IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of the Article 138 (1) of the Constitution read with the Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

CA. HCC 149 / ABC / 2014

Case Number of the High Court of Kandy: HC 15 / 2007

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

01. Pattiya Vidanalage Ruwan Perera

02. Wijesinghe Mudiyanselage Brian Abeysinghe

03. Baalayalage Anura Prasanga Udaya Kumara

04. Habarakade Roshan

05. Arukkwaththa Patawala Gedara Ketwala Muhandiranlage Nuwan Priyadarshana (Deceased)

Accused

And Now in Between

01. Pattiya Vidanalage Ruwan Perera

02. Wijesinghe Mudiyanselage Brian Abeysinghe

03. Baalayalage Anura Prasanga Udaya Kumara

04. Habarakade Roshan

Accused Appellants

Vs.

The Hon. Attorney General Attorney General's Department, Colombo 12.

Complainant Respondent

Before:	**N. Bandula Karunarathna J.**
	&
	R. Gurusinghe J.
Counsel:	Neranjan Jayasinghe for the 01st & 02nd Accused – Appellants
	Rienzie Arsecularatne for the 03rd Accused – Appellant
	Dr. Ranjith Fernando with I.B.S. Harshana for the 04th Accused – Appellant
	Anoopa de Silva, SSC for the Complainant-Respondent
Written Submissions:	By the 01st & 02nd Accused – Appellant on 06.12.2017
	By the 03rd Accused – Appellant on 09.01.2018
	By the 04th Accused – Appellant on 11.12.2017 & 19.04.2021
	By the Complainant-Respondent on 12.01.2018
Argued on:	30.03.2021
Decided on:	30.07.2021

N. Bandula Karunarathna J.

The accused-appellants have preferred this appeal against the decision, given by the learned Judge of the High Court of Kandy on the 24th of July 2014, by which, the accused-appellants who are now before this Court, were convicted and sentenced to, rigorous imprisonment for twenty years and death, for having, robbed a van bearing the registration number 252-0121 which was in the possession of one Balasuriya Arachchige Chanaka Perera (the deceased) and caused his death.

The accused-appellants, together with the 5th accused (who had died before the trial commenced), were indicted on five counts that charged them with,

1. having been members of an unlawful assembly, the common object of which was to rob the van aforementioned, thereby committing an offence punishable under section 140 of the Penal Code,

2. having robbed the van aforesaid, in prosecution of the said common object thereby committing an offence punishable under section 383, read with section 146 of the same,
3. having committed murder by causing the death of the deceased, in prosecution of the common object thereby committing an offence punishable under section 296, read with section 146 of the same,
4. having robbed the van aforementioned thereby committing an offence punishable under section 383, read with section 32 of the same and
5. having committed murder by causing the death of the deceased thereby committing an offence punishable under section 296, read with section 32 of the same.

The trial commenced on the 29th of April 2014, during which the prosecution, led evidence of nine witnesses, marked documents, of the statement made by the fourth accused-appellant under section 27 of the Evidence Ordinance (P5), of confessions made by the third and the fourth accused-appellants (P6 and P7) and of the statutory statements made by the accused-appellants (P9) and produced a mobile phone, a cassette player, three speaker baffles and two fog lights; (P1 to P4).

The narrative below unfolds the story of the prosecution.

After seeing a dead body fifty metres below the road level, in a culvert at a bend in the Kandy-Nuwara-Eliya road, one Sumith Kannangara had made the first complaint to the Police in Pudalu-Oya.

B.A. Dayananda Perera (PW1), the father of the deceased, had stated in his evidence that the deceased was his only son and was a self-employed taxi driver stationed at Awissawella, who went on hires in the van bearing number 252-0121, which belonged to him. On the 2nd of September 1999, the deceased had left home at around 14.00h stating that he was going on a hire to Nuwara-Eliya. Although the deceased was in the habit of informing the family if he stayed overnight, that fateful night the deceased had failed to do so. All attempts made by the said witness to contact him had failed. As such, a complaint had been made by him to the police. Later, upon receiving information to the effect that the van was said to be somewhere in Pelmadulla, the police had searched and found the same at a filling station.

Soon after the van was found, it had been observed that the numbers in the number-plate had been changed from 0121 to 8121. Nevertheless, by looking at the other features of the vehicle, the said witness had been able to confirm that it was his van, which was last seen with and driven by the deceased. The police had made some arrests immediately and a short while after. Subsequently, the dead body of the deceased son who was 21 years of age at the time of the incident had been identified by the said witness at the mortuary in Kandy Hospital. It had also been observed that, the cassette player, the speakers and the fog lights of the van were missing.

Those items had been identified by PW1 at the police after they were recovered. The mobile phone of the deceased, marked P1, had been found inside the van and the same had been identified by the said witness at the trial. The cassette player, speakers and fog lights that were missing from the van had been recovered by the police, were identified by the witness and marked P2, P3 and P4. These items as well as the van had been handed over to the witness on an order of Court. The van had later met with an accident and had been condemned. The witness had been consistent in his evidence under cross-examination and had stated further that he was able to identify the van with a special security light that he had fixed under the carriage.

Chaminda Prasad Dias Wickremanayake (PW4), is a relative of the fourth accused-appellant whom he identified as Roshan. He was also known to the other accused-appellants as they used to come to his fruit stall. He could only recollect the name of the first accused-appellant as Ruwan, who was also known as 'Cell' but he could not recall the names of the second and third accused-appellants although they too were known to him. He had further stated that the second and third accused-appellants were from the adjoining village. Somewhere in September in the year 1999, he had observed a white Toyota Caravan at the house of one Percy and the latter had informed him in the presence of the first accused-appellant that it belonged to the uncle of the first accused-appellant. As it was brought to the notice of this witness that the van did not start, the witness had made an attempt and he had succeeded in doing so. Thereafter, they had taken the van to someplace to wash. Since few digits were missing from the number plate of the said van, the witness had written them with paint using his finger. He had stated that he recalled writing the digit '8'. Later, with the said Percy, the accused-appellants and another person, this witness had gone to see a musical show in Ratnapura, by the said van driven by him. This witness had been consistent in cross examination.

