IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal made in terms of Section 33(1)1of the Code of Criminal Procedure Act No.15/1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. No. 243A-C/2006

H.C. Gampaha No. HC 156/2004

1. Palle Kanaknamalage Don Mahesh Vijaya Gunawardena.
2. Kudaduryalage Chaminda
3. Warnakularuriya Arachchige Don Kumara Ratnayake.

Accused-Appellants

Vs.

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

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J**

ACHALA WENGAPPULI J.

COUNSEL : Milinda Sarathchandra(Assigned Counsel) for the 1st Accused-Appellant.
Saliya Peiris P.C. with Rukshan Nanayakkara for the 2nd Accused-Appellant.

A.K.Chandrakanthe for the 3rd Accused-Appellant.

Ayesha Jinasena PC, A.S.G. for the Respondent

ARGUED ON : 01st Nobember2018 & 05th December 2018

DECIDED ON : 22nd March, 2019

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ACHALA WENGAPPULI J.

The three Accused-Appellants (hereinafter referred to as the " 1st to 3rd Appellants") were indicted by the Hon. Attorney General for committing murder of one *Hettiarachchige Sarath Sisira Kumara* on or about 10.08.2000 and, in the course of the same transaction committing robbery of a three-wheeler bearing number 203 - 2324 valued at Rs. 120,000.00. After trial all three Appellants were convicted on both these counts by the High Court of Gampaha and they were accordingly sentenced to death, in

addition to an imposition of a fifteen-year sentence, on account of the offence of robbery.

Being aggrieved by the said convictions and sentences, the Appellants have invoked the appellate jurisdiction of this Court seeking to set them aside on several grounds of appeal.

Learned Counsel for the 1st Appellant, relied on the following grounds of appeal;

a. there was no evidence before the trial Court to convict the 1st Appellant either to the charge of murder or to robbery,
b. the trial Court has erroneously imputed criminal liability on him under Section 32 of the Penal Code,
c. the prosecution has failed to establish the production chain.

In support of the 2nd Appellant's appeal, learned President's Counsel relied on the following grounds of appeal;

a. the conviction of the Appellants is bad since the trial Court had amended the indictment during the course of its judgment and thereby denying them of a fair trial,
b. the conviction of the Appellants is bad since the trial Court found them guilty solely on the prosecution evidence without considering contents in their statements from the dock,
c. the trial Court made an error when it failed to consider the explanation by the 2nd Appellant regarding stains of blood found on his shirt,
d. the trial Court erred in considering evidence when it misled itself in relation to the evidence of discovery of a knife, by

attributing it to the 2nd Appellant, when in fact it was discovered upon the information provided by the 3rd Appellant,

e. the trial Court has failed to consider whether there was common murderous intention among all three Appellants in convicting them for murder upon imputing criminal liability under Section 32 of the Penal Code.

The 3rd Appellant, whilst associating himself with the grounds of appeal raised by the other Appellants, opted to raise an additional ground for himself on the basis that the trial Court has failed to consider the medical evidence that it was improbable to cause the injuries as seen on the body of the deceased by a knife with a bent blade which the prosecution claimed to have been recovered upon information provided by him.

It must be noted at the outset that the prosecution presented a case essentially based on items of circumstantial evidence against the three Appellants. In view of the several grounds of appeal raised by the three Appellants, which are primarily based on the imposition of criminal liability under Section 32 of the Penal Code in respect of the two counts contained in the indictment, it is prudent to consider them in the light of the evidence presented by the prosecution before the trial Court. Therefore, a precis of the evidence for the prosecution as well as for the Appellants, is useful at this stage of the judgment.

The deceased was a resident of *Ihala Karagahamuna* of *Kadawatha* who could repair and drive three wheelers. He did not have a licence apparently being an underage person to apply for one. However, he used

to run hires of the three wheeler bearing number 203 - 2324 from a three wheel park along *Kadawatha Ganemulla* main road, with the consent of its owner *Sirisena* upon rental of Rs. 210.00 a day.

Witnesses *Sumith* and *Janaka,* who were related to the deceased, have stated that the deceased had left their home on 09.08.2000 at about 7.30 p.m. with the said three wheeler. On the following morning they received information from *Kadawatha* Police that the deceased was killed and his vehicle was robbed. They had gone to the place where the dead body was found.

The same night, *Richard Gunaratne,* a *Kepakaru* of the *Kirindiwela Meddegama Rajamaha Viharaya* was preparing tea in the temple kitchen at about 1.00 a.m., when he heard a dog barking which alerted him to some activity in the vicinity. He then heard the sound of someone trying to start up the engine of a three wheeler. There is a public road running along the rear boundary of the temple and as the witness heard this sound, he flashed his torch in that direction. Then a three wheeler had driven away. With day break, he was told that there is a dead body, and found the body of the deceased with bleeding injuries lying by the side of the road, in the direction he heard the noise of the three wheeler the previous night. He then alerted the Police. During cross examination, the witness said that he did not hear any one shouting that night.

PS 21895 *Jayatilaka* was manning a check point at *Warakapola* Junction with three others and at 5.25 a.m. on 10.08.2000, stopped the three wheeler bearing number 203-2324. It came along *Kandy* road from the direction of Colombo. The 1st Appellant was its driver and the other two

Appellants were his passengers. They were questioned by the witness and their conflicting claims arose suspicion in the mind of the witness who then conducted a search on the three Appellants.

The 1st Appellant had a toy pistol with him and the officer noted human blood stains on his shirt, which were still wet. He had some cash and few other documents with him including his driving licence. Upon a search carried out on the 2nd Appellant, the officer recovered a knife and noted its blade had human blood stains . His shirt also had similar stains. The denim trouser worn by the 3rd Appellant also had large "blood" stains on both of its legs.

Upon searching the three wheeler, the witness noted a large patch of blood on its rear deck. He took charge of its revenue licence and certificate of insurance along with several other items including a *kitul* club and two note books.

The three Appellants were thereafter taken to *Warakapola* Police Station and the officer has produced them to the station along with the production items recovered from them after making relevant entries in the Productions Register.

IP *Wijeratne* was the Officer-in-Charge of *Kirindiwela* Police during this time and on 10.08.2000 at 6.20 a.m. received a telephone call informing him of a discovery of a unidentified dead body near *Kirindiwela Meddegama Rajamaha Viharaya.* He proceeded to the place where the body of the deceased was found. It was a lonely place along a roadway, which was surrounded by shrub jungle and thick grass. There were two stab injuries on the chest area of the body with bloodstains. The deceased had a tattoo

which reads as *"Janaka"* and wore a red T shirt and a grey denim trouser. He noted a piece of coir rope with stains like blood near the body.

The *Avasaya* of the resident monks of the temple was located about 75 meters from the place where the dead body was found and he has recorded a statement from *Gunaratne,* the *Kepakaru* of the temple.

At about 10.15 a.m., whilst conducting investigations at the scene he received information from *Warakapola* Police that the three wheeler 203 - 2324 that had been robbed from his area was taken into custody along with three suspects at a check point. He assigned SI *Vander Gert* to take charge of the vehicle and suspects from *Warakapola* Police and had taken steps to record statements from the owner of the three wheeler, and the persons who identified the dead body.

SI *Vander Gert,* took charge of the three Appellants, the vehicle and a multitude of other items of productions, which had already been entered in the Productions Register of *Warakapola* Police, under PR. Nos. 87 to 91 on 10.08.2000 in the afternoon from PC *Piyasena* who was the reservist at that time. He then produced the Appellants and the items of productions to *Kirindiwela* Police under PR Nos. 191 to 195 in the same evening to reservist PS 346 *Yasanayaka.*

IP *Wijeratne* then recorded the statement of 3rd Appellant at *Kirindiwela* Police Station and upon the information provided by him recovered a knife with a bent blade from a place located about 36 feet away from the place where the body was found. The officer has recovered the deceased's wallet from the gutter of the roof of an eatery in *Warakapola* town on 11.08.2000 at about 3.45 p.m. also upon information provided by

the 3rd Appellant This wallet contained several documents including the deceased's identity card, which established the identity of its ownership..

Having made initial investigations, facts were reported to the Magistrate's Court. IP *Wijeratne* then moved Court to direct the Government Analyst to conduct scientific investigations on the items of productions and report back. PS 5690 *Wijebandra* of *Kirindiwela* Police took these items of production to Government Analyst Department and handed them over on 31.08.2000.

