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

In the matter of an Appeal under Section 451(3) of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No.21/1988

**S.C. TAB Appeal No. 02/2012**

H.C. Colombo [TAB]

No.5247/2010

1. W.M.M. Kumarihami,
   Chief Registrar,
   High Court, Colombo 12.

**Complainant**

Vs.

1. Galagamage Indrawansa Kumarasiri,
2. Thumbedura Vitty Newton,
3. Jayaratnage Dhammika Nihal Jayaratne,
4. Godapitiyawatte Arachchilage Janapriya Senaratne,

**Accused**

And now between

1. Galagamage Indrawansa Kumarasiri,
2. Thumbedura Vitty Newton,
3. Jayaratnage Dhammika Nihal Jayaratne,
4. Godapitiyawatte Arachchilage Janapriya Senaratne,

**Accused-Appellants**

Vs.

1. W.M.M.Kumarihamy,
   Chief Registrar, Colombo.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

**Respondents**

Before: Tilakawardane, J.
Ekanayake J.
Sathyaa Hettige, PC, J.
Priyasath Dep, PC, J.
Wanasundera, PC, J.

Counsel: Anil Silva PC, with Lasith Muhandiramge and
Manoj Nanayakkara for the 1st Accused-Appellant.

Saliya Pieris with Upul Kumarapperuma, Suranga
Munasinghe, Thanuka Nandasiri and Silyna Pieris
for the 2nd Accused Appellant.

D.P.Kumarasinghe PC, with M.A. Kumarasinghe, and
Vajira Ranasinghe for the 3rd Accused Appellant.

Amila Palliyage with Eranda Sinharage
for the 4th Accused Appellant.

Jayantha Jayasuriya PC, ASG, with
Chaminda Atukorale SC, for the Attorney General.

Written submissions-

Filed on: 20.09.2013 by 1st Accused-Appellant
20.09.2013 by 2nd Accused-Appellant
18.09.2013 by 3rd Accused-Appellant
11.09.2013 by 4th Accused-Appellant
18.09.2013 by the Respondent

Argued on: 05.08.2013, 06.08.2013, 07.08.2013

Decided on: 02.04.2014

**SHIRANEE TILAKAWARDANE, J**

This is a direct Appeal from the decision of the Trial-at-Bar dated 25.08.2011 whereby the Learned Judges found the 1st, 2nd, 3rd and 4th Accused-Appellants guilty on the following counts:

**Count (1):** did conspire to abduct Muthuthanthri Bastiange Dinesh Tharanga Fernando in order that such person maybe murdered or put in danger of being murdered and as a result of the said conspiracy you did commit the offence of abduction punishable under **Section 355** read with **Section 113(a)** and **102** of the *Penal Code*.

**Count (2):** did conspire to abduct Goniamalimage Dhanushka Udayakantha Aponso in order that such person maybe murdered or put in danger of being murdered and as a result of the said conspiracy you did commit the offence of abduction punishable under **Section 355** read with **Section 113(a)** and **102** of the *Penal Code*.

**Count (3):** did conspire to murder Muthuthanthri Bastiange Dinesh Tharanga Fernando and as a result of the said conspiracy you did commit the offence of murder punishable under **Section 296** read with Section **113(a)** and **102** of the *Penal Code*.

**Count (4):** did conspire to murder Goniamalimage Dhanushka Udayakantha Aponso and as a result of the said conspiracy committed the offence of murder punishable under **Section 296** read with Section **113(a)** and **102** of the *Penal Code.*

**Count (5):** did abduct Muthuthanthri Bastiange Dinesh Tharanga Fernando in order that such person maybe murdered or put in danger of being murdered and thereby committed an offence punishable under **Section 355** read with **Section 32** of the *Penal Code*.

**Count (6):** did abduct Goniamalimage Dhanushka Udayakantha Aponso in order that such person maybe murdered or put in danger of being murdered and thereby committed an offence punishable under **Section 355** read with **Section 32** of the *Penal Code*.

**Count (7):** at the given time, place and transaction, behaved in order that Goniamalimage Dhanushka Udayakantha Aponso maybe murdered and thereby committed an offence punishable under **Section 296** read with **Section 32** of the *Penal Code.*

**Count (8):** at the given time, place and transaction, behaved in order that Muthuthanthri Bastiange Dinesh Tharanga Fernando maybe murdered and thereby committed an offence punishable under **Section 296** read with **Section 32** of the *Penal Code.*

The 4 Accused, namely, G. Indrawanasa Kumarasiri [Police Constable], the 1st Accused-Appellant, T. Vitty Newton [Officer in Charge, Angulana Police Station], the 2nd Accused-Appellant, J. Dhammika Nihal Jayaratne [Police Constable], 3rd Accused-Appellant, G. W. A. Janapriya Senaratne [Home Guard], 4th Accused-Appellant each raised questions of law, both jointly and separately, which are dealt by this Court.

The questions of law raised by the Counsel for the 1st Accused-Appellant (hereinafter referred to as the 1st Accused) are as follows:

I. Were the necessary matters not considered in the conviction of the Accused on the charges based on Conspiracy and Common Intention?;

II. Was 1st Accused was deprived of a fair trial [due to the following]?

a. Matters favourable to the 1st Accused had been glossed over by the Learned Judges of the Trial-at-Bar;

b. The Trial-at-Bar had come to the conclusion that the offences have been proved based on material that was not placed before Court;

c. The Trial Judges failed to appreciate what the defence of the 1st Accused was;

d. The defence of the 1st Accused was rejected on tenuous and unsubstantiated grounds;

e. The Accused had been prejudiced at trial because PC Kulasinghe was not called as a witness by Court.

III. The unsworn dock statement of a co-accused was impermissibly allowed as evidence against another accused.

The Counsel for the 1st Accused also averred the defence available under **Section 69** of the *Penal Code* and the defence of duress on account of the *'overpowering nature'* of the 2nd Accused-Appellant.

The questions of law raised by the Counsel for the 2nd Accused-Appellant [hereinafter referred to as the 2nd Accused] are as follows:

I. Was the entire trial vitiated upon the Accused being tried based on the indictment signed by the Registrar of the High Court?;

II. Was the procedure adopted by the CID in respect of naming the key Prosecution Witnesses unfair, unreliable and contrary to Law?;

III. Was the evidence of the Prosecution Witnesses No. 02, 01 and 03, namely, Dissanayake, Thotawatte and Navaratne, unreliable and contradictory, and thus, should have been regarded with caution and rejected;

IV. Does the evidence led by the Prosecution and the Defence lead to the sole inference of the guilt of the 2nd Accused?;

V. In the light of the Dock Statements of the 1st and the 2nd Accused, does not a reasonable doubt arise in respect of the guilt of the 2nd Accused?;

VI. Were investigations which led to the discovery of the spent cartridge and the weapon marked “P 4” tainted which should accrue to the benefit of the 2nd Accused?;

VII. Did the Learned Judges of the Trial-at-Bar fail to take into consideration the fact that the 2nd Accused did not entertain a common murderous intention in respect of the charges regarding murder?;

The questions of law raised by the Counsel for the 3rd Accused-Appellant [hereinafter referred to as the 3rd Accused] is as follows:

I. Did the Learned Judges of the Trial-at-Bar fail to consider whether the weapon carried by 3rd Accused was used in the commission of the murder?;

II. Did the Learned Judges of the Trial-at-Bar fail to critically consider the discovery of the spent cartridge and the circumstances surrounding the recovery of the weapon?;

III. Was the reliance on Ellenborough dictum fair and lawful with the statutory right to silence available to the Accused?;

IV. Has the 3rd Accused been prejudiced because the Court did not call Kulasinghe as a Witness?;

V. Did the Learned Judges of the Trial-at-Bar fail to comprehensively evaluate the law relating to Conspiracy and Common Intention?;

VI. Did the Learned Judges of the Trial-at-Bar fail to consider the contradiction between the evidence of Witness Susantha Jayalath and other Witnesses as to whether the 3rd Accused accompanied the other Accused?;

VII. Did the Learned Judges of the Trial-at-Bar fail to adequately consider the question of intoxication of the 3rd Accused-Appellant?;

VIII. Did the Learned Judges of the Trial-at-Bar fail to consider whether witnesses are accomplices?

The Counsel for the 3rd Accused also averred the defence available under **Section 69** of the *Penal Code*.

The questions of law raised by the Counsel for the 4th Accused-Appellant [hereinafter referred to as the 4th Accused] are as follows:

I. Were the items of circumstantial evidence sufficient to prove the case of the Prosecution against the 4th Accused beyond reasonable doubt?;

II. Was the conviction for the charge of murder under common murderous intention invalid in law as there was no participatory presence of the 4th Accused to the crime?;

III. Did the Learned Judges of the Trial-at-Bar fail to consider the Plea of Justification in favour of the 4th Appellant?;

IV. Did the Learned Judges of the Trial-at-Bar err in law by failing to consider the evidence in favour of the 4th Accused, and instead considering evidence not borne from the Witnesses to convict the 4th Accused for the charge of Murder;

V. Did the Learned Judges of the Trial-at-Bar fail to apply the principles governing the evaluation of a dock statement correctly and legally and, therefore, erroneously reject the Dock Statement?;

VI. Was the Allocutus part of evidence which would strengthen the Plea of Justification and can the Allocutus of an Accused be compared with that of another Accused?

The narrative as unfolded primarily by the Police Officers attached to the Angulana Police Station, namely, Prosecution Witness 01 Thotawatte Gayan Chaturanga Thotawatte (hereinafter referred to as Thotawatte), Prosecution Witness 02 Dissanayake Mudiyanselage Nishanka Dissanayake (hereinafter referred to as

Dissanayake), Prosecution Witness 03 Navaratne Mudiyanselage Roshan Bandara Navaratne (hereinafter referred to as Navaratne) and Prosecution Witness 05 Walpola Gamage Susantha Jayalath (hereinafter referred to as Susantha Jayalath) is set forth as follows:

At the time of the alleged violations, the 2nd Accused was the Officer in Charge of the Angulana Police Station, the 1st Accused and 3rd Accused were Police Constables attached to the said Station and the 4th Accused was a Home Guard serving at the Station.

On the night of 12.08.2009, a party took place at the house of the brother-in-law of Police Constable Kulasinghe, in the vicinity of the Angulana Police Station. This gathering was attended by the 1st, 2nd, 3rd and 4th Accused as well as the aforementioned Police Constable Kulasinghe. Between 11.00-11.30pm, several individuals - a young lady, an elderly man and a woman - arrived at the Police Station in a state of agitation with the view of lodging a complaint regarding two persons alleging to be army officers. These two individuals had entered their house which was located at a nearby tsunami camp, while the lady was asleep with her small child, and allegedly pulled the lady's hand, asked for a box of matches and had wanted to search the house. The lady had then immediately rushed to the Angulana Police Station and complained about this purported harassment to Thotawatte, who was the Reserve Police Officer at the Angulana Police Station at the time. Thotawatte, in turn, had instructed Susantha Jayalath (a Home Guard attached to the Angulana Police Station) to inform the 2nd Accused of this complaint and, consequently, this message was conveyed to the 2nd Accused.

A short while later, acting on the directions of the 2nd Accused, the 1st Accused had come to the Police Station and questioned the complainant in order to ascertain what had transpired. He then made his way back to the party and informed the 2nd Accused of his findings subsequent to which the 1st, 3rd and 4th Accused as well as PC Kulasinghe came back to the Police Station and, together with Susantha Jayalath and

one of the complainants, went in search of the suspects. They went to the house of the complainants and as they could not locate the suspects, returned to the Station. Whilst the 1st, 3rd and 4th Accused and the others were away, the aforementioned lady identified two people who were going past the Police Station as those who harassed her. The two individuals were immediately arrested and taken into police custody by Thotawatte.

Whilst being lead into a cell, Susantha Jayalath mentioned that the two youth were known to him and upon hearing this; the 1st Accused had chased him away. The 1st Accused also assaulted the detainees during this time. Having heard this disturbance, Gunamunige Jayawickrama [Prosecution Witness 15], a Police Sergeant, instructed Thotawatte to record the statement of the complainant and take the two youth to the 2nd Accused. He then retired to bed. The 2nd Accused returned and requested that the complainant be brought to him, which interrupted the process of recording the statement, and as she left immediately after meeting the 2nd Accused, Thotawatte was not in a position to complete the recording of the complaint. Subsequently, the 1st Accused escorted the detainees to the office of the 2nd Accused where they were assaulted by the 2nd Accused with a belt and a rubber tube. During this time, a villager who came to the gate of the Station, through whom Susantha Jayalath wished to convey a message to the father of one of the detainees, was chased away by the 1st Accused as well.

Later, the 2nd Accused requested Thotawatte to inform Navaratne to be ready with the vehicle. The 2nd Accused had further asked the witness to hand over two T56 weapons to the 3rd and 4th Accused and subsequently asked the 1st Accused to relieve the 4th Accused of his weapon and for him to take it instead. None of the three Accused', namely, the 1st, 3rd and the 4th, made entries when they took charge of two T56 guns, thereby contravening the normal established procedure.

The detainees were then handcuffed, their heads were covered in 'shopping bags'

and taken away in the vehicle driven by Navaratne. All four Accused together with PC 35437 Kulasinghe (hereinafter referred to as Kulasinghe), Dissanayake and the two youth travelled in the rear compartment of the vehicle. The 2nd Accused got into the front passenger seat and asked Navaratne to proceed towards Lunawa.

The 2nd Accused had ordered Navaratne to stop the vehicle just after passing the Lunawa Bridge. There, the 1st, 3rd and 4th Accused got off from the vehicle along with the 2nd Accused and at this time, the 1st and 3rd Accused' were armed. One of the two youth, later identified as Danushka Udayakantha Aponso, was also taken out of the vehicle at this stage. The party headed towards the Lunawa Bridge and shortly after, Dissanayake heard a gunshot and he also confirms that after the shooting the 2nd Accused shouted "Kumara [the 1st Accused] remove those handcuffs". Subsequently, all four Accused returned to the vehicle without the youth.

The 2nd Accused got into the front seat of the vehicle and thereafter ordered Navaratne to drive towards Ratmalana. Navaratne stopped the vehicle at a barrier that blocked the road and the 2nd Accused tapped on the glass separating the front compartment with the rear compartment. Then the 3rd and 4th Accused went towards the barrier and it is alleged that at this point the 3rd Accused was armed. The 3rd and 4th Accused removed the barrier and thereafter the witness drove the vehicle towards Ratmalana.

The vehicle was driven past Angulana Police station and parked, on the instructions of the 2nd Accused, near a co-operative store close to a streetlight. At this point, the 2nd Accused alighted from the vehicle and asked the 1st Accused to follow suit.

At this stage, Navaratne had seen the 1st, 2nd, 3rd and 4th Accused proceeding towards the beach with an unknown person who was handcuffed and whose face was covered with a "shopping bag". This unknown person was later identified as Dinesh Tharanga Fernando. The 3rd Accused was carrying a firearm. Navaratne alighted from the

vehicle and proceeded towards the rear of the vehicle where he found Dissanayake and Kulasinghe from whom he inquired what the others were doing. Two gunshots were heard from the direction of the beach. 10 to 12 minutes later the 1st, 2nd, 3rd and 4th Accused returned without the unknown person who was taken towards the beach. The 2nd Accused then asked Navaratne to proceed towards Mt. Lavinia and stopped at the house of one 'Bathala Chaminda'. Acting on the instructions of the 2nd Accused, the 1st, 3rd and 4th Accused, as well as Kulasinghe and Dissanayake, went in search of this individual and returned without him, stating that he was not at home, though he actually was there, a fact they deliberately concealed as they feared that he too would be harmed. The party then returned to the Station. At the Station, the 3rd and 4th Accused returned the two T56 weapons to the Reserve and, contrary to normal due procedure, no entries were made by either at even this stage.

Furthermore, according to the testimony of Navaratne, the 2nd Accused had specifically instructed that no entries were to be made regarding the events that had transpired that night.

It is the submissions of the Prosecution that, when the crowds attacked the Police Station the following morning and relatives of the two deceased detainees were making inquiries about them, the 2nd Accused denied knowledge of any arrests. Further, the 2nd Accused, having noticed that a part of the complaint of the previous night had been recorded by Thotawatte, asked the witness why he had done so when he had instructed him not to record it and asked him to alter the Information Book [hereinafter referred to as the IB]. Prosecution Witness 17 Kariyawasam Hewamanaghe Kasun Buddhika (hereinafter referred to as Kasun Buddhika) was then threatened by the 2nd Accused and asked to alter the IB which he did so, under coercion, by making entries on a fresh page which had been introduced to the book after removing the original page. The particular IB which was altered was produced as P12 and the IB from which the blank sheet was taken to replace the torn page was produced as P19.

After the attack on the Police Station on 13.08.2009, the Senior Superintendent of Police and Senior Superintendent of the Mt. Lavinia Police Station made arrangements to replace all officers attached to the Angulana Police Station. They were taken to Mt. Lavinia Police Station and IP Dias, who was attached to the Mt. Lavinia Police, was detailed to conduct an investigation. At the Mt. Lavinia Police Station, steps had been taken to record statements of several officers including that of Thotawatte, Dissanayake and Navaratne. Furthermore, the Mt Lavinia Police had taken over some of the IBs that were maintained at Angulana Police Station and on 14.08.2009 arrangements were made to take over the weapons from Station.

On 16.08.2009, the Criminal Investigations Department [hereinafter referred to as the CID] was ordered by the Inspector General to take over this investigation. Accordingly, a team of officers met with the Superintendent of Police at the Mt. Lavinia and arrived at the Angulana Police Station in the evening of 16.08.2009 and commenced investigations. The CID took charge of all the IBs and weapons taken over by the Mt. Lavinia Police by that time and proceeded to take charge of an IB that was at the Angulana Police Station as well. They continued with the investigation till the early morning of 17.09 2009 and during this period, steps were taken to record statements from several persons including the Home Guard Susantha Jayalath, who was on duty at the gate of Angulana Police Station on the night of 12.08.2009. The CID also examined all the material that was taken over including the Weapons Issuing Register, through which a discrepancy between the number of guns that was issued to the Angulana Police Station and the number of guns taken into the custody of the Mt. Lavinia Police was noted. On 17.08.2009, the CID recovered the 'missing gun' bearing serial number 1555658 from the strong box of the Angulana Police Station which was produced as P14. This gun, along with the other productions, was handed over to the Government Analyst, Mr. Sarath Gunatilake, on 28.09.2009.

It is the submission of the Prosecution that the investigators attached to the Mt.

Lavinia Division, who were conducting the investigation until the CID took over on 16.08.2009, failed to realise the discrepancy between the actual number of guns that had been in the custody of the Angulana Police Station on 12.08 2009 and the number of guns that were taken over from the Angulana Police Station on 14.08.2009 by PS 26792 Wijesinghe Appuhamy thereby ignoring one of the most important items of evidence.

On 18.08.2009, a statement from Thotawatte was recorded. On 19.08.2009, the statements of the 3rd and 4th Accused and Dissanayake were recorded. The tampering of the IB was discovered on 20.08.2009 while a spent cartridge was recovered at the crime scene in Ratmalana in a 'finger tip search' on 21.08.2009 which, as later confirmed by Government Analyst Mr. Sarath Gunatilake, was fired from the T56 rifle and which was produced as P36B. On 22.08.2009, the IB from which a page was removed [and later entered into the IB that was tampered with], was recovered from the barracks of the Angulana Police Station.

The first issue that merits the consideration of this Court is the argument that the Indictment was signed by the Registrar of the High Court and not the Attorney General. The Counsel argued that this procedural irregularity should vitiate the trial.

In this regard, the Court notes that the Attorney General, by his letter dated 24.05.2009 addressed to the Registrar of the High Court of Colombo, exhibited information against all four Accused under **Section 450(4)** of the *Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 21 of 1988* (hereinafter referred to as the *Code of Criminal Procedure*) and His Lordship Justice Asoka De Silva, the Chief Justice at the time, by Order dated 15.06.2010 appointed three Judges of the High Court to try the Accused for offences set out in the Information previously exhibited. The trial was set for 19.08.2010.

**Section 450(3)** of the *Code of Criminal Procedure* indicates the procedure whereby a

trial before the High Court is to proceed:

> *"A trial before the High Court under this section maybe held either upon indictment or upon information exhibited by the Attorney General."*

It was submitted by the Counsel for the 2nd Accused on 19.08.2010, that the Indictment was signed by the Registrar of the High Court when it should have been signed by the Attorney General, and that this procedural irregularity is a ground for vitiating the entire trial. The Preliminary Objection raised by the Counsel before the High Court was dismissed by the Learned Judges of the Trial-at-Bar on the basis that the Registrar signed the Indictment upon the direction given by the Court in terms of **Section 450(5)(a)** of the *Code of Criminal Procedure*:

> *"A trial before the High Court at Bar under this section shall be held as speedily as possible and shall proceed as nearly as possible in the manner provided for trials before the High Court without a jury* ***subject to such modifications as maybe ordered by the Court*** *or as maybe prescribed by rules made under this section."* (Emphasis added).

In his submissions to this Court, the Defence Counsel relied upon the decision in **Abdul Sammen v. The Bribery Commissioner (1991)** *(1 SLR 76)* to support this argument, where it was stated that

> *"The failure to frame a charge under Section 182 (1) is a violation of a fundamental principle and is not a defect curable under Section 436 of the Code of Criminal Procedure Act No. 15 of 1979".*

It has been observed by this Court that this case refers explicitly to **Section 182(1)** which is a direction to the Magistrate's Court and thus, inapplicable to the judges of the High Court specifically.

This Court makes further reference to **Section 450 (4)** of the *Criminal Procedure Code* which states as follows:

> *"Notwithstanding anything to the contrary in this Code or any other law, the Attorney General may exhibit to the High Court information in respect of any offence to be tried before the High Court at Bar by three Judges without a jury."*

In accordance with this special provision, the Attorney General by a letter dated 24.05.2010 addressed to the Registrar of the High Court, exhibited information marked 'R2' in evidence against all four Accused' under **Section 450(4)** of the *Code of Criminal Procedure*. This Court notes that the Counsel have not disputed the information so exhibited by the Attorney General and that the Counsel have been served copies of the Information so exhibited prior to the commencement of the trial on 13.08.2010. The submissions of the Counsel in this regard, is limited to the fact that proceedings upon an exhibit before the Court are extremely rare, but the Court feels that this is insufficient to vitiate the conviction. Given that the **Section 450 (4)** has been adhered to, this Court affirms that the procedure adopted as lawful and that the Section recognises an alternative procedure to that of tendering the Indictment to a single Judge of the High Court. Therefore, it is not a ground upon which the conviction should be vitiated and the Learned Judges of the Trial-at-Bar were correct to overrule the objection.

Prior to considering the issues raised by the Counsel for the Accused' with regards to the Judgment of the Learned Judges of the Trial-at-Bar, it is important to establish and verify the credibility of the witnesses as well as the investigation process which was conducted by the Mt. Lavinia Police and the Criminal Investigations Department.

It has been brought to the attention of this Court by the Defence that the events that took place on the night of 12.08.2009 and the early hours of 13.08.2009, are in

dispute. From a review of the documentation before us, the version of events that took place on the days in question, as told by each of the Accused' as well as several witnesses, need to be considered to ascertain whether the evidence given by the witnesses are contrary to one another, in order to evaluate the credibility of the Witnesses.

Thus, the Court feels it imperative to recount and reconsider the evidence and material facts that have been established during the trial and then consider whether the facts are in dispute.

In considering the facts that have been established, it has been accepted that Navaratne drove the vehicle; the 2nd Accused occupied the front passenger seat whilst the 1st, 3rd and 4th Accused along with Kulasinghe, Dissanayake and the two deceased were seated in the rear compartment of the vehicle. It has been established by the evidence before us that there was a partition separating the driver and the 2nd Accused from the rest of the passengers. Therefore, communication between the two compartments occurred by way of tapping on the partition. It has been further noted that the passengers seated at the rear compartment of the vehicle were consistently unaware of their exact geographic location.

It has also been established and accepted in the evidence that the two deceased were taken to the vehicle from the Police Station while being handcuffed and with plastic bags placed on their heads in a manner covering their faces. It has been observed that at the first crime scene, the 1st, 2nd, 3rd and 4th Accused alighted from the vehicle and the shooting of the 1st detainee took place close to the Lunawa Bridge. Subsequently, they returned to the vehicle and went to the Ratmalana beach where the 1st, 2nd, 3rd and 4th Accused took the second detainee to the beach and shot him.

Several of these facts have been called into question by the Accused on the basis that

the Prosecution Witness statements do contain number of discrepancies.

The first of such inconsistencies is alleged by the Counsel for the 2nd and 3rd Accused who adverts to the fact that the Witnesses failed to implicate the 4 Accused' when they first made statements to the Mt. Lavinia Police on 13.08.2009.

In this regard, Thotawatte maintains that, out of fear and, being a subordinate officer, he had falsely stated that neither the jeep nor the weapons left the Station on 12.08.2009 when Assistant Superintendent of Police (A.S.P) Gunawardana questioned him. Dissanayake asserts that he gave his statement at the Mt. Lavinia Police to IP Dias denying knowledge of the incident while Navaratne too had similarly maintained that he did not know of the incident.

However, all three Prosecution Witnesses assert that their initial statements to the Mt. Lavinia Police were false and that the statements subsequently made to the CID, implicating the Accused', were accurate. The Defence asserted that the statements made by the Prosecution Witnesses were inconsistent and hence inadmissible and that the subsequent statements made were incompatible with their original statements. In this regard, the Prosecution has pointed out that the ground reality at the time of taking the initial statement was such that the Witnesses were compelled by the 2nd Accused to make statements denying knowledge of the incident. The 2nd Accused, who in the chain of command was their superior officer, had ordered them specifically to deny knowledge of the incident and the Witnesses were simply afraid to say otherwise. For instance, Navaratne states that just before they were being taken in to obtain their statements, he had observed the 2nd Accused and Inspector of Police (I.P) Dias in conversation, and was afraid that divulging the truth at this point would bring them harm. They also stated that as the 2nd Accused was on good terms with the senior officers in the Division, they feared that they might be framed for the offences. Furthermore, Navaratne asserts that he disclosed the truth to Officer Shani Abeysekara who was conducting the investigations for the CID as he felt that the CID

Officers had visibly acted independently and they were genuinely seeking the truth.

Considering the evidence that has been presented before us, I feel that the explanation given by the Witnesses is plausible especially as it has been established that the Mt. Lavinia Police was given complete control of the Angulana Police, and that they had commenced the recording of statements the following morning itself. As such, there was insufficient time in the interim to provide the witnesses with the opportunity to present their evidence in a *secure* atmosphere. It seems that, either deliberately or ineptly, they had not, especially knowing the seriousness of the charges against the officers, handled the investigation independently, impartially nor competently.

The second allegation with regard to inconsistent evidence is made by the Counsel for the 2nd Accused. It was argued that there was a contradiction between the evidence given by Dissanayake and Navaratne in terms of the exact time of the shooting at the 1st crime scene. It was submitted that Navaratne, during Examination-In-Chief, admitted that he heard a gunshot from behind the vehicle shortly after the 2nd Accused alighted from the vehicle, whereas Dissanayake states that a gunshot was heard, roughly five minutes after those at the rear end of the vehicle got down. In this regard, it is noteworthy that, according to the evidence of IP Methias Silva, the body was found only 7-8 feet away from the road which indicates that the 2nd Accused could've reached the place where the victim was shot within in a very short period of time whereas the 1st, 3rd and 4th Accused and the victim could've alighted from the vehicle prior to the 2nd Accused getting down. This would comprehensively explain the difference in evidence and corroborate each other's testimonies. Thus, this Court does not find a serious contradiction in the Witness testimonies which assails the testimonial creditworthiness of the witnesses.

The third submission regarding the contradictions in the evidence pertains to the Affidavit attached to the answer for the Fundamental Rights Application bearing

number S.C.F.R. 687/09 instituted by the parents of the deceased. It was submitted that there were discrepancies between this Affidavit and the statements of the Witnesses. The Prosecution urged that that the Affidavits were signed on 06.02.2010 and were both in English. They maintain that the witnesses lacked sufficient knowledge of the language and were therefore, unable to comprehend the statement that they signed. The Witnesses also in their testimony stated that they had merely signed the Affidavits upon instructions by their lawyers and had not been given the opportunity to read it through thoroughly and understand it.

In order to support their argument, the Defence called upon the Commissioner of Oaths, Mr. Kamal Colambage, before whom the Affidavits were signed. He affirmed that the Affidavits were prepared by the Attorney-at-Law, namely Mr. Sudath Karavita, who was retained by the witnesses' families. He also maintained that he read over the Affidavits and explained the contents of it to the Witnesses. However, this Court is inclined to agree with the Prosecution, which raised the question as to why Dissanayake, who clearly was not the driver of the vehicle, would sign the Affidavit agreeing that he was the driver. It should also be noted that the Attorney- at- Law abovementioned should have been called as a Witness in order to establish the lack of credibility of the Prosecution Witnesses. The Defence opted not to do so.

Three final points were argued by the Defence with regard to the Witnesses. Firstly, the Counsel for the 2nd Accused alleged that the CID engaged in what he referred to as "*witness shopping*" by isolating the witnesses with the most consistent stories to enable a definite conviction of the Accused. The Counsel for the 1st Accused also echoed similar sentiments as he opined that the Prosecution made a concerted effort to bolster up the case against the 1st Accused. The Counsel for the 3rd Accused also asserted that the witnesses procured by the Prosecution could potentially be accomplices to the offences committed and that the CID, in its dire need for witnesses, may have overlooked this fact. This allegation was made with regards to Thotawatte who was the officer responsible for the arrest of the two deceased youth

as well as for the issuance of the firearms that were utilized in the murder. The Counsel for the 2nd Accused further noted that the most appropriate action would have been to obtain evidence from these witnesses subsequent to pardons granted by the Attorney General in accordance with the judgment of the Supreme Court in **Ajith Fernando alia Konda Ajith and Others v. The Attorney General (2004)** *(1 SLR 288)*.

However, this Court notes that this very same judgment states that such a pardon should be given if the Attorney General is:-

> *'satisfied that the accused has in fact committed the crime charged in conjunction with others, or that he has some active part towards its commission; in other words he should be satisfied that the accused is really an accomplice. A mere suspicion that he may have committed the offence is insufficient.'*

The Prosecution has indicated that Thotawatte was interviewed by the CID on 18.08.2009 and made a statement to the Magistrate on 11.10.2009 while Navaratne was interviewed by the CID on 18.08.2009 and Dissanayake on 19.08.2009 and thereafter, both witnesses made statements to the Magistrate on 18.02.2010. The Prosecution asserts that upon perusal of these documents, it was clear that there was insufficient cause to establish that the witnesses acted in complicity in order to garner a pardon. The Prosecution is well within their rights to analyse the evidence available and arrive at this conclusion, provided the evidence does not indicate that the witness (es) played an active role in the commission of the offence. As indicated above, a mere suspicion that he did so is insufficient to garner a pardon. Thus, having carefully examined the material before this Court, we are of the opinion that the allegation of *'witness shopping'* is unfounded and that the Prosecution has adhered to the established legal procedure.

Secondly, the Defence asserted that the trial is unfair due to procedural failures as well as the failure of the trial judges to fulfill their investigatory role. Three of the four Accused alleged that the trial judges were negligent by not calling PC Kulasinghe, the only passenger in the vehicle who was not involved in the trial either in the capacity of a witness or as an Accused. The Defence purported that the Trial Judges had an investigatory role to fulfill and therefore had a duty upon them to call Kulasinghe to give evidence. The Defence further invited the Court to draw an adverse inference due to the failure of the Prosecution to call PC Kulasinghe.

In this regard, the decision given by G. P. A. Silva, S. P. J in **Walimunige John and Another v. The State [1973]** *[76 NLR 488]* is important as it clearly outlines when the Prosecution must call a witness:

> *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the Prosecution and the failure to call such witness constitutes a vital missing link in the Prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the Prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."*

Keeping this in mind, it must be noted that both Dissanayake and Kulasinghe were sitting in the rear compartment of the vehicle when it stopped at the first and second crime scenes. Dissanayake, as the second Prosecution Witness, presented the narrative to Court. Thus, this Court cannot observe that a '*vital missing link in the Prosecution case'* has been occasioned by failing to call Kulasinghe. In fact, it appears that had Kulasinghe been called as a witness, his evidence would have been a simple repetition of the facts that had already been established by Dissanayake's

evidence.

Furthermore, the Counsel for the 1st Accused, in particular, argued that the reason the Defence did not call Kulasinghe as a witness was because of the fear that the CID would 'coach' the witness to retract his statement. In light of this argument, as **Section 114** of the *Evidence Ordinance* presumes regularity of all official acts, including that of the police during an investigation, the Court cannot therefore infer or speculate that the witness may have been coached, in the absence of specific evidence to indicate the same. An examination reveals that the Criminal Investigation Department has conducted a thorough and careful investigation and there appears to be no potent or valid reason why the Court should have interfered in the proceedings before the Trial-at-Bar to call Kulasinghe as a witness. In any event had this witness been of such importance to the Defence, it is certainly strange that *none* of the Accused chose to call Kulasinghe to give evidence, although they strongly felt that it was essential in order to prevent 'a miscarriage of justice', but chose to hide behind a purported and unsupported fear of 'witness coaching' by the CID.

Thirdly, the Counsel for the 3rd Accused raised the issue that the Witnesses have to be treated as *Accomplices* whose evidence required independent corroboration. The Court wishes to deal with this question of law on two levels: firstly, in considering whether the Witnesses can indeed be categorised as 'Accomplices' and secondly, if they can be considered 'Accomplices', whether their evidence requires independent corroboration.

According to ***E.R.S.R. Coomarasamy***, the definition given by Wharton is the appropriate definition for Sri Lanka. Wharton in his textbook on Evidence defines accomplice thus:

> *'An accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was an admitted participant in*

> *a related but distinct offence. To constitute one an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission."*

The definition given in the Indian case of **Chetumal Rekumal v. Emperor (1934)** *(AIR 183)* has also found support in Sri Lankan case law and was adopted in **King v. Pieris Appuhamy (1942)** (*43 NLR 412*):

> *'An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is admittedly,* ***not every participation in a crime which makes a party an accomplice*** *in it so as to require his testimony to be confirmed'* (Emphasis added).

Thus, the idea that all acts pertaining to a crime can make a party an accomplice is ill-founded. This idea was encompassed in the decision in **King v. Pieris Appuhamy (1942)** (*43 NLR 412)* where the Court held

> *'A witness who merely assisted in the disposal of the dead body but who did not take part in the perpetration of the crime is not an accomplice'.*

This decision was followed in **The Queen v. Ariyawantha (1957)** (*59 NLR 241*). While other cases sought to extend the definition of an accomplice further, a definitive determination on the matter was given by the Supreme Court in **Prabath de Saram v. Republic of Sri Lanka (2002)** where it was submitted, similar to the present case, that the two principal witnesses are accomplices and thus, there should be independent corroboration of their evidence. It was further argued by the Counsel that in the absence of corroboration, their evidence should be rejected and that the Accused was entitled to an acquittal. However, the Supreme Court held that the principal witnesses were not accomplices and thus kept the definition of an

accomplice within the parameters set by **King v. Pieris Appuhamy (1942)** (*43 NLR 412*) and **The Queen v. Ariyawantha (1957)** (*59 NLR 241*).

Thus, the evaluation of whether a witness is an accomplice or not is a manifestly difficult decision to make and this task would admittedly be made easier if the witness had pleaded guilty or admitted or confessed to the police wherein he could be treated as an accomplice. However, one must admit the difficulty that arises when there is no evidence or proof of the involvement or especially the extent of the involvement and it must be strongly asserted that it is improper to treat a person as an accomplice on mere suspicion. Relevant here is the case of **Emperor v. Burns** (*11 BLR 1153*) it where it was held that:

> *'No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such hand. If the evidence of a witness falls short of these tests, he is not an accomplice, and his testimony must be judged on principles applicable to ordinary witnesses'.*

In the present case, it must be noted that the Attorney General did not grant conditional pardons to the witnesses as there was insufficient evidence to indicate that they were involved in the crime in the capacity of accomplices. Given this reality, as well as subsequent to an independent evaluation of the evidence presented, this Court cannot be satisfied that the Prosecution Witnesses, in particular Thotawatte, Dissanayake and Navaratne have engaged in a conduct or behaviour that would substantiate the claim that they were indeed accomplices. The definition of an accomplice in Sri Lankan law, as accepted by the Courts, clearly indicates that an accomplice must demonstrate common intent and knowingly unite with the principal offender to commit the crime but excludes the mere presence of witnesses in the vicinity of the scene from coming within this definition.

However, for the purpose of answering this question of law fully, let us assume that

the Witnesses come within the definition of an 'Accomplice'. The question posed to us is whether evidence proceeding from an accomplice must be corroborated and verified by an independent source.

In this regard, reference is made to **Section 133** of the *Evidence Ordinance* which states that

> *"An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".*

While **Section 133** makes it clear that the uncorroborated evidence of an accomplice is acceptable, this section must be read in conjunction with **Section 114(b)** of the *Evidence Ordinance* which states as follows:

> *"An accomplice is unworthy of credit, unless he is corroborated in material particulars".*

These statutory provisions, read together, create a conundrum of sorts leading to the conclusion that the creditworthiness of an accomplice is dependent upon whether his evidence, in material particulars, is corroborated by another source, whereas a conviction based solely on the uncorroborated evidence of an accomplice is not illegal. Yet, such a conviction would undoubtedly be a dangerous and unsafe one. Thus, it is within the purview of the Courts to consider the creditworthiness of each accomplice, apply their mind and search for cogent and conclusive factors that satisfy them that the accomplice is in fact, reliable, if they are to convict solely on his evidence. This sentiment was encapsulated succinctly in **The Queen v. Liyanage and Others (1962)** (*67 NLR 193*) which stated the following with regard to corroborative evidence:

> *'In the case of fellow conspirators or accomplices the established practice, virtually equivalent to a rule of law, requires independent corroboration of their evidence, in material particulars. What is required is some additional evidence, direct or circumstantial, rendering it probable that the accomplice's story is true and reasonably safe to act upon, and connecting or tending to connect the particular defendant with the offence. The degree of suspicion attaching to an accomplice's evidence varies according to the extent and nature of his complicity."*

However, such independent corroboration need not confirm each detail of the account presented by the accomplice, for if such a standard were required, as stated in **Rex v Noakes** *(5 C&P 326) 'his evidence would not be essential to the case; it would be merely confirmatory of the other and independent testimony'.*

Therefore, this submission of the Defence has no legal basis and is not tenable in law. On the facts of this case, the Court does not find evidence to reasonably conclude that the witnesses were accomplices. Therefore, it is held that their testimonial creditworthiness has not been assailed and that the evidence of the witnesses taken individually and cumulatively corroborates each other on material facts and all the evidence in the case, when considered together, proves the charges beyond a reasonable doubt.

The next issue which was raised by the Counsel for 2nd and 3rd Accused, and which is considered by this Court, is whether the investigations which led to the discovery of the cartridge and weapon were tainted and concocted and ought to be rejected.

The Counsel for the 3rd Accused alleged that the discovery of the empty cartridge at the crime scene by ASP Abeysekara shed serious doubts on the reliability of the matter. It was alleged that the scene was visited by a 'veteran investigator', IP Samudrajeeva and officers of the SOCO (Scene of the Crime expert unit) and neither party discovered the empty cartridge whereas it was ASP Abeysekara, who visited the

crime scene much later, who discovered it. Similar concerns have been raised by the Counsel for the 2nd Accused as well in that it was ASP Abeysekera who also made the discovery of the T56 weapon bearing no 1555658 from the strong box on 17.08.2009. In response to these allegations, the Prosecution asserted that the recovery of the spent cartridge was in fact done methodically, using a specialised 'Finger tip Search' which was previously used subsequent to the bombing of the Temple of the Tooth Relic, and is recognised in forensic science. The main witness who was present at the crime scene when the cartridge was discovered was PS 2761 Upali Bandara who narrated the events. Furthermore, Prosecution Witness 34 M.A.S Ajith [hereinafter referred to as M.A.S Ajith] explained the manner in which the search was conducted as one where a selected number of Officers stayed in one line and checked the ground using their finger tips in a slow and patient manner which ultimately led to the discovery of the empty cartridge on the beach. In light of such strong evidence, this Court does not see merit in the argument that this investigation was, in any way, erroneous or suspicious. In fact, it is to be noted that this method of investigation was quite contrary to the search made by the Investigating Officers of the Mt. Lavinia Police who made a cursory visual search. Of course, this may have been due to the agitation by the villagers who made demonstrations against the Police during the initial stages of the investigation. The Court finds no evidence to assail the independence and impartiality of the investigation conducted by the officers of the CID and no reasonable ground for these allegations have been disclosed from the evidence or the lengthy cross-examination in this case to offer a basis for the unfounded allegation by the Defence.

Having established the credibility of the Prosecution Witnesses and resolved the alleged inconsistencies in their testimonies and having established that the investigations were not tainted, this Court now examines the issues put forward by the Defence with regard to the Judgment delivered by the Learned Judges of the Trial-at-Bar.

The Counsel for the 1st Accused alleged that the Learned Judges of the Trial-at-Bar convicted the Accused on evidence and material that was not placed before Court and made references to the judgment of the High Court wherein it was stated that the behaviour of the 1st, 2nd, 3rd and 4th Accused after the commission of the murders, i.e. through the alteration of the Information Book, it is proven that they did in fact commit the murders. In light of this allegation, the Court feels it imperative to analyse the evidence with regard to the tampering of the IB.

The evidence of Thotawatte establishes the following narrative: when the 2nd Accused noticed that the complaint of the lady had been partly recorded in the Information Book [hereinafter referred to as the IB] he questioned Thotawatte as to why he made the entry when he had explicit orders not to do so. The 2nd Accused then instructed Thotawatte to alter the IB and when he protested, the task fell upon the shoulders of Prosecution Witness 17 Kariyawasam Hewamanaghe Kasun Buddhika [hereinafter referred to as Kasun Buddhika], who altered the IB upon compulsion. Given this narrative, this Court accepts the argument of the 1st Accused that it was only the 2nd Accused who was involved in the tampering of the evidence. However, it is equally important to note that none of these Accused had, even after the incident, taken any steps to disclose the truth of the incident. The fact that despite having the knowledge that two youth had been murdered on that fateful night, they omitted to take the ordinary, expected steps of disclosure expected of any innocent person, but instead actively assisted the 1st Accused.

The next issue that requires the consideration of this Court pertains to the allegations made regarding the unsworn statements made from the dock [hereinafter referred to as Dock Statements] by the 1st, 2nd and 4th Accused. It is in agreement that the 1st, 2nd and 4th Accused provided Dock Statements whilst the 3rd Accused exercised his right to remain silent and therefore, refrained from making such a statement.

The arguments put forth by the Defence in terms of the Dock Statements of the

Accused can be summarized as follows:

The Counsel for the 2nd Accused stated in his oral and written submissions that the contents of the Dock Statement of the 1st Accused correspond and corroborates the Dock Statement of the 2nd Accused and this has not been taken into consideration by the Learned Judges at Trial- at Bar. It is also the submissions of the Counsel that the Trial-at Bar erred in law by failing to take in to consideration the declaration of the 1st Accused in his Dock Statement; where he mentions that when the second murder was committed the 2nd Accused remained in the vehicle; and that, due to this, the Learned Judges of the Trial-at-Bar had failed to give the benefit of doubt to the 2nd Accused.

The Counsel for the 4th Accused, in his submissions to this Court suggests that the Learned Judges of the Trial-at bar had erred in law by rejecting the Dock Statement of the 4th Accused on the basis that the position taken up by the 4th Accused in his Dock Statement was not suggested to the Prosecution witnesses.

The Counsel for the 1st Accused also argued that the unsworn Dock Statement of the 4th Accused cannot be used as evidence against the 1st Accused.

Thus, given that the Defence has alleged that the Dock Statements of the Accused were not given sufficient consideration by the Learned Judges of the Trial-at-Bar, this Court feels it imperative to consider the allegations levelled by the Defence as well as consider the Dock Statements and assess its evidential value and relevance.

It must be noted that a Dock Statement is considered evidence, however, subject to the infirmity that it was not given under oath and therefore, not subject to cross-examination. In **The Queen v. Buddhrakkita Thera and 2 Others [1962]** [63 NLR 433],

*"The right of an accused person to make an unsworn statement from the dock*

*is recognised by our law [**King v. Vellayan [1918]** [20 NLR 251]. That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination".*

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

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

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

The above direction was expressly followed in **Somasiri V. The Attorney General [1983]** *[2 SLR 225*] and **Gunapala and Others v. The Republic of Sri Lanka [1994]** *[3 SLR 180]* while the principle it embodies was followed in **D. K. Lionel v. The Republic of Sri Lanka [1976]** [*79 NLR 553*].

In assessing whether the Dock Statement of the 1st Accused should be taken into account, its reliability must be verified by this Court. In order to do so, the Court finds it necessary to list out the summarised Dock Statement of the 1st Accused, which is unfolded as follows:

- He assaulted the two youth who were in custody before placing them in the cell;

- The 2nd Accused asked him to bring the two youth to him but claims that he does not know who took them to the 2nd Accused.
- The 2nd Accused asked *'someone'* to take the two youth and put them into the vehicle;
- After the vehicle stopped at the first point, the *'others'* went away with a gun;
- He claims that during this time, he remained in the vehicle along with Dissanayake and PC Kulasinghe;
- He heard a gunshot;
- Someone shouted " Kumara *get down* and remove handcuffs";
- Thereafter, the vehicle proceeded, and after it stopped at the second point, the '*others'* got off and went away.
- Then the 2nd Accused asked him to go and look for the others;
- Upon hearing a gunshot he came back to the vehicle;
- The CID officers recorded only a part of the statement;
- No opportunity was given to make a statement to any judicial officer of any court;
- He did not commit any offence relating to either of the two youth;
- He did not go armed at any stage;
- The only person who was available to prove the innocence was Kulasinghe who remained in the vehicle with him;
- Dissanayake lied against him.

The Prosecution in their submissions holds that the 1st Accused has deliberately failed

to disclose the identity of the officers who took the deceased to the crime scenes, by referring them as '*others'* or '*someone'*. These evasive statements indicate the need of the 1st Accused to not commit to anything for if the events he recounts in the Dock Statement were true, there was no reason for him to be so elusive and non-committing.

Furthermore, the Prosecution avers in their submissions that the 1st Accused makes an attempt to favour the 2nd Accused by refraining from disclosing the person who asked him to remove the handcuffs by referring to him as "*someone*", and shielding himself with the legal right to make any statement without being subjected to cross-examination. It was further submitted that the 1st Accused was making an attempt to assist the 2nd Accused and, in the process, exonerate himself from criminal responsibility as well.

His statement lacked clarity, was superficial and lacked basic details. Further, he was evasive and the lack of full disclosure affects the truthfulness and credibility of this witness.

In assessing the reliability of this Dock Statement, the Court notes the assertion of the 1st Accused that Dissanayake had lied against him, and the only person who could have proven his innocence was PC Kulasinghe [who was not examined as a witness]. Thus, the Court feels it vital to ascertain whether the validity and truthfulness of the Dock Statement, in the absence of the testimony of Dissanayake, can be established. The Counsel for the 1st Accused asserted that he remained in the vehicle at the first crime scene and that "*someone"* shouted "Kumara *get down* and remove the handcuffs". However, Navaratne clearly indicates that he heard the words "Kumara remove those handcuffs" and nothing to specify that the 1st Accused was actually in the vehicle at the time. This affirms the reasoning that the 1st Accused was in fact outside the vehicle, at the crime scene with the other Accused.

Moreover, and even more convincing is the manner in which his declaration in the Dock Statement that he remained inside the vehicle at the second crime scene, is disproven by the testimony of Navaratne where he indicated that he saw the 1st, 2nd, 3rd and 4th Accused, walk towards the beach by the light shed by a street light. Thus, even if the testimony of Dissanayake were untrue as alleged by the 1st Accused, evidence given by Navaratne negates the accuracy and veracity of the Dock Statement.

The Prosecution in their submissions states that the Dock Statement of the 2nd Accused is unacceptable and therefore should be rejected due to his conduct. The Dock Statement of the 2nd Accused statement is summarised as follows where he stated that he:

- He observed the two youth being assaulted at the Police Station;
- Instructed Thotawatte to record the complaint and to detain the two youth until morning;
- PC Kulasinghe and the 3rd Accused sought his permission to question the two youth;
- PC Kulasinghe and 3rd Accused informed him that the two youth had underworld connections and said that it is necessary to proceed to Lunawa to recover an offensive weapon hidden there;
- PC Dhammika said that the time now is passed 4.00 am;
- Claims that he got into the vehicle with the idea of having a cup of tea;
- When questioned by him, Navaratne said that PC Kulasinghe wanted him to proceed to Lunawa;
- The vehicle was stopped at Lunawa in response to a signal that came from the rear compartment of the vehicle;

- He heard a gunshot and opened the door of the jeep.
- He further claims that thereafter he asked “Why were the people in handcuffs shot at” and asked the 1st Accused “Why did you allow shooting people in handcuffs”. Thereafter, the Accused instructed the 1st Accused to remove handcuffs;
- Claims that the 1st Accused removed handcuffs after the shooting;
- Claims that he blamed the officers when they returned to the vehicle;
- Admits that he, thereafter, decided to take the necessary steps to introduce hand grenades to the crime scene with a view of justifying the shooting;
- Claims that thereafter the vehicle proceeded and stopped at Ratmalana following a signal that came from the rear compartment;
- Claims that he remained in the vehicle allowing the others to go with the second youth;
- Admits that he heard gunshots and thereafter officers returned without the youth;
- He claims that he questioned the officers upon their return. Thereafter he asked Navaratne to proceed towards a boutique to have a cup of tea and then went looking for Bathala Chaminda;

In ascertaining the accuracy and reliability of this Dock Statement, several Prosecution arguments appear to be pertinent. The Prosecution notes that the 2nd Accused, admittedly, viewed a number of events, which are against the law, taking place, yet, he did not take any action, being the Officer in Charge of the Angulana Police Station, to either prevent them from taking place, or admonishing or punishing the officers involved, other than merely blaming them. For instance, 2nd Accused admittedly observed the two youth being assaulted, but did not take any steps to reprimand the officers involved, and admittedly, deliberately did not take any

meaningful steps to stop it despite having the authority to do so.

Furthermore, the Prosecution has validly noted the inconsistency of the witness testimonies and the stance of the 2nd Accused where he states that it was PC Kulasinghe and Dissanayake who stated that it was necessary to take the victims to recover an offensive weapon, and that the signal to stop the vehicle at the two crime scenes came from the back of the vehicle when, the testimony of Navaratne clearly indicates that it was the 2nd Accused who was giving directions that night. These directions included ordering two persons to take weapons, asking the 1st Accused to remove the 1st victim's handcuffs, asking Navaratne to drive to Lunawa and Ratmalana and so on. It is also pertinent to note that if the assertion of the 2nd Accused that it was Kulasinghe who wished to take the victims to recover a weapon [and thus, the true culprit of the murder is Kulasinghe], is true, it makes little or no sense as to why Kulasinghe remained in the vehicle during the shootings.

The Prosecution also submits that the 2nd Accused was present at the crime scene and was involved in the murders as he demonstrated intimate knowledge of the crime. He knew that the youth were shot whilst being handcuffed and this Court further notes that if the 2nd Accused was not actually involved in the shooting, it is highly unlikely that he would ask another officer to remove the handcuffs. This Court is inclined to agree with the submissions made by the Prosecution in relation to the reliability and accuracy of the Dock Statement of the 2nd Accused, particularly given the improbability of the 2nd Accused, the Officer in Charge, allowing the 2nd victim to be taken away in the same manner the 1st victim was taken, when he knew that the 1st victim was shot.

Further, it is improbable that the 2nd Accused, if innocent, would have allowed the vehicle to drive *past* the Angulana Police Station to reach Ratmalana without, having witnessed a murder, hurrying back to the Station in order to make sense of events and take the necessary measures against the perpetrators. Instead, the 2nd Accused states that he proceeded to a nearby boutique to have a cup of tea. Given the

alarming events that have just unfolded, it is extremely unlikely, in the eyes of this Court, that an Officer in Charge would treat the matter in a manner so candid and disinterested unless, as testified and proved by the Prosecution Witnesses, he himself was involved in the shooting as well.

Furthermore, this Court notes that *even* if the Dock Statement is to be accepted as valid, the 2nd Accused demonstrated an intention to conceal the illegal events that took place by admitting that he had a view of placing hand grenades at the crime scene to justify the shooting, by not making the relevant entries regarding the arrest of the youth or the journey to Lunawa and Ratmalana, and finally, coercing several Officers to refrain from making truthful statements to the Mt. Lavinia Police.

The Counsel for the 4th Accused submitted that the Learned Judges of the Trial-at-Bar had failed to consider the Dock Statement of the 4th Accused separately and thereby denied a fair trial to the Accused. The Counsel further submitted that the grounds upon which the Learned ASG President's Counsel submitted that the Dock Statement be rejected were untenable. Given these allegations, this Court feels it imperative to analyse the statement to verify its authenticity. Thus, the Dock Statement of the 4th Accused is summarised as follows:

- The 1st and the 3rd Accused took two weapons;
- One of the two youth and 1st, 2nd and 3rd Accused were seen near the vehicle at Lunawa;
- Admits that he also got down from the vehicle;
- Claims that *he remained near the vehicle*;
- Confirms that he heard a gunshot;
- The youth did not return and the vehicle proceeded;

- At the second crime scene, confirms that he saw the three Accused near the vehicle and admits getting down from the vehicle;
- He heard a noise;
- The youth did not return;
- Claims that he did not carry a weapon and that he did not kill them.

With regard to the sincerity of the statement of the 4th Accused that he stayed near the vehicle when the shots were fired, the Learned Judges applied the rules laid out in **Rex v. Lucas (1981)** *(2 All ER 1008)* which was applied by Atukorale J. of the Supreme Court in **Karunanayake v. Karunasiri Perera [1986]** [*2 SLR 27].*. These principles must be satisfied in order to reject a Dock Statement and can be summarized as follows:

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

In assessing the authenticity of the statement, the Prosecution notes the improbability of the 2nd Accused actually allowing him to remain near the vehicle, after having instructed him to get down from the vehicle. This contention is supported by the testimony of Dissanayake who was seated in the rear compartment of the vehicle at the time. Dissanayake was also able to verify from his position in the vehicle that the 4 Accused' and the detainee walked towards the Bridge. He did not, however, indicate that the 4th Accused did in fact stay close to the jeep. The testimony of Navaratne who alighted from the vehicle at the second crime scene and came to the back of the vehicle too did not state that he saw the 4th Accused near the vehicle is also relevant

which casts a reasonable doubt upon the veracity of the statement. This reasonable doubt is compounded by the fact that neither witness was cross-examined regarding this statement which prompted the Learned Judges of the Trial-at-Bar to accurately apply the decision delivered by Sisira de Abrew J in **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)** where it was stated that

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

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

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

and in **Motilal v. State of Madhya Pradesh (1990)** *(CLJ NOC 125 MP*) which held that the

> *'Absence of cross examination of Prosecution Witnesses of certain facts leads to inference of admission of that fact'.*

Furthermore, in consideration of the assertion that he did not carry a weapon, this Court notes the testimony of Thotawatte who claimed that the 3rd and 4th Accused took charge of the guns taken from the strong box, and proceeded to return the weapons as well, and observes that the 4th Accused *did not* challenge this evidence either.

Thus, the inability to accurately verify whether the 4th Accused did in fact stay close to the vehicle due to these questions not being suggested to the Prosecution Witnesses, the fact that this statement remains as mere conjecture without supporting evidence and also the fact that the 4th Accused did not challenge the evidence of Thotawatte, provides this Court with sufficient cause to disbelieve and reject the Dock Statement of the 4th Accused.

Therefore, taking into account all the material before us and the in-depth reasoning above that effectively militates against the Dock Statements of the 1st, 2nd and 4th Accused being accurate, we are in a position to agree with the reasoning of the Learned Judges of the Trial-at-Bar in holding that the Statements were unacceptable and thereby rejecting them.

The next issue was raised by the Counsel for the 3rd Accused who, in his oral and written submissions, averred that the Trial- at Bar has made an error in law by holding that that silence of the 3rd Accused is satisfactory evidence denoting his acceptance of the case of the Prosecution while it is the argument of the Prosecution that the silence of the 3rd Accused establishes his guilt.

In considering the position of the 3rd Accused and, in particular, his silence in this instance, the stance of the Prosecution that his failure to explain incriminatory material is an item which establishes his guilt was on the basis of the 'Ellenborough Dictum'. The Counsel for the 3rd Accused averred that this particular reference cannot be found in any modern text on Evidence and implied that this Dictum cannot, therefore, bear any legal merit.

In considering this contention, this Court makes reference to the Ellenborough Dictum which was encompassed in the judgment delivered by Lord Ellenborough in **Rex v. Cochrane (1814)** *(Gurneys Reports 479)*. The most relevant section is extracted below:

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

In analysing the evidence before this Court, it is noted that the 3rd Accused was present when the youth were assaulted, took possession of a weapon without making entries as required, alighted from the vehicle at the first crime scene and proceeded with the other Accused and the victim, alighted from the vehicle at the second crime scene while bearing the firearm and lied about these events upon return to the Station. In the eyes of this Court, these facts create a strong prima facie case against the 3rd Accused and his omission to provide a reasonable explanation, when he had the opportunity to do so, would only amount to this evidence operating adversely to his interest.

It was averred by the Counsel that the Ellenborough Dictum bears no legal merit whatsoever, but this Court notes that the essence of this Dictum has been encompassed in a series of decisions in Sri Lanka. The Ellenborough Dictum was cited by Howard CJ in **The King v. L. Seeder de Silva (1940)** *(41 NLR 337)* and the Learned Judge went on to hold that:

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

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

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

This principle was analysed in depth by Fernando J in **Queen v. Seetin [1965]** [*68 NLR 316]* from p. 321-324 and further upheld in **Ilangatilaka and Others v. The Republic of Sri Lanka [1984]** [2 SLR 38] and in **J. M. Chandradasa v. The Queen [1969]** [*72 NLR 160].* This principle was more recently approved and accepted by the Supreme Court in **Mohamed Niyas Naufar v. The Attorney General** (*TAB-01/2006*) as well and this Court notes the continuous relevance of this principle in evaluating suspicious circumstances where a strong prima facie case has been constructed against the Accused but he fails, even though it is within his power, to provide an explanation. Thus, in light of a strong prima facie case against the 3rd Accused, his silence cannot be justified.

The final question of law regarding Dock Statements pertains to whether the unsworn statement of one Accused can be held as evidence against another. The Counsel for the 1st Accused argued this point in defence of the Prosecution's invitation to the Court to compare the unsworn statement of the 4th Accused in which incriminatory statements were made regarding the 1st Accused. Reference was made to **Section 30** of the *Evidence Ordinance* which states that

> "*When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of*

*such persons is proved, the Court shall not take into consideration such confession as against such other person*"

and the decision in **Monis Appu v. Heen Hamy (1924)** (*26 NLR 303*) where Bertram C. J stated that

*"If one prisoner standing on the dock makes an unsworn statement implicating the other, this is not evidence. It has no more effect than an ejaculation uttered by an auditor in Court".*

While Dock Statements amount to evidence, a statement of one Accused should not be used to implicate another Accused. This principle of evaluating dock states was laid out in **The Queen v. Kularatne [1968]** [*71 NLR 529*] as follows:

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

*(c) That it* ***should not be used against another accused****". [*Emphasis Added*].*

This is especially important as Dock Statements are not strengthened by an Oath and cannot be subjected to cross-examination. This Court therefore affirms that the Dock Statements of a Co-Accused [in this case, that of the 4th Accused] cannot be used against another Accused [i.e. the 1st Accused].

However, Court also feels it noteworthy to mention that evidence given by the Prosecution Witnesses, and adverted to in detail as set out above, which is independent of the Dock Statement made by the 4th Accused, is valid evidence in this case and prove the case beyond a reasonable doubt.

The next issue that will be considered by this Court pertains to common intention. On the medical evidence alone, it is clearly proved that whoever committed these murders had entertained a murderous intention. The site of the injuries, the weapons used to inflict the injuries seen at the Post-Mortem examination etc. all prove, beyond a reasonable doubt, that whoever committed this offence had a murderous intention as the victims were clearly shot at close range with the clear intention of causing death. This was not even assailed during arguments. The question then to be considered is whether all the accused shared a *common* murderous intention.

An issue raised by the Counsels for the 1st and 4th Accused, in particular, related to whether the conviction of the Accused under Common Murderous Intention was bad in law with the Counsel for the 4th Accused in particular, alleging that participatory presence of the 4th Accused had not been established. In order to effectively analyse this position, this Court will initially assess the law that has been presented.
**Section 32** of the *Penal Code* states the following:

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

As laid out by the Privy Council in **Mahbub Shah v. Emperor (1925)** (*A. C. 118*), this Court agrees that

> *"It is no doubt difficult if not impossible to procure direct evidence to prove the intention of the individual; it has to be inferred from his act or conduct or other relevant circumstances of the case".*

In this regard, the Counsel for the 4th Accused in his written submissions averred that the Learned Judges of the Trial-at-Bar did not accurately analyse and consider the present case according to the elements of common intention that must be proven. The case of **The King v. Asappu (1950)** (*50 NLR 324*) was cited by the Counsel for the 4th

Accused where Lordship Dias J. outlined the elements of common intention. However, in order to analyse whether the Accused have committed a criminal act in furtherance of the common intention of all, it is noteworthy that the law pertaining to common intention has developed greatly since the decision in **The King v. Asappu (1950)** (*50 NLR 324*), and thus must be updated prior to consideration. In this regard, the Court endeavours to summarise the law relating to common intention as follows:

a. The case of each Accused must be considered separately;

b. The Accused must have been actuated by a common intention with the doer of the act at the time the offence was committed;

c. Common intention must not be confused with same or similar intention entertained independently each other;

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

e. It must be noted that 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 two fundamental issues raised in the present case is the non-consideration of elements (d) and (f) by the Learned Judges of the Trial-at-Bar and this Court will consider these allegations together.

The Counsel raised the issue of the absence of a 'pre-arrangement' or 'plan' and the fact that the 4th Accused did not utter a single word that could be construed as evidence of such a plan. The Court notes that this element was required according to the elements listed out in **The King v. Asappu (1950)** *(50 NLR 324)* but this Court notes that this requirement has since then been subjected to change. Reference must be made to the case **of R v. Mahatun (1959)** *(61 NLR 540)* where one offender chased the victim with a bomb in his hand and another offender joined him. It was held that common intention arose at the moment in which the offender joined in the chase and thus, common intention could arise on the '*spur of the moment*.' Therefore, even in the present case, the absence of a proven plan does not undermine the existence of a common intention shared by all 4 Accused' as such an intention can arise on the spur of the moment.

The Counsel also averred that there is no direct evidence that establishes an agreement or plan. In this regard, this Court makes reference to the case of **Ariyasinghe and others v. The Attorney General (2004)** *(2 SLR 357*) where Court observed that it is

> "..*very often it is difficult to prove a conspiracy by direct evidence. The existence of an 'agreement to commit a particular offence' is a matter to be*

*inferred from the proved circumstances*.'

It has also been stated by the Supreme Court of India in **Rishideo v. State of Uttar Pradesh (1955)** *(AIR 331)* [quoted in **Wasamulani Richard v. The State (1973)** (*76 NLR 534*)] that

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

Thus, this Court is of the opinion that the behaviour of the 4 Accused persons at the Police Station, at the crime scenes and upon return to the station infers the existence of a conspiracy and a common intention to commit the murders. The absence of protest by the Accused, voluntarily escorting a handcuffed detainee and witnessing his murder all point towards a common intention albeit arising on the spur of the moment. The Counsel for the 4th Accused further sought to draw the distinction between participatory presence and mere presence to establish that the behaviour of the 4th Accused did not amount to participatory presence. In this case, the Court does not see a need to establish a verbal declaration which can be construed as evidencing common intention but notes that the knowledge of the assault at the Station, the decision of the 4th Accused to take weapons from the reserve without making any entries as is the established procedure, climbing into the vehicle with the victims being handcuffed and climbing down from the vehicle at Ratmalana knowing what had taken place near the Lunawa Bridge, indicates, cumulatively, evidence of collusion and common murderous intention. These facts establish participatory presence, and when collectively considered indicate that the 4th Accused was not merely present at the crime scenes but actively engaged in illegal acts and dismounted the vehicle at the 2nd crime scene with full knowledge of what had happened earlier.

It has also been submitted to this Court that the presence of an agreement should be established in order for the charges of conspiracy to stand and that the absence of

such a 'verbal' agreement negates the validity of these charges. This Court notes the comprehensive difficulties that tend to arise with regard to definitive evidence of such an agreement. As held in **The Queen v. Liyanage and Others (1962)** (*67 NLR 193*)**,**

> *'The evidence in support of an indictment charging conspiracy is generally circumstantial'.* Having recognised these inherent difficulties, this case goes on to state that '*It is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy maybe inferred from the collateral circumstances of the case. Conspiracy can ordinarily be proved only by a mere inference from the subsequent conduct of the parties in committing some overt acts which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to bring it all about'*.

Thus, this Court is of the strong opinion that the abovementioned factual evidence lead to the irresistible inference of an implied agreement between the parties.

With regard to the 3rd Accused, this Court sees three issues as being worthy of discussion under the analysis of common intention. Firstly, the Counsel for the 3rd Accused alleged that the Prosecution failed to establish whether the firearm from which the cartridge was fired was in fact the same weapon that the 3rd Accused had in his possession during the incident. Secondly, the issue of whether the 3rd Accused did in fact entertain a common intention must be considered. Thirdly, the argument of the Counsel that the strong 'prima facie' case against the 3rd Accused does not move to the stage of being proven beyond reasonable doubt merits the consideration of this Court.

With regard to the first issue, the Court finds it appropriate to consider the abovementioned **Section 32** of the *Penal Code*, as well as the decisions in, **The Queen v. Vincent Fernando (1963)** (*65 NLR 265*) and **Gunasiri and Two Others v.**

**The Republic of Sri Lanka (2009)** (*1 SLR 39*).

In **The Queen vs. Vincent Fernando (1964)** (*65 NLR 265*), Basnayake C.J. held that

> "*A person who does a criminal act by himself is liable for that act if it offends any provision of the penal law. The above section does not deal with the liability of a person for the criminal act he himself does but with his liability for the criminal acts of others. What are the pre-requisites of such liability? Several persons must have a common intention to do a criminal act, they must all do that act in furtherance of the common intention of all. In such a case each person becomes liable for that act in the same manner as if it were done by him alone*."

Furthermore, in **Gunasiri and Two Others v. The Republic of Sri Lanka (2009)** (*1 SLR 39*), it was held that

> *"In the case of a murder when two or more accused persons are charged on the basis of common intention, the prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow".*

Thus, it is noteworthy in this case that there is no burden upon the Prosecution to conclusively establish that each and every Accused was armed or that each Accused committed the deed. What is necessary for a conviction under **Section 32** is proof beyond reasonable doubt that the Accused participated in the act and that *collectively*, the act was carried out by the four Accused. Thus, claiming that the Prosecution was unable to establish whether the cartridge came from the weapon the 3rd Accused was carrying does not help his case for, the Prosecution being able to establish through the evidence submitted by Government Analyst Mr. Sarath Gunatilake who confirmed that the spent cartridge was fired from the relevant T56 rifle recovered from the strong

box, is sufficient to establish that the deed was in fact committed and according to **Section 32**, all persons involved in the commission of the crime individually responsible as if it were done by them alone.

The second issue that merits discussion pertaining to the position of the 3rd Accused is that, in the absence of a defence or an explanation by the 3rd Accused, whether common intention can indeed be inferred. In analysing this position, Court makes reference to The **King v. Endoris et al. (1945)** (*46 NLR 498*) where it was held that where an Accused was proved to have been present when the crime was committed, if he wished his presence to be construed as innocent, he should have provided an explanation of his presence. This case should be read together with the decision in **Wasalamuni D. Richard v. The State** (*76 NLR 534)* where Alles J. and Thamotheram J. held that

> *"The circumstantial evidence against the 3rd Appellant was sufficient, in the absence of evidence given by him to explain his presence at the scene, to establish that he acted in furtherance of a common murderous intention with the other Accused to kill the deceased".*

Thus, in the present case, absence of direct evidence that places the 3rd Accused directly at the crime scenes does not disallow the application of the dictum in **The King v. Endoris et al. (1945)** (*46 NLR 498*). The Court notes the difficulties inherent in establishing an accurate chain of events in the absence of direct evidence but is sufficiently satisfied that the circumstantial evidence coupled with the Witness testimonies and the subsequent findings of the Mt. Lavinia Police and the C. I. D establish a continuous chain of events that establishes the participatory presence of the 3rd Accused, along with the other 3 Accused, at the crime scenes.

This Court further notes that in **The King v. Endoris et al. (1945)** (*46 NLR 498*), Soertsz A.C. J. noted that even if the Accused did not play an active role in the actual attack on the deceased, his armed presence at the scene should have been

explained. Thus, circumstantial evidence provided by the Navaratne and Dissanayake, indicates that the 3rd Accused was armed and that he alighted from the vehicle and walked away with the victims and the other Accused, and returned without the victims, on both occasions which should have been supplemented with an explanation by the 3rd Accused.

The Counsel for the 3rd Accused also indicated that a 'prima facie' case remains 'prima facie' and does not become a case proven 'beyond reasonable doubt' without evidence i.e. that the absence of explanation does not in itself transform a 'prima facie' case into one which has been proven beyond reasonable doubt. In this regard, the Court notes the 3rd Appellant's behaviour that night including quietly taking possession of a gun without making entries, going along with the 2nd Accused and the others when ordered to get down from the vehicle at the Lunawa bridge with the aforementioned gun, returning to the vehicle with a gun in his possession and disembarking from the vehicle, with the gun, where the 2nd murder took place in Ratmalana. The Court further notes that there is no evidence to indicate any remorse, regret or concern in his actions that night and this positive evidence, particularly of the possession of the gun, and the discovery of the T56 gun bearing serial number 1555658 from which the spent cartridge marked P36B had been fired as attested by the Government Analyst Mr. Sarath Gunatilake, is not a mere absence of explanation, but positive evidence that proves the charge beyond reasonable doubt.

In assessing the veracity of the information placed before this Court, it is imperative to note that none of the Prosecution Witnesses were present at the actual crime scenes. Thus, the evidence placed before the Court is largely circumstantial in nature and the Counsel for the 2nd and 4th Accused, in particular, raised the issue of such evidence failing to establish the guilt of the Accused beyond reasonable doubt.

While direct evidence is always more desirable, the proven of circumstantial evidence alone should never negate a conviction. However, it must be noted that items of such

evidence must be treated with extreme care and diligence by the Courts and certain guidelines must be followed in the evaluation and assessment of such evidence.

In **The Queen v Kularatne [1968]** [*71 NLR 529*], the Court of Criminal Appeal quoted the dictum of Watermeyer J in **Rex v. Blom (1939)** as follows:

> *"Two cardinal rules of logic which governs the use of circumstantial evidence in the criminal trial (1) the inference sought to be drawn must be consistent with all the approved facts. If it does not, then the inference cannot be drawn. (2) the proof of facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct'.*

Furthermore, in terms of basing a conviction solely on circumstantial evidence several safeguards are in place in order to avoid a miscarriage of justice as held in **Don Sunny v Attorney General (Amarapala Murder Case) (1998)** *(2 SLR 1)*, where it was stated that when the charges are sought to be proved by circumstantial evidence, the items of circumstantial evidence when taken together must irresistibly point towards the only inference that the Accused committed the offence. These sentiments were further expressed soundly in **King v Abeywickrema et al. (1943)** (*44 NLR 254*) where it was held that

> *"In order to base a conviction on circumstantial evidence, the Jury must be satisfied that the evidence was consistent with the guilt of the Accused and inconsistent with any reasonable hypothesis of his innocence".*

Furthermore, in **King v Appuhamy (1945)** (*46 NLR 128*), it was held that

> *"In order to justify the inference of guilt from purely circumstantial evidence, the*

*inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable-hypothesis the that of his guilt".*

What is important then to keep in mind during the evaluation of circumstantial evidence is to assess whether the evidence is compatible with the guilt of the Accused. Any reasonable inference that it is not so, must be always held in favour of the Accused.

Thus, for the purpose of assessing the circumstantial evidence placed before this Court, the narratives unfolded by the Prosecution Witnesses are as follows.

*"The 2nd Accused asked the two deceased to be brought to his office room where he hit the deceased and requested for a baton/ stick "pollak" and once again hit the deceased. The 3rd Accused, went to the 3-wheeler that was parked in the Police Station and brought a rubber belt and gave it to the 2nd Accused. The 2nd Accused hit the deceased with the rubber belt. Thereafter, the 2nd Accused handed the rubber belt to the 1st, 3rd and 4th Accused' who were also present in the room and asked them to hit the two deceased. Then the 1st Accused took the deceased to the jeep: they were hand cuffed and had plastic bags over their heads".*

Evidence by Thotawatte, unfolds as follows:

*"The 3rd and 4th Accused had two weapons. The 2nd Accused told the 4th Accused to hand over the weapon he had in his hand to the 1st Accused. Then the 1st Accused took the weapon. Thereafter, he went in to the 2nd Accused' office and brought the deceased in to the jeep. 1st, 3rd and 4th Accused, Kulasinghe and also Dissanayake got in to the rear part of the jeep whilst the 2nd Accused and Navaratne got in to the front part of the jeep. The 4th Accused did not have a weapon in his hand when he was getting in to the jeep".*

Whilst Navaratne in his evidence relates the following:

*"When I was driving towards Moratuwa we came towards Lunawa Bridge. The 2nd Accused asked me to stop on the bridge. I stopped the vehicle near a light post after the bridge. After I stopped, I remained in the vehicle. The 2nd Accused got out of the vehicle and went towards the back of the jeep. When the 2nd Accused got down from the vehicle I heard a loud noise. It came from the back of the jeep. I knew it was a gunshot. Then I heard the 2nd Accused shouting at the 1st Accused asking him to take off the handcuffs. After about five minutes the 2nd Accused got into the jeep. I heard people getting in to the back of the jeep. I started to drive forward and then the 2nd Accused asked me to drive down the river road which leads to the Angulana Railway Station and once again falls to the Angulana junction. On that road there was a barrier. So I stopped the jeep and kept the lights on. The 2nd Accused knocked at the back window. Then the 3rd and the 4th Accused got down and came to the front. They removed the barrier, then they got back in to the jeep: I did not see them getting in to the jeep I just heard them getting in. The 3rd Accused had a T-56 gun with him.*

*The 2nd Accused then told me to drive past the Angulana Station towards to Ratmalana. I drove towards Ratmalana; there is a ground in front of the co-operative store. I stopped in front of it. There was a light post near the shop. After I stopped the jeep, the 2nd Accused got out of the jeep and asked the 1st Accused to get down. Then 4 people including the 1st, 3rd, 4th Accused and a man with his hands cuffed got down from the back of the jeep and came in front of the vehicle. In front of the jeep there was a road that led to the beach; they all went down that road towards the beach. I saw the 3rd Accused had a gun in his hand.*

*Then I heard a sound from the back of the jeep. So I came out and went to the back of the jeep. I saw Kulasinghe and Dissanayaka seated at the back. I asked Kulasinghe what the others were doing. Then I went back to the driving seat and was seated. Once again I heard gun shots firing twice. I remained in the vehicle.*

*They returned after ten to twelve minutes and the 2nd Accused asked me to drive to Mt. Lavinia to buy cigarettes. The 1st, 3rd and 4th Accused got in to the back of the jeep. But the boy who was handcuffed did not return".*

The essence encompassed in the dictum of Fernando, J. in **Chuin Pong Shiek v The AG (1999)** *(2 SLR 277)* (The Tony Martin Case) is relevant in the assessment of the circumstantial evidence placed before the Court in the present case. In the Tony Martin Case, the Court placed emphasis on evidence that was consistent with the presence and participation of the Petitioner [as he was referred to in that case] in the murder, his conduct immediately before and after the crime and the deliberate false statements he had made in material aspects.

With regard to the 1st Accused, Witnesses testified that he assaulted the victims at the Police Station, chased away a villager who had inquired about the deceased, took over a gun from the 4th Appellant and, at the crime scene and removed the handcuffs of one of the deceased subsequent to him being shot. He further failed to disclose a full account of the events that had transpired and deliberately refrained from disclosing the identity of the officers by referring to them as 'the others'. The 2nd Accused also assaulted both victims, ordered two officers to take weapons, ordered the 1st Accused to remove the handcuffs of the deceased, ordered the alteration of the Information Book and coerced all officers concerned to refrain from disclosing the truth at the Mt. Lavinia Police Station. The 3rd and 4th Accused took over weapons without making any entries and returned them without making the relevant entries as well. Further, neither Accused endeavoured to disclose the truth upon return to the Station while the 3rd Accused lied and stated that the 2nd Accused was drunk and the two persons were dropped off. All 4 Accused' where seen climbing into the Police jeep with the two victims being handcuffed and their heads covered with shopping bags and returned to the Station without the deceased. Further, all 4 Accused' were seen accompanying the deceased at the two crime scenes by the Witnesses and returning without the deceased to the vehicle. The evidence of Thotawatte also indicates that

the vehicle first went towards Lunawa and was then seen passing the Police Station and heading towards Ratmalana, where the 2nd crime scene was located. Such circumstantial evidence is consistent only with their presence and participation in the murder and is confirmed by the conduct of the Accused prior to the crimes being committed and their subsequent conduct as well as the deliberate false statements made by them, presumably to conceal true facts.

It must also be mentioned that the Sri Lankan Courts have also recognised that each component of circumstantial evidence, assessed individually, may only amount to a circumstance of suspicion but have emphasised the importance of assessing such components accumulatively. This sentiment was summarised succinctly in **Regina v. Exall (1866)** (*176 ER 853*) where it was held as follows:

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together maybe quite of sufficient strength.*
>
> *Thus…in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of."*

Thus, it must be noted that in the present case, while each piece of evidence, individually considered, may not direct the Court to the conclusion that the Accused were in fact responsible for the murders, the evidence presented by the Prosecution Witnesses, when considered together, irresistibly leads this Court to the conclusion

that the Accused were guilty beyond any reasonable doubt. The evidence further excludes any reasonable inference that is compatible with the innocence of the Accused, thereby leaving the irresistible and only conclusion that the 4 Accused' did conspire to abduct and subsequently murder the two deceased.

The next issue that needs to be considered by the Court is the assertion by the 1st, 2nd and 4th Accused, that their defences were not appreciated by the Learned Judges of the Trial-at-Bar in which judgement the case of **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)** was applied. In this case, it was held that in the event important questions are not put to the witnesses during cross-examination, it is believed that the Defence has accepted the witnesses' answers during examination-in-chief. Accordingly, the Learned Judges did not accept the defences admitted to Court on this basis.

This Court thus feels it prudent to assess whether the reasoning of the High Court is sound. The Counsel for the 1st Accused in his written submissions outlined his defence which was that at the time of the first shooting, the 1st Accused was allegedly inside the vehicle with Dissanayake and PC Kulasinghe and during the second shooting, he admits that he got down from the vehicle but once the shots were fired, he allegedly ran back to the vehicle in fright. However, this Court notes that only the discrepancy which arose between the Witness testimonies and the Dock Statement of the 1st Accused was raised in terms of suggesting to Dissanayake the fact that during the 1st shooting, the 1st Accused was inside the vehicle. This position was not suggested to Navaratne during cross-examination. Even then, it is noteworthy that while this position was posed to Dissanayake, he categorically denied this claim and asserted that the 1st Accused, along with the rest, alighted from the vehicle at the first crime scene. Furthermore, the 1st Accused maintains that he was not armed at any point, but this position was not suggested to the Witnesses either. Thus, this Court upholds the application of the judgment in **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)** as the above issues are material points upon which no

cross-examination has taken place and the absence of which amounts to an acceptance of the Prosecution's version.

The Counsel for the 1st Accused also asserts that these questions were posed to the witnesses and alleges that the Learned Judges of the Trial at Bar did not appreciate or care to find out what the defence of the 1st Accused was. In this regard, the Court wishes to highlight several inconsistencies in the argument of the 1st Accused which clearly undermine the truthfulness of his defence. While the 1st Accused categorically maintained that he was in the vehicle during the first shooting, Dissanayake clearly states that he, along with the 2nd and 4th Accused and the first victim, alighted from the vehicle near the Lunawa Bridge. With regard to the second incident, the 1st Accused maintains that he got down from the vehicle but immediately returned when he heard shots being fired. However, Dissanayake does not corroborate this version but states that the 1st Accused alighted from the vehicle with the rest, and returned about ten minutes after the shots were heard, along with the other Accused. The testimony of Dissanayake is corroborated by that of Navaratne as well who did not see the 1st Accused milling near or close to the vehicle when he got down to speak to the two officers at the back whereas he saw the 1st Accused return together with the 2nd, 3rd and 4th Accused by streetlight.

Another inconsistency this Court wishes to highlight is with regard to the assertion of the 1st Accused that he was not armed at any point. However, evidence given by the Witnesses suggest otherwise. Dissanayake stated that the 2nd Accused asked the 3rd and 4th Accused to take the weapons while Thotawatte asserted that a little while later, the 2nd Accused asked the 1st Accused to take the weapon over from the 4th Accused, which the 1st Accused did. In addition, Dissanayake also stated that when the vehicle stopped near the Lunawa Bridge, he saw that both the 1st and 3rd Accused had weapons in their hands when they got down.

Thus, it cannot be said that the High Court, as the Counsel for the 1st Accused

vehemently asserted, did not appreciate or care to find out what the defence of the 1st Accused was, for given that the truthfulness of the account of the 1st Accused is entirely undermined by the testimonies given by the two Witness, namely, Dissanayake and Navaratne, it is apparent that the account of the 1st Accused of his own defence cannot be relied upon.

With regard to the defence tendered by the 2nd Accused, the submissions made by the Counsel for the 2nd Accused complemented by the evidence presented in the Dock Statement state that he was in the vehicle the entire time and did not have control over the situation when his subordinates murdered the two boys. If this position is to be accepted, the Court has to seriously consider the fact that the 2nd Accused is the Officer in Charge of the Angulana Police Station and by law, he is responsible for the actions of his subordinates.

This Court further notes that it is in his power to prevent imminent illegal acts, suppress crimes in progress, punish completed offences, restrain or impose sanctions on his subordinates, as appropriate. In the judgments of the International Criminal Tribunal for the former Yugoslavia the case of **Delalic et al (I.T-96-21) "Celebici"** *16th November 1998, para 395*, **Prosecutor v Tihomir Blaskic** *(IT-95-14), para 333* and in the case of **United States v Karl Brandt et al "doctors trial",** *2 TWC 212*; it was held that an officer in a position of command holds a duty to take steps to control those under him, and failure to do so will render him responsible for his actions. It seems necessary to apply this principle in the present case, although no evidence has been produced before us confirming that the 2nd Accused was in fact incapable of controlling the actions of his subordinates and was helpless in the matter.

Therefore, we do not accept that the 1st, 3rd and 4th Accused abducted and murdered the two boys without the knowledge and/or orders of the 2nd Accused and it is our view that the 2nd Accused was part and parcel of the criminal offences committed.

The next issue with regard to defences is the allegation that the Learned Judges of the Trial-at-Bar have failed to consider the Plea of Justification in favour of the 4th Appellant. The Counsel for the 4th Appellant submits that he was simply carrying out the orders made by his superior officer and that this does not amount to demonstrating a common intention and that he did not carry out illegal orders. Additionally, the Counsel for the 1st and 3rd Accused too argued this point and averred that the defence of superior orders should be applicable to them as well while the Counsel for the 1st Accused, in particular, averred that he had been denied a right to a fair trial due to the dismissal of his defence by the Learned Judges of the Trial-at-Bar in which they relied on the judgement given in **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)**.

In this regard, this Court makes reference to **Section 69** of the *Penal Code* which states as follows:

> "*Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in* ***good faith*** *believes himself to be, bound by law to do it."* (Emphasis added).

**Section 72** of the *Penal Code* further goes on to state that:

> "*Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in* ***good faith*** *believes himself to be justified by law in doing it."* (Emphasis added).

With regard to the applicability of **Section 69** of the *Penal Code*, Alles, J. clearly stated in **Wijesuriya v. The State (1973)** *(77 NLR 25)* that

> *"To entitle a person to plead Section 69 as a defence, it is essential that the*

*order given by the superior, even if it be not strictly lawful, prompted the person obeying the order to consider himself bound by law, in good faith, to act on the basis that it was a lawful order".*

Sri Lankan Courts have recognised the applicability of the defence of superior orders in certain circumstances as enunciated by Gratien, J. in **Corea D. H. R. A v. The Queen (1954)** *(55 NLR 457)* who stated as follows:

*"It is not improbably that, when the senior police officer present eventually ordered the complainant's arrest at a later stage, (the subordinate officers) reasonably and in good faith entertained the belief that the order was one which they ought to obey. In these circumstances they were entitled to claim the benefit of the exception to criminal liability set out in* ***Section 69*** *of the Penal Code",*

However, the onus is on the Accused to prove that he was, on a balance of probability, acting in *good faith* in order to establish that his actions do not amount to an offence.

In recounting the events that took place that night and firstly, the actions of the 1st Accused i.e. assaulting the youth at the Police Station, chasing away Susantha Jayalath when he informed the 1st Accused that the two youth were personally known to him, and another villager who was near the gate of Police Station, getting the two youth, handcuffed and with shopping bags over their heads into the vehicle, the removal of the handcuffs of the 1st deceased upon instruction and failure to make an entry once he returned to the Police Station, the Court believes that the Accused was not acting in good faith.

The 2nd Accused assaulted the two victims with a baton/stick and a rubber belt [as noted by Thotawatte and corroborated by Dissanayake], ordered the 3rd and 4th Accused to take possession of weapons without making an entry as legally required,

was fully aware that the two youth were handcuffed and had shopping bags over their heads, pretended that he was entirely unaware of the arrests made the previous night, instructed Thotawatte to alter the Information Book and coerced all the relevant officers to prevent them from divulging the truth to the Mt. Lavinia Police. These actions clearly indicate, to a reasonable person, that the 2nd Accused was not acting in good faith whatsoever, but was clearly seeking to further his own means and conceal true events.

With regard to the 4th Accused, the Accused knowingly took possession of a gun from the reserve along with the 3rd Accused and returned said weapon without making entries as legally required. The 4th Accused also knowingly concealed his true whereabouts during the shootings as he asserts that he alighted from the vehicle but remained near it. While no one can corroborate this statement, it should also be noted that at the second crime scene, Navaratne got down from the vehicle and spoke to Dissanayake and Kulasinghe at the back but did not notice the 4th Accused nearby, as he alleged, indicating that he concealed his true whereabouts, possibly to prevent prosecution. Thus, this Court cannot agree that the 4th Accused was acting in good faith either.

The Court feels that it is imperative to note that in **Wijesuriya v. The State** *(77 NLR 25)* it was held that

> "*Section 69 of the Penal Code which states that "Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it" can have* ***no application when a person obeys an order which is manifestly and; obviously illegal****."* (Emphasis added).

The Counsel for the 4th Accused argued, in this regard, that the 4th Accused did not carry out a single illegal order other than obeyed the order to disembark from the

vehicle and walk towards the beach with the other Accused. This Court is inclined to strongly disagree as, at the very least, the 4th Accused obeyed an order to take possession of a weapon and later returned that weapon without making a single entry as required by law. He also admitted to having alighted from the vehicle at the second crime scene, with full knowledge of the extra judicial killing that had taken place earlier at the first crime scene.

Furthermore, this Court feels that it is appropriate to refer to International Criminal Law, which has much persuasive value, where the defence of superior orders has been comprehensively discussed as well.

**Article 33** of the *Rome Statute of the International Criminal Court* recognizes the defence of superior orders on the basis of three qualifications. **Article 33** reads as follows:

> *"The fact that a crime within the jurisdiction of the court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:*
>
> *I. The person was under a legal obligation to obey orders of the government or the superior in question;*
> *II. The person did not know that the order was unlawful; and*
> *III. The order was not manifestly unlawful.*

The first requirement is an existence of loyalty or legal obligation, whilst the other two requirements refer to requisite standards of knowledge. The latter requirements require the Accused to have personal knowledge of the illegal nature of the order. In this case, the 1st, 3rd and 4th Accused' were Police Officers and given the nature of their profession, it is apparent to us that they had personal knowledge of the nature of

the acts committed.

In ascertaining the trend of international opinion with regard to the applicability of this defence, it is also noteworthy that the English Courts adopt a somewhat strict line in the case of illegal orders, when police officers are involved. Similarly, in the Indian Case of **Gharan Das Narain Singh v. The State** *(AIR 1950 37)*, a constable, acting on the orders of a sergeant, fired into a tent and caused the death of a woman. Though he pleaded the defence of superior orders, Khosla J stated that

> *"The order was unlawful. Obedience to an unlawful order does not exonerate or excuse the person who commits an offence as a consequence of such an order.*

Furthermore, in the South African case of **R v. Smith (1900)** *(17 S.C. 561)*, Solomon J noted that

> *"It is monstrous to suppose that a soldier would be protected where the order is grossly illegal. If a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer."*

Thus, it is this Court's opinion that they had a moral choice to avoid committing such offences. The concept of moral choice, recognised at the ***Leipzig trials***, established a principle where a subordinate would be punished, if in the execution of an order, he went beyond its scope or executed an unlawful act which the subordinate could have avoided. This principle was upheld by the German Supreme Court in the case of **USA v. Ohlendorf and Others ( Einsatzgruppen Case) (1949)** *(15 ILR 656)*, on the basis of **Article 47** of the *1872 German Military Penal Code* and it is thus clear that superior orders will not avail a subordinate where it is apparent that the order is illegal.

**Article 47** states as follows:

> *"If through the execution of an order pertaining to the service, a penal law is violated, then the superior giving the order is alone responsible. However, the obeying sub- [...ordinate] [sub...] ordinate shall be punished as accomplice (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offense."*

In the case before this Court, it is abundantly clear that the Accused were aware that the order given by the 2nd Accused concerned an act which aimed at a crime i.e. the ill-treatment of prisoners and their subsequent execution whilst in Police custody and thus, the defence of following superior orders cannot be relied upon.

This stance of the Court is in line with similar decisions such as that given in the case of **Llandovery Castle** *(16 AJIL*), where the German Supreme Court did not accept the defence of superior orders. In this case, it was held by the Learned Judges of the Supreme Court that although subordinates are under no obligation to question the order of their superior officer, when an order is universally known to be unlawful, following such an order would be against the law. Even at a very basic level, obeying an order to shoot and kill an individual who was handcuffed is clearly an order universally known to be against the law. Therefore, on the facts pertinent to the case at hand, and on evidence proven beyond a reasonable doubt, this Court dismisses the defence of "Superior orders" as averred by the 1st, 3rd and 4th Accused.

Another question to address is whether the 1st, 3rd and 4th Accused could plead duress. The Counsel for the 4th Accused in particular averred that the said Accused, being the most junior Officer, had carried out the orders given by his superior out of an implied fear of being reprimanded or punished, if he refused to do so. In addition, the Counsel for the 1st Accused asserted that due to the 'overpowering nature of the 2nd Accused' he carried out his orders out of fear.

The defence of duress by threat was defined in **A.G v. Whelan [1993]** (*IEHC*) as being a defence available to an Accused who has committed an offence subject to

> *'Threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance.'*

It is up to the Court to determine whether the threat was sufficiently serious to warrant the defence of duress to stand.

This Court faces insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others. Thus, this Court makes reference to the decisions of the House of Lords in the English cases of **Abbott v. The Queen [1977]** *(AC 755) and* **R v. Howe & Bannister [1987]** (*2 WLR 568)* which have persuasive value and reflect the international opinions on the matter. In the latter case, the House of Lords held that the defence of duress will not be available for murder or attempted murder:

> i. "*We face a rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of human life lies at the root of this ideal and I would do nothing to undermine it, be it ever so slight.*
>
> ii. *Attempted murder requires proof of an intent to kill, whereas in murder it is sufficient to prove an intent to cause really serious injury. It cannot be right to allow the defence to one who may be more intent upon taking a life than the murderer."*

This Court also makes reference to **Section 87** of the *Penal Code* which states the following:

> *"Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequent; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such restraint".*

In light of the evidence presented to this Court, I am of the opinion that the 1st, 3rd and 4th Accused had a choice. In analysing the evidence presented to this Court, it cannot be stated that the Accused were subjected to any threats of immediate death or serious personal violence by the 2nd Accused that is so great as to overpower the ordinary powers of human resistance. What is crucially important to note is that the Accused are Police Officers who are professionally and lawfully entrusted with the duty to serve, to maintain law and order, to protect members of the public and their property, prevent crime, reduce the fear of crime and improve the quality of life of all citizens. Having such great responsibility in their hands and moreover, having wilfully taken on this responsibility, it is atrocious for them to seek duress as an excuse for the abduction and killing of two innocent people. In any case, **Section 87** of the *Penal Code* negates any claim of the defence of duress against a charge of murder. Thus, in the circumstances of this case, the Court notes that the defence of duress in fact and in law, as the Accused have acted with impunity in blatant abuse of their power, the defence of duress cannot be relied upon to provide perpetrators with a pretext for avoiding the responsibilities that have been entrusted to them, especially when the proven facts speak otherwise.

The next issue that is discussed by this Court is one that arises from the submissions

made by the Counsel for the 3rd Accused where intoxication was purported as a defence. From the evidence brought before us it has been noted that the 1st, 2nd, 3rd and 4th Accused was at a party prior to the murder. Although the 2nd Accused in his statement averred that due to medical reasons he did not consume alcohol, 1st, 3rd and 4th Accused accepted that they had consumed alcohol at the party. Subsequent to such consumption, they returned to the Police Station to resume duty in an inebriate state.

The difficulty presented before us is the task of identifying whether the mind of the 1st, 3rd and 4th Accused were so affected by the consumption of alcohol that they were entirely incapable of knowing what they were doing was dangerous i.e. likely to inflict serious injury. With regard to the documentation and other evidence presented before this Court, we are unable to effectively ascertain whether their inebriated state rendered them incapable of knowing what they were doing. However, even if it could be determined that they were unaware of their actions, Court makes reference to **Section 78** of the *Penal Code* which states the following:

> *"Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law:*
>
> *Provided that the thing which intoxicated him was administered to him* ***without his knowledge or against his will***." [Emphasis added].

What is noteworthy is that the Accused cannot, under any circumstances, plead that they did not commit an offence on the ground of intoxication because the consumption of alcohol at the party was entirely voluntary. There is no evidence whatsoever presented to this Court to indicate that the Accused were coerced into consuming alcohol prior to returning to the Station to resume police duties.

This Court notes the Gambian case ***Banday (1948) 15 E.A.C.A. 145***, where it was held that

> "*The common result of the consumption of liquor is that it makes a person reckless as to the consequences of his actions. That, however, is not a defence in law".*

Similarly, we do not accept that 1st, 3rd and 4th Accused could escape from the consequences of their actions by alleging intoxication as a defence, especially in the given circumstances. As Police Officers, allowing the defence of intoxication to stand would be entirely unjust as they are expected to safeguard the rights of the people and prevent situations such as what has transpired in this case.

What is thoroughly alarming is the callous manner in which these officers have treated their respective duties. It is established that they, subsequent to consuming alcohol, returned to the Station to resume their public duties and a rather worrying question arises in our minds as to how the protectors of the public could voluntarily intoxicate themselves and deliberately put themselves in a position where they are unable to control their actions when discharging their duties.

A final question of law pertaining to defences and the Plea of Justification was raised by the Counsel for the 4th Accused. The Counsel, in his written submissions, argued that the Allocutus under **Section 280** of the *Code of Criminal Procedure* is part of evidence and will strengthen the Plea of Justification. **Section 280** of the *Code of Criminal Procedure* states as follows:

> *"In the High Court before judgment of death is pronounced, the Accused shall be asked whether he has anything to say why judgment of death should not be pronounced against him".*

The Counsel has relied on the case of **Priyambalamet. Al. v The Queen (1970)** (*74 NLR 515*), where it was held that

*"An admission made by an accused person in answer to the Allocutus under Section 305 of the Criminal Procedure Code is evidence in the case and the Court of Criminal Appeal cannot ignore the effect of such admission".*

However, Court makes the distinction that in the abovementioned case, an admission, rather than a defence was made and is thus inapplicable to the present case as in the present case, the 4th Accused in his Allocutus averred the defence of superior orders. However this is untenable in Law and is rejected.

On a concluding note, this Court further deem it utterly horrific for members of the forces in a country to unlawfully detain, physically and mentally assault and thereafter abduct and murder persons who were in their custody. One should not forget that being a member of the forces is an honourable position, where the lives of the citizens have been entrusted to them. This power should not be used to abuse, intimidate and generate fear in the minds of the public. When a person is detained, he is merely a suspect; he has not been found guilty according to the laws of the country and therefore, allowing the forces to behave in such a manner and punish the detainee, cannot, on any count, be condoned as is the basis of the arguments of this defence.
Therefore, for the aforesaid reasons, the Appeal to set aside the Judgment dated 25.08.2011 is dismissed and the Judgment of the Trial-at-Bar is affirmed.

Sgd.

**JUDGE OF THE SUPREME COURT.**

**EKANAYAKE. J**

I agree.

Sgd.

**JUDGE OF THE SUPREME COURT**

**HETTIGE.P.C. J**

I agree.

Sgd.

**JUDGE OF THE SUPREME COURT**

**DEP. P.C. J**

I agree.

Sgd.

**JUDGE OF THE SUPREME COURT**

**WANASUNDERA.P.C. J**

I agree.

Sgd.

**JUDGE OF THE SUPREME COURT**