shooting of Mr. Ambepitiya and IP Upali Ranasinghe.

It is clear from the evidence of Susantha Pali which is corroborated by documentary evidence by way of phone records submitted by both Mobitel Lanka Pvt. Ltd. and Celltel Lanka Pvt. Ltd. with respect to phone number 0723323418 (hereinafter referred to as 418) possessed by the 1st accused and No. 108 possessed by the 2nd accused, that the accused were in regular contact with the 1st accused during the course of the day and were biding their time until the arrival of Mr. Ambepitiya at his residence. The tower report indicating the coverage of incoming and outgoing calls made on No. 108 details the path traveled by the accused and is consistent with the evidence of Susantha Pali, adding credence to his testimony. At no point did the accused break ranks or deviate from their common purpose, even when the 3rd accused was evidently sick and had vomited near the Otters Sports Club where the vehicle was parked waiting for that specified moment of action. The only plausible, possible inference from this joint and concerted conduct of the accused considered along with other circumstantial evidence is that each of them was party to a conspiracy to commit the murder of Mr. Ambepitiya.

Therefore a *prime facie* case of conspiracy for the purpose in terms of section 10 of the Evidence Ordinance has been very clearly established by the prosecution, and the objection to the application of this section by the defence is not tenable in law.

There is however credence in the prosecution argument that as the charge against the accused has been confirmed based on their joint conduct it does not require the application of section 10 to prove the existence of a conspiracy as all acts were done by the conspirators in the presence of each other and through linked communication. Also with respect to the application of the *Ellenborough dictum* to the accused, it is immaterial to enter into the validity of extending the principle in this charge, as the charge of conspiracy has been clearly established beyond any reasonable doubt against all accused based on their joint conduct and communications with the 1st accused.

A further ground of appeal submitted is that the trial at bar failed to recognize the legal requirements for consideration of a common

intention to commit murder in the application of section 32 of the Penal Code to the facts of the instant case. Section 32 of the Penal Code provides that, *"Where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if it were done by him alone."*

The law in Sri Lanka follows the view expressed by the Privy Council in *Barendra Kumar*(9) in which it was observed that where each of several persons commits a different criminal act, each act being in furtherance of the common intention of all, each of them is liable for each such act as if he did it alone. As per the *dictum* in *Mudalihamy*(10) the effect of the application of section 32 is that the casual effectiveness of the act of each accused to produce the harm is no longer treated as a relevant consideration.

The operation of the section preconceives a shared intention by all the accused but does not depart from the principle that each accused is punished based on his or her individual intention. The section also requires that a criminal act be conducted by each of the accused in furtherance of the common intention of all.

There exists an important distinction between a common intention and a same or similar intention or common object. While each of the accused may have a similar intention with a common object in view, this does not attract the application of section 32 of the Code. The same intention becomes a common intention only when it is shared by all. This principle emerges clearly in *Ranasinghe*(11) and the judgment of Weeramantry, J. in *Wilson Silva* v *The Queen*,(12) in which he pronounced that "... *the crucial distinction they (the jury) should have in mind was that, even if this was a simultaneous attack such attack should have been in consequence of a sharing of intentions ...*" In a case of murder against all the accused where the accused are sought to be made liable on the basis of section 32, the common intention must necessarily be a murderous common intention.

In *Asappu*(13) several persons were accused of being responsible for an attack which caused the death of the victim.

Dias, J. in his judgment laid down the rules that in order to justify the inference of common intention there must be evidence, direct or circumstantial, either of pre-arrangement or a pre-arranged plan or a declaration showing common intention or some other significant fact at the time of the commission of the offence. This principle has also been recognized in the Indian case of *Mahbub Shah*(14).

The distinction between common intention and common object was emphasized by Basnayake C.J. in *Ekmon*(15). In *Appuhamy*(16) Sansoni, J. observed that *"a common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the offence is committed."* The significance of a common murderous intention was again stressed in the case of *Punchi-banda* v *The Queen*(17).

Significantly in *Wasalamuni Richard* v *The State*(18) eye-witness testimony was conclusive only against the 1st and 2nd accused. The evidence against 3rd accused the younger brother of the 1st accused was circumstantial in that he was present on the road at the time of the abduction and at the time and place of the killing and on the direction of the 1st accused he prevented the witness from leaving the scene of the crime. The court in this case held that the circumstantial evidence against him was sufficient in the absence of any explanation tendered by him with regard to his presence, to establish that he acted in furtherance of a common murderous intention shared with the other accused as his presence was a participating presence.

In *Weerasinghe v Kathirgamathamby,*(19) several indicia were used by court in coming to a conclusion of common intention. The fact that the accused had arrived together to the scene of the crime, that one accused was carrying an explosive substance and used it without protest from the other accused, that the other accused had taken action in furtherance of their common intention, and that they all made away upon the approach of officers, were considered relevant by court in determining liability based on common intention.

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.