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

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

Democratic Socialist Republic of Sri Lanka.
Complainant

S.C.Appeal No.169/2019
SC(SPL) LA Application No. 336/2018
C.A.Case No. 203/2015
H.C.Polonnaruwa Case No.39/2012

Vs.

And

1. Hethambi Prabakaran alias Kumara
2. Kokka Koralage Mahindapala alias Gamunu
3. Adam Lebbe Mohamed Haris
4. Noor Mohamed Kabul(Dead)

Accused

AND NOW

Hethambi Prabakaran alias Kumara,
No.258, Muthuwella,
Mahaweli Sinhapura,
Walikanda.
Presently at Walikada Prison
1st Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's
Department.
Colombo 12.
Complainant-Respondent

AND NOW BETWEEN

Hethambi Prabakaran alias
Kumara,
No.258, Muthuwella,
Mahaweli Sinhapura,
Walikanda.
Presently at Walikada Prison

1st Accused-Appellant-Appellant

Vs.

Hon. Attorney General
Attorney General's
Department.
Colombo 12.
Complainant-Respondent-Respondent

BEFORE : **P. PADMA N SURASENA, CJ.**
ACHALA WENGAPPULI, J.
MAHINDA SAMAYAWARDHENA, J

COUNSEL : Anil Silva P.C. with Tharindu Rukshan and D. Bhanu for the Accused-Appellant-Appellant

Ayesha Jinasena A.S.G., (P.C.) with
Chathuranga Bandara S.C. for the Complainant-Respondent-Respondent.

ARGUED ON : 04th August, 2021

DECIDED ON : 30th January, 2026

****

ACHALA WENGAPPULI, J.

The 1st accused-appellant-petitioner-appellant (hereinafter referred to as "the 1st accused") was indicted by the Hon. Attorney General, along with two other accused and another called *Noor Mohammed Kabul,* who since died, for committing the murder of *Mohammed Riham* on 25.07.2004, at *Mutuwella* of *Welikanda* area. The 3rd accused was also accused of committing the offence of retention of stolen property that belonged to the deceased.

Upon the election made by the three accused for a trial without a jury, the trial against them commenced and proceeded before the learned Judge of the High Court of *Polonnaruwa.* During that trial, the prosecution led evidence of several lay witnesses as well as of official witnesses, including that of a Consultant Judicial Medical Officer. When the trial Court called for the defence, the 1st and 2nd accused made statements from the dock, whereas the 3rd accused gave evidence under oath and called witnesses on his behalf.

In delivering his judgment, the learned High Court Judge acquitted the 2nd and 3rd accused from the murder charge. The 3rd accused was acquitted of the charge exclusively levelled against him under Section 394 of the Penal Code as well. Only the 1st accused was convicted for murder and was accordingly sentenced to death.

Being aggrieved by the said conviction and sentence, the 1st accused preferred an appeal to the Court of Appeal. The appellate Court, in delivering its judgment which is being impugned in these proceedings, dismissed the said appeal after affirming the conviction and sentence. Thereupon, the 1st accused sought Special Leave to Appeal against the said judgment.

After affording a hearing to the parties, this Court granted Special Leave to Appeal to the 1st accused on 23.10.2019, in respect of the following questions of law contained in paragraphs 14(c) and 14(j) of his petition;

i. Did the learned Judges of the Court of Appeal and the learned High Court Judge misdirect themselves as regards the inferences that could be drawn from the fact the body was discovered consequent to a statement made by the 1st accused?

ii. Did the learned High Court Judge as well as the learned Judges of the Court of Appeal err in law when they convicted the 1st accused for the charges levelled against

him notwithstanding the fact that the said charges had not been proved beyond reasonable doubt?

During the hearing of the appeal of the 1st accused, learned President's Counsel, who represented him before this Court, contended that the prosecution relied heavily on an item of evidence that indicated the recovery of the body of the deceased was made subsequent to the 1st accused pointing out the place where it was buried. The line of authorities commencing from ***Edwin Singho v Inspector of Police Chilaw*** (46 CLW 52), ***Etin Singo v The Queen*** 69 NLR 353, ***Heen Banda v The Queen*** 75 NLR 54, ***Ranasinghe v Attorney General*** (2007) 1 Sri L.R. 223 and ***Sunil Ratnayake v Attorney General*** (SC TAB Appeal 01/2016 – decided on 25.04.2019) consistently acted on the principle that, in situations where a relevant fact had been discovered upon the information provided by an accused, which made that portion of his statement admissible against him under Section 27 of the Evidence Ordinance, the Courts would infer only his "*knowledge*" to the fact that had been discovered and nothing more.

The learned President's Counsel, who then submitted that however the "*new doctrine*", propounded in the judgment of ***Ariyasinge and Others v The Attorney General (2004) 2 Sri L.R. 360,*** was inappropriately utilised by the trial Court in the instant matter, when it cast a burden on the 1st accused to give an explanation how he acquired the knowledge about the location of the place where the body of the deceased was buried. According to the learned President's Counsel, in the peculiar set of circumstances presented before the trial Court in this instance, the

evidence pertaining to the recovery of the dead body is totally insufficient to cast any burden on the 1st accused to offer an explanation to the prosecution case.

According to the learned President's Counsel, this is due to the fact that the 1st accused could not be presumed to have murdered the deceased, based upon his inferred knowledge of the place where the dead body was buried. Moreover, he contended that, it was wrong for the trial Court to presume that he had the requisite common murderous intention, only on mere '*knowledge*' attributed to him over a Section 27 recovery. Hence, the learned President's Counsel's contention is that the guilt of the 1st accused could not be considered as the only irresistible conclusion that the trial Court could have reached, and, in the given set of circumstances, particularly in view of the item of evidence which indicates that it was the 3rd accused, who had the mobile phone of the deceased in his possession soon after the latter's death, such a finding could not be sustained at all.

In view of these multiple factors, it was submitted by the Counsel that the Court of Appeal was clearly in error when it adopted the erroneous reasoning of the trial Court as a correct finding in fact and law, before proceeding to affirm the conviction of the 1st accused.

In view of the several contentions that were presented by the learned President's Counsel for consideration of this Court, in relation to the nature and scope of the questions of law on which the instant appeal was heard, and also in view of the fact that the case against the 1st accused, being a one essentially based on circumstantial evidence, it is necessary to highlight the relevant items of evidence that were presented by the

prosecution, before the trial Court. In order to ensure the narrative is presented in a chronological order as much as possible, the multiple items of circumstantial evidence are re-arranged to form a sequence.

Riham, the deceased was an unmarried businessman of 27 years who was generally engaged in the textile trade. He lived in *Periyamulla*, area of *Negombo* and had an elder sister, who is married and settled in *Kurunegala*.

On the evening of 23.07.2004, the deceased invited two of his friends *Malhas* (PW6), and *Saharan* (PW 5) to join him in a trip to visit his sister. They boarded a bus and reached *Kurunegala* at about 5.00 or 6.00 in the following morning. Having visited his sister, the deceased suggested that they should attend a religious function held at *Kalmunai.* The three of them boarded a bus bound to *Kalmunai* from *Kurunegala.* They alighted from the bus at *Ottamawadi* around 3.00 a.m., on 25.07.2004 and spent some time in a nearby mosque. That evening, the deceased, along with his two friends, has visited the 4th accused at his residence, located in that area. The 4th accused introduced the 1st, 2nd and 3rd accused, who later joined them to the deceased. They all chatted for a while. The visitors from *Negombo* were then served food by the family members of the 4th accused. This was around 4.00 p.m. The group of men thereafter proceeded to *Welikanda* in two three-wheeler taxis. They reached *Welikanda* town in the evening. While at *Welikanda* town, the deceased indicated his mind to go with the 4th accused to some undisclosed place, a journey, which he said would take only about 10 minutes. *Malhas* and *Saharan* decided to stay back and await the return of the deceased. They stayed near the *Welikanda* police station. The deceased and the four accused left in a three-wheeler. Having waited

till about midnight in *Welikanda* town expecting the return of the deceased, *Malhas* and *Saharan* have thereafter decided to go back to the 4th accused's house, as none of the five men, who left them at *Welikanda* in that evening did return as indicated.

While waiting for a *Kalmunai* bus, *Malhas* and *Saharan* saw the 4th accused returning in a three-wheeler to *Welikanda*. The 4th accused told them that the deceased is now waiting near *Polonnaruwa* bus stand at *Kaduruwela* junction and invited them to join him in the three-wheeler to meet up with the deceased. When the three of them reached *Kaduruwela* bus stand, only the 1st, 2nd and 3rd accused were there, but the deceased was nowhere to be seen. Upon being enquired of the whereabouts of the deceased, the 1st, 2nd and 3rd accused told *Malhas* and *Saharan* that their friend had already boarded a bus, in order to return to his sister's place. They further conveyed that the deceased wanted *Malhas* and *Saharan* also to meetup with him in *Kurunegala*.

When the deceased left *Malhas* and *Saharan* at *Welikanda,* he had in his possession a Nokia phone. He also carried Rs. 70,000.00 in cash with him. The two friends tried to contact the deceased by repeatedly dialling his number, as the latter was getting late. The calls went unanswered, although they could hear the ringing signal. After about 3.30 a.m., on 26.07.2004, they realised the deceased's phone did not respond at all to their calls any longer.

The two friends returned to *Kurunegala,* only to find that the deceased had not returned from *Kalmunai*, although they were told by the 1st, 2nd and 3rd accused that he did so. They searched for him in the

Negombo area and thereafter returned to the 4th accused's house at *Ottamawadi* once more, looking for the missing person. Thereupon, the 4th accused took them to *Valachchenai* police, where a police officer was introduced to them, who disclosed to *Malhas* that the deceased had been arrested by *Wehera* police for possessing a firearm and is kept under its detention. This lead provided by the 4th accused about the whereabouts of the deceased too turned out to be a false one and therefore a formal complaint was lodged with the *Welikanda* police by one *Sriyananda,* on 29.07.2004 at 11.30 a.m., in relation to the disappearance of the deceased, without a trace, in that police area.

Malhas and *Saharan* had no information of the deceased, after he left them that evening at *Welikanda* in the company of the four accused. But, *Malhas* has noted down the number of the three-wheeler, in which the deceased travelled along with the other accused that evening, when they left *Welikanda* in that evening.

Armed with that information, *Welikanda* police traced two three-wheeler drivers. *Kumara* (PW9) and *Ranjith* (PW3) operated their three-wheeler taxis from a place near the *Welikanda* bus stand. Both of them already knew the 1st to 4th accused, as passengers who regularly travelled in their vehicles. According to *Ranjith,* the 3rd accused came with another unknown person and wanted to go to *Mutuwella.* This was on 25.07.2004, the day the deceased has disappeared. It's a journey that would cover over a distance of about nine kilometers from *Welikanda* and would generally takes about 30 to 45 minutes to reach, depending on the speed and road conditions.

