**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

**Complainant**

**S.C. Appeal No.14/2019**

**SC/SPL/LA No. 125/2014**
**Court of Appeal Case No. C.A.95/2011 A.B.C.**
**H.C. Avissawella No. 58/2006**

**Vs.**

1. Singappuli Arachchilage Rumesh Sameera Dissanayake alias Gaminige Kolla
2. Baduwala Wahampurage Podinona,
3. Kalanchidewage Suresh Nandana

**Accused**

**And**

1. Singappuli Arachchilage Rumesh Sameera Dissanayake alias Gaminige Kolla
2. Baduwala Wahampurage Podinona,
3. Kalanchidewage Suresh Nandana

**1st, 2nd, and 3rd Accused-Appellants**

**Vs.**

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**Complainant—Respondent**

**AND NOW**

Kalanchidewage Suresh Nandana

Presently at

Remond Prison Welikada,

Boralla, Colombo 08.

**3rd Accused-Appellant-Appellant**

**Vs.**

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**Complainant—Respondent-Respondent**

**BEFORE** : P. PADMAN SURASENA, J.
ACHALA WENGAPPULI, J.
MAHINDA SAMAYAWARDHENA, J.

**COUNSEL** : Anil Silva P. C. with Amaan Bandara for the 3rd Accused-Appellant- Petitioner-Appellant
Rohantha Abeysuriya P.C. A.S.G. for the Hon. Attorney General

**ARGUED ON** : 21st January, 2022

**DECIDED ON** : 09th February,2024

**ACHALA WENGAPPULI, J.**

The 3rd Accused-Appellant-Appellant (hereinafter referred to as "the Appellant") was indicted along with 1st and 2nd Accused-Appellants-Petitioners (Petitioners of SC Spl. LA No. 126/2014 and hereinafter referred to as the 1st and 2nd accused) before the High Court of *Avissawella* for committing attempted murder on *Thotapitiya Arachchilage Kusumawathie* and, in the course of same transaction, committing murders of *Hetti Arachchige Susantha* and *Hetti Arachchige Swarna* on or about 26.10.2003. All three accused elected a trial without a Jury. After the ensuing trial, during which the Appellant as well as the 1st and 2nd accused made statements from the dock denying any involvement with the offences to which they were accused of, the High Court found three of them guilty on all counts contained in the indictment.

In relation to the 1st count of attempted murder the High Court imposed a term of 20-year Rigorous Imprisonment along with a fine of Rs 50,000.00 on each of the accused, coupled with a default term of imprisonment, whereas the Court imposed death sentence on them in respect of the 2nd and 3rd counts.

All three accused have individually preferred appeals against the Judgment of the High Court in appeal No. CA 95/2011 (A, B and C) and the Court of Appeal by its consolidated Judgment dated 19.06.2014, affirmed the convictions entered against them and along with the sentences imposed by the High Court, before proceeding to dismiss their appeals.

Thereupon, the Appellant had sought Special Leave to Appeal from this Court against the said Judgment of the Court of Appeal. When the said application for Special Leave bearing No. SC SPL. LA No. 125/2014 was supported on 09.01.2019, this Court thought it fit to grant Special Leave to Appeal on the questions of law, as set out in sub paragraphs 12(b), 12(c) and 12(d) of his Petition dated 25.07.2014. The joint application of the 1st and 2nd accused seeking Special Leave to Appeal under application No. SC SPL LA No. 126/2014, against the dismissal of their appeals by the Court of appeal too was taken up for support on the same day but, they were unable to persuade this Court to grant leave.

The three questions of law, on which special leave to appeal was granted in relation to the impugned Judgment of the Court of Appeal, are as follows;

(b) Did the Learned Judges of the Court of Appeal fail to appreciate that the entirety of the evidence led at the trial in the High Court do not justify the conviction of the Appellant of the offences set out in 1st, 2nd, and 3rd charges of the Indictment?

(c) Did the Learned Judges of the Court of Appeal fail to appreciate the items of evidence in favour of the Appellant which tends to negative his participation in the incidents which culminated in causing hurt to *Thotapitiya Arachchilage Kusumawathie* and causing the deaths of *Hettiarachchige Susantha* and *Hettiarachchige Swarna*?

(d) Did the Learned Judges of the Court of Appeal misdirect themselves in holding that the Appellant's convictions in respect of the murders of *Hettiarachchige Susantha* and *Hettiarachchige Swarna* is correct inasmuch as there is no direct or circumstantial evidence connecting the Appellant with the said murders?

At the hearing of the appeal, the learned President's Counsel for the Appellant, submitted that even if the testimony of the injured *Thotapitiya Arachchilage Kusumawathie* is accepted as a whole and the prosecution case is placed at its best, still there was insufficiency of evidence, either in the form of direct or circumstantial evidence, in order to justify drawing an irresistible and necessary inference as to his guilt to the count of attempted murder. He further contended that the prosecution had failed to establish that the Appellant's participatory presence to the attempted murder of *Kusumawathie* to the required degree of proof. Similarly, the learned President's Counsel stressed on the point that there was no evidence at all to establish that the Appellant was even merely present when the two murders were committed, and that factor had effectively negated justification of any inference drawn by the Court on his complicity to the said murders. Therefore, the learned President's Counsel contended that the appellate Court had fallen into grave error in affirming the Appellant's convictions to the count of attempted murder as well as to the two counts of murder.

Learned Additional Solicitor General resisted the appeal of the Appellant and contended that the High Court as well as the Court of Appeal were satisfied with the available evidence in direct and

circumstantial forms and thereby sought to justify the affirmation of the conviction entered against the latter.

In view of the very nature of the legal principles that are associated with the contention advanced by the learned President's Counsel, which should be considered along with the issue of sufficiency of evidence, it would be helpful if reference is made to the case that had been presented before the trial Court by the prosecution. This would facilitate the task of consideration of the contention advanced by the Appellant, against the backdrop of the three questions of law in which leave was granted.

The injured *Kusumawathi* is a married woman of 45 years at the time of the incident who lived with her husband and their two children *Susantha* and *Swarna.* She had another daughter who had settled elsewhere after marriage. The 2nd accused is *Kusumawathi's* husband's half-sister. The 1st accused is the only son of the 2nd accused, who also had a daughter. The 3rd Appellant was to marry the 2nd accused's daughter and was in the habit of regularly visiting the 2nd accused's house. Both these families lived on a commonly owned rectangular piece of land in an extent of about ½ an acre and had their houses built on it. The two houses were only about ten feet apart and were facing a pathway which commenced from the main road and leading up to a stream called *Gomala Oya.* This pathway provided the only access to the main road to both families. *Kusumawathi* did depend on *Gomala Oya* for supply of water and, as such, had to regularly walk pass the 2nd accused's house.

Describing the incident, during which *Kusumawathie* had sustained serious injuries to her head and her son and daughter were

killed, she testified that it happened on the evening of 26.10.2003. It was a Sunday. She had returned home at about 4.15 in the afternoon from *Ratnapura* Hospital after visiting her husband, who was receiving in-house treatment for the past two weeks. Her 24-year-old son *Susantha,* who was employed as a field officer in a Government Institution, had left home in the morning to attend some official work and not returned home by then. Daughter *Swarna,* a 22-year-old unmarried girl at the time of her death, was reading for a diploma conducted by *Kelaniya* University. She too had left in the morning and not returned home. *Kusumawathie*, after returning from the hospital and after having attended to some household chores, had gone to the stream and washed her laundry and had left them there drying. At about 6.00 in the evening she returned to the stream in a hurry, going past the accused's house, in order to bring back her clothes as a huge storm was brewing this time.

On her way back she saw the 1st accused, who was now standing in front of his house, approaching her with a sword in his hand. Upon seeing him and sensing an impending danger, she had frozen where she was. *Kusumawathie* had her laundry in one hand and, in the other, a cake of soap. The 1st accused was not alone but was flanked by the 2nd accused and the Appellant, who too had emerged from the doorway following the 1st accused. The 2nd accused and the Appellant had clubs in their hands.

The 1st accused, without making any utterance, had struck her with the sword on her hand**.** She fell down when he struck her with his sword for the second time. The 2nd accused had thereafter hit her with a club. The Appellant too had attacked her with a club. It was a sustained

attack by all three of them and their attack concentrated on her head and legs. After the attack, all the accused had dragged her up to the stream and left her there. She did not see who it was as she was dragged face down.

After about five minutes since the three attackers of *Kusumawathie* left leaving her near the stream, she heard her daughter *Swarna* repeatedly calling out "අම්මේ". This was about 6.15 p.m. Due to multiple injuries *Kusumawathie* already had suffered, she could not move or call out for her daughter for help. At that point of time, the rain started. It was a heavy downpour and she fainted where she was. When she regained consciousness after some time, which she estimates to be about one and half hours, she made an attempt to stand up. She could not hold her head up due to injuries and started dragging herself along the pathway towards her house, with the hope her son would have returned home by then. Having reached in front of her house, she saw the bookcase and the water bottle of her daughter lying in the front garden of their house. After seeing some blood on their main door and realising that her daughter too had been attacked, *Kusumawathie* had then inched towards the main road and came across the body of her son *Susantha*. It was lying on the pathway leading to their house. He had fallen on his umbrella. She had eventually managed to reach the main road and called out for help from one of her neighbours, *Jayasinghe,* who lived in a house bordering main road.

According to *Jayasinghe*, after the heavy rain had eased off, he heard a woman's call of distress and, on enquiry, saw *Kusumawathi* lying on the ground in front of his house with bleeding injuries on her head. When questioned as to what happened, she had said "ගාමිණිගෙ

කොල්ල ගැහුව" referring to the 1st accused. *Jayasinghe* had then asked one *Jayaratne* to take the injured to hospital, however, the latter had fainted after seeing the nature of injuries on *Kusumawathie's* head. She was then rushed to *Eheliyagoda* Hospital by one *Premalal*, where she was treated initially, before being transferred to *Colombo* National Hospital for specialised medical care.

The first information over the incident was received by *Eheliyagoda* Police Station on the same day at 7.40 p.m. and SI *Medawatta* who visited the crime scene observed a body of a male lying on a pathway about a distance of five feet away from the main road and about 20 meters away from the house of *Kusumawathie*. The deceased was dressed in a shirt, a pair of trousers and shoes. There was an umbrella underneath his body. Several deep cut injuries were noted by the officer on the head of the deceased. This was the body of *Susantha.* The body of his sister, *Swarna,* was discovered about nine meters away towards their house and lying on an embankment of about 6 feet above from the pathway. She was dressed in a blouse and a skirt. Her books were strewn in the front garden and one of her shoes was found near the house. She too had suffered several cut injuries to her head and face. The Officer also noted several blood-like patches in the back garden of the house. The 1st and 2nd accused were at their home. They were arrested on the following day by the Police along with the Appellant. The Police thereupon recovered a sword, upon being pointed out the place by the 1st accused, where it was lying concealed in a shrub.

Post-mortem examination of *Susantha's* body revealed that he had suffered multiple cut injuries to his head, inflicted by a heavy sharp weapon like a sword. His death was due to an injury which had severed

several major blood vessels of the neck along with neck muscles and caused damage to cervical vertebrae. That particular injury was classified as a necessarily fatal injury by the expert witness. The deceased also had defensive wounds on his arms. The death of *Swarna* was also due to multiple necessarily fatal cut injuries to her head, inflicted by a sharp heavy weapon, similar to a sword. She also had several injuries which the medical officer, who testified on his autopsy findings, had described as defensive injuries, in addition to several abrasions which may have caused due to a fall.

The medical evidence presented by the prosecution also revealed that *Kusumawathie* had lost her middle and ring fingers due to an attack using a heavy sharp cutting weapon. She also had suffered a fracture of her *ulna,* upon being hit by a blunt weapon, similar to a club. She also had suffered multiple cut injuries to her head, which the Consultant JMO, who examined her in the hospital after she was treated for those injuries, expressed his opinion that they could have endangered her life.

Thus, it is not a surprise that the learned President's Counsel opted to place reliance on the contention that there was no direct or circumstantial evidence to conclude that the Appellant had participated in the attack on *Kusumwathie* along with his other contention that the available evidence only points to him being merely present during the attack on *Kusumawathie,* although being armed with a club at the time of causing injuries to the elderly woman by the other two. It is also clear that the learned President's Counsel had heavily relied on the total absence of any direct or circumstantial evidence, according to him which even fail to suggest the Appellant's mere presence, during the attack on the two deceased.

In this context, it is also relevant to note that the prosecution relied on Section 32 of the Penal Code, in order to impute criminal liability vicariously on the 2nd accused and the Appellant, in view of the fact that the main striker was the 1st accused, who used a sword to repeatedly inflict serious cut injuries on all of his victims, in the course of same transaction, resulting in causing life threatening injury to *Kusumawathie* and necessarily fatal injuries to her two children.

Before I turn to consider the validity of the conviction of the Appellant entered against him by the High Court and affirmed by the Court of Appeal in relation to the second and third counts of murder, it is convenient to consider the legality of his conviction to the count of attempted murder, in this part of the judgment, particularly in view of the fact that the prosecution presented an eyewitness account, in support of that count.

Admittedly, the only source of direct evidence available to the prosecution to establish the count of attempted murder was *Kusumawathie* herself, who provided an eye-witness account to the sequence of events that resulted in causing a life-threatening injury to her. The trial Court as well as the appellate Court relied on her evidence to sustain the convictions entered against the three accused. Hence, a brief reference should be made on the issue of the testimonial trustworthiness of that eyewitness before I proceed any further.

During her cross-examination, learned Counsel who represented all three accused before the High Court, was unable to mark a single contradiction or an omission against the testimony of *Kusumawathie***.** Learned Counsel only suggested to the injured that she was the aggressor who harassed the 1st and 2nd accused and, at times, threatened

them with violence, over the dispute regarding the land. Continuing with this line of questioning, the witness was also suggested by the learned Counsel that prior to this incident she had chased after the 1st accused, while being armed with a sword. *Kusumawathie* totally denied occurrence of such an incident and consistently maintained her position, that it was the 1st and 2nd accused who wanted her family out of the land, on which they lived for a long period of time. However, the issue was not probed beyond that particular suggestion.

Importantly there was no suggestion made to the witness to the effect either that she had falsely implicated the 1st, 2nd accused, upon being motivated by the animosity she had entertained against them. Also, there was no suggestion made on behalf of the Appellant either on the basis that she had falsely accused him because he was merely associated with the household of the 1st and 2nd accused or at least that he was never involved in the attack.

The trial Court considered these aspects in detail and, having found that *Kusumawathie's* evidence was corroborated by medical evidence, decided to accept her evidence as a credible and truthful account of the incident. In affirming the conviction of the two accused and the Appellant to the count of attempted murder, the Court of Appeal too was satisfied with the said conclusion reached by the trial Court, as it found it safe to act on her evidence. I am in agreement with the said decision of the Court of Appeal to treat *Kusumawathie's* evidence as truthful account. Understandably, learned President's Counsel for the Appellant did not challenge that finding of fact. Hence, his contention that even if one were to take her evidence its best, it would only reveal that the Appellant was "*merely present*" at the scene

and nothing more, and thereby falling short of establishing he had a participatory presence in the commission of attempted murder.

In these circumstances, her narration of the sequence of events had to be taken as an uncontested account of an eyewitness, in relation to the count of attempted murder and also provided several important items of circumstantial evidence, in relation to the two counts of murder.

Returning to the contention advanced before this Court by the Appellant, it must be noted that the three counts contained in the indictment had been presented to the High Court on the premise that the three accused committed the several offences in the course of same transaction, citing Section 32 of the Penal Code. With that citation, the prosecution sought to impute vicarious criminal liability on each of the three accused for criminal acts committed by any one of them, and therefore each one of them was made liable for the attempted murder and murders in the same manner as if it were done by each one of them individually. As such, it was the burden of the prosecution to establish beyond reasonable doubt that the three accused have acted in furtherance of their common murderous intention, in the commission of the offences they were charged with.

The collective wisdom, as found in multiple judicial precedents that had been pronounced over the years by the superior Courts, in which the applicable principles of law on Section 32 of the Penal Code in the imputation of criminal liability on several accused, was encapsulated by this Court in the Judgement of ***Indrawansa Kumarasiri and Others v Kumarihamy, Chief Registrar Colombo and the Attorney***

***General*** (SC TAB Appeal No. 2 of 2012 – decided on 02.04.2014), in the following manner;

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 each other;

d. There must be evidence either direct or circumstantial, of prearrangement or some other evidence of common intention;

e. It must be noted that common intention can be formed on 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.

The underlying principle of law contained in Section 32 of the Penal Code, in imputing criminal liability on a person for the criminal act of another, is evident from the words; "*accused must have been actuated by a common intention with the doer of the act at the time the offence was committed*". Dr. *Gour* in his book Penal Law of India (11th Edition), (at p. 314), states that in order to impute criminal liability under Section 34 of the Penal Code of India (which is the counterpart provision to our Section 32) "the *essence of Section 34 is that the person must be physically present at the actual commission of crime. This must be coupled with actual participation*." With the imposition of the requirement of the person, on whom the liability under Section 32 is sought to be imputed, must be present at the actual commission of crime, the principle of law quoted above in (f) becomes relevant in view of the contention advanced by the learned President's Counsel in relation to the count of attempted murder. The said principle of law states "mere *fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention*."

Thus, the core contention of the Appellant, in impugning his conviction for the offence of attempted murder, is that his mere presence at the place of the incident, without any other evidence indicating that he did take any active part in the attack on the injured *Kusumawathie*, clearly insufficient for the trial Court to impute him with any criminal liability under Section 32 of the Penal Code. Clearly this

contention is based on the pronouncement made by *Basnayake* CJ in the case of ***The Queen v Vincent Fernando and two others*** (1963) 65 NLR 265, (at p. 272) that "*a person who merely shares the criminal intention or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others*."

In view of this pronouncement, if the Appellant were to be afforded an exemption from criminal liability under Section 32, on account of his "*mere presence*" at the crime scene, the evidence must indicate that he did not do any "*criminal act in furtherance of the common intention of all.*" If the words of *Basnayake* CJ, as appear in the quoted segment of the judgment of the Court of Criminal Appeal, taken in isolation ignoring the rest of his Lordships reasoning, then it could lead to a mistaken notion that the "*act or acts*" that are attributed to the accused, on whom criminal liability sought to be imposed under Section 32, should be done along with or at the same time, with the act or acts of the other accused that had resulted in the commission of that particular offence. If this notion is accepted as a correct principle of law in relation to imposition of criminal liability under Section 32, then the timing of the act or acts attributed to the accused becomes material as it is the contention of the Appellant that he was merely present, when the others attacked and caused injuries to *Kusumawathie.* This contention seems to indicate that he placed reliance on the factual position that during the time period within which the said attack was carried out by the others, there was no evidence at all to indicate that he did anything to injure the woman.

In the same Judgment, *Basnayake* CJ effectively negates validity of such a notion. His Lordship stated (at p. 272) "*By virtue of the definition of 'act' in Section 31 of the Penal Code the application of the Section also extends to a series of criminal acts done by several persons in furtherance of the common intention of all. There are more cases which fall within the extended application than within the un-extended.*" Thereupon, his Lordships further stated thus; "*… where a series of criminal acts is done by several persons, each act would be done either jointly or severally. But whether the criminal acts in the series of criminal acts are done jointly or severally if each criminal act is done in furtherance of the common intention of all each of the persons sharing the common intention and doing any act in the series of criminal acts is not only liable for his own act but is also liable for the acts of the others in the same manner as if it were done by him alone.*"

More importantly, having referred to the often-quoted words of Lord *Sumner* in the Privy council judgment of ***Barendra Kumar Gosh v. Emperor*** (1925) A. I. R. Privy Council (at p. 1), that "*they also serve who only stand and wait*", *Basnayake* CJ offered an important clarification to that statement by stressing the point that the words of Lord *Sumner* has to be regarded "*… as applying not to a bystander who merely shares mentally the criminal intention of the 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.*"

The Appellant, however, does not claim that he was present there as a mere bystander and simply watched the proceedings. Neither did he claim that he *merely shares the criminal intention* and did nothing "*in furtherance of the common intention of all*" nor derived a fiendishly delight

from the criminal act of the others. In his statement from the dock, the Appellant only pleaded that he had no knowledge of the incident.

While the judgement of ***The Queen v Vincent Fernando and two others*** (supra) speaks of an accused, who, by way of an act or a series of criminal acts done in furtherance of the common intention of all persons, each sharing a common intention with the others and doing any act in that series of criminal acts is not only made liable for his own individual act but also made liable for the acts of the others in the same manner as if it were done by him alone, the Privy Council judgment of ***Mahbub Shah v Emperor*** AIR (32) 1945 Privy Council 118, *Nair* J stated that " … *common intention within the meaning of the Section implies a pre-arranged plan, and to convict the accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to a pre-arranged plan"*.

This principle of law was referred to in the case of ***The King v Asappu et al*** (1948) 50 NLR 324, (at p.329) by *Dias* J and restated the underlying principle as follows;

> *"… 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, and not merely a same or similar intention entertained independently of each other."*

Thus, the requirement considered by the Privy Council, for the purpose of imposition of criminal liability on an accused under Section 32 in relation to the said appeal, was the presence of a pre-arranged plan. The requirement of evidence as to a pre-arranged plan, as considered in the judgment of ***Mahbub Shah v Emperor*** **(**supra), was further expanded by the judgment of ***The King v Asappu et al*** (supra), with the pronouncement that a Court could infer existence of common intention on evidence as to "… *pre-arrangement, or a pre-arranged plan, or a declaration showing common intention".* The Court also highlighted yet another factor in the said judgment, when it stated that in order to establish criminal liability under Section 32 a Court could also infer existence of common intention in an accused based on "… *some other significant fact at the time of the commission of offence*".

In this context, I think it is important to highlight another important aspect in this regard. The prefix "*pre*" is generally taken to connote an event that had occurred prior to, in relation to another event that had followed the first event. Similarly, when that prefix appears in the phrase "*pre-arranged plan*", it also gives an impression to a general reader what that particular phrase might mean is that the arrangement to commit the offence was agreed upon by the accused must have taken place well in advance to the time of actual commission of the offence. However, *Basnayake* CJ, in the judgment of ***The Queen v Mahatun and another*** (1959) 61 NLR 540, clarified that ambiguity by making the authoritative pronouncement (at p. 546) that "*to establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre- arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment. To hold that 'common intention' within the meaning of the Section 32*

*necessarily implies a pre-arranged plan would unduly restrict the scope of the Section and introduce an element which it has not."*

Thus, in a given time scale, which has its starting point placed at the occurrence of the meeting of the accused in their physical form and its terminal point set at the time of the actual commission of the offence, the event of common meeting of minds in the form of a pre-arranged plan or pre-arrangement could occur at any point of time between the said two points within that time scale, either spontaneously and alongside with the commission of the offence, or prior to the actual commission of the crime, and thereby making it indeed a "*pre-arranged plan*".

It is noted earlier on, in relation to the count of attempted murder, that the prosecution presented an eyewitness, who in turn had provided direct evidence regarding details of the violent attack that had been unleashed upon her, by the three accused. In ***Wasalamuni Richard v The State*** (1973) 76 NLR 534 at p. 549, *HNG Fernando* CJ made the following observation after considering a long line of judicial precedents; "*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."*

Since the count of attempted murder is based on direct evidence, it is necessary to test the validity of reasoning adopted by the High Court in order to convict him to that count, as well as the reasoning of the appellate Court, adopted in the affirmation of that conviction,

against the backdrop of the legal principles that are referred to in the preceding paragraphs.

The trial Court, in its consideration of the evidence had observed that the injured *Kusumawathie* could not recall exactly what the Appellant did to her during the attack. The Court also noted that, despite her inability to recall a specific act of the Appellant during the attack, she had, however, implicated all three of the accused for mounting an attack on her. She was not challenged by the Appellant for the role attributed for him in the attack. The question as to what particularly the Appellant did during the attack was answered by the injured by stating that "*I cannot recall, all three came and attacked*" ("**මතක නැහැ, තුන් දෙනාම ආවා, ගැහුවා**"). She distinctly remembered that the Appellant had a club in his hand and also asserted that she was struck with clubs multiple times. The trial Court was satisfied that the Appellant had attacked the injured woman along with the other two and had thereafter got involved with them in carrying *Kusumawathie* up to the stream. Therefore, the Court concluded that the Appellant shared a common intention with the other accused, in relation to the attack on *Kusumawathie*, during which the injured woman sustained an injury may have been caused her death in the ordinary course of nature. This conclusion was reached by the trial Court after satisfying itself that it is the necessary inference that could be drawn after consideration of the material placed before it. The Court of Appeal too, in affirming the said conviction after undertaking a detailed analysis of the evidence, also was of the view that the "*material placed before the trial Court is totally consistent with the guilt of the accused and proves and establish circumstances which guilt safely confirm of all three accused*."

If there was material to reasonably conclude that the three accused, including the Appellant, had acted in furtherance of a common intention of all, in launching the attack on *Kusumawathie,* not merely to hurt her, but to cause her death or such bodily injuries as were likely to cause her death, and that they did so by carrying out a "*pre-arranged plan*", then there is no question as to the validity of imposition of vicarious criminal liability on the Appellant, for the commission of the offence of attempted murder, despite the fact the injury that had endangered her was inflicted by the 1st accused and the Appellant was "*merely there*", with a club in his hand.

It is significant to note when *Kusumawathie* made a general accusation against the Appellant, that he, along with the others, had attacked her and there was no challenge made by him on that specific accusation. Thus, her claim that the Appellant too had attacked her, despite the fact that it remains bereft of any specific details of the manner in which that attack was carried out, supported the prosecution case, and thereby enabling the trial Court to answer the question; whether the material presented before it is indicative of a "*pre-arranged plan*" in the affirmative, which in turn established the common intention entertained by each of the accused.

The trial Court had made a reference to this aspect of a pre-arranged plan as it related the evidence indicating a strong motive entertained by the 1st and 2nd accused in order to secure the land only to themselves. It had therefore inferred that the only obstacle that prevented them achieving that objective was the continued occupation of the land by *Kusumawathie's* family and the accused made an attempt to remove that obstacle by mounting the said attack on her family. In

the circumstances, it is helpful if the gist of her evidence touching on this particular aspect is referred here in more detail, although I have already devoted some space earlier on this Judgment in reproducing her evidence.

The injured was attacked by the three accused, when she was returning from the stream in a hurry after collecting her laundry. She had already gone past the house of the 2nd accused to do her laundry and returned home. This was the second time she had gone past that house in that afternoon to the stream. On her hurried return, before the onset of the heavy downpour, she came to pass the entrance to the 2nd accused's house. Then only the 1st accused emerged out from the house with a sword in his hand and was flanked by the 2nd accused and the Appellant, each carrying clubs. The 1st accused struck *Kusumawathie* with his sword once on her right hand, severing her middle and ring fingers and when he struck for the second time, she fell down. The 2nd accused then struck her with a club and the attack by the accused, using the sword and clubs, continued for some time. Thereafter she was dragged down to the stream and dumped there. None of the accused ever uttered a single word in the entirety of the whole sequence of events.

The above narration does not speak of any recent act by which the pre-existing animosity between the two families over the possessory rights of the land was rekindled. The suggestion that *Kusumawathie* had made an attempt to attack the 1st accused with a sword was merely for the purpose of negating her assertion that the aggressor was the 1st accused. The Learned Counsel did not connect that suggestion to the incident during which *Kusumawathie* sustained serious injuries. The

denial of the witness of this suggestion was not probed any further and there was no evidence elicited by the Appellant to substantiate that suggestion. In the circumstances, what transpires from the available evidence is that there was no recent incident that triggered the violent attack on *Kusumawathie* and her children.

In fact, there could not have been any spare time for *Kusumawathie* during her short stay at home on that day to allowing her to challenge the 1st and 2nd accused as her husband was receiving inhouse treatment at a hospital for the past two weeks and she was busy with the tasks of managing the house, preparing and taking meals to her sick husband whilst attending to the needs of her children. There was no indication of an imminent threat of violence that would be unleashed anytime soon on any member of her family, as the mother and the two siblings have attended to their regular activities, as if there was absolute peace that exists between the 1st or 2nd accused, despite the continuing resentment over the land.

Even on the day of the incident, the evidence is that *Kusumawathie* had returned from hospital only in the mid-afternoon and was thereafter busy with her daily household chores since then. There was no indication to *Kusumawathie* of any acts of animosity directed towards her by any of the accused on that particular day. Her actions clearly indicate that she did not anticipate any of the events that had taken place in that very evening. She had once gone past the accused's house to do her laundry without an incident. She then returned home to prepare dinner for her children who are expected to return anytime that evening itself. Then for the third time too, she had gone past the accused house, that time in a hurry, in order to pick her laundry up

before the onset of rain. None of the accused were seen in the open at that point of time. Only on her return journey for the third time, the first sign of trouble emerged as she was prevented proceeding any further by the three accused, who had come out of their house, and formed a human barricade blocking the pathway. Upon seeing that the 1st accused was armed with a sword while the 2nd accused and the Appellant had clubs, *Kusumawathie* immediately realised that she was in mortal danger. After her fall due to the sustained attack, the accused, probably due to her appearance with the bleeding injuries to her head and showing no signs of life, had taken her to be dead and thereafter brought her down to the stream to be left there.

This sequence clearly indicative of the fact that the three attackers were waiting patiently until *Kusumawathie* returned from the stream for the second time to mount their surprise attack on her. The fact that the 1st accused suddenly emerged out of his door armed with a sword, being flanked by the 2nd accused and the Appellant with clubs, is indicative that they have timed well to launch their attack and were determined to carry out a decisive attack on the unsuspecting woman. As already noted, this attack was not due to any provocative act done on the part of the injured, by which she had re-ignited the animosity that had subsided for some time. It is also not an instance where the victim was attacked by the attackers during an incident that erupted spontaneously and acting under the heat of passion using whatever they could lay their hand on or had picked up from their surroundings to be used in the attack. The three attackers were already armed with a sword and clubs, when they emerged from the front door of their house.

One striking feature that could be observed from these circumstances is that no one of the trio had issued any directions or commands on the other two members as the attack proceeded on and, each of them, by their conduct indicated that they knew exactly what each of them were supposed to do individually. After the attack and while the injured woman lay motionless, the accused knew the next step is that she should be carried away to the exact place, where she was eventually taken. The task of carrying *Kusumawathie* down to the stream, obviously an unusual course of action by any standard, was carried out by them without any instructions issued by the 1st accused, who spearheaded the attack.

The only probable reason for the accused to adopt such a strange move would have been to erase any indication of violent attack on *Kusumawathie*, from the pathway as her children were due to return home at any moment in that evening. It was essential for the attackers not to leave any room for suspicion, so that they could have an edge over the unsuspecting victims *Swarna* and *Susantha,* by mounting similar surprise attacks on them, when they were least prepared. What is important to note here is, not particularly the reason why they took her there, but the fact that the decision to carry *Kusumawathie* down to the stream was not taken at the place and time where she was attacked. The act of carrying her down to the stream had been a result of an act of prior understanding reached between the three attackers. It obviously would have been reached even before the actual attack was launched, and its timing shifts to a point even prior to their emergence from the doorway, as *Kusumawathie* walked back from the stream. In this regard, the fact that the washed clothing and the cake of soap which *Kusumawathie* had in her hands at the time of her attack, that should be

lying at the place of attack, had disappeared from the scene is a very relevant and significant factor indicative of the degree of preparedness.

The attack on the injured was carried out by all three accused, whilst maintaining a stoical silence in its entire duration, and therefore the intentions entertained by each of them at that point of time had to be inferred from the available items of evidence and also of any inferences that could reasonably be drawn from those items of evidence.

It was observed by the Privy Council in ***Mahbub Shah v Emperor*** (supra - at p. 120) in fulfilling its task of consideration of the evidence, the Court must bear in mind that "*… it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases, it has to be inferred from his act or conduct or other relevant circumstances of the case*." In the Judgment of ***Sirisena and six others v The Queen*** (1969) 72 NLR 389, the Court of Criminal Appeal quoted the Judgment of the Supreme Court of India in ***Afrahim Sheik v. The State of West Bengal*** 3 A. I. R. 1964 S.C. 1263 at 1268, which stated; "*A person does not do an act except with a certain intention ; and the common intention which is requisite for the application of S. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of the criminal act … and Section 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was caused as a result of the beating.* "

The Court of Criminal Appeal observed in ***Regina v Somapala et al*** (1956) 57 NLR 350 (at p. 353), the that the word "*act*", as found in Section 32 of the Penal Code, have been authoritatively explained quoting Lord Sumner in ***Barendra Kumar Ghosh v Emperor*** (supra) " …

*the whole action covered by the unity of criminal behaviour which results in something for which an individual would be punished if it were all done by him alone ", and liability is imputed to each individual socius criminis not merely for his own acts but for the totality of the acts committed by his confederates in furtherance of their common intention. Vicarious or collective responsibility attaches in such a situation for the result (e.g., death) of their united action. But S. 32 certainly does not, in addition, constructively impute to one socius criminis the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal acts has committed an offence involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence."*

The factors referred to in the previous paragraph makes it very clear that there was indeed a "*pre-arranged plan*", that had agreed upon between the three accused for the purpose of causing death of *Kusumawathie* or to cause her an injury that would be sufficient to cause death in the ordinary course of nature, with which the three accused had agreed upon before launching their attack on her.

In relation to the manner of the attack on *Kusumawathie,* the fact that all three emerged from their door already armed with a sword and clubs and that too when only the injured had reached their house, are all indications of prior planning. Neither the Appellant nor the 2nd accused had to think on their feet to align their individual actions to coincide with that of the 1st accused, who acted as the main striker during the entire episode. The three accused knew exactly what each one of them was supposed to do with passing of each phase of the attack. This factor becomes explicit when one takes the sequence of events that took place after *Kusumawathie*, being repeatedly struck on

her head by the 1st accused with a sword coupled with repeated club blows aimed at her by the other two, had collapsed in the same spot and was lying motionless. The accused took that as an indicator that she had died. It was the 1st accused who inflicted the injury that could be termed as a fatal in the ordinary course of nature.

However, none of the remaining partners to the attack neither expressed their dismay or remorse for the fate of the victim, indicating the actions of the 1st accused had far exceeded what they had anticipated for. It is a factor that gives rise to an inference what they saw was what exactly they wanted to see. They executed the said "*pre-arranged plan*" to a total completion by mounting a violent surprise attack on *Kusumawathie*, resulting in an injury that would be sufficient to cause her death in the ordinary course of nature, and finally disposing of their victim, under the mistaken belief that she was dead.

There is no material which might point to any other innocent hypothesis in favour of the Appellant either from the prosecution evidence or from his own evidence, which confined to a pleading ignorance of the attack, taken up at the last minute, and was rightly rejected by the trial Court. Thus, all these factors point to the irresistible conclusion that when the Appellant did emerge through that doorway, being armed with a club and alongside the 1st accused and 2nd accused, to obstruct *Kusumawathie* who was merely returning home with laundry, he had entertained a common murderous intention shared with them to cause her death or to cause such bodily injuries as were sufficient to cause her death.

The Court of Criminal Appeal, in its judgment of ***The King v Piyadasa et al*** (1947) 48 NLR 295 (at p.297), followed the reasoning of

*Howard* CJ in the judgment of ***King v. Herashamy*** (1946) 47 N. L. R. 83, in which it was held that (at p.89), " *… to convict all of the accused of the offence of attempted murder each one of them at the time of the assault was actuated by a common intention not only to beat but also to cause his death or such bodily injuries as were sufficient to cause his death*". In the instant appeal, the High Court was convinced that the evidence presented by the prosecution satisfied these requirements and the offence of attempted murder was complete and the Court of Appeal concurred with that conclusion. These two conclusions reached by the Courts below, which I find to be correct in both law and in fact as they were reached after taking into consideration of the circumstances referred to above in its totality. Hence, even if this Court were to accept the contention of the learned President's Counsel that, in the absence of any specific act attributed to him during the attack, other than being merely present with a club in his hand, as opposed to confirming his participatory presence, that fact alone does not suffice to absolve him of the criminal liability for the attempted murder of *Kusumawathie* vicariously, because the evidence clearly point to a necessary inference that there was indeed a "*pre-arranged plan*" to which he too was a party and therefore his presence at the commission of that offence could be taken a participatory presence.

A similar approach was taken by the Court of Criminal Appeal in ***The King v Marthino et al*** (1941) 43 NLR 521, where several employees of one bus Company had mounted an attack on the employees of a rival Company, over transporting passengers between *Matale* and *Anuradhapura.* The appellants are the employees of one company, who had caused the bus of the rival company to stop in front of their garage by obstructing the road with several of their own buses and then

launching an attack on the driver and conductor of the other Company and another person, who was travelling in that bus and injuring them.

During the appeal, in challenging the conviction by the Jury, particularly on the 9th accused, it was contended that the evidence indicated that he had not taken part in the attack on the employees of the rival company but was waiting lawfully at a halting place and therefore he did not entertain common intention with the other attackers. *De Krester* J rejected that contention after considering the propriety of him being there at the bus halt. His Lordship stated;

> *"That may be so if he is taken apart in that way. But once all the other circumstances point to a plan of attack it is difficult to believe that he alone of the Mant Bus Co. was ignorant of the plan or disapproved of it. The conductor of his bus and the runner were both accused. He gave no evidence explaining how he happened to be there or that he was unaware of any plan and in the circumstances of this case, he should have given evidence if he had anything to say for himself."*

Having dealt with the sustainability of the conviction that had been entered against the Appellant on the count of attempted murder by the High Court and its affirmation by the Court of Appeal in the preceding paragraphs, I shall now turn to consider the validity of the conviction entered by the trial Court in respect of the remaining two counts, i.e., the murders of *Swarna* and *Susantha.*

The available evidence against the Appellant in relation to these two counts, as correctly pointed out by the learned President's Counsel, are necessarily of circumstantial in nature. Therefore, I agree with the learned President's Counsel on the point, that the question whether the

Appellant had a participatory presence with shared common intention to commit the two murders with the others at the time of its commission, will have to be decided upon consideration of the totality of the available items of circumstantial evidence, although, in relation to the count of attempted murder the prosecution presented an eyewitness account.

The primary contention of the learned President's Counsel in respect of the convictions for murders is, by affirmation of the conviction of the Appellant on them, the Court of Appeal had fallen into grave error as it failed to hold that the items of circumstantial evidence presented by the prosecution in respect of the said two counts are wholly inadequate even to infer his mere presence at the crime scene and therefore incapable of offering any justification to the drawing of an inference of guilt, which should be the necessary and inescapable inference under the circumstances.

In view of the said contention advanced by the Appellant in challenging the validity of his conviction to the two counts of murder, it is incumbent upon this Court to assess that contention both in its legal and factual aspects, in relation to the questions of law that had been formulated and accepted by this Court. Therefore, as the first step, I intend to examine the basis on which the trial Court found the Appellant guilty to the two counts of murder, which would be followed by an examination of the approach adopted by the Court of Appeal, in affirming the said conclusion reached by the original Court.

The trial Court, in its 50-page Judgment summarised its process of reasoning and the conclusion reached on the evidence presented before it in the following manner (at page 45 of the Judgment);

*"මෙම ඉඩම තුල පදිංචිව සිටින අනික් එකම පාර්ශවය වුදිත පාර්ශවයයි. විනාඩි 5 ක් වන කෙටි කාලයකදී දියණියට පහරදීමක් සිදු කිරීමට වුදිතයන් හැර වෙනත් පුද්ගලයෙක් එම ස්ථානයට පැමිණියායි සිතීම උගහටය. මන්දයත් පැමිණිලිකරුවන් ඉඩමෙන් ඉවත් කිරීමේ චේතනාව තිබුණේද වුදිතයන් හටය. මෙම අපරාධ ස්ථානය සම්බන්ධයෙන් සළකා බැලීමේදී මෙය පුද්ගලික ඉඩමක් වන අතර, තුවාලකාරියට වුදිතයන් පහර දුන්නේද දරුවන් දෙදෙනාගේ මෘත ශරීරයන් සොයාගනු ලැබුවේද ආසන්න කාලයක් තුල එකම ඉඩමක පිහිටි ආසන්න ස්ථාන වලදීය. ඒ අනුව මුල් අපරාධය එනම් තුවාලකාරියට පහරදීමෙන් පසු තුවාලකාරියගේ දියණිය සහ පුතාගේ මරණයන් දෙකත් සිදු වී ඇත්තේ එකම ස්ථානයේ ය. එනම්, තුවාලකාරිය සහ 1, 2 වුදිතයන් පදිංචි ඉඩම තුලය. ඊට අමතරව මරණකරුවන් දෙදෙනාගේ දේහයන් තිබුණේද එකම ස්ථානයේ වන බැවින්, එකම පුද්ගලයන් විසින් මෙම අපරාධ තුනම සිදු කල බවට සාධාරණ අනුමිතියකට එලඹීමේ හැකියාව ඇත."*

It is clear from the above quoted paragraph, that the trial Court was of the considered view that it could reasonably draw an inference that the three offences were committed by the same set of persons, who attacked *Kusumaswathie* and they committed the two murders, in the course of same transaction, as the prosecution alleged in the indictment. In page 46, The trial Court re-iterated its conclusion already reached by stating (at p.46) *"ඊට අමතරව තුවාලකාරියගේ සහ මරණකරුවන් ගේ තුවාල පිහිටා ඇත්තේ හිසේ සහ දෙඅත්වලය. ඉන් මාරාන්තික තුවාල සිදු කර ඇත්තේ සියඵ දෙනාගේම හිස ප්‍රදේශයේ වීමද සුවිශේෂී කරුණකි. ඒ අනුව එකම චේතනාවකින් සහ එකම ආකාරයේ ආයුධයකින්, එකම ආකාරයේ අපරාධ ක්‍රියාවන් සිදු කිරීමට එකම පුද්ගලයන් මගින් පැ. සා. 1 තුවාලකාරිය සහ මරණකරුවන් දෙදෙනා හටම තුවාල සිදු වී ඇති බව පැහැදිලිවම පෙනී යයි."*

Then the trial Court referred to an inference it had drawn in stating (at p. 46) that *" මේ අනුව සියඵම සාක්ෂි එක්ව සලකාබලන කල එනම් සමාන ආකාරයේ තුවාල එකම ස්ථානයකට (හිසට) එකම ආකාරයේ ආයුධයකින් තුවාල සිදු කිරීම මෙම වුදිතයන් මිස වෙනත් කිසිවකු මගින් සිදු විය නොහැකි බවට සාධාරණ අනුමිතියකට එලඹීමේ හැකියාව ඇති බව නිගමනය කරමි"* and excluded the probability of a third party committing the two murders, as it states (at p. 48) *" ඉහත සඳහන් සියඵම කරුණු සහ සාක්ෂි සළකා බැලීමේදී මෙම අධිවෝදනා පත්‍රයේ 1, 2, 3 වෝදනාවන්ගෙන් දැක්වෙන අපරාධයන් සිදු කර ඇත්තේ මෙම වුදිතයන් තිදෙනා මිස වෙනත් අයෙකු විසින් නොවන බවට වන අනුමිතිය මිස වෙනත් අනුමිතියකට එළඹීමට හැකියාවක් නොමැති බව තීරණය කරමි."*

It is evident from the nature of injuries suffered by both the deceased, that their deaths were due to the seriousness of multiple cut injuries that had been inflicted on them. These injuries were inflicted with repeated attacks on their heads using a heavy sharp cutting weapon similar to a sword. Each of the deceased suffered at least one necessarily fatal injury to their heads which resulted in instantaneous death. The evidence indicates it was the 1st accused, who used a sword in the initial attack on *Kusumawathie,* while the 2nd accused as well as the Appellant had clubs in their hands.

The trial Court had thereafter taken note of the time interval of mere five minutes between the attack on *Kusumawathie* and the attack on *Swarna* along with the fact that the three offences were committed within the confines of the same compound and in close proximity to each other. The Court was satisfied that the possibility of a third-party involvement in the two murders was highly unlikely, owing to these factors. The Court also considered the uncontradicted evidence of *Kusumawathi,* that the 1st and 2nd accused had entertained a strong motive against her family, and there was no material even to suggest that there were others, who similarly entertained such motives, strong enough to launch such an attack against the three victims. The trial Court was of the view this is the factor that reduced the likelihood of a third-party intervention in the commission of the three offences to a mere possibility.

In addition, the segments that are reproduced from the Judgment of the trial Court in the preceding Section of this Judgment also indicate that, in arriving at the final conclusion as to the guilt of the Appellant and his co-accused on the two counts of murder, the trial Court concluded that they did commit the said two offences in the course of

same transaction that commenced with the commission of the offence of attempted murder on *Kusumawathie.*

The approach that had been adopted by the trial Court could be attributable to the reason that there was no direct evidence available to arrive at a finding that the Appellant had participated in the commission of two murders with a shared common intention with the others. The prosecution sought to fill this factual gap in its case by placing reliance on the several items of circumstantial evidence and inviting the trial Court to draw an inference of guilt against the Appellant.

The trial Court, being mindful of the requirement to satisfy itself as to the necessity of drawing an inference of guilt, if it is the inescapable and necessary inference under the given set of circumstances. The trial Court, in order to exclude any reasonable hypothesis as to his innocence and to reach the conclusion that the items of evidence before Court are sufficient to impute criminal liability under Section 32 on the Appellant for the two counts of murder, had acted on the unchallenged evidence of *Kusumawathie* as well as the evidence of other witnesses along with the opinions of experts.

The conclusion reached by the trial Court, that the two murders were committed by the same three accused and those offences were committed within the course of same transaction, which commenced with the commission of attempted murder, is in turn based on several inferences drawn on the combined effect of its consideration of direct evidence, the several items of circumstantial evidence, the presumptions of fact and the inferences the Court had drawn on them. The Court of Appeal too, in its part, concurred with the approach of the

trial Court in drawing such presumptions of fact and inferences, when it affirmed the finding of guilt entered against the Appellant by the original Court.

In determining the appeal preferred by the Appellant, where he advanced the identical contention that had been placed before this Court, the Court of Appeal held that "*the material placed before the trial Court is totally consistent with the guilt of the accused and proves and establish circumstances which guilt safely confirm all three accused*". Then the Court added that "*the circumstantial evidence which surface from the testimony of the main witness, taken its entirety and collectively establish the guilt of all the Accused on the murder charge as well*" and, highlighted its approval of the conclusion referred to in page 48 of the Judgment of the High Court, by making a direct reference to same. In addition, the appellate Court also observed that the "*items of direct evidence taken collectively fortify circumstantial evidence to establish the two counts of murder*."

Thus, the concurrence of the Court of Appeal with the conclusion reached by the trial Court by approving the manner in which the original Court considered the circumstantial evidence, the facts in issue it had presumed and the inferences drawn on them. When the trial Court concluded that it was the same three accused who committed attempted murder were also responsible for the two murders as well, it had obviously excluded the proposition that the Appellant had simply walked away from the scene after committing attempted murder, as the learned President's Counsel surmised during his submissions before this Court, and instead concluded that he was present with the other two accused, when *Swarna* and *Susantha* were killed. In other words, in order to conclude that the two murders were committed by the same

three accused who committed the attempted murder, the trial Court had acted on the presumption of fact that after the attack on *Kusumawathie,* same three accused were present when *Swarna* was attacked and continued to be present when *Susantha* was attacked as well. In effect, the appellate Court had approved the several inferences drawn by the trial Court, which in turn acted on presumptions of fact that the persons who were present at the time of committing attempted murder were present at the time of committing the two murders as well.

I intend to revisit this finding of the trial Court, that the two murders were committed during the course of same transaction that began with committing attempted murder, further down in this Judgment, where the consideration of the said finding in yet another perspective. But at this point of time, I shall confine myself only to one particular factor, namely the trial Court's decision to act on the presumptions of fact it had drawn upon evidence and drawing inferences on them.

In these circumstances, it is necessary to devote some space in this Judgment considering the legal validity of such presumptions of fact and, in the same process, must also examine whether the trial Court had acted within the its legally permissible limits, in presuming existence of certain facts in issue, for this aspect will undoubtedly have a direct bearing on the legality of the guilt of the Appellant to the two counts of murder.

In relation to the two counts of murder, the prosecution presented a case based on circumstantial evidence. *Coomaraswamy*, (supra) states (p. 17 of Vol. I) in contrast with direct evidence,

circumstantial evidence is where " … *any fact from which a fact in dispute may be inferred.*" He then adds ( ibid) , " *[I]n criminal law, it would mean evidence as to the existence of all collateral facts and circumstances from which the commission of an offence by the accused can reasonably be inferred*. The judgment of ***Chakuna Orang v. State of Assam*** (1981) Cri. L. J. 166, by *Lahiri* J, also compared a case based on direct evidence with a one based on circumstantial evidence, whilst specifically highlighting the underlying principle on which the Courts have acted on such situations.

His Lordship states that circumstantial evidence "… *ordinarily means a fact from which some other fact is inferred, whereas, 'direct evidence' means testimony given by a person as to what he has himself perceived by his own senses*" and therefore the "*… evidence which proves or tends to prove the factum probandum indirectly, by means of certain inferences or deduction to be drawn from its existence and its connection with other 'facta probantia'* …". This Judgment of the Indian Supreme Court was cited by this Court in ***Rajapakse and Others v AG*** (2010) 2 Sri L.R. 113.

In this context, as already noted above, the contention advanced by the learned President's Counsel that the items of circumstantial evidence, as adduced by the prosecution, are insufficient to draw an inference that the Appellant was even present at the places where the two murders were committed. He therefore seeks to challenge the validity of the determination of the trial Court as to his participatory presence, which essentially is a question of fact, based on the inferences drawn from several items of circumstantial evidence. In effect, this contention is based on highlighting a significant gap found in the narration of events presented by the prosecution as to what the Appellant did after *Kusumawathie* was dumped by the stream. Whether

the Appellant did continue with others to the place where the murders were committed, in order to participate in the attacks or whether he had simply withdrawn from the company of the other two accused after the attack on *Kusumawathie* by allowing them to proceed to the next phase of the attack by simply walking away from them, as the learned President's Counsel contended.

There was no direct evidence presented by the prosecution pointing to either of these possibilities. There was no explanation forthcoming from the Appellant either, despite the strong *prima facie* case against him in relation to the count of attempted murder nor did he even suggest that position to the injured. In my view, considering the totality of the evidence presented by the prosecution in this particular instance, the said factual gap that exists in the prosecution case in relation to the presence of the Appellant where the two murders were committed, as pointed out by the learned President's Counsel, need not necessarily be filled out by means of direct evidence. The prosecution, as alleged in the indictment, sought to fill this gap in its case by presenting evidence seeking to establish that the three offences were committed by the same three accused, and they did so during the course of same transaction.

This situation, that resulted in due to a factual gap in a narrative, was aptly described by the then Chairman, Law Commission of *India*, Justice *Mathew,* in his report on proposed law reforms dealing with Dowry Deaths, dated 10.08.1983. This report was referred to by the Supreme Court of *India,* in its judgment of ***State of West Bengal v Mir Mohammad Omar & Others*** (2000) 8 SCC 382 and reproduced a certain part therein. Relevant part of Justice *Mathew's* statement (at paragraph

1.4 of the said report) in relation to the situation under discussion is as follows;

> "*Speaking of the law of evidence, it may be mentioned that one of the devices by which the law usually tries to bridge the gulf between one fact and another, where the gulf is so wide that it cannot be crossed with the help of the normal rules of evidence, is the device of inserting presumptions*."

In the circumstances, this Court must examine whether the presumptions of fact as to the Appellant's presence at the time of committing the two murders, as drawn by the trial Court, so as to "*bridge the gulf*", could legally and factually be justified, upon the available items of evidence both direct and circumstantial before it, as did by the Court of Appeal in determining his appeal.

Courts, in determining cases presented before them, do come across similar situations on a regular basis. In such situations, the Courts could turn to a provision where the Evidence Ordinance itself had provided to cater to such situations. I have ventured to adopt this course of action, in view of the pronouncement made by Lord *Reid* in the case of ***Benmax v. Austin Motor Co***.(1958) 1 A. E. R. 320, to the effect "*where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the Trial Judge, and ought not to shrink from that task*." This statement was referred to and acted upon by *HNG Fernando* J, (as he then was) in ***The Attorney General v Gnana-Piragasam and another*** (1965) 68 NLR 49 (at p. 58), where the matter before their Lordships was to determine the validity of the finding of fact as decided by the trial Court, whether the gold bars were made in this country to the order placed by the first Plaintiff, who sought a declaration from Court

that he is entitled to eight bars of gold which were seized by the Collector of Customs, Northern Province, and forfeited in pursuance of Sections 45 and 106 of the Customs Ordinance, read with certain provisions of the Exchange Control Act No. 24 of 1953.

The original Court accepted the plaintiff's position that he purchased items of old jewelry by utilising profits made from a smuggling business and were subsequently converted into gold slabs. The Attorney General, who preferred an appeal against the said finding of fact, contended before their Lordships that the said determination of fact reached by Court was made neither on a perception of the oral evidence nor was it reached based upon credibility or demeanour of witness, but was referable solely to inferences and assumptions. It is in these circumstances the appellate Court had made the pronouncement reproduced above.

Before I proceed to consider the question of justifiability of reaching such a presumption drawn on the given set of circumstances presented by the prosecution in the form of direct and circumstantial evidence before the trial Court, it is important to examine as to the nature of the discretion conferred on Courts by Section 114 of the Evidence Ordinance, within which a Court could legally draw presumptions of fact.

Section 114 states that it confers a discretion on Courts, to presume the existence of any fact which the Court thinks likely to have happened, having regard to the common course of natural events, human conduct and public and private business, in their relations to the facts of the particular case. The Section also indicates it is a discretion conferred on the Courts, which it may or may not exercise.

*Coomaraswamy*, in his treatise on Evidence Ordinance, states (p. 340 of Vol II Book 1) that "… *wherever the ordinary course of human events and the general tendency of human character render it probable under the circumstances of the case that a thing is true, the Court is at liberty to presume its truth …"* and, in addition allows a Court "…*to exempt the party asserting it from the necessity of proof in the first instance …*". The Court could also impose the burden of rebutting that such a presumption, as to the existence of any fact is not true, upon the party who denies it. Learned author then adds that "*whether, in a particular case, it is safe to do so, is a question which the Judge must decide for himself according to his judgment*". Thus, indeed a wide discretion had been conferred on Courts by Section 114, which it may or may not decide to exercise, depending on the facts of each case. The inclusion of this particular Section in the Evidence Ordinance is a mere codification of a principle of law in England.

In the case of ***R v Burdett*** (1814-1823) AER Rep. at p.84, decided in 1820, *Best* J stated "*[W]hen one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen as well in criminal as in civil cases.*" Holroyd J concurred with this pronouncement by stating "*[C]rimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly proved by presumptive evidence only, and the wellbeing and security of society much depend on the receiving and giving due effect to such proofs.*"

The purpose of recognising a legally sanctioned presumption of fact was described by *Monir* in his *Principles and Digest of the Law of Evidence,* 6th Ed, Vol 2 (at p. 1188), where the learned author states that;

> *"The term "presumption of fact" is used to designate an inference, affirmative or dis-affirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal."*

He then adds the modality in drawing such presumptions of fact by stating (ibid);

> *"when inferring the existence of a fact from others, Courts of justice do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being would, under similar circumstances, have applied itself; and the force of which rests altogether in the experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the usage habits if society. The sources of presumption of fact are, (i) the common course of natural events, (ii) the common course of human conduct, and (iii) the common course of public and private business*."

Illustration (a) to Section114 of the Evidence Ordinance indicates (obviously to illustrate the point) that the said Section confers a discretion on Court to presume, a man in whose possession stolen goods were found soon after the theft, is either the thief or has received the goods knowing them to be stolen. In the words of *Howard* CJ in ***The King v William Perera*** (1944) 45 NLR 433 (at p.438), "*the law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called up to account for the possession, that is, to give an explanation of it which is not unreasonable or improbable. The strength of the presumption, which arises from such possession, is in*

*proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is, that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And juries can only judge of matters, with reference to their knowledge and experience of the ordinary affaire of life."*

The scope of Section 114, particularly in its practical aspect, was considered by the superior Courts on numerous occasions. But the majority of those instances, the Courts have dealt primarily with the aspect of recent possession of stolen goods, as per illustration (a) to that Section, in order to decide over the question whether, in the circumstances presented in those instances, the presumption could be extended to hold that the accused, who possessed stolen goods recently, had committed the offence of theft as well.

However, it is important to note that the scope of presumptions of fact that could be drawn under Section 114 were not confined only to the cases of theft or of retention of stolen property. This statement is in accord with the view expressed by the author of the Indian Evidence Act as well as the Ceylon Evidence Ordinance No. 12 of 1864, *Sir James Fitz-James Stephen.* In his book titled *An introduction to the Indian Evidence Act,* (2nd Impression), after dealing with the topic of conclusive presumptions, learned author then makes the following statement in relation to Section 114, (at p. 181), that "… *the Court may* ***in all cases whatever*** *draw from the facts before it* ***whatever inferences it thinks just***" (emphasis added).

On a similar note, *Wijewardene* J (as he then was), in ***Cassim v Udaya Manaar*** (1943) 45 NLR 519, quoted *Tayler on Evidence* 12th Ed, para 142, where it is noted that the "*… presumption is not confined to cases of theft but applies to all crimes even the most penal. Thus, on an 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 the 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 the possession of a quantity of counterfeit money*". His Lordship then added a caution in drawing such presumptions of fact by laying emphasis on the aspect that (at p. 520), "*… the Court has to consider carefully whether the maxim applies to the facts of the case before it*" because a presumption under Section 114 is not a presumption of law but only a presumption of fact.

Having undertaken an exhaustive analysis of the judicial precedents both local and foreign and considered the authoritative texts on the nature of the discretion conferred on Courts to presume facts under Section 114, *Amaratunge* J, in the Judgment of ***Ariyasinghe and Others v Attorney General*** (2004) 2 Sri L.R. 357, stated (at p.399) that the "*… categories of offences in respect of which a presumption under Section 114 may be drawn are not restricted or closed. The Courts are left with an unfettered discretion in all cases to presume, if so advised, 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*". I am in respectful agreement with said statement made by *Amaratunge* J on Section 114, in view of the material I have reproduced in the preceding paragraphs.

In comparatively a recent judgment, the Supreme Court of *India* expressed its view on this issue, where *Thomas* J, in the judgment of ***State of West Bengal v Mir Mohammad Omar & Others*** (supra), stated thus;

> *"In this case, when prosecution succeeded in establishing the afore narrated circumstances, the Court has to presume the existence of certain facts. Presumption is a course recognised by the law for the Court to rely on in conditions such as this. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process Court shall have regard to the common course of natural events, human conduct etc., in relation to the facts of the case."*

Therefore, the presumption of fact under Section 114 of the Evidence Ordinance is a legally sanctioned method, which permits a Court of law to use its discretion conferred by the said Section, to infer the existence of a fact from either a proved fact or set of proved facts, which were established by credible evidence. Despite the presumption of fact of a mental state of the accused is presumed in direct evidence

cases, generally, the necessity to draw presumptions of fact makes out an important function in the judicial reasoning in cases that are based on circumstantial evidence. According to *Lahiri* J, in ***Chakuna Orang v. State of Assam*** (supra), circumstantial evidence, being "*… evidence which proves or tends to prove the factum probandum indirectly, by means of certain inferences or deduction to be drawn from its existence and its connection with other 'facta probantia', it is called. The force of the evidence does not depend merely on the credit attached to the 'factum probandum' but to the result which by a process of reasoning it indirectly establishes in the mind of the Judge. It is sometimes styled as collateral evidence or presumptive evidence. When we infer or presume things from the collateral circumstance the nature of the evidence is styled as collateral evidence.*"

In the circumstances, it is helpful to consider the manner in which the Section 114 had been put to use by the superior Courts and utilised same to draw certain presumptions of fact. In that respect, I wish to refer to the case of ***Perera, Inspector of Police v Mohideen*** (1970) 73 NLR 393, first. This is an instance where the accused was charged under Section 3(3)(b) of the Betting on Horse-racing Ordinance for unlawfully accepting a bet on a horse named *St. Mungo*, expected to run at a race meet in England. The prosecution presented the chit by which the bet was placed on by a decoy and accepted by the accused, in addition to presenting a news sheet titled "*Grand sporting News*", containing the name of a horse *St Mungo* among the names of horses set down to run at a race in *England.* It was necessary for the prosecution to establish the fact that the horse *St Mungo* did run in the race held in *England*. This news sheet was tendered to Court along with two issues of *London Times,* published prior to the bet and on the day of the bet, indicating that the horse named *St Mungo* did run at *Thirsk* Race on both these

days. These were produced by the prosecution in order to substantiate the contents of the chit, which only had *St Mungo* scribbled on it, in addition to few digits indicating the value of the bet.

The trial Court held that the reports published in *London Times* cannot be taken as lawful proof of the fact that the horse *St Mungo* was a runner in the race referred to in the charge, in relation to the disputed fact in issue, as it disqualifies as hearsay. In consideration of the material available before the trial Court, *HNG Fernando* CJ held that, in the absence of any evidence or inference to the contrary, Section 114 made the trial Court entitled to presume that a horse named *St Mungo* did run in a race on the date of the offence. This conclusion was reached by his Lordship on the reasoning that;

> *"In the language of s. 114 of the Evidence Ordinance, when regard is had to 'the common course of human conduct and private business' in relation to the practice of betting on horse-races, it is surely 'likely to have happened' that St. Mungo did run in the particular race. To think otherwise would be to think quite unreasonably that the London Times perpetrates on its readers either stupid pranks or fraudulent deceptions".*

In view of the above, it is quite clear that the conclusion reached by the trial Court, over the question of fact that whether the Appellant was present at the place where two murders were committed as they were committed in the course of same transaction which began with the commission of attempted murder, is a legally sanctioned presumption of fact, if it could be drawn "*in relation to the facts of the case*" that had been presented before it, as per the only qualification imposed by Section 114. The Court of Appeal was therefore correct in accepting the

legality of the said conclusion in this particular respect. However, in the circumstances, it is now incumbent upon this Court to consider whether such a conclusion, as to the presence of the Appellant at the place where murders were committed, is justified and reasonable in relation to the facts of the case placed before the trial Court.

Clearly the trial Court had, having considered the evidence in totality, had acted on certain inferences it had drawn upon established facts. These include the inferences that the Appellant had shared common murderous intention with the other two accused and has had participatory presence at the time of committing the two murders, in order to find the Appellant guilty to the two counts. The necessity to draw such inferences to determine these facts in issue before the trial Court arose as *Kusumawathie's* evidence indicate that none of the accused, including the Appellant, did ever utter a word during the entire duration of the attack or at least when they carried her up to the stream, betraying their minds.

In addition to the acts attributed to the attackers by *Kusumawathie* in her evidence, the trial Court must then satisfy itself as to the intentions entertained by each of them in doing those acts and that too to the required degree of proof, in order to determine whether those acts were done whilst sharing common murderous intention or an intention to cause a life threatening injury to the injured. In respect of the two murders, the Court had to arrive at a similar finding that the attackers shared a common intention to commit murder and the Appellant was present with the others during the attack. In the absence of any utterances attributed to the three accused by *Kusumawawathie* that were made during the attack, indicating what they had in mind or

what they intended to achieve by carrying out the attack, it was necessary for the trial Court to draw inferences from the established facts as to the existence of the requisite mental element on each of the accused, in addition to their participation in the acts.

Hence, before I embark upon the task of assessing the justifiability and reasonableness of the inference of the Appellant's presence at the time of committing the murders in the given set of circumstances, it is helpful, if I pause for a moment to investigate the difference between the terms '*presumptions*' and '*inferences*' that could be drawn over facts, as the first step, in the context of a judicial inquiry. At this juncture, it is of interest to refer to basic classification introduced by *Stephen* himself on the methodology and the nature of inferences employed in judicial investigations *vis a vis* scientific investigation, which he described as follows (supra - at p.53);

1. Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted,
2. Inferences from fact which, upon the strength of such assertions, are believed to exist, to facts of which the existence has not been so asserted.

He then clarifies the difference between outcome of the two inferences in the following manner (at p. 55); ,

> "*Let the question be whether A committed a crime. The facts which the Judge actually knows are that certain witnesses made before him a variety of statements which he believes to be true. The result of these statements is to establish certain facts which show that either A or B or C must have committed the crime, and neither B or C did commit it. In this case that facts before the*

> *Judge would be inconsistent with any other reasonable hypothesis except that A committed the crime. This would be commonly called a case of circumstantial evidence; yet it is obvious that the principle on which the investigation proceeds as in the last case is identically the same. The only difference is in the number of inferences, but no new principle is introduced."*

The word "inference" is defined in the Black's Law Dictionary 9th Ed, (p.847) as "*a conclusion reached by considering other facts and deducing a logical consequence from them." Basnayake* CJ echoed this position in the judgment of ***The Queen v Ekmon and Others*** (1962) 67 NLR 49, by observing that (at p.62), a "*… presumption is not the same as inference. In presumption the presumed fact is taken to be true or entitled to belief without examination or proof unless and until it is disproved while inference is the conclusion drawn from one or more proved facts or a combination of them".*

A limitation to the extent to which the existence of a fact could be presumed by Court, in the exercise of discretion under Section 114 of the Evidence Ordinance, was expressed by *Stephens* in his book, published in the year 1872. The rationale for the recognition of such a limitation was due to the reason that in such cases most probably an injustice will be done to the accused if "*… the principal fact has to be inferred from circumstances pointing to it*" (supra – at p. 67). Learned author then states "*[T]his is the foundation of the well-known rule that the corpus delicti should not in general in criminal cases be inferred from other facts but be proven independently."* This principle was strictly applied in situations where a person accused of murder, but no dead body was found enabling the prosecution to establish the death of the deceased and its cause.

However, over the years, the Commonwealth jurisdictions have consciously departed from this view and adopted a more pragmatic approach by taking the view that insisting on the said rule. This is because insisting of direct and positive evidence of death, in the absence of a dead body would result in "… *many crimes would occasionally go unpunished*". This was explicitly stated by *Gour,* in his work *Penal Law of British India,* 5th Ed, (at p.1019); "… *the absence of the body is not fatal to the trial of the accused for murder, though a material circumstances to be considered. Any other view would place in the hands of the accused an incentive to destroy the body after committing the murder and thus secure immunity for his crime. A rule to the contrary is impossible practically.*" *Coomaraswamy* (supra – Vol 1, pgs. 31,32) too states the "… *position would be the same in Sri Lanka as in India in view of the definition of 'proved'*" and accordingly "*[I]n law, the fact that the corpus delicti has not been found or traced cannot make any difference, if there is sufficient reliable evidence, direct or circumstantial, that murder has in fact been committed."* It would be clear from these citations, a Court could even infer a principal fact regarding a crime, provided there is sufficient and reliable evidence, direct or circumstantial, that a crime has in fact been committed, despite the apprehensions of *Stephens.*

Thus, having considered the legal permissibility of drawing presumptions of fact, in order to examine the factual validity of the facts presumed by the trial Court, and to determine whether there was sufficient material that had been placed before the trial Court to reasonably presume the facts it did presume, I find the evidence relating to the timing of the attacks on *Swarna* and S*usantha* is a convenient point to embark upon that task.

The three counts contained in the indictment against the Appellant and other two accused were presented on the sequence of committing attempted murder of *Kusumawathie* as the first count, followed by the counts on committing the murder of *Susantha* and *Swarna* as the 2nd and 3rd counts, respectively. It was stated in the indictment that the 2nd and 3rd counts were committed by the three accused sharing common intention and in the course of same transaction that begun with commission of the offence referred to in the 1st count. But the evidence indicated that the attack on *Swarna* preceded the attack on *Susantha.*

In the circumstances and for convenience in dealing with the factual situation in chronological order, I prefer to follow the sequence of the three incidents, in which they occurred, as revealed in the evidence. Therefore, it is proposed to consider the evidence in relation to *Swarna's* murder first before I proceed to evidence relating to the murder of *Susantha.*

The evidence presented by the prosecution particularly in relation to the death of *Swarna* commences with *Kusumawathie's* evidence which revealed that, after about 5 minutes she was dragged down to the stream by the accused and dumped there, she had heard her daughter calling out "අම්මේ" at least twice. The time was about 6.15 in the evening. Then she lost consciousness. She regained her senses after about 1 ½ hours and she only heard the sound of water gushing down in the stream. Thereupon, *Kusumawathie*, having failed to stand up and walk upright due to her injuries, had dragged herself towards her house with difficulty. She saw the bookbag of *Swarna*, lying on the front garden of her house. She also saw blood patches on the wall near the kitchen. She did not see her daughter's body anywhere near her

house but instead came across her son's body, lying on an umbrella, as she continued to drag herself along the pathway towards the main road.

It is evident that *Swarna* had reached home that evening having returned from her class, a few minutes before her brother did. Her mother was not at home. She then called out for her mother. She would obviously have thought, as usual, her mother would have gone to the stream to do some washing. She called out for her mother "අම්මේ". This was not a call of distress, as denoted by the common usage of "අම්මෝ". At that particular point of time, she had no threat of any violence and therefore had no apparent cause to be alarmed.

The fact that *Swarna's* bag and the books were strewn in the garden indicate that, after calling out for her mother, she had to flee in a great hurry, probably after being terrified over some incident which happened to her at that point of time. The blood patches that were seen by *Kusumawathie* and the police officer indicate that the said incident is a violent one and the degree of its violence extends to causing physical harm to her. This incident is clearly referable to a surprise attack mounted on *Swarna* by an attacker armed with a cutting weapon, due to which she had sustained one or more bleeding injuries. The blood patches could not be attributed to the injuries of *Swarna's* brother, since he was killed even before reaching anywhere near their house. *Kusumawathie* did not go inside the house and she merely had a passing glance of her house, whilst dragging herself along the pathway with the intention of seeking help. There was no evidence to indicate that any of the accused including the Appellant had suffered any bleeding injury to leave such blood patches. Clearly the blood patches were of *Swarna,*

who suffered at least one bleeding injury during the brief period she was inside the house.

*Swarna,* with this surprise attack on her, would have realised that she was faced with an imminent threat to her life. Being injured and terrified by this unexpected violent attack by her own relative, she then ran out of her house, as a desperate attempt to save her life. In the process, she dropped her bag containing books and lost a shoe. Obviously, she needed to get to safety in a great hurry.

Placed in such a situation, the most natural and probable course of action for *Swarna* to take was to run along the pathway to reach the main road and to call out for help, as her mother did. This is the pathway she had taken a few minutes before to reach home. But strangely her body was found on an embankment and it was above 6 to 7 feet from the level of the pathway. She had climbed this embankment, which is even taller than her own body height, whilst fleeing for safety, despite her attacker was closing in armed with a sword. In view of the medical evidence, her death had been an instantaneous one due to the seriousness of the injuries caused to her head. She died where her body was eventually recovered. The fact that *Swarna* had only two abrasions, which were possibly due to fall, positively indicate she was not dragged to the place where her body was found, but she had collapsed there after the attack on her head.

Then a question arises as to what made her to climb up on a ridge or an embankment (කණ්ඩිය) of about 6 to 7 feet above from the level of the pathway which caused her to lose valuable time in the process and thereby giving an advantage to her pursuer armed with a deadly weapon, who then struck multiple sword attacks on her head, causing

already referred to necessarily fatal injuries resulting in an instantaneous death.

The answer to this question could be found, if another scenario, that could reasonably be deduced from these circumstances, is considered. *Swarna's* apparent irrational conduct, could easily be explained, if one were to infer a situation where that pathway she had to take, was already been obstructed by someone blocking her escape route, and thus compelling *Swarna* to take the most difficult route as the only available alternative for her safety.

If that is the case, then who did obstruct *Swarna* from running along the pathway?

Clearly it was not the 1st accused, as he was chasing after her from behind. Then it must be others who were present. The Appellant and the 2nd accused were right there, only several feet away from the place where *Swarna's* body was found, barely five minutes ago, according to *Kusumawathie*. Then the strong inference could be drawn that it was the Appellant and the 2nd accused who prevented *Swarna* running along the pathway. If it was only the 2nd accused who was preventing *Swarna* taking the pathway, she would have had a chance of escaping her fate by overpowering the elderly woman. But apparently *Swarna* had no choice. It appears that she was forced to take the more difficult escape route as the only available option. In the circumstances, it is highly probable that the Appellant too was present there, in order to effectively prevent her escape.

It need not be emphasised that it would have been impossible for *Swarna* to overpower the Appellant, a grown-up male, who is in the prime of his youth. If this was the sequence of events that led to *Swarna*

suffering a necessarily fatal cut injuries that resulted in her instantaneous death, then the 2nd accused, and the Appellant would most certainly have shared a common murderous intention with the 1st accused, who carried on the fatal attack and therefore have participated in the murder by facilitating the 1st accused. There are no other circumstances that exist to point any other conclusion.

What is more important to note from the set of circumstances that had been established by the prosecution is that there were sufficient materials before the trial Court on which it could reasonably presume the fact that while the initial attack on *Swarna* was being carried out by the 1st accused, the Appellant and the 2nd accused were present at the crime scene and facilitated the 1st accused, to complete their already agreed plan of attack.

*Susantha's* body was found just five feet away along the pathway from the point it connected to the main road. The body was facing up and was lying on an umbrella. *Susantha* had his lower left arm bent from the elbow from the upper arm, which remained raised. His face was heavily disfigured with several serious cut injuries. The distance between the bodies of *Susantha* and his sister was about nine meters.

The expert witness who performed the autopsy on the body of *Susantha* observed multiple deep and long cut injuries on his face totaling to nine. The 10th 11th and 12th injuries, classified as defensive injuries, were also seen on his left arm, in addition to an abrasion found on his forehead. The witness was of the opinion that the 1st to 9th injuries would have been inflicted on the deceased using a sharp cutting weapon, similar to a sword, and could well have been inflicted by using the one and the same weapon. The 9th injury was a long one, cutting

into cervical vertebrae, major bold vessels and nerves of the neck and, therefore, termed as the necessarily fatal injury.

Thus, the conclusion reached by the trial Court as to the guilt of the Appellant on the two murders, was obviously based on several presumptions and inferences drawn from the facts that are already established through direct evidence and in addition the presumptions of facts, likely to have happened according to ordinary human conduct. In view of this particular factor, it is of interest to examine as to how the superior Courts, in the past, have dealt with similar situations that were presented for its determination.

In this respect, I shall first refer to the judgment of the Court of Criminal Appeal in ***Rex v Wijedasa Perera et al*** (1950) 52 NLR 29. This judgment was pronounced on the appeal preferred by the accused who sentenced to death for the murder of one *John Silva.* The Section I wish to highlight refers to the 6th accused, who was charged for conspiracy to rob cash collection of Ceylon Turf Club, committing robbery, conspiracy to commit murder of *John Silva* and abetment to commit murder of *John Silva*. He was found guilty by the Jury to the 1st and 2nd counts.

The facts related to the involvement of the 6th accused are as follows. The 1st to 8th accused have conspired that the cash collection of the Turf Club be robbed, whilst in transit. The Turf Club usually transported its cash collection in a vehicle hired from a particular establishment in Colombo. The 5th and 6th accused have hired a car from the same establishment especially for the purpose of committing the robbery. Usually, the cash collection is transported in the personal

custody of one of its employees, who had the protection of an escorting police officer.

*John Silva* was the unfortunate driver, who was assigned to drive the car, that was hired by the 6th accused and his partner, who paid for the hire. The 6th accused, an ex-policeman and the 5th accused, an ex-Army driver were *John Silva's* passengers. It had already been agreed between the conspirators, that the 6th accused was to impersonate as an Inspector of Police during the hold-up of the vehicle transporting cash of the Turf Club, scheduled for the next day and the 5th accused were to drive *John Silva's* car to the place of planned heist.

Other accused have followed *John Silva's* car in another smaller car and after stopping for refreshments at Puttalam, have left in advance. Near the culvert No. 13/4 along Puttalam-Anuradhapura Road, a lonely and an isolated place, the 5th accused, feigning a stomach upset and, as agreed with the others earlier on, halted the car driven by *John Silva,* under the pretext of relieving himself. The 7th and 8th accused, who had already arrived there and hiding in the jungle, were awaiting for the arrival of the car driven by *John Silva*. They had a gas mask and a rope with them. The 6th accused remained in that car while the others have lured the unsuspecting *John Silva* to walk with them into the jungle, under some pretext.

After a lapse of a few days, *John Silva's* body was recovered in highly decomposed state. It was tied to a tree in the jungle and had a gas mask placed over its head. His death was due to suffocation, which resulted in due to squeezing of the tube that admitted air, which enabled the wearer to breath in, with the mask on.

In appeal, it was contended before the Court of Criminal Appeal on behalf of the 6th accused, that he was not physically present at the place where the murder of *John Silva* was committed and did not abet the latter's murder either.

The Court rejected this contention. The reasoning of the Court is indicative from the following paragraph quoted below;

> *"We are unable to distinguish the case of the 6th accused from that against the other three appellants. It is true that he was physically not present at the time the deceased man was murdered but we are of opinion that having regard to all the facts and circumstances he was an abettor of this murder, and as such equally liable with his co-conspirators. His learned Counsel conceded that the 6th accused was privy to the tying up of the deceased in the jungle. It is clear that not only was it the intention of the robbers to tie up the deceased man in the jungle but it was also the intention to kill him there, and, therefore, the 6th accused is equally guilty with his co-conspirators in everything they did in order to give effect to their common plan. We agree with the submissions of the Attorney-General with regard to the 6th accused. He knew that the deceased had to die. He gave no evidence at the trial. He is an ex-police officer and with true police caution he did not like to be seen carrying the incriminating suitcase in which the uniform which he was to use the following day was packed. We do not think the fact that the 6th accused was on the road by the car while the others murders the deceased makes any difference to his case. Somebody had to be by the big car. This is a main road and any passer-by who saw a large car standing unattended on a lonely forest*

*road, might be tempted to stop and make inquiries which would be extremely inconvenient for those who were murdering the deceased in the jungle. Therefore, the 6th accused, or some other person had to be by the car. The Attorney General argues that if his companions told him that they had merely tied the deceased to a tree, the 6th accused as an ex-police officer would never have kept quiet for his own safety, because if John Silva remained alive he would indubitably have given evidence against the 6th accused whom he saw in circumstances in which he would have been able to identify him."*

However, it must be noted that in the case referred to above, the charge was abetment of murder following conspiracy. In that respect this case differs from the instant appeal as it is based on common intention and not on a charge of conspiracy. But what is relevant to the appeal before this Court is that in the said Judgment their Lordships had made several presumptions of fact, based on common course of natural events and human conduct, in their relation to the fact of the case presented before the original Court. These presumptions of fact and the inferences that were drawn by the Court of Criminal Appeal are relevant to the determination of the appeal before us, indicating the extent to which a Court could utilise presumptions of facts and inferences drawn upon them in determining the guilt or innocence of an accused. The Court of Criminal Appeal had drawn several inferences from the already established facts presented by direct evidence and also on the presumed facts, in coming to the conclusion that the 6th accused was equally guilty to the offence of abetment of murder, in rejecting his contention that he remained in the car and therefore had no hand in the commission of murder that had taken place elsewhere. The judgment of

***Rex v Wijedasa Perera et al*** (supra) is another among many instances where Courts had relied on presumptions of facts and inferences drawn from the established facts, in order to determine the validity of the imposition of criminal liability to capital offences. Similarly, in the instant appeal, the question to be answered by this Court too is whether the inference of guilt entertained by the lower Court is a reasonably drawn inference on the available material or not.

The judgment of ***Attorney General v Seneviratne*** (1982) 1 Sri L.R. 302, is another such judgment. The appeal before the Supreme Court was a situation where the accused was charged for robbery and murder of two persons. The prosecution case was that the deceased couple, who lived all by themselves in a house situated in their 22-acre property, had a large stock of pepper, was murdered by the accused while committing robbery. Investigators found blood-stained footprints of the accused on a newspaper bearing the same date as of the date of murder along with his fingerprints. Witness *Arnolis* said the accused hired his vehicle to transport several gunny bags of pepper from a place near *Pinwatta* bend. There was a trail of pepper that commenced from the deceased's house and ended where pepper bags were loaded into *Arnoli's* vehicle. Essentially the case against the accused was a one based on several items of circumstantial evidence.

When the learned Counsel for the accused contended before this Court as to the unexplained 3 ½ hour gap between the hearing of the cries of the deceased and loading of gunny bags into the car, the Court had drawn certain inferences based on presumptions of fact. The Court stated that "*there is evidence that there was a trail of pepper from the house of*

*the deceased to the bend on the road. This path was not motorable. Therefore, whoever carried the bags of pepper would have had to do so on foot and it would have taken him at least ten to fifteen minutes to walk this distance. He would have had to walk this distance to and for twelve times. The time gap is therefore easily explained."*

The Court then added *"It is significant that on the evidence of Arnolis the conclusion that the robbery was well planned is inescapable. On the first occasion that the accused invited Arnolis to bring his hiring car to transport the bags of pepper, Arnolis was unable to accede to his request. That night not only was there no robbery, but there were no murders as well. However,on the following day when Arnolis brought his hiring car to the Pinwatte bend the 6 bags of pepper had been removed from the bedroom of the deceased. It was on this same night that the deceased persons were done to death. On the evidence there is no doubt that the accused had been involved in the attack on the couple, for otherwise his footprints could not been stained with blood. It would have been a strange coincidence that the couple had already been done to death at the time the accused came to remove the bags of pepper."*

These selected segments of the Judgments that I have reproduced above in length clearly illustrative the extent to which the Courts exercised its discretion to presume facts from the established facts and had drawn inferences upon both these categories of facts, in order to reach the conclusion as to the guilt or the innocence of accused.

Returning to the conclusion reached by the trial Court on the inference it had drawn upon the material that the murders of *Susantha* and *Swarna* were committed during the course of same transaction by the 1st, 2nd accused and the Appellant that commenced with the

commission of attempted murder, to my mind a question necessarily arises whether the trial Court, in the same process of reasoning concluded that the pre-arrangement that existed between the three of them, in relation to the commission of the offence of attempted murder on *Kusumawathie,* could also be extended to include to commit the deaths of her two children as well. If there was such a pre-arranged plan and if it did include the murder of the two deceased, then that fact coupled with the presumed act of the Appellant of being present in the execution of that part of the said pre arrangement, would undoubtedly justifies imposition of vicarious criminal liability on him.

This requirement of the existence of a pre-arranged plan to commit murders, could be satisfied if the evidence presented by the prosecution supports such a reasonable inference to that effect.

Even on a superficial consideration of the set of circumstances that were enumerated in the preceding paragraphs, one could immediately observe many a similarity in the series of violent attacks that were carried out on *Kusumawathie* and her family members. The 1st and 2nd accused, being the immediate neighbours and close relatives of the victims, had sufficient familiarity with the routine activities and movements of *Kusumawathie's* family at that point of time. Clearly the attack was carried out by selecting a day in which only one member of the victim family was present at each point of time.

Of these three attacks, the most notable feature is the element of surprise in the attacks carried out on each of the unsuspecting victims. The injured had no reason even to suspect that she would be attacked by her own relatives, when she ran out to the stream in a hurry to collect her laundry prior to the onset of the heavy downpour in that

evening. She was surprised to see the 1st accused armed with a sword. Without any utterance, the 1st accused struck her with a sword. Similarly, when *Swarna* innocently called out for her mother, the 1st accused probably made the first move by striking the unsuspecting woman with his sword. In the case of *Susantha* too, the way his body was lying indicate that he had little or no opportunity to suspect, even faintly, of the impending attack. Each one of the two murder victims virtually had no opportunity of knowing what happened to the other family member when they were attacked, as care was taken to prevent them realising of what happened to the other, thus keeping the element of surprise intact.

The medical evidence before Court indicated that it is very likely that the same heavy cutting weapon was used in the three incidents. The cut injuries sustained by all three victims were primarily concentrated to their heads. The attack on them were carried out swiftly and decisively. Except for *Kusumawathie,* who survived the attack in spite of her head injury and did not move after collapsing on the ground, other two victims had sustained necessarily fatal injuries and died at the place where they were attacked.

Particular care was taken to retain the surprise element on the subsequent victims by clearing any tell-tale evidence from the scene of the previous attack. *Swarna* did not see any of the laundry, carried by her mother up to the 2nd accused's house, when she was attacked on the pathway. This feature also explains the selection of the place of attack on *Susantha,* because, if he did reach home and notice his sister's belongings and blood patches, he would have realised something sinister had taken place. That would in turn prompt him to take adequate precautions to defend himself. If he was alerted to the nature

of imminent danger he would soon be exposed to, it would have made the execution of the last phase of the planned attack a total failure. Hence, it was important to mount a surprise attack particularly on *Susantha* when he least expected of such an attack. The distance from the main road to the body indicate that *Susantha* had just got off bus and that too in the rain. He had his umbrella with him. The sun had already set, and the time was few minutes after 6.30 p.m. with the dark rain clouds still looming in the sky. Limited availability of light also contributed to the surprise element of the attack. *Susantha* had no time to react even to the instinctive response of fight or flight, at least by making an attempt to run away from the attackers unlike his sister but, instead was done to death on the spot with repeated attacks, numbering nine, concentrated to his head, using a sword.

The other reason for the extension of the prearrangement made in respect of *Kusumawathie* to include *Susantha* and *Swarna* as well, is the motive. It is uncontested that there was a dispute over the land they all lived on and the 2nd accused and her son, the 1st accused, wanted *Kusumawathie* and her family out of it. The Appellant was to marry the 1st accused's sister and that would have made him to participate in the planned attack, because he too could someday be a beneficiary. It is therefore clear that the motive entertained by the two accused and the Appellant does not confine to elimination of *Kusumawathie* but also it should logically extend to her children as well. Wanting the land in its entirety, being the compelling reason to mount an attack on *Kusumawathie*, there was no logic in sparing her children, who would assert their rights over the land. If *Susantha* and *Swarna* too were not eliminated, then it would render the already 'completed' act of elimination of *Kusumawathie,* absolutely a meaningless exercise. It

would also pose the additional danger of leaving witnesses to a possible criminal prosecution against the perpetrators of the attack.

As the Court, in the case of ***Rex v Wijedasa Perera et al*** (supra), inferred that *John Silva*, the innocent driver of the hiring car, was killed in order to facilitate the accused's plan to commit the robbery and also to wipe out a vital witness for the prosecution, in the instant appeal too, the three of the accused including the Appellant would have decided that both *Susantha* and *Swarna* should not live on that land anymore and they too must die. In consideration of the manner in which the attacks were carried out, the attackers could not have decided the fate of each of their victims whilst on their feet and being actively engaged in the attack. Both the murder victims, *Susantha* and *Swarna,* were expected to return home at any moment of time when they mounted the attack on *Kusumawathie.* Thus, it is clear that what should become of each of the three victims were already decided by the trio, even before they stepped out of their house, in order to confront *Kusumawathie*.

It was disclosed before the trial Court that the attempted murder and two murders were committed within a time span of little over one hour. *Kusumawathie* was attacked at about six in the evening and the learned Counsel for the three accused who defended them before the trial Court clarified from Dr. *Wijepala Bandara* whether he agrees with the position that the deaths of the deceased would have occurred between 6.30 p.m. to 7.30 p.m. of that evening, the expert witness answered the question in the affirmative. The assertion of *Kusumawathie* that she regained her senses after about one and half hours does not cut across this position and *Swarna* obviously had died sometime after 6.15 p.m. upon her return to their house, followed by her brother's death. The time duration of the three incidents was

extended to last over an hour not due to a reason within the accused's control but owing to the fact that the two of the remaining victims had returned home at different time intervals.

In the circumstances, it is evident that the course of action that commenced when the 1st and 2nd accused along with the Appellant coming out from the entrance of the 2nd accused's house with a prior arrangement, in order to confront *Kusumawathie* who was returning from the stream after collecting her laundry, had continued thereafter with the killing of her two children as per the said arrangement entertained and executed to the full by the three of the accused. Thus, the said course of transaction had unquestionably been extended to the attacks on *Swarna* and *Susantha* resulting in their deaths.

When viewed against the backdrop of these circumstances, the finding of the trial Court that the two murders were committed in the same transaction which commenced with the attempted murder is indeed a reasonable inference to draw. In this context, it is necessary, at least by making a superficial consideration of the term "same course of transaction", because it will have a bearing on the validity of the conviction in relation to the offences of murder.

The phrase "*same transaction*" is used in Section 180 of the Code of Criminal Procedure, enabling the prosecution to charge all persons concerned in committing an offence together in one and the same indictment, as in the instant appeal. The operative words used in the Section are "*when more persons than one, are accused of jointly committing the same offence or of different offence committed in the same transaction … may be tried together or separately if the Court thinks fit.*" It was noted earlier on that the indictment on which the Appellant was tried on, was

presented on that basis and no challenge to its validity was made by any of the three accused before the original Court. A helpful description of what that term means could be found in the Judgment of the Indian Supreme Court ***Mohan Baitha and Others v State of Bihar and Another*** (2001) 4 SCC 350, where it is stated that;

> "*The expression 'same transaction' from its very nature is incapable of an exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case, it can be held to be in one transaction. It is not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. But the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the factors for deciding whether certain acts form parts of the same transaction or not. Therefore, a series of acts whether are so connected together as to form the same transaction is purely a question of fact to be decided on the aforesaid criteria*" (emphasis added).

The trial Court, in page 45 of its Judgment, as evident from the Section reproduced above, used the identical consideration in arriving at the conclusion that the two murders were committed in the same transaction that commenced with the attempted murder on *Kusumawathie.* The trial Court, although mindful of the requirement to satisfy itself as to the existence of common intention and participatory presence of the Appellant to found him guilty to the two offences, did not specifically referred to them in its conclusion. Instead, it used the

term that the three accused committed the three offences they were charged with in the same transaction. But undoubtedly the Court would have considered them, when it considered the "*continuity of action and community of purpose or design*" in arriving at the said conclusion.

The relatively later pronouncement made by the ***Mohan Baitha and Others. v State of Bihar and Another*** (supra) perfectly in line with the test applied by *Wijeyewardene* J in the case of ***Jonklaas v Somadasa et al*** (1942) 43 NLR 284 (at p. 285), where his Lordship held that "*… the substantial test for determining whether several offences are committed in the same transaction is to ascertain whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. While the fact that offences are committed at different times and places need not necessarily show that the offences are not committed in the same transaction, yet these are matters which cannot be ignored altogether.*"

In relation to the evidence presented before the trial Court, I am of the view that the principle enunciated in the judgment of ***The King v Pedrick Singho*** (1946) 47 NLR 265, by *Howard* CJ by stating that if the facts are so interwoven to constitute a series of facts, then such a situation could be regarded as a one transaction, applies to the instant Appeal as well and, as such, the finding of the trial Court that the three offences were committed in the same transaction is well justified.

Even if the evidence clearly supports a reasonable conclusion that the three attacks were carried out by the same three accused during the course of same transaction, this Court, however, must satisfy itself as to legality of the criminal liability imposed at least on the Appellant, if not

on each of the other accused. This aspect needs further consideration with citation of a few applicable principles.

Lord *Sumner* in ***Barendra Kumar Ghosh v Emperor*** (supra) stated *"… liability is imputed to each individual socius criminis not merely for his own acts but for the totality of the acts committed by his confederates in furtherance of their common intention. Vicarious or collective responsibility attaches in such a situation for the result (e.g., death) of their united action.* In ***Regina v Somapala et al*** (1956) 57 NLR 350 at p. 353, the Court of Criminal Appeal observed that Section *32* of the Penal Code "… *does not, in addition, constructively impute to one socius criminis the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal acts has committed an offence involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence."* This requirement could be satisfied if the evidence presented by the prosecution supports a reasonable inference of the existence of a pre-arranged plan, as the Privy Council, in its judgment of ***Mahabub Shah v Emperor*** (supra) stated (at p.120) " … *common intention within the meaning of Section implies a pre-arranged plan, and to convict the accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan*" or as in ***The King v Asappu et al*** (supra), "*… 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, and not merely a same or similar intention entertained independently of each other.*"

In ***Sirisena and six others v The Queen*** (1969) 72 NLR 389, the Court of Criminal Appeal quoted the Judgment of the Supreme Court of *India* in ***Afrahim Sheik v. The State of West Bengal*** 3 A. I. R. 1964 S.C. 1263 at 1268, which stated; " *A person does not do an act except with a certain intention; and the common intention which is requisite for the application of S. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of the criminal act*."

In determining the course of action it had taken, the trial Court, particularly in order to decide on the question of fact whether the Appellant had a participatory presence during the attack on *Swarna* and *Susantha*, had aided itself with the presumption of fact that it had arrived at after a consideration of the totality of the material, that the Appellant was present with the other two, when the two murders were committed upon the pre-arrangement which all three had shared from the commencement of the series of attacks on their victims. The Court arrived at this finding on the premise that they were committed within the course of same transaction that commenced with the commission of the offence of attempted murder and continued thereafter with that of committing the two murders. There was no alternative version available for the Court to consider. The Appellant in his short statement from the dock denied any knowledge of this incident but did not put across any suggestions as to what he did and, more importantly what he did not, thereby left *Kusumawathie's* evidence without a challenge with an alternative narration.

In my view the phrase "*in the course of same transaction*" was used by the trial Court, in a sense that it had the components of common intention and participation of each accused, incorporated into it, as

these factors are continued to be present from the initial criminal act to the next criminal act, if it could be taken as such. Despite the fact that the conviction entered against the Appellant by the trial Court without specifically referring to some of these individual components, when it decided that it was committed in the course of same transaction as fulfilment of a prior arrangement, it was obviously mindful of the existence of these requirement, as evident from several references that were made to them in the course of its judgment.

When viewed in the light of the above, the Appellant's presence during the attack on *Kusumawathie* and thereafter on her children could not be taken as a mere by stander who simply watched what was happening due to his curiosity. Neither the Appellant's conduct could be accepted as "*who merely shares the criminal intention*" nor as a person who derived *"fiendishly delight in what is happening"* as per ***The Queen v Vincent Fernando and two others*** *and* ***Mir Mohammad Omar & Others*** (supra). In the context of consideration of any other reasonable hypothesis that might accrue in favour of the Appellant, the trial Court had considered the probability of a third-party involvement in the commission of the two murders. None of the accused or the Appellant had made any suggestion to the prosecution witnesses in that regard. The prosecution evidence also does not provide any basis for such a proposition. Nonetheless, the trial Court considered this hypothesis and then decided to exclude same on the basis such an involvement of another party is highly unlikely, given the fact that the two murders were committed by the three accused in the same transaction with the motive attributed to them.

The process of reasoning adopted by the trial Court to exclude a third-party involvement in the commission of the two murders runs

parallel to the process of reasoning adopted by *Sir Stephen,* when he stated (supra - at p 55);

> "*Let the question be whether A committed a crime. The facts which the Judge actually knows are that certain witnesses made before him a variety of statements which he believes to be true. The result of these statements is to establish certain facts which show that either A or B or C must have committed the crime, and neither B nor C did commit it. In this case that facts before the Judge would be inconsistent with any other reasonable hypothesis except that A committed the crime.*"

Learned author, in his attempt to illustrate the manner in which a Court could prefer to accept one hypothesis among several other by accepting same and discarding others, adopted a process of logical reasoning in the selection of that particular hypothesis against the others. If this example is adopted with certain modifications to suit the circumstances of the instant appeal then it should read thus; if certain facts which show that the three accused together or a third party must have committed the crimes, and the established facts before the Judge points to the fact that no third party involvement, then the "*facts before the Judge would be inconsistent with any other reasonable hypothesis except that the three accused committed the crime.*" Then the remaining question would be the liability of the Appellant, in the commission of the murders.

The decision of the Court of Appeal, in affirming the conviction entered by the trial Court upon the said inference, adopted the reasoning of the judgment of the Court of Criminal Appeal in ***King v Gunaratna et al*** (1946) 47 NLR 145, which dealt with a case of

circumstantial evidence. *Cannon* J, referring to the contention by the appellant before that Court stating that the evidence related to circumstances that are only of suspicion against him, stated (at p.149) "*… each fact, taken separately, may be so termed, but the question for consideration is whether, taken cumulatively, they are sufficient to rebut the presumption of innocence*". The conclusions reached by the trial Court as well as the appellate Court could not be faulted, in view of the considerations I have already referred to in this Judgment, taken along with the pronouncement in the Judgment of ***Attorney General v Seneviratne*** (supra) that "*The Jury, who are judges of fact, are entitled, as they did in the present case, to conclude that where murder and robbery form part of the same transaction, the person who committed the robbery committed the murder also*" which I reformulate in relation to the instant appeal to denote that the trial Court, being the tribunal of fact, is entitled to conclude that the persons who committed the attempted murder also committed the two murders where the attempted murder and the two murders form part of the same transaction,

However, in ***Don Somapala v Republic of Sri Lanka*** (1975) 78 NLR 183, Thamotheram *J* held the view (at p.188); "*… Court may presume that a man who is in possession of stolen goods, soon after the theft, is either a thief, or has received goods knowing them to be stolen, unless he can account for its possession. This is a presumption which a Court may or may not draw depending on the circumstances of the case. There is no " similar " presumption that a murder committed in the same transaction was committed by the person who had such possession. There is no presumptive proof of this. The burden still remains to prove beyond reasonable doubt that the person who committed the robbery did also commit the murder. All that the prosecution has established is that the accused was present at the time of robbery.*"

This statement of *Thamotheram J* was considered by a divisional bench of five Judges of this Court in ***Attorney General v Seneviratne*** (ibid), and *Weeraratne* J, with concurrence of *Sharvananda* J (as he then was) and *Zosa* J, held that "*… the ruling in Somapala's case should be confined to the special facts of that case and has no application to the facts disclosed in the instant case. The Jury, who are judges of fact, are entitled, as they did in the present case, to conclude that where murder and robbery form part of the same transaction, the person who committed the robbery committed the murder also. The validity of such a conclusion depends on the facts of the transaction*." I respectfully follow the pronouncement made by *Weeraratne* J that "*… the ruling in Somapala's case should be confined to the special facts of that case"* and hold that it does not lay down a general principle. I fortify my view on that statement with the wording found in Section 114 itself to the effect that the Court may presume existence of any fact which it thinks likely to have happened having regard to common course of natural events, etc. "***... in their relation to the facts of the particular case***" (emphasis is added), as observed by *Amaratunge* J in ***Ariyasinghe and Others v Attorney General*** (supra).

In this regard, it must be noted that the indictment, upon which the 1st accused, 2nd accused and the Appellant were tried on, too had been presented before the trial Court on that very basis. It is not necessary to highlight the fact that the participatory presence of the Appellant in the commission of the three offences is built into the said conclusion reached by the trial Court and affirmed by the Court of Appeal, and I have no reason to term it as an unreasonable inference reached on the available material.

Learned President's Counsel placed his contention solely upon the factor that there was no sufficient evidence to support a conviction on attempted murder and there was none to support the conviction on murders. In view of the reasons already stated in the preceding part of this judgment, it is my considered view that the inference reached by the trial Court is a reasonable inference that could be drawn upon, having regard to the totality of the circumstances presented before that Court and therefore could also be termed as a necessary inference, in the absence of any material to the contrary. I find the following statement of *De Kretser* J in ***The King v Marthino et al*** (supra, at p.524) is apt in relation to the instant appeal, since the evidence presented by the prosecution clearly forms "*… a substantial compact mass and to disintegrate the evidence into fragments and to examine each fragment is hardly to do justice to the evidence as a whole*."

The Court of Criminal Appeal, in its judgment of ***Wasalamuni Richard and two Others v The State*** (1973) 76 NLR 534, had held thus (at p.552);

> "*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****, (1955) A. I. R. 331, (at p.335), the Supreme Court of India has expressed this principle on following terms*;
>
> > *'After all the existence of a common intention said to have been shared by the accused person is, on an ultimate analysis, a question of fact. We are not of opinion that the*

*inference of fact drawn by the Sessions Judge appearing from the facts and circumstances appearing on the record of this case and which was accepted by the High Court was improper or that these facts and circumstances were capable of an innocent explanation".*

In this instance, the conclusion reached by the trial Court that the Appellant had shared a common murderous intention with the other two accused to commit murder, in addition to him sharing a common intention to commit either the murder of *Kusumawathie* or to cause life threatening injury to her could easily be termed as a reasonable inference that had been reached upon consideration of the set of circumstances that were presented before Court. Therefore, I concur with the affirmation of the said conclusion by the Court of Appeal.

Accordingly, I proceed to answer the three questions of law, on which the instant appeal was heard, in the following manner;

(b) Did the Learned Judges of the Court of Appeal fail to appreciate that the entirety of the evidence led at the trial in the High Court do not justify the conviction of the Appellant of the offences set out in 1st, 2nd, and 3rd charges of the Indictment? No.

(c) Did the Learned Judges of the Court of Appeal fail to appreciate the items of evidence in favour of the Appellant which tends to negative his participation in the incidents which culminated in causing hurt to *Thotapitiya Arachchilage Kusumawathie* and causing the deaths of *Hettiarachchige Susantha* and *Hettiarachchige Swarna*? No.

(d) Did the Learned Judges of the Court of Appeal misdirect themselves in holding that the Appellant's convictions in respect of the murders of *Hettiarachchige Susantha* and *Hettiarachchige Swarna* is correct inasmuch as there is no direct or circumstantial evidence connecting the Appellant with the said murders? No.

In view of the fact that the answers of this Court on all the questions of law are found to be in the negative, the conviction entered by the High Court against the Appellant on all three counts in the indictment and the judgment of the Court of Appeal dismissing the appeal of the Appellant by affirming the said conviction should not be disturbed. The judgment of the Court of Appeal and the judgment of the High Court are accordingly affirmed, along with the sentences imposed on the Appellant.

The appeal of the Appellant is accordingly dismissed.

**JUDGE OF THE SUPREME COURT**

**P. PADMAN SURASENA, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**MAHINDA SAMAYAWARDHENA, J**.

I agree.

**JUDGE OF THE SUPREME COURT**