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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Court of Appeal Case No.
HCC/157-158/2009
High Court of Gampaha
Case No. HC/11/2002

Complainant

Vs.

1. Panawala Widanalage Joseph Douglas Peiris.

1st Accused

2. Ratnayake Adikari Perennehelage Shantha Gamini Ratnayake.

2nd Accused

3. Ihala Panditha Gedara Jayaratne.

3rd Accused

4. Mahadurage Ranathunge.

4th Accused

5. Baddegama Ranjith Jayasekara.

5th Accused

AND NOW BETWEEN

1. Panawala Widanalage Joseph Douglas Peiris.

1st Accused-Appellant

2. Ratnayake Adikari Perennehelage Shantha Gamini Ratnayake.

2nd Accused-Appellant

3. Ihala Panditha Gedara Jayaratne.

3rd Accused-Appellant

4. Mahadurage Ranathunge.

4th Accused-Appellant

5. Baddegama Ranjith Jayasekara.

5th Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Nalin Ladduwahetty, PC with Kavithri Hirusha Ubeysekera for the 1st Accused-Appellant.
Ranjan Mendis with Kavinda Priyankarage for the 2nd, 3rd and 5th Accused-Appellants.

Darshana Kuruppu with Tharushi Gamage for the 4th Accused-Appellant.

Rohantha Abeysuriya, ASG for the Respondent.

ARGUED ON : 06.06.2024, 10.06.2024 and 11.06.2024

DECIDED ON : 25.07.2024

WICKUM A. KALUARACHCHI, J.

The five accused-appellants were indicted in the High Court of Gampaha on seven counts. All five accused were convicted by the learned High Court Judge by his Judgment dated 26.08.2009, only for the fifth count of the indictment, i.e. for abducting one Rathnachandra Liyanage in order to murder him, acting in furtherance of a common intention, an offence punishable under Section 355 of the Penal Code read with Section 32. Accordingly, five years of rigorous imprisonment were imposed on each accused-appellant. Against the said conviction, the 1st accused preferred one appeal and the 2nd to 5th accused preferred another appeal. Both appeals have been filed against the conviction but not against the sentence.

Prior to the hearing, written submissions were filed on behalf of the 1st accused-appellant and the 2nd, 3rd and 5th accused-appellants. At the hearing of the appeal, the learned President's Counsel for the 1st accused-appellant, the learned Counsel for the 2nd, 3rd and 5th accused-appellants, the learned Counsel for the 4th accused-appellant and the learned Additional Solicitor General for the respondent made oral submissions.

The story of the prosecution emanates from the evidence of four main witnesses, PW-1, PW-2, PW-3 and PW-7. Liyanage Udayachandra (PW-3) is the brother of Rathnachandra Liyanage (hereinafter sometimes referred to as the 'Victim'). PW-7, Yasawardena Liyanage is

the cousin brother of Rathnachandra Liyanage and Udayachandra Liyanage. The father of the victim, Liyanage Sumanadasa Perera (PW-1) and the mother of the victim Wickramasinghe Arachchige Somawathie Elisabeth (PW-2) had died prior to the High Court trial. Accordingly, evidence given by PW-1 and PW-2 in the non-summary inquiry held in the Magistrate Court of Gampaha was admitted as evidence in the High Court trial in terms of Section 33 of the Evidence. Ordinance.

According to the evidence of the prosecution witnesses, Rathnachandra Liyanage was a sixteen-year-old school boy at the time of the incident. On 07th July 1989, around 11.00 p.m., a group of persons including an officer who was clad in police uniform came to the house of Rathnachandra Liyanage which was situated at Delgoda. They took away Rathnachandra Liyanage with them stating to his father, PW-1 that they want to record a statement from him.

PW-3, the brother of the said Rathnachandra Liyanage was not living in the same house with his parents at that time. He resided in the house of PW-7, Yasawardena Liyanage, the cousin brother of him, as it was convenient for him to go to work from the house of Yasawardena Liyanage. That house was situated about 2.5 miles away from the house where his brother Rathnachandra and his parents were residing. Both PW-3 and PW-7 were at the house of PW-7 on the day of the incident. While PW-3 was sleeping, he heard his brother Rathnachandra calling his nickname from outside "සිකුරු අයියේ, සිකුරු අයියේ". Thereafter, both PW-3 and PW-7 has opened the window and seen Rathnachandra, the victim with a group of persons who were wearing uniforms. PW-3 has stated in his evidence that he identified 2nd, 3rd, 4th, and 5th accused-appellants among the group of persons.

When PW-3 and PW-7 opened the door, one of the persons pointed out PW-3. At that time, PW-3 stated that one of the persons in the group of persons hit him. The group then took PW-3 to a white colour van which was stopped in the road. PW-3 was put inside the van, his brother Rathnachandra was also brought to the van, and then PW-3 was blindfolded (Page 144 of the appeal brief). According to PW-3, he realized that there were police officers inside the van too. PW-3 was carried from that van blindfolded to a house and then to another unknown room situated at somewhere else (he states that he later got to know that this place is Batalanda). He states that his brother Rathnachandra was brought to the same room he was in and that he identified Rathnachandra by his voice. PW-3 states that he was beaten up while being blindfolded at the said place and when his blindfolding dropped, he saw 2nd to 4th accused -appellants in the place of beating holding clubs. He was kept in the said place for a day and then brought to Peliyagoda Police Station where he had been kept for two and a half months. During the said period of two and a half months, he was produced before a Judge in one occasion. However, PW-3 never met or saw his brother, Rathnachandra Liyanage after hearing his voice in the same room where PW-3 was subjected to various physical tortures.

According to the father of Rathnachandra (PW-1), after Rathnachandra was taken away from their house on the day of the incident around 11.00p.m, a police jeep arrived at their house around 5.00 O'clock in the morning. PW-1 knew one of the officers who came to the house, Lalith Mahanama, Officer in Charge of Meegahawatte Police station. OIC Mahanama has introduced to PW-1, another police officer who came with him, as ASP Douglas Pieris who is the 1st accused-appellant of this case. PW-1 has identified the said Doughlas Pieris at that instance as one of the persons who came to his house previous night and took into custody his son, Rathnachandra Liyanage around 11.00 p.m. PW-1 inquired from him as to why they took away his son and what happened to him. According to PW-1, at that instance, the 1st

accused-appellant had stated that the younger son Rathnachandra Liyanage escaped from their custody.

As Rathnachandra Liyanage was missing from the date of the incident, PW-1, the father instituted proceedings before the Court of Appeal by way of an application of *habeas corpus* against the 1st accused-appellant and compensation was ordered to be paid by the Court in favour of the petitioner for the abduction of his son, Rathnachandra Liyanage.

Grounds of Appeal on behalf of the 1st Accused-Appellant

1. Has the learned High Court Judge wrongfully evaluated the evidence at the trial?
2. Has the learned High Court Judge erred in not complying with Section 196 of the of the Code of Criminal Procedure Code?
3. Has the learned High Court Judge failed to consider belatedness of the complaint and failed to evaluate the impact of the same?
4. Has the 1st Accused-Appellant been properly identified?
5. Has the learned High Court Judge failed to consider or evaluate common intention as required by Law?
6. Has the prosecution proved charged No.5 beyond reasonable doubt?
7. Are the learned High Court Judge's findings maintainable in Law?

The grounds of appeal are not specified in the written submission filed on behalf of the 2nd, 3rd and 5th accused-appellants. The learned Counsel for the said appellants advanced his arguments on the following grounds:

1. The case against the 1st accused and the other four accused are fundamentally different.
2. The 2nd, 3rd and 5th accused were not properly identified.

3. Delay of six years and four months in making a complaint to the police is fatal to the prosecution case.
4. The evidence given by the 2nd, 3rd and 5th accused from the witness box has not been properly considered and evaluated by the learned High Court Judge.

Grounds of Appeal on behalf of the 4th Accused-Appellant

1. The learned Trial Judge has failed to comply with Section 196 of the Code of Criminal Procedure Code, thereby denying the 4th Accused-Appellant the right to a fair trial.
2. The learned Trial Judge has failed to consider the fact that the evidence of PW-1 and PW-2 was not properly admitted.
3. The learned Trial Judge has failed to consider that the belatedness of the first complaint has caused a serious prejudice to the 4th Accused-Appellant.
4. The learned Trial Judge has failed to consider that the prosecution did not prove the required elements of the charge under Section 355 of the Penal Code, rendering the conviction under this section legally unsound.
5. The learned Trial Judge has failed to properly analyze the evidence of the prosecution witnesses.
6. The learned Trial Judge has failed to give the benefit of the doubt to the 4th Accused-Appellant, when in fact such doubt was created in his mind, at the time of writing the Judgement.

The grounds urged by all appellants could be summarized as follows:

i. Has the learned High Court Judge erred in not complying with Section 196 of the Code of Criminal Procedure Act?
ii. Whether belatedness of making a complaint to the police has caused a substantial prejudice to the accused-appellants?
iii. Have the accused-appellants been properly identified?

iv. Whether the evaluation of evidence and applying the doctrine of common intention were correctly done?

v. Whether the 5th charge has been proved beyond a reasonable doubt?

Now, I proceed to deal with the aforementioned five grounds of appeal.

Has the learned High Court Judge erred in not complying with Section 196 of the Code of Criminal Procedure Act (CCPA)?

Section 196 of the CCPA reads as follows:
When the Court is ready to commence the trial, the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged.

Citing the Judgments of ***Piyasena V. Officer in Charge, Police Station, Mawarala and Another*** – (2005) 1 Sri L.R. 31 and ***Baddurdeen Sajeer Arfeth V. Hon. Attorney General*** – C.A. 66/14, Decided on 20.01.2016, the learned President's Counsel for the 1st accused-appellant contended that reading the indictment to the accused is imperative and in the instant action, indictment was not read over to the accused before the commencement of the trial. The learned President's Counsel cited the relevant Judgments to substantiate his argument.

While admitting the fact that charges have not been read over to the accused-appellants in this case, the learned Additional Solicitor General (ASG) for the respondent submitted the case of ***Hiniduma Dahanayakege Siripala alias Kiri Mahaththaya and Henapita Gamage Shantha V. The Hon. Attorney General*** – SC Appeal No. 115/2014, Decided on 22.01.2020 and contended that according to the said decision, failure to read the charges does not have the effect of vitiating the trial.

The learned President's Counsel for the 1st appellant pointed out that the aforesaid case is different from the present appeal. The learned President's Counsel also contended that the said Supreme Court decision cannot be applied in all cases because it has not been held in the said case that it is not mandatory to read the charges to the accused in any criminal case in the High Court.

In the Judgment of ***Hiniduma Dahanayakege Siripala alias Kiri Mahaththaya and Henapita Gamage Shantha V. The Hon. Attorney General*** *(Supra)*, most of the Court of Appeal and Supreme Court Judgments that deal with Section 196 of the CCPA have been extensively considered with the impact of the Article 138(1) of the Constitution. This Court is not bound to follow the Judgments written by this Court but bound to follow the Judgments of the Supreme Court. ***David Perera V. The Hon. Attorney General*** – (1997) 1 Sri L.R. 390 is a Judgment of the Supreme Court wherein it was held that "compliance with Section 182(1) and (2) of the Code of Criminal Procedure Act is imperative. When an amended plaint is filed, a fresh charge sheet should be framed and read over to the accused. Failure to do so vitiates the conviction". His Lordship Justice Aluwihare considered the said Supreme Court decision and observed that "in the decision of ***David Perera V. The Attorney General***, the non-compliance with Section 182 of the CCPA has been dealt with but in this case, the effect of non-compliance with Section 196 has to be considered and therefore they have to be treated separately." His Lordship has explained in the Judgment why these two have to be treated separately.

When there are two different Supreme Court decisions on the similar issue, this Court is entitled to follow any of them. However, since the issue of the case before us is pertaining to Section 196 of the CCPA, this Court is inclined to follow the decision of *Hiniduma Dahanayakege Siripala alias Kiri Mahaththaya and Henapita Gamage Shantha V. The*

Hon. Attorney General. Also, it is important to note that it is mentioned in this Judgment, that none of the other relevant cases, the effect of the proviso to Article 138(1) of the Constitution has been considered. As pointed out by the learned President's Counsel for the 1st appellant, it cannot be considered that in every case, reading the indictment to the accused is not essential. According to the decision of the aforesaid Supreme Court case, if failure to read the charge has not prejudiced the substantial rights of the parties or occasion a failure of justice, it would not be a reason to vitiate the trial and to set aside the conviction.

In the case at hand, undisputedly, charges have not been read over to the accused. However, the indictment with the other relevant documents were served to all accused-appellants prior to the commencement of the trial and jury option was also given to the accused. It appears from the journal entries of the High Court case that from the beginning, all accused were represented by Attorneys-at-Law. It must then be considered whether there has been substantial prejudice to the rights of the accused.

In the case at hand, there were seven charges against the appellant and two of the charges are relating to the offence of murder. As observed in the aforesaid Judgment of the Supreme Court, according to the proviso to Section 197 of the CCPA when the offence pleaded to is one of murder, the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused had pleaded not guilty. Therefore, the instant case should have been necessarily taken up for trial, as there were two charges of murder. However, for the other five charges, the accused-appellants could have pleaded guilty if the charges were read over to them before the commencement of the trial. Therefore, the appellants did not get the opportunity to plead guilty only to the other five charges, if they wanted to plead. The issue is whether it had prejudiced the substantial rights of the accused-appellants by not giving the opportunity to plead guilty to the said five charges before

commencing the trial. It is to be noted that although the trial was commenced, if the accused wanted to plead guilty to any of the charges, the accused were free to plead guilty at any time during the trial before the Judgment. As all accused-appellants were represented by Attorneys-at Law throughout the trial, they could have done so if they wanted. Therefore, no prejudice has been caused to the substantial rights of any of the accused-appellants in this case. Also, a failure of justice has not been occasioned. Hence, following the aforesaid Supreme Court Judgment of *Hiniduma Dahanayakege Siripala alias Kiri Mahaththaya and Henapita Gamage Shantha V. The Hon. Attorney General*, I hold that non-compliance with Section 196 of the CCPA is not a reason to set aside the convictions of this case.

However, it should be mentioned that this Court followed the Supreme Court decision of *Hiniduma Dahanayakege Siripala alias Kiri Mahaththaya and Henapita Gamage Shantha V. The Hon. Attorney General* after considering the specific facts and circumstances relating to this case. In this case, evidence had to be led regarding the death of two witnesses at the commencement of the trial in order to use their depositions, which does not arise normally in most cases. Also, indictment was served to the accused by one Judge and the evidence regarding the deaths of PW-1 and PW-2 was led before another Judge. After leading the said evidence, the trial commenced passing over the step of reading the indictment. Therefore, this Court reached this decision after considering the facts distinctive to this case. However, it must be specifically mentioned that no Court should neglect the responsibility of reading and explaining the indictment to the accused in terms of Section 196 of the CCPA before commencing the trial.

Whether belatedness of making a complaint has caused a substantial prejudice to the accused-appellants?

According to the indictment, the offences took place in 1989 July 7. All three learned Counsel appearing for the appellants repeatedly and

vehemently argued about the delay in making a complaint to the police. They contended that PW-1 made a complaint to the police only after six years and four months of the incident. The learned Counsel for the 2nd, 3rd and 5th appellants contended that several Judges have heard this case and the learned Judge who wrote the Judgment failed to consider the delay of making a complaint. I regret that I am unable to agree with that contention because in the first paragraph of page 13 of his Judgment, the learned Judge has considered the delay of making a complaint and found that the incident relating to this case occurred during the insurgency period of this country, and the attempts of the victim's father to make a complaint to the police had been futile.

Making a prompt complaint to the police regarding an incident is a reason to strengthen the prosecution case. In some occasions, a belated complaint raises a reasonable doubt on the prosecution case. However, delay in making the first complaint is not always a reason to reject the testimony of the complainant or to disbelieve the prosecution story. What has been decided by the appellate courts is, if the delay can be explained, delay in making a statement to the police is not a reason to reject the prosecution story. The following two judicial authorities explained how the delay should be considered.

In ***Ajith Samarakoon V. The Republic (Kobaigane Murder Case)*** – (2004) 2 Sri L.R. 209, it was held as follows:

Just because the statement of a witness is belated, the Court is not entitled to reject such testimony. In applying the test of spontaneity, the test of contemporaneity and the test of promptness, the court ought to scrupulously proceed to exercise the reasons for the delay. If the reasons for the delay are justifiable and probable, the trial judge is entitled to act on the evidence of a witness who had made a belated statement.

The decision of ***Sumanasena V. Attorney-General*** – (1999) 3 Sri L.R. 137 is as follows:

"Just because the witness is a belated witness, Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness".

Submitting the following two decided cases, the learned President's Counsel for the 1st appellant and the learned Counsel for the 2nd, 3rd and 5th appellants contended that according to these decisions, the father of the victim (PW-1) could have made a complaint in 1991, even if it is assumed that the situation of the country was bad in the period that the incident relating to this case occurred.

The learned Counsel for the 2nd, 3rd and 5th appellants cited the Judgment of ***Udagama V. Attorney General*** – (2000) 2 Sri L.R. 103, and contended that in this case, even the explanation given for a delay of 15 months had not been considered as an acceptable explanation for the delay. In the aforesaid case, there were three main prosecution witnesses, namely; Piyaseeli, Karunadasa and Premasiri. Piyaseeli had made a belated statement to the police, 15 months after the incident. It was held that the explanation given by her that the delay was due to the situation that prevailed in the country is unacceptable, for the reason that her own brother Karunadasa who gave evidence at the trial and her mother Alisnona, had made statements to the police on the very next day after the incident. Not accepting the explanation of Piyaseeli for the delay is apparent in this case. Victim's mother and her own brother had made statements to the police on the very next day after the incident. Therefore, the Court of Appeal correctly held that if the victim's mother and her brother could have made statements the very next day after the incident, Piyaseeli could have also made a statement without such a delay.

However, facts of the instant case are completely different from the aforesaid case. The father of the victim, PW-1 explained in his testimony in the non-summary inquiry, the terrible situation prevailed in the country at that time. Both of his sons were taken away by the police. One of his sons, Udayachandra, was tortured severely, thereafter, kept in the Peliyagoda Police for about two and half months and then, he was detained in the "Punani Camp" for about one and a half years. Thereafter only he could come home according to his evidence. The father could not see his younger son, Rathnachandra again, after he was taken by the police officers. Not only that, the father, PW-1 stated in his evidence at the non-summary inquiry that he came to know the Attorneys-at-Law Kanchana Abeypala and Lankapura were also murdered during this time. He has instructed an Attorney-at-Law Liyanaarachchi to file *Habeas Corpus* application regarding his younger son, but PW-1 learnt that the said lawyer had also brought to the Sapugaskanda Police Station and murdered. In a situation where even the lawyers were murdered in this way and especially when he came to know that the lawyer through whom he wanted to file a *Habeas Corpus* application was also murdered in a police station, it is obvious that PW-1 was not in a position to make a complaint to the police during that time.

The learned President's Counsel for the 1st appellant and the learned Counsel for the 2nd, 3rd, and 5th appellants submitted the case of ***Jayawardena & others V. The State*** – (2000) 3 Sri L.R. 192 and contended that the father could have made a complaint at least in the year 1991. I have gone through the facts and circumstances of the case of *Jayawardena & others V. The State*. In the said case, three accused-appellants with others, unknown to the prosecution, were indicted in the High Court of Colombo on three counts. The learned Counsel for the appellant in the said case submitted that the incident had taken place on 28. 12. 1989 and the 1st complaint had been made in the year

1995, five years after the incident and the complainant Sarathsena has failed to explain the long delay satisfactorily and cogently.

In the said case, when the complainant was questioned about the long delay in making the complaint to the police in respect of the robbery that took place on the night of 28. 12. 1989, he had taken up the position that the police were not accepting complaints from the public during the period. At the same time, he tried to explain the delay by saying that due to the fear he had that his family may be destroyed, presumably by the police, he did not make a complaint to the police. According to the complainant, it was upon hearing that the government had requested the public to make complaints in respect of missing persons to the commissions, that he decided to make a complaint.

The Court of Appeal held as follows: "We cannot accept this position taken up by the complainant that till 1995, he could not make a complaint to the police with regard to the robbery, due to the reasons given by him as referred to above. Even assuming that during the period 1989 to 1990, there was a fear psychosis that prevailed in the country, it is common knowledge that by 1991 conditions had improved and it was possible for any citizen to lodge a complaint at any police station."

As stated previously, the contention of both the learned Counsel for the appellants was that the father of the victim, PW-1 just waited and only after six years and four months, he made a complaint to the police. At this stage, it is vital to consider why the belatedness raises a reasonable doubt on the prosecution case. The main reason is that when there was a possibility to make a complaint immediately and the complainant does not make a complaint, a reasonable doubt arises whether he fabricated a story and then made a complaint. In the case at hand, PW-1 explained in his evidence, how he attempted to make a complaint to the police. He stated that the very next day of the incident, the 8th of July, he went to the Meegahawatta police station to make a complaint,

but the OIC informed that it is not necessary to make a complaint and the OIC had told him to go to the Peliyagoda police station. Then PW-1 went to the Peliyagoda police station and met Douglas Peiris (Douglas Peiris is the 1st accused of this case). Then he said "Udayachandra is there, younger son ran away", but in the Peliyagoda Police Station also, a complaint had not been recorded. These items of evidence have not been disputed. Therefore, it is precisely clear that PW-1 went to the police stations to make a complaint immediately after the incident, but police had not recorded his complaint. Hence, the argument that PW-1 just kept quiet for six years and only after six years, he wanted to make a complaint is completely wrong.

In addition, citing the case of *Jayawardena & others V. The State*, both the learned Counsel contended that in this case, it was observed that the conditions had improved in 1991 and it was possible for any citizen to lodge a complaint at any police station. In the case before us, after realizing that it is not possible to complain to the police, PW-1, Samaradasa Perera went to the 2nd highest Court in this country and made a complaint about the disappearance of his son through an application of *Habeas Corpus* when the conditions had improved in 1991. As the Case No. of the *Habeas Corpus* application is 13/91, it seems that the said application has been filed in 1991. Hence, soon after the conditions had improved in 1991, as observed in the aforesaid case of *Jayawardena & others V. The State*, PW-1 made a complaint to Court of Appeal through *Habeas Corpus* application about the disappearance of his son, Rathnachandra.

When an illegal act is committed by a person and causes injustice or harm to another person, he normally goes to the nearest police station and makes a complaint. However, the police station is not the only place to make a complaint. According to Section 136(1)(a) of the CCPA, on a complaint made orally or in writing to a Magistrate that an offence has been committed, which such court has jurisdiction either to inquire into

or try, proceedings shall be instituted at the said Magistrate Court. So, the law provides for making even an oral complaint to the Magistrate of the particular area regarding an offence committed. In the instant action, the police came and took the younger son of PW-1 and thereafter he was missing. PW-1 failed all his attempts in making a complaint to the police. When all the circumstances demonstrate that his son was illegally or improperly detained in public or private custody or that he was not to be found, the remedy that was available to PW-1 was filing a *Habeas Corpus* application in terms of Article 141 of the Constitution. As, PW-1 failed in all his attempts to make a complaint to the police and after he came to know that the Attorney-at-Law Liyanaarachchi by whom he wanted to get the *Habeas Corpus* application filed was also murdered after bringing him to the Sapugaskanda police station, PW-1 opted to make the complaint about his son through a *Habeas Corpus* application to the Court of Appeal. After two years of the incident, in 1991 when there was a suitable environment in the country to take an action regarding his missing son, he had filed the *Habeas Corpus* application. PW-1 was successful in the said Habeas Corpus application and the 1st accused-appellant was ordered to pay compensation of a sum of Rs.100,000/-. Thus, there is no unexplained delay in this case.

The learned Counsel for the 2nd, 3rd and 5th appellants contended that Samaradasa Perera, the father of the victim was unable to adduce any effective explanation for the failure to cite the names of the 2nd, 3rd and 5th accused as respondents in the *Habeas Corpus* application. It is apparent from the evidence of this case that PW-1 did not know the names of the 3rd, 4th and 5th appellants at that time. Without knowing the names, he could not name them as the respondents of the *Habeas Corpus* application. PW-1 knew the name of the 1st accused, Douglas Peiris because Meegahawatta OIC, Lalith Mahanama whom he knew prior to the incident had introduced ASP Douglas Peiris to him. Also, he came to know the name of the 2nd accused, Ratnayake, as he showed

his official identity card when he came with the other police officers to PW-1's house in search of Rathnachandra, the victim. PW-1, Samaradasa Perera stated in his evidence that he gave those two names to the Attorney Mr. Gomes to whom he had entrusted the filing of the *Habeas Corpus* application. However, PW-1 stated that his Attorney had filed the *Habeas Corpus* application only against Douglas Peiris. Therefore, not filing the *Habeas Copus* application against the 2nd accused is a decision of his Attorney. But, PW-1 has given the names of the two persons that he knew at that time. It is necessary to mention at this juncture that PW-1 has never stated that he could not identify the other police officers who came to his house and abducted his younger son (victim). What transpires from his evidence is that he could not name the others as respondents of the Habeas Corpus application because PW-1 did not know the names of the 3rd, 4th and 5th accused-appellants at that time.

For the foregoing reasons, I hold that there is no unexplained delay in the instant action and belatedness does not cast any reasonable doubt about the prosecution case.

Accepting the depositions of PW-1 and PW-2 in terms of Section 33 of the Evidence Ordinance

Although, the learned President's Counsel for the 1st accused did not raise this issue in the course of his arguments, I wish to deal with the applicability of Section 33 of the Evidence Ordinance, as it is stated in the written submission tendered on behalf of the 1st appellant that the 1st appellant is relying on the Judgment of ***The King V. Appu Sinno*** reported in 22 NLR 353 and according to the said Judgment, PW-1's evidence cannot be admitted under Section 33 of the evidence Ordinance. It is stated further in the written submissions that the evidence of PW-1 cannot be admitted under Section 33 because the 1st

accused-appellant did not have the right nor the opportunity to cross-examine the said witness.

In the case of ***The King v. Appu Sinno - 22 NLR 353,*** a witness gave evidence before the Magistrate when the accused was not present. The Magistrate issued a warrant, but the accused was not arrested for some months. The witness had by this time disappeared, and consequently he was not recalled for cross-examination by the accused. The deposition of the witness was read at the trial before jury without objection. It was held as follows; "The condition prescribed by section 33 of the Evidence Ordinance that the adverse party in the first proceeding had the right and opportunity to cross-examine was thus not complied with, and the deposition was therefore, in my opinion, wrongly admitted."

In the aforementioned case, the accused did not get the right and the opportunity to cross-examine the witness because not only the accused was absconding but also the witness had disappeared. After the arrest, the accused had not made an application to recall the witness.

In the case at hand, PW-1 or PW-2 did not disappear. After the 1st accused-appellant was arrested and produced, he did not make an application to recall PW-1 for cross-examination. That is why the learned High Court Judge has mentioned in his Judgment after analyzing the relevant judicial authorities and the law pertaining to Section 33, that it is the duty of the accused to make the application to recall the witness for cross-examination, if he wanted to do so. The learned High Court Judge also observed that the 1st accused could have made the application to recall the witnesses for cross-examination, as the witnesses PW-1 and PW-2 were alive at the time of the arrest of the 1st accused, but he waved off that right.

Section 33 of the Evidence Ordinance is clear on this point. The said Section reads as follows:

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount or delay or expense which, under the circumstances of the case, the court considers unreasonable:
Provided -
(a) that the proceeding was between the same parties or their representatives in interest;
(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; (c) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation -
A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

The Section states that the adverse party in the 1st proceeding must have the right and the opportunity to cross-examine. In the case at hand, the said right and the opportunity was there. From the day of the arrest, 07.08.2000, the 1st accused-appellant was represented by an Attorney-at-Law. on 30.11.2000, the Attorney-at-Law for the 1st appellant raised an objection to the appearance of the learned State Counsel. The said objection was overruled but it is apparent that if his attorney could raise such objection even with regard to the appearance of the State Counsel, he could have been able easily to request to recall the witness, PW-1 for cross-examination. After waving off that right, it cannot be argued on behalf of the 1st appellant that the 1st accused-appellant did not have the right nor the opportunity to cross-examine

the witness, PW-1. However, I must note that the learned President Counsel did not raise this argument at the hearing of the appeal, although it is mentioned in the written submission of the 1st appellant. The aforesaid legal position is clearly explained in ***K. V. Subramaniam V. The Inspector of Police, Kankesanturai –*** 71 NLR 204 as follows: "One of the requisites to the admissibility of such evidence in terms of Section 33 of the Evidence Ordinance is that in the former proceeding, the adverse party should have had the right and the opportunity to cross-examine. In applying this section, the question whether the right or opportunity has been effectively used is immaterial so long as the right and opportunity did exist. Indeed, even if the right and opportunity have not been used, the requisites of Section 33 would still have been satisfied." (Emphasis added)

PW-2 was recalled by the prosecution, the 1st accused was given the opportunity to cross-examine PW-2 and PW-2 was cross-examined. As the right and the opportunity was there for the 1st accused-appellant to recall and cross-examine PW-1, the learned High Court Judge is perfectly correct in considering the depositions of PW-1 and PW-2 in determining this action.

Have the accused-appellants been properly identified

In considering the identification, the learned President's Counsel for the 1st appellant stated that the case of the 1st accused and the other accused are slightly different. The learned Counsel for the 2nd, 3rd and 5th appellants contended that there is a fundamental difference in the case against the 1st accused and the other four accused. The learned Counsel pointed out that the 1st appellant was an ASP at that time and other four appellants were Sergeants.

In this case, an identification parade had not been held. The learned President's Counsel for the 1st appellant contended that the only

evidence against the 1st appellant was the evidence of PW-1. PW-1 stated that 1st appellant came with the group who abducted his son and the 1st appellant also came on the following day to inform PW-1 that his son escaped. The learned President's Counsel pointed out that according to the evidence of PW-1 in the non-summary inquiry, at the time the victim was taken away by the police officers, the 1st appellant was standing far away and this is an identification carried out in the night from a distance. The learned President's Counsel contended further that there was no dock identification even and when the 1st accused-appellant was arrested and brought to the Magistrate Court, the prosecution did not recall PW-1 to identify the 1st appellant.

The mother of the victim Somawathi Elizabeth has been recalled in the non-summary inquiry on 15.02.2001 to identify the 1st accused-appellant after the 1st accused was arrested and produced. She has also stated in her evidence that Lalith Mahanama has introduced a police officer who came with him as Douglas Peiris. When PW-2 was recalled, she identified the 1st accused as the said Douglas Peiris. PW-1 has stated that they knew the Meegahawatta OIC, Lalith Mahanama very well prior to the incident. He had introduced the 1st accused as ASP Douglas Peiris when they came around 5/5.30 in the next morning after his son was taken by them in the previous night. All this time, the mother, PW-2 was also with PW-1 and her testimony in the non-summary inquiry is almost identical to the testimony of PW-1. So, ASP Douglas Peiris who was introduced by OIC Lalith Mahanama has been identified in the non-summary inquiry by PW-2, the mother of the victim. Therefore, there is no issue whatsoever regarding the identification of the 1st accused-appellant.

In addition, the said Douglas Peiris has informed the father, PW-1 that his younger son (victim) escaped from their custody. This item of evidence has not been challenged in cross-examination. It was held in the case of ***Himachal Pradesh V. Thakur Dass*** (1983) 2 Cri. L.J. 1694

at 1701 by V.D. Misra CJ that, "whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed". Also, it was held in ***Motilal V. State of Madhya Pradesh*** (1990) Criminal Law Journal NOC 125 MP that "Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact."

Therefore, ASP Douglas Peiris, the 1st accused is the person who informed PW-1 that his son escaped from custody. When ASP Douglas Peiris was introduced to PW-1, he realized that Douglas Peiris is the person who was standing at a distance when the team of police officers took away his child the previous night. When a father who never got to see his child again in his lifetime says that he remembered the person who informed him that the child escaped from custody, it is needless to state that the father can identify that person not only after six years but for the rest of his lifetime. The learned High Court Judge has also observed this aspect in his Judgment.

In addition, PW-1 instructed and filed a case of *Habeas Corpus* against the 1st appellant, Douglas Peiris about the disappearance of his son. In the said *Habeas Corpus* application, the Court of Appeal found that the 1st appellant was liable for that and ordered compensation/damages in a sum of Rs.100,000/-. Therefore, it is precisely clear that there was no issue in identifying Douglas Peiris by PW-1. Hence, there was no necessity to recall PW-1 to identify the 1st appellant in the non-summary inquiry. In these circumstances, it is correct in holding that there is no reasonable doubt about the identification of the 1st accused-appellant.

The learned Counsel for the 2nd, 3rd and 5th appellants contended that the identification of 2nd, 3rd and 5th accused is a putative identification. The learned Counsel for the 4th appellant also contended that only after

six years their names were disclosed and there was only a dock identification.

Now, I proceed to consider the identification of 2nd, 3rd, 4th and 5th accused-appellants. PW-1 and PW-2 had identified 2nd, 3rd, 4th and 5th accused-appellants as the police officers who came to their house in search of Rathnachandra, the victim. PW-3, Udayachandra was not at his parent's house and he was in one of his relatives, Liyanage Piyawardena's house. Yasawardena Liyanage, a son of Piyawardena has given evidence in this case. PW-1 stated that the police officers entered the house and searched Rathnachandra. He identified the appellants except the 1st appellant as the police officers who came inside their house and taken the victim to their custody. When PW-1 asked why his son is taken, they said that they need to take a statement from him. Thereafter, they have led the victim to PW-3's place of residence, made the victim to call his brother PW-3 and he was also taken into custody. PW-3 has also identified 2nd, 3rd, 4th and 5th appellants as the persons who came to his residence to arrest him. So, all three witnesses have identified the 2nd, 3rd, 4th and 5th appellants as well.

According to PW-1 and PW-2, the 2nd accused-appellant came to their residence and showed his official identity card to prove his identity. Then PW-1 had identified him as Ratnayake. However, the learned Counsel for the 2nd, 3rd and 5th appellants contended that when PW-1was asked to identify the said Ratnayake, he went and showed the 3rd accused-appellant. The learned Counsel contended that this is a serious issue regarding the identity. It is correct that in the evidence in chief he showed the 3rd accused as Ratnayake. However, the said mistake has been rectified in cross-examination and when PW-1 was cross-examined, he correctly pointed out the 2nd accused as Ratnayake (as the 1st accused was absconding, the 2nd accused was there as the 1st accused). It is recorded in the non-summary inquiry that the PW-1 pointed out the accused, Shantha Gamini Ratnayake. Therefore, it is

clear that the person who came that day to their house had proved his identity as Ratnayake by showing his identity card and PW-1 identified him as the 2nd accused of this case.

At this juncture, it is important to consider the "Turnbull Guidelines" regarding identification. In the written submissions tendered on behalf of the 1st appellant, the attention of the Court has been drawn to the "Turnbull Guidelines". I wish to consider whether the "Turnbull Guidelines" can be applied for the identification of any of the appellants in this case.

Turnbull rules or guidelines were set out in the case of ***R. V. Turnbull – [1976] 3 All E.R. 549***. It is to be noted that the Turnbull guidelines apply to mistaken identity. According to the Turnbull rules, it must be examined closely the circumstances in which the identification by each witness had been made. How long did the witness have the accused under observation? At what distance? In what light? are material factors to be considered.

In the case of ***Keerthi Bandara v. Attorney General*** – [2000] 2 Sri L.R 245, it has been stated as follows;

"In *Rex vs Oakwell* at 1227 Lord Widgery, CJ in dealing with a similar contention that the directions given in *Rex vs Turnbull* were not applied to the identification issue which is alleged to have arisen in that case, succinctly, observed:

> "This is not the sort of identity problem which *Rex vs Turnbull* is really intended to deal with. *Rex vs Turnbull* is primarily intended to deal with the ghastly risk run in cases of fleeting encounters. This certainly was not that kind of case".

Undoubtedly, this is not a case where the accused were identified on fleeting encounters. Especially, PW-3 after seeing the 2nd, 3rd, 4th and

5th appellants at his residence on the occasion that they came to arrest him, PW-3 saw the 2nd, 3rd, and 4th appellants again when he was brought to an unknown place. PW-3 stated in his testimony that he was brutally assaulted and when his blindfold was dropped, he saw the 2nd, 3rd and 4th appellants with clubs in their hands (pages 123 and 124 of the appeal brief). Hence, in two occasions PW-3 saw these appellants. In addition, PW-3 stated that the person called "Ranatunga" (whom he identified as the 4th accused) took a statement from him at the "Peliyagoda Police Station" (Page 127 of the appeal brief). So, PW-3 had the opportunity to see the 2nd, 3rd, and 4th appellants closely for a long time and certainly, those were not fleeting encounters. It is vital to note that when PW-3 described how he was tortured by the 2nd, 3rd and 4th accused-appellants, at least there was no suggestion during the cross examination in High Court that the said three accused had not tortured him. It is correct that the fifth charge is not regarding the torture of PW-3, but this chain of events demonstrates the intention of the accused-appellants. Also, when considering the way that they assaulted PW-3, it is apparent that he will not forget the persons who brutally assaulted him. Therefore, there is no doubt about the identification of the 2nd, 3rd and 4th accused-appellants as well.

When PW-3 stated that 2nd, 3rd, and 4th, appellants tortured him with clubs in their hands, a specific question was asked what was in Ranjith's (the 5th accused) hand? PW-3 clearly stated that the 5th accused-appellant was not there. (Page 124 of the appeal brief). PW-1 and PW-2 had stated in their evidence that all five accused came to their place. In cross-examination, PW-1 stated that they did not do any harm at that time. Thereafter, PW-3 has also stated that 2nd, 3rd, 4th and 5th appellants came to his place with some other police officers but he identified only the said four police officers. The 5th appellant has given evidence and stated that he was the driver of the vehicle and when he was asked to go for an official duty, he did it. According to his evidence, when he started driving the police vehicle, he did not know at least the

place that the police officers intended to go. On the way, Police Sergeant Ratnayake has told him to go to the house where Rathnachandra was arrested. So, he had gone to that place. Obviously, the witnesses could see him, as he drove the police vehicle to the places where the victim and PW-3 resided. Other than that, there was no evidence that the 5th appellant was involved in torturing or doing any other activity in connection with PW-3 or the victim, Rathnachandra. Therefore, there is no evidence that the 5th accused-appellant had committed the offence described in the 5th charge with the common intention of the other appellants. Hence, I hold that the learned High Court Judge is erred in convicting the 5th accused-appellant for the 5th charge and his conviction should be set aside.

Whether the evaluation of evidence and applying the doctrine of common intention were correctly done?

Whether the 5th charge has been proved beyond a reasonable doubt?

Above two grounds could be considered together. Wrong evaluation of evidence is a ground urged by all three Counsel. The learned Counsel for the 2nd, 3rd, and 5th appellants contended that the learned High Court Judge has not considered the defence evidence. However, I regret that I am unable to agree with that contention because defence evidence has been considered from page 15 to page 20 of his Judgment.

The learned President's Counsel for the 1st appellant and the learned Counsel for the 4th appellant contended that the doctrine of common intention has been wrongly applied in convicting the 1st appellant and the 4th appellant. By the impugned Judgment all five accused were convicted for the 5th count. They have been convicted of the offence under Section 355 of the Penal Code for kidnapping or abducting with common intention the person called "Rathnachandra", in order to murder.

The case of ***Ariyasinghe and Others V. Attorney General (Wickremasinghe Abduction Case)*** – (2004) 2 Sri L.R. 357 explains the ingredients that should be established in proving a charge under Section 355 of the Penal Code as follows: "In order to prove an offence under section 355 it is necessary, to prove that the accused had the intention at the time of abduction that the person abducted should be murdered or would be so disposed of as to be put in danger of being murdered. It is the burden of the prosecution to prove that the accused had that particular intention at the time they, abducted the victim, that intention must be unequivocal intention, it can't be conditional".

In this case, the death of the "Rathnachandra Liyanage" was not proved. However, citing the cases of ***Alim Jan Bibi v. Emperor***- A.I.R. 1937 Cal 578; I.L.R. (1937) Cal.484; 171 I.C. 944 and ***Jinnat Ali v. King***- A.I.R. 1949 Dacca 21; 50 Cr. L.J. 1008, the learned ASG contended that it is not essential to prove the death in order to prove a charge under Section 355 of the Penal Code. The aforementioned two cases have been cited by Dr. Sir Hari Singh Gour in his book ***'The Penal Law of India: Analytical Commentary on the Indian Penal Code as amended by Information Technology Act, 2000"*** – 11th Revised Edition, Volume IV (2003). Dr. Gour states in this book that the actual murder of the person is not a prerequisite to prove kidnapping for murder. It is stated further that "indeed, if the intended murder takes place, the offence may be dealt with as a capital crime, or as its abetment with or without the addition of this offence." In the latter judgment, it has been stated that charges of murder and abduction to murder should be kept distinct and the evidence bearing on each should be separately summed up.

Professor G.L Peiris has expressed his view in his book, ***"Offences under the Penal Code of Sri Lanka"*** that it must be proved that the purpose of murder was entertained at the time inducement or compulsion of the victim took place. Thus, the fact that the purpose was not in fact accomplished does not negate liability for the aggravated

offence, so long as the abduction is proved to have been committed with the intention to commit murder.

As stated by Dr. Gour, if the death of the victim could be proved, most probably the charge of murder can also be proved against the accused. In order to prove a charge of abducting to murder, establishing the intention to murder at the time of abduction is sufficient.

In considering the facts and circumstances of the instant case, it is apparent that the appellants came first in search of Rathnachandra. He and his brother, PW-3 was taken into their custody at late night. The very next morning the 1st appellant came and inform Rathnachandra's father, PW-1 that Rathnachandra escaped from their custody. However, PW-3 stated in his evidence that Rathnachandra was put in a van with him, taken to an unknown place by the 2nd, 3rd, and 4th appellants where PW-3 was tortured. At that place, he heard his brother Rathnachandra's voice. So, it is apparent that the information given by the 1st appellant to PW-1 is false. However, Rathnachandra disappeared thereafter. All the appellants who have given evidence in the High Court did not speak a word about taking Rathnachandra into their custody. What they stated in their evidence was that PW-3 was with his parents at their house, they went to his parents' house and took him to their custody. When all these circumstances are taken together, the only inference that can be drawn is that Rathnachandra was abducted in order to murder.

In the case at hand, the appellants have not involved only in one event. A chain of events has occurred. Common intention of the appellants to commit the offence should be considered in the said perspective. The following judicial authorities clearly demonstrate the various different legal aspects of the common intention.

In the case of ***The Queen V. Mahatun*** - 61 NLR 540 it was held that "Under section 32 of the Penal Code, when a criminal act is committed by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were done by him alone. If each of several persons commits a different criminal act, each act being in furtherance of the common intention of all, each of them is liable for each, such as if it were done by him alone".
It was held further; "To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment".

In ***Sarath Kumara V. Attorney General*** – C.A. No. 207/2008, Decided on 04.04.2014, it was held that "…. once a participatory presence in furtherance of a common intention is established at the commencement of an incident, there is no requirement that both perpetrators should be physically present at the culmination of the event, unless it could be shown by some overt act that one perpetrator deliberately withdrew from the situation to disengage and detach himself from vicarious liability."

According to the aforementioned judicial authorities, a common intention can come into existence without pre-arrangement. Also, there is no requirement that all perpetrators should be physically present at the culmination of the event. Abducting the victim and arresting PW-3 have been done by the same team of police officers including 1st, 2nd, 3rd and 4th appellants. On the circumstances of this case, it cannot be said that there was no pre-arrangement. All five accused-appellants went first in search of Rathnachandra Liyanage, the younger son of PW-1 and PW-2. After taking him into their custody, both PW-1 and PW-2 explained how the appellants treated them. PW-1 saw his son being taken to a van parked a short distance away. He tried to go near

the van, however, one police officer pointed a gun to his chest and shouted "නාකියා ගෙදර ගිහින් දොර වහ ගනින්". This is the initial step of abduction.

In this case, there is ample evidence about the arrest, torture, and detention with regard to the brother of the victim, PW-3. The Court posed the question to the learned ASG whether there is sufficient evidence with regard to the victim to prove that he has been kidnapped or abducted in order to murder. I must say that the learned ASG assisted this Court by pointing out very clearly, accurately and impartially the relevant items of evidence that are necessary to prove the 5th charge.

When the appellants went to PW-3's residence, they got the victim to call his brother PW-3 and then, PW-3 was also taken into custody. As stated previously, PW-3 also identified 2nd, 3rd, 4th and 5th appellants as the persons came with some others to arrest him. Although, he did not speak about 1st appellant's presence at that time, his common intention with the 2nd, 3rd and 4th appellants is apparent from the evidence of PW-1 and PW-2 that the 1st appellant came with the police team when Rathnachandra was taken in to their custody, and in the subsequent morning around 5/5.30, the 1st appellant came with OIC Lalith Mahanama and informed PW-1 that his son (victim) escaped from their custody.

The 1st appellant has not given evidence or not made a dock statement. A witness was called on behalf of him but the said witness has not stated anything material to this case. The 2nd, 3rd, 4th and 5th appellants have given evidence on oaths. The learned High Court Judge has analyzed the defence evidence and correctly concluded that no reasonable doubt casts on the prosecution case due to the defence evidence. Another important matter arises from the evidence of the 2nd, 3rd, 4th and 5th appellants is that they all speak only about the arrest of

PW-3. They never say that they took Rathnachandra into their custody or at least they went in search of him. However, it has been established clearly from the evidence of PW-3, firstly, they took Rathnachandra to their custody and then through him PW-3 was taken into custody, both of them were put in the van and then both were taken to Batalanda.

This is how taking Rathnachandra into their custody becomes an abduction. These sequences of events clearly demonstrate that the 1st appellant as well as the 2nd, 3rd and 4th appellants were liable for the abduction of Rathnachandra with a common intention.

Now, it is to be considered whether the victim was abducted to murder. It must be noted that all five appellants with some other police officers came first in search of Rathnachandra, the victim. They took him in to their custody. As Rathnachandra is not found alive to give evidence, the charge of abduction to murder has to be proved on circumstantial evidence.

As stated previously, there is clear evidence of PW-1, PW-2 and PW-3 regarding the abduction of Rathnachandra. The fact that Rathnachandra was abducted in order to murder has to be established by the circumstantial evidence. The crux of the cases of ***Junaiden Mohomed Haaris V. Hon. Attorney General*** – SC Appeal 118/17, decided on 09.11.2017, ***King V. Abeywickrama*** – 44 NLR 254, ***King V. Appuhamy*** – 46 NLR 128, ***Podisingho V. King*** – 53 NLR 49 and ***Don Sunny V. Attorney General*** (Amarapala murder case) – (1998) 2 Sri L.R. 1 is that it was incumbent on the prosecution to establish that the circumstances the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any reasonable hypothesis of his innocence.

The appellants who took victim in to their custody, took him to his brother's place and asked him to call his brother (PW-3). The victim

called his brother and the brother was also taken in to their custody. Then they took both the victim and his brother, PW-3 to the van where they arrived. (ප්‍ර: සුදු පාට වෑන් එකේ සිටියා, තමා සිටියා, තමාට හොඳට විශ්වාසයි 2 සිට 4 වන විත්තිකරුවන් සිටියා, ඒකේ සිටියා විශ්වාසයි? උ: ඔව්. – page 143 of the appeal brief). As PW-3 was blindfolded, PW-3 stated that neither he saw his brother nor he heard the voice of his brother when he was in the van. However, PW-3 saw his brother (victim) being taken into the van after he was put into the van. Thereafter PW-3 was made to sit in the van and he was blindfolded. (Page 144 of the appeal brief) The relevant items of evidence appear as follows:

ප්‍ර: සුදු පාට වෑන් එකේ මල්ලිව ගෙනිච්චාද?

උ: ඔව්.

Then, PW-3 was taken to an unknown place like a room. The manner in which he was tortured by the 2nd, 3rd, and 4th accused-appellants at that place has been described by PW-3 in his testimony. It is established that the victim who was brought to the van with PW-3, was also brought to this unknown place because it transpires from PW-3's testimony that he spoke to his younger brother and identified his brother's voice even though he did not see him. (මගේ ඇස් දෙක බැඳ තිබුනා. මගේ මල්ලීව එතනට ගෙන්නුවා. ... මල්ලී කතා කලා. කටහඬින් හඳුනා ගත්තා. – Page 122 of the appeal brief) (ප්‍ර: මල්ලීව දැක්කේ නැහැ? උ: මල්ලීව දැක්කේ නැහැ, මාත් සමග කතා කලා. – Page 140 of the appeal brief) Hence, it is apparent that the 2nd, 3rd, and 4th, appellants had put the victim and PW-3 into the van and taken them to an unknown place. PW-3 stated that he found later that it was a place in "Batalanda".

It appears that the learned defence Counsel appeared in the High Court attempted to show that PW-3 had not seen his brother, Rathnachandra at "Batalanda" although he said that he identified his brother by his voice. It is to be noted that voice identification is also a mode of identifying people. However, the evidence of voice identification must be

accepted carefully. Following judicial authorities explain how the voice identification evidence should be analyzed:

In the case of ***Gajraj Singh v. The State of Madhya Pradesh***, Criminal Appeal No. 1645/2003, decided on 28th November 2014, an observation of the case of *Inspector of Police, T. N. vs. Palanisamy Selvan*, (AIR 2009, SC 1012) has been cited as follows: "where the witnesses were not closely acquainted with the accused and claimed to have identified the accused from short replies given by him, evidence of identification by voice is not reliable".

When the witness and the other person is not closely acquainted, voice identification evidence is not reliable. However, it is apparent from the following decisions that if the witness had previous acquaintance with the person and the person is intimately known to the witness, evidence of voice identification can be considered reliable.

In the Indian case of ***Dalbir Singh v. State of Haryana***, Criminal Appeal No. 899 of 2008 decided on 15th May 2008, the accused was the grandson of the witness. Therefore, the voice identification was accepted.

In the case of ***Kishnia and Others v. State of Rajasthan*** - Case No: Appeal (crl) 120 of 1998 decided on 10th September 2004, voice identification has been accepted. In this case, witnesses had previous acquaintance with the appellants as their properties were situated close to the field of the deceased.

In Sri Lankan judgment ***Hatangalage Ariyasena v. The Attorney General*** CA 68/2011 decided on 21st February 2013, the witness *Kalyani* was living in her ancestral house and the accused was living in the same land. So, it was held that *Kalyani* could identify accused's voice. In this case, the decision of the Indian case *Kirpal Singh v. The*

State of Uttar Pradesh - AIR 1965, 712 has been cited as follows: "Where the accused is intimately known to the witness and for more than a fortnight before the date of the offence, he had met the accused on several occasions in connection with the dispute, it cannot be said that identification of the assailant by the witness from what he heard and observed was so improbable."

In view of the aforesaid decisions, the voice identification evidence of PW-3 could be accepted without any reasonable doubt because PW-3 heard his younger brother's voice from the day that he was born.

In the case at hand, the victim, Rathnachandra was taken into the custody of the appellants and put him with his brother, Udayachandra into a van. Thereafter, they were brought to a place at "Batalanda". PW-3 was brutally tortured there by 2nd, 3rd and 4th appellant and he heard his brother shouting. Then, PW-3 was taken to Peliyagoda police station and thereafter to the Punani camp. Although, he was able to come home after about one and a half years, after hearing the voice of his brother, Rathnachandra at Batalanda, PW-3 did not hear him. Neither the brother, PW-3 nor the parents got to see Rathnachandra again in their life time. Rathnachandra disappeared. Although, at the very beginning, the appellants came in search of Rathnachandra and took him into their custody, the subsequent events show that it was an abduction. The very next morning after Rathnachandra had been taken into custody, the 1st appellant came and informed PW-1 that he escaped from their custody. The said information given by the 1st accused-appellant has not been disputed by the defence. When the 1st accused was arrested and produced to the Magistrate Court before the non-summary inquiry was concluded, no application was made by the 1st appellant to recall PW-1 at least to suggest him that the 1st appellant never informed PW-1 that Rathnachandra escaped from their custody. PW-2 was recalled after the arrest of the 1st appellant; however, no such suggestion has been made on behalf of the 1st appellant even to her.

It is apparent from the evidence of PW-3 that Rathnachandra did not escape but he was brought to Batalanda and thereafter he was missing. Therefore, it is apparent that although the 1st appellant was not involved in assaulting PW-3, he was with the 2nd, 3rd and 4th appellants in this entire process of abducting Rathnachandra and his brother, PW-3. As explained previously, the common intention of the 1st, 2nd, 3rd and 4th appellants have been clearly established.

All the aforementioned circumstantial evidence invites to reach the only inference and nothing else that the 1st, 2nd, 3rd, and 4th accused-appellants had the common intention to abduct Rathnachandra in order to murder him. Hence, the learned High Court Judge has correctly convicted the 1st, 2nd, 3rd, and 5th accused-appellants for the 5th charge. As stated above, the 5th accused-appellant should be acquitted.

It must be stated that some of the matters considered in this Judgment have not been considered by the learned High Court Judge. Some of the matters dealt extensively in this Judgment have been considered briefly in the High Court Judgment and the learned Judge has come to some of the findings on slightly different reasons. However, as the conclusion of the learned High Court Judge to convict the 1st, 2nd, 3rd, and 4th accused is correct, I see no reason to interfere with the Judgment of the learned High Court Judge except with the finding in respect of the 5th accused appellant.

Accordingly, the convictions and sentences imposed on the 1st, 2nd, 3rd, and 4th accused-appellants are affirmed.

The conviction and sentence imposed on the 5th accused-appellant is set aside. The 5th accused-appellant is acquitted.

The 1st, 2nd, 3rd, and 4th accused-appellant's appeals are dismissed.
The 5th accused-appellant's appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL