DAYANANDA LOKUGALAPPATHTHI AND EIGHT OTHERS
v
THE STATE
(THE EMBILIPITIYA ABDUCTION AND MURDER CASE)

COURT OF APPEAL
KULATILAKA, J.
FERNANDO, J.
C.A.93-99
H.C.RATNAPURA 121/94
MAY 2,28,29,2001
JUNE 11,12,18,19,25,26, 2001
JULY 2,3,9,10,17,18,31,2001
AUGUST 2,27,29,2001
SEPTEMBER 3,4,5,10,11,12,17,19,24,25,26,2001
OCTOBER 23,24,25,30,2001
NOVEMBER 5,6,7,12,13,19,20,21,22,26,27,28,29,2001
DECEMBER 3,7,10,11,12,2001

Penal Code – Sections 32 – 113(A), 113(b), 334, 335, 353 and 356 – Evidence Ordinance -- Sections 3, 10, 11, 106 and 134 – Code of Criminal Procedure – Sections 217, 229 and 232 – Conspiracy, Abduction – Aiding and Abetting – wrongful confinement – Murder – Is intention a necessary ingredient? – Proof? – Is the offence of abduction a continuing offence? – Corroborative evidence – Dock identification –Test of spontaneity and contemporaneity – Test of Probability and – Improbability – Common intention – Applicability of section 217 Criminal Procedure Code to trial by a Judge of the High Court – Alibi – Nemo Allegans Suam Turpitudinem non audiendus est.

In the prosecution before the High Court sitting without a jury nine accused were indicted on a total of 80 counts. Count Nos.1-4 – related to all accused to wit: Count 1 and 3 – Conspiracy to commit acts of abduction or aiding and abetting to abduct in order to secretly and wrongfully confine certain unidentified persons and in order to commit murder.

Counts 2 & 4 – same as above but in relation to 25 identified persons.

Counts 5-29 – and Counts 30-54 related to abduction of 25 identified persons with the intention of wrongfully confining them and to commit murder. These charges were preferred against the 4-9th accused.

Counts 55-79 – related to wrongful confinement exceeding 10 days in respect of the same 25 identified persons.

These charges were preferred against 3-9th accused.

Count 80 – wrongful confinement of one N.S.exceeding 10 days.

This charge was levelled against 3-9th accused.

After trial all accused were acquitted of Counts 1 and 3, 2nd and 3rd accused were acquitted of all charges. Accused who were convicted were sentenced to 5-10 years rigorous imprisonment.

In appeal it was contended that -

i) The prosecution has failed to establish beyond reasonable doubt the prerequisite intention to establish the offence of abduction.

ii) that the evidence led was insufficient to establish the agreement/common purpose participation.

iii) that the trial court ought not to have relied upon evidence of dock identification.

iv) that the trial Judge was not alive to the principle of common intention;

v) the learned trial Judge failed to consider the positive evidence of alibi;

vi) that there was no corroborative evidence.

Held:

(i) The fact that the purpose specified in the charge was not in fact accomplished does not exculpate an accused from criminal liability so long as the offence of abduction is proved to have been committed with that purpose in mind. The charge of abduction intention is a necessary ingredient. It does not mean that the test applied is a subjective test to be proved beyond reasonable doubt. The actual intention could be inferred from the circumstance.

(ii) The offence of abduction is a continuing offence and that the principle of aggravation of liability on account of specific intent is applicable to the offence of abduction. The full mens rea required for the specific intent is not expressed in the accused's immediate commission of material acts of the offence. The intention required to establish liability for the aggravated offence is a combination of the general intent which is the feature of the basic offence and the particular intention which is peculiar to the more serious offence.

(iii) The law does not envisage the prosecution to prove any direct concert or even any meeting of the conspirators, it is not necessary to prove that they knew each other earlier. In establishing detached acts of each of the accused related to the main design the prosecution can proceed to establish the conspiracy itself.

(iv) Law relating to identification does not shut out evidence of dock identification. The Trial Judge must examine clearly the circumstances under which the identification by the witness came to be made.

(v) In a Jury trial an accused is tried by his own peers. Jurors are ordinary laymen. In order to perform their duties specified in section 232 of the Code, the Trial Judge has to inform them of their duties. In a trial by a Judge of the High Court without a jury, there is no provision similar to section 217. There is no requirement similar to section 229 that the Trial Judge should lay down the law which he is to be guided. In appeal the Appellate Judges will consider whether in fact the Trial Judge was alive and mindful of the relevant principle of law and has applied them in arriving at his conclusion. The law takes for granted that a Judge with a trained legal mind is well possessed of the principles of law, he would apply.

(vi) In respect of an alibi what is expected of the defence is merely to create a doubt in the mind of court, if the alibi is accepted or even if it is not accepted yet if there is a doubt created in the Judges mind the prosecution shall fail. The Trial Judge has considered the defence evidence of alibi and weighed it in the balance with the prosecution evidence and has rejected it.

(vii) Section 134 - Evidence Ordinance postulates the evidence shall be evaluated and weighed and not counted. If the trial Judge is satisfied with the testimonial trustworthiness of a witness even though he is the sole witness relied upon by the prosecution the trial Judge will act upon such evidence.

Per Kulatilaka, J.

"In applying the test of spontaneity and test of contemporaneity and the test of promptness Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement."

Per Kulatilaka, J.

"The learned trial Judge has accepted the explanations given for omission by witness and also the delay in making complaints. In the attendant circumstances the test of spontaneity and contemporaneity cannot be applied, it appears that the Trial Judge has applied the test of probability and improbability in the evaluation of the evidence in the case."

(viii) Appellants are not entitled to complain that no identification parade was held. No one ought to be heard when he asserts his own turpitude.

APPEALS from the Judgement of the High Court of Ratnapura.

Cases referred to:

1. *Q* v *Murugesu* – 65 NLR 11
2. *R* v *Mohamed Sidiq* – *AIR (1938) Lahore, 474*
3. *Q* v *Liyanage*– 67 NLR 203
4. *R* v *Miller* – 1939 AD 106
5. *R* v *Parnell* – 154 ER 1132
6. *R* v *Meyrick* – 21 Cr.App.Report 94 at 102
7. *King* v *Appuhamy* 45 NLR 128
8. *King* v *Haramanis* 48 NLR 529
9. *Regina* v *Tumbull* 1997 QB 224
10. *R* v *Tumfrill* – 1977 QB 224 at 228
11. *Gunaratne Banda* v *The Republic* – SC 132 - 136/76 H.C.Kegalle 79/75 SCM 2.3.78
12. *L. Edrick de Silva* v *Chandradasa* – 70 NLR 169
13. *Q* v *Pauline de Croos* – 71 NLR 169
14. *K* v *Appuhamy* – 46 NLR 57 ; *K* v *Haramanis* 48 NLR 403,
15. *R* v *Hassan* – 1970 1 QB 423
16. *Mulluwa* v *State of Madya Pradesh* – AIR 1976 SC 198
17. *Walimunige John* v *State* – 76 NLR 495
18. *Madawela Samarakoon Mudalige Ajit Devapriya Samarakoon* v *The Republic* - CA 8/97 HC Kurunegala 180/94 CAM 5.10.99
19. *R* v *Olivia* – 1965 3 All ER 116
20. *K* v *Chalo Singho* – 42 NLR 269

Dr.Ranjith Fernando with *Ms. Sandamali Munasinghe*, *Ms.Sandamali Manatunga* and *Kaweendra Nanayakkara* for 1st, 3rd, 5th, 6th and 7th accused – appellants.

Ranjit Abeysuriya, P.C. with *Ms.Sharmaine Gooneratne*, *Lanka de Silva* and *Dinusha Mirihana* for 4th accused - appellant.

A.S.M.Perera P.C. with *Ms. Shamila Daluwatta* and *Neville Ananda* for 2nd accused - appellant.

Palitha Fernando, D.S.G., with *Sarath Jayamanne*, S.S.C., *Mohan Senaviratne* S.C., for Attorney-General.

R.K.W.Gunasekera with *M.A.Justin*, *J.C.Weliamuna*, *S.P.Senaratne*, *Ms.Priyadharshani Dias*, *P.Gunawarnasuriya*, *Chandima Sugathadasa* and *S. Liyanage* for the aggrieved parties.

January 4, 2002

Cur.adv.vult.

January 4, 2002

KULATILAKA, J.

In this prosecution before the High Court of Ratnapura sitting without a jury nine accused were indicted on a total of 80 counts to wit:

Count No.1 related to conspiracy to commit acts of abduction or aiding and abetting to abduct in order to secretly and wrongfully confine certain unidentified persons in Embilipitiya area, an offence punishable under section 356 read with section 113(b) and section 102 of the Penal Code.

Count No. 2 related to conspiracy to commit acts of abduction or aiding and abetting to abduct in order to secretly and wrongfully confine 25 identified and named persons in the Embilipitiya area, an offence punishable under section 256 read with section 113(b) and section 102 of the Penal Code.

Count No. 3 related to conspiracy to commit acts of abduction or aiding and abetting to abduct certain unidentified persons in Embilipitiya area in order that such persons may be murdered or may be so disposed of to be put in danger of being murdered, an offence punishable under section 355 read with section 113(b) and section 102 of the Penal Code.

Count No. 4 related to conspiracy to commit acts of abduction or aiding and abetting to abduct 25 identified persons in order that such persons may be murdered or may be so disposed of to be put in danger, of being murdered, an offence punishable under section 355 read with section 113(b) and 102 of the penal Code.

Count Nos. 1 to 4 related to all nine accused.

Count Nos. 5 to 29 related to the abduction, of 25 named persons with the intention of wrongfully confining them, an offence punishable under section 356 read with section 32 of the Penal Code.

These counts were preferred against the 4th 5th, 6th, 7th, 8th and 9th accused.

Count Nos. 30 to 54 related to abduction of the same 25 named persons with the intention to commit murder or to be so disposed of as to be put in danger of being murdered, an offence punishable under section 355 read with section 32 of the Penal Code.

These charges are preferred against the 4th, 5th, 6th, 7th, 8th and 9th accused.

Count Nos. 55 to 79 related to the wrongful confinement exceeding ten days in respect of the same 25 named persons, an offence punishable under section 335 read with section 32 of the Penal Code.

These charges were preferred against the 3rd, 4th, 5th, 6th, 7th, 8th and 9th accused.

Count No. 80 related to the wrongful confinement of one Nimal Sugathapala exceeding ten days, an offence punishable under section 335 read with section 32 of the Penal Code. These charges are levelled against the 3rd, 4th, 5th, 6th, 7th, 8th and 9th accused.

After trial all the accused were acquitted of counts 1 and 3 for conspiracy to abduct unidentified persons. The 2nd and 3rd accused were acquitted of all the charges preferred against them. The accused who were charged under counts 55 to 79 for committing offences preferred in terms of section 335 read with section 32 of the Penal Code were acquitted. So were the accused charged on count 80.

The 1st accused-appellant was convicted on counts 2 and 4 and was sentenced to five (5) years rigorous imprisonment and ten (10) years rigorous imprisonment respectively. Sentences are to run concurrently.

The 4th accused who is the 2nd accused-appellant was convicted on counts 2, 4, 7, 32, 11, 36, 13 and 38 and was sentenced to five (5) years rigorous imprisonment on counts 2,7,11,13 and to a term of ten (10) years rigorous imprisonment on counts 4, 32, 36 and 38. Sentences are to run concurrently.

The 5th accused who is the 3rd accused-appellant was convicted on counts 2,4,5,30,6, 31,11,36,12 and 37. He was sentenced to five (5) years rigorous imprisonment on counts 2,5,6,11 and 12 and to a term of the (10) years rigorous imprisonment on counts 4,30,31,36 and 37. Sentences are to run concurrently.

The 6th accused who is the 4th accused-appellant was convicted on counts 2,4,7,32,11,36,13,38,23,48,27, and 52. He was sentenced to five (5) years rigorous imprisonment on counts 2,7,11,13,23 and 27 and to a term of ten (10) years rigorous imprisonment on counts 4, 32,36,38,48 and 52. Sentences are to run concurrently.

The 7th accused who is the 5th accused-appellant was convicted on counts 2, 4, 6, 31, 9, 34, 10, 35, 11, 36, 13, 38, 18, 43, 20, 45, 21, 46, 22, 47, 23, 48, 24, 49, 26, 27, 51, 52, 29, 54,(19,44). He was sen-

tenced to five (5) years rigorous imprisonment on counts 2, 6, 9, 10, 11, 13, 18, 19, 20, 21, 22, 23, 24, 26, 27, 29, and (19) and sentenced to a term of ten (10) years rigorous imprisonment on counts 4, 31, 34, 35, 36, 38, 43, (44), 45, 46, 47, 48, 49, 51, 52 and 54. Sentences are to run concurrently.

The 8th accused who is the 6th accused-appellant was convicted on counts 2, 4, 9, 34, 10, 35, 18, 43, 23, 48, 26, and 51. He was sentenced to five (5) years rigorous imprisonment on counts 2,9, 10, 18, 23, and 26 and to a term of ten (10) years rigorous imprisonment on counts 4, 34, 35, 43, 48, and 51. Sentences are to run concurrently.

The 9th accused who is the 7th accused-appellant was convicted on counts 18 and 43 and was sentenced to five (5) years rigorous imprisonment on count 18 and ten (10) years rigorous imprisonment on count 43. Sentences are to run concurrently.

The above accused-appellants have appealed against the conviction and sentence.

In view of the mass of evidence that was led in the case it is pertinent to keep in mind the respective positions the accused-appellants occupied in the dock at the trial court. The 1st accused-appellant was the 1st accused at the trial. The 2nd accused-appellant was the 4th accused at the trial. The 3rd accused-appellant was the 5th accused at the trial. The 4th accused-appellant was the 6th accused at the trial. The 5th accused-appellant was the 7th accused at the trial. The 6th accused-appellant was the 8th accused at the trial. The 7th accused-appellant was the 9th accused at the trial.

After considering the evidence led against the 7th accused-appellant at the trial, the observations made by the learned trial Judge at the closure of the prosecution case and the submissions made by the learned Senior Counsel who appeared for the 7th accused-appellant and also the learned Deputy Solicitor-General on behalf of the Attorney-General during the course of the argument before us we have acquitted the 7th accused-appellant.

We have very carefully considered the submissions made by the learned Senior Counsel who appeared for the 1st, 3rd, 5th and 6th accused-appellants and the submissions made by the learned President's Counsel who appeared for the 2nd accused-appellant and also the submissions made by the learned President's Counsel who appeared for the 4th accused-appellant. We also gave our minds to

the submissions made by the learned Deputy Solicitor-General on behalf of the Attorney-General and Mr.R.K.W.Gunasekera, Senior Counsel for the aggrieved parties.

At the commencement of their submissions the learned Deputy Solicitor-General and thereafter the Senior Counsel for the aggrieved parties submitted to court that in order to adequately understand the alleged conspiracy, it is incumbent upon Court to be conscious of the background of the events that prevailed in Embilipitiya during this time as deposed to by the prosecution witnesses. It is common knowledge that in 1989/90 there was an uprising in the South geared by the JVP. The Government of the day had stationed army camps all over the country with a view to crush the Southern insurrection immediately. One such camp namely Sevana camp was set up at Embilipitiya. That was a time when law and order had failed.

At the time of the conspiracy and abduction of 25 students as alleged in the indictment from some schools in Embilipitiya, the 1st accused-appellant was the Principal of Embilipitiya Madya Maha Vidyalaya. He was in fact serving as the head of the cluster schools in Embilipitiya.

Witness Sujatha Kalugampitiya, then Principal of Moraketiya Vidyalaya, testified that prior to the 1st accused-appellant's coming to Embilipitiya Madya Maha Vidyalaya as its Principal there had been student unrest during Principal Jayatissa's time over an attempt to acquire a portion of the school playground for the purpose of putting up a filling station. The 1st accused-appellant had supported the student agitation which in fact paved the way for him to come as the Principal of that school. Even after his coming there as the Principal the student unrest continued which made him to arm himself with a pistol and a hand bomb as well, as deposed to by witnesses. Apparently, the 1st accused-appellant's explanation in this regard was that the prosecution witnesses would have mistaken a wood apple he was carrying to be a hand grenade.

The student unrest appears to have heightened when the students themselves were divided into two camps over a love affair the 2nd accused (at the trial) who was the son of the 1st accused-appellant supposed to have had with Pavitra Ranmali a girl studying in Grade 11 A in that school.There was also evidence of students hooting at the Principal, the 1st accused-appellant, when he was going back to his

official residence after a meeting with the parents. Thus according to the prosecution the 1st accused-appellant had a grudge against the students and that he had ear marked a number of students as trouble makers and was determined to get rid of them. The prosecution version is that to achieve that end he got the support of men in uniform stationed at the Sevena camp which was about 200 yards away from the school.

According to the prosecution witnesses the 6th accused-appellant, 4th and 5th accused-appellants were seen in the school premises, Principal's office and the official residence during this period, showing that a close rapport and liaison had existed between the 1st accused-appellant and the men in uniform. So much so, that at times they addressed the 1st accused-appellant as "uncle".

The learned Senior Counsel who appeared for the 1st accused-appellant submitted that no aspersions can be directed at the 1st accused-appellant for getting the army personnel to guard the school premises for the reason that the circumstances that prevailed in Embilipitiya was so tense that the 1st accused-appellant had to seek protection from army personnel. Albeit, at the trial the 1st accused-appellant's position was that the army men were present only on occasions when the politicians visited the school. It was an attempt to distance himself from the army.

The learned Deputy Solicitor-General submitted that the parents were under the impression that their children were taken away by the army personnel because they had committed some offences, but they expected that they would be dealt with according to law. When they realised that it was not going to be so they went to the local police with a view to get their children back but the local police did not entertain their complaints. In fact Sujatha Kalugampitiya had rushed to the Embilipitiya Police that very morning but the Police refused to record her complaint. This was the story that came out from the mouths of the parents and brothers and sisters of the missing students before the learned trial Judge. Of the accused-appellants except for the 1st accused-appellant who was the principal of Embilipitiya Madya Maha Vidyalaya the others were army officers/soldiers.

An examination of the evidence in the case reveals certain significant features, namely,

1. that almost all the persons abducted were school children studying in Grades 10, 11, and 12 classes.
2. majority of the abducted children were students of Embilipitiya Madya Maha Vidyalaya where the 1st accused-appellant was the Principal.
3. that the parents of the abducted students soon after the abductions had hurried to the 1st accused-appellant to complain about the abductions crying for help from him knowing the close relationship between the Principal and the army personnel.
4. that the manner and the time of abduction in most cases were similar.
5. that most of the abducted children had been taken directly to the Sevana army camp.
6. that most of the parents were under the impression that their children had been involved in some illegal activity and that was the reason why the Army arrested them. Albeit, they expected that their children would be dealt with according to law. They did not want to believe that their children were not among the living, so much so that some mothers stood at the gate in tears for weeks expecting that their children would be released.
7. that most of the parents and relatives while giving evidence complained to court about the manner in which the local police treated them when they went to make complaints. Either the police did not want to record their complaints or even in cases where the police took down their statements, deliberately they had omitted to record vital matters they spoke of to the police.
8. that there was a fear psychosis prevalent among the people of the area during and after the relevant period. Except in few cases only the mothers testified to the abduction of their children.

One of the arguments adverted to by the learned Senior Counsel who appeared for the 1st, 3rd, 5th, 6th accused-appellants and the 7th accused-appellant (acquitted by this court during the argument) was that the prosecution has failed to establish beyond reasonable doubt the pre requisite intention to establish the offence of abduction. He argued that if the prosecution fails to show that such intention was entertained by the accused-appellants at the time of abduction, then the prosecution should fail.

Section 353 of the Penal Code defines the term "abduction" in the following terms:

> "Whoever by force compels or by deceitful means, or by abuse of authority or any other means of compulsion induces any person to go from any place is said to abduct that person."

According to the above definition the essence of abduction lies in inducing or compelling any person to go from one place to another in one of the following ways:

(1) by force

(2) by abuse of authority or any other means of compulsion

(3) by use of deceitful means.

In the instant case the prosecution witnesses spoke of their children being taken away either by use of force or by deceitful means.

The charges of abduction have been levelled against the accused-appellants, on the basis, firstly that the students were abducted with intent to cause them to be secretly and wrongfully confined and secondly, for compelling or inducing of the victims for the following purposes:

(a) to murder

(b) be so disposed of as to be put in danger of being murdered.

It must be observed here the fact that the purpose specified in the charge was not in fact accomplished does not exculpate an accused from criminal liability, so long as the offence of abduction is proved to have been committed with that purpose in mind.

There is no doubt that in a charge of abduction intention is a necessary ingredient. It does not mean that the test applied is a subjective test to be proved by the prosecution beyond reasonable doubt. It has been held that the actual intention of the abductors at the time of abduction could be inferred from the circumstances, such as the time and manner of removal, the number of persons engaged in the enterprise. Vide the judgment of Sansoni, J. in *Queen* v *M.Murugesu* [1] at page 16. Hence the test applied is an objective test.

The learned Senior Counsel who appeared for the 1st, 3rd, 5th and 6th accused-appellants contended that the abductors could not have entertained both intentions namely an intention to wrongfully confine

the abductees and an intention of murdering or disposing of the abductees so as to put them in danger of being murdered referred to in the two sets of charges on abduction contained in the indictment. In dealing with this contention, we must be mindful of the legal position that the offence of abduction is a continuing offence and that the principle of aggravation of liability on account of a specific intent is applicable to the offence of abduction. The full *mens rea* required for the specific intent is not expressed in the accused's immediate commission of the material acts of the offence, namely manner of entry to the houses of the abductees, manner of removal, the number of the persons engaged in the exercise, whether the abductees or their household members protested or not, whether the abductees used force or not or took them by deceitful means. The evidence in the case reveals that intention of murdering or disposing of the abductees so as to put them in danger of being murdered superimposed on the primary intention entertained by the abductors namely to cause the abductees to be secretly and wrongfully confined. Hence the intention required to establish liability for the aggravated offence is a combination of the general intent which is the feature of the basic offence and the particular intention which is peculiar to the more serious offence. Vide Chapter 11 of G.L. Peiris's "General Principles of Criminal Liability in Ceylon". The evidence in the case clearly establishes that the abductions were primarily for the purpose of secretly and wrongfully confining the abductees. The prosecution also has established that after arresting the abductees they had been tortured at the Sevana camp which was the abode of the accused-appellants, made use of them to get information and thereafter disposed of the abductees. Hence it can safely be inferred that the prosecution has through circumstantial evidence (discussed later in the judgment) has proved the specific intent required to establish liability for the aggravated offence. In view of the material set out above we are unable to agree with this contention of the learned Senior Counsel.

If an accused had any intention other than what is suggested by the natural circumstances of the case the burden lies upon him under section 106 of the Evidence Ordinance to prove his innocence. Vide *R* v *Mohamed Sidiq* AIR(2) (1938) Lahore, 474.

The learned Deputy Solicitor-General strongly submitted that the learned trial Judge has taken into consideration the manner of abduction of these abductees from their parents. Further the learned counsel

invited our attention to the prevailing circumstances at Embilipitiya during this period and that those circumstances also be looked into when considering the issue of abduction.

It is evident from the testimonies of witnesses who spoke of the removal of their children by giving them the impression that their children had done something against the law and it was for that reason that the Army Officers stationed at Sevana army camp took away their children, they thought that their children would be dealt with according to law. But they later realised that their children were never to be seen again alive or dead.

Considering the manner of abduction, in some cases the abductors had come under the guise of police officers. They got the inmates of the house to open the doors for them to enter and take away the abductees, stating that they were from the Police. In some cases they came under the guise of "deshapremi" members. In cases where the inmates were reluctant to open the doors they broke open the doors and came in. In some cases they took away the abductees by force and in that process assaulted or caused physical harm and harassment to the parents and relatives of the abductees as well. In some cases children were taken away by deceitful means telling the parents and the relatives that they were being taken away for the purpose of recording a statement. Parents never ever saw their children so taken alive or dead. Witnesses described the dress the abductors wore. Some wore shirts and sarongs, some shirts and shorts. One abductor had covered his head with a cap in one occasion and a towel on another occasion. Most of the abductions had been executed in the night, forcing the inmates to switch off the lights with a view to conceal their identity. In fact they terrorised the inmates.

The learned President's Counsel who appeared for the 2nd accused-appellant went on to say that in order to curb the insurrection the Army officers were authorised to arrest any person. It should be noted that such a position was never taken up at the trial. However, the learned Deputy Solicitor-General met this argument by submitting that if they came as Army officers without hiding the identity and arrested them that could have been lawful and he may not have any complaint to make as to the manner of abduction.

In this regard we would refer to the testimonies of some of the parents recounting the manner in which the abductors conducted them-

selves at the time they took away the children. Some children were hiding under the bed when they were mercilessly dragged out. Sujatha Kalugampitiya who was the Principal of Moraketiya Maha Vidyalaya from 1980 up to 1996, is the mother of Rasika Wijetunga. She described what happened on 6 November 1989. Around 11.30 p.m. she woke up hearing the door bell. She hesitated a while and then proceeded to the window to see who were around. She saw two persons in army uniform in the compound. At that point of time her daughter as well as her son Rasika Wijetunga were up. They heard somebody knocking at the door heavily saying that they were from the police. So saying they broke open the door.

At that time there was a light burning near the Lord Buddha's picture which was hung near the front door. There was another light burning near her deceased husband's photograph. There was a big light burning at the centre garden. One of the persons entered the house and ordered them to switch off the lights. He asked for Rasika. He was wearing a T-shirt with a round neck and a sarong. He was wearing a cap as well and was holding a torch in one hand and a pistol in the other. That person got hold of her son Rasika Wijetunga and told the witness that he would send her son back in half an hour. That was the last time she saw her son alive. The abductor's face was familiar to her because she had seen him before. She had seen him after the abduction at the old Sevana camp when she went in search of her son. Then he was in uniform. At the trial this witness identified the 3rd accused-appellant as the person who came into her house and removed her son Rasika Wijetunga. It is significant that the 3rd accused-appellant and the others posed themselves as police officers. They came in the night, broke open the door armed with pistols and took away Rasika Wijetunga by deceitful means giving the assurance that he would be returned in half an hour.

Sirinawathie de Silva was the mother of Ruwan Ratnaweera, 16 years of age at the time of abduction on 16.11.89. The time was between 10 and 11 p.m. There was a lamp hung at the Buddha statue which was lit and there was a bulb illuminating the halo. She heard the door bell and queried as to who rang the bell, some persons from outside told her that they were from the police and ordered her to open the door. When she complied four persons entered the house and ordered her to switch off the lights. She switched off the lights in the house, nevertheless the lamp hung at the Buddha statue was not put off and was

still burning. They asked for Ruwan Ratnaweera. That time Ruwan Ratnaweera was sleeping at a friend's house at the Mahaweli Circuit. Therefore he was not in the house. The intruders had pistols. One of them got hold of her son Upali Ratnaweera, dragged him, hit him with the pistol and put him on the floor. They assaulted her eldest son Ananda Ratnaweera asking for the whereabouts of Ruwan Ratnaweera, put him also on the floor. Thereafter she said that the 2nd accused-appellant dragged her to the place where her two sons were lying and put her on the floor as well. Thereupon the 4th accused-appellant held her by her neck and throttled her, putting his hands from behind. She said she lost consciousness. The 2nd accused-appellant hit her again on her back and said "bitch give us the son that you bore". Thereafter the 2nd accused-appellant trampled the neck of her son Upali Ratnaweera and threatened to kill him if she did not tell the whereabouts of Ruwan Ratnaweera. Her daughter Nirmali and her husband Sirisena Wickremaaratchi who were in one of the rooms too were brought there. The 4th accused-appellant assaulted Sirisena Wickremaaratchi as well. Then they held Sirisena Wickremaaratchi from his neck and left the house with him in order to get hold of Ruwan Ratnaweera. It is significant to note that in this case too the abductors came in the night armed with pistols. They posed as police officers and entered the house. Then they assaulted the mother, father, Ruwan Ratnaweera's brothers and brother-in-law Sirisena Wickremaratchchi before they left with Wickremaaratchi with a view to abduct Ruwan Ratnaweera. In this instance witness identified the 2nd accused-appellant and the 4th accused-appellant out of the four people who entered her house that night.

Kankanam Pathiranage Lionel, is the father of Prabath Kumara 16 years of age abducted on 17.11.89. He testified that on that day between 12 mid-night and 1.00 a.m. he heard a knock at the door, ordering him to open the door saying that they were from the Kuttigala Police. When he opened the door he found two of his sons friends Dammikka Kumara Baragamaarachchi and Susil Kumara at the door step in the company of five persons who were in army uniform. Two of them came to the house and one of them assaulted his younger son and asked for Prabath Kumara. He identified these two persons who came in as the 5th and 6th accused-appellants. When he told them that the son was living elsewhere they ordered him to come with them to show the place. They were armed with T56 guns. Thereafter he was

put to a white coloured van. Apart from Dammikka Kumara and Susil Kumara, there were a number of persons inside the van. He saw Anura Gonawala also inside the van. Lionel was ordered to lie down on the floor of the van. At some place the army officers alighted from the van along with Anura Gonawala and at that point of time another boy who was inside the van spoke to him. He identified him as Principal Thunkama Jayasena's son Chamara Jayasena. In fact Chamara Jayasena had been abducted on 11.11.89. Thereafter the army officers came back with Anura Gonawala and along with them they brought another person who was blind folded. Thereafter Lionel was asked to cover his face with his sarong and took him to Garusinghe Arachchilage Sirisena's house where Lionel's son was sleeping. They wanted Lional to call Sirisena. He called him "Garu Garu" and when Sirisena opened the door the army men asked him whether there was a guest in his house. Then he had said that "the son of the person who called him" was there. Thereafter they took Prabath Kumara and pushed Lionel to Sirisena's house and closed the door. Lionel in his evidence categorically spoke on the participation of the 5th accused-appellant and the 6th accused-appellant in all these episodes. His evidence unveiled before the trial Court the manner in which not only his son was abducted but also how Dammikka Kumara Baragamaaratchi, Susil Kumara, Pradeep Wijesinghe and Chamara Kumara were abducted.

Upul Janaka Perera, a Graduate of the Ruhunu University (at the time of giving evidence) was himself abducted on 7.11.89. That was the time when he was inquiring about his missing brother who had been abducted and seen at the Sevana camp on 30 October 1989 by his mother and father. He was arrested around 4 a.m. on that day by the 5th accused-appellant. He was taken on the pretext of getting him to show the house of one of his friends. When he queried from the 5th accused-appellant about his brother he was hit on his head with the pistol the 5th accused-appellant was carrying with him saying that he was "too talkative". When Upali Janaka was taken out he was wearing only a sarong. He was pushed into a white coloured van and when he turned towards the occupants he was assaulted and ordered to cover his face with the sarong he was wearing. He was naked then. He was taken to Sevana camp and there he was asked to wear his sarong again. That point of time he saw 15 to 17 persons tied on to a chain. They were naked. He was later released. His evidence not only

showed the manner in which he was abducted and the ordeal he had to face but also how the abductees were kept inside the Sevana camp waiting for their Doomsday.

We have considered not only the evidence of these witnesses referred to above but also the evidence elicited from the other witnesses as to how their children or relatives were abducted by the accused-appellants. The prosecution has furnished sufficient evidence to prove inferentially that the abductors had abducted the persons referred to in the charges firstly, with intent to cause them to be secretly and wrongfully confined and secondly, in order that such person be murdered or be so disposed of as to be put in danger of being murdered. We hold that on the evidence led before the trial Court such a conclusion is irresistible. In the circumstances the submissions adverted to by the learned Counsel that the evidence did not establish a charge of abduction should fail.

The learned Senior Counsel who appeared for the 1st, 3rd, 5th, 6th, and 7th accused-appellants made a submission with which the two President Counsel also associated themselves with, that in a charge of conspiracy the facts placed before the trial Court should be such that they cannot fairly be admitted to another inference being drawn from them. The learned counsel contended that the evidence led by the prosecution in this case was insufficient to establish the agreement/common purpose participation. What is conspiracy is defined in section 113A of the Penal Code in the following terms:

> "If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting 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 law does not envisage the prosecution to prove any direct concert or even any meeting of the conspirators. Vide the judgement of H.N.G. Fernando, C.J. in *Queen* v *Liyanage*.[3] As common to most of the conspiracy charges in this case too the prosecution had to rely upon circumstantial evidence to prove its case. What is important is the cumulative effect of the totality of the evidence led before the trial court.

It is not necessary to lead any evidence to establish that the conspirators had met, put their heads together and then agreed to execute

their common purpose. It is not necessary to prove that they knew each other earlier. Yet in establishing detached acts of each of the accused related to the main design the prosecution can proceed to establish the conspiracy itself. Vide R v *Miller*(4), *Queen* v *Parnel*(5). Even though the Counsel appearing for the 1st accused-appellant endeavoured to make a good samaritan out of the 1st accused-appellant for the reason that almost all the parents whose children were abducted hurried to him for help the evidence elicited in the case pertaining to his conduct, the utterances he made and his acts clearly establish that he was the main conspirator around whom the rest revolved. Vide *R.* v *Meyrick*(6) at 102.

The prosecution has placed cogent evidence to establish the fact that the 1st accused-appellant had a motive to get rid of certain students earmarked by him. Even though before he came to Embilipitiya Madya Maha Vidyalaya as its Principal he supported the students cause agitating against a portion of the school playground being acquired to put up a filling station the students unrest continued even after his coming there as its Principal. Situation was aggravated by certain incidents relating to a love affair the 1st accused-appellant's son is supposed to have had with Pavitra Ranmali a girl studying in Grade 11A. In this regard Sujatha Kalugampitiya mother of abductee Rasika testified that the 1st accused-appellant had requested her to get from her son Rasika who was supposed to be having in his possession a love letter. As a result of this love affair there had been a division among the students of Grade 11A. Sujatha Kalugampitiya further spoke of an incident where the students had hooted and jeered at the 1st accused-appellant when he was passing the Grade 11 classes after a meeting with the parents. The prosecution story is that in order to put an end to the student unrest the 1st accused-appellant got round the army personnel at Sevana camp. We find evidence of motive adduced against the 1st accused-appellant is cogent, convincing. It has been held that such evidence of motive strengthens and advances the prosecution case, Vide *Kenuman*, J. in *King* v *Appuhamy*(7) at 132 *King* v *Haramanis*(8) 48 at 534.

The prosecution has elicited from the prosecution witnesses that the 1st accused-appellant had developed a close relationship with the army personnel stationed at the Sevana camp. The witnesses spoke of the presence of army officers inside the Principal's office, the school garden and his residence. Sujatha Kalugampitiya spoke of certain

utterances made by the 1st accused-appellant to her on a number of occasions. One such utterance was "If the students demonstrate the army would take them away". On one occasion he made the following utterance: "I have discussed a plan with Mahesh Danasuriya and Kodikara, 7 or 8 fellows will be abducted on the same day". When she queried from him what he meant, he said "what do you know madam? We are not going to do it. That may be done by the army in the night". Even though the 1st accused-appellant requested her to give a list of names of trouble makers, she told court she never obliged. The evidence of this witness brought to light in no uncertain terms the desire of the 1st accused-appellant to get rid of certain students he had earmarked with the assistance of the army personnel stationed at the Sevana camp.

Rosalin Wickremasinghe, the mother of the abductee Mahindapala spoke of an utterance made by the 1st accused-appellant when she went to seek his assistance to rescue her son abducted on 4.1.90 around 10.30 p.m. When she complained about the abduction the 1st accused-appellant made a telephone call in her presence. She recounted the telephone conversation as follows: "Hello Mr. Senaratne, did you go anywhere last night? Did you find the stuff? Did you take the stuff to the beef stall? Did you bring Mahindapala? I will come to the camp in the evening".

Thusani Apsara Jayasena who was studying in Grade 11A in 1989 a Prefect, in her evidence before the trial Court regarding the abduction of her brother Chamara Sudarshana Jayasena on 11.11.89 spoke of the presence of two armed men at the Principal's office. In fact she had seen the 5th accused-appellant Senaratne on a number of occasions present in the Principal's office. These are some of the evidence that was elicited from the prosecution witnesses at the trial which go to show not only the existence of very close relationship between the 1st accused-appellant and the army personnel of Sevena camp, but that he conspired with the men in uniform to engage in an illegal exercise of abducting the students. The evidence relating to the manner in which they carried out the illegal exercise of abducting these students clearly establishes that they had intention and thereby they become partners in the crime. The detached acts of the different conspirators relative to the main design are admissible as steps to establish the conspiracy itself. Vide *R* v *Miller* (*Supra*).

The prosecution also has led cogent evidence to establish the conspiracy to abduct students through witnesses who had deposed to certain acts done by the accused-appellants to show that they acted together with a common purpose.

In this regard an important item of evidence which was placed before the trial Court by the prosecution was the evidence of Upul Janaka Perera. He had been abducted by the 5th accused-appellant on the pretext of getting him to show the house of one of his friends. He was taken blind folded and naked. He was taken to the Sevana camp and there they ordered him to remove the sarong with which he was blind folded and wear it. That point of time he knew he had been taken to the Sevana camp. He saw 15 to 17 persons tied up to a chain. Thereafter he was taken to a hall. He found the 1st accused-appellant comfortably seated on a sofa. The 4th and 5th accused-appellant too were present. At that point of time the 1st accused-appellant introduced the witness to the 4th accused-appellant and wanted him to release him. Then Manelka too was brought in there and he too was released. Thereafter the witness and Manelka were put into a white coloured van. The 1st accused-appellant also got into the van and it was driven by the 5th accused-appellant. Later on they were dropped at their residences. This is a vital item of evidence which came up before the High Court unimpugned and unchallenged which would go to establish the conspiracy.

In the course of his submissions the learned Deputy Solicitor-General invited our attention to the manner in which the 1st accused had conducted himself in the school. Sujatha Kalugampitiya, Principal Moraketiya Maha Vidyalaya categorically stated to Court that on one occasion she saw a pistol covered with a handkerchief and an object which she thought to be a hand grenade placed on the 1st accused's table at his office. Further she testified that on one occasion when students hooted at him she saw the 1st accused-appellant going out carrying that object with him. Thilaka Piyaseeli Wijekone, mother of Nalin Kumara Gunaratne has testified that she had seen a pistol wrapped in a brown paper and an object which she thought to be a hand bomb with the 1st accused-appellant. Apsara Jayasena in her evidence testified that she had seen the 1st accused-appellant carrying a pistol. Such evidence also came from a teacher Maddumage Yasapala. It is interesting to note that the 1st accused-appellant's explanation was that the prosecution witnesses would have mistaken about a wood

apple he was carrying. The learned Deputy Solicitor-General's contention was that the 1st accused-appellant had the privilege of moving about carrying such weapons because he had the blessings of the army personnel who were frequently seen in the school premises.

Apparently during this time students unrest had been a common occurrence in most of the schools in Embilipitiya. It appears that even at Moraketiya Maha Vidyalaya where Sujatha Kalugampitiya was the Principal occurrence of students unrest had been there. Evidence show that student unrest had commenced prior to the large scale abductions of students from their parents. As we have already referred to this in our judgment, Sujatha Kalugampitiya testified that on one occasion immediately prior to these abductions the 1st accused-appellant had divulged a plan he had in mind to Sujatha Kalugampitiya. His utterance was to the following effect. "I have discussed about a good plan with Mahesh Danasuriya and Kodikara. 7 or 8 fellows will be abducted on the same day." The word used was "උස්සාවි" Perturbed by this utterance Sujatha Kalugampitiya had queried from the 1st accused-appellant what he meant. Then he uttered the following: "What do you know madam? We are not going to do it that will be done by the army in the night. You have only to give a list". When the 1st accused-appellant came as the Principal of Embilipitiya Madya Maha Vidyalaya which happened to be a respected and powerful position his main concern was to consolidate his position by suppressing the student unrest. In that process he had even threatened the students indirectly with death. Apsara Jayasena, Prefect at the time when these abductions took place spoke of an incident where the 1st accused-appellant had threatened the students of Grade 11 in the following way: "උඹලා තේක්ක කැලයට යන්නද දහලන්නේ"

Apsara Jayasena described what was meant by this phrase "තේක්ක කැලේ" vide page 531 Vol. 11. She said "උඩ වලවේ හමුදුවෙන් ගෙන ගිහින් පුච්චන තැනක් කියලා" The learned Deputy Solicitor-General contended that it is an external manifestation of the intention of the 1st accused-appellant. In her evidence Apsara Jayasena said that the 1st accused-appellant addressed Chamara Jayasena as "Tunkama Chandiya". Rasika Wijetunga as "Moraketiya Weeraya" Ruwan Ratnaweera as "Kunfu-Karaya".

It is pertinent now to refer to section 10 of the Evidence Ordinance which reads as follows:

"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, done, or written by any one such persons in reference to their common intention, after the time when such intention was first entertained by anyone of them is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it".

For the application of section 10 what is required is specified in the following phrase, "where there is reasonable ground to believe". We have carefully considered the above utterances made by the 1st accused-appellant which indicates the 1st accused-appellant's complicity with the army in executing these abductions which in fact took place soon afterwards. We have already referred to the manner in which these students were abducted by the army personnel attached to Sevena Camp secretively, concealing their identity using force which clearly manifests that they were knowingly executing an illegal exercise.

The 1st accused-appellant had totally denied such utterances made to Kalugampitiya but the learned trial judge who had the benefit of seeing the demeanour and deportment of the 1st accused-appellant as well as witness Sujatha Kalugampitiya, accepted Sujatha Kalugampitiya's evidence that the 1st accused-appellant made such utterances and rejected the bold denial by the 1st accused-appellant. The learned trial Judge was satisfied with the testimonial trustworthiness of witness Apsara Jayasena.

The learned Deputy Solicitor-General when addressing us on the evidence relating to conspiracy submitted that this court should consider the evidence relating to the 1st accused-appellant's conduct as well when some of the students were abducted and it was brought to his notice. He referred to the case of Manelka de Silva. Manelka de Silva was abducted on 1 December 1989 in broad day light while he was playing cricket. Shortly afterwards Manelka's brother Dilan Niroshan de Silva who had witnessed the abduction and recognised the abductors had gone to the Principal's house (1st accused-appellant) along with his mother and father and had informed him of the abduction. According to Dilan Niroshan de Silva when this complaint was made, school teacher Jayatissa too was there. Jayatissa for some

reason was a reluctant witness who kept silent on this identity of the abductors except the fact that he saw two persons going away with Manelka de Silva. In fact the army camp according to the evidence in the case was just 200 yards away from the school premises and there is ample evidence to show at that point of time army officers were seen frequenting the school premises, the Principal's quarters as well. One of the witnesses Amarapala in giving evidence before the learned trial Judge has stated that on one occasion he heard the army officers addressing the 1st accused-appellant as "uncle". On this occasion the 1st accused-appellant did not take any steps either to go to the camp to ascertain what happened to Manelka or any other meaningful step. Manelka was a student of his school. It is significant to note that there is no evidence whatsoever to indicate that when all these abductions of students from Embilipitiya Madya Maha Vidyalaya were taking place the Principal brought this to the notice of his Superiors in the Education Department or the Minister of Education, the Prime Minister or the President. This is something unbelievable.

According to Tilaka Piyaseeli Wijekoon when she met the 1st accused-appellant to bring to his notice the abduction of her son Nalin Kumara Gunaratne the 1st accused-appellant made an utterance to the following effect: "Children may be burnt on the roads dead bodies may float in the rivers. Nalin will not fall into those categories. Don't be scared of Nalin". Hence the inference one could draw from this utterance is that the 1st accused-appellant apparently had even foreseen what would happen to the abductees.

The 1st accused-appellant's guilty behaviour comes to light by the evidence of Soma Munasinghe an independent witness who was in charge of the Grade 11 A class at the time these abductions had taken place. According to her document marked P1 was a temporary register prepared by her on the basis of the previous years register marked P2. Her evidence was that in P1 the temporary register she has prepared for that year she had the names of the following students in the following order: No.10 in the register marked P1 was the name Rukman Paranavitana.

No. 5 was Ruwan Ratnaweera.

No. 20 was Rasika Kumara Wijetunga.

No. 15 was Chamara Jayasena.

No. 12 was Manelka de Silva.

Soma Munasinghe's evidence was a vital item of evidence for the

prosecution. By then these students had been abducted. The 1st accused had directed Soma Munasinghe before two months of continuous absence from school was over to delete their names when preparing the new register. This teacher an independent witness categorically stated that in order to delete the name of a student from the school register at least a period of two months of continuous absence has to be there. This vital item of evidence clearly shows that the 1st accused-appellant was very much aware that the abducted students will never come back to school. In fact they never returned and went missing forever.

In this regard an item of corroborative evidence comes from witness Sirinawathie, mother of Ruwan Ratnaweera that when she complained to the 1st accused-appellant about her son's abduction he had told her that there are five boisterous students in the Grade 11 class and that he would eradicate the cancer.

Evidence of utterances made by the 1st accused-appellant, the 2nd accused-appellant, 5th accused-appellant had been placed before the trial Court by the prosecution to establish the complicity the 1st accused-appellant had with the army personnel to carry out the plan the 1st accused-appellant had in his mind. These utterances were admissible evidence in terms of section 10 of the Evidence Ordinance. In our view these statements thus become part of the *res gestae.*

We have already referred to the statements made by the 1st accused-appellant to Sujatha Kalugampitiya about a plan he had discussed with Kodikara and Mahesh Danasuriya. According to Sujatha Kalugampitiya she had seen the 2nd accused-appellant on a number of occasions after her son was abducted to get her son released. On one occasion the 2nd accused-appellant had said "Rasika was a naughty boy. We will make him a good boy and send him back in five years time." Thereafter her evidence was when she met him again at Mount Lavinia Army Camp he had told her not to look for her son anymore because he is not amongst the living.

Leelawathie testified before Court in giving evidence relating to the abduction of Susil Kumara, that she met the 2nd accused-appellant at the Camp regarding the abduction of her son Susil Kumara. Then the 2nd accused-appellant had made an utterance to the following effect that the Principal (1st accused-appellant) had given him a list and he will take into custody all the students referred to in that list. In fact we have already referred to similar utterances made by the 1st accused-

appellant to Sujatha Kalugampitiya. There is also evidence of Rosalin Wickremasinghe, that when she went to see the 1st accused-appellant about the abduction of her son along with Kamala Kottegoda whose son Wasantha Ariyadarshana too had been abducted the 1st accused-appellant was alleged to have made the following telephone call: "Hellow Mr. Senaratne did you go anywhere last night? Did you find the stuff? Did you take the stuff to the beef stall? Did you bring Mahindapala. I will come to the camp in the evening". Thereafter the 1st accused-appellant assured her that her son will be released after two or three days time. Very correctly the learned trial Judge has come to the inference that when the 1st accused-appellant addressed one Mr.Senaratne in his telephone call he was speaking to the 5th accused-appellant whose name is Y.A.Senaratne.

Subsequently the 1st accused-appellant had told Rosalin Wickremasinghe that he went to the camp and that Mahindapala was brought before him and an army officer said "Your teacher has come. Tell him what you have done." The 1st accused-appellant told Rosalin that her son was involved in three murders, attacked the Army Camp and had collected identity cards.

Leelawathie mother of abductee Rukman Paranavitana saw the 1st accused-appellant regarding the abduction of her son. The 1st accused-appellant had given a letter through the 2nd accused-appellant to be given to the 3rd accused at the trial (acquitted by the learned trial Judge) and when she went to meet the 2nd accused-appellant along with the letter given by the 1st accused-appellant she found the 1st accused-appellant in the company of the 2nd accused-appellant.

Apart from that we have already referred to the evidence of Niroshan de Silva regarding the abduction of his brother Manelka de Silva and also Upul Janaka Perera a person who was abducted and released later relating to the involvement of the 4th accused-appellant and the 5th accused-appellant in the abduction of Manelka de Silva. When these items of evidence are taken together the cumulative effect of these circumstances proved by the prosecution would be that an irresistible conclusion could be arrived at that these accused-appellants were the perpetrators of the conspiracy to execute the abductions of the students referred to in the charges levelled against them.

Question would arise whether the accused-appellants were falsely implicated in the charges levelled against them by the prosecution wit-

nesses. In fact the counsel for the accused-appellants made submissions to that effect.

In the case of Palitha Alfred his mother Ran Menika had seen three persons entering her house. But she identified only the 5th accused-appellant out of the nine accused who were in the dock because her position was that she knew him before. In the case of the abduction of Prabath Kumara it was from Garusinghe Arachchilage Sirisena's house in his presence that Prabath Kumara was taken by the abductors. But at the trial he did not identify any of the abductors.

In the case of the abduction of Palitha Lakshman Ranasinghe his mother Dayawathie Ranasinghe testified that when her son was abducted on 7.12.89 a number of persons entered her house but she identified only the 5th accused-appellant as one of the abductors. She also spoke of an incident on 20.12.89 when they heard the voice of her abducted son, apparently the son was not shown to them as they were made to lie on the floor, face downwards. On that occasion of the persons who came she identified not only the 5th accused-appellant but also the 3rd accused-appellant. If she wanted to falsely implicate the 3rd accused-appellant as one of the abductors who came on 17.12.89 to abduct her son she could well have done so. Rasika Wijetunga's mother Sujatha Kalugampitiya when pointing out the abductors who took away her son on 06.11.89 she identified only the 3rd accused-appellant as one of the abductors. On the following day when she went to the Army Camp she met the 2nd accused-appellant who had in fact given her the assurance that her son would be handed back to her. Had she wanted to falsely implicate him as one of the abductors, she could have done so.

There are instances even though charges of abduction had been preferred against the accused there was no evidence before court relating to the identity of the abductors. Therefore our conclusion on this matter is there is no evidence before trial court for the learned trial Judge to come to a conclusion that the accused-appellants were falsely implicated and that there was some hidden hand behind it.

One of the main objections taken by all Counsel who appeared for the accused-appellants was that the evidence of identification adduced before the learned trial Judge was evidence of dock identification and that the trial Judge should not have relied upon such evidence of identification, in view of the dangers involved in such means of identification specially because such evidence can "bring about miscarriage of jus-

tice." Vide *Regina* v *Turnbull* [10] at 228 and therefore worthless. *Vide* *Gunaratne Banda* v *The Republic* [11].

If the witness did not know the accused earlier and in the absence of an identification parade the identification in court becomes a "first time" identification in court or a dock identification. Vide E.R.S.R. Coomawaswamy's The Law of Evidence Vol.1 page 256.

Most of the witnesses whose evidence was led relating to the abductions complained of to the trial court about the lackadaisical attitude of the Embilipitiya Police. This can be understood because it is apparent from their very conduct as deposed to by witnesses that the police did not want to investigate into these complaints of abductions against the officers of the army detachment stationed at Sevana Army Camp and the Government of the day too was under pressure because of the Southern insurrection.

In some cases the local Police refused to take down the complaints. In some cases even if they took down the complaints they have distorted the complainant's version or omitted to record the vital matters. In fact Sujatha Kalugampitiya, Principal of Moraketiya Maha Vidyalaya complained of how the Embilipitiya Police refused to record the complaint in regard to the abduction of her son Rasika Wijetunga. Upul Janaka Perera testified that consequent upon a radio announcement inviting parents whose children had been abducted to make a complaint to the police, he went to the Embilipitiya Police to make a complaint about the abduction of his brother. He was turned away by the Police telling him that if the abductee was inside the Army Camp there was no need to make a complaint. The same complaint comes from the mouths of almost all the witnesses who testified to the abduction of their children which is a special feature in the case which the learned trial Judge should necessarily take into consideration in terms of Section 3 of the Evidence Ordinance. Vide the observations made by H.N.G. Fernando, C.J. in *L. Edrick de Silva* v *Chandradasa* [12] at 174.

It is observed that the learned trial Judge while considering the contradictions and omissions has referred to the "no action" attitude of the local police and the partisan approach of some of the CID officers as deposed to by the prosecution witnesses, reluctance of some of the parents to implicate the army officers through fear. In the course of protracted cross-examination of Sujatha Kalugampitiya, she was asked why she did not mention to the police about the request made by the 1st accused-appellant to give a list of names of trouble makers among

the students and the fact that the 1st accused-appellant was seen with a pistol and a bomb at his office. She described to the trial court the prevailing situation in Embilipitiya at that time. The local police did not even record the complaint of her son's abduction. We have already referred to the evidence of Upul Janaka Perera in this regard.

The learned trial Judge has accepted the explanations given for omissions by witnesses and also the delay in making complaints. In the attendant circumstances of this case the test of Spontaneity and Contemporaneity cannot be applied. Hence, quite rightly it appears that the learned trial Judge has applied the test of Probability and Improbability in the evaluation of the evidence in the case. In the attendant circumstances of the case, we hold the view that it was the correct test. In *The Queen* v. *Pauline de Croos* (13) Justice T.S Fernando observed that delayed evidence can be acted upon if there was reason to explain the delay.

It is to be observed that at the relevant period when these abductions were taking place law enforcement in Embilipitiya was at a stand still because of the prevailing situation. As we have already referred to above Upul Janaka Perera in his evidence disclosed that when he went to the Embilipitiya police in response to a radio announcement inviting the parents to make complaints to the local police if their children had been abducted the police turned him away saying that since the abductee is in the Sevena Camp it is not necessary to make a complaint. Weeragedara Sumanawathie, the mother of Peduru Hewa Nihal came out with a similar story. In these circumstances we are of the view that the appellants are not entitled to complain that no identification parades were held. The principle being "*Nemo allegans suam turpitudinem non audiendus est*". No one ought to be heard when he asserts his own turpitude.

The learned Senior Counsel who appeared for the aggrieved parties submitted that the evidence relating to the identification of an accused person would fall into one of the following categories: firstly, where a witness has the prior knowledge of the accused as well as his name. Secondly, where the witness has the prior knowledge of the accused but not his name. Thirdly, where the witness sees the accused within a reasonable time after the incident but before the trial. Finally, where the witness does not have the prior knowledge of the accused and see him for the first time at the dock after seeing him at the crime scene. This identification is commonly referred to as "dock identification". The

learned Senior Counsel submitted that according to the evidence led in the case the identification evidence would fall into one of the first three categories. He cited the case of Niroshan de Silva's evidence relating to the identification of the 4th accused-appellant and the 5th accused-appellant. He had seen the two accused-appellants and had come to know their names prior to seeing him at the crime scene, namely the abduction of his brother Manelka de Silva.

It must be observed that the law relating to identification as it stands today does not shut out evidence of dock identification. Albeit, decided cases emphasize the need for caution before convicting an accused on the basis of such identification. The learned trial Judge must examine closely the circumstances under which the identification by the witness came to be made. For example, for how long did witness have the accused under observation, at what distance, in what light, was the observation impeded in any way, had he any special reason for remembering the accused. All these matters would go to the quality of identification. vide the judgment of Lord Widgery, C.J. in *Rex* v *Turnbull.(supra)* In examining the evidence relating to the means of knowledge the witnesses had of the abductors at the time of abduction we are well possessed of the guidelines laid down in Turnbull.

At this juncture it is pertinent to look into the merits of another ground adverted to by the learned Counsel appearing for the 1st, 3rd, 5th, 6th and 7th accused-appellants. The ground he urged is that all the abduction charges were preferred on the basis of common intention under section 32 of the Penal Code. He submitted that there is no indication in the judgment that the learned trial Judge was even alive to the principles relating to common intention. His contention is that the Appellate Court cannot look into the evidence sitting in appeal in order to ascertain whether there is evidence of common intention. It must be noted that the judgments cited in support by the learned counsel were relating to jury trials. Albeit, even in appeals from the jury verdict the Appellate Judges have themselves carefully considered the evidence led at the trial and given their minds to the issue whether had the jury being properly directed would have brought the same verdict. In *King* v *Appuhamy*[14] which was a case where the trial Judge has not emphasized to the jury that under section 32 of the Penal Code to support a charge of murder the common intention must itself be a "murderous intention" within the meaning of section 294. In this Judgment Keuneman, SPJ arrived at the following conclusion:

"We have carefully considered the evidence and come to the conclusion that, had the jury been correctly instructed, they would at least have found in this case that all these accused were actuated by a common intention, to cause grievous hurt".

We do not think there is any constraint in the Appellate Courts perusing, examining and considering the evidence in a case tried by a High Court Judge without a jury. In this regard the learned Deputy Solicitor-General referred us to the provisions of section 334 which deals with determination of appeals in cases where trial was by jury and section 335 which deals with determination of appeals in cases where the trial was without a jury. Our function is to examine the evidence in the case in order to satisfy ourselves with the assistance of Counsel that there is evidence upon which the trial Judge should have reached a verdict which he came to and that there has not been any misdirection or non direction. In this case as is evident from our judgment we have very carefully sorted out all the evidence relating to the abduction charges preferred against each of the accused-appellants in order to see whether the prosecution has established circumstantially inculpatory facts against the accused-appellants which are incompatible with the innocence of the accused-appellants and incapable of an explanation or any other reasonable hypothesis than of their guilt.

With regard to the submission that the learned trial Judge should have set forth the principles of common intention, circumstantial evidence etc., the learned Deputy Solicitor-General referred us to the provisions relating to jury trials set out in the Code of Criminal Procedure Act. In a jury case an accused is tried by his own Peers. The jurors are ordinary laymen. In order to perform their duties specified in the section 232 of the said Act, at the commencement of the trial the learned trial Judge has to inform them of their duties. At that stage he may also direct them briefly on presumption of innocence, the burden of proof and other principles of law as may be relevant to the case. Vide section 217 of the Act. In the mandatory provisions of Section 229 of the Act when the case for the prosecution and defence are concluded the learned trial Judge should charge the jury, sum up the evidence and lay down the law by which the jury are to be guided. Hence in appeal the Judges will look into the charge to the jury to see whether these provisions of law have been complied with and whether the jurors were properly directed by the trial Judge.

In a trial by a Judge of the High Court without a jury it is significant that there are no such provisions similar to section 217 of the Act, for example to set forth the basic principles of criminal law, i.e. the presumption of innocence, the burden of proof etc.

We do not see any requirement similar to section 229 that he should lay down the law which he is to be guided. The reason being that the law takes for granted that a Judge with a trained legal mind is well possessed of the principles of law, he would apply. In appeal the Appellate Judges will consider whether in fact the learned trial Judge was alive and mindful of the relevant principles of law and has applied them in arriving at his conclusion. We have very carefully perused and considered the trial Judge's judgment pertaining to the above aspect and come to the conclusion that there is hardly any merit in the submission advanced by the learned counsel.

Of the accused-appellants the 3rd accused-appellant, 4th accused-appellant, 5th accused-appellant and the 6th accused-appellant in their dock statements have taken up a defence of alibi, for the period specified in the indictment within which the abductions had taken place. The abduction of students in respect of whom verdict of guilty was entered at the trial by the learned trial Judge took place on the following dates: Palitha Alfred and Sanath Priyantha were abducted on 3 August 1989; Sanath Chaminda Wijekone was abducted on 16 October 1989; Jagath Chaminda Kumar Dissanayake was abducted on 19 October 1989; Rasika Kumara Wijetunga was abducted on 6 November 1989; Chamara Jayasena and N.A. Jayatilaka were abducted on 11 November 1989. Susil Kumara was abducted on 12th November 1989; Ruwan Ratnaweera was abducted on 16 November 1989. Damikka Kumara Baragamaaratchi, Prabath Kumara and Pradeep Kumara Wijesinghe were abducted on 17 November; Peduru Hewa Nihal was abducted on 20 November 1989; Rukman Paranavitana and Manelka de Silva were abducted on 1 December 1989; Palitha Lakshman Ranasinghe Guruge on 17 December 1989; Nalin Kumara Gunaratne was abducted on 26 December 1989 and Mahindapala Wickremasinghe was abducted on 4 January 1990.

Evidence in support of an alibi means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time, he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission. Vide *R* v. *Hassan*[15].

A plea of alibi is provided for in terms of section 11 of the Evidence Ordinance which makes any fact which is inconsistent with a fact in issue or a relevant fact also relevant. What is meant by the term "inconsistency" is the physical impossibility of co-existence of two facts. Vide Illustration A to section 11 of the Evidence Ordinance.

The alibi taken up by the 3rd accused-appellant covers a period from 30.10.89 to 08.12.90. His position was that he was at the Diyatalawa camp during that period following a junior officers course. In support of his alibi the following documents were produced marked 5V4, 5V5, 5V6, 5V11, 5V7, 5V9, and 5V9 (a). The alibi taken up by the 4th accused-appellant covers a period from 28.11.89 to 04.01.90. His position was that he was at the Panagoda camp during that period. The alibi taken up by the 5th accused-appellant covers two periods; firstly, 01.10.89 to 20.10.89 during which time he was following a course at Panagoda. After that 30.10.89 to 14.11.89 he followed a repeat course at Panagoda camp. In support of his alibi produced the documents marked 7V 33(2), 7V 38, 7V 34(2), 7V 35, 7V 32(6), 7V 32 (7), 7V 32(8), 7V 32(9), 7V 33(3), 7V 34(3), 7V 40, 7V 39, 7V 41(2) (a), 7V 32(a). The 6th accused-appellant's alibi covers a period from 01.08.89 to 14.08.89. His position was he was at the Panagoda camp during that time. Further he has taken up the position that from 3rd October to 13th October he was on leave for his mother's funeral.

The learned Deputy Solicitor-General submitted that there was no allegation of abduction against the 6th accused-appellant except in one case for the latter period he had taken leave for his mother's funeral. That was the case of Dayananda Ekanayake's abduction. The learned trial Judge disbelieved the witness and acquitted the accused of that charge. The fact that there were no allegations of abduction during this period against the 6th accused-appellant would speak to the *bona fides* of the prosecution version of the abductions. He was following a repeating course from 30.10.89 to 14.11.89. The register relating to leave had been elicited from Lt. Tennakoon produced marked 7V 34(3) and 7V41,7V 41(1).

In respect of an alibi what is expected of the defence is merely to create a doubt in the mind of the Judge. If the alibi is accepted or even if it is not accepted yet there is a doubt created in the Judge's mind the prosecution should fail.

The learned Deputy Solicitor-General submitted that in this case what the accused-appellants had put forward was a general alibi and there was no positive evidence before the learned trial Judge to the effect that the accused-appellants were elsewhere at the time the offence was committed so as to exclude his presence at the place of the offence or the crime scene. Vide Wills, Circumstantial Evidence 7th Edition page 289.

The documentary evidence led on behalf of the accused-appellants relates to movement orders which show only movement from one place to another. It would merely show that he would have been there at the place mentioned in the movement order. It should be borne in mind that the defence of an alibi should be established by unsuspected testimony. The learned Counsel for the State submitted to Court that there is no such testimony of an alibi in respect of each of the accused placed before the trial Judge.

The learned Deputy Solicitor-General referring to the cross-examination of each prosecution witness relating to each count by the defence Counsel submitted that none of them have been cross-examined on the basis of an alibi.Credibility of an alibi is greatly enhanced if it be set up at the time when the accusation is first made and is consistently maintained thereafter and if such a defence is taken up belatedly the weight of the defence is weakened.

The learned Deputy Solicitor-General brought to the notice of Court that in the Habeas Corpus applications filed against some of these accused-appellants alibi defence was not taken up. Anyway, he submitted that since similar format had been used in the affidavit of the respondents to the Habeas Corpus applications, he is reluctant to take up that infirmity.

Anyway on record fact remains that at the first opportunity the accused-appellants have not taken up such defence to exculpate themselves from liability. Even in the dock statements no explanations have been given by the accused-appellants why that alibi defence was not taken up in the Habeas Corpus application.

Apart from the documents relating to movement orders there is no supporting evidence to make out a case of alibi defence. In the case of the 3rd accused-appellant evidence of Major Manoj Perera was called on his behalf. In the course of his evidence he took up the position that

he did not have an independent recollection whether this accused-appellant was physically present attending the course. Witness was a Course Commander. At one stage he told Court that he was in charge of a parallel course where the accused was not a participant. Whereas, later on he shifted his original position and took up the position that mid way he came to be in charge of the course which this accused-appellant was supposed to be following. This shifting of positions taken up by this witness was observed by the learned trial Judge when considering the witness's demeanour and deportment at the time of giving evidence. Hence the learned trial Judge has disbelieved his evidence.

On a perusal of the judgment we find that the learned trial judge has considered the defence evidence of alibi and weighed it in the balance with the prosecution evidence and has rejected it. In these circumstances, we do not see any reason to interfere with that conclusion the learned trial Judge arrived at in rejecting the alibi defence taken up by the above mentioned accused-appellants at the closure of the prosecution case, in their dock statements.

The 1st accused-appellant has given evidence on oath. His testimony in effect was a denial of liability to the two conspiracy counts preferred against him. In his evidence he has attempted to distance himself from the army with whom, according to the prosecution witnesses he had conspired to abduct their children. The 1st accused-appellant offered two reasons as to why he was implicated in the conspiracy. Firstly, his refusal to accede to the request of Sujatha Kalugampitiya to carry out a protest campaign against the abduction of Rasika Kumara and secondly, his refusal to accede to the request made by the parents of the missing children to be the Chairman of their Association. These positions were not put to the prosecution witnesses in cross-examination. The learned trial Judge who had the advantage of observing the demeanour and the deportment of the witnesses did not accept him as a credible witness. We in our judgment have upheld the convictions against him where we were of the view that the prosecution has proved its case beyond reasonable doubt and we have set aside the convictions and acquitted him where the convictions were not supported by evidence.

The 2nd accused-appellant made a dock statement when called upon for his defence. According to him he was one of the staff officers assigned to the Co-ordinating Officer. He was stationed at the Mahaweli Circuit. His work involved the office administration and

assisting the Co-ordinating Officer in carrying out the essential services in the area. He did not have any powers to arrest persons. In his dock statement he spoke of the JVP activities prevalent in Embilipitiya during that time. His statement in effect was a bold denial of liability whereas, the prosecution has established incriminating circumstances against him which called for an explanation from him.

A submission was adverted to by the learned President's Counsel who appeared for the 4th accused-appellant that in most of the abductions the prosecution has relied upon the evidence of a sole eye witness to the incident without any corroborative evidence, even though there had been others present who were alleged to have witnessed the incident.

There is no such requirement in law of evidence. The provisions of Section 134 of the Evidence Ordinance postulates that evidence should be evaluated and weighted and not counted. That section sets out that no particular number of witnesses are required for proof of any fact. This principle has been applied by the Indian Supreme Court where the conviction rested solely on the evidence of a solitary witness who gave circumstantial evidence in regard to the accused's liability. Vide *Mulluwa* v. *State of Madhya Pradesh*(16). The Privy Council upheld the conviction. This principle has been adopted with approval and applied in the judgment of Justice G.P.A. de Silva in *Walimunige John* v. *State*(17) at 495. The principle applied is that testimony must be weighed and not counted. If the trial Judge was satisfied with the testimonial trust worthiness of a witness even though he is the sole witness relied upon by the prosecution to establish the incident the learned trial Judge could act upon such evidence.

We have already dealt with the evidence of Soma Munasinghe Grade 11A class teacher at the relevant time in dealing with the conspiracy charges. She has testified that the 1st accused-appellant who was the Principal had instructed her to delete five names contained in the temporary register marked P1 prepared by her, when preparing a permanent register sometime later. Those five names were

1. Rasika Kumara Wijetunga
2. Manelka de Silva
3. Rukman Paranavitana
4. Ruwan Ratnaweera
5. Chamara Jayasena

In dealing with these abductions we are very much conscious of the plan the 1st accused-appellant had to get rid of the trouble makers among the students as deposed to by Sujatha Kalugampitiya, his intention of getting rid of five "boisterous students" in 11A class who were a cancer as deposed to by witness Sirinawathie de Silva and death threats he had made to the students of Grade 11A as deposed to by Apsara Jayasena. We are also possessed of the utterance made to Don Leelawathie mother of abductees Susil Kumara and Susantha Kumara by the 2nd accused-appellant that he had a list given by the 1st accused-appellant and that he would abduct all the students who are in the list.

Rasika Kumara Wijetunga had been abducted on 6.11.89. In the course of his mother, Sujatha Kalugampitiya's evidence she spoke of the following matters:

1. the presence of army personnel in the Principal's office, school premises and his residence carrying weapons.
2. the student unrest in schools, especially at Embilipitiya Madya Maha Vidyalaya.
3. that on one occasion while the Principal was passing the Grade 11 A class after a meeting with the parents he was hooted and jeered at by the students.
4. her seeing a pistol covered with a white handkerchief and an object which she thought to be a hand grenade on the Principal's table. Apparently Apsara Jayasena and a teacher Jayatissa had also spoken of seeing weapons with the 1st accused-appellant.
5. Disclosure by the 1st accused-appellant to Sujatha Kalugampitiya about a plan he had in mind to get rid of the trouble makers with the assistance of the army secretively.
6. The 1st accused-appellant was under the impression that Rasika Wijetunge was one of the students responsible for creating a rival group against the love affair with the1st accused-appellant's son (2nd accused at the trial) supposed to have had with Pavitra Ranmali, a girl studying in Grade 11A.

In addition to the above facts this witness being a Principal herself had placed a vivid picture of how her son Rasika Wijetunga was abducted on 6.11.89. She identified the 3rd accused-appellant as he entered the house for the reason that his face was quite familiar to her

and when he held her son she gazed at his face for quite sometime. It was at a short distance she saw him when she pleaded with him not to take the son away. The 3rd accused-appellant had told her that he would return Rasika in half an hour's time. Though she switched off the lights at the behest of the abductors the lamp hung at the Buddha statue, and her deceased husband's picture still kept on burning. The above matters have to be taken into account in deciding the quality of identification.

In this case this witness is not an ordinary woman. She was the Principal of a school at the time. Her evidence is that she had seen the 3rd accused-appellant at the camp few days after the incident as well. Therefore Sujatha Kalugampitiya's means of knowledge of the 3rd accused-appellant has been established by the prosecution at the trial. The learned counsel who appeared for the 1st, 3rd, 5th and 6th accused-appellants relying upon the Test of Spontaineity and Contemporaneity contended that the statement made by this witness to the CID was made after a lapse of a period of nearly three years and as such the trial Judge should not have relied upon her evidence. In fact the same contention was raised in respect of the other witnesses who spoke of the abduction of their children as well.

This aspect was considered by Justice Ninian Jayasuriya in *Madawala Samarakoon Mudalige Ajith Devapriya Samarakoon* v *The Republic* (18) where the same point was raised regarding the evidence of the sole eye witness to the killing of Mananlage Malini *alias* Nilanthi. In this case eye witness Chulasiri made the first statement to the police after a lapse of one and a half years from the date of the crime. The learned Judge observed thus: "just because the statement of a witness is belated the Court is not entitled to reject such testimony". In applying the Test of Spontaineity and Test of Contemporaneity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a "belated statement." In the instant case the learned trial Judge has taken into consideration the reasons elicited from the prosecution witnesses as to the belatedness of their statements and also the background of events at the time. It is to be observed that no contradiction or omission has been marked in her statement to the CID on this point. The learned trial Judge has

accepted her as a truthful witness. Therefore we do not see any reason to interfere with the finding of guilt arrived at by the learned trial Judge against the 3rd accused-appellant.

Soon after the incident the witness Sujatha Kalugampitiya had met the 2nd accused-appellant who had assured her that her son Rasika Wijetunga was in the camp. According to her he had taken 50% responsibility for the safety of Rasika Wijetunga. He had promised Sujatha Kalugampitiya that he would give Rasika back to her in about 5 years time after making him a "good boy". She had kept faith and trust on this officer's assurance. She had seen him several times after her son's abduction and she had not filed a *Habeas Corpus* application because she thought by doing so the lives of her other children too would be in danger. Finally, when she met the 2nd accused-appellant at Mount Lavinia Army Camp in January he had told her that Rasika Wijetunga is no more among the living and it is pointless looking for him.

The learned President's Counsel for the 2nd accused-appellant contended that the alleged utterances by the 2nd accused-appellant have been made after Rasika Kumara Wijetunge was abducted. Therefore the learned trial Judge could not have acted upon that evidence. Through Sujatha Kalugampitiya the prosecution has established that the 2nd accused-appellant was well aware of the abduction of her son when she met the 2nd accused-appellant soon after the abduction. He had given the impression to Sujatha Kalugampitiya that he would give back her son after correcting him. It is on this assurance that Sujatha Kalugampitiya had seen the 2nd accused-appellant on a number of occasions, until he had intimated to her that her son was no longer among the living. It must be borne in mind that there was overwhelming evidence against this accused-appellant in respect of a number of other abductions as well. In the circumstances we are unable to accept the submissions made by the learned President's Counsel on behalf of the 2nd accused-appellant.

The learned trial Judge has rightly rejected the defence of alibi taken up by the 3rd accused-appellant and the dock statement made by the 2nd accused-appellant. He had disbelieved the denial by the 1st accused-appellant of having conspired with the army to get rid of the students.

In the circumstances we affirm the conviction of the 3rd accused-appellant for abduction on counts 5 and 30 and the conviction of the

1st accused-appellant and the 2nd accused-appellant for conspiracy under counts 2 and 4 and the sentences imposed on them.

Ruwan Ratnaweera who was a student of Grade 11A was abducted on 16 November 1989 around 11 p.m. The abductors had come posing as police officers. Four persons had come into the house. According to Sirinawathie, mother of Ruwan Ratnaweera she switched off the lights when ordered to do so by the abductors. However, the lamp hung at the Buddha statue kept burning. This witness had given a vivid description of the physical harassment she and the rest of her family was made to undergo. She described in detail each and every act done by the 4th accused-appellant and the 2nd accused-appellant. She recounted the utterance made by the abductors which was to the following effect: "bitch give us the son that you bore". The ordeal she herself had to undergo, her husband, two sons, daughter and the son-in-law had to undergo until the intruders went away taking with them the son-in-law Sirisena Wickremaaratchi, had been elicited by the prosecuting counsel. They abducted Ruwan Ratnaweera who was at the time sleeping in the house of a friend, as deposed to by Wickremaaratchi. The evidence of identification spoken to by this witness was not that of a "fleeting glance" referred to in *Rex* v *Turnbull* (*supra*). She had sufficient time and opportunity to identify the persons who had made her and the members of her family to suffer such ordeal, namely, holding them and dragging them, assaulting them, putting them on the floor, throttling Sirinawathie's neck, trampling the son's neck, threatening to kill him if Sirinawathie did not reveal the whereabouts of Ruwan Ratnaweera.

Sirinawathie further testified that sometime after the abduction of her son she went to see Sujatha Kalugampititya to her house. There she had seen the 2nd accused-appellant and told Sujatha Kalugampitiya that he was the person who took away her son. The learned President's Counsel who appeared for the accused-appellant contended that the prosecution should have clarified this position from Sujatha Kalugampitiya. Anyway in his dock statement the 2nd accused-appellant stated to Court that he had visited Kalugampitiya's house on a number of times. The learned trial Judge has believed this witness Sirinawathie. This item of evidence would strengthen the position taken up by Sirinawathie that she did identify the abductors at the time they came into her house.

No Habeas Corpus application has been filed relating to the abduction of Ruwan Ratnaweera. The learned Deputy Solicitor-General in this regard submitted to Court that at that point of time the grievance was against the authorities for holding their children illegally, while some parents were still under the belief that their children were still alive and would be released some day. Some of the parents were still in fear to institute any action against the army personnel. Hence considering the background of events we do not hold the failure of some parents to file Habeas Corpus applications should have any adverse effect on the creditworthiness of their evidence. The learned Judge has rightly rejected the defence of alibi and their dock statements. We do not see any reason to interfere with the findings of guilt arrived at against the 2nd and 4th accused-appellants by the learned trial Judge.

Sirinawathie de Silva recounted that her son prior to the abduction told her about an utterance made by the Principal to wit: "you will be taken by the army but I will save you. Don't tell your mother." In the totality of evidence led in relation to this abduction we affirm the convictions of the 2nd accused-appellant, and the 4th accused-appellant on counts 7 and 32 and the conviction of the 1st accused-appellant, 2nd accused-appellant and the 4th accused-appellant on conspiracy charges and also the sentences imposed on them. We acquit the 3rd accused-appellant and the 5th accused-appellant-appellant on the conspiracy charges.

Regard to the abduction of Manelka de Silva on 01.12.89 convincing and cogent evidence has been elicited through his brother Niroshan de Silva, 13 years of age at the time. He has testified how his brother while playing cricket was taken away by the 4th accused-appellant and the 5th accused-appellant. They were no strangers to him for the reason that he had seen them coming to his house on a previous occasion and taking away his brother Manelka de Silva. Even prior to that this witness had seen the two accused-appellant playing cricket with the school children in the school playground. On the first occasion Niroshan de Silva got to know the names of the two persons from his father, that was on 6.11.89. The learned President's Counsel appearing for the 4th accused-appellant citing *R.* v *Olivia*[19], and *Walimunige John* v *State* (*supra*) contended that the prosecution should have called Niroshan de Silva's father to corroborate Niroshan's testimony on this point. It is to be noted that in the latter case G.P.A.

Silva, S.P.J. Wijayatilake, J. and Pathirana, J. agreeing confirmed the principle laid down in *K.* v *Chalo Singho* (20) that the prosecution is not bound to call all the witnesses on the back of the indictment or tender them for cross-examination. We are of the view that the failure to call Niroshan de Silva's father as a witness does not in any way affect the veracity of Niroshan de Silva's evidence on this point. The learned trial Judge has been satisfied with the creditworthiness of this witness. We reiterate here the principle enunciated in *Mulluwa* v *State of Madhya Pradesh* (*supra*) that testimony must be weighed and not counted. On 07.11.89 Niroshan had seen his brother being brought back in a van driven by the 5th accused-appellant. He saw the 1st accused-appellant also in the van. Regarding this item of evidence there is corroborative evidence coming from an independent source Upul Janaka Perera, who had seen the 1st accused-appellant seated on a sofa along with the 4h accused-appellant and the 5th accused-appellant at the Sevana camp. Upul Janaka Perera also testified as to how he and Manelka were released by the 4th accused-appellant at the behest of the 1st accused-appellant. Adducing evidence regarding the abduction of Manelka de Silva, Niroshan de Silva spoke of how Rukman Paranavithana went up to them and queried why they were taking away Manelka, and how the two accused-appellants warned him that the same fate would befall on him that very night. Evidence revealed that the 4th and 5th accused-appellants in fact carried out that threat given to Rukman Paranavithana.

The learned President's Counsel who appeared for the 4th accused-appellant submitted that the learned trial Judge should not have relied on this witness Niroshan de Silva for the reason that he did not make a complaint either to the local police or the CID. Having already lost one child it is quite natural that the parents through fear of losing this child as well did not want to expose him to any danger. But when Habeas Corpus application was filed against the 4th and 5th accused-appellants Niroshan de Silva had made a statement to the learned Magistrate. We are aware of the evidence of retired Supreme Court Judge Mr. J.F.A. Soza, that even at the inquiry about the missing persons some witnesses were still reluctant and scared to give evidence against the army or police personnel. Defence of alibi taken up by the two accused-appellants was rightly rejected by the learned trial Judge.

The learned trial Judge has accepted the testimonial trustworthiness and creditworthiness of this witness Niroshan de Silva and has acted upon his evidence in convicting the 4th and 5th accused-appellants for the abduction of Manelka de Silva on counts 27 and 52. We see no reason to interfere with his finding. We affirm the conviction of the 1st accused-appellant, 4th accused-appellant and 5th accused-appellant on the conspiracy charges as well. We proceed to acquit the 2nd accused-appellant and the 3rd accused-appellant on counts 2 and 4 relating to the abduction of Manelka de Silva.

Evidence relating to the abduction of Rukman Paranavithana on 1.12.89 was adduced by his mother Leela Gamage. The abductors had come to her house around 11.30 p.m. and ordered the inmates to open the door saying that they were from the police. Anyway Leela Gamage has testified that she did not open the door because she was aware of the incident that had taken place in the afternoon. She in fact was referring to the utterances made by the 4th accused-appellant and the 5th accused-appellant to Rukman Paranavithana when he queried from them as to why they were taking away Manelka de Silva. That point of time they had given him the warning that the same fate would fall on him as well that night. This evidence was elicited from Niroshan de Silva. When the inmates did not open the door they broke open the door and entered the house. According to her it was the 4th accused-appellant who broke open the door. When Leela Gamage highly excited gazed at the intruders one of them said " මේකි දිවිදෙන වගේ බලා ඉන්නවා". She had a torch light with her. She saw the 4h accused-appellant and the 5th accused-appellant armed with pistols. She had seen them earlier at the Principal's office and also while they were playing with the school children.

At the trial this witness has identified the 4th and 5th accused-appellants. In respect of these two accused-appellants the prosecution was able to establish the means of knowledge because she had seen them before. In addition, she identified the 2nd and 3rd accused-appellants as the other persons who came in. This witness also spoke of going to the Sevana camp along with a letter given by the 1st accused-appellant addressed to the 3rd accused (at the trial) to be given through the 2nd accused-appellant. When she went to the camp she had seen 1st accused-appellant along with the 2nd accused-appellant. In a shortwhile later she saw the 1st accused-appellant coming out

holding the hand of the 2nd accused-appellant. The latter after opening the letter said "son is not there anymore". That was on 01.01.90. According to her at the time of abduction the 3rd accused-appellant was wearing a turban. Her evidence in respect of the 3rd accused-appellant seems to be only visual identification at the time the offence was committed. In the Habeas Corpus application the 2nd, the 4th and the 5th accused-appellants had been made respondents. We affirm the conviction of the 4th accused-appellant, the 5th accused-appellant, the 2nd accused-appellant for abduction charge counts 11 and 36. We also affirm the convictions of the 1st accused-appellant, 2nd accused-appellant, 4th accused-appellant and the 5th accused-appellant for conspiracy charges. We acquit the 3rd accused-appellant of the charges relating to the conspiracy and abduction charges namely counts 2, 4, 11 and 36 for the reason that the evidence available against him is insufficient to allow the conviction to stand.

Evidence relating to the abduction of Susil Kumara comes from his mother Don Leelawathie. This boy was abducted on 12.11.89 at 5 a.m. When there was a knock at the door ordering them to open it they were reluctant to open the door. She had switched on the lights of the sitting room. Then the abductors had broke open the door, come in and asked for Susil Kumara. She had observed the presence of about 8 persons. Of the abductors she identified the 4th accused-appellant and the 5th accused-appellant. Her means of knowledge was that she had seen both of them before. Later on at the trial she identified the 2nd accused-appellant also as one of the persons who had come to abduct her son.

As regard the implication of the 4th accused-appellant the learned President's Counsel strongly urged that Don Leelawathie's evidence relating to the identification of the 4th accused-appellant should be rejected, for the reason that in the Habeas Corpus application No. 415/92 filed by her husband Y.U.K. Munidasa the 4th accused-appellant was not a respondent. He rightly pointed out that Don Leelawathie speaks of the presence of her husband when the abductors came in search of Susil Kumara. Therefore the learned Counsel submitted that a reasonable doubt arises as to whether Don Leelawathie did in fact identify the 4th accused-appellant being present among the abductors. We uphold the submission of the learned President's Counsel and acquit the 4th accused-appellant of the charge of abduction in counts 13 and 38. Don Leelawathie had met the 2nd accused-appellant at the

Sevana Camp and pleaded with the 2nd accused-appellant to release her son. That point of time the 2nd accused-appellant had demanded her to surrender the elder son Susantha in which case he would release Susil Kumara, the younger son who was just 16 years of age. The 2nd accused-appellant had told her that he had a list given to him by the 1st accused-appellant and that he would abduct all the students who were in that list. Later she had come to know that the elder son Susantha too had been abducted. Then she rushed to the 2nd accused-appellant and pleaded with him to release the younger child Susil Kumara because her elder son was then in custody. The reaction of the 2nd accused-appellant was as follows: "you did not give the elder son when I asked for him now both are with us". He refused to accede to her plea. Susantha Kumara had been abducted from the aunt's house. Aunt Rosalin Premaratne was unable to identify the abductors. The 1st accused-appellant in his evidence did not refute the utterances alleged to have been made by the 2nd accused-appellant to the effect that the 1st accused-appellant had given a list of names of the students to be abducted.

There is corroborative evidence coming from witness Lionel, father of Prabath Kumara, who spoke of seeing this child and Dhammika Kumara Baragamaaratchi at his door step along with the person who abducted his son Prabath Kumar on 17.11.89. In fact Lionel's evidence was that the abductors had come in a van with students already abducted. Lionel speaks of the presence of the 5th accused-appellant among the abductors. Therefore we see that there is strong evidence before court for the learned trial Judge to convict the 2nd and the 5th accused-appellants for the abduction of Susil Kumara. There is no reason for us to interfere with the finding of guilt entered by the learned trial Judge in respect of the 2nd and 5th accused-appellants.

We affirm the convictions of the 1st accused-appellant and the 2nd accused-appellant on counts 2 and 4. There is no sufficient evidence to implicate the 4th accused-appellant in the abduction. Hence we proceed to acquit him of counts 13 and 38.

Rosalin Premaratne from whose house Susantha Kumara was abducted did not identify any of the abductors. Learned Deputy Solicitor-General quite rightly did not support the convictions of the 1st accused-appellant and the 2nd accused-appellant on counts 2 and 4 relating to that abduction. We acquit them on those counts.

It is significant that the abduction of Dammika Kumara Baragamaaratchi, Pradeep Kumar Wijesinghe and Prabath Kumara had taken place on the same day 17 November 1989.

Evidence relating to the abduction of Pradeep Kumara Wijesinghe came from his grandmother Korale Jayasinghege Hamine and Anura Gonawala. Pradeep Kumara Wijesinghe was a student of Udagama Maha Vidyalaya. He was abducted on 17.11.89 in the night. According to her on that day Pradeep was sleeping in a friend's house. Around 1.00 o'clock in the night she heard a voice from outside ordering the inmates to open the door saying that they were from the police. Reluctantly when she opened the door three people had entered the house. She did not know one person. She knew the other two and she identified the 5th accused-appellant and the 6th accused-appellant. The fact that she knew them at that point of time was not impugned in cross-examination. When Hamine opened the door according to Anura Gonawala, she had a lamp with her and Anura Gonawala said that one of the intruders flashed a torch. Anura Gonawala was a friend of her other son Weeraratne.

That night Anura Gonawala and another friend Ajith were sleeping at Hamine's house. They asked for the whereabouts of her grandson Pradeep Wijesinghe. Hamine spoke of the 6th accused-appellant assaulting her son Weeraratne with a club. Thereafter the intruders left the house taking Anura Gonawala along with them. Anura Gonawala corroborated the evidence of Hamine regarding the fact that three people entered Hamine's house getting her to open the door on the pretext that they were from the Police.

Anura Gonawala spoke of how he was put into a white coloured van in which there were a number of other persons. He was asked to sit down inside the van. Thereafter they went to the house of Dayananda where Pradeep was sleeping that night and brought him also to the van. He also noted some persons wearing camouflage dresses. Pradeep too was assaulted. Anura Gonawala testified to the presence of the 6th accused-appellant. He had seen the 6th accused-appellant before at the Sevana camp. The learned trial Judge has evaluated the evidence of Hamine and Gonawala relating to the identity of the persons who came in search of Pradeep Kumara Wijesinghe that night. They were the 5th and 6th accused-appellants. In fact the presence of these two accused-appellans in that white coloured van in

which there were a number of persons already abducted was elicited from Prabath Kumara's father Lionel when he gave evidence relating to the abduction of Prabath Kumara. In fact Lionel in his evidence spoke of seeing Anura Gonawala inside the van. Therefore we are of the view that the learned trial Judge has come to a correct finding on the facts when he arrived at the conclusion that the 5th and 6th accused-appellants were guilty of the abduction of Pradeep Kumara Wijesinghe. The learned Deputy Solicitor-General submitted during the course of his submissions that there had been a Habeas Corpus application in respect of Pradeep Kumara Wijesinghe in which both these accused-appellants had been made respondents.

We affirm the conviction of the 5th and 6th accused-appellants on counts 26 and 51.

Dammika Kumara Baragamaaratchi was a student of Udagama Maha Vidyalaya and was 15 years and 11 months of age at the time of abduction. He was abducted on the same day on which Pradeep Kumara Wijesinghe and Prabath Kumara were abducted, namely 17.11.89. That day there had been some dispute between the students of Udagama Maha Vidyalaya and Uda Walawe Maha Vidyalaya at a cricket match. Evidence in this case comes from his mother Abeywickrema Kankanamalage Menik Hamy. Around 11.45 p.m. in the night some people had spoken to the inmates from outside ordering them to open the door saying that they were from the police. At that time Dammika Kumara Baragamaaratchi's brother and Manik Hamy's sister's son and her husband were present in the house. When the door was opened two persons entered the house. One was in a commando suit and was carrying a gun. She had seen the army officers before at the camp. She had seen them carrying weapons as well. She said this person was carrying a T56 gun. They asked for her son Dammika Kumara. She described in detail how her husband was handled by the intruders when he cried aloud. She identified the 5th accused-appellant as one of the intruders. He was wearing a tee-shirt over his trouser. She also identified the 6th accused-appellant. She had seen both of them at the camp before. Thereafter they had carried Dammika Kumara Baragamaaratchi away. It was around 11.45 then. Menik Hamy did not know the names of the two accused-appellants at that point of time. Later on when she went in search of her son to the camp she came to know their names as Senaratne and Upul Kariyawasam. Corroborative evidence has come from Manik Hamy's

husband Somapala Baragamaaratchi who too had identified the 5th and the 6th accused-appellants as the two persons who entered his house and took away their son Dammika Kumara Baragamaaratchi.

Apart from these evidence coming from the mother and father of Dammika Kumara a vital item of independent corroborative evidence came from the testimony of Prabath Kumara's father Lionel who spoke of seeing Dammika Kumara Baragamaaratchi and Susil Kumara at his door step along with the abductors who took away his son Prabath Kumara. Lionel implicated the 5th and 6th accused-appellant in the abduction of his son Prabath Kumara.

In the light of the cogent and convincing evidence we do not see any reason to interfere with the finding of guilt arrived at by the learned trial Judge against the 5th and 6th accused-appellants. It is to be noted that a Habeas Corpus application had been filed against the 5th and 6th accused-appellants. We affirm the conviction of the 5th and 6th accused-appellants on counts 9 and 34.

Relating to the abduction of Prabath Kumara the prosecution adduced the evidence of his father Lionel and Garusinghe Arachige Sirisena from whose house Prabath Kumara was abducted on 17.11.89. It was around 12 mid-night when there was a knock at the door ordering the inmates to open the door saying that they were from Kuttigala Police. When he opened the door he saw at his door step two of his son Prabath Kumara' s friends. They were Dammika Kumara Baragamaaratchi and Susil Kumara. In fact Dammika Kumara Baragamaaratchi had been abducted on the same day. Of the persons who came into the house he identified the 5th accused-appellant and the 6th accused-appellant. When he told the intruders that Parabath Kumara was sleeping at a friend's house they took him out of the house and put him into a van and made him to lie down. Lionel observed the presence of a number of persons inside the van. Among the persons inside the van he identified Anura Gonawala and later on when someone called him, he saw Chamara Jayasena also lying inside the van.

Thereafter the van was stopped near his friend Garusinghe Aratachige Sirisena's house. He was asked to call his friend. Lionel testified that he called is friend "Garu Garu" and then Garusinghe Aratchige Sirisena had opened the door. Thereafter his son Prabath Kumara was taken out of Sirisena's house and the abductors pushed

him into Sirisena's house and closed the door. He spoke of the presence of the 5th and 6th accused-appellants throughout the journey. Garusinghe Aratchige Sirisena testified to the fact that he opened the door hearing the voice of Lionel and thereafter he was ordered by the persons who accompanied Lionel to hand over Lionel's son Prabath Kumara. He was sleeping at his house that night. Those persons thereafter took away Prabath Kumara pushing his friend Lionel into his house.

Lionel's evidence that he was brought to Sirisena's house that night in order to abduct his son Prabath Kumara was corroborated by Sirisena's evidence. Witness Lionel had the opportunity of seeing the 5th and 6th accused-appellants from the time they came into his house, during his journey in the van, until he was pushed into Sirisena's house by the abductors who carried away his son. Therefore we do not see any infirmity in the identification evidence that came up before the trial Court in respect of the identity of the 5th and 6th accused-appellants.

It must be observed that Susil Kumara and Chamara Jayasena had been abducted on a previous occasion. It can safely be inferred that the abductors, of whom the 5th and 6th accused-appellants had been identified in the abduction of Dammika Kumara Baragamaaratchi, Prabath Kumara and Pradeep Wijesinghe, had taken the abductees Susil Kumara and Chamara Jayasena along with them in the van for two reasons. Firstly, to gather information and to get them to show the houses of their friends who were to be abducted that night and secondly, to induce the parents to hand over the children when asked for by the abductors without making any fuss. They took Lionel and Anura Gonawala to get at Parabath Kumara and Pradeep Wijesinghe. Even though the evidence reveals that the abductors that night abducted Dammika Kumara first for the reason that Lionel's evidence is of vital importance relating to the other abductors that we have decided to deal with Prabath Kumara's abduction last. Apart from the fact that Lionel's evidence corroborates the evidence adduced to establish Dammika Kumara's and Pradeep Wijesinghe's abduction, his evidence do have a corroborative evidential value relating to the involvement of the 5th accused-appellant in the abduction of Susil Kumara as disposed to by his mother Don Leelawathie and 5th accused-appellant in the abduction of Chamara Jayasena as desposed to by the sister Apsara Jayasena.

In view of the above findings we affirm the conviction of the 5th and 6th accused-appellants on counts 10 and 35.

Dayawathie Ranasinghe who was a teacher at Embilipitiya Madya Maha Vidyalaya during the relevant period testified to the abduction of her son Palitha Lakshman Ranasinghe on 11.12.89 just two days after his GCE A/L examination. According to her the 1st accused-appellant was not well disposed towards her family because sometime prior to the abduction, the 1st accused-appellant had asked her husband for his van for some personal work. But her husband was unable to accede to his request for the reason that the vehicle was engaged in business work.

On 17.12.89 around 7 p.m. there was a knock at the door and some persons from outside ordered the inmates to open the door saying that they were from the police. At the time there was a chimney lamp burning inside the house and lamp lit at the Buddha statue. When her husband opened the door the 5th accused-appellant entered the house first. He was carrying a torch with him. He inquired about the persons living in the house. Thereafter carried away her son Palitha Lakshman Ranasinghe after locking the inmates in a room. Before the abductors left the house the 5th accused-appellant had demanded from her husband for the keys of his vehicle and her husband had to obey him.Thereafter the abductors left the house taking away Palitha Lakshman Ranasinghe and also the van.

On 20.12.89 around 2 a.m. the inmates were awakened on hearing the voice of their son calling the mother. "Mother, mother I came home open the door". On hearing the son's voice her husband said "Mage rattaran putha avada ?" and jumped out of the bed and hurried to open the door. But they did not see the son. At that point of time she identified the 5th accused-appellant and the 3rd accused-appellant. She had seen the 5th accused-appellant already on the day her son was abducted. The 3rd accused-appellant had covered his head with a towel at the time. The intruders made the inmates to lie on the floor and ransacked the wardrobes searching for something. Even though she heard the voice of her son, they never had the opportunity of seeing him on that day or any day thereafter.

Dayawathie Ranasinghe's identification of the 5th accused-appellant is not a dock identification because she had seen this accused-appellant on the day her son was abducted and again three days later.

Having assessed the evidence relating to the abduction the learned trial Judge has convicted the 5th accused-appellant as charged on counts 29 and 54. We do not see any reason to interfere with the finding of guilt arrived at by the learned trial Judge.

In order to prove the abduction of Peduru Hewa Dewage Nihal a Grade 10 student at Udagama Maha Vidyalaya on 20.11.89 the prosecution adduced the evidence of his mother Weeragedera Gunawathie. On that day around 12 mid-night some persons had ordered the inmates to open the door saying that they were "deshapremine". At that time there was a lamp burning in her house. When they entered the house her husband had armed himself with a club to attack the intruders. But before that one intruder had assaulted her husband with the butt of a gun. Thereafter they got hold of her son Peduru Hewa Dewage Nihal. When she objected one of the intruders had pointed a gun at her. The abductors were armed with guns and pistols. Amongst the accused in the dock she identified the 5th accused-appellant as one of the abductors.

Two weeks prior to the incident the 5th accused-appellant had come to her house in search of her sister's son Gunasekera. After the abduction she had seen him again at the Sevana camp. Therefore her identification of the 5th accused-appellant is not a dock identification. In fact it was under cross-examination she came out with the fact that the 5th accused-appellant was a person seen before. Having carefully assessed the evidence placed before the trial Court, the learned trial Judge has convicted the 5th accused-appellant as charged in the indictment.

Further, she testified that she filed a Habeas Corpus application where the 5th accused-appellant was made a respondent. She complained that when she went to make a statement to the local police, the police had turned her away saying if the son was abducted by the army they cannot entertain her complaint. It must be observed here that the learned trial Judge has given his mind to the alibi defence taken up by the 5th accused-appellant and has rejected it. We do not find any reason to interfere with the finding of guilt entered by the learned trial Judge and we affirm the conviction of the 5th accused-appellant on counts 19 and 44 and the sentences imposed on him.

The prosecution has failed to establish the charges relating to the abduction of Upul Shantha Rajapakse in counts 28 and 53.

Nevertheless the trial Judge has found the 1st an the 2nd accused-appellants guilty of conspiracy charges 2 and 4.

In the case of Pradeep Indika Malwatte the prosecution failed to prove the charges of abduction in counts 15 and 40. But the trial Judge has found the 1st and 5th accused-appellants guilty of conspiracy charges. The learned Deputy Solicitor-General quite rightly did not support the above convictions. Hence it is not necessary for us to peruse and consider the evidence relating to these two abductions. In the circumstances we proceed to acquit the 1st and 2nd accused-appellants on the conspiracy charges relating to the abductions of Upul Shantha Rajapakse. We also acquit the 1st accused-appellant and the 5th accused-appellant on conspiracy charges relating to the abduction of Pradeep Indika Malwatta.

Chamara Sudarshan Jayasena was abducted on 11.11.89 around 10 p.m. He was one of the five students referred to by teacher Somawathie Munasinghe that the 1st accused-appellant wanted to be deleted from the class register P1. According to Apsara Jayasena, sister of the abductee who was a Prefect at the time of these abductions, the abductors had broke open the door and asked for her brother. There was no electricity in her house because electric wires had been cut. But she said that there was sufficient light emanating from the lights illuminating the close by CTB Depot. Some of the intruders had torch lights. Of the 5 or 6 persons who came into the house some were in uniform, some in shorts and others in sarongs. One of them slapped her mother on her mouth. She has told Court that she very well remember this person's face and identified the 5th accused-appellant as that person. Then they searched the house for Chamara Jayasena. At that point of time her uncle N.E. Jayatilaka who was with them that night had come out. The abductors after getting at Chamara Jayasena who was sleeping in a room took away N.E. Jayatilaka as well. Apsara Jayasena had seen the 5th accused-appellant before at the Principal's office and after the abduction when she accompanied her father to the Sevana camp looking for her brother. She saw the 5th accused-appellant and came to know his name through her father. The learned trial Judge has accepted the trustworthiness of this witness.

To buttress her evidence implicating the 5th accused-appellant there is the testimony of Kankanam Pathirage Lionel, father of abductee Prabath Kumara. Lionel testified that he was being driven in

a van on 17 October '89 night to get at his son who was sleeping at Garusinghe Arachchige Sirisena's house. This witness has deposed to the presence of the 5th accused-appellant and the 6th accused-appellant inside the van throughout the journey while in the process of executing a number of abductions. While lying inside the van he heard someone addressing him, to wit "uncle, uncle tell my father that I was also in the van". He saw that it was Chamara Jayasena who was speaking to him. This item of evidence came unchallenged and unimpugned. The conduct of the 5th accused-appellant (along with the other abductors) taking away Chamara Jayasena on 11.11.89 and thereafter his conduct of taking Chamara Jayasena on 17.11.89 in the van referred to by Lionel along with Susil Kumara who had been abducted on 12.11.89 in the process of abducting Dammika Kumara Baragamaaracthci, Prabath Kumara and Pradeep Wijesinghe on 17.11.89 were highly incriminating circumstances established by the prosecution. Except for a bold denial on the basis of an alibi which the learned High Court Judge has rightly rejected there were no explanations afforded by the 5th accused-appellant (and 6th accused-appellant as well) for their incriminating conduct.

Having considered the above material, we affirm the conviction of the 5th accused-appellant for the abduction of Chamara Jayasena on counts 21 and 46 of the indictment and the conviction of the 5th accused-appellant for the abduction of N.E. Jayatilaka on counts 22 and 47 and affirm the sentences imposed on them.

Sarath Chaminda Wijekoon a student of Embilipitiya Madya Maha Vidyalaya was abducted on 16.10.89. His brother Upul Janaka Perera whose evidence we have already referred to testified to Court of the utterances made by the 1st accused-appellant to the effect that his brother Sarath Chaminda Wijekoon was a JVPer and that some strong action will have to be taken against him.

Their mother Padmini testified how on 16.10.89 around 9.00 p.m. some persons saying that they were "deshpremine" came in search of her son Sarath Chaminda, who had by then joined the International Centre for Training of Rural Leaders (ICTRL).When the intruders came to know that Sarath Chaminda was not living there they had taken the younger son Samantha to get at Sarath Chaminda.

What happened thereafter was deposed to by witness Ananda Ekanayake who had been abducted on an earlier date namely

13.10.89 and was taken to Sevana camp and was fortunate enough to have been released thereafter. He recounted that on a particular date he and some other abductees kept at Sevana camp were taken in a van by the army men and how on their way they brought Samantha a young child to the vehicle. Then they went to ICTRL and brought Sarath Chaminda blind folded and dropped Samantha on their way back to the Sevana camp. This witness categorically referred to the presence of the 5th accused-appellant who had a list with him. Ekanayake identified the 5th accused-appellant at the trial.

Padmini in her evidence has told Court that the younger brother was returned after half an hour's time. Soon after Padmini had seen the 5th accused-appellant at the Sevana camp. That was on 18.10.89. She was allowed to see her son on that date. She observed that his hands were swollen and that he was in pain. She had seen him again on 30.10.89. The 5th accused-appellant has failed to explain away the incriminating circumstances established against him.

The learned trial Judge has found the 5th accused-appellant guilty of the abduction of Sarath Chaminda Wijekoon as charged in counts 24 and 49. We affirm the conviction and sentence imposed on the 5th accused-appellant by the learned trial Judge.

Piyaseeli Wijekone the mother of Nalin Kumara Gunaratne giving evidence in Court stated that on 26.12.89 around 3.15 a.m. her son Nalin was abducted from house by a group of persons who claimed to be from the police. Out of the group two persons had come to her doorstep and she identified the 3rd accused-appellant as one of the person who came that night and abducted her son. It was her position that the lights were on for about five minutes before they ordered the light to be switched off.

When they went to meet the 1st accused-appellant before they could speak the 1st accused had said "wasn't Nalin taken away last night. He is in some place. Don't ask me for the place. He will be released in two or three days." Further the 1st accused had told her that it was Handawela who had given the names.

Apart from the above witness Piyaseeli Wijekone witness Saman Kumara de Silva who was a detainee at the Sevana camp speaks of having seen Nalin Kumara at the Sevana camp in late January 1990. On this evidence the learned trial Judge has convicted the 3rd accused-appellant on charges of abduction under counts 12 and 37 and sentenced him.

The only identification of the accused was in Court at the trial. It is relevant that although Habeas Corpus application No.407/92 had been filed by the father of the abductee the 4th accused-appellant had been made a respondent and not the 3rd accused-appellant. Hence there is a doubt whether Piyaseeli Wijekone's evidence could be relied upon.

This being the only evidence we are of the view that it is unsafe to act on mere dock identification of the 3rd accused-appellant several years after the incident. Accordingly we set aside the conviction of the 1880
3rd accused-appellant on counts 12 and 37 and acquit him of charges 12 and 37.

As regards the abduction of Sanath Priyantha the evidence came from Mohottige Lisinona the mother and Jayasuriya Arachchige Chandrawansa a detainee.

According to Lisinona the mother of Sanath Priyantha on 3 August 1989 around 10.30 p.m. a crowd of persons claiming to be from the police had threatened them to open the door and when they reluctantly opened the door they had walked in. Out of the persons who came in four were dressed in army uniforms and some were armed with 1890
guns. At the time they came the lamps were burning in the house.

At the trial this witness identified the 5th accused-appellant, 6th accused-appellant, and 7th accused-appellant as the persons who came into the house that night and abducted her son. She further said that she used to go to the camp to have a glimpse of her son and that she saw her son at the Sevana camp about one and a half months after he was abducted and that the 5th accused-appellant came upto her and asked what she was doing there. This witness in her evidence states that she had seen the 5th, 6th accused-appellants in the Sevana camp after her son was abducted. 1900

This witness has filed a Habeas Corpus application regarding the alleged detention of her son and has made on the 3rd accused (at the trial) and the 5th accused-appellant as respondents to the application. Her explanation as to why the 6th and 7th accused-appellants were not made respondents was that she did not know their names at the time of filing the Habeas Corpus application. That explanation was accepted by the learned trial Judge.

The 5th and 6th accused-appellant had admittedly been attached to the Sevana camp during the relevant period. Hence her evidence that she had seen him at the Sevana camp after the son's abduction 1910

can be believed. Therefore the identification of the 5th and 6th accused-appellants in court does not amount to a dock identification.

The learned trial Judge has convicted the 5th, 6th and 7th accused-appellants of the abduction of Sanath Priyantha on counts 18 and 43.

We have elsewhere in the judgment dealt with the alibi defence of the 5th and 6th accused-appellants and also the defence submission that the witnesses had failed to mention the names of the abductors in their statements made to the authorities prior to the trial.

The learned trial Judge having seen and heard the evidence of Mohottige Lisinona has accepted her evidence on the abduction and the identification of the 5th and 6th accused-appellants. We see no reason to disagree with the findings of the learned trial Judge against the 5th and 6th accused-appellant on counts 18 and 43.

Accordingly we affirm the conviction of the 5th and 6th accused-appellants on counts 18 and 43. As regards the 7th accused-appellant he has already been acquitted of the charges against him for the reason that he did not have a fair trial.

As regards the abduction of Palitha Alfred Gamage his mother Kandagamage Ramanayake gave evidence at the trial. According to her on 3.8.89 around 10.30 p.m. a crowd of people had come and knocked at the door saying that they were from the police. When the door was opened three persons in army uniform had entered the house armed with guns. The lights in the house were on at that time and the intruders had wanted their son Palitha to record a statement from him. The witness had identified the 5th accused-appellant at the trial as one of the persons who abducted her son on 3.8.89. She had seen the 5th accused-appellant at the Sevana camp after the son was abducted when she went there in the hope of seeing her son.

This witness had filed a Habeas Corpus application in respect of the abduction of her son and there is evidence that the 5th accused-appellant was made a respondent. According to her she had got to know the name of the 5th accused-appellant about 2/3 weeks after the son was abducted.

The learned trial Judge has convicted the 5th accused-appellant for the abduction of Palitha Alfred Gamage on counts 20 and 45 on the evidence of Kandagamage Ranmenika. She has identified the 5th accused-appellant with the aid of the lights burning in the house. She

has explained her means of knowledge. She has made the 5th accused-appellant a respondent to the Habeas Corpus application and as such we see no reason to disagree with the learned trial Judge in accepting her evidence and convicting the 5th accused-appellant on counts 20 and 45.

We therefore affirm the conviction and sentence of the 5th accused-appellant on counts 20 and 45.

Evidence with regard to the abduction of Jagath Chaminda Kumara Dissanayake comes from his father Seetin Dissanayake. According to this witness on 19.10.89 around 2.45 p.m. about 7 - 8 people came and entered his garden and three of them had come into the house and taken away the son. His wife and the other children too had been at home.

Both the witness and his wife had gone to the Sevana camp every-day since the abduction and according to him he had seen and recognized the 4th, 5th and 6th accused-appellants at the camp. As he saw them in he camp he had recollected that these three persons came to his house and abducted his son. He had got to know the names of these three persons from the sentry at the gate.

As this abduction has taken place at 2.45 p.m. the means of identification is not disputed because the abduction was in broad daylight. However in the Habeas Corpus application 418/92 only the 5th accused-appellant had been made a respondent and there is no explanation for not having made the 4th and 6th accused-appellants respondents to the application. No doubt it is his wife who had filed the Habeas Corpus application but it cannot be imagined that they would not have discussed the persons who were involved in the abduction prior to the filing of the Habeas Corpus application.

The learned trial Judge has convicted the 4th, 5th and 6th accused-appellants of the abduction of Jagath Chaminda Kumara Dissanayake on the evidence of Don Seetin Dissanayake.

There is uncertainty about the involvement of the 4th and 6th accused-appellants in the abduction for the reason that they were not made respondents in the Haebes Corpus application.

Therefore allowing the finding of guilt by the learned trial Judge against the 4th and 6th accused-appellants on charges 23 and 48 on the above evidence to stand is unasfe. Therefore we set aside the con-

victions and sentences against the 4th and 6th accused-appellants on counts 23 and 48.

However the evidence against the 5th accused-appellant is uncontradicted and as such we find the conviction of the 5th accused-appellant on the abduction of Jagath Chaminda Kumara Disssanayake on counts 23 and 48 on the evidence of Don Seetin Dissanayake is justified. We therefore affirm the conviction and sentence of the 5th accused-appellant on counts 23 and 48.

Mahindapala Wickremasinghe was a second year Advanced Level student at Embilipitiya Madha Maha Vidyalaya in 1989/90.

According to the witness Roslin Wickremasinghe the mother of Mahindapala on 04.01.90 around 10.30 p.m. about 4 - 5 people had come into her house and taken her son away stating that they want to record a statement from him. When they told that they would bring him the next morning to the police station her husband had been assaulted. A bottle lamp was burning in the hall then. She had identified the 3rd and 5th accused-appellants among them. This witness had seen them before the abduction of her son, once at a Shramadana at Embilipitiya Madha Maha Vidyalaya and also at the Sevana camp when going to the fair.

This witness also stated that when she met the 1st accused-appellant the day after the abduction, he telephoned one Senaratne in her presence. She recounted "Hello Mr. Senaratne did you go anywhere last night, did you get the stuff, did you put that stuff in the beef stall. Did you take Mahindapala. If so I' ll come to the camp."

After the conversation the 1st accused-appellant told her that the son will be sent back in 2 to 3 days. A few days later when she went there again he had told her "do you know what your son is up to? He has killed 3 people, collected ID cards, attacked the camp and can dismantle a T 56 into parts and fix it back." Further the 1st accused-appellant had told her that the officers at the Sevana camp had called her son upto him and told him "Here is your 'guru' now show what you can do". The 1st accused-appellant had finally told her that it was useless looking for the son and that she should bring the daughter well.

The witness has filed a Habeas Corpus application in respect of her missing son and made the 3rd and 5th accused-appellants respondents.

The identification of the 3rd and 5th accused-appellants at the trial does not amount to a dock identification as the witness had seen the two accused on several occasions before the abduction, as such we are satisfied with the learned trial Judge's acceptance of Roslin Wickremasinghe's evidence on the identity of the 3rd and 5th accused-appellants on the abduction of her son. As we have stated earlier their presence in the camp during the period is accepted and the defence evidence of alibi we have already dealt with elsewhere.

On this evidence the learned trial Judge has convicted the 1st, 2nd and 5th accused-appellants of conspiring to abduct Mahindapala Wickremasinghe and also convicted the 3rd and 5th accused-appellants for the abduction of Mahindapala.

However we find that there is no evidence to implicate the 2nd accused-appellant with the conspiracy to abduct Mahindapala. Therefore we acquit him of that charge.

On the evidence of Rosalin Wickremasinghe the conviction of the 1st and 5th accused-appellants on counts 2 and 4 on the charge of conspiracy and the conviction of the 3rd and 5th accused-appellants of the charge of abduction under counts 2 and 31 is affirmed.

Accordingly in respect of the 1st accused-appellant we set aside the convictions and sentences imposed on him on the conspiracy charges in counts 2 and 4 relating to the abductions of Y.M.A Susantha Kumara, Upul Shantha Rajapakse and Pradeep Indika Malwatte.We acquit him of these charges. We affirm the rest of the convictions and sentences imposed on him by the learned trial Judge. Subject to the above we proceed to dismiss his appeal.

In respect of the 2nd accused-appellant we set aside the convictions and sentences imposed on him on the conspiracy charges in counts 2 and 4 relating to the abductions of Manelka de Silva, Y.W.A. Susantha Kumara, Upul Shantha Rajapakse, and W.W.K. Mahindapala Wickremasinghe. We acquit him of these charges. We affirm the rest of the convictions and the sentences imposed on him by the learned trial Judge. Subject to the above we proceed to dismiss his appeal.

Regarding the 3rd accused-appellant we set aside the convictions and sentences imposed on him on the conspiracy charges in counts 2 and 4 relating to the abductions of Ruwan Ratnweera, Manelka de Silva and Rukman Paranavithana. We set aside the convictions and

sentences on counts 11 and 36 relating to the abduction of Rukman Paranavithana and counts 12 and 37 relating to the abduction of Nalin Kumara Gunaratne. We acquit him of these charges. We affirm the rest of the convictions and sentences imposed on him by the learned trial Judge. Subject to the above we proceed to dismiss his appeal.

Regarding the 4th accused-appellant we set aside the convictions and sentences on the abduction charges in counts 13 and 38 relating to the abduction of Y.W.A. Susil Kumara and counts 23 and 48 relating to the abduction of Jagath Chaminda Kumara Dissanayake. We acquit him of these charges. We affirm the rest of the convictions and the sentences imposed on him by the learned trial Judge. Subject to the above we proceed to dismiss his appeal.

In respect of the 5th accused-appellant we set aside the convictions and sentences imposed on him on the conspiracy charges in counts 2 and 4 relating to the abductions of Ruwan Ratanweera and Pradeep Indika Malwatte. We acquit him on these charges. We affirm the rest of the convictions and the sentences imposed on him by the learned trial Judge. Subject to the above we proceed to dismiss his appeal.

As regards the 6th accused-appellant we set aside the convictions and sentences imposed on him on counts 23 and 48 relating to the abduction of Jagath Chaminda Kumara Dissanayake and acquit him on these counts. We affirm the rest of the convictions and the sentences imposed on him by the learned trial Judge. Subject to the above we proceed to dismiss his appeal.

It was rather a difficult task for us to peruse and examine the mass of evidence led before the learned trial Judge. In this regard we highly appreciate and acknowledge the assistance given to us by learned Counsel who appeared on both sides.

FERNANDO, J. - I agree.

EDITORS NOTE

The Supreme Court in S.C.Spl.L.A. No. 15-20-2002 on 14-2-2003, refused Special Leave to the Supreme Court from the Judgment of the Court of Appeal, however it was directed that the period during which the accused – appellants were in custody should be taken into account as having served as part of the sentence – Section 323(5), Criminal Procedure Code.