Dr. Hewapatirana, who performed the post mortem examination on the body of the deceased observed only two stab injuries on the front of the chest. The 2 inch wide 1st stab injury was located 2 ½ inches below the collar bone and about 1 inch from the mid line towards the right. It had penetrated into the chest cavity through the 3rd and 4th intercostal space, piercing the right lung. The 2nd stab injury was also measured 2 inches wide and was located 3 inches below the collar bone and 1 inch from the mid line towards the left. It also penetrated into the chest cavity through the 4th and 5th inter costal space and pierced the left ventricle of the heart, thereby causing a necessarily fatal injury. Both these stab injuries have penetrated 4 inches deep into the chest cavity and there were 2 litres of blood collected in it. Death of the deceased was the result of "*shock due to bleeding following stab injuries to the chest.*"

There were no other injuries observed by the Medical Officer on the body of the deceased and it is clear that there were no signs of any resistance offered by the deceased at the time of infliction of the two stab injuries nor to suspect that he struggled at the time of its infliction. He was

of the opinion that the two stabs could have been caused when the deceased was held in the same position and his death could well have occurred within 1 to 3 hours since his last meal.

He also expressed his opinion that the two knives recovered from the Appellants could have been used to inflict the said stab injuries and the acts of stabbing were possible within the confined space available in a three wheeler. He is of the opinion that these injuries could have been caused very easily, if the deceased was being held by the others.

The Government Analyst Department received a properly sealed parcel containing several items of productions in relation to the investigations conducted by *Kirindiwela* Police on 28.08.2000 from the Magistrate's Court of *Pugoda,* under case No. BR 276/2000 and delivered to it by PS 5690 *Wijebandara.* The parcel contained items marked as P1 to P10 (as per the questionnaire) which consists of two shirts (P1 and P2), two trousers(P4 and P6), two knives (P3 and P8), one T shirt (P7), one cotton swab (P5), one blood sample (P9) and a control sample (P10).

Report of the Assistant Government Analyst, Ms. *Bandaranayke* indicates that after her analysis of these items of productions, its results revealed that the items marked as P1, P2, P3, P5, P6, P7 and P8 have tested positive for having traces of "human blood". The trouser marked P4 was tested positive only for traces of "blood". No blood was identified by the Government Analyst on the knife marked as P3.

That was basically the evidence presented by the prosecution against the three Appellants. When the trial Court ruled that they have a

case to answer at the close of the prosecution case, the three Appellants made statements from the dock.

It is the position of the 1st Appellant that he had a funeral to attend in the *Warakapola* area and having met the other two Appellants on the evening of "08/08/2000" they consumed some toddy at a friend's house. Then they came to *Warakapola* town and were waiting near the bus stand. There was a barrier nearby. The officers who manned the barrier have called them to the barrier several times but since they did not comply with the direction, one of the officers found fault with them. That escalated into an argument as they were intoxicated liquor. Then they were escorted to the Police where they were questioned about a three wheeler. They have complained to the Officer-in-Charge of the Station who arrived there in the morning. He directed the officers to release the Appellants after recording their statements. At that time *Kirindiwela* Police conveyed information of the death of a person and they suspected the Appellant's involvement. Thereafter they were handed over to *Kirindiwela* Police who kept them for 7 days in detention. They were tortured and heavily beaten up and as a result he has lost a finger. They were finally produced before Court.

The 2nd Appellant claimed that he arrived at "*Warakapola* Stand" and had consumed some alcohol. He was then questioned by two Police officers. He then stated that "they" argued back with the officers which resulted in an assault. He was bleeding from his nose. The three of them were arrested and locked up. He told his version to the OIC. Following morning they were taken to *Kirindiwela* Police and beaten up while questioning them about the three wheeler. He said "yes" to everything he was asked.

In his short statement, the 3rd Appellant denied any knowledge of the incident although he said "yes" to everything the Police asked. He was arrested at *Warakapola*. He protests his innocence since he had no involvement with the incident.

With this brief reference to the evidence that had been placed before the trial Court, it is appropriate at this stage to consider the common ground of appeal of the three Appellants that the trial Court erred in relation to the imposition of criminal liability under Section 32 of the Penal Code.

In relation to the matter before us, being a case based on items of circumstantial evidence, the collective contention of the Appellants could be crystallised into following two issues;

a. whether there was sufficient evidence before the trial Court to convict each of the Appellants for the offence of Robbery under Section 32 liability ?
b. whether there was sufficient evidence before the trial Court to convict the Appellants for the offence of Murder under Section 32 liability ?

In addition, the learned President's Counsel for the 2nd Appellant further contended that there was a serious flaw in the procedure adopted by the trial Court in conducting the trial of the Appellant. The learned President's Counsel invited our attention to the fact that the indictment presented by the Hon. Attorney General, in its original form, had no reference to Section 32 of the Penal Code and the learned High Court Judge on his own motion has amended the indictment in the course of his

judgment to include Section 32 and having recorded their plea to the amended indictment, he pronounced his conclusion by convicting all three Appellants as charged.

It was submitted by the learned President's Counsel that this course of action is in violation of the provisions contained in Section 167 of the Code of Criminal Procedure Act No. 15 of 1979 since it clearly states " *any Court may alter any indictment or charge at any time before judgment is pronounced ...*". Learned President's Counsel further contended that the resultant position is the learned High Court Judge did not consider the evidence of the prosecution in the light of the legal principle laid down in Section 32 and therefore, the conviction based on the said legal principle could not be valid.

Learned Additional Solicitor General who appeared for the Respondent sought to counter the contention of the 2nd Appellant by making reference to the journal entry dated 30.11.2006 and the contents of the judgment. The journal entry of 30.11.2006 indicated that the trial Court has caused to amend the indictment to include a reference to Section 32, prior to the conviction of the Appellants. The reference in the judgment (at p. 454 of the appeal brief) to the amendment could be found in its penultimate paragraph, where the learned High Court Judge found the Appellants guilty to the two counts contained in the indictment which has just been amended.

Learned Additional Solicitor General also referred to the fact that, just after the indictment was amended by the learned High Court Judge, having recorded the Appellants' plea, provided an opportunity for them to

reconsider their respective positions in view of the said amendment. Only upon their reply in the negative that the trial Court has pronounced its judgment convicting them on the two counts.

The procedure adopted by the learned High Court Judge is not the most desirable course of action in such circumstances. It is unfortunate that the trial Court was not assisted by the prosecutor in inviting its attention to the judgment of ***The Attorney General v Munasinghe and three Others*** 69 N.L.R. 241 where five Justices of the then Supreme Court have considered this question and decided to answer it in the following form;

> *"Must there be a reference to section 32 in the charge? Indeed the question referred to this court is in this very form. Formulated thus the question must, I think, be answered in the negative. Section 32 does not create an offence; it is only a section laying down a principle of liability."*

Thus it is clear that the mere absence of any reference to Section 32 of the Penal Code does not prevent a trial Court in imposing criminal liability upon the several accused who are named in the indictment of committing the offence of murder. However, the important question arises in view of the rather late attempt of imposition of criminal liability under Section 32, whether the said amendment has resulted in the failure of the trial Court to consider the evidence in the light of the said principle of law.

In the judgment of ***Wijithasiri and Another v Republic of Sri Lanka*** (1990) 1 Sri L.R. 56, this Court reiterated the principles that had been clearly enunciated in the judgment of ***King v. Assappu and Others*** 50 NLR 324 in relation to the underlying principles that had to be applied by a trial Court where criminal liability under Section 32 of the Penal Code is to be imposed. In ***King v. Assappu and Others*** (ibid) it was held that;

> *"... where the question of common intention arises the jury must be directed that*
>
> *(1) the case of each accused must be considered separately.*
>
> *(2) that the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*
>
> *(3) common intention must not be confused with similar intention entertained independently of each other*
>
> *(4) there must be evidence of either or circumstantial evidence of a pre-arranged plan or some other evidence of common intention.*
>
> *(5) the mere fact of the presence of the co-accused at the time of the offence is not necessarily evidence of common intention unless there is other evidence which justifies them in so holding."*

Perusal of the judgment of the trial Court reveals that it had not specifically referred to any of the above principles in its text. However, quite unmistakably it could be observed from the text and the presentation of the judgment, that the trial Court, in its consideration of the several items of circumstantial evidence, has applied those principles to arrive at the conclusion it eventually did. The trial Court has considered the items of circumstantial evidence that are common to all three Appellants as well as the one which are specific to each Appellant.

The contention of the Appellants is based on the repetitive usage of the word " විත්තිකරුවන් " in the body of the judgment, as a factor indicative that the Court did not consider evidence against each of the Appellants separately. The mere fact of making reference to the Appellants in plural, that factor alone could not be construed to hold that the trial Court has not considered the evidence against each of the Appellants separately. It is clear from the presentation and analysis of evidence undertaken by the trial Court, it has come to the conclusion that all three Appellants were present throughout the entire transaction, from the point of the robbery of the three-wheeler to the point of murder of the deceased. Hence, the reference to the Appellants in plural should be understood in that context.

In ***Rajadheera and Others v Attorney General*** (2008) 2 Sri L.R. 321, it was held that;

> *"Although it is not strictly necessary for the learned trial Judge who has a trained legal mind to state all the principles of law relating to common intention, it must be apparent*

from the judgment that he had directed his mind to the relevant principles of law because especially in a case of murder he should be mindful that he was dealing with liberty of a person. When accused persons are charged on the basis of common intention trial judge or the jury as the case may be must be mindful of the principles laid down in ***King v Assappu"***

Considering the impugned judgment of the trial Court we are satisfied that the learned High Court Judge was mindful of the principles of law involved with common intention as laid down in ***King v Assappu*** and have applied them in determining the guilt or innocence of the Appellants.

Another contention advanced by the Learned President's Counsel for the 2nd Appellant is that there were only two stab injuries on the body of the deceased and from the medical evidence it is clear that such an injury could not have been inflicted using a knife with a bent blade. Therefore, the prosecution is not in a position to prove that the three Appellants have acted with common murderous intention, because, in order to find them guilty of murder, the available evidence, being circumstantial in nature, is not conclusive. He further submitted "if at all they are only guilty to the charge of robbery."

It seems this particular submission of the learned President's Counsel has an underlying notion that it is not possible to convict multiple accused for murder if the evidence against them are of circumstantial in

nature. However, in fairness to the learned Counsel, it must be stated that he did refer to insufficiency of evidence. Learned President's Counsel's contention is based on the apparent unequal participation by the Appellants in the infliction of stab injuries. It was submitted that in view of the fact that the deceased had only two stab injuries, it is virtually an impossibility that three persons were involved in inflicting them using only one knife.

There is no rule that where several accused are charged with committing murder, it is not possible to find them guilty if there were only items of circumstantial evidence against them. As per ***King v. Assappu and Others*** (supra) it has been stressed that there must be evidence to the effect that "*the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*" This pronouncement envisages a situation where there are different degrees of participation with the commission of the offence of murder by the accused. In our opinion, therefore it is rather a question of sufficiency of evidence, irrespective of its nature, whether they are direct or circumstantial.

What is expected of a prosecution in imposing criminal liability under Section 32 has been considered in greater detail in the judgment of ***The Attorney General v Munasinghe and three Others*** (supra) in the following manner;

> *"Where more persons than one are involved in the commission of one offence there are some cases in which there is what appears to be equal participation : for example X and Y may join in bludgeoning A to death each attacking*

with a club ; in this type of case it is more often than not impossible to prove which of the participants inflicted the fatal injury ; details of the participation may be obscure and beyond the reach of any investigator ; but before a case of joint commission of the offence is established it would be necessary for the prosecutor to prove that both X and Y attacked, that one or more of the blows (irrespective of who struck) resulted in the death of A and that each X and Y were acting in furtherance of the common intention of both to cause the death of A. There can also be, seemingly unequal participation: X and Y may join in order to achieve their common intention of causing the death of A, X doing the bludgeoning while Y keeps a lookout to prevent their being surprised by an intruder. This is the type of case in which it has been said of persons who play a role similar to Y's, that " he also serves who only stands and waits ". Y has not done anything which, in the physiological sense, can be said to have caused the death of A. No medical witness will testify that Y's act of keeping watch caused, or was one of the factors contributing to, the death of A. But it is unnecessary to understand the expression " cause death " in section 293 of the Penal Code in this somewhat limited medico-legal sense. The result achieved by X and Y is the death of A. The acts by which that result was intended to be achieved are the totality of the acts of both persons. Some of the acts would never by themselves achieve the ultimate

result intended; they would only be furthering the attainment of that result." (emphasis added)

In view of this clear pronouncement by a divisional bench of the then Supreme Court, when the three Appellants were charged for murder of the deceased, the fact that there were only two stab injuries which could have been inflicted with one knife alone, is not a shield preventing them to be found guilty due to their "*unequal participation*" with the commission of the offence of murder.

In this situation, the resultant position is that it was incumbent upon the trial Court to satisfy itself whether the prosecution has proved that each of the other accused were actuated by a common murderous intention with the doer of the act at the time the offence of murder was committed.

The trial Court has considered the evidence that the shirts worn by the 1st and 2nd Appellants had wet patches of human blood while the trouser worn by the 3rd Appellant had large patches of "blood" when they were arrested at the check point in the early morning with the three-wheeler, which was in the possession of the deceased in the previous night. It considered the noise heard by the *kepakaru* of the temple which seem to suggest that it was at that time the body of the deceased was dumped at the place where it was later found. It was on the same morning the Appellants were arrested.

When the evidence presented by the prosecution is considered, it is reasonable to infer that the deceased was already dead when the *Kepakaru*

heard some activity at 1.00 a.m. near the rear boundary of the temple. Whoever, who came in that three-wheeler, has fled from the scene when the witness flashed his torch in that direction. The body of the deceased would have been already dumped there before the three wheeler was driven away.

The medical evidence is clear that the deceased had his last meal 1 to 3 hours prior to his death due to stabbing. His relations confirmed that he left their home at about 7.30 p.m. in the previous evening. Therefore the death of the deceased would most probably have occurred around 12.00 midnight. His body was transported to the place where it was eventually dumped using his own three-wheeler to transport it as indicative from the large human blood patch on its rear deck. Within 5 hours of the dumping of the dead body, the said three-wheeler was found in the possession of the three Appellants. Only the 1st Appellant was in possession of a driver's license and therefore it can safely be assumed that he drove the vehicle after it was robbed from the deceased that same evening until taken charge by the officers who manned the check point at *Warakapola*.

There is no doubt that the body that was recovered near the temple was that of the deceased named in the indictment and the three-wheeler that was in the possession of the three Appellants was the one that had been forcibly taken from the possession of the deceased that late evening.

There was evidence that the three Appellants were from three different areas of the country and were arrested together few hours after the death of the deceased possessing his three-wheeler. The 1st and 3rd

Appellants had other items belonging to the deceased with them or had knowledge where some of them were.

The 3rd Appellant had knowledge where a knife was located near the place where the dead body was. He also had knowledge of the place where the wallet belonging to the deceased was found. In view of these factors, it could safely be inferred that he had knowledge of these two places because it was he who put them there, in the absence of an explanation offered by him in view of the pronouncement of the apex Court in its judgments of ***Ariyasinghe and Others v Attorney General*** (2004) 2 Sri L.R. 357 at p.386 and ***Wimalaratne & Others v Attorney General*** (1997 1 SLR 309. He also failed to deny the specific item of evidence led by the prosecution in his dock statement

A divisional bench of the then Supreme Court, in its judgment of ***Don Somapala v Republic of Sri Lanka*** 78 N.L.R. 183 held that;

> *"The Court may presume that a man who is in possession of stolen goods, soon after the theft, is either a thief, or has received goods knowing them to be stolen, unless he can account for its possession. This is a presumption which a Court may or may not draw depending on the circumstances of the case. There is no " similar " presumption that a murder committed in the same transaction was committed by the person who had such possession. There is no presumptive proof of this. The burden still remains to prove beyond reasonable doubt that*

the person who committed the robbery did also commit the murder."

The evidence presented before the trial Court and the reasonable inferences that could be drawn from those items of evidence are sufficient to arrive at the conclusion that the Appellants were in possession of the three-wheeler of the deceased. They were in possession of the three-wheeler because they robbed it from the possession of the deceased just few hours before. They transported his body to the place near the temple. That factor justified the finding of guilt of the Appellants to the count of robbery by the trial Court. However, as their Lordships have held in ***Don Somapala v Republic of Sri Lanka*** (ibid) there is no similar presumption that could be drawn in respect of the charge of murder that it was committed by the three Appellants.

In order to justify their conviction for murder there should be sufficient evidence that each of the other two Appellants were actuated by common murderous intention which they shared with the Appellant who stabbed the deceased twice on his chest with a knife.

This Court has already indicated its mind that the body of the deceased was dumped near the temple by the three Appellants as indicative by the evidence to the effect that the 1st Appellant being the only person who had a licence to drive, and the 3rd Appellant's knowledge of the place where a knife with a bended blade was recovered. The 2nd Appellant had a similar knife in his possession at the time of his arrest and its blade had traces of "human blood". This evidence supports a strong

inference that all the Appellants were present when one of them stabbed the deceased twice.

The shirts worn by the 1st and 2nd Appellants also had "human blood" patches on its front side and they were still wet at the time of arrest. So they were in close proximity to the Appellant who stabbed the deceased.

It is the opinion of the medical expert that if the deceased was held by the others that would have facilitated the person who inflicted the two stabs, one of which is necessarily a fatal injury. His opinion is based on the fact that there were no tell-tale signs that the deceased ever struggled or attempted to protect himself from the act of stabbing. The injury pattern is clearly consistent with repeated stabs by one person and they penetrated 4 inches deep. It must be noted that none of the rib bones were cut or damaged. The penetrating stabbing had taken place accurately finding the gap of soft tissue within two ribs, through which the knife blade could easily penetrate. When considered in the light of these, it is reasonable to infer that the person who stabbed the deceased had carefully chosen the most vulnerable area of the chest and made sure the stabs penetrated well into the chest cavity sufficient enough to damage the internal organs.

This is not possible with a moving target. The stab site had to be relatively stable for the person who stabbed to inflict such clean wounds with no drag of the blade. This leads to the inference that therefore he was assisted by some other person or persons.

As already noted wet human blood patches found in the front part of the shirts worn by the 1st and the 2nd Appellants and the trouser worn

by the 3rd Appellant brings them to close proximity to the act of stabbing. It is unfortunate the prosecution deprived the trial Court of the expert opinion of the pattern of the blood patches on the clothing worn by the Appellants by failing to elicit that evidence from the expert who gave evidence before the trial Court. However, the evidence of the presence of multiple blood patches observed on the front part of the two shirts provides for this deficiency and are indicative of splashing of blood when the deceased was stabbed. In addition, the 2nd Appellant was in possession of a knife with human blood stains few hours after the death of the deceased.

Learned President's Counsel submitted that the 2nd Appellant provided an explanation for the blood in his shirt, which fact the trial Court failed to consider. This aspect will be dealt in the latter part of this judgment.

In our view this satisfies the situation discussed in the judgment of ***The Attorney General v Munasinghe and three Others*** (supra) which has been emphasised by us.

Therefore, we are of the firm opinion that there was sufficient, truthful and reliable circumstantial evidence to satisfy the trial Court beyond reasonable doubt that the two remaining Appellants were actuated by a common murderous intention, which they shared with the other Appellant, when he inflicted the necessarily fatal injury on the deceased.

We are satisfied that the available evidence thus far referred to in this judgment are totally inconsistent with the innocence of the Appellants and only consistent with their guilt.

It is time to consider the remaining grounds of appeal of the Appellants.

The remaining three grounds of appeal that had been raised on behalf of the 2nd Appellant, namely that the trial Court has failed to consider the evidence presented on behalf of the Appellants, failure to consider the explanation offered by him for the blood stains on his shirt and the factual error of attributing the discovery of a knife under Section 27 of the Evidence Ordinance to the 2nd Appellant, when in fact it has been recovered upon it being pointed out by the 3rd Appellant, could be considered together since they relates to the general complaint that the trial Court has failed to properly consider their case.

As noted earlier all three Appellants have made statements from the dock. The trial Court, in its impugned judgment made reference to the fact that the three Appellants have made statements from the dock and referred to its contents in the Court's consideration of the evidence as a whole. The trial Court, having considered the contents of statements of the Appellants from the dock, observed that there was no denial of the fact that the blood-stained clothing were recovered from them and noted that they failed to offer any explanation as to the presence of blood stains on them.

In fact the 2nd Appellant, in his dock statement claimed that he was assaulted by two policemen and he was bleeding from his nose.

Learned President's Counsel contended that therefore the 2nd Appellant provided an explanation for the presence of blood stains in his

clothing and the trial Court has totally overlooked this vital piece of evidence from its consideration and thereby seriously prejudiced his right to a fair trial by convicting him without considering his explanation.