Since it was already dark, *Ranjith* called one of his friends, *Hemantha* also to join him, in case of an emergency. On their way to *Mutuwella*, the 3rd accused asked *Ranjith* to stop the three-wheeler at a point, well before reaching *Mutuwella,* as he wanted to collect some money from the 1st accused. The 3rd accused returned within 10 minutes with the other passenger. They completed the journey by reaching *Mutuwella,* where *Ranjith* had dropped off his two passengers near, the 3rd accused's house.

On their return journey, nearing the point where *Ranjith* had stopped the vehicle in order to allow the 3rd accused to collect some money from the 1st accused, the 2nd accused signaled the vehicle to stop. The 1st, 2nd and 4th accused came running towards the three- wheeler. They all wanted *Ranjith* to take them to *Welikanda.* Upon reaching *Welikanda,* the three accused wanted him to take in two more passengers, who were waiting there, to be taken to *Kaduruwela* junction. Since, it was not possible to travel six passengers in one vehicle, *Hemantha* brought in his own three-wheeler. They proceeded to *Kaduruwela* in two three-wheelers. They all got off at *Kaduruwela* and the two drivers returned back to *Welikanda,* after collecting their hires.

Similarly, *Kumara* also said that in the same night the 1st and 2nd accused wanted him to take them to *Mutuwella* from *Welikanda.* At some point during that journey, the 4th accused and another unknown person too had joined them. After passing a jungle area and *Mutuwella* Farm and at a point near the main Z- canal, all four passengers have got off from the vehicle. *Kumara* was told that they would to take a walk through the

paddy filed. *Kumara* knew that the 1st accused lived in that area, as he had dropped him off at the same spot, on several previous occasions.

Manimaran (PW7) is a shop assistant employed in a phone shop in *Batticaloa.* On a particular day in July 2004, the 3rd accused brought a Nokia 6220 phone and wanted to sell it for Rs. 22,000.00. The 3rd accused said it belonged to one of his aunts, who had returned from abroad recently. At that point of time, the 3rd accused did not have the charger of that phone or any of its other accessories with him, that usually are supplied along with the phones by its manufacturer. He promised to bring them over some other time. The phone had no SIM card inserted to it. After a bout of bargaining, the 3rd accused agreed to part with the phone by accepting a sum of Rs. 15,000.00. The witness knew the 3rd accused before this incident as he was employed as a driver of a passenger bus that regularly plied between *Colombo* and *Batticaloa*.

A few days later, the 3rd accused returned to the shop, but this time with the police. The police officers, after having verified the details of the phone, had taken charge of the same.

The *Welikanda* police, after receiving the 1st information regarding the disappearance of the deceased on 29.07.2004 at 11.30 a.m., have acted immediately to commence its investigations. IP *Gunatillake* (PW13) conducted investigations into the said complaint and recorded a statement from *Ranjith,* the driver of one of the three-wheelers, in which the deceased and the others have travelled to *Mutuwella.* His statement was recorded on the same day at 12.30 p.m. at *Welikanda* town and within two hours, the 1st accused was arrested at 2.30 p.m., from his house at *Mutuwella*. He was

informed of the reason to arrest, being suspected of committing murder. The 2nd accused too was arrested on the same day from a temporary hut in *Mutuwella* paddy filed at 2.50 p.m. After questioning the 1st accused at *Mutuwella* police post, his statement was recorded at 3.30 p.m., whereas the statement of the 2nd accused was recorded ten minutes later at 3.40 p.m., on the same day.

The 1st accused thereafter pointed out a place, located close to the said *Mutuwella* paddy field to the police. The place pointed out by the 1st accused is located about 500-600 meters away from his own house. It is an isolated and open area consisting of a large extent of paddy fields. There were no dwellings located in the vicinity. The police, during its investigations, had noted signs of recent disturbance to the top layer of soil of the place pointed out by the 1st accused. Having secured the place pointed out by the 1st accused by placing officers to stand guard, the police team had returned to the station and reported facts to the Magistrate's Court of *Polonnaruwa* on 30.07.2004 in Case No. B 1392, requesting an order of Court for the exhumation of the body.

Arrest of the 3rd accused was made on 03.08.2004 at 4.30 p.m., and after recording his statement, he pointed out the phone shop, where the witness *Manimaran* was employed.

The 4th accused could not be arrested as he evaded the police for some time. He eventually surrendered to Court and had his statement recorded by police on 06.09.2004, whilst being kept under the supervision of prison officials, consequent to an order of Court issued to that effect. After the service of the indictment, the 4th accused died, apparently due to

several firearm injuries he has sustained, and as a result, the indictment already served on the other accused was amended to reflect the said change.

Exhumation of the dead body was carried out in the presence of learned Magistrate of *Polonnaruwa* on the same day. The body of the deceased was buried in a shallow grave. After removing sandy soil into a depth of about 1 ½ feet, the body of the deceased was discovered, wrapped in two polybags. It was observed that the neck of the deceased was cut in a manner that the cut had almost severed the head from the body. The body was buried with its left side to the bottom of the pit, that too after bending its legs from the knees. The body was properly identified by the relatives of the deceased, who were present there and a post mortem examination was ordered.

The post mortem examination on the body of the deceased was conducted by the Consultant JMO of *Kurunegala* General Hospital, Dr. *Mahendra Senanayake,* on 31.07.2004. There were three injuries on the body that were observed by him. The 1st injury is a 24 cm long cut injury with a width of 4 cm found in the neck of the deceased. That particular cut injury had severed all the soft tissues, including the carotid arteries, jugular veins, and trachea. The cut extended up to the spinal cord and into the 3rd intervertebral disk in the neck. In the opinion of the Consultant JMO, the neck of the deceased was cut probably when the deceased was in a position of sleeping, as the edges of the cut injury were found to be of irregular shape. It was cut with a single attempt; this is because it had only two clean cutting edges on either side of the cut. The cut injury had

severed all the blood vessels that supply blood to and from the brain, resulting in a severe blood loss and therefore was classified as the necessarily fatal injury that caused the death of the deceased. The expert estimated the death of the deceased would have occurred in a matter of few minutes. The weapon used to inflict the said cut injury could be a sharp, heavy and a long-bladed weapon and in inflicting the said cut, the expert opined that a moderate force was used.

Of the other two injuries, one is another cut injury, which was noted by the Consultant JMO, 3 cm above the left eyebrow and 2 cm to the right from the midline. The said cut injury measured 2 cm long and 1 cm in width. The other injury was a contusion measuring 5 cm long and 3 cm in width, located 3 cm above the right eyebrow and 2 cm to the right from the midline. These two injuries were classified as non-grievous injuries.

The Consultant JMO also expressed his opinion to the effect that the deceased would have taken his last meal between 6-8 hours before his death. He also expressed his opinion that the death of the deceased would have been occurred about 3-4 days prior to his examination, which he did, based on the degree of putrefaction found on the body.

It is against these items of evidence and, in the light of the processes of reasoning adopted by the Courts below, this Court proceeds to consider the contentions that were presented on behalf of the 1st accused. One such contention advanced on behalf of the 1st accused by the learned President's Counsel is that the guilt of the 1st accused to the charge of murder could not be considered as the only irresistible conclusion that the trial Court could have reached, in the given set of circumstances.

In my view, this particular contention requires investigation at the very outset of this judgment, even prior to make any attempt to consider the three questions of law.

The reason for the adoption of that course of action is, if the 1st accused is correct in this aspect, as it was claimed on his behalf, the remaining issue with regard to his failure to offer an explanation to the prosecution case does not arise for consideration at all. In the absence of a substantial body of evidence establishing a strong *prima facie* case against him that requires an explanation, a consideration into the legality of the conclusion reached by the both Courts over the failure of the 1st accused to offer such an explanation would merely be an academic exercise, which this Court need not ordinarily undertake.

The trial Court as well as the Court of Appeal, in the respective judgments, have expected the 1st accused to offer an explanation to the allegation of murder, on the premise that the prosecution had established a strong *prima facie* case against him. That is a conclusion reached by both Courts. Hence, it is necessary to inquire into the question whether there was a *prima facie* case established by the prosecution against the 1st accused as the foremost consideration. This would also answer the contention that the guilt of the 1st accused is not the only conclusion the trial Court have reached in the given set of circumstances.

In order to carry out the said inquiry, I wish to commence from the point that the deceased and his two friends leaving *Kurunegala* in a bus bound to *Kalmunai*.

There is no evidence that the 1st accused has had any influence over the decision of the deceased to make him visit the 4th accused's house that evening. In fact, even *Malhas* and *Saharan* were kept in the dark by the deceased of his intention to visit the 4th accused, when he invited his two friends to join him with in the trip to *Kalmunai.* The disclosed purpose of the trip was to attend a religious function at *Kalmunai*. When the 1st, 2nd and 3rd accused arrived at the 4th accused's house in that evening, they did not pay much attention to the three, who just arrived there from *Negombo.* Similarly, the 1st accused apparently did not contribute to the decision of the deceased to proceed to *Welikanda.* It was the deceased who indicated to *Malhas* that they need to go there.

It was the 4th accused who arranged the two three-wheelers, enabling all of them to travel to *Welikanda.* It is evident that the deceased and the 4th accused had some undisclosed purpose, in taking the decision to travel to *Welikanda* in that evening. Of course, the 4th accused had no connection to *Welikanda* or to *Mutuwella,* other than through the other accused, who are residents of that area.

After arriving at *Welikanda, Malhas* and *Saharan* were invited by the deceased and the 4th accused to join them to go to some other place. No mention of where exactly they would proceed from *Welikanda* or for the purpose of such a journey was made, either by the deceased or the 4th accused. Before leaving *Welikanda* in the company of the four accused, the deceased indicated to *Malhas* and *Saharan* that he would be back within a matter of ten minutes.

It is evident that the deceased has kept the purpose of coming to *Ottamaw**adi,*** then proceeding to *Welikanda* and from there proceeding further into an undisclosed location, only for himself. This made *Malhas* and *Sharan* suspicious about the whole transaction which in turn made them to decide not to follow the deceased blindly. *Malhas* and *Sharan* decided that they would remain in *Welikanda* town until the latter had returned. Apparently, either *Malhas* or *Saharan* had no knowledge of the real purpose of the deceased's decision in coming to *Ottamawadi* that day and then to meet up with the 4th accused in the evening. If they knew, they pretended to know nothing. The reluctance shown by the two, to join with the deceased to continue the journey with the others at *Welikanda* indicate that it is more likely that they had no knowledge of what the deceased had in his mind.

Evidence of the 2nd and 3rd accused that were presented before the trial Court in support of their respective defences seems to suggest that the purpose of the deceased's visit to *Ottamawadi* and then to *Welikanda* and beyond is not at all that innocent. They both claim to have knowledge of the activities of others who are involved with illegal *Cannabis* trade. Irrespective of the said motive, what is important to note in this regard is that the decision of the deceased to proceed beyond *Welikanda* without his friends was made after reaching *Welikanda*. Up to this point, the 1st accused played no active role and was merely following the group of men, led by the 4th accused.