M.A. Osmund (PW3) was a mechanic at a garage in Ratnapura. On the 5th of September 1999, the fourth accused-appellant had brought a Sony cassette player and a fog light and had asked him to fix them to a three-wheeler. While those were lying at his garage, the police had, come with the fourth accused-appellant and recovered the said items from him. This witness had identified the cassette player marked P2 but had not been able to identify the fog lights as they were inside a bag. During cross-examination the witness had said that the fourth accused-appellant and his brother were friends. As regards the special feature that had been observed in the cassette player, the witness had stated that he observed that the wires at the back of the player were missing.

Sub-Inspector of Police, Govindasamy Kannan (PW10) of the police station in Pudalu-Oya had recovered the dead body from a culvert above an estate in Wedamulla down Pelmadulla -Nuwara -Eliya road on the 6th of September 1999 at around 19.30h. At the time of recovery, the body, only had an underwear on and had been partially putrefied. The dead body had been later identified by the father of the deceased PW1 at the post mortem examination on the 9th of September 1999.

Lionel Weerasinghe (PW8) was the Officer In-Charge of Crimes of the police station in Awissawella. He had received a complaint from PW1 on the 5th of September 1999 about a missing son and his vehicle. While they were conducting investigations into the matter, on the 9th of September 1999 the vehicle had been spotted by the complainant at a filling station in Pelmadulla with the number plate 252-8121. Upon seeing the police, the three persons in the van had made attempts to flee, but later all had been arrested by the police. The police had also recovered a mobile phone from the van. At the police station, both the van and the mobile phone had been produced under PR 182. At the trial, the witness had identified the first, second and third accused-appellants as persons who were arrested in the course of the search. The witness had identified the mobile phone marked P1 as the phone that was found inside the van. Later, the three accused-appellants, the van and the mobile phone had been handed over to Inspector of Police, Chulani Weeraratne (PW9) of the police station in Pudalu-Oya for further investigations on the same day. At the cross-examination, the witness has reiterated what he said at his evidence-in-chief.

PW9 was the Officer In-Charge of the police station in Pudalu-Oya. Upon receiving information about an unidentified dead body at 19.00h, he had visited the scene at 23.00 h on the 6th of September 1999. Thereafter, he had taken over three suspects, the van along with the mobile phone from the police in Awisawella. The witness had identified the first, second third accused-appellants as the suspects whom he took over from the police station, Avissawella on the 9th September 1999. Subsequent to this taking-over, he had arrested the fourth accused-appellant at the office of an Attorney-at-Law in Pelmadulla on the 19th of September 1999. Consequent to a statement made by the fourth accused-appellant, the police had recovered a cassette player, speakers and fog lights from the garage of one Osmund in Ratnapura. This witness identified the cassette player, speakers, fog lights and the mobile phone. (P1 to P4)

The confessions made by the third and the fourth accused-appellants were produced and marked as P6 and P7, through Hon. Tudor Gunaratne, former Magistrate of Gampola.

The post mortem examination had been done on the 9th of September 1999 and it had been observed that putrefaction had set in. The Judicial Medical Officer (PW11) had observed five external injuries on the dead body which were mainly lacerations on the hands. Upon dissecting the dead body further, he had observed contusions on the soft tissues and muscles on the neck and the cartilages were found to be ruptured. When the skull was opened, it had been observed that there were contusions on the head. The Judicial Medical Officer has opined that the cause of death was due to strangulation. The post mortem report was marked and produced as P8. He had stated that the death had taken place roughly three to five days prior to the post mortem examination.

At the end of the trial, the statutory statements of the accused-appellants were marked as P9.

All accused-appellants made exculpatory statements from the dock.

The first accused-appellant stated that when he was about to board a bus on the 9th of September 1999, he was arrested by a police officer clad in civil and brought to the police station in Awissawella; the second accused-appellant stated that he was arrested at home and was brought to the police station in Awissawella where he was assaulted and later handed over to the police in Pudalu-Oya; the third accused-appellant denied the fact that he went to see a musical show with PW4 and the fourth accused-appellant stated that he surrendered to the police in Pudalu-Oya through an Attorney-at-Law; he further stated that he was asked by the police to make a statement to the Magistrate of Awissawella . The relevant portions of his statement deposed under section 27 of the Evidence Ordinance was marked as P5; moreover, the fourth accused-appellant stated that he agreed to make a confession at the behest of the police officers, under duress and was later handed over to the police in Pudalu-Oya.

The accused-appellants were found guilty by the learned Judge of the High Court on charges three and five and were thereby convicted and sentenced as mentioned above.

Counsel for the accused-appellants opposed the said verdict on following grounds.

The counsel for the first and second accused-appellants contended that,

1. the items of circumstantial evidence on which the learned Judge of the High Court had based the conviction were not sufficient to come to a conclusion that the one and only irresistible and inescapable inference was that the accused-appellants committed the offences of robbery and murder,
2. the prosecution had failed to prove the identification of the corpse beyond reasonable doubt and that,
3. the learned Judge of the High Court had, failed to evaluate the dock-statement of the accused-appellants and refused the same on wrong grounds.

Contentions of the counsel for the third accused-appellant were that,

1. the learned Judge of the High Court had delivered his judgment in violation of section 203 of the Code of Criminal Procedure Act No.15 of 1979,
2. the learned Judge of the High Court had disregarded and had not considered P6 and P7 on the basis that they were exculpatory and not confessions,
3. the learned Judge of the High Court had applied a dictum called the Ellenborough Dictum without specifying what that is,
4. the learned Judge of the High Court had failed to apply principles pertaining to circumstantial evidence and that,
5. the learned Judge of the High Court had failed to consider the ingredients that the prosecution ought to have proved to establish the offences set out in counts three and five.

The counsel for the fourth accused-appellant argued his case by pointing out,

1. that the items of circumstantial evidence were wholly inadequate to support the convictions and
2. the infirmities in the judgment of the learned Judge of the High Court.

The question that seems to be of paramount importance is, whether the accused-appellants were convicted by the learned Judge of the High Court based on adequate evidence, since the conviction entirely hinges on circumstantial evidence.

The learned counsel appearing on behalf of the first and second accused-appellants submitted that the sole conviction of the said accused-appellants were based on three items of evidence, namely, the evidence that the accused-appellants were taken into custody when they were attempting to flee which was contradictory when considering the testimonies of PW1 and the police, the evidence as to whether the first accused-appellant was seen with the van that had been robbed prior to the date of arrest, as regards which, the counsel stated that the evidence was not clear as to that fact and as to whether the witnesses of the prosecution were referring to the same van.

The evidence which indicated that the number of the number-plate of the van had been altered, in relation to which the counsel argued that, the evidence of PW4 had not suggested that the number "0" was changed to number "8", the altered number plate was neither produced nor identified by this witness and that the evidence of PW1 and PW4 contradict on the fact of whether the numbers of the number-plate at the front or the rear had been altered.

The counsel for the third accused-appellant asserted that, the evidence pertaining to a single instance of the third accused-appellant running away from the van in question at the time of his arrest did not support his conviction for murder.

The counsel for the fourth accused-appellant reiterating the facts stated by the counsel for the first second and third accused-appellants on this matter, contended that there hadn't been any evidence to say that the accused-appellants had asked PW4 to alter the number plate and went on to contend that the learned Judge of the High Court had erroneously concluded that the accused-appellants had frequently travelled by the said van. In addition, the counsel made lengthy submissions stating that,

i. in relation to the testimony given by PW4, it is doubtful as to whether it was the same van that PW4 had driven and had been seen to be with the accused-appellants,
ii. if PW4 had seen the van in question in the company of the accused-appellants before the alleged incident, then there was no value of the evidence given by him,
iii. PW4 could not remember the names of the accused-appellants who were said to have watched a musical show with PW4,

iv. the learned Judge of the High Court had failed to consider the weaknesses in the testimony of PW4 and such weak evidence should have been corroborated to prove veracity,

v. as regards the productions said to have been discovered in consequence of the statement recorded by the police form the fourth accused-appellant in terms of section 27 of the Evidence Ordinance, the contradictions present in the evidence of PW9 as to the date, the fourth accused-appellant was arrested and was made to make the statement mentioned above were not considered by the learned Judge of the High Court,

vi. the identification of productions marked P1 to P4 was not genuine since those items were in possession of PW1 as they were ordered to be released to PW1 by the Magistrate of Awissawella on a bond, therefore, he had the opportunity to unnecessarily get acquainted with the productions,

vii. the productions had no precise attributes for PW1 to have identified the same with certainty,

viii. vital contradictions that go to the root of the case in relation to the number of speakers that were fixed to the van prior to the incident in question had not been considered by the learned Judge of the High Court and reasons were not given for disregarding the same,

ix. the fact that the cassette player had no wires attached at the trial had only been divulged by PW3 at the trial and the same had not been revealed to the police by his statement at the inception of this case,

x. the fog lights and baffles were not identified by PW3 at the trial,

xi. PW9 had stated during his cross-examination that the said productions bore no special marks and that type of articles could have been available at the market as well,

xii. the learned state counsel who conducted the evidence-in-chief had not even followed proper way of submitting the said productions for the identification of the same by PW1, PW3 and PW9 as the learned state counsel had failed to firstly question them as to the nature and appearance of the said productions, thus, the identifications were mere identifications without precision,

xiii. the statement marked P5 which was said to have been recorded by the fourth accused-appellant cannot be connected to the articles claimed to have been fixed to the said van of the deceased in the absence of proper identification of the productions P2 to P4 and the learned Judge of the High Court had failed to consider the above deficiencies with reference to the said identification,

xiv. the learned Judge of the High Court had come to a flawed conclusion that the fourth accused-appellant was guilty on counts three and five set out above on the basis that the said accused-appellant too had been present at the time of committing robbery of the said Toyota Caravan and murder of the deceased as

the aforesaid production were discovered consequent to the aforementioned statement made by the fourth accused-appellant and that,

xv. on the issue of the applicability of section 114 of the Evidence Ordinance with the aforementioned section 27 of the same to extend the liability of the fourth accused-appellant upto conviction for robbery and murder, the learned Judge of the High Court had failed to consider, the ownership of the articles in question, establishing of which would have failed for the want of identification of the same and the recent and exclusive possession of the said articles by the fourth accused-appellant.

The items of circumstantial evidence considered by the learned Judge of the High Court to arrive at his decision, as arrayed by the learned Deputy Solicitor General are as follows.

1. The deceased informed PW1 that he was going on a hire to Nuwara-Eliya on the 2nd of September 1999, in their Toyota Caravan bearing number 252-0121
2. As there was no news of the deceased, on the 5th of September 1999, PW1 made a complaint to the police of Avissawella that both the deceased and the van were missing.
3. Upon receiving information that the van had been seen in Pelmadulla, PW1 had gone with the police to look for the van.
4. On the 6th of September 1999, while on the lookout, the van was seen at a filling station in Pelmadulla and the police arrested the first, second and third accused-appellants when they had tried to escape getting arrested.
5. From the security light under the carriage and from the other features, PW1 identified it to be his van.
6. PW1 also observed that the digits 0121 had been changed to 8121 in the number plate.
7. The mobile telephone of the deceased was found inside the van.
8. A Sony cassette player, speakers and fog lights were missing at the time the van was found and the deceased was still missing.
9. In the meantime, a dead body was found by the Pundalu-Oya police on the 6th of September 1999 in a culvert below the road level down Pelmadulla – Nuwara-Eliya road.
10. The dead body was identified by PW1 to be of his son, i.e. the deceased.
11. At the post mortem examination, it was revealed that the cause of death was strangulation.
12. PW4 had seen a Toyota Caravan at the place of one Percy and was told that it belonged to the uncle of the first accused-appellant.
13. As one or two digits were missing in the number plate, PW4 had written the digit '8' with paint using his finger (this corroborates the evidence of PW1 who found the registration number altered from 0121 to 8121.)

14. PW4 knew all four accused-appellants and the fourth accused-appellant was his cousin.
15. With the four accused-appellants and said Percy, PW4 had gone to see a musical show by the said van to Ratnapura and he had driven it.
16. PW4 admitted that this incident happened in September 1999 and this fact was not challenged in cross examination by the defense.
17. According to PW3, who was a mechanic working in a garage in Ratnapura, the fourth accused-appellant had handed over a Sony cassette player, speakers and fog lights to him on the 5th of September1999 to fix them on to a three-wheeler.
18. Later the police came with the fourth accused-appellant and recovered the said cassette player, speakers and the fog lights.
19. His evidence corroborated the evidence of PW9 wherein he stated that he recovered the Sony cassette player, speakers and the fog lights from the garage of PW3 based on the statement made under section 27 of the Evidence Ordinance by the fourth accused-appellant.

The legal principles pertaining to convictions based on circumstantial evidence are laid out in the following judicial decisions.

Keuneman J in King Vs. Appuhamy; 46 NLR 128**,** held that,

> 'in order to justify the inference of guilt from purely circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.'

Similarly, in King Vs Abeywickrama; 44NLR 254**,** Soertsz J stated that,

> 'In order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence.'

In the case of C. Chenga Reddy and Others Vs State of A.P. 8 (1996) 10 SCC 193**,** it had been observed by the Indian Supreme Court thus:

> 'In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.'

When applying the law to the facts stated above, the learned Judge of the High Court could not have arrived at any other the conclusion rather than one that is in accordance with the guilt of the accused-appellants. The Toyota Caravan bearing the number 252-0121 which was the subject matter of robbery, belonged to PW1 at the time it was robbed, which he had been using for over a year. Thus, he was familiar with the vehicle. There was a special security light that he had fixed onto it. As stated above, PW4 was known to all four accused-appellants and the fourth accused-appellant was his cousin.

He admitted that he wrote the digit '8' on the number plate using his hand with paint and the vehicle was a Toyota Caravan. At the time the vehicle was recovered by the police, it was observed that the number had been changed from 0121 to 8121. Therefore, his testimony corroborated the evidence of PW1 and further confirmed the fact that both witnesses were speaking about the same vehicle. PW4 stated that he saw this van with the accused-appellants somewhere in September 1999; this timeline tallied with the duration the van remained missing.

Ultimately, the van was recovered from the possession of the first, second and third accused-appellants on the 9th of September1999. It was revealed from the evidence of PW1 that the vehicle was last seen on the 2nd of September 1999 which was finally recovered by the police on the 9th of September 1999 from the possession of the first, second and the third accused-appellants. Taking the entirety of the evidence into consideration, it can be concluded that, the van that was used by the four accused-appellants and PW4 between the 2nd and the 9th of September 1999 was one and the same vehicle. Later, the police recovered items belonging to the van, i.e. a Sony cassette player, speakers and fog lights on the statement of the fourth accused-appellant from a garage in Ratnapura.

On the issue of securing a conviction solely on indirect evidence, Jagath Premawardene Vs. The Attorney General; CA Appeal 173/2005 observed thus;

> 'although there was no judicial evaluation of evidence, then the learned trial judge on the evidence led at the trial, could not have arrived at any other decision other than the conclusion reached by him,'

thereby confirming the stance taken by the learned Judge of the High Court.

During the course of the trial, none of the issues raised at length by the learned counsel for the accused-appellants, in relation to vital evidence that had been led to clinch the case of the prosecution, had been challenged in a considerable manner rendering the said evidence to have been accepted by the defence.

The evidence of PW1 and PW4 were not challenged by the defence regarding the identity of the vehicle, nor did they challenge the evidence of PW4 who claimed that he wrote digit '8' on the number plate using paint with his hand clearing any doubt whatsoever about the identity of the vehicle in question. Handing over the recovered productions to PW3 by the fourth accused-appellant had not been challenged at all during the cross-examination by the

defense; moreover, the fourth accused-appellant had not denied at any point the recovery of the production via his statement to the police and the evidence of PW3 with regard to the recovery of the said productions from his garage too had not been challenged.

In setting out the law in this regard, the decision in Dadimuni Indrasena & Dadimuni Wimalasena Vs. The Attorney General (2008) provides insight whence the following can be extracted.

> 'Whenever the evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not disputed and is accepted by the opponent.'

This principle was echoed in Pilippu Mandige Nalaka Krishantha Kumara Tissera Vs. The Attorney General (2007) and is line with the approach adopted by the Indian Courts as well, as evidenced by the decisions in Sarwan Singh Vs. State of Punjab (2002) (AIR SC 111) where it was held that,

> 'It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted,' and

in Motilal Vs. State of Madhya Pradesh (1990) (CLJ NOC 125 MP) which held that,

> 'the absence of cross examination of prosecution witnesses of certain facts leads to inference of admission of that fact.'

In a similar vein, Edrick de Silva Vs. Chandradasa de Silva; 70 NLR page 169 and 170, had held that,

> 'Where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross examination, that is a special fact and feature in the case. It is a matter falling within the definition of the word "prove" in section 3 of the Evidence Ordinance, and a trial judge or court must necessarily take that fact into consideration in adjudicating the issue before it.'

In light of the above premise, there is no difficulty in connecting the items recovered to the statement given by the fourth accused-appellant under section 27 mentioned above thus, establishing the fact that the fourth accused-appellant had knowledge of the existence and whereabouts of the said items.

This connection can be well established going by Ariyasinghe Vs, The Attorney General (2004) 2 SLR 357 at page 386, which sheds light on three inferences that can be drawn about an accused person in consequence of a statement made by him in relation to recovery of a thing. They are as follows.

1. The accused himself hid the thing found in the place where it was found.
2. The accused saw another person concealing the thing in that place.

3. A person who had seen another person concealing the thing in that place had told the accused about it.

The missing things of the van the deceased drove prior to his death were found in a garage through the statement of the fourth accused-appellant. This fact was never challenged as observed above, hence, the plausible deduction in this regard would certainly be that the accused-appellant himself handed over the said things in question to PW3.

The deceased had set out to go to Nuwara-Eliya in the van belonging to PW1. Few days later, the body of the deceased was found dumped below Pelmadulla-Nuwara-Eliya road whilst the said van was found in Pelmadulla in the possession of the first, second and third accused-appellants, with, the mobile phone of the deceased, an altered number plate and few things missing. The missing things were recovered through the confession made by the fourth accused-appellant and were identified by PW1 and PW3. The said van was identified by PW1 and PW4 who had altered the numbers in its number plate.

The fact that the accused-appellants were in possession of the van was evinced by the testimonies of PW4 and PW3. In establishing a link between the said evidence and the offences alleged to have been committed by the accused-appellants, the learned Judge of the High Court had rightly relied on the presumption explained in section 114 of the Evidence Ordinance.

Section 114 of the Evidence Ordinance states the following.

> 'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.'

A presumption that is indeed material to the instant matter, which had been made avail of by the learned Judge of the High Court in his deliberation is found in illustarion (a) which states that,

> 'The court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.'

It was explained in Ariyasinghe Vs. The Attorney General (2004) 2 SLR 357 at pages 392-399 that, in order to attract the above presumption given in the above illustration, the criteria below must be established.

1. Proof of ownership of the property in question.
2. Proof of theft of that property.
3. There must be evidence of recent possession of that property by the accused.

The testimony of PW1 in identifying the van in the instant situation and the missing things therein and the fact that it belonged to him satisfy the first requirement.

The offence of theft is as good as proved provided that, the following elements are satisfied in terms of section 366 of the Penal Code namely,

(a) The property in question must be movable property.
(b) There must be a moving of the property by the accused in order to the taking of such property.
(c) The property should be moved out of the possession of another.
(d) The moving of the property should have been done without the consent of the person possessing the property.
(e) The accused should have the intention of taking the property dishonestly.

It is evident that the van was taken out of the possession of the deceased dishonestly and without his consent given the fact that the offenders had gone to the extent of committing murder in order to its taking. The statement made by the fourth accused-appellant with reference to the recovery of the missing things of the van, the fact that the accused-appellants went to see a musical show in the said van and the fact that the van was found at a filling station with the accused-appellants being present therein establish the recent possession of the van by the accused-appellants.

The next issue that comes into being is, whether the presumption aforementioned can only be applied in relation to offences of property.

Discussing the said presumption at length, Amaratunga J in the case of Ariyasinghe v AG (2004) 2 SLR 357 at pages 392-399 held that,

> 'the circumstances in which the presumption under section 114 may be drawn are not limited to cases of theft and retention of stolen property. The decided cases indicate that a presumption of fact, under section 114, may be drawn in connecting accused persons to other offences as well.'
>
> 'When section 114 of Evidence Ordinance is closely examined, a very significant feature, which is highly relevant to the exercise of the discretion available to Court, becomes apparent. In deciding to presume the existence of any facts, the Court can take into account the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Those highlighted words indicate the guiding factor. Those words clearly indicate that the reasonableness and the correctness of the Court's decision to presume the existence of any fact would depend on the particular facts of that case.
>
> The question of drawing a presumption of fact is a matter to be considered on a case by case basis. The use of the words 'in their relation to the facts of the case' prevents

the courts from laying down any general guidelines regarding the situations in which a Court may be justified on drawing a presumption under section 114 of the Evidence Ordinance. When a trial Judge has presumed a fact under section 114 of Evidence Ordinance, it is the unenviable task of an appellate Court to examine the validity of the trial Judge's conclusion in the light of particular facts of the case.'

In the Indian case of Saundraraj v The State of Madya Pradesh; (1954) 55 Cr. L.J 257, it had been held that,

'in cases where murder and robbery were shown to be part of the same transaction, recent and unexplained possession of stolen articles, in the absence of circumstances tending to show that the accused was only a receiver, would not only be presumptive evidence on the charge of robbery but also on the charge of murder.'

In Cassim v Udaya Mannar (1943) 44 NLR 519, Wijeyawardene J cited with approval a passage from Taylor on Evidence which laid out the following.

'The presumption is not confined to cases of theft but applies to all crimes even the most penal. Thus on indictment for arson proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner has been held to raise a probable presumption that he was present and concerned in offence. A like inference has been raised in the case of murder accompanied by robbery, in the case of burglary and in the case of possession of a quantity of counterfeit money.' (12th Ed; para 142)

Owing to the above the learned Judge of the High Court had not erred in, applying the said presumption to the instant matter before this Court and accordingly, convicting the accused-appellants. Furthermore, since the accused-appellants had not made any attempt to rebut the above presumption during the course of proceedings of the High Court, it can be taken to have become invariably conclusive.

Counsel for the first, second and fourth accused-appellants submitted that the learned Judge of the High Court had not considered the vital contradictions and omissions marked at the trial. It was argued that, the evidence of PW1 and the police as to whether the accused-appellants were arrested with the robbed van or not were contradictory, PW1 and PW4 gave contradictory evidence regarding whether the alteration of the number had been done on the number plate at the front or the rear of the said van, the evidence of PW1 was contradictory to evidence of PW8 on how the police officers were clad when they had gone to arrest the accused-appellants and that the evidence of the police in relation to when the fourth accused-appellant was arrested were contradictory. In addition, counsel for the fourth accused-appellant asserted that PW3 had failed to mention in his statement to the police about the missing wires in the recovered cassette player and that this and the above evidence seep to the root of the case of the prosecution.

Counsel appearing on behalf of the third accused-appellant too submitted that the positions of PW1 and PW 8 in their evidence had contradicted with regard to the arrest of the third accused-appellant. However, in the backdrop of the circumstantial evidence and the law relating to the same illustrated and discussed above in this judgment, such contradictions and omissions can be disregarded since, undoubtedly human memory tend to fail, when undergoing mental and physical strain and with time. The most sensible approach Courts could have taken to evaluate evidence when tainted with contradictions and omissions is to appreciate such evidence in their entirety and arrive at a conclusion on whether the flawed evidence as against the rest of the acceptable evidence significantly affects the heart of the matter in question. The said line of thinking was propounded by the Supreme Court of India in Bhoginbhai Hirjibhai Vs. State of Gujarat; AIR 1983 SC 753**,** whence it can be concluded that,

> 'discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. More so, when the all-important probabilities factor echoes in favour of the version narrated by the witnesses. The reasons are: By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily it so happens that a witness is overtaken by events the witness could not have anticipated the occurrence of which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
>
> The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.'

The decision of the Indian Supreme Court in State of U.P Vs. M.K. Anthony; AIR 1985 SC 48 is significant in stating that,

> 'appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence attaching importance to some technical error committed by the

investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as whole.'

Learned counsel for the third accused-appellant contended that the learned Judge of the High Court had convicted the third accused-appellant since he provided no explanation in stating that he was not a party to the robbery and murder. The counsel was of the view that the learned Judge of the High Court had applied a dictum called the Ellenborough Dictum without specifying what it was and averred that such a dictum did not contain in the case of Rex Vs. Cochrane (1814) (Gurneys Reports 479) and is not known to law.

Learned counsel for the fourth accused-appellant argued stating, that the learned Judge of the High Court had erroneously applied the said dictum and in the absence of a strong and prima facie case in support of the prosecution, there was no duty cast upon the fourth accused-appellant to provide explanation as to what happened to the deceased after the said deceased was said to have been last seen with the fourth accused-appellant. The counsel further argued that this legal principle cannot be called to aid to compensate the laxity, negligence, ignorance and lethargy on the part of the investigators and went on to assert that weaknesses in the case of the defense cannot be used to benefit the case of the prosecution when the case of the prosecution against the fourth accused-appellant was full of infirmities.

In this contention, reference to this dictum is made below, which is encompassed in the judgment delivered by Lord Ellenborough. The relevant section that is applicable in this instance can be extracted thus.

'No person accused of crime is bound to offer any explanation of his conduct of circumstances of suspicion which attach to him, but nevertheless, if he refused to do so where a strong prima facie cases has been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and inexplicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.'

Although an accused has the right to remain silent and is not bound to offer any explanation as to his conduct, when confronted with a strong prima facie case against him, his failure to do so would amount, the evidence that had been led, to operate adversely to his interest. The third accused-appellant had not challenged the incriminating evidence adduced against him at the trial. After the said accused-appellant was arrested with the van that had been robbed few days after the van went missing whilst attempting to flee, had he wished to suggest that he was not a party to offences explained in count three and four he would have explained his conduct to Court. He owed an explanation to Court as to why the stolen van was in his possession soon after

the said van went missing and his failure to offer any explanation had led to the said evidence being operated against his innocence.

As regards the case of the fourth accused appellant, the learned counsel seemed to have come to an erroneous understanding about the strength of the case of the prosecution. The connection of the fourth accused-appellant to the instant case has already been fortified elsewhere in this judgment, therefore, in this regard it can be concluded that the fourth accused-appellant owed an explanation to Court as to how he ended up possessing the missing items of the van. Thus, the laxity on the part of the fourth accused-appellant in failing to do so can indeed be used to the benefit of the prosecution.

the essence of this dictum had been encompassed in a series of decisions in Sri Lanka. The Ellenborough Dictum was cited by Howard CJ in The King Vs. L. Seeder de Silva (1940) (41 NLR 337) and the learned Judge went on to hold that,

> 'a strong prima facie case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellant the jury were justified in coming to the conclusion that he was guilty.'

Furthermore, in Inspector Arendstz Vs. Wilfred Pieris (1938) (10 Ceylon Law Weekly 121), the Supreme Court of Ceylon held that,

> 'a strong prima facie case, — and when it is within his own power to offer evidence, if such exist, in explanation of such suspicious appearances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.'

Sailing along with the above, the issue on the applicability of this dictum to Sri Lankan cases was emphasized in The Attorney General Vs. Potta Nauffer and Others (2007) 2 SLR 144 in the following manner.

> '…While the judgment in Cochrane's case provides the basis for the development of the law in this area, the principle attached has undeniably evolved far beyond its roots in the statement of Lord Ellenborough. This Court is not prepared to halt the development of the law through a deliberate and regressive step in the opposite direction to the march of the Law in this field…'

> '…I reject the learned President's Counsel's submission that there is no dictum called the dictum of Lord Ellenborough; that the words attributed to Lord Ellenborough is a fabrication by Wills; and that the views expressed by Lord Ellenborough is not a part of the Law of Sri Lanka…'

The counsel for the first and second accused-appellants took up the position that the prosecution had failed to prove the identification of the corpus beyond reasonable doubt. The counsel was of the understanding that since the corpus was in a decomposed state PW1 was only able to identify it from the yellow colour underwear, which was different in colour to what was taken into custody by the police.

With reference to what had been stated by the respondent, at the examination-in-chief PW1 had stated that he was able to identify the dead body of his son, the deceased from a particular pigmentation on the skin. This evidence was not challenged by the defense in cross-examination with regard to the identity of the dead body. According to the evidence of PW11, putrefaction had set in. However, he did not state that the corpus had putrefied to the extent that it could not have been identified. PW11 in his evidence stated that the dead body was duly identified before the post mortem examination, which evidence, was not challenged by the defense and it was never suggested to either of the witnesses that the dead body had changed beyond recognition.

On the question of whether the learned Judge of the High Court had flawed in refusing the dock-statement of the third accused-appellant on a wrong footing, what the accused-appellant had stated to exculpate himself needs to be looked into. The third accused-appellant had flagrantly denied that he had gone to watch a musical show with the rest of the accused-appellants in his dock statement and had not provided any other explanation. Moreover, the fact that the third accused-appellant had gone to the said musical show had been established by the prosecution via the evidence given by PW4 and the said evidence hadn't been challenged by the defense in any significant way.

The law pertaining to evaluation of dock-statements is examined below. A dock-statement, though considered as evidence, is subjected to the infirmity that it was not given under oath and thus cannot be subject to cross-examination.

In The Queen Vs. Buddharakkitha Thera and 2 Others [1962] [63 NLR 433], it had been held that,

> 'the right of an accused person to make an unsworn statement from the dock is recognized by our law. That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination.'

The manner in which such a statement should be evaluated was analyzed in The Queen v. Kularatne [1968] [71 NLR 529] as follows.

> 'We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(a) If they believe the unsworn statement it must be acted upon,
(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed, and
(c) That it should not be used against another accused '.

The Supreme Court in Karunanayake v. Karunasiri Perera [1986] [2 SLR 27] held thus with regard to the facts that should be taken into account in rejecting a dock-statement.

'These principles must be satisfied in order to reject a dock statement and can be summarized as follows:

1. It must be deliberate;
2. It must relate to a material issue;
3. The motive for the lie must be realization of guilt and a fear of truth;
4. 4. The statement must be clearly shown to be a lie other than that of the accomplice who is to be corroborated.'

The case Sarath Vs. Attorney General (2006) 3 Sri L.R. 96 too had shed light on the issue of how a dock- statement must be evaluated, wherein, it had been held that,

> 'one must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation. How can one accept or reject the dock statement without knowing the other side of the story?'

The case Kumara de Silva and two others Vs. Attorney General; [2010] 2 SRI. L.R elucidated the fact that, dock-statements that seem to have nothing but blanket denials in substance can conveniently be rejected. The relevant extract states the following.

> 'There has been no attempt to explain the incriminating circumstances against the accused. The dock statements have not introduced fresh material or evidence into the case formulating novel issues other than bare denials of involvement. In the light of cogent incriminating evidence adduced by the prosecution against the accused, the learned trial Judge has the duty to decide whether such dock-statements create a reasonable doubt as to the veracity of the prosecution version. Even though the learned trial Judge has not formally rejected the above dock-statements in so many words, a perusal of page 266 of the original record would reveal that impliedly she has rejected the dock statements. Even though it is desirable that the learned triad Judge should have specifically stated her findings as to the credibility of the dock-statements, in my mind, this alone has failed to constitute a failure of justice taking into consideration the direct evidence adduced against the accused. Therefore, this contention too should fail.'

Taking note of the extract above, the contention that the learned Judge of the High Court had erroneously rejected the dock-statement is inconceivable.

Counsel for the third accused-appellant expressed that, by delivering his judgment after two months hence the trial, the learned Judge of the High Court had acted in violation of section 203 of the Code of Criminal Procedure Act, which stipulates that,

> 'when the cases for the prosecution and the defense are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefor and if the verdict is one of conviction pass sentence on the accused according to law.'

There had been two schools of thought on the interpretation of the term 'forthwith'. One approach had been to give a literal interpretation to the term and interpret it to be 'at once' or 'immediately' whereas the other approach had been to take up the purposive approach of interpretation and hold the term to mean 'within a reasonable time' or 'as soon as practicable'. Having regard to the number of cases that are being dealt with by Courts on a daily basis at present, adherence to strict interpretation would not only be impractical but also would affect the quality of justice that is served.

Following authorities underpin the above premise.

The case of Dayaratne Vs. Bowie; S. G. 947—M. G. Colombo, 23020/A held thus,

> 'I prefer to interpret the word "forthwith" to mean "within a reasonable time" or "as soon as practicable."'

This question was elaborated in depth in the case of Anura Shantha alias Priyantha and Another Vs. Attorney General; (1999) 1 Sri.L.R.299 and the following extract is material to the present case.

> 'I am of the view that the provisions of s. 203 are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court and its non-compliance would not affect-the individual's rights unless such non-compliance occasioned a failure of justice. As such, I am reluctant to hold that such provisions should be blindly adhered to - and indeed where such adherence may cause a miscarriage of justice in itself. The right of the accused is to a just and fair trial and the returning of a just and fair verdict. To interpret the law as operating to automatically disqualify a verdict and vitiate a full trial merely on the basis of non-compliance with a procedural directive issued to the judge to my mind is unsound. But, I must hasten to add that non-compliance with statutory provisions by Courts themselves is disturbing and should not be encouraged.'

The case of Singha Ranatunga Vs. The State; (2001) 2 Sri.L.R 172**,** similarly held that,

> ‘despite the large volume of evidence to be considered, the trial Judge with commendable speed has delivered, his verdict giving reasons. Provisions of S. 203 CEC are directory and not mandatory. This is a procedural objection that has been imposed on the court and its non-compliance would not affect the individual’s rights unless such compliance occasions a failure of justice.’

Being mindful of the above, it is the view of this Court that the learned Judge of the High Court had not acted in violation of section 203 of the Code of Criminal Procedure Act.

Counsel for the fourth accused-appellant submitted that the state counsel had not followed acceptable procedure in submitting the productions for identification. Although such mistakes are not to be encouraged, such technical faults can be disregarded if no prejudice had been caused to neither of the parties involved for,

> ‘a criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny,’

as justly stated in Himanshu Singh Sabharwal Vs. State of M.P. and Ors; (2008) 3 SCC 602, by the Supreme Court of India.

Next submission by the counsel for the third accused-appellant is about the alleged confessions made by the third and fourth accused-appellants to the Magistrate in Kandy. Counsel averred that the learned High Court Judge had disregarded the alleged confessions on the basis that they were exculpatory and not confessions and had not considered the contents of same that were favourable to the case of the third accused-appellant.

As correctly pointed out by the learned Deputy Solicitor General for the respondent, a trial judge is the sole trier of facts in a case when seated without a jury. In those circumstances, it is the duty of the learned trial judge to analyse and evaluate the evidence presented before him. He is not bound to accept every item of evidence. He is required to judicially evaluate such evidence and act upon it accordingly. In support of this contention, section 230 (a) of the Code of Criminal Procedure Act states that,

> ‘it is the duty of a Judge to decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties.’

The duty of a Judge is to work towards ascertaining the truth and nothing but the truth in order to deliver justice. This point had been reiterated time and again by Courts in India. The Supreme Court of India in Mohan Singh Vs. State of M.P.;(1999) 2 SCC 428**,** as follows.

> ‘Effort should be made to find the truth; this is the very object for which Courts are created. To search it out, the Court has to remove chaff from the grain. It has to disperse the suspicious, cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the Courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the Court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. There is no mathematical formula through which the truthfulness of a prosecution or a defense case could be concretized. It would depend on the evidence of each case including the manner of deposition and his demeans, clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So Courts have to proceed further and make genuine efforts within judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt.’

And in Zahira Habibullah Sheikh Vs. State of Gujarat, (2006) 3 SCC 374, as follows.

> ‘the Supreme Court observed that right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice.’

In the instant case, the learned Judge of the High Court upon considering the contents of the alleged confession of the third accused-appellant, had come to the conclusion that it was an exculpatory statement. As stated above, the learned Judge is not bound to accept every item of evidence without judicially evaluating the same. In the circumstances, he had correctly not acted upon the confession that was marked and produced by the prosecution. It is also to be noted that, in as much as all such statements made to Magistrates do not necessarily become confessions, hence all that is said by accused in such statements is not necessarily true. In this instance, by refusing to accept the alleged confession, no prejudice has been caused to the third accused-appellant as he had ample opportunity to discredit the

prosecution witnesses and/or to place evidence on his behalf at the trial. It is discussed elsewhere in this judgment that whenever the opponent had declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted.

The final ground of appeal that requires deliberation is on the elements of the offences whereupon the accused-appellants had been convicted. Counsel for the third accused-appellant argued that the learned Judge of the High Court had failed to consider that section 383 of the Penal Code only sets out aggravated punishment for robbery and does not set out the offence of robbery and as such the third accused appellant could not have been convicted on the third count of the indictment.

For the purpose of clarity, sections 379 and 383 of the Penal Code are reproduced below.

Section 379 states thus:

> 'Theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint.'

Section 383 states that,

> 'if, at the time of committing robbery, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished may be extended to twenty years.'

Since the definition of section 383 begins with the wording, 'if, at the time of committing robbery' it is common sense that when the stipulated penal section in the indictment is section 383 of the Penal Code, the corresponding offence should undoubtedly be robbery, elements of which has been laid out above. Moreover, the definition of robbery in section 379 clearly indicates the possibility of death and the evidence adduced were in relation to the death of the deceased and the van that had been robbed during the course of the same transaction, since, the deceased and the van went missing together at about 14.00h on the 5th of September 1999, i.e. on the same day and at the same time. With reference to the evidence that had been led at the trial, the offence that should have been considered and thus had been considered was in fact robbery in its aggravated form as regards the third count. The fact that the accused-appellants were sentenced to rigorous imprisonment for twenty years by the learned High Court Judge further clarifies that the elements of the offence that were considered against the accused-appellants were in relation to robbery.

As it has already been examined intensely and established above in this judgment, the operation of the presumption stipulated in section 114 of the Evidence Ordinance and the

Ellenborough Dictum in favour of the prosecution, the actus reus and mens rea in relation to the charges of murder and robbery are as good as proved against the accused-appellants. Thus, the contention that the learned Judge of the High Court had not considered the offence of robbery is not acceptable.

Counsel for the third and fourth accused-appellants stated in their submissions that the legal principles in relation to common intention had never been considered and applied and whether there is evidence pertaining to common intention had not been considered by the learned Judge of the High Court.

It is indisputable that whoever committed the murder of the deceased had indeed entertained murderous intention given the fact that the deceased was strangled to death and his corpus was dumped in to a culvert. As regards the offence of robbery, the requisite mental element would be the *mens rea* of theft which is dishonest intention. The mere fact that the van was missing for a few days and was found elsewhere with some items missing and the numbers of its number plate being altered proves that the offender had intended wrongful loss or wrongful gain.

The question then to be considered is whether the third and fourth accused-appellants entertained common murderous and dishonest intentions along with the first and second accused-appellants.

It had been rightly held by the Privy Council in Mahbub Shah Vs. Emperor (1925) (A. C. 118), that,

> '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.'

Common intention is defined in section 32 of the Penal Code in this manner.

> 'When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.'

With reference being made to King Vs, Asappu (1950); 50 NLR 324, a summary of the law relating to common intention has been spelt out in S.C. TAB Appeal No.02/2012 as arrayed below.

'It is noteworthy that the law pertaining to common intention has developed greatly since the decision in The King v. Asappu (1950) (50 NLR 324), and thus must be updated prior to consideration. In this regard, the Court endeavours to summarise the law relating to common intention as follows:

(a) The case of each accused must be considered separately.

(b) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
(c) Common intention must not be confused with same or similar intention entertained independently of each other.
(d) There must be evidence either direct or circumstantial of pre-arrangement or some other evidence of common intention.
(e) It must be noted that the common intention can be formed in the 'spur of the moment'
(f) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.
(g) 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.
(h) The prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred
(i) The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.'

It had been held by the Supreme Court of India in Rishideo vs. State of Uttar Pradesh (1955) (AIR 331) that,

> 'the existence of common intention said to have been shared by the accused is, on an ultimate analysis, a question of fact.'

In consideration of the above, evidence of PW1 and the police had already established that the third accused-appellant along with the first and the second accused-appellants was arrested with the stolen van when he was trying to flee. Recovery of the missing things of the stolen van, made consequent to the confession made by the fourth accused-appellant under section 27 of the Evidence Ordinance has already been proved against him.

The third accused-appellant as well as the fourth accused-appellant together with the other accused-appellants were seen to have travelled in the said stolen van to watch a musical show as per the evidence of PW4. Since both accused-appellants failed to offer any explanation as to how the stolen van came into their possession, common intention entertained by them along with the other accused-appellants is deemed to have been proved as regards the offence of robbery.

As mentioned above, it is clear that the deceased had been murdered. He was last seen travelling to Nuwara-Eliya in the said van and since he never returned with it, it had been rightly presumed that at the time of his death he was still in possession of the stolen van and he was murdered to its taking.

In the backdrop of the evidence which proved that the third and the fourth accused-appellants were travelling in the stolen van and was in possession of the same with the other two accused-appellants, the manner in which they came into possession of the van without the deceased being present, ought to have been explained by the third and the fourth accused-appellant, hence they had failed in that regard, they were fairly presumed to have committed the murder of the deceased along with the other two accused-appellants with the common murderous intention in mind.

In light of the facts and applicable legal principles peculiar to this matter in question, this appeal has failed to hold any merit. The conviction therefore is affirmed and the appeal dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal