IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALISTREPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979, against the Conviction and Sentence imposed by the Hugh Court holden in the Judicial Zone of Colombo by its Judgement dated 26th September 2014.

Democratic Socialist Republic of Sri Lanka

CA Appeal No: 297-301/14 **Complainant**

High Court of Colombo
Case No: HC 4027/07

Vs.

1. Agampodi Gnanasiri De Soyza Jayatilleke
2. Ananda Wickramasinghe Ambepitiy:
3. Rasheed Mohammed Mursheed
4. Bakeer Mohammed Rifaaz
5. Mohammed Subair Fauzool Avami
6. Mohammed Moujool Ameer Irshad alias Mohammed Nazeer Cader
7. Nagoor Adumey Mohammed Nazmi alias Abdul Ibrahim
8. Mohammed Kamil Kuthubdeen
9. Abdul Wadood Mohammed Saafi alias Meera Saibu Liyakan Ali
10. Sinnaiah Subramanium
11. Salawdeen Mohammed Ashroff
12. Mohammed Cassim Mohammed Safeek
13. Mohammed Ismail Mohammed Rizwin
14. Sahadeen Abdulla

accused

And Now Between

5. Mohammed Subair Fauzool Avami
6. Mohammed Moujool Ameer Irshad alias Mohammed Nazeer Cader
8. Mohammed Kamil Kuthubdeen

accused-appellants

Vs.

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

Respondent

Before:	**N. Bandula Karunarathna J. P/CA**
	Sampath Abeykoon J.
	R. Gurusinghe J.
Counsel:	Mahendra Kumarasinghe, AAL with Ms. H.L. Dhammika Nishanthi, AAL and Navindu Kalansooriya, AAL for the 5th accused-appellant
	Rienzie Arsecularatne PC, with Eranga Yakandawala AAL, Punsisi Gamage AAL, Thilina Punchihewa AAL, Udara Muhandiramge AAL, Sasheen Arsekularatne AAL, Namal Karunarathna AAL, Thejitha Koralage AAL, Chamindri Arsecularatne, AAL for the 6th accused-appellant
	Mr. Zuhair, PC with Channa Bakmeewela, AAL, Udayanthi Senevirathna, AAL and Rizwan Uwais, AAL for the 7th accused-appellant
	Kapila Waidyaratne, PC and Niel Unamboowe, PC with Nipuna Jagodaarachchi, AAL, Akila Jayasundara, AAL and Asela Muthumudalige, AAL for the 8th accused-appellant
	Shanil Kularatne, SDSG with Maheshika Silva, DSG for the State
Written Submissions:	By the 5th accused-appellant – 27.04.2021
	By the 6th accused-appellant – 10.10.2023
	By the 7th accused-appellant – 27.04.2021 and 02.03.2022
	By the 8th accused-appellant – 27.04.2021
	By the Respondents – 20.10.2023
Argument on	27.03.2023, 30.03.2023, 03.05.2023, 24.05.2023, 25.05.2023, 26.06.2023,14.07.2023, 26.07.2023 and 26.09.2023
Judgement Delivered On:	13.12.2023.

N. Bandula Karunarathna J. P/CA

The 3rd, 5th,6th,7th and 8th accused-appellants (hereinafter referred to as the appellants) were indicted along with nine others before the High Court of Colombo in terms of, Offences Against Public Property Act No 12 of 1988 for committing criminal misappropriation of nearly Rs. 4.0 billion of Treasury money.

The 14 accused persons are as follows;

(1) A Gnanasiri De Soiya Jayathilake (1 A)
(2) Ananda Wickramasinghe Ambebitiya (2 A)
(3) Rasheed Mohammed Murshid (3 A)
(4) Bakir Mohammed Rifaz (4 A)
(5) Mohammed Zuber Fouzul Awami (5 A)
(6) Mohommed Moudjood Ameer Irshad alias Mohammed Nazeer Carder (6 A)
(7) Nagoor Adumai Mohammed Thasmi alias Abdul Ibrahim (7 A)
(8) Mohammed Kameel Kuthubdeen (8 A)
(9) Abdul Wadood Mohammed Shafi alias Meera Zaibul .Liyakath Ali (9 A)
(10) Sinnaiyah Subramanium (10 A)
(11) Saloudeen Mohammed Ashroff (11 A)
(12) Mohammed Kazeem Mohammed Safeek (12 A)
(13) Mohammed 'smile Mohammed Rizween alias Sulaiman Lebbe Abdul Kareem (13 A)
(14) Sahabdeen Abdulla (14 A)

Attorney General presented an indictment dated 18.09.2007 containing several charges against the above-named accused persons.

The 1st accused-appellant was indicted on 08.09.2007 together with thirteen other accused persons, before the High Court of Colombo, on thirty-four counts of aiding and abetting, conspiring and the commission of misappropriation of public funds, punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

The charges against the accused persons are as follows;

1. During the period of 15.11.2002 to 15.08.2004 in Colombo the accused with Dharmandasa Rajapakshage Neville Shantha Watthala deniya who is now deceased and others unknown to the prosecution, in order to commit the offence of criminal misappropriation of monies belonging to Inland Revenue Department (IRD,)or aiding and abetting to commit the same and or agreed to commit with a common object and/or conspired to commit or aided and abetted the said offence and as a result of the said conspiracy, committed misappropriation pertaining to public monies to the value of Rs. 399,60,08,151.55 by fraudulently committing misappropriation thereby committed the offence in terms of section 113(b) conspiracy read with section and punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act No 12 of 1982 amended by the Act No 76 of 1988 and No 28 of 1999.

2. During the period of 01.04.2004 and 30.05.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant committed misappropriation of Rs. 70849862.90 of public money by releasing the said monies to

Inimag Kandy (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant acting with the common intention committed misappropriation punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

3. During the period of 26.02.2004 and 21.07.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant committed misappropriation of Rs. 120706670.95 of public money by releasing the said monies to Inimag Apparels (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant acting with the common intention committed misappropriation an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

4. During the period of November 2002 and 31.10.2003 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant committed misappropriation of Rs. 70307970.64 of public money by releasing the said monies to Worldgate Apparels (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

5. During the period of November 2003 and 31.08.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3th accused-appellant and the 4th accused-appellant committed misappropriation of Rs. 162625265.20 of public money by releasing the said monies to Worldgate Apparels (Pvt) Ltd. Thereby, 1st accused-appellant, 2nd accused-appellant, 3rd accused-appellant and 4th accused-appellant acting with the common intention committed misappropriation an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

6. During the period of 01.01.2003 and 31.12.2003 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant committed misappropriation of Rs. 76730421.00 of public money by releasing the said monies to World Gate Euro Apparels (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

7. During the period of 01.01.2004 and 31.07.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant committed misappropriation of Rs. 106952245.50 of public money by releasing the said monies to World Gate Euro Apparels (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant and the 5th accused-appellant acting with the common

intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

8. During the period of 01.02.2003 and 31.12.2003 in Colombo and during the same transaction referred to above in count- one, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant and the 5th accused-appellant committed misappropriation of Rs. 93447903.95 of public money by releasing the said monies to South Lanka Garment Industries (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant and the 5th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

9. During the period of February 2004 and 31.08.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant and the 5th accused-appellant committed misappropriation of Rs. 157854483.65 of public money by releasing the said monies to South Lanka Garment Industries (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant and the 5th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

10. During the period of April 2003 and 31.03.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 6th accused-appellant, the 7th accused-appellant and the 8th accused-appellant committed misappropriation of Rs. 175856722.85 of public money by releasing the said monies to Pro Garment. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 6th accused-appellant, the 7th accused-appellant and the 8th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

11. During the period of 01.04.2004 and 31.08.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 6th accused-appellant, the 7th accused-appellant and the 8th accused-appellant committed misappropriation of Rs. 159666571.80 of public money by releasing the said monies to Pro Garment. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 6th accused-appellant, the 7th accused-appellant and the 8th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

12. During the period of 01.10. 2003 and 30.12.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant and the 9th accused-appellant committed misappropriation of Rs. 187936010.95 of public money by releasing the said monies to M.S.L Creations (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-

appellant, 3rd accused-appellant, the 4th accused-appellant and the 9th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

13. During the period of 01.04.2003 and 31.03.2004 in Colombo, the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 106176216.70 of public money by releasing the said monies to Lanka Universal Garments Export. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

14. During the period of 01.04.2004 and 31.08.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 102526612.25 of public money by releasing the said monies to Lanka Universal Garments Export. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

15. During the period of 01.04.2004 and 31.08.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 61231494.00 of public money by releasing the said monies to Lotus Apparels (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

16. During the period of 01.04.2004 and 31.04.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 51402620.55 of public money by releasing the said monies to Lotus Apparels (PVT) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

17. During the period of 01.09.2003 and 30.07.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 144279313.75 of public money by releasing the said monies to Upali Garments (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

18. During the period of 01.05.2003 and 30.04.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 78495985.30 of public money by releasing the said monies to Subramaniam S. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

19. During the period of 01.05.2004 and 31.08.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 54015935.55 of public money by releasing the said monies to Subramaniam S. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

20. During the period of 01.08.2003 and 30.07.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant the 10th accused-appellant and the 11th accused-appellant committed misappropriation of Rs. 150870035.50 of public money by releasing the said monies to Lotus Garments (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 10th accused-appellant and the 11th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

21. During the period of 01.10.2003 and 30.09.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 6th accused-appellant and the 8th accused-appellant committed misappropriation of Rs. 328105163.00 of public money by releasing the said monies to Euro Clothing. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 6th accused-

appellant and the 8th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the public property Act (as amended).

22. During the period of 14.08.2003 and 13.08.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 7th accused-appellant and the 8th accused-appellant committed misappropriation of Rs. 319171745.65 of public money by releasing the said monies to Uni Line Apparels. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 7th accused-appellant and the 8th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

23. During the period of 01.06.2003 and 31.05.2004 in Colombo during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 6th accused-appellant and the 8th accused-appellant committed misappropriation of Rs. 245512851.21 of public money by releasing the said monies to Kobi Apparels. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 6th accused-appellant and the 8th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

24. During the period of 01.06.2004 and 31.08.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 6th accused-appellant and the 8th accused-appellant committed misappropriation of Rs. 101509472.75 of public money by releasing the said monies to Kobi Apparels. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant, the 6th accused-appellant and the 8th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

25. During the period of 01.12.2003 and 30.08.2004 in Colombo, during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 6th accused-appellant, the 7th accused-appellant and the 8th accused-appellant committed misappropriation of Rs. 177112186.50 of public money by releasing the said monies to Lord and Tailor (PVT)Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 6th accused-appellant, the 7th accused-appellant and the 8th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

26. During the period of 01.10.2003 and 30.08.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-

appellant, the 4th accused-appellant, and the 12th accused-appellant committed misappropriation of Rs. 29900194.80 of public money by releasing the said monies to Canbro International (PVT) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, and the 12th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

27. During the period of 01.01.2004 and 30.08.2004 in Colombo and during the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, and the 4th accused-appellant committed misappropriation of Rs. 137823509.95 of public money by releasing the said monies to Minipe Garment (PVT) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant and the 4th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

28. During the period of 01.12.2003 and 30.08.2004 in Colombo and during the same transaction referred to above in the first count the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant and the 14th accused-appellant committed misappropriation of Rs. 188831406.70 of public money by releasing the said monies to Polytex Apparels, Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant and the 14th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

29. During the period of 01.04.2003 and 30.08.2003 in Colombo and the same transaction referred to above in the first count, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, and the 9th accused-appellant committed misappropriation of Rs. 20742238.00 of public money by releasing the said monies to Lord and Tailor (Pvt) Ltd. Thereby, the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant and the 9th accused-appellant acting with the common intention committed misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

30. During the period of 01.05.2004 and 30.08.2004 in Colombo and the same transaction referred to in the first count, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant committed misappropriation of 51976532.00 of public money by fraudulently releasing the said money to KIL Apparel. Thereby, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant acting with the common intention committed the offence of misappropriation punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

31. During the period of 01.04.2004 and 30.07.2004 in Colombo and the same transaction referred to in the first count, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant committed misappropriation of 69938968.00 of public money by

fraudulently releasing the said money to Randunu Garments. Thereby, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant acting with the common intention committed the offence of misappropriation punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

32. During the period of Pt February 2004 and 30.08.2004 in Colombo, during the same transaction referred to in the first count, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant committed misappropriation of 52538002.00 of public money by fraudulently releasing the said money to Fashion Garments. Thereby, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant acting with the common intention committed the offence of misappropriation; an offence punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

33. During the period of 01.04.2004 and 30.08.2004 in Colombo and during the same transaction referred to in the first count, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant committed misappropriation of 71618564.00 of public money by fraudulently releasing the said money to DTN Apparels. Thereby, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant acting with the common intention committed the offence of misappropriation punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).
34. During the period of 1st April 2004 and 30th July 2004 in Colombo and during the same transaction referred to in the first count, the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant committed misappropriation of 69294974.00 of public money by fraudulently releasing the said money to Supreme Garments. Thereby the 1st accused-appellant, the 2nd accused-appellant and the 8th accused-appellant acting with the common intention committed the offence of misappropriation; punishable in terms of section 386 of the Penal Code and section 5(1) of the Public Property Act (as amended).

In the course of a lengthy trial, nearly 150 witnesses gave evidence and nearly 2000 documents had been marked, both by the prosecution and the defence. According to the prosecution version, the entirety of the charges was established through documentary evidence and the testimonies of official witnesses and a few civil witnesses.

Out of the fourteen accused persons who were named in the indictment that was filed in the High Court, several accused were tried in absentia as evidence of absconding was led against them and an order was made by the High Court in terms of section 241 of The Code of Criminal Procedure Act No. 15 of 1979 as amended. Some of the accused persons against whom the trial was held in absentia were arrested after the trial and have served their sentences.

The trial against the appellants was commenced before the High Court Judge of Colombo and at the conclusion of the said trial, the learned High Court Judge had convicted the appellants and sentenced them to jail on 26.09.2014. Being dissatisfied with the said conviction and sentence, the 3rd, 5th,6th,7th and 8th accused-appellants had preferred this appeal to the Court of Appeal seeking to set aside the conviction and sentence imposed upon them.

The 3rd accused-appellant passed away on 15.08.2015 while this appeal was pending and this court decided on 22.06.2020 that the appeal in respect of the 3rd accused-appellant to be abated.

The 7th accused-appellant who served the sentence decided to withdraw the appeal on 11.10.2022. On the direction of this Court, prison officials sent a report on 20.06.2022 indicating how the jail term was reduced while he was serving the said sentence at Mahara Prison. Learned Senior Deputy Solicitor General who appeared on behalf of the Attorney General, confirmed this position and informed this Court that he has no objection to releasing the 7th accused-appellant as he had legally served the sentence in the prison.

The grounds of appeal are as follows;

- The learned Trial Judge had failed to consider the correctness and the validity of the counts and thereby had wrongfully convicted the appellants.
- The learned Trial Judge had erred in law and fact in determining the culpability of the accused-appellants in respect of all counts when there is no evidence placed by the prosecution as to the involvement of the accused-appellants to misappropriate of the total amount of 3.8 billion.
- The learned Trial Judge had failed to determine the admissibility and failed to judicially evaluate the evidence of witnesses Namal Liyanagunawardana (PW 125), Lilesha Athawuda (PW 134) and Rajeev Perera (PW 135), who had no specific knowledge of actual circumstances of the evidence testified and placed by them.
- The learned Trial Judge had failed to properly consider alternative inferences which could be drawn from the available circumstantial evidence against the accused-appellants, thereby denying a fair trial to the accused-appellants.
- The learned Trial Judge had failed to apply his judicial mind to arrive at a finding whether the prosecution had proved its case beyond reasonable doubt.

The indictment was read to the accused and all accused persons pleaded "not guilty" to the charges. The trial commenced thereafter and continued before Justice Sunil Rajapaksha. The judgment was delivered by his successor Justice Kumudini Wickramasinghe. She had recalled K. Rajaratnam (PW 17) - Deputy Commissioner of the Inland Revenue Department ("IRD") and allowed him to be examined and cross-examined. The learned Trial Judge in the judgment had referred to PW 17 as the "main witness" of this case.

Before Justice Sunil Rajapaksha at the trial, the prosecution mainly led the evidence of the following witnesses:

- Rajaratnam- Deputy Commissioner IRD (PW 17)
- Piyadasa Guruge (PW 50)
- Wimal Dharmakeerthi – Auditor of the IRD (PW 24)
- Ravindra Kumara-Officer of the Sri Lanka Customs (PW 22)
- R.M Karunarathe -Board of Investment (PW 38)
- J.M Wazir (PW 153)
- Nalin Edirisinghe- Manager, Pan Asia Bank, Nugegoda Branch (PW 82)
- Mohommed Luthoor -Security Guard (PW 113)
- T.M Sheik -Cousin of Mohomed Thaufeek (PW 186)
- P.S Maharoof -Investigating officer (PW 250)

- Dushyantha Aloysius -Customs Officer (PW 18)
- Wasantha Kumara -Office Assistant of IRD (PW 8)
- Paul Thissa Hettiarachchi —Real Estate Broker for the land in Colombo 07 (PW 48)
- Namal Liyanagunawardena -Asst. Manager, Pan Asia Bank, Kotahena Branch (PW 125)
- Tissa Perera -Tax consultant (PW 228)
- Wasantha Padmalatha -Accounts Clark at the IRD (PW 14)
- Edman Kularathna-Attorney-At- Law (PW 37)
- Mohomed Munir-Attorney-at-Law (PW 27)
- Lilesha Athauda – Cashier, Pan Asia Bank, Kotahena Branch (PW 134)
- Siyumi Fernando - Finance Officer, Pank Asia Bank Kotahena Branch, (PW 128)

The main prosecution witness as specifically mentioned in the judgment - Deputy Commissioner of the IRD (PW 17) Rajarathnam - had testified inter alia