AJITH FERNANDO *ALIAS* KONDA AJITH AND OTHERS
v
THE ATTORNEY-GENERAL

SUPREME COURT
ISMAIL, J.
EDUSSURIYA, J.
YAPA, J.
WIGNESWARAN, J. AND
JAYASINGHE, J.
S.C. APPEAL NO 1/2002
H.C. COLOMBO (TRIAL AT BAR)
NO 9760/89
OCTOBER 21ST AND 31ST 2003

Criminal Law – Abduction, Gang rape and murder – Penal Code, sections 296, 364(2) and 357 – Offences committed in the course of the same transaction – Abduction and murder in furtherance of the common intention.

Newly married *Rita Joan* and *Mr.Manoharan* were staying with her father-in-law in Crow Island. The island was about 60 acres and situated in proximity of the estuary of the Kelani river. On the eastern side was a mangrove jungle. With creepers forming a canopy which prevented light reaching the land underneath. A waterway extending from the river ran through the forest in which weeds and water hyacinth grew.

On 11.10.1998 at about 6.15 p.m. Rita Joan the deceased and Manoharan had walked towards the estuary of the Kelani river and were returning when they were accosted by the three accused whom Manoharan identified at an identification parade. Despite resistance in the course of which the 2nd accused bit Manoharan causing an injury which was medically confirmed, the three accused took Rita Joan by force. Having failed to save his wife Manoharan ran home. The police arrived and with other people meticulously searched for Rita until 11.00 p.m. but unsuccessfully. The search continued on the 12th and 13th but in vain.

On 13.10.98 the 2nd and 3rd accused were arrested. The 1st accused was arrested on 14.10.98 away from his residence. Jewellery worn by the deceased were recovered from the 2nd and 3rd accused. All the accused had injuries which according to medical evidence could have resulted from having had intercourse on the ground.

The statements of the 2nd and 3rd accused were recorded in consequence of which they were taken to the scene separately. Each showed the place where the deceased's body lay in a stream in the jungle area. According to medical evidence injuries on the deceased were consistent with gang rape and anal intercourse and strangulation of the neck with a creeper. The clothes worn by the deceased were found in consequence of a statement of the 1st accused.

HELD:

(1) The failure of the court to call Lakshman Perera who was on the list of State witnesses did not prejudice the case. He had been given a conditional pardon. But the failure to call him does not raise any issue of non compliance with section 256 of the Code of Criminal Procedure Act because the Attorney-General could not legally give him a pardon as he was not an accomplice. In any event the court examined his statement and decided that to call him as a witness of court would have been prejudicial to the accused; and left it open to the defence to call him if necessary.

(2) The trial court did not attach a probative value to the statement of the 2nd and 3rd accused which resulted in the discovery of the deceased's body. In all the circumstances there was no misdirection in the matter. Only the accused knew where the deceased's body lay.

(3) The objection that common intention had not been proved in regard to the abduction and murder is without justification in view of the strong *prima facie* case established which required an explanation from the accused.

(4) The conviction of the accused is justified.

Cases referred to:

1. *Walimunige John* v *The State* – 76 NLR 488 at 496
2. *Chuin Pong Shiek* v *The Attorney-General* – (1999) 2 SRI LR 277 at 285
3. *Pulukuri Kottaya* v *Emperor* – AIR 1947 PC 67 at 70
4. *Richard* v *The State* – 76 NLR 534
5. *Rishideo* v *The State of Uttar Pradesh* – 1955 AIR 331 at 335
6. *Commonwealth* v *Webster* – 5 Cush 295
7. *Seetin* v *The Queen* – 68 NLR 316 at 322
8. *R* v *Lord Cochrane and others* – (1814) Guruey's Reports 479

APPEAL from the order of the High Court Colombo

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

C.R.de Silva, P.C. Solicitor-General with *Wasantha Bandara,* Senior State Counsel and *Harippriya Jayasundera,* State Counsel for Attorney- General.

Cur.adv.vult

January 27, 2004

ISMAIL, J.

The accused above named were tried before the High Court at Bar by three Judges without a jury on an order made by the Chief Justice in terms of section 450(2) of the Code of Criminal Procedure Act, No.15 of 1979, as amended by Act, No.21 of 1998.

The following charges were included in the information exhibited by the Attorney General to the High Court.

1. That on or about the 11th of October 1998, the said accused did, at Modera, within the jurisdiction of this High Court, abduct Rita Joan Manoharan in order that she may be forced into illicit intercourse and that they did thereby commit an offence punishable under section 357 read with section 32 of the Penal Code.
2. At the time and place aforesaid and in the course of the same transaction that the 1st accused together with the 2nd and the 3rd accused constituted a gang and whilst being a

member of such gang, the 1st accused did commit rape on the said Rita Joan Manoharan or that he did aid and abet the 2nd and/or 3rd accused to commit rape on the said Rita Joan Manoharan and that he did thereby commit gang rape, an offence punishable under section 364(2) of the Penal Code, as amended by Act, No.22 of 1995.

3. At the time and place aforesaid and in the course of the same transaction the 2nd accused together with the 1st and 3rd accused constituted a gang and whilst being a member of such gang, the 2nd accused did commit rape on the said Rita Joan Manoharan or that he did aid and abet the 1st and/or 3rd accused to commit rape on the said Rita Joan Manoharan and that he did thereby commit gang rape, an offence punishable under section 364(2) of the Penal Code, as amended by Act, No. 22 of 1995.

4. At the time and place aforesaid and in the course of the same transaction that the 3rd accused together with the 1st and 2nd accused constituted a gang and whilst being a member of such gang, the 3rd accused did commit rape on the said Rita Joan Manoharan or that he did aid and abet the 1st and/or 2nd accused to commit rape on the said Rita Joan Manoharan and that he did thereby commit gang rape, an offence punishable under section 364(2) of the Penal Code, as amended by Act, No. 22 of 1995.

5. At the time and place aforesaid and in the course of the same transaction set out in count I above, the said accused did cause the death of Rita Joan Manoharan and did thereby commit an offence punishable under 296 read with section 32 of the Penal Code.

6. At the time and place aforesaid and in the course of the said same transaction the said accused did commit robbery of a chain worth Rs.25,000/, a pair of gold bangles worth Rs.15,000/- and a ring worth Rs.10.000/-, the property in the possession of the said Rita Joan Manoharan and that they did thereby commit an offence punishable under section 380 read with section 32 of the Penal Code.

The deceased Rita Joan, an Indian citizen who was living in Bombay married Jude Mohan Sunanthiran Manoharan, a Marine Engineer from Sri Lanka, on 12.9.1998 at St.Michael's Church, Maniff, India. The couple came to Sri Lanka soon thereafter on 20.9.1998. She lived with her husband at the residence of her father-in-law, a retired Senior Superintendent of Police, at Crow Island, Modera.

Crow Island was approximately 60 acres in extent extending on the north to the estuary of the Kelani river. On the eastern side was a mangrove jungle about 16 acres in extent. This area had large bushes with an extensive growth of creepers. The creepers provided a canopy covering the surface preventing the fall of sunlight and thus the area was in total darkness. A waterway extending from the river ran through the parts of the jungle on the eastern side which were marshy and covered with an intense growth of weeds and water hyacinth. A sketch of the area (P12a) was plotted by Mr.S.M.W.Fernando, Deputy Surveyor General, based on aerial photographs previously taken and on data compiled by the Surveyor General's Department and the sketch 'P12' made by Chief Inspector Dehideniya in the course of his investigation.

On the evening of 11.10.1998, at about 6.15 p.m. Rita Joan went with her husband for a walk towards the estuary of the Kelani river. Having spent about 10 to 15 minutes there, they were returning home along a winding road by the river. They ate some gram bought from a gram vendor whom they had met on the way back. When they had come about 200 to 300 meters from the estuary, they observed three persons coming towards them from the opposite direction. The tallest of them was on one side. The shortest of them was in the centre and the other person who was also tall was a few steps behind them.

The evidence of the husband of the deceased Jude Manoharan was that the tallest person had long hair which was tied as a 'pony tail'. He was dressed in a blue T-shirt with two white stripes on it and was wearing a pair of blue denim trousers. He had not seen that person prior to that day. he was the 1st accused. The other person who was walking with the 1st accused was dressed in a black T-shirt and a pair of black shorts. He was the 2nd accused. The third person who was behind the 1st and 2nd accused was dressed

in a light mauve 'V' neck T-shirt and was wearing a pair of light blue denim trousers. He was the 3rd accused. Manoharan identified these three persons as the accused above named at an identification parade held on 27.10.1998.

As the three accused were passing them, the 3rd accused held his wife's hand and tried to pull her. He managed to drag his wife towards him and asked the 3rd accused as to what he was doing. The 3rd accused abused him in obscene language and all three accused proceeded a distance of about 21/2 yards. All of a sudden the 3rd accused started running towards them followed by the 1st and 2nd accused. As they came towards them he asked his wife to run away. Before she could run away, the 3rd accused held him by his T-shirt while the 2nd accused held him by his neck. The 1st accused went behind his wife and grabbed her saying that he was armed with a pistol. The 3rd accused kicked him on his abdomen and when he was trying to extricate himself from the clutches of the 2nd accused, the white T-shirt that he was wearing came off and his pair of spectacles fell on the ground. While the 2nd accused held the witness by his neck, the 3rd accused came towards him to assault him. He kicked the 3rd accused and dealt a blow towards the genitals of the 2nd accused. Both he and the 2nd accused fell down. At that time he had heard his wife shouting out his name and calling for his assistance. When he and the 2nd accused were fallen down, the 2nd accused bit him just below the left nipple. This resulted in an injury which was later identified by the Medical Officer as a bite mark. He dealt a blow on the face of the 2nd accused. Then the 3rd accused came towards him and attempted to trample him. At that time too he heard his wife calling out his name. He did not hear the cries of his wife thereafter. The 2nd accused had also attempted to strangle him with a silver coloured chain. He shouted out to his wife and there was no response from her. As he was unable to continue to fight with these persons, he decided to escape and to run away to seek assistance.

While he was running towards his house he met a neighbour of his father named Balakrishnan. He informed him of the incident. Balakrishnan advised him to run to his house and inform his father and seek assistance. He then ran home and having informed his father as to what had taken place, he returned in the direction of the

place where the incident had taken place followed by 10 to 15 persons from the neighbourhood. A short while later, a team of police officers together with some army personnel came towards the place where the incident had taken place on motor cycles and in jeeps. They began a search for his wife and the three accused. It was dark at the time and the area was covered by shrub jungle, creepers and huge trees. That evening all attempts to find his wife were unsuccessful. The police informed him that they had found his T-shirt and a pair of slippers that belonged to his wife. The search for his wife was given up at about 11p.m. that night.

The following morning too police officers, army personnel and the neighbours made a search in the jungle and the marshy land for his wife and the accused but were unsuccessful in locating them. He saw the naked body of his wife at about 2 p.m. on 13.10.1998, immersed in the waterway filled with water hyacinth plants, behind the Nara Institure building at Crow Island. The police took the body out of the water and at that time, he observed that the items of jewellary that she was wearing at the time she was abducted were missing, except for the pair of 'gypsy' ear-rings on her ears.

The evidence of Jude Manoharan was that at the time he went for a stroll with his wife towards the estuary of the Kelani river on the evening of 11.10.1998, he was dressed in a white T-shirt and a mauve coloured pair of shorts. He wore a pair of slippers. His wife was dressed in a bluish pair of denim trousers and a light green shirt which could be unbuttoned from the front. She was wearing a pair of 'gypsy' ear-rings and 'thali', also known as a 'mangala suthra', which was tied by him on the day of their wedding, a pair of gold bangles, a wedding ring, a diamond ring and a pair of ear-studs which had the shape of a Bo leaf, and a pendant attached to the 'thali', which had the initials K.D.M. and the number 916 engraved on it. The pair of bangles had a design depicting the number 8 with a design of flowers at the centre. She was also wearing a white coloured Indian brassiere and grey coloured under-wear, purchased in Singapore, with the trade name 'Marks & Spencer' on it. At the time the body was recovered, none of the above items of jewellery and clothing were found on her body, except for the pair of 'gypsy' ear-rings.

Dr.Vidanapathirana, Assistant Judicial Medical Officer, visited the Crow Island on 13.10.1998, accompanied by officers of the Modera Police and had observed the body of the deceased Rita Joan Manoharan lying in the waterway covered with water hyacinth plants. The body was naked and lay face downwards. The body was taken out of the water and taken to the JMO's Office in Colombo, where on the following day, on 14.10.1998, the post-mortem examination was held. The body was identified as being that of Rita Joan by her husband Jude Manoharan and his brother. At the time of the post-mortem examination, the body was found to be putrefied and the nails along with the skin had peeled off as the condition known as "glove and stockings" had set in. The following injuries on the body of the deceased have been set out in the post-mortem examination report:

1. Multiple parallel lacerations on the face.

2. Multiple parallel lacerations over the left nipple.

3. Multiple abrasions over the left scapular area, 2" x 2", involving the dermis with criss-cross patterns.

4. Multiple parallel abrasions over right scapular area 2" x 1", involving the dermis.

5. Multiple criss-cross abrasions over the left buttock area 2" x 1" involving the dermis.

6. Multiple post mortem chlorophyll stains, on the back of the chest, abdomen and buttocks in criss-cross patterns involving only the epidermis. These marks were lost when removing the epidermis at autopsy.

7. Multiple abrasions over the back of the left ankle 2" x 1" involving the dermis

8. Ligature (creeper) around the neck 39 cm long below the thyroid cartilage running over the hair on the back side. The knot was on the back of the right side of the neck, one end was 25 cm and the other end 111cm. The ligature was removed by cutting it a few c.m. to the right of the knot.

Out of the injuries set out above, the 1st and 2nd injuries were post-mortem injuries caused by animal bites. The other injuries

were all ante-mortem.

The mark of the ligature was 2 cm in depth, and 1 cm thick and of a length of 25 cm, running horizontal around the neck pairing at the back of the neck, due to the hair. There was no underlying hemorrhage of the skin or muscles. There were no laryngeal cartilage fractures. The thyroid gland was putrefied. The carotid arteries were normal. There were no fractures of the cervical vertebrae.

On an examination of the urinary and sexual area of the body, the Assistant Judicial Medical Officer found that the area was moderately putrefied. He found fibrosis of the hymen at the 5 and 7o'clock positions. There was a contusion on the right labia majora on the inner aspect 1c.m.x1c.m. There was a vaginal contusion of the right side of the posterior wall 1 cm.x1 cm, 2 cm above the hymen. The cervix and the uterus were normal. There was contusion of the posterior wall of the anus 1 cm x 1 cm and 2 cm above the anal verge. Upon a consideration of these injuries, the evidence of Dr.Vidanapathirana was that in his opinion the deceased had been subjected to intra vaginal and anal intercourse by more persons than one.

The cause of death was due to strangulation of the neck by a ligature. His considered view was that death had taken place 36 to 40 hours prior to the post-mortem examination, between 6 pm and 11 pm on 11.10.1998. In fixing the probable time of death he had taken into account the presence of partly digested food in the stomach identified as gram and had formed the view that death had taken place within one hour of its consumption. The post-mortem examination report was produced at the trial marked 'P18'.

Dr.Vidanapathirana also examined the three accused. He examined the 1st accused on 14.10.1998 at 1.30 p.m. He has listed 5 injuries found on him in the medico-legal report 'P21'.

(i) 4"x2" multiple linear criss-cross abrasions over the left shin.

(ii) 4"x2" multiple linear criss-cross abrasions over the right shin.

(iii) 1/2"x1/2" contusion on the upper lip.

(iv) 1"x1" contusion on the right wrist.

(v) 1/2"x1/2" contusion on the left wrist.

He examined the 2nd accused at 12.55 pm on 13.10.1998. He had the following injuries as set out in the medico-legal report 'P20'.

(i) 4"x1" multiple linear criss-cross abrasion over the left knee.

(ii) 2" linear abrasion on the left shin.

(iii) 4" linear abrasion on the left shin.

(iv) 2" linear abrasion on the dorsum of the left foot.

(v) 2"x2" multiple linear abrasions on the right knee.

(vi) 1/2" linear abrasion over the back of the left hand.

(vii) 1" linear abrasion on the back of the right hand.

He examined the 3rd accused on 13.10.1998 at 2.30p.m. at the JMO's office on being produced by the Modera Police. He had four injuries as set out in the medico-legal report 'P19'.

(i) 1" linear abrasion over the left knee

(ii) 2" linear abrasion over the right knee

(iii) 1/2"x1/2" contusion over the right shin

(iv) 1/2"x1/2" contusion over the left wrist.

Dr.Vidanapathirana expressed the opinion that the injuries found on the legs of all three accused could have been sustained while lying face downward on a rough surface probably in the act of having sexual intercourse and that such injuries could have been sustained between 6.30p.m. and midnight on 11.10.1998.

In the course of his evidence, Dr.Vidanapathirana produced several photographs taken by him at the scene and also some photographs taken by an official photographer which were taken during the post-mortem examination. 'P17A' is a photograph taken by him at the scene before the body was taken out of the stream covered with water hyacinth. 'P17B' is one which shows the chlorophyll stains on the body of the deceased. Photograph 'P17C' shows the peeling of the skin and the nails described by him as the 'glove and stocking' effect. Photograph 'P17D' shows the injury in front of the neck caused by the ligature 'P3', 'P17E shows the injury on the

back of the neck as a result of the ligature. 'P17F' shows the injury caused to the labia majora of the deceased. 'P17G' is a photograph showing the injuries on the knee of the 3rd accused. 'P17G' is a photograph showing the injuries on the knee of the 3rd accused. 'P17H' shows the injuries with black scabs on the skin of the 1st accused.

Jude Manoharan was examined by Dr. H.P.Wijewardena, Assistant Judicial Medical Officer at about 11.20 am on 13.10.1998. He had an injury 20 mm x 3mm on the left side of the chest about 12cm below the left nipple with redness around the injury. It was identified as a bite mark. There were abrasions below the ankle on both his legs which could have been caused while running through the scrub jungle. A photograph showing the bite mark was produced 'P2C' at the trial.

Chief Inspector Ranjith Dehideniya received the first information regarding the abduction of the deceased Rita Joan Manoharan by way of a telephone call at 6.50p.m. on 11.10.1998. He proceeded to Crow Island which was about 1 1/2 miles from the police station with a police party and met Jude Manoharan at about 7.05 pm. He questioned him at the scene and made inquiries with regard to the place where his wife was abducted and the direction in which she was taken away. He searched the area with the assistance of the other police officers and some villagers who had gathered there. He found a pair of slippers 'P10' at the scene which was that of the deceased. Although the police dog was given the scent from the slippers and from the clothing of the deceased obtained from her residence nearby, the search with the police dog was unsuccessful. The police, villagers and army personnel continued to search the area till about 11 p.m. but it was of no avail. The search continued the next day. Although he and others went into jungle in Crow Island they were unable to trace Rita Joan who was abducted.

Upon the receipt of some information in the early hours of the morning on 13.10.1998, he proceeded to St.Andrew's Lower Road, Modera and took into custody Mahamalage Lakshman Perera on suspicion. Having questioned him, he along with the police party proceeded to the railway quarters in Slave Island and arrested K.Balapuwaduge Basil Mendis, the 2nd accused, at about

6.00 a.m. at the house of one Sunil. Thereafter he proceeded with the party to Kohalwila in Dalugama and arrested the 3rd accused, P.Chaminda Kumara Fernando, at about 6.35 a.m. He returned to the Police Station with the police party and the suspects at about 7 a.m. Although they were on the look out for the 1st accused on the 13th, they were unable to arrest him.

Having recorded the statements of the 2nd and 3rd accused they were separately taken to the spot marked 'X' in the sketch and from there each of them pointed out an area marked 'Y'. Lakshman Perera who was also taken there did not point to any place. Upon a search of the area pointed to by the 2nd and 3rd accused, IP Dehideniya discovered the body of the deceased in the water which was fully covered with water hyacinth plants at point 'C' on the sketch 'P12A'. The body was recovered at about 12 noon on 13.10.1998. The extracts of the statements made by the 2nd and 3rd accused which led to the discovery of the body were produced at the trial marked 'P24' and 'P25' respectively under the provisions of section 27 of the Evidence Ordinance. The body was naked and was dumped face downward in the stream covered with water hyacinth plants. After the discovery of the body he notified the Magistrate who arrived at the scene at about 4.15 p.m. and after he made his observations, the body was taken out of the water and was taken to the JMO's office. The pair of 'gypsy' earrings on her ears was produced marked 'P16' at the trial and was identified by the husband of the deceased. Inspector Dehideniya also produced a set of 9 photographs marked 'P1' which was taken by him of the body with a ligature round her neck at the scene.

SI Udayakumara took the 1st accused-appellant into custody at Hasalaka and produced him at the Modera Police Station at 10.30 a.m. on 14.10.1998. He questioned the 1st accused and after his statement was recorded, he was taken at about 11 a.m. on 14.10.98 in a covered police vehicle to Crow Island. At a place which was 10 to 15 yards from where the body was discovered, he recovered a pair of blue denim trousers, a yellowish blouse and a lady's underwear with the trade name Marks & Spencer underneath some leaves near a 'Kottan' tree. These items of clothing were identified by Jude Manoharan as the items of clothing that were worn by his wife at the time of the abduction and were produced

marked 'P7', 'P8' & 'P9'. An extract of the statement leading to the discovery of these items was produced marked 'P27' by IP Udayakumara. The 1st accused was examined by the Judicial Medical Officer at 1.30 p.m. and produced thereafter at the Colombo Magistrate's Court and was remanded till 27.10.1998. The wife of the 1st accused handed over a pair of bangles to IP Dehideniya at the Police Station on 15.10.1998. It was produced marked 'P15'.

Inspector Chandrathilake, the Officer-in-Charge at the Modera Police Station testified at the trial that after the identification parade was held, having obtained an order from Court, he questioned the 2nd accused in the presence of prison officers. On the following day on 28.10.1998, he searched the house of the 2nd accused situated at 173/46, Modera Street and recovered a gold chain with a pendant with the mark K.D.M. and the number 916 engraved on it. It had been concealed under a plank on the roof of the said house. He produced the chain marked 'P15'. It was identified by Jude Manoharan as the 'thali' which was worn by the deceased at the time of her abduction.

After the case for the prosecution was closed, an application was made by counsel who appeared for the 1st and 2nd accused-appellants in terms of section 199(4) of the Code of Criminal Procedure Act for the Court to call a witness named in the list of witness in the indictment but not called by the prosecution. The Court having examined the statement made by the said witness Lakshman Perera refused the application on the basis that the evidence of the witness, if called by Court, would be prejudicial to the accused. However, an order was made permitting the accused to call the said witness as a witness for the defence if they so desired. Lakshman Perera was not called as a witness for the defence. Thereafter, the three accused-appellants made statements from the dock denying the charges against them and stated that they have been falsely implicated.

At the conclusion of the trial, the 1st accused was found guilty and was convicted on counts 1,2,5 and 6. The 2nd accused was found guilty and convicted on counts 1,3,5 and 6. The 3rd accused was found guilty and was convicted on counts 1,4 and 5.

The 1st accused was sentenced on count 1, to 12 yrs R.I; on count 2, to 20 yrs R.I; and on count 6, to 10 yrs R.I. The sentences were ordered to run consecutively. The death sentence was passed on Court 5.

The 2nd accused was sentenced on count 1, to 12 Yrs R.I; on count 3, to 20 Yrs R.I.and on count 6, to 10 Yrs R.I. The sentences were ordered to run consecutively. The death sentence was passed on Count 5.

The 3rd accused was sentenced on count 1, to 12 Yrs R.I; and on count 4, to 20 Yrs R.I; The sentences were ordered to run con- 390
secutively. The death sentence was passed on Count 5.

This appeal is by all three accused-appellants against the said convictions and sentences.

Learned Counsel for the appellants submitted, firstly, that the learned Judges of the High Court at Bar erred in law by failing to deal with the non-compliance at the trial of the mandatory provisions of section 256(2) of the Code of Criminal Procedure Act. It was submitted that compliance with this provision is necessary in the interests of justice and that this section is not meant to serve the interests of a suspect accepting a pardon. The words of the 400
section are that every person accepting a pardon shall be examined as a witness and the failure to do so would vitiate the trial and conviction. Mahamalage Lakshman Perera who accepted a conditional pardon granted to him by the Attorney-General under section 256(1) of the Code of Criminal Procedure Act was not examined as a witness at the trial.

The provisions of section 256 of the Code are as follows:

(1) In the case of any offence triable exclusively by the High Court the Magistrate inquiring into the offence may, after having obtained the Attorney-General's authority so to do, 410
or the Attorney-General himself may, with the view of obtaining the evidence of any person supposed to have been directly or indirectlyconcerned in or privy to the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence and to every other person concerned whether

as principal or abettor in the commission thereof.

(2) Every person accepting a tender under this section shall be examined as a witness in the case.

(3) Such person if not on bail shall be detained in custody until the termination of the trial.

The object of tendering a pardon is to obtain the evidence of an accomplice, a person supposed to have been directly or indirectly concerned in or privy to an offence. "Granting a pardon and examining the evidence of an approver is at best a necessary evil, in view of both the approver's escape from punishment, and of the natural suspicion with which any court would look upon the evidence in the best circumstances. The secrecy of the crime and the scarcity of clues, sometimes necessitates this course, solely for the apprehension of other offenders, the recovery of incriminating objects, and production of evidence otherwise unobtainable. These can be safely considered to be the only grounds on which a pardon may be granted. The object of tendering a pardon is to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies"– Sohoni on The Code of Criminal Procedure 1973, 18th Edition, Volume IV at page 3192.

The Attorney-General can tender a pardon only to a person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry with the view of obtaining his evidence to prevent the escape of other offenders from punishment in grave cases for lack of evidence. The considerations which should guide the Attorney-General in granting or withholding of the pardon has been stated as follows by R.F.Dias in "A Commentary on the Ceylon Criminal Procedure Code", vol. II, pg.727, paragraph 5.

> "Before tendering the pardon the Attorney-General shall be satisfied that the accused has in fact committed the crime charged in conjunction with others, or that he has some active part towards its commission; in other words he should be satisfied that the accused is really an accomplice. A mere suspicion that he may have committed the offence is insufficient. The police inquiry notes, the recorded evidence and statements of the accused should all be placed before him to

decide whether or not there is sufficient evidence, apart from the testimony which the accused can give, to bring about the conviction of the other accused. If such evidence exists, he will, as a rule, refuse to tender a pardon ... He should consider the degree of complicity of the accomplice."

It would therefore be appropriate to consider whether Mahamalage Lakshman Perera could have in the first instance been granted a pardon. He was the first person to have been arrested on suspicion and was produced before a medical officer. He did not have any injuries. His statement which was recorded did not show any complicity on his part in any of the offences. He was not identified at the identification parade by the eye witness Jude Manoharan. No productions relevant to the case were recovered consequent to his statement being recorded. He was taken to the alleged scene of the offence but he, unlike the 2nd and 3rd accused was unable to point to any spot that could have helped the police in its investigation. A close scrutiny of his statement clearly reveals that he cannot be regarded as a person who could have been directly or indirectly concerned in or privy to the offence under inquiry.

A pardon may not be granted in instances where there is no evidence available to connect an accused with the crime. An examination of the statement of Lakshman Perera shows that at best he was a witness to the abduction of the deceased by the three appellants and was certainly not an accomplice. Dias in his Commentary on the Ceylon Criminal Procedure Code, Vol.II at Pg.728 observes that, "A pardon would be illegally tendered if it is made to a person who is not an accomplice and who is no way responsible for the crime alleged." In such a case the evidence of a suspect to whom a pardon has been illegally tendered would neither be admissible nor could he be dealt with for any breach of the conditions of the pardon.

The unambiguous words in section 256 of the Code of Criminal Procedure Act and the authorities cited above make it abundantly clear that a pardon may be granted to a person supposed to have been directly or indirectly concerned in or privy to the offence; in other words, to a guilty associate of a crime, meaning an accomplice. It may be so granted only in instances where there is no other

evidence available to connect the accused with the crime. In the instant case the direct evidence of the husband of the deceased was available in regard to the abduction of his wife by the three accused. Having regard to the factors which should guide the Attorney-General in granting or withholding a pardon, Lakshman Perera could not, in my view, have been tendered a pardon in terms of the provisions of section 256(1) of the Code of Criminal Procedure Act. The pardon so granted has, in the circumstances, been wrongly granted by the Attorney-General.

Counsel for the appellants submitted, however, that even if the pardon has been wrongly granted, section 256(2) mandates that the person accepting the pardon should be examined as a witness. He submitted that the Judges erred in law in refusing the application made by the defence for Lakshman Perera, who was a witness listed in the indictment, to be called as a witness of Court in terms of provisions of section 199(4) of the Code of Criminal Procedure Act.

The Court having considered the said application made by the defence at the trial and having perused the statement of Lakshman Perera took the view that it would have been prejudicial to the accused if he was called as a witness of Court and left it open to the defence to call him as their witness. The refusal of the application by the defence to call Lakshman Perera as a witness of Court in terms of section 199(4) of the Code of Criminal Procedure Act had not occasioned a miscarriage of justice. He was not a witness whose evidence was necessary to unfold the narrative and no presumption adverse to the prosecution case could be drawn by its failure to call Lakshman Perera. As G.P.A.Silva, S.P.J. observed in *Walimunige John* v *The State*[1].

> "The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution, and the failure to call such witness constitutes a vital missing link in the prosecution case, and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness' evidence is cumulative of the other and would be a mere repetition of the

narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114(f) of the Evidence Ordinance."

The next submission of Counsel was that the Judges erred in law by attaching a probative value to the discovery of the body consequent to statements made by the 2nd and 3rd accused as they were inadmissible under section 27 of the Evidence Ordinance and that such information was not the cause of the discovery. In any event, it was submitted, that even if such statements were admissible, the Judges have erred in attributing to the accused more than "the knowledge of the whereabouts" of the body. Counsel submitted that in terms of section 27 of the Evidence Ordinance, the information must be such as has caused the discovery of a fact. This follows from the words "thereby discovered"; the fact must therefore be the consequence and the information the cause for the discovery. The connection must be that of cause and effect.

The evidence of IP Dehideniya was that the 2nd and 3rd accused separately pointed towards an area which was marked "Y" on the sketch and that the body of the deceased was recovered from the point "C" in the canal and that this point was near this area. Learned Counsel submitted that as the spot from which the body was recovered was not within the area "Y", that the relevant statements could not have been the cause for the discovery.

The extensive search for the body by the police, army personnel and the villagers on the night of the 11th and the 12th was not successful. However, after their statements were recorded, the 2nd and 3rd accused were taken to the vicinity of the mangrove swamp and both accused separately pointed to the area marked "Y". The body was recovered form a point in front of the area "Y" in the sketch. Shortly thereafter and in consequence of such information the body which was initially not visible as it lay in the water covered with a thick growth of water hyacinth was recovered. The medical evidence that there were chlorophyll stains on the body confirms this fact. In the circumstances, the submission that the body could have been discovered consequent to information from other sources including Lakshman Perera cannot be accepted. Considering that the area pointed to by the accused was marshy

and in their words 'muddy' and a 'muddy hole', the exact location where the body lay could not have been pointed to, even by them, with pin-point accuracy. I am of the view that the prosecution has established that the recovery of the body was the consequence and that the information from the 2nd and 3rd accused was the cause for such recovery. The requirement of the nexus has been fulfilled and thus the prosecution has established that the two accused who pointed to the area marked 'Y' had knowledge of the place where the body could be found.

In this connection, the learned Solicitor General has appropriately referred to the observations made by Fernando, J. when he considered this principle in *Chuin Pong Shiek* v *The Attorney General*,(2). In this case it was sought to be argued that the discovery of six screws in the pocket of the jacket was improperly admitted contrary to section 27 of the Evidence Ordinance because that part of the petitioner's statement did not refer to the contents of the bag. Fernando, J. observed as follows:

> "The Court of Appeal rejected that submission, and I would venture to summarize its reasoning as follows. The bag was the 'fact' discovered; it was deposed to as having been discovered in consequence of the petitioner's statement; so much of that statement as related distinctly to the bag – the 'fact' discovered – could therefore be proved. The 'fact' discovered was the bag including its contents. Accordingly as held in *R* v *Krishnapillai and Etin Singho* v *The Queen*, the petitioner's statement established that he had knowledge of the place at which was found the bag containing the jacket and the screws. The petitioner failed to explain how he had acquired that knowledge. In my view, no question of law arises in relation to the interpretation or application of section 27(1)."

Learned Counsel for the appellant submitted while dealing with the evidence regarding the discovery of the body, that the judges of the High Court at Bar erred in law in attributing more than the knowledge of its whereabouts. He referred in particular to the finding that the accused were present during the disposal of the body and that they were aware of her death. In this connection the obser-

vations of the *Privy Council in Pulukuri Kottaya* v *Emperor*, (3) has an important bearing. It was held that "it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced. The 'fact discovered' embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact". The finding of the High Court at Bar was not unreasonable considering the other items of evidence led in this regard. The information provided by the 2nd and 3rd accused which led to the discovery of the body confirmed their knowledge of the whereabouts of the body which was not clearly visible and was found submerged in water covered with a thick growth of water hyacinth. The three accused were identified by the husband as the only persons who forcibly took the deceased away shortly prior to her death. The finding of the Judges arrived at on the basis of the cumulative effect of the entirety of the evidence besides the evidence relating to the discovery of the body is not unreasonable and is justified. The submissions of counsel in regard to the discovery of the body cannot therefore be accepted.

The next ground of appeal, in regard to the conviction for murder, was that the available evidence did not support an irresistible inference that all three accused entertained a common murderous intention at the time of committing the offence. Counsel for the appellants submitted that the original plan of the accused was abduction apparently for the purpose only of illicit sexual intercourse; that there was no evidence of sharing of a common intention; that there was no prior preparation as the creeper used as a ligature was readily available at the scene and that the medical evidence did not point to the use of force in its application or the involvement of more than one individual to effect the strangulation. Counsel also drew attention to the evidence that all the items of jewellery worn by the deceased at the time of the abduction were recovered only from the 2nd and 3rd accused. They did not abscond, although it was only the 1st accused who was absent from his usual place of residence and was arrested the day after the other two accused were taken into custody.

On the other hand, it was submitted by the Solicitor General that the following items of evidence have to be taken into account in this

regard. The deceased was forcibly abducted with the active participation of all three accused after assaulting her husband. She was raising cries at that time. Shortly thereafter police and army officers together with the villagers were making a search of the area with the aid of lights. If the deceased had raised cries or was permitted to escape there was a strong likelihood of her abductors being identified and arrested. In the circumstances, realising the predicament they were in, silencing her effectively and killing her would presumably have been the only means for all the accused to escape detection. There was reliable evidence of the abduction which has not been challenged and of the identity of the three accused had been established. The failure of the accused to offer an explanation was a factor that the judges could reasonably have taken into consideration in arriving at their finding in regard to a common murderous intention. It was held in *Richard* v *The State*,(4) that the cumulative effect of all the items of circumstantial evidence against one of the appellants was sufficient, in the absence of evidence to explain his presence at the scene, to establish that he acted in furtherance of a common murderous intention with the other accused to kill the deceased.

The question whether a particular set of circumstances establish that the accused acted in furtherance of a common intention is a question of fact and if the view of the trial Court cannot be said to be unreasonable, it is not the function of an appellate court to interfere. In *Rishideo* v *State of Uttar Pradesh*,(5) the Supreme Court of India has expressed this principle as follows:

> "After all the existence of a common intention said to have been shared by the accused person is, on an ultimate analysis, a question of fact. We are not of opinion that the inference of fact drawn by the Sessions Judge appearing from the facts and circumstances appearing on the record of this case and which was accepted by the High Court was improper or that these facts and circumstances were capable of an innocent explanation."

In this instance it was essential that the accused should have either given or offered evidence to explain their conduct subsequent to the abduction of the deceased. Their failure to do so did

attract a presumption adverse to them. I am therefore of the view that the finding of the judges that the accused were actuated by a common murderous intention is justified and cannot be said to be unreasonable.

While urging further that the judges of the High Court at Bar erred in law by attributing guilt on the basis that the accused failed to offer any explanation in regard to the prima facie evidence led against them, it was contended that the burden did lie on the prosecution to prove its case beyond reasonable doubt, independent of any explanation required to be offered by the accused. The rule regarding circumstantial evidence and its effect, if not explained by the accused, has been stated by Chief Justice Shaw in the American Case of *Commonwealth* v *Webster*[6] in the following words which have been referred to in *Seetin* v *The Queen*[7].

> "Where probable proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a 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."

E.R.S.R. Coomaraswamy on the Law of Evidence, Vol.1 at page 21 has observed in this regard as follows:

> "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 on the strength of the evidence and the operation of such rules as that requiring a specially high standard of proof on a criminal charge."

The items of evidence relied upon by the prosecution were as follows:

a) The three accused were identified as the only persons who abducted the deceased at about 6.30 pm on 11th October '98. This aspect of the prosecution case has not been disputed.

b) The death had occurred within one hour, close to the place of the abduction.

c) The medical evidence is that the deceased had been subjected to vaginal and anal intercourse by more persons than one after the abduction.

d) The injuries found on the knees and shin of each of the accused and the opinion of the medical evidence suggestive of the circumstances in which they could have been sustained.

e) The body of the deceased was found submerged in water covered with an extensive growth of water hyacinth and was discovered only upon the information provided separately by the 2nd and 3rd accused. This attributed knowledge to them of the place where the body of the deceased whom they had abducted could be found.

f) The clothes worn by the deceased were found hidden in the mangrove swamp and were discovered upon information provided by the 1st accused.

g) The 1st and 2nd accused had access to the jewellery worn by the deceased at the time of her abduction.

The cumulative effect of the aforesaid items of evidence was that a strong *prima facie* case had been made out in regard to the culpability of the accused, in relation to the offences of abduction, rape and murder having been committed in the course of the same transaction. The place from where the body was recovered and the place at which the items of clothing worn by the deceased lay hid-

den were within the knowledge of the accused. The accused had been in possession of the jewellery worn by the deceased at the time of her abduction. The failure of the accused to give or offer evidence in respect of these matters justify the application of the following dictum of Lord Ellenborough in *R* v *Lord Cochrane and others,*(8).

> "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 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 circumstances 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 he conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

However, learned counsel for the appellants contended that the dictum of Lord Ellenborough has been misapplied in this case which involved more than one offence. Learned Solicitor General submitted in reply that the several offences in the indictment were committed in the course of the same transaction and that the dictum which is not a principle of evidence but a rule of logic applies only when the prosecution has established a strong prima facie case against the accused. I am of the view that there is no rational basis for a selective application of the dictum and it is to be noted that it has been applied previously in cases where the accused have been convicted of more offences than one.

For the reasons set out above, the appellants cannot succeed on the grounds of appeal relied upon by them. The conviction of each of the accused-appellants is therefore affirmed.

At the outset counsel for the appellants submitted correctly that the sentence of imprisonment imposed on all the accused on count 1 of the indictment exceeded the maximum term of imprisonment specified in section 357 of the Penal Code.

The sentence of imprisonment imposed on all three accused appellants in respect of Count 1 of the indictment is therefore set aside. In lieu thereof, I impose a sentence of 10 years R.I. on each

of the accused-appellants on count 1 of the indictment.

Subject to the variation in regard to the sentence only on count 1 as above, the sentences imposed on each of the accused-appel- 790
lants are affirmed. Considering the heinous nature of the offences committed by the accused-appellants, the order that the sentences of imprisonment should run consecutively is affirmed.

Subject to the above, the appeals of the 1st, 2nd and 3rd accused-appellant are dismissed.

EDUSSURIYA, J. – I agree.

YAPA, J. – I agree.

WIGNESWARAN, J. – I agree.

JAYASINGHE, J. – I agree.

Appeal dismissed;
sentences on count one varied.