It is correct that the trial Court has totally failed to consider the claim of the 2nd Appellant that he was bleeding from his nose after the Police assault at the time of his arrest. This is a serious lapse by the trial Court since it concluded that there was no explanation offered as to the presence of the blood stains on his shirt.

In ***Udagama v Attorney General*** (2000) 2 Sri L.R. 103, this Court, after considering the material before it, held that a failure to consider the dock statement by the trial Court caused serious prejudice to the accused.

This Court must then examine whether such failure by the trial Court has prejudiced the 2nd Appellant. It is noted by this Court, during his rather lengthy cross examination of the police officer who arrested him at the check point, did suggest to the witness that he was assaulted. The officer of course denied such assault while adding that the Appellants acted obediently to their directions during the search and arrest. There was not even a hint of a suggestion to the witness that due to the said assault on the 2nd Appellant, he bled from the nose. Contrary to his statement from the dock, the 2nd Appellant suggested to the officer that those stains were in fact not blood stains but mere stains (පැල්ලම්) on the fabric.

In applying the test of consistency on the evidence of the 2nd Appellant, it is clear that the claim of nose bleeding was thought of only at the late stage of making a statement from the dock and therefore it was cleverly introduced as an item of evidence upon an afterthought,

particularly in view of the incriminating evidence presented by the prosecution. Owing to this factor his evidence should have been totally rejected by the trial Court as it clearly did not result in creating reasonable doubt of the prosecution case.

As to the complaint of factual mix up of the 2nd Appellant, instead of the 3rd Appellant, in relation to the recovery of the knife from the place where the body was found, it is our considered view that it had not caused any prejudice to the 2nd Appellant in view of the fact that he was also in possession of a similar knife, but with a blood-stained blade at the time of his arrest. The trial Court did not utilise this factual mistake to determine that the 2nd Appellant was the person who knew where it was recorded. It only utilised this evidence to form an opinion as to the visual similarity of the two knives.

Lastly the complaint by the 1st Appellant that the prosecution has failed to establish the production chain should be considered. However, the Appellant did not elaborate on the factual basis of his complaint.

The prosecution has led evidence from the relevant prosecution witnesses to establish the fact that from the moment these items of productions were recovered from the three Appellants in the morning of 10.08.2000, they were properly entered in the relevant registers after sealing them in to separate parcels under PR 87 to 91 and handed over officially to the reservist (PS 17171 *Piyasena*) at the *Warakapola* Police Station. These parcels were then received by SI *Vander Gert* of the *Kirindiwela* Police on the same evening who in turn produced them under different PR numbers on the same day. PS 23594 *Yasanayake* received them

from SI *Vander Gert,* as the reservist of his station, under PR 190 - 195 on the same day. PS 5690 *Wijebandra* thereafter handed these production items to the Government Analyst Department on 31.08.2000. Thus, the prosecution has presented evidence of proper custody of the productions in relation to the inward journey until its analysis by Ms. *Bandaranyaka* by calling the relevant witnesses.

Although there was cross examination by all three Appellants of these witnesses there was no evidence even to suggest that there was an opportunity for these items of production to be tampered with or contaminated. What is expected of the prosecution in this regard was considered in ***Perera v Attorney General*** (1998) 1 Sri L.R. 378, in the following terms;

> *"It is a recognised principle that in a case of this nature, the prosecution must prove the productions had been forwarded to the Analyst from proper custody, without allowing any room for any suspicion that there had been no opportunity for tampering or interfering with the productions till they reach the Analyst."*

We are satisfied that the evidence that had been placed before the trial Court are sufficient to prove this requirement that the production items were not tampered or interfered with until its analysis at the Government Analyst Department. In any event , if we were to ask the question from ourselves *" whether on the evidence, a reasonable jury, properly*

directed on the burden of proof, would without doubt have convicted the appellant?" as their Lordships did in ***Mannar Mannan v Republic of Sri Lanka*** (1990) 1 Sri L.R. 280, following ***Stirland v. D.P.P.*** 30 Cr. App. Rep. 40, we would also answer it in the affirmative.

In view of the reasoning contained in the preceding paragraphs of this judgment, we are of the view that there is no reason to interfere with the conviction of the Appellants and the sentences imposed on them. Therefore we affirm the conviction and sentences imposed on the three Appellants. Accordingly the appeals of the Appellants stand dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL