[COURT OF CRIMINAL APPEAL]

1973 *Present:* **H. N. G. Fernando, C.J. (President), Alles, J., and Thamotheram, J.**

WASALAMUNI D. RICHARD and 2 others, Appellants, *and* THE STATE, Respondent

APPEALS NOS. 140-142 OF 1972, WITH APPLICATIONS 157-159

S. C. 753/71—M. C. Kandy, 78316

Penal Code—Sections 31, 32—Several accused charged jointly—Common intention—Question of fact for Jury to decide—Presence of a co-accused at the scene of offence—Whether common intention can be inferred against him—Difference between "participating presence" and "mere presence".

To make an accused vicariously liable under section 32 of the Penal Code for a criminal act done by another person in furtherance of common intention there should be evidence of a pre-arranged plan to which he agreed. Inference of a pre-arranged plan can be drawn from both direct and circumstantial evidence.

The question whether a particular set of circumstances establish that an accused person acted in furtherance of common intention is always a question of fact and if the jury's views on the facts cannot be said to be unreasonable, the Court of Criminal Appeal will not interfere.

The three accused-appellants were indicted upon a charge of murder. The deceased was a young woman, 28 years of age. The case for the prosecution was that the 1st and 2nd appellants killed her at a lonely spot by cutting her neck after she was abducted by all three appellants while she was walking along a desolate part of a road. The evidence of the only eye-witness who happened to be present at the scene at the time of killing was conclusive against the 1st and 2nd appellants.

In regard to the 3rd appellant, who was a younger brother of the 1st appellant, the evidence against him was circumstantial in that, *inter alia*, he was present on the road at the time of the abduction and, shortly afterwards, at the time and place of the killing and, on the direction of the 1st appellant, he prevented (without using physical violence) the eye-witness from leaving the scene of offence soon after the killing.

Held, by ALLES, J., and THAMOTHERAM, J. (FERNANDO, C.J., dissenting), that the circumstantial evidence against the 3rd appellant was sufficient, in the absence of evidence given by him to explain his presence at the scene, to establish that he acted in furtherance of a common murderous intention with the other accused to kill the deceased. His presence at the scene was a "participating presence" as distinct from a "mere presence". *The King v. Jayanhamy* (45 N. L. R. 510) not followed.

As evidence of a pre-arranged plan was established beyond reasonable doubt, it was not necessary for the prosecution to prove, in addition, any significant fact at the time of the commission of the offence showing that the 3rd accused had a common intention with the other accused to kill the deceased. Even from the standard of proof of a "significant fact", there was a case for the 3rd accused to answer.

APPEALS against three convictions at a trial before the Supreme Court.

G. E. Chitty, with *A. C. de Zoysa*, *Wijaya Wickramaratne*, *Justin Perera*, *Vijaya Malalasekera*, *Lal Wimalaratne*, *Asoka de Silva*, and *V. Satchitananthan* (assigned), for the accused-appellants.

V. S. A. Pullenayegum, Deputy Solicitor-General, with *Cecil Goonewardene*, Senior State Counsel, and *N. J. Vilcassim*, State Counsel, for the State.

Cur. adv. vult.

July 25, 1973. H. N. G. FERNANDO, C.J.—

This Court pointed out in *King v. Assappu*[1] (50 N. L. R. 324) that one of the vital and fundamental principles governing the application of the rule of common intention is that "in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act....." This principle would justify an inference against the 3rd Accused in the instant case if any one of several different conditions is satisfied, and it is useful to set out those conditions separately:

A. Was there direct evidence of pre-arrangement or a pre-arranged plan? There was none whatsoever.

B. Was there circumstantial evidence of pre-arrangement or a pre-arranged plan to which the 3rd Accused agreed?

C. Was there any evidence of a declaration showing common intention? There was none whatsoever.

D. Was there evidence of any significant fact at the time of the commission of the offence showing that the 3rd Accused had a common intention with the 1st Accused to kill the deceased girl?

With reference to the question at B above, learned State Counsel submitted that certain inferences arose from the circumstances of this case:—

(i) The girl must have been enticed or carried away from the road. I will refer to this fact as "the abduction".

(ii) The 3rd Accused's presence at the scene of the actual murder establishes also that he must have been present on the road at the time of the abduction.

(iii) The abduction must have been planned before-hand.

(iv) The 1st Accused could not have expected to carry out the abduction without assistance.

(v) Therefore the 3rd Accused must have agreed to the plan for abduction.

(vi) It follows that the 3rd Accused also agreed to the plan for the murder.

[1] *(1948) 50 N.L.R.324.*

I am content to concede that the inferences specified at (i) to (iv) above are justified. But do those inferences, namely that the 3rd Accused was present at the time of the abduction and that the 1st Accused must have expected assistance, lead to the irresistible inference that the 3rd Accused agreed to the plan for abduction? The inference adverse to the 3rd Accused was not irresistible, if in the proved circumstances a different inference was reasonably available, because in the latter event there was indeed an "escape" from the adverse inference.

The presence of the 3rd Accused at the time of the abduction would not (according to the principle already cited) justify an inference that he joined in an intention to abduct, unless there was evidence of some other significant act on his part at that time. There was no such evidence whatsoever. On the contrary, the positive evidence of Senapala established that the 3rd Accused did nothing at the time of the actual murder; that proved fact surely made available the inference that the 3rd Accused did nothing at the time of the abduction.

In considering the inference that the 3rd Accused agreed to the plan for abduction, there was an unusual factor in this case, which is much in his favour. None of these accused, not even the 1st Accused, could have been convicted, unless the Jury was completely satisfied that the witness Senapala had been in abject fear of the 1st Accused at the time when this murder took place, and even for several days thereafter. On his own showing, Senapala would and could have run away after he saw the 1st Accused sitting on the stomach of the deceased girl; and he became an eye witness of the actual murder, only because through this abject fear he submitted to an order from the 1st Accused to come down from a place on an elevation about 40 feet away. If then the presence of the witness Senapala at the scene of the murder was due entirely to this fear of the 1st Accused, I am satisfied that there was available to the 3rd Accused the possible inference that his presence at the time of the murder and earlier at the time of the abduction, was equally influenced by fear of his elder brother.

Thus on the question which arises, whether it was an irresistible inference that the 3rd accused must have agreed to the plan for abduction, I have now referred to three matters which in my opinion rendered that opinion unjustified. It follows that the circumstantial evidence did not establish that the 3rd accused agreed to a pre-arranged plan for the murder.

I pass now to the question enunciated at D above. Apart from the presence of the 3rd Accused at the time of the actual murder, the only matter to which the learned Commissioner referred was that this accused had acted " as a sort of guard " to prevent the witness Senapala from being free to disclose forthwith his knowledge of this murder.

The evidence concerning this matter was that, after the 1st Accused had killed the girl, Senapala said that he wanted to go to the boutique: thereupon the 1st Accused allowed Senapala to go but insisted that he must return to the scene; Senapala then went to the boutique followed by the 3rd accused, and when Senapala thereafter said that he wanted to go home, the 3rd accused reminded him that the 1st accused had asked him to return to the scene.

It is to my mind obvious that Senapala then returned to the scene only because fear prevented him from disobeying the order of the 1st accused. The conduct of the 3rd accused at this stage was easily explicable on one or both of two grounds: firstly, that he himself acted because of fear of his brother the 1st accused, and secondly, that having seen his brother committing murder he was anxious to prevent Senapala from giving information of the murder. This conduct in my opinion falls very far short of being " a significant act " of the 3rd accused at the time of the commission of the murder.

For the sake of completeness, I refer to certain other matters which State Counsel thought were of avail against the 3rd accused.

Senapala testified that when he saw the 1st accused cutting the neck of the girl, he himself protested by exclaiming " Richard ' what is this crime you are committing. ' Richard said, " You have no business. You move to a side and keep quiet. " Such an exclamation was indicative of Senapala's innocence of an intention that the girl should be killed, and of his attempt (however futile) to save her life at the last moment.

State Counsel's submission in this connection was that the 3rd accused merely stood by, that he watched the cutting, and that he " said nothing ". In the context of the point now under consideration, namely whether, in addition to the presence, there was any " significant act " of the 3rd accused, I can concede that *proof of silence* on his part *may* indicate a guilty intention. But if the prosecution case was that the 3rd accused remained silent and that this silence was " significant ", the fact of such silence had to be established positively by evidence. The only available

witness, Senapala, did not testify that the 3rd accused "said nothing". Since prosecuting Counsel at the trial did not even attempt to seek from that witness any evidence that the 3rd accused had remained silent, it is gravely speculative to suggest at the stage of appeal that Senapala, if questioned on this point, would have answered that the 3rd accused said nothing.

With respect, I was much surprised at State Counsel's submission in appeal that according to the evidence the 3rd accused "said nothing" during this transaction. I note with satisfaction that the trial Judge did not indulge in unwarranted speculation that the 3rd accused had remained silent at this stage.

Much was sought to be made during the argument of the circumstance that the 3rd accused was the brother of the 1st accused, and was present with the latter during this transaction. At the stage of appeal, we can rightly assume that because the 1st accused was proved at the trial to have committed this murder, he must have had a compelling motive for the murder. But since the evidence did not establish beyond doubt what was the actual motive which moved the 1st accused, it is unreasonable to infer that the 1st accused's brother must have shared some unknown motive.

The strict rule that presence alone cannot suffice to establish a common intention does not permit of any exception based on the fact of close family relationship. That fact can be significant, only if accompanied by evidence that the family had a strong motive for desiring the commission of the act charged.

If it be thought that some explanation of the 3rd accused's presence was necessary in this case, a requisite explanation was available from the witness Senapala that the 3rd accused did nothing, and also that the 3rd accused, like Senapala himself, could have been compelled to be present out of abject fear of his elder brother.

After preparing the greater part of this judgment, I have had the advantage of considering the draft judgment proposed by my brother Alles. It is evident that in his opinion the presence of the 3rd accused at the scene of this murder could be regarded as a "participating presence", if in all the circumstances a proper inference arose that the 3rd accused participated in the act of abducting the deceased girl from the road.

There are at least three passages in which my brother states his opinion on this vital question :—

> "There is no direct evidence that she was forcibly removed from the road, but the conclusion is irresistible that this must have been done. If so, *is it unreasonable to infer* that

the persons who were present at the time of the murder were the persons who participated in the criminal act of abducting her from a spot on the main road ? "

. . . . . .

" *If it can be reasonably inferred* that he (the 3rd accused) participated in the act of bringing the deceased down from the main road, his presence in a thicket in an inaccessible part of the land at the scene of the murder can only mean that he shared the common murderous intention. "

. . . . . .

" The criminal act in this case at least commenced from the time the deceased was forcibly taken from the main road, and *if it is a reasonable inference* from all the relevant facts that Premadasa (the 3rd accused) participated in that part of the transaction....., the series of acts must have been done in pursuance of a pre-arranged plan. "

. . . . . .

I have italicized some similar phrases in each of these passages, because in my opinion the fundamental principle enunciated in *King v. Assappu* required in this particular case direct or circumstantial evidence of a significant fact concerning the 3rd accused, in addition to his presence at the scene of the murder. If the significant fact alleged was that he participated in the abduction, my brother agrees that there was no direct evidence of that fact. Since that fact could therefore be established only by circumstantial evidence, I cannot agree that a " reasonable inference " of participation in the abduction sufficed to establish the significant fact. A finding of participation by the 3rd accused in the abduction was justified in this case, only if there was an irresistible inference that he did so participate. On this very important point, there was no direction to the Jury, nor was there evidence which could have justified such an irresistible inference. I have already tried to show that on the totality of Senapala's evidence the alternative inference, that the 3rd accused may have been only a spectator at the stage of the abduction, was readily available.

With much respect, I point also to what I think is a flaw in the reasoning in at least the first of these passages. When the question is whether, in addition to the presence of the 3rd accused at the scene of the murder, there was any other significant fact concerning him, it is not in my opinion permissible to draw from his presence any inference that he must have done some act at an earlier stage. To do so would be to beg the question, by assuming that the presence at the scene must have been a participating or guilty presence.

I find it impossible to distinguish between the proved conduct of the 3rd accused during this transaction and the proved conduct of the witness Senapala. Indeed, Senapala's subsequent false statements, which could have delayed or prevented discovery of the girl's body, rendered his conduct even more suspicious than that of the 3rd accused. If then the conduct of the 3rd accused led to a proper inference that he must have been an accomplice in the commission of this offence, then equally the same inference arose in the case of Senapala. But in deciding this appeal we are holding that no direction of the trial Judge was necessary on the question whether Senapala may have been an accomplice. That being so, I feel bound to hold also that the similar proved conduct of the 3rd accused did not lead to the necessary inference that he must have been an accomplice.

For these reasons, I am satisfied that the verdict against the 3rd accused was unreasonable and against the weight of the evidence, and that a verdict of acquittal should be entered in his case.

ALLES, J.—

About 4 p.m. on 25th June 1971 Somalatha Munasinghe, a Graduate trainee employed at the Plantation Ministry at Getambe near Kandy, alighted from the bus that halted at the Menikdiwela Junction and proceeded on foot along the Tismada Road towards her parental home 1¼ miles away at Tismada village. Somalatha was a young woman, 28 years of age and the eldest daughter of Alwis Vedamahataya who was a resident of Tismada for a considerable period. After a successful career at the University she had sat for the Administrative Service Examination and was awaiting the results at the time of her death. She was engaged to be married to Gamini Jayasinghe, a Graduate translator at the Academy of Administrative Studies, and the wedding was to take place in September of the same year. Somalatha's success in her studies and her impending marriage appears to have evoked the jealousy of her fellow villagers at Tismada, particularly those who were not well disposed towards the Vedamahataya's family. The 1st appellant in this case, Richard, was a distant relation of the Vedamahataya and lived 150 yards below the Vedamahataya's house at Tismada village ; the 3rd appellant Premadasa was his younger brother 26 years of age and resided at the ancestral home some distance away and the 2nd appellant Jayewardene was also a distant relation

and lived a ¼ mile away. Since 1965 the brothers were neither on visiting nor talking terms with the members of the Vedamahataya's family, the reason being that on a complaint made by the Vedamahataya of the loss of his gun Richard was charged and convicted of theft and sentenced to pay a fine of Rs. 100. The motive appears to be slender but this is the motive suggested by the State for the murder of Somalatha. It was not suggested that the three appellants had any particular grievance against the deceased but the case for the State was that they were responsible for the murder because they were angry with the Vedamahataya's family.

Somalatha travelled to work invariably by bus. One could travel to Tismada either by the Potupitiya bus, alight at the Menikdiwela Junction and then board the Tismada bus or take the direct bus to Tismada. The Tismada mail bus reached the village, which was the terminus of the route at 3.30 p.m., and the next and last bus was at 7 p.m. On 25th June, Somalatha took the Potupitiya bus, alighted at the Menikdiwela Junction and was unfortunate to miss the Tismada bus which was taking off as she alighted from the Potupitiya bus. Instead of waiting therefore for the 7 p.m. bus she apparently decided to walk the 1¼ miles to her home. At the time she was dressed in a saree and blouse and wearing some jewellery which included a saree pin and a pair of ear studs and as it was raining at the time she was using her umbrella. She also carried a handbag.

The stretch of road from Menikdiwela Junction to Tismada was a steep incline with a few scattered houses situated some distance away from the road. The road ran through a cutting with a steep hill on one side and a precipitous valley on the other which ended in a ravine through which flowed a stream. About ¼ mile away from the Menikdiwela Junction a washerwoman called Kirimuttu met Somalatha walking towards Tismada. Somalatha appeared quite normal and greeted Kirimuttu in a friendly fashion and was protecting herself from the rain with her umbrella. Kirimuttu was the last person to see the deceased alive.

A little beyond the spot where Somalatha met Kirimuttu there was a sharp bend and this was the most desolate part of the road. On the left was a land which bore the picturesque name of Hiraywatunanilamagewatte—the land belonging to the Nilame who had been to jail—and it is on this land that the gruesome remains of Somalatha with her neck severed were discovered in the early hours of the morning of 28th June. The

description of the land where the body was found has an important bearing on the facts of this case and Inspector Gnanendran in evidence described the land as follows:—

> " This land is situated about one mile away on the Tismada road and it appeared to be neglected tea land with a mixed plantation of shrubs, weeds and trees such as jak, cloves and spathodea trees. The ditch in which the body was found was in a slope about 15 feet from the edge of the main road and when I arrived at the scene first I observed that the white sun flower plants that had been growing on the edge of the road had been cut. There was also a thicket south easterly to that ditch grown with shrubs, weeds and trees. And in the midst of the thicket there was an artificial terrace ; there were also five large spathodea trees by the side of the main road through which one could enter this tea field. This land was separated from another tea land by a fence of live trees.
>
> There is a very steep path going down between the 5th and 4th spathodea trees. "

It was the case for the prosecution that the murder was committed on the artificial terrace where the handbag, umbrella and saree pin were found and that the body was subsequently carried higher up to a spot 15 feet below the edge of the road where an attempt had been made to conceal it with a bent jak tree and uprooted tea bushes.

The entire case for the prosecution depended on the testimony of a single witness called Senapala, who was a fellow villager and a friend of Premadasa. In order to appreciate the submissions of Mr. Chitty it is necessary to recount the evidence of Senapala in some detail.

Senapala was a sawyer and came to the Nilame's land about 3.30 p.m. on the 25th June to pluck a jak fruit. Having plucked the fruit he climbed down to pick it when his attention was attracted by the rustle of leaves in the distance which he thought was caused by some human agency or some animal. He went to investigate and then saw Premadasa standing. He then proceeded further and from a distance of 39 feet saw a person lying on the ground and another person seated on the stomach. He recognised the person seated as Richard. Richard looked up and saw Senapala and when the latter tried to run away said " Don't run. If you run the job will be a failure. You will also be implicated in this. " Then Richard called him and he went up closer. At that stage Senapala identified the fallen person as Somalatha. He saw Jayawardene holding the legs of the deceased and a portion of Somalatha's saree was stuffed into her mouth.

Then Senapala exclaimed "What is this crime you are committing?" whereupon Richard replied "You have no business. You move to a side and keep quiet." Richard then held the deceased's hands, picked up a tapping knife nine inches long and placed the knife on Somalatha's neck. Senapala tried to run away again when Richard said "Don't run away. If you run I will kill you." Senapala then continued to remain at the spot. By this time Richard had cut Somalatha's neck and Senapala witnessed Somalatha's dying moments. Then Senapala told Richard that he had to go to the boutique whereupon Jayewardene interposed and said "Don't go now itself." Richard wanted Senapala to remain and accompany them. When Senapala, after some time, insisted again on going to the boutique, Richard said "Alright, you can go but you must come back here". Senapala then left the scene and Premadasa who, up to that time, was a silent spectator to all what was happening within a few feet of him followed Senapala to Tikiri's boutique. Premadasa waited outside while Senapala purchased some beedis. When he came out of the boutique he told Premadasa that he was going home, and asked Premadasa to go wherever he wanted whereupon Premadasa said "Don't go home. They wanted you to come back; I do not know for what purpose; let us go back and see why they wanted you to come back." Premadasa obviously accompanied Senapala to the boutique to ensure that he would return to the scene as requested by Richard, and Senapala admitted in cross-examination that although Premadasa did not use physical violence he returned to the scene as a result of Premadasa's insistence. Senapala stated that he did so through fear of Richard. Richard then suggested that the dead body should be taken closer to the road and Richard and Jayawardene carried the body while Premadasa and Senapala followed. On the way the deceased's slipper dropped and at the request of Premadasa, Senapala picked it up. The body was deposited in a ditch and attempts were made by Richard and Senapala, under threats from Richard, to conceal it. Senapala then saw Premadasa meddling with Somalatha's ears and presumably at that stage Premadasa did the ghoulish act of stealing the ear studs which were found missing when the body was later discovered. Before the appellants left the scene Richard told Senapala to mislead the Police by telling them, if questioned, that he did not see the dead body at the scene when he went to pluck the jak fruit the previous day, to give the impression that the murder had been committed elsewhere and the body deposited below the road. This Senapala mentioned to Somalatha's father on the day the body was discovered.

Senapala was taken for questioning by the Police on 8th July and after his statement was recorded he was produced before the Kandy Magistrate on 9th July and remanded to Fiscal's custody until the 16th when his statement was recorded by the Magistrate. He was prepared to make a statement earlier but the Magistrate gave him the usual warning and did not wish to record his statement until he had an opportunity to reflect whether he should make a statement or not. At one stage he was willing to make a statement because he was in fear and at another he alleged that he had been harassed by the Police to do so—an allegation which he later withdrew. On the 16th he expressed his willingness to make a statement in a letter which he sent to the Magistrate from prison and it was thereafter, after the Magistrate had taken the necessary precautions, that his statement was recorded.

It was the submission of Mr. Chitty that in view of Senapala's continued presence at the scene and his subsequent conduct, that he was either an accomplice or a person who had made endeavours to exonerate himself and therefore that he should have been treated as a guilty associate in the crime. Counsel at the trial had not treated him as an accomplice and his evidence was only challenged on the footing that he was not a witness of truth. The learned Commissioner in the course of his charge gave no directions to the jury on the basis that Senapala was an accomplice. There is nothing in the evidence of Senapala to suggest that he could be charged as a *particeps principis* and it would, in our view, be an unwarranted extension of the law relating to accomplice evidence to enlarge the category of persons to include a person in the position of Senapala. Senapala was only a reluctant witness who refrained from making a disclosure of the matters within his knowledge through fear of Richard. It was only after he was aware that Richard was arrested that he was prepared to divulge the truth. His false accusation against the Police is understandable since he was warned by the Magistrate of the consequences attendant on his making a statement. Counsel for the appellant sought to equate the evidence of Somapala to that of a co-accused but the principles affecting the evidence of a co-accused have no bearing on the evidence of a person in the position of Senapala. We are therefore unable to agree with the submission of Counsel that the evidence of Senapala should have been treated on the same footing as the evidence of an accomplice.

It was also urged by Counsel, that the learned trial Judge was in error, when he directed the jury that the finding of the knife P16 in the house of the 2nd appellant affected the entire case against all three appellants and not only the case against

the 2nd appellant. In answer to leading questions by Counsel for the defence, Senapala stated that the knife P16, which was the murder weapon, belonged to the 2nd appellant and he identified it as a knife that had been previously used by the 2nd appellant. The finding of the knife in the house of the 2nd appellant supported the evidence of Senapala in regard to the transaction to which he testified and we are in agreement that there was no misdirection when the learned Commissioner stated that it was an item of evidence that supported the case against all three appellants. The learned trial Judge correctly directed the jury, that in addition, the evidence of the finding of P16, which was recovered from under some firewood in the loft built above the hearth, indicated that the 2nd appellant had knowledge of the presence of the murder weapon in his house. We are therefore unable to agree with Counsel's submissions in regard to the evidentiary value of the finding of P16.

On the evidence of Senapala we are satisfied that the convictions of Richard and Jayewardene were amply justified, that their applications should be refused and their appeals dismissed.

There remains for consideration the case against the 3rd appellant in respect of which we have unfortunately not been able to reach unanimity. It was strongly urged by Mr. Chitty that even on an acceptance of Senapala's evidence it was not established that Premadasa acted in furtherance of a common murderous intention with Richard and Jayewardene in causing the death of Somalatha. This is essentially a question of fact dependent on the circumstances of the particular case and it appears to the majority of us that in the absence of an explanation from Premadasa, the jury were entitled to draw the reasonable inference from all the circumstances that his presence at the scene was a " participating presence " as distinct from a " mere presence " which would have entitled him to an acquittal.

Since an " act " connotes a series of acts as well as a single act—vide section 31 of the Penal Code—it is pertinent to consider whether it could be reasonably inferred that Premadasa participated in any of the series of acts which constituted the entire transaction. Although the common murderous intention may have been conceived before any of the appellants set their hands on Somalatha, the series of criminal acts must have commenced from the time Somalatha was forcibly abducted from a spot on the main road and taken to a place on the artificial terrace where she was ultimately done to death. Having regard to her physique—she was an adult woman 5 feet 5 inches tall

and weighing 120 pounds—it is inconceivable that one person could have forcibly taken her down to the valley below, particularly when one considers the nature of the terrain to which reference has already been made. She no doubt had an open umbrella with her at the time but this would have been a poor weapon against the persons who lay in ambush and abducted her from the main road. Her mouth had been stuffed with a portion of her saree and this able bodied woman had to be taken down a precipitous path to the place where she was ultimately murdered. There is no direct evidence that she was removed forcibly from the road, but the conclusion is irresistible that this must have been done. If so, is it unreasonable to infer that the persons who were present at the time of the murder were the persons who participated in the criminal act of abducting her from a spot on the main road? If this case depended on circumstantial evidence of the abduction and the deceased was killed soon afterwards, a conviction of the abductors for murder would have been justified even though no evidence was forthcoming which of the abductors was responsible for the death. This was the position accepted in *Ariyadasa* [1], 68 N. L. R. 66, where the Court of Criminal Appeal approved of the directions of the trial Judge who summed up to the jury on the lines laid down in the West Indian case of *Ramlochan* [2], (1956) A. C. 576, to the effect, that if two persons took part in the assault on the deceased in furtherance of the common criminal purpose of causing the death of the deceased and one of them struck the fatal blow, even if it was not the accused, then the accused will be guilty of murder. Of course, the position is different in the present case because there is direct evidence as to how the deceased was killed but this does not negative the possibility of the persons present at the time of the killing sharing a common murderous intention with the killer. Can it be said, in the absence of an explanation, that Premadasa's presence at the scene indicates that his presence was not a participating presence? It seems to the majority of us that if it can be reasonably inferred that he participated in the act of bringing the deceased down from the main road, his presence in a thicket in an inaccessible part of the land at the scene of the murder can only mean that he shared the common murderous intention with his companions to kill the deceased even though he took no active part at the time of cutting—the suggestion of the State being that he played the role of a sentinel.

The position would have been materially different if the murder took place on the main road and the evidence disclosed a mere presence of the 3rd appellant at the scene, because then it would have been open to the reasonable inference that his

[1] *(1965) 68 N. L. R. 66.* [2] *(1956) A. C. 576.*

presence was that of a bystander who happened to witness the incident while he was walking along the public highway. As Lord Sumner observed in the leading case of *Barendra Kumar Gosh v. Emperor*[1] (1925) A. I. R., P. C. 1—

> "'They also serve who only stand and wait' has to be regarded as applying not to a bystander who merely shares mentally the criminal intention of others but to a person whose act of standing and waiting is itself a criminal act in a series of criminal acts done in furtherance of the common intention of all."

Lord Sumner's observation might well apply to the culpability of Premadasa in the present case. In this connection reference may also be made to the observations of Soertsz A.C.J. in *Endoris*[2] 46 N. L. R. 498 at 499. In that case the 3rd appellant did not take an active part in the actual attack on the deceased. He was present at the scene armed with a club at the time two shots were fired by the 1st and 2nd appellants and fled with them after the shooting. The defence sought to suggest that the 3rd appellant was proceeding along a path some distance away from the spot where the 1st and 2nd appellants were standing, a suggestion which did not find acceptance with the jury. Soertsz A.C.J. was of the view that in the circumstances of the case it was essentially one in which the 3rd appellant should have given an explanation of his presence at the scene, an observation which is equally applicable to the facts in the present case. There was no evidence in *Endoris* to show that the 3rd appellant came to the scene with the other two accused, but Soertsz A.C.J. stated that if he was present with the 1st and 2nd appellants and ran away after the shooting the jury were entitled to draw the reasonable inference that he had come to the scene with them. Would not the presence of Premadasa at the scene of the murder equally warrant the reasonable inference in this case that he was present with the 1st and 2nd appellants at the time the woman was abducted from the road and that he must have participated in the abduction? Would not this evidence be indicative not only of a common murderous intention but also of a participating presence in the series of criminal acts which commenced with the abduction and culminated in the killing? In *Endoris* no reference is made to the earlier case of *Jayanhamy*[3] 45 N. L. R. 510, where the facts are similar to those present in *Endoris* but where this Court held that a case of common intention had not been established. It is however respectfully submitted that the case of *Jayanhamy* has been wrongly decided.

[1] *(1925) A. E. R. (P.C.)* [2] *(1945) 46 N. L. R. 498.*
[3] *(1944) 45 N. L. R. 510.*

Both in India and Ceylon, the Courts have accepted the principle that to make an accused liable under section 32 of the Penal Code there should be evidence of a prearranged plan or preconcert to make the accused vicariously liable with the doer of the act for the criminal act.

In the leading case of *Mahbub Shah v. Emperor*[1] (1925) A. C. 118, the Privy Council laid down the law in the following terms :—

> "Common Intention implies a prearranged plan. To convict the accused of an offence applying Section 34 it should be proved that the criminal act was done in concert pursuant to the prearranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of the individual; it has to be inferred from his act or conduct or other relevant circumstances of the case."

In Ceylon the principle in *Mahbub Shah's* case has been applied in cases of direct evidence. Invariably in such cases the material question is whether or not there was evidence of a pre-arranged plan among the assailants, where the facts disclose that the assailants set upon their victim and assaulted him in pursuance of which he was injured or received fatal injuries—*Ranasinghe*[2] 47 N. L. R. 373 at 375 ; *Piyadasa*[3] ; 48 N. L. R. 295 ; *Asappu*[4] 50 N. L. R. 324 ; *Mahatun*[5] *61 N. L. R. 540 ;* and *Vincent Fernando*[6] 65 N. L. R. 265.

In *Piyadasa,* 48 N. L. R. 295 at 296, the only evidence implicating three of the accused was that after the deceased had been hit on the head by the 1st accused with an iron rod and fallen down the other three accused came and struck him with iron clubs. The Court of Criminal Appeal held that there was no evidence of a pre-arranged plan as there was no evidence of any connection between the 1st accused and the others prior to the assault.

In *Mahatun,* 61 N. L. R. 540, the 2nd appellant in the company of his brother the 1st appellant and several others invaded the complainant's field to evict him. The 1st appellant was armed with a red ball which was subsequently found to be a hand bomb and threw it at the complainant injuring him. The 2nd appellant was similarly armed but there was no evidence that he threw the missile although there was evidence of a second explosion. It was held by this Court that the evidence disclosed that the 2nd appellant was one who shared the intention in furtherance

[1] *(1925) A. C. 118.*
[2] *(1946) 47 N. L. R. 373.*
[3] *(1947) 48 N. L. R. 295.*
[4] *(1948) 50 N. L. R. 324.*
[5] *(1959) 61 N. L. R. 540.*
[6] *(1963) 65 N. L. R. 265.*

of which the 1st appellant threw the bomb. The Court adopted the principle in *Mahbub Shah v. The Emperor* in arriving at the conclusion that the appellants were acting in pursuance of a pre-arranged plan. Both *Piyadasa* and *Mahatun* were cases where the evidence was of a direct nature. There is however no reason in principle why the observations laid down by the Privy Council should not be held applicable to a case where the inference of a pre-arranged plan could be drawn from both direct and circumstantial evidence. The " criminal act " in this case at least commenced from the time the deceased was forcibly taken from the main road and if it is a reasonable inference from all the relevant facts that Premadasa participated in that part of the transaction which ultimately culminated in the act of killing at a spot below the road, to which he was at the least a silent spectator, the series of acts must have been done in pursuance of a pre-arranged plan—to lie in wait for the deceased on the main road, forcibly seize her when she was on her way home, take her down to the valley below and then kill her. True it is that " the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case " (*Mahbub Shah's* case) but would it be unreasonable for a jury to draw such an inference from the circumstances of this case ? The learned Commissioner in the course of a very full charge did not direct the jury on circumstantial evidence but he dealt with the submission of State Counsel that " this was a planned killing and that whoever decided to carry out the act decided to lie in wait for their prey. " The failure of the Judge to direct the jury on circumstantial evidence could not therefore be said to be a non-direction which amounted to a misdirection to warrant an interference by this Court.

I have so far dealt with the case against Premadasa without taking into account the details referred to by Senapala in his evidence. On that evidence Premadasa was in close proximity to the deceased at the time her neck was cut ; he must have heard the threats uttered by Richard to Senapala and also the request to Senapala to come closer ; he was aware of Senapala's reaction to the crime and the direction given by his brother requesting Senapala to return from the boutique. He accompanied Senapala to the boutique to ensure that his brother's mandate could be carried out ; he could have dissociated himself with the crime at that stage without choosing to return to the scene. He accompained the 1st and 2nd appellants when they transported the body closer to the road, asked Senapala to pick up the slipper that had fallen and robbed the ear studs after the body was deposited in the ditch, an act which clearly

indicates that he bore ill will towards the deceased even after death. In the view of the majority of us, having regard to the motive that was common to Richard and Premadasa, the reasonable inference that he participated in the abduction from the main road, his presence at the time of the murder and his strange and unexplained behaviour at the scene can only mean that he acted in furtherance of a common intention with the 1st and 2nd appellants to cause the death of the deceased.

My Lord the Chief Justice in his dissenting judgment has stressed the point that there is an absence of proof of any " significant fact " in respect of the case against the 3rd appellant. The absence of such proof would not affect the culpability of Premadasa if it can be established from other evidence that there was proof of a pre-arranged plan in which Premadasa participated. According to *King v. Asappu* (*supra*) in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, proof of a " significant fact " is only one of the means by which the inference of common intention can be drawn, this method being an alternative to proof of a pre-arranged plan or evidence of pre-arrangement. If evidence therefore of the latter is established beyond reasonable doubt, it is not necessary that there should be in addition evidence of proof of a " significant fact ". Although the 3rd appellant did nothing at the time of the murder—may be for the reason that his active participation in the killing was superfluous—the cumulative effect of all the items of evidence to which reference has already been made would be sufficient, in the absence of an explanation to establish that he was a party to a pre-arranged plan to kill the deceased. The majority of us are inclined to take the view that even if the case against Premadasa has to be considered from the standard of proof of a " significant fact ", there was a case for the 3rd appellant to answer. Proof of a " significant fact " depends on the reasonable inference to be drawn from all the acts and omissions of the prisoner against whom such an inference is sought to be drawn, and which are incapable of an innocent explanation. Applying this test to the case of the 3rd appellant, it is difficult to resist the conclusion that the 3rd appellant shared a common intention with his companions to commit the crime.

It was suggested by learned Counsel for the appellants that there was no difference between the position of Senapala and that of Premadasa. The majority of us are unable to agree. Senapala stumbled on an episode which was not meant to be seen by him ; he protested when the deceased was being attacked ; he attempted to escape from the scene on more than one occasion and he stated that his subsequent conduct was actuated by his fear of Richard.

Premadasa gave no such evidence and with respect I cannot agree in the absence of evidence that some of the items of evidence which tell against the 3rd appellant can be explained on the basis that he, like Senapala, was in abject fear of the 1st appellant. There is no presumption either in law or in fact that an elder brother wields influence over a younger brother who was 26 years of age at the time. The jury apparently took the view that he acted as a look out although Senapala was not able to render any assistance on the point. One cannot say, having regard to the relationship between Richard and Premadasa, that this was an unreasonable view to take. The majority of us are of the opinion, having regard to all the facts and circumstances in the case against Premadasa, that this was essentially a case in which he should have given evidence and explained his presence at the scene, and his failure to do so was one which would attract the oft quoted dictum of Lord Ellenborough in *R. v. Lord Cochrane and others, Gurney's* Reports 479.

The question whether a particular set of circumstances establish that an accused person acted in furtherance of a common intention is always a question of fact and if the jury's views on the facts cannot be said to be unreasonable, it is not the function of this Court to interfere. In *Rishideo v. State of Uttar Pradesh,*[1] (1955) A. I. R. 331 at 335, the Supreme Court of India has expressed this principle in the following language:—

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

The unanimous verdict of the jury in the present case indicates that, having regard to the entire evidence led by the prosecution against the 3rd appellant, they came to the conclusion, not unreasonable in the circumstances, that the 3rd appellant shared the common murderous intention with his brother, and in the view of the majority of us his conviction was not unreasonable.

The majority of us are therefore of the view that the application of the 3rd appellant also should be refused and his appeal dismissed.

Appeals dismissed.

[1] *(1955) A. I. R. 331 at 335.*