It is undisputed that the 1st accused lived near the main Z canal on *Welikanda-Mutuwella* road. The place where the house of the 1st accused is

located was at some considerable distance away from the nearest motorable road and was found adjacent to vast tract of open paddy land. A reserved forest, near the 1st accused house, formed a boundary to those paddy fields. The area is in total isolation, barring a few temporary sheds that were put up by the farmers, who cultivated these lands on a seasonal basis.

The evidence presented before the trial Court is clear on the point that the four accused and the deceased had travelled in two groups and in two different three-wheelers to *Mutuwella* area that evening. The 1st and 2nd accused hired *Kumara's* three-wheeler for their journey to *Mutuwella.* The two accused accordingly proceeded from *Welikanda* in *Kumara's* vehicle. The 4th accused and the deceased did not travel with the 1st and 2nd accused initially but joined them subsequently at some point *en route Mutuwella,* when *Kumara* had to stop the three-wheeler after running out of fuel. Having refuelled, the group of four men once again resumed their journey towards *Mutuwella* in one vehicle. They travelled up to the point at which the 1st accused would usually get down from the three-wheeler in order to reach his house on foot. Thus, it was *Kumara* who saw the deceased alive for the last time in the company of 1st, 2nd and 4th accused in that late evening.

In respect of the 3rd accused, the situation is significantly different. The 3rd accused travelled in the three-wheeler driven by *Ranjith* to *Mutuwella* that evening with another person. The 3rd accused too had stopped on their way to *Mutuwella* to visit the 1st accused's house. The reason given by the 3rd accused was that he needed to collect some money

from him. *Ranjith* was emphatic that both the 3rd accused and the other person got off his three- wheeler upon reaching the 3rd accused's house at *Mutuwella. Ranjith* turned back from *Mutuwella* with his friend, in order to return to *Welikanda.* The other person who travelled with the 3rd accused happened to be another friend of that accused, who too lived in the same area.

The 3rd accused's evidence that he did not take part in the murder was acted upon by the trial Court as that evidence was well supported by other evidence. the Prosecution had no evidence as to the fate of the deceased after he walked away in the company of the 1st and 4th accused. This evidence came from an unexpected source.

Damayanthi is the wife of the 1st accused. She was called as a witness for the defence by the 3rd accused, along with his own wife. During cross-examination by the prosecution, *Damayanthi* excluded the 3rd accused from the group of men who returned home that evening with a young person, who was of about 25 years of age. She estimated the time of their arrival at the 1st accused's house to a point sometime after 7.30 p.m. The said young person, whom she later identified as the deceased, has already fallen into deep sleep after consuming some drink prepared by the 4th accused, when she retired for the night, around 9.00 p.m.

The trial Court excluded *Damayanthi's* evidence altogether in respect of the 1st accused, acting in terms of Section 120(2) of the Evidence Ordinance. Section 120(2) reads " *[I]n criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness if called by the accused, …". Damayanthi* was not called by the prosecution for

the purpose of testifying against her husband, the 1st accused. She was called by the 3rd accused, that too in order to corroborate his evidence that he did not proceed with the 1st, 2nd, 4th accused and the deceased into the 1st accused's house that night. The trial Court was rightly mindful of the competency of *Damayanthi* as a witness against her husband, even though she was called to testify on behalf of a co-accused. The trial Court used her testimony only to the extent to find support to the 3rd accused's claim that he was not with the rest of the group of men who set off from *Welikanda* town to *Mutuwella* that night.

On their way back to *Welikanda*, the 2nd accused signaled *Ranjith* to stop the three-wheeler, near the point where the 1st accused would get down to reach his house. Then the 1st and 4th accused too have appeared from the darkness. Only the 1st, 2nd and 4th accused have returned back to *Welikanda* that night in *Ranjith's* three-wheeler, but without the deceased.

According to *Malhas* and *Saharan,* the 1st, 2nd and 4th accused have returned back to *Welikanda* only about 11.30 p.m., or 12.00 midnight. The three accused then informed *Malhas* and *Saharan,* who were anxiously waiting for the deceased to return that their friend had boarded a bus and is already on his way back to *Kurunegala.* The three accused also conveyed that the deceased wanted his two friends to join him at *Kurunegala.*

Having referred to the multiple items of circumstantial evidence in the preceding paragraphs, which sets out the sequence of events that led to the death of the deceased in summary form, I now turn to consider the strength of the case presented by the prosecution, particularly in relation to the 1st accused.

The 1st accused's active involvement in the murder of the deceased appears to have commenced only after the group of men had left *Welikanda* in that late evening for *Mutuwella.*

The two three-wheeler drivers, who drove the two groups of men up to *Mutuwella* that evening, knew the exact point, at which the 1st accused would usually get down on that *Welikanda-Mutuwella* road, in order to reach his house. The evidence is clear on this point that, only after walking through a foot path that runs through a vast tract of paddy lands, one is able to reach the 1st accused's house. The 4th accused, a resident of *Ottamawadi,* had no apparent involvement in the *Mutuwella* area, other than through his relationship with the 1st, 2nd and 3rd accused, all of whom are residents of *Mutuwella.* It could be reasonably inferred that the 1st accused was accordingly more familiar with the sparsely populated area around *Mutuwella,* compared to the 4th accused, particularly around the locality where his dwelling house was located at. The 2nd and 3rd accused too have lived in the same area but further away from the place where the 1st accused lived. Their residences were located in the more populated areas of *Mutuwlella.* These two had only connection to the area where the 1st accused lived was through the latter.

It is the uncontradicted evidence of *Kumara* that establishes the fact that he had dropped off the 1st ,2nd, 4th accused and the deceased who travelled in his three-wheeler that night, near the usual place where the 1st accused would get down in order to reach his own residence. The 2nd accused gave evidence stating that he parted company with the rest, soon after they alighted from *Kumara's* three-wheeler. The 2nd accused met the

1st and 4th accused in the same night once more with a kerosine bottle, on the request of the 1st accused and had thereafter travelled with them back to *Welikanda* to meet up with *Malhas* and *Saharan.* The trial Court accepted this evidence and decided to acquit the 2nd accused from the indictment.

Thus, it is clear that there was uncontradicted evidence available before the trial Court to indicate that the deceased was last seen in the company of the 1st and the 4th accused. The trial Court relied on this item of evidence with the other items of circumstantial evidence in order to find the 1st accused guilty to the count of murder, upon reaching the inescapable inference of guilt.

These items of circumstantial evidence shall be considered in the following segment of this judgment.

What is popularly referred to by Counsel as the '*last seen theory*' could be described as a situation where the prosecution establishes to the required degree of proof that the deceased was last seen alive in the company of the accused, a factor which would then be used by a Court, to imply his involvement to the death of that deceased, particularly in a circumstantial evidence case. However, delivering the judgment of the Court of Criminal Appeal in ***The King v Appuhamy*** (1945) 46 NLR 128, *Keuneman* J has held (at p. 132) that if the "*… prosecution failed to fix the exact time of the death of the deceased, and the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance*".

It is undisputed evidence that the deceased had taken his last meal at the 4th accused's house that afternoon around 4.00 p.m., and during the

post mortem examination, the Consultant Judicial Medical Officer found a small quantity of rice in the stomach of the deceased. In the opinion of the medical expert, the death of the deceased would have occurred within hours of consuming his last meal, which he estimated as a time period between 6 to 8 hours. He was affirmative that the time could not be more than 8 hours.

This evidence indicates that the death of the deceased would have taken place sometime before 12.00 midnight in that day. Thus, after the deceased was last seen alive in the company of the 1st and 4th accused around 7.30 p.m., his death occurred within 4 ½ hours. This time interval is further reduced, in view of the evidence of *Malhas* and *Saharan,* who vouched for the accuracy of the fact that the 1st, 2nd and 4th accused have returned to *Welikanda* in that night between 11.30 p.m. to 12.00 midnight. Taking the time of 30 minutes' drive from *Mutuwella* to *Welikanda* into consideration, the 1st accused, in order to reach the main road after taking a long walk, would have left his residence at least by 11.15 p.m., from which point, he had taken the three-wheeler to ride back to *Welikanda.*

Thus, the time gap that exists between the point at which the deceased was last seen alive and to his eventual death, put at its most, is only a four-hour period. On the other hand, if one takes the shorter span of six hours since the last meal, then the death of the deceased would have occurred, is reduced to mere two-hour period from the point he was last seen alive, but in the company of the 1st accused.

Another factor taken into consideration by the trial Court in arriving at the conclusion of guilt of the 1st accused is that he has lied about the

deceased's whereabouts to *Malhas* and *Sharan* at *Welikanda* after he met them around 11.30 p.m. or midnight on the same night the deceased had disappeared.

The evidence indicated that it was the 4th accused who first came up to *Malhas* and *Sharan,* who were waiting for their friend, to convey the information that the deceased is at *Kaduruwela* junction bus halt, awaiting them. Then the three of them proceeded to *Kaduruwela* junction bus halt, at which point the 1st and 2nd accused told *Malhas* and *Saharan* that the deceased already boarded a bus bound to *Kurunegala.* According to the two accused, the deceased wanted them to convey his message to two of his friends asking them to join him there.

There is no doubt, by then the deceased was already dead. The 1st and 4th accused who was with him ought to know his fate. But the 1st and 4t accused have conveyed a totally false version providing an explanation to the absence of the deceased to pacify *Malhas* and *Saharan,* by uttering a deliberate lie that the deceased had already boarded a bus and is on his way to *Kurunegala.* When there is evidence that an accused uttered a falsehood relevant to the matter he is tried with (whether inside or outside Court), what is known as the '*Lucas principle*' becomes applicable.

The principle that had been laid down by Lord *Lane* LCJ, in the oft cited case of ***Rex v Lucas*** [1981] QB 720, dealing with a situation where the accused found to have uttered a lie, has since been followed in most common law jurisdictions. This Court, in the judgment of ***Samy and Others v Attorney General*** (2007) 2 Sri L.R. 216, considered the

applicability of the principles contained in the said judgment. *Weerasuriya* J (at p. 231) identified and arranged them in the following manner;

> *" … a lie told out of Court or in Court will amount to corroboration if they satisfy the following requirements.*
>
> 1. *it must be deliberate,*
> 2. *it must relate to a material issue,*
> 3. *the motive for the lie must be a realization of guilt and fear of the truth,*
> 4. *the statement must be clearly shown to be a lie by evidence other than of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness".*

The evidence referred to in the preceding paragraphs indicate that in this instance, the lie uttered by the 1st accused qualifies all of these requirements, and therefore had the effect of corroborating the factual narrative presented by the prosecution.

In a prosecution presented on items of circumstantial evidence, the evidence relating to a possible motive on the part of the 1st accused also assumes a greater significance than to a case presented on direct evidence. If there is direct evidence, the Court need not infer the *actus reus* on the part of the accused, but could act on that evidence, if it is found to be truthful and reliable. But in a prosecution presented on the basis of several items of circumstantial evidence and its cumulative effect on the decision to impose of criminal liability on an accused, any evidence that tends to

show a motive entertained by the accused becomes an important link in the chain of circumstances that supports the prosecution case.

In this context, it is important to inquire in to the question whether the prosecution presented any evidence indicative of a possible motive entertained by the 1st accused as well as the 4th accused, who were last seen in the company of the deceased, to commit the latter's murder.

It is undisputed that the deceased had more than Rs. 70,000.00 in cash with him, when he left his two friends *Malhas* and *Saharan* at *Welikanda* that evening, and proceeded in a three-wheeler in the company of the Appellant, 2nd and 3rd accused. The deceased also had a smart phone with him. According to *Manimaran,* who bought that phone from the 3rd accused, in the year 2004, such mobile phones came into the market only recently and paid Rs. 15,000.00 for that phone after much bargaining as it could be re-sold to a much higher price. The phone was recovered by the police from *Manimaran* on 04.08.2004.

The fact that the deceased had a significant amount of cash with him was made known to the 1st accused and other accused is evident from their conduct, as after his conversation with them at the 4th accused's *Ottamawadi* house, the deceased readily acted on that suggestion by setting off with them to *Welikanda,* even without disclosing the real purpose of that trip to any of his friends. *Malhas* felt suspicious of the purpose of this trip and opted to stay near *Welikanda* police with *Saharan.* However, when the body of the deceased was exhumed, except for a stainless-steel chain and a gold-coloured talisman (සුරයක්) there were no other valuable items found on his fully clothed body. The mobile phone used by the deceased

was given to the 3rd accused by the 4th accused to convert it to cash also supports this inference.

In view of these factors, it could be reasonably inferred that the Appellant and the 4th accused were motivated to commit the murder of the deceased in order to have his money and mobile phone.

Finally, I have reached the point at which the item of evidence that the 1st accused relied on so heavily could conveniently be dealt with. The 1st accused relied on those items of evidence in order to support his contention that the trial Court inferred very much more than it is legally entitled to, when he pointed out the place where the body of the deceased was buried.

After a statement was recorded at 12.30 p.m., from the driver of one of the three wheelers, in which the deceased and the others have travelled to *Mutuwella,* the investigators have arrested the 1st accused, within a matter of two hours (at 2.30 p.m.), at his house at *Mutuwella*. After questioning the 1st accused at *Mutuwella* police post, a statement was recorded at 3.30 p.m., and thereupon he pointed out a place to them located about 500-600 meters away from his own house and in a shrub jungle that bordered the *Mutuwella* paddy field, as the place at which the body of the deceased was found buried.

Due to the swift actions taken by the police, the 1st accused had no opportunity to knowing that he would be arrested that day in connection with the disappearance of the deceased. The 1st accused, when pointing out the place where the body was buried, did not have to depend on

someone else's information to disclose what he already knew to the investigators. Of the four suspects arrested, all of whom were later indicted for the murder of the deceased, but only the 1st accused was in possession of any knowledge of the place of burial of the body of the deceased. Thus, he had exclusive knowledge of the place of burial.

Learned President's Counsel's complaint of adopting the reasoning from ***Ariyasinghe and Others v The Attorney General*** (2004) 2 Sri L.R. 357, where the Court of Appeal accepted the proposition advanced before that Court by the learned Solicitor General, as to the manner in which the 1st, 2nd, 3rd, 4th and 5th accused, in that appeal would have acquired knowledge of the place where some of the bank notes, belonging to the G/66 series, were hidden.

The Court accepted the following three ways of acquiring such knowledge by the accused;

1. the accused himself concealed those G/66 notes found in the place where they were found,
2. the accused saw another person concealing the notes in that place,
3. a person who had seen another person concealing those notes in that place has told the accused about it.

None of the accused offered any explanation in that matter as to how each of them acquired their individual knowledge of the places where the bank notes were hidden, in order to exclude the proposition that it was they who concealed the bank notes in those places. The Court of Appeal,

thereupon, was of the considered the fact that (at p. 387) "… *in the circumstances if they had any innocuous explanation about the manner in which they acquired their knowledge or came to possess those notes one would expect them to give those explanations to exculpate themselves."* In the absence of any such explanation, the appellate Court thought it could proceed to concur with the conclusion reached by the trial Court (at p. 388) that the failure to offer any explanation supports the view that they knew where the money was hidden "… *because they themselves had put those notes in those places."*

It must be noted here that the Court of Appeal did not rely necessarily on the application of the *Ellenborough principle* in reaching the said conclusion. This becomes clearer when considered in the light of the fact that the appellate Court had concurred with the trial Court's act of inferring the guilt of the accused, primarily over the exercise the discretion available to it " … *in terms of the general principle contained in Sction114 of the Evidence Ordinance"* not only "… *to draw the presumption"* against the 1st, 2nd, 3rd, 4th and 5th accused, and to hold " … *even the 6th to 12th accused were not mere guilty receivers but were perpetrators of offences of conspiracy."*

In any event, the fact of recovery of bank notes and, the knowledge of the relevant accused of same, forms only two of the many items circumstantial evidence that were presented against them by the prosecution. Therefore, the applicability of the proposition that it was the accused who themselves put the bank notes from where they were recovered could not be equated to situation of satisfying a "*strong prima facie"* case established in terms of the *Ellenborough principle* to expect them to offer an explanation.

In my humble opinion, the situation in ***Ariyasinghe and Others v The Attorney General*** (*supra*) is relevant to situation where a discovery of a fact is made following information provided by an accused during investigation and the manner in which such an accused had acquired the knowledge of that discovered fact. In the absence of an explanation bringing the mode of acquisition of knowledge to one of the two innocuous explanations, the Court, in that instance, acted on Section 114 of the Evidence Ordinance, by which the Legislature conferred a discretion on Courts to "*… presume the existence of any fact which it thinks likely to have happened"* but "*… in their relation to the facts of the particular case."*

In relation to the instant appeal, since only the 1st accused had any knowledge of the place where the body of the deceased was buried, and, in the absence of offering any innocuous explanation, if he had one on his part over the manner in which he had acquired that knowledge, as any reasonable person would have done under the circumstances, the trial Court proceeded to hold that it was him who buried the dead body in the shallow pit near his own house, from which the body was exhumed. This could be termed as a justifiable and a reasonable inference reached by that Court in consideration of the available evidence.

When all these factors, that were individually established by different items of circumstantial evidence, are lined up; it is unquestionable that indeed a strong *prima facie* case has been established against the 1st accused. One such item is his exclusive knowledge of the place of burial. But he offered no explanation to the damning set of circumstances that were established against him by the prosecution, other

than merely to reiterate his claim that he had no involvement at all with this incident. I find myself in total agreement with the determination made by the Courts below that there is a strong *prima facie* case has been made out against the 1st accused.

The trial Court, in arriving at the conclusion that the 1st accused is guilty to the murder of the deceased, made references to the multiple items of circumstantial evidence it had already considered in detailed at the outset of its judgment, and had not totally relied upon the solitary fact of him having exclusive knowledge over where the body of the deceased was buried, even though it noted that he made no explanation how he acquired that knowledge, following the reasoning to that effect adopted in ***Ariyasinghe and Others v The Attorney General*** (*supra*).

The time is opportune to consider the validity of the expectation of an explanation by the 1st accused over the incriminating circumstances by the trial Court and affirmation of that expectation by the appellate Court.

This was among the primary contentions that were presented before this Court by the learned President's Counsel on behalf of the 1st accused, which stood out from the rest, and therefore ought to be considered in a more detailed manner than the rest of the contentions for its validity.

Learned President's Counsel, after citing from page 127 of the book, written by Professor *G.L. Peiris* with the title ***Recent trends in the Commonwealth Law of Evidence***, where the learned author observed "*[I]t is a feature of the Law of Sri Lanka that the only permissible inferences against the accused is that he had knowledge of the whereabouts of the corpus delicti or other*

objects discovered. It has been emphasised that in the absence of evidence connecting the accused with the crime, the pointing out the corpus delicti is not sufficient to constitute a prima facie case against him"; stressed upon the point that, if that is the case, the application of the *Ellenborough Principle* by the trial Court, has no relevance at all to the circumstances of the instant appeal. He therefore submitted that the trial Court, having arrived at an adverse finding against his client by erroneously applying the said principle had fallen into grave error. This is because, learned President's Counsel further submitted, what had been established against the 1st accused by the prosecution is that he only had *'knowledge'* of the place of burial and, owing to that very reason, it is wrong for the trial Court to expect him to offer an explanation about the manner in which he had acquired such knowledge since the only inference it could have reached on that evidence is his mere knowledge of the place of burial.

In view of the said contention, it is important at this stage to identify what actually is the *Ellenborough Principle* that had been applied by the Courts of this Country, the circumstances under which it would be applied and the nature and the extent to which, inferences that could be drawn upon in such instances, if there is a failure on the part of an accused to offer an explanation.

Since its first appearance in the text of the judgment of the Supreme Court of Ceylon of ***Inspector Arendstz v Wilfred Pieris*** (1938) 10 Ceylon Law Weekly 121, the said principle, attributed to a *dictum* of Lord *Ellenborough,* had firmly taken root in our jurisdiction and is consistently applied by the Courts, primarily in cases based on circumstantial evidence,

but also applied in the instances where direct evidence is available. The applicability of this principle of logic, in turn would depend on the circumstances of each case, whether those circumstances are based either on direct or circumstantial evidence. However, the applicability of *Ellenborough dictum*, although consistently utilised by of our Courts in the exercise of its original as well as appellate jurisdiction, could not be taken as a course of action without any form of criticism.

The said principle, essentially a one based on logic and common sense, that had been applied by this Court in ***Inspector Arendstz v Wilfred Pieris***, is said to have been reproduced from the text of the judgment in ***R. v Lord Cochrane and others***, claiming to be found in *Gurney's Reports 479,* which is as follows;

> *" … once the Prosecution has made out a strong prima facie case [against an accused], 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".*

In the judgment of the Court of Criminal Appeal in ***The King v Seeder De Silva*** (1940) 41 NLR 337, *Howard* CJ, while applying the said *dictum,* held (at p. 242) 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." In that appeal, *J.D.R. Illangakoon* K.C., the Attorney General, who represented the Crown, invited attention of Court to the fact that the said principle was already described in ***Wills' Circumstantial Evidence***, (7th Ed, pages 314 to 316) and adopted in our jurisdiction in the case of ***Inspector Arendstz v Wilfred Pieris*** (supra). It was also brought to the notice of Court that the said principle is referred to in ***Criminal Procedure Code*** (Vol. I, at p. 640) by *R. F. Dias* as well, in order to substantiate his contention that since 1940, the Courts of this country have consistently applied that principle.

However, perhaps the first of the few traceable instances, in which the applicability of the *Ellenborough Principle* was questioned, could be found in the year 1962. It was by *Basnayake* CJ, in the judgment of ***The Queen v Santin Singho*** (1962) 65 NLR 445.

I wish to digress at this point from the originally intended scope of considering what actually is the *Ellenborough Principle*, the circumstances under which it was applied and the nature and the extent to which, the inferences that could be drawn upon such a failure on the part of an accused, to deal with these challenges, particularly to its legality, for the sake of completeness.

Basnayake CJ, once more challenged the applicability of that principle in ***The Queen v Sumanasena*** (1963) 66 NLR 350. These challenges were premised on two primary considerations. First, his Lordship commented on the legality of the application of such a principle in a criminal case and second, it was also challenged on the basis of the very existence of such a

dictum, appearing in the text of the reported judgment of ***R. v Lord Cochrane and others***, being doubtful. Elaborating further on the first of the two, his Lordship observed (in ***The Queen v Santin Singho*** (*ibid*) at p. 450) that;

> *"[T]he judicial dicta cited to the jury introduce the concept of a prima facie case which finds no place in our Evidence Ordinance. It is now well settled that the burden on the prosecution is to prove the case against the accused beyond reasonable doubt. That burden is not lessened by the fact that the accused does not give evidence. It remains the same throughout the trial. We cannot be certain that what was said in the passages cited above did not lead the jury to think that the standard of proof required of the prosecution was something less than proof beyond reasonable doubt. The concept of a "prima facie " case is well known in the field of preliminary inquiry prior to committal for trial where the question is one of sufficiency of evidence. For instance, under section 156 of the Criminal Procedure Code, before its amendment in 1938, a Magistrate holding an inquiry under Chapter XVI into an offence not triable summarily was empowered to discharge the accused if the evidence did not establish a prima facie case of guilt and if the evidence did establish a prima facie case of guilt the Magistrate was empowered to take the further steps prescribed in that Chapter. The expression when used in a direction to the jury in a criminal trial is out of place and is likely to confuse the jury as to the burden that lies on the prosecution. The view expressed above is fortified by the discussion of the expressions "prima facie evidence" and "prima facie case " in*

> *section 2494 of Wigmore on Evidence and the cases referred to therein. For the reasons herein expressed we think that the appeal should be allowed, that the conviction should be quashed and a judgment of acquittal entered. We accordingly do so."*

Despite the said view being expressed quite strongly by *Basnayake* CJ, in ***The Queen v Santin Singho*** (*supra*), *T.S. Fernando* J, in the case of ***Seetin and Others v The Queen*** (1965) 68 NLR 316, had taken a contrary view to that line of reasoning.

His Lordship states (at p. 322);

> *"[I] agree, with great respect, that it would be wrong to attribute to any judge an intention to impose on an accused person a burden which the law did not permit the latter to discharge. But it seems to me necessary to point out that the words used by Lord Ellenborough on the occasion in question did not refer to a failure of the accused to give evidence but only to offer evidence which was in his power to offer. Even in 1814 an accused, although not competent to give evidence himself, was not denied the right (a) to call witnesses and (b) to make an unsworn statement from the dock. The comment in Lord Cochrane's case came to be made in respect of the failure of the accused to call as his witnesses his servants to explain suspicious features in the case which told against him. What has been referred to above as the dictum of Lord Ellenborough is, if I may say so, not a principle of evidence but a rule of logic. It is therefore not surprising that this dictum is not ordinarily to be met with in books on Evidence."*

His Lordship further points out that (at p. 322) "*[I]n deed, Basnayake C. J. himself, so recently as 1962, in The Queen v. Santin Singho (1962) 66 NLR 445, referred, without adverse comment, to this very dictum of Lord Ellenborough which the trial judge in that case had quoted to the jury*".

In ***Chandradasa v The Queen*** (1969) 72 NLR 160, *H.N.G. Fernando* CJ was also of the view that (at p. 163) "*[T]his dictum has been applied in cases of circumstantial evidence as well as where the evidence is direct. In many cases, however, while it has been held that in the circumstances the failure of an accused to offer evidence was a matter to be taken into account, the inference to be drawn or the effect to be given to that fact has been set out in terms other than that contained in the dictum of Ellenborough J.*" In ***Wasalamuni Richard and Others v The State*** (1973) 76 NLR 534, his Lordship applied the said *dictum* by holding that (at p. 552) "*[T]he majority of us are of the opinion, having regard to all the facts and circumstances in the case against Premadasa, that this was essentially a case in which he should have given evidence and explained his presence at the scene, and his failure to do so was one which would attract the oft quoted dictum of Lord Ellenborough in R. v. Lord Cochrane and others, Gurney's Reports 479*".

Of these few instances, where the Court have questioned the legal validity of the principle underlying in the *Ellenborough dictum*, *Basnayake* CJ, in ***The Queen v Sumanasena*** (*supra*), also considered the likelihood of such a pronouncement ever being made by Lord *Ellenborough.* After posing that question, his Lordship proceeded to answer it by stating that it is unlikely that the law Lord would make such a pronouncement, contrary to the accepted norms of criminal law, as (at p. 352) "*[I]n view of the fact that this opinion was expressed by Lord Ellenborough in 1814 before the Criminal*

Evidence Act and at a time when an accused person had no right to give evidence on his own behalf, it is unthinkable that he thereby intended to impose on the accused a burden which the law did not permit him to discharge".

Interestingly, this is not the only instance where any pronouncements of law made by Lord *Ellenborough* were challenged on the basis of its legal validity. In the year 1897, *Bonser* CJ in ***Emanis v Sadappu et al*** (1897) 2 NLR 261, in considering the issue of prescription in a land matter, observed (at p. 264) that "*[I]t is still more surprising that any editor of Law Reports should have reported the case. The greatest Judges are liable to err, and Lord Campbell, who, when at the bar, reported in the Court of King's Bench, which at that time was presided over by Lord Ellenborough, one of the most eminent of the Judges who have occupied the position of Lord Chief Justice of England, used to say that he had a drawer full of Lord Ellenborough bad law*".

Perhaps, in view of these challenges made to the *Ellenborough dictum* particularly on its legality, the said issue was fully considered by the Court of Criminal Appeal in the case of ***Seetin and Others v The Queen*** (*supra*). *T.S. Fernando* J, having observed that (at p. 322); the said *dictum* was applied not only to prosecutions based on circumstantial evidence, but also to the ones based on direct evidence, thereafter quoted from an American case of ***Commonwealth v John W. Webster,*** decided in March 1850 and reported 59 Mass. 295, where *Shaw* CJ adopted an almost identical, if not similar, reasoning. His Lordship cited the Americal precedence in order to support the legal validity of the *Ellenborough dictum* coming from the other side of the Atlantic. The said quoted section of the text that appeared in the original judgment at page 316, was reproduced at

p. 322 of the judgment of ***Seetin and Others v The Queen*** (*supra*), which reads as follows;

> "*[W]here probable proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge.*"

In ***Chandrasena v The Queen*** (*supra*) *H.N.G. Fernando* CJ noted that (at p. 163) the proper effect to be given to the failure of an accused to offer evidence when a strong *prima facie* case has been made out by the prosecution and the accused is in a position to offer an innocent explanation appears to have been set out more elaborately in the dictum of *Abbot* J in the case of ***The King v Sir Francis Burdett*** (1820) 4 B & A 95, who posed the question "*[N]o person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the*

accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? "

The *Ellenborough dictum,* believed to have been pronounced in 1814 and the judgment of the Kings Bench in the case of ***The King v Sir Francis Burdett*** (ibid) was pronounced in 1820. The gap of six years between these two pronouncements seem to indicate that the contemporary judicial thinking of the common law tradition, in fact did entertain such similar processes of reasoning. The underlying rule of logic, that the accused ought to offer an explanation in certain circumstances, after having survived for 180 long years, now been afforded with a statutory recognition by an Act of Parliament of the United Kingdom. The provisions of the said Act were endorsed by the European Court of Human Rights at a later point in time, as statutory provisions that are in conformity of the European Convention of Human Rights. These factors shall be referred further down in this judgment in more detailed manner.

In Sri Lanka, said *dictum* was applied consistently by the Court of Criminal Appeal since ***Inspector Arendstz v Wilfred Pieris*** (*supra*) and in more recently by this Court, as indicative from the judgments of ***Prematilleke v Republic of Sri Lanka*** (1972) 75 N.L.R. 506, ***Illangatilleke v The Republic of Sri Lanka*** (1984) 2 Sri L.R. 38, ***Ajith Fernando and Others v The Attorney General*** (2004) 1 Sri L.R. 288, ***Mohamed Niyas Naufer v The Attorney General*** (2007) 2 Sri L.R. 144, and ***Kumarasiri and three Others v Kumarihamy and another*** (SC TAB 02/2012 – decided on 02.04.2014).

It is noted earlier on that the challenges made to the applicability of *Ellenborough dictum* were premised mainly on two factors. First of the two

was considered in the preceding paragraphs. The second factor is the questioning of the very existence of such a *dictum.* At one time, a question was posed by the Court, whether such a *dictum*, although believed to pronounced by Lord *Ellenborough,* had ever been made.

In the case of ***The Queen v Sumanasena*** (*supra*), his Lordship, in making reference to the *dictum* attributed to Lord *Ellenborough* in *Gurney's Reports,* observed that (at p. 352) *"[T]he report of the trial in which he expressed those observations is not available in any of the libraries in Hulftsdorp and it is therefore not possible to ascertain the context in which it was stated."* The issue regarding the very existence of such a *dictum,* once more surfaced in the appeal of ***Mohamed Niyas Naufer v The Attorney General*** (*supra*) as a distinct ground of appeal, by which one of the appellants contended that the High Court at Bar erred in its application of a non-existent *dictum* of Lord *Ellenborough* to the facts of that appeal. It was strongly contended that such a *dictum* could not be found anywhere in the reported text of the judgment of ***Rex v Lord Cochrane***.

Shiranee Tilakawardane J, having considered the merits of the said ground of appeal has held that (at p. 190) *"[T]he principle has acquired a high precedent value in Sri Lanka through its application and endorsement by this Court in a plethora of cases as a rule of logic as well as evidence. While the judgment in Cochrane provides the basis for the development of the law in this area, the principle attached has undeniably evolved far beyond its roots in the statements of Lord Ellenborough. This Court is not prepared to halt the development of the law through a deliberate and regressive step in the opposite direction to the march of the law in this field".*

It appears that the said pronouncement did not convince all the sceptics who had doubts as to the legality of the said *dictum*. In an article titled "*Woolmington v Lord Cochrane, A misdirection of law and fact*" (2008) 20 (No.1) Sri Lanka Journal of International Law 67, Professor *L. Marasinghe* noted that "*[T]he authority of the Ellenborough dictum continued until today although the Supreme Court was faced with a frontal attack upon the dictum in the Mohamed Niyaz Naufar Appeal, in 2006. The Supreme Court was unable in 2006 to precisely locate the dictum in Ellenborough's direction to the Jury in the Cochrane Case. The Learned judges merely presumed that, that dictum must be somewhere in that Direction*" and therefore, the learned writer was of the view that "… *that the dictum which runs contrary to the established rule regarding the burden of proof in Woolmington is firstly untenable as a Rule of Law and secondly is perhaps a product of a misdirection of both law and fact by a colonial judge presiding in an Indian Court.*"

In the year 1989, with the publication of the 2nd edition of the treatise ***The Law of Evidence***, *E.R.S.R. Coomaraswamy* observed (at Vol. II, Book 1, p. 304) that " … *the dictum of Lord Ellenborough lives on in Sri Lanka and continues to place a subtle burden on accused persons, even though it is not worthy of a place in modern text-books in the country where it was first formulated.*"

However, after a lapse of mere five years, since the said statement was inserted into the text by *Coomaraswamy,* in the year 1994, the Parliament of the United Kingdom enacted the Criminal Justice and Public Order Act. Section 35(2) of that Act states "*[W]here this subsection applies, the Court shall, at the conclusion of the evidence for the prosecution, satisfy itself … that the accused is aware that the stage has been reached at which evidence can be*

given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the Court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question".

The said statutory provision of law appears to be a fulfilment of a long-felt need for reform in the criminal justice system in that country. In the House of Lords judgment in ***Regina v Becouarn*** [2005] UKHL 55, Lord *Carswell* sets out in detail of the legal backdrop against which the necessity to introduce necessary changes in the applicable law on this issue arose in his exposition, which is found in paragraphs 9, 10 and 11 of the said judgment. In order to fully comprehend the underlying process that led to the enactment of the said law, it is necessary to reproduce the said three paragraphs in *verbatim* in this judgment.

The contents of those three paragraphs referred to above are as follows;

> "*9. The position of a defendant in a criminal trial and the options open to him in relation to giving evidence have changed in very material respects since the end of the 19th century. Until the passage of the Criminal Evidence Act 1898 ("the 1898 Act") the law did not permit him to give evidence on oath on his own behalf, restricting him to giving an unsworn statement from the dock. That Act made him generally a competent witness in his own defence, but did not make him compellable. From that time the defendant was quite entitled*

to decline to give evidence – the privilege generally termed the right of silence – but if he did testify, he was liable under section 1(e) of the Act to be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to any offence with which he was charged in the proceedings.

10. *Several consequences followed from other provisions in the 1898 Act. First, the prosecution was not permitted to comment adversely on the defendant's failure to give evidence (section 1(b)) and the trial judge's ability to comment on that was fairly closely circumscribed. The judge was in most cases bound to direct the jury that the defendant was fully entitled to sit back and see if the prosecution had proved its case, and that they must not make any assumption of guilt from the fact that he had not gone into the witness box (see, eg. R v Bathurst [1968] 2 QB 99, 107-8, per Lord Parker CJ). The second consequence was that the defendant could not be asked about any previous convictions, unless he had "lost his shield" and incurred liability to such cross-examination by reason of, inter alia, putting his character in issue. This could occur if questions were asked or evidence was given with a view to establish his good character or, most commonly, if he attacked the character of the prosecution witnesses: section 1(f)(ii), and see the decision of the House in R v Selvey [1970] AC 304 on the operation of this provision. Thirdly, if the defendant put his character in issue by attacking the character of the prosecution witnesses, but did*

not himself give evidence, he escaped the consequences of having his convictions put in evidence (R v Butterwasser [1948] 1 KB 4).

11. *Although practitioners reckoned that the ability to give evidence conferred by the 1898 Act was a not unmixed blessing, it enabled those defendants who wished to put forward their own evidence in support of their case to do so, while those who wished to stay silent and challenge the sufficiency of the prosecution case were able to follow that course. Criticism of the state of the law, not least of the effect of the ruling in R v Butterwasser, and the degree of advantage which it conferred on defendants in criminal trials, mounted in the Eleventh Report of the Criminal Law Revision Committee (1972) (Cmnd 4991) p 83, para 131 it is stated that "To many it is highly objectionable that the accused should be able to do this with impunity." Eventually Parliament enacted the provisions contained in section 35 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), with the objective of redressing the perceived imbalance".*

The scope of the statutory provisions contained in Section 35 of the Criminal Justice and Public Order Act 1994 was considered in ***R v Cowan*** [1996] QB 373 and the specimen directions published by the Judicial Studies Board, (presently referred to as The Crown Court Compendium of July 2024 – updated in April 2025), as a suggested model for the use by the Judges in situations where Section 35 is applicable, was approved by the

Court of Appeal with the statement that "… *the specimen JSB direction on drawing inferences as sufficiently fair to defendants, emphasising as it does that the jury must conclude that the only sensible explanation of his failure to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination. This direction has been used for some years and appears to have stood the test of time. It goes without saying, however, that trial judges have full discretion to adapt even a tried and tested direction if they consider that to do so gives the best guidance to a jury and fairest representation of the issues.*"

The some of the directions contained in the said specimen, relevant to the appeal before this Court, are reproduced below;

> *"[T]he defendant has not given evidence. That is his right. But, as he has been told, the law is that you may draw such inferences as appear proper from his failure to do so. Failure to give evidence on its own cannot prove guilt but depending on the circumstances, you may hold his failure against him when deciding whether he is guilty."*
>
> *"[W]hat proper inferences can you draw from the defendant's decision not to give evidence before you? If you conclude that there is a case for him to answer, you may think that the defendant would have gone into the witness box to give you an explanation for or an answer to the case against him. If the only sensible explanation for his decision not to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination,*

then it would be open to you to hold against him his failure to give evidence. It is for you to decide whether it is fair to do so."

It is important to note that the Criminal Justice and Public Order Act 1994 does not restrict the inferences drawn in situations covered by that Section by limiting them only to where an accused does not offer an explanation after the prosecution has put up a case against him, but also to cover the situations during investigations, irrespective of whether it was before or after he was charged with a formal accusation, in terms of the applicable law, by the investigators and his failure to answer the questions put to him during that period (vide Section 34 of the Act).

In the case of ***Desmond Kavanagh v United Kingdom*** (Application No. 39389/98 and decided on 28.08.2001), the European Court of Human Rights considered the applicant's complaint that *"his right to a fair trial was breached on account of the fact that the trial judge erred in allowing the jury to draw adverse inferences from his silence in violation of Article 6 § 1 of the Convention, separately and in conjunction with Article 6 § 2, since the terms of the direction breached his right to a fair trial and undermined at the same time the presumption of innocence."*

The Court at *Strasburg*, having considered the directions issued to the jury by the trial Judge during his summing up, concluded that *"… in accordance with section 34 of the 1994 Act, it was the function of the jury to decide whether or not to draw an adverse inference from the applicant's silence. Having regard to the fact that it is impossible to ascertain the weight, if any, given by the jury to the applicant' silence, it was crucial that the jury was properly directed on this matter. It finds that in the instant case, and bearing in mind the*

safeguards in place, the jury's direction on this question was confined in a manner which was compatible with the exercise by the applicant of his right to silence at his trial". Therefore, the Court held that view that "… *accordingly no appearance of a breach of the fairness guarantees of Article 6 § 1 of the Convention"*.

In terms of Section 35 of the Criminal Justice and Public Order Act 1994, if the jury concludes that the prosecution at the close of its case has established a case for the accused to answer, if they think that the accused would have gone into the witness box to give them an explanation for or an answer to the case against him but he did not, and if they are satisfied that the only sensible explanation for his decision not to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination, then it would be open for them to hold against him his failure to give evidence.

If one were to make a comparison with the situation in the United Kingdom and in Sri Lanka, it must be noted that, an accused in this country is placed at two distinct advantages over his counterpart in the United Kingdom. In the United Kingdom, an accused is called upon to answer if the jury is of the view that there is a "*case for him to answer*". In Sri Lanka too, at the close of the prosecution's case, if the trial Court considers "… *that there are grounds for proceeding with the trial"*, it should call upon the accused for his defence, in terms of Section 200(1) of the Code of Criminal Procedure Act No. 15 of 1979, as amended. However, it is important to highlight a significant distinction between the two countries, in situations where the rule of logic encapsulated in the *Ellenborough dictum*

applies. In Sri Lanka, an accused is expected to offer an explanation only when a "*strong prima facie*" case is established by the prosecution not when there is a "*case for him to answer*".

After the enactment of the Criminal Justice and Public Order Act 1994, an accused in United Kingdom could either remain silent, exercising his right to silence, or could opt for the only other option available to him, by offering evidence under oath, provided that the jury decides there is a case for him to answer. If such an accused elects to offer evidence, he must offer such evidence under an obligation to disclose the truth, subject himself to cross- examination by the prosecution and must answer questions, in spite of the fact that such answer might tend to incriminate him. In relation to an accused in Sri Lanka, he need not answer any question put to him which tends to incriminate him to the offence. In addition, such an accused has another extra option to consider. This is because, an accused in Sri Lanka could make a statement from the dock, without being placed under any legal obligation to speak the truth and also without subjecting himself to cross examination of the prosecution.

If at all the observation, which I have already referred earlier on made by *Coomaraswamy* (*supra*), in relation to *Ellenborough dictum* could aptly be used here to describe the present legal status in Sri Lanka, attributed to a statement made by an accused from the dock. Here, the opportunity given to an accused to make statement from the dock is not due to any statutory provision permitting such a course of action. It is a situation that resulted in after adopting the Common law practice of permitting an accused to make a statement from the dock, and thereafter

continuing with that privilege, even after the United Kingdom, had specifically taken away that opportunity, along with the provisions of Section 72 of Criminal Justice Act 1982 coming into operation. Hence, it could be stated that, as at present, the entitlement of an accused to make a statement from the dock, continues to live on in Sri Lanka, even after its validity found no place in the contemporary criminal justice system of the country where it was first formulated and applied.

However, in a more recent pronouncement, in relation to the entitlement to make a statement from the dock, *Kodagoda* J, has observed (vide judgment of ***Munasinghe Mudalihamy Koralage Dissanayake v Director General, Commission to Investigate Bribery and Corruption & another*** (S.C. Appeal No. 160/2017 - decided on 21.11.2023), thus;

> *"[I]ndeed , a person accused of having committed an offence has an unfettered right to remain silent. That means there can be no compulsion on an accused person to incriminate himself or to give evidence which is exculpatory in nature. Be that as it may, an Accused also has the entitlement to give evidence under oath from the witness box. If at a time when the Accused is being ably defended by counsel, he opts to make a Dock Statement which is an unsworn statement from the dock, in my view a pragmatic and a realistic approach to criminal justice should necessitate the Court to consider inter-alia as to why the Accused had opted to make a Dock Statement. The reasons are obvious. They are (i) unwillingness to take an oath or affirmation before commencing to give evidence, (ii) unwillingness to face cross-examination, (iii) to prevent the contents of the Dock Statement being compared and contrasted during cross-*

> *examination with other exculpatory statements and admissible inculpatory statements".*

This observation, although made in the context of an accused electing to make a statement from the dock, is applicable with more vigour and force when a strong *prima facie* case is established against him by the prosecution.

In the neighbouring jurisdiction of India, although no reference could be found in the significant body of jurisprudence in that country to a direct reference to *Ellenborough dictum* in that very form, the apex Court of that country, nonetheless expected an accused to offer an explanation in certain situations. In this regard, the Supreme Court of India had clearly acknowledged that there could be situations in which, either the failure of the accused to offer an explanation or even if one is offered, which turned out to be false, could result in an adverse inference drawn against him, provided certain pre-conditions are satisfied. The Supreme Court of India, in the judgment of ***Sharad Birdhichand Sarda v State of Maharashtra,*** (1984) 4 SCC 166, laid down a five-point test, which it described as the "*panchasheel of the proof of a case based on circumstantial evidence*", which must be satisfied before a conviction is entered against an accused in such a case.

Paragraphs 153 of the said judgment states;

> *"[A] close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established;*

1. *the circumstances from which the conclusion of guilt should be fully established,*
2. *the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
3. *the circumstances should be of a conclusive nature and tendency,*
4. *they should exclude every possible hypothesis except the one to be proved, and*
5. *there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

The Court further held that (at para 159), once the ""*panchasheel of the proof of a case based on circumstantial evidence" are* established, a Court could take into account both the absence of explanation or a false explanation offered by an accused, to hold "… *that it will amount to be an additional link to complete the chain",* if the following essential conditions too are fulfilled;

" 1. *various links in the chain of evidence led by the prosecution have been satisfactorily proved,*

2. *the said circumstances points to the guilt of the accused with reasonable definiteness and,*

3. the circumstances is in proximity to the time and situation".

After undertaking a long exposition on comparative jurisprudence in the preceding segment of this judgment, the point that I wish to highlight here is that the expectation of an explanation from an accused, upon a strong *prima facie* case being established against him by the prosecution, in terms of the principle enunciated in the statement of law what generally termed as *Ellenborough dictum*,, is neither obnoxious to the long-cherished presumption of innocence nor to his fundamental right to a fair trial, guaranteed under Article 13(3) of the Constitution.

In this context, it is imperative that this Court makes a reference to the Section 200(1) of the Code of Criminal Procedure Act No. 15 of 1979, for the purpose of distinguishing the situation, as envisaged by that Section, and the situations in which the *Ellenborough dictum* applies. The relevant pre-requisite for calling of the defence in terms of Section 200(1), as spelt out in that Section is, if the Judge considers "*… that there are grounds for proceeding with the trial",* whereas only when a strong *prima facie* case established by the prosecution only the said dictum applies. There could be situations where these two eventualities might arise in a case simultaneously, as within the situation "*… that there are grounds for proceeding with the trial",* there could also be an instance of a *strong prima* facie case was established. But in general terms the difference between the two must be emphasised here.

In the judgment of ***The Attorney General v Baranage*** (2003) 1 Sri L.R. 340, Court of Appeal examined the statutory provisions contained in Section 200(1) of the Code of Criminal Procedure Act. In relation to the

different situations envisage by that Section, and the conformant of power on the trial Judge to "*record a verdict of acquittal*" the appellate Court held that (at p. 353); "*In a trial by a judge without a jury the judge is the trier of facts and as such at the end of the prosecution case in order to decide whether he should call upon the accused for his defence he is entitled to consider such matters as the credibility of the witnesses, the probability of the prosecution case, the weight of evidence and the reasonable inferences to be drawn from the proven facts. Having considered those matters, if the judge comes to the conclusion that he cannot place any reliance on the prosecution evidence, then the resulting position is that the judge has wholly discredited the evidence for the prosecution. In such a situation the judge shall enter a verdict of acquittal.*"

The Court further held (*ibid*) "*Even if the Judge has not wholly discredited the prosecution evidence the words that the Judge 'is of opinion that such evidence fails to establish the commission of the offence charged against the accused or of any other offence of which he might be convicted on such indictment' give him the power to enter a verdict of acquittal without calling for the defence*". The last part of the said section reads thus; "*if, however, the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence*".

Generally, in a situation of calling for defence in terms of Section 200(1), if the accused chose to remain silent, the trial Court would carefully consider the evidence of the prosecution and, if the charge is established beyond reasonable doubt, enters a conviction or if there is a reasonable doubt arises in its mind, enters a verdict of acquittal. If the accused offered evidence, the Court would consider that evidence as well, applying the same considerations that it applied to the prosecution witnesses and if it

accepts that evidence or entertains a reasonable doubt on that evidence, would still enter a verdict of acquittal. However, there is no adverse inference generally drawn against an accused who chose to remain silent, and thereby putting to the prosecution to establish its allegation against him.

After undertaking a careful consideration of the evidence available before the trial Court presented by the prosecution against the 1st accused, I am of the view that it has rightly concluded that he had lied about the whereabouts of the deceased and thereby attracting the *Lucas* principle, he was last seen with the deceased alive and, also that the place where the body of the deceased was buried was discovered by the police only upon his information. Of the four accused, only the 1st accused had knowledge of the place where the body was buried. The 2nd accused who was arrested a few minutes later, and was with the 1st accused when the latter pointed out the place where the body is buried and brought along when it was exhumed, but had no knowledge of that place. Neither the 3rd accused nor the 4th accused indicate of any knowledge on their part as to where the body was buried.

It was a shallow pit dug out in a sandy soil in an isolated place located within a reserved forest, only about 500 meters from his place of residence. Thus, it is safe to infer that only the 1st accused had the exclusive knowledge of the place of burial of the body of the deceased, who went missing whilst being with him and the 4th accused.

Thus, the trial Court was correct to apply *Ellenborough dictum* in relation to the Appellant, as undoubtedly a strong *prima facie* case had been

established by the prosecution against him, a factor that justified the expectation of an explanation entertained by that Court. The citation relied upon by the learned President's Counsel that "*[I]t has been emphasised that in the absence of evidence connecting the accused with the crime, the pointing out the corpus delicti is not sufficient to constitute a prima facie case against him"* will not help the 1st accused as there is "*evidence connecting the accused with the crime"* in addition to him pointing out the place, where the dead body was found buried.

The 1st accused, in his statement from the dock, stated to Court as follows;

> " මම ගොවිතැන් කටයුතු කරමින් සිටියා. ගංජා වෙළඳාම් කළා. ඒ අවස්ථාවේ මමයි මහින්දපාලයි ඔට්ටමාවඩි වලට ගියා. ඔට්ටමාවඩි ගංජා ගන්න ගියා. සොයා බැලුවා නමුත් බඩු තිබුනේ නැ ගන්න. ඊට පස්සෙ කාබුල් හමු වෙන්න ගියා. කාබුල්ට මීට කලින් අපි මුදල් දීලා තිබුනා. කාබුල් කිව්වා දැන් ගන්න විදියක් නැ. හවස තමයි ගන්න වෙන්නේ කියලා. කාබුල් කිව්වා අපට යන්න කියලා. කාබුල් අපිත් එක්ක එන්න කියලා පිටත් වුනා. ඔහු කිව්වා හවස බඩු ටිකක් ඒවි බඩු ටික අරන් දෙන්නම් කිව්වා. ඊට පස්සෙ අපි තුන්දෙනාම ත්‍රීවිල් එකෙන් වැලිකන්දට ගියා. කාබුල් පොලිසිය ලඟින් බැස්සා. අපි දෙන්නා කලින් ගිහිල්ලා බඩුත් අරන් ගෙදරට ගියා. අපි තුන්දෙනා ගිහිල්ලා ගින්දර පත්තුකරලා නිදා ගත්තා. ඊට පස්සෙ රෑ කාබුල් ආවා. ඊට පස්සේ කිව්වා වැලිකන්දට බඩු ටිකක් ඇවිල්ලා තියෙනවා. අඩු ගානට ඇවිල්ලා තියෙන්නේ ගන්න පුළුවන්ද කියලා. මා ඇහුවා ගාන කියද කියලා. අඩු ගානට ගන්න පුළුවන් කියූ නිසා මමත් මහින්දපාලත් ආවා. කාබුල් කිව්වා දවල් ආපු තුන්දෙනාගෙන් දෙන්නෙක් ගියා එක්කෙනෙක් ඉන්නවා. ඒ දෙන්නාට කදුරුවෙලට ගිහිල්ලා පණිවිඩයක් කියන්න පුළුවන්ද කියලා. මම ඇහුවා බඩු දෙනවද කියලා. කදුරුවෙලට යන්න මම ගෙනත් දෙන්නම් කිව්වා. අපි ගිහින් බැලුවා කට්ටිය හිටියෙ නැ. ඊට පසු මම නැවතත් කාබුල්ගේ දුරකථනය ඇමතුවා. කාබුල් කිව්වා මම මග එනවා ඒ කට්ටිය එක්කන් එන්න. ඇහුවම කිව්වා මම කියන විදියට කියන්න කියලා. මම කිව්වා. ඊට පසු බඩු කිලෝ **2** ක් දුන්නා. ඊට පසු සල්ලි දීලා බඩු අරන් මම ගමට ගියා. ඊට පසු මහින්දයි මමයි ගෙදර ගියා. මම මගේ ගෙදර නැවතුනා. මෙම සිද්ධිය සිදුවෙන්න සතියකට කලින් මම ඔට්ටමාවඩි ගියා. බඩුත් අරන් ආවා. කාබුල් ගෙන් තමයි අරන් ආවේ. කබුල් කිව්වා මමත් එන්නම් කියලා. ඊට පස්සෙ ඇවිල්ලා වැලිකන්දෙන් බැස්සා.

ඒ අවස්ථාවේ මගේ අතේ සල්ලි තිබුනෙ නෑ. මම ත්‍රීවිල් එකේ යන්න ඕන. නමුත් ත්‍රීවිල් එකේ යන්න මගේ ළඟ සල්ලි තිබුනේ නෑ. කාබුල්ගෙන් මම සල්ලි ඉල්ලුවා. ඊට පස්සෙ කාබුල් කිව්වා මටත් යන්න ඕන මමත් එනවා කිව්වා. ටික වෙලාවක් බැලුවා. කාබුල් එන පාටක් නෑ. මම සම්පත් තුෂාරගේ ත්‍රීවිල් එක අරන් යන්න පිටත් වුනා. යන කොට නිහාල් හාඩ්වෙයාර් එක එහා පැත්තේ කාබුල් ඉන්නවා දැක්කා. ඔහු කිව්වා මම එන්නම් කියා. ඔහුවත් නග්ගන් ගියා. මට මෙපමනයි කියන්න තියෙන්නේ. මම මේ සිද්ධියට කිසිදු සම්බන්ධයක් නෑ. මම මට නිදහස ලබා දෙන ලෙස කියා සිටිනවා."

Perusal of the contents of the statement made by the 1st accused from the dock clearly indicates that the only reference made by him to the sequence of events that led to the death of the deceased person and to the recovery of the body upon information provided by himself is the statement that reads "කාබුල් කිව්වා දවල් ආපු තුන්දෙනාගෙන් දෙන්නෙක් ගියා එක්කෙනෙක් ඉන්නවා. ඒ දෙන්නාට කදුරුවෙලට ගිහිල්ලා පණිවිඩයක් කියන්න පුළුවන්ද කියලා." With this assertion, the 1st accused expected the trial Court to accept the fact that the deceased was with the 4th accused. He further expected from the trial Court accept the fact that he had no knowledge of the whereabouts of the deceased, other than what was told to him by the 4th accused. The 1st accused thereby places himself outside the ring of possible suspects for the murder, by taking up the position, that too indirectly, that he was elsewhere, when the deceased was murdered.

It is obvious that the 1st accused, when he made that statement from the dock, had sufficient knowledge of the nature of the accusation levelled against him over "*this incident*" (මෙම සිද්ධිය), the nature of evidence presented before the trial Court by the prosecution and the fact that the body of the deceased was recovered upon him pointing out the place where it was

buried was already established before that Court. This made the 1st accused a probable candidate having involvement with the death of the deceased. The reason for this is the evidence of the Consultant JMO indicate that the body of the deceased was buried soon after the death has occurred. The three-day period of time since the death of the deceased and the estimation of time of death since the last meal of the deceased clearly supports such a conclusion. Thus, it was safe to infer that it was the 1st accused who buried the body of the deceased soon after he was killed. This places the 1st accused at the scene when the deceased was killed.

It is natural for a person, who is placed in such a situation, to offer an explanation by protesting his innocence to the serious accusation. Nonetheless, he chose to offer no explanation how is that only he had acquired that knowledge all by himself.

In view of the resultant situation, it is important to inquire into the effects of such a failure to offer an explanation that would accrue on the 1st accused in consequence of his failure. It has already been accepted that where the *Ellenborough dictum* is applicable, the failure of an accused to offer an explanation would tend to make certain suspicious circumstances to become presumptive against him.

This particular aspect was considered by a divisional bench of this Court in the judgment of ***Ajith Fernando and Others v The Attorney General*** (*supra*). In that instance, this Court relied on the text of *Coomaraswamy*'s ***Law of Evidence***, where it is stated (at Vol. 1, p.21) "*[A]*

party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive. Whether prima facie evidence will be converted into presumptive evidence by the absence of an explanation depends on the strength of the evidence and the operation of such rules as that requiring especially a high standard of proof on a criminal charge", when the 2nd and 3rd separately pointed out the "*muddy hole*" where the dead body of *Rita John Manoharan* was found under the cover of a cluster of water hyacinth plants, but failed to offer an explanation of their knowledge.

Lord Carswell, in the judgment of ***Regina v Becouarn*** (*supra*) in relation to the nature of the inferences that could be drawn by a jury, upon the failure of an accused to offer an explanation (at para 25) stated that *"[I] would regard the specimen JSB direction on drawing inferences as sufficiently fair to defendants, emphasising as it does that the jury must conclude that the only sensible explanation of his failure to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination. This direction has been used for some years and appears to have stood the test of time. It goes without saying, however, that trial judges have full discretion to adapt even a tried and tested direction if they consider that to do so gives the best guidance to a jury and fairest representation of the issues.*

In India too, the adoption of similar approach on this issue, could clearly be seen from the judicial pronouncements made by its Supreme Court. The judgment of ***Ram Gulam Chaudhary and Others v State of Bihar*** (2001) 8 SCC 311, dealt with a case where the deceased boy was

brutally assaulted and the appellants have carried him away. The deceased was not seen alive thereafter. The appellants gave no explanation as to what they did after they took away the boy. The Supreme Court held "*[I]n the absence of an explanation, and considering the fact that that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the Court, there is every justification for drawing the inference that they had murdered the boy.*" Similarly, in the case of ***Sahadevan v State represented by Inspector of Police, Chennai*** (2003) Vol. 1 SCC 534, the prosecution established that the deceased was seen in the company of the appellants from the morning of March 6, 1985. The Court held "*… it has become obligatory on the appellants to satisfy the Court as to how, where and in what manner Vedivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted with company.*"

In the relatively recent judgment of ***State of Himachal Pradesh v Raj Kumar*** (2018) INSC 9, the Supreme Court of India said (at para 17); "*Meena Devi who was residing in the same house with the accused and was last seen alive with the accused, it is for him to explain how the deceased died. The accused has no reasonable explanation as to how the body of Meena Devi was found hanging from the tree. … If the accused does not throw light on the fact that which is within his knowledge, his failure to offer any explanation would be strong militating circumstances against him.*"

Coming back to the evidence against the 1st accused, it is already noted that it was in the night of 25.07.2004 that the group of the men including the 1st accused and the deceased went to *Welikanda*. It was almost midnight on the same day when the 1st accused, 2nd accused and 3rd accused had returned without the deceased. After returning without the deceased, the accused had told a lie about the whereabouts of the deceased to *Malhas* and Zaharan (the friends of the deceased). The evidence is that the deceased's phone was ringing (without an answer) till about 3.30 a.m. on 26.07.2004 and thereafter it emanated no ringing signal.

The 1st accused knew where the body of the deceased was buried. The 1st accused pointed out this place of burial to police on 29.07.2004. This site is located about 500 to 600 meters away from his house. It is an isolated and open area consisting of a large extent of paddy fields. There were no dwellings located in the vicinity. Furthermore, the evidence shows that it is somewhere near this locality that the deceased got off the three-wheeler along with others including the 1st accused.

The 1st accused in his dock statement has absolutely not stated anything that could be taken as a challenge to the evidence of police officers with regard to the recovery of the body under Section 27 Statement made by him.

The evidence has proved beyond reasonable doubt that the deceased was in his company up until 25.07.2004. Evidence also has established that the place, the deceased has commenced his last journey with some other persons is a location where the house of the 1st accused was situated. The deceased is not a person from that area. He lives far away. He was

brought there with the knowledge of the 1st accused. The Section 27 statement of the 1st accused and the subsequent recovery of the body of the deceased has established that the 1st accused knew that the body of the deceased was buried at that particular location which was about 500 to 600 meters away from his own house. The medical evidence has established that the deceased has died on 25.07.2004. This proves that the 1st accused knew that the deceased would not be amongst the living after that day from the inception of the saga that led to his death.

Applying the principle enunciated in *Ariyasinghe's* case, it must be through the following three ways that the 1st accused would have acquired the knowledge relating to the whereabouts of the dead body of the deceased.

I. the 1st accused himself concealed the dead body of the deceased in the place where it was found;

II. the 1st accused saw another person burying the dead body of the deceased in the place where it was found;

III. a person who had seen another person burying the dead body of the deceased in the place where it was found has told the 1st accused about it;

The next question that would arise for consideration is as to which way out of the above three propositions, the 1st accused has acquired the knowledge relating to the whereabouts of the dead body of the deceased. Who knows it? It is only the 1st accused. Who can explain it? It is only the

1st accused. Then Section 106 of the Evidence Ordinance must apply. It states as follows:

> *"When any facts is especially within the knowledge of any person, the burden of proving that fact is upon him."*

The first illustration to Section 106 is as follows;

> *"When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."*

However, the 1st accused has not adduced any material to discharge that burden. It is not the position of the 1st accused that he had seen somebody else burying the body of the deceased at that place or that he heard from somebody else that the body of the deceased was buried there. If that was the case the 1st accused should have been first to exculpate him on that basis.

Moreover, he would have brought this fact to the law enforcement authorities immediately or even at a later stage thereafter. If he had reason such as a fear of facing any possible reprisal from somebody and if that was the reason for not divulging it, well, he should have said so at least in the dock statement.

On the other hand, he told the friends of the deceased on 25.-07.2004 itself a blatant lie regarding the whereabouts of the deceased. The fact that the deceased had died according to medical reasons on the same day taken in the light of the fact that the 1st accused did not only divulge the fate of

the deceased but deliberately misled the friends of the deceased regarding his whereabouts, cries for an explanation from the 1st accused. If he doesn't, he does so simply because that explanation would be detrimental to him. Therefore, Court is justified in drawing inference under Section 114(f) of the Evidence Ordinance.

The Rule in a circumstantial evidence case is that Court must be able to make an irresistible inference on the proven facts that it was the accused who has committed the crime. Since above sentence refers to "*proven facts*" let me examine its meaning.

Section 3 of the Evidence Ordinance defines the term *'proved'*. It states:

> *"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man might, under the circumstances of the particular case, to act upon the supposition that it exists."*

Thus, a fact is proved in following two ways:

> *After considering the matters before it,*
>
> I. *the Court either believes it to exist or*
>
> II. *considers its existence so probable that a prudent man might, under the circumstances of the particular case, act upon the supposition that it exists.*

Applying both these propositions, shouldn't the Court after considering the aforementioned material in this case, consider that it is so probable that a prudent man, under the circumstances of this case, will have no hesitation to act upon the supposition that the 1st accused was someway involved in the death of the deceased? The answer clearly, is the Court should. This means that the fact the 1st accused was someway involved in the death of the deceased becomes a proven fact.

When considering the circumstantial evidence adduced in this case as a whole, shouldn't the irresistible inference, the Court must draw on the proven facts, in the absence of any explanation from the 1st accused, be that it was the accused who has committed the crime? Indeed, it should be.

Therefore, taking all the evidence into consideration in its totality, I conclude that both Courts are justified in coming to the conclusion that the 1st accused must stand convicted for the murder of the deceased.

Therefore, in conclusion, I hold that the contention of the 1st accused presented by learned President's Counsel that he was convicted for murder solely on his knowledge of the place where the body of the deceased was buried is clearly at variance with the undisputed evidence presented before the trial Court and therefore could not be accepted as a valid one. Similarly, the submissions of the 1st accused that the trial Court as well as the Court of Appeal have insisted on his explanation merely on the discovery of a fact is also not an acceptable proposition, in view of the body of evidence considered by the Courts below.

In view of the reasoning contained in the preceding paragraphs of this judgment, I now proceed to answer the two questions of law on which this appeal was argued in the negative.

The judgment of the High Court convicting the 1st accused to the charge of murder and the Judgement of the Court of Appeal concurring with that finding are hereby affirmed, along with the sentence of death imposed on him.

The appeal of the 1st accused is accordingly dismissed.

JUDGE OF THE SUPREME COURT

P. PADMA N SURASENA, CJ.

I agree.

CHIEF JUSTICE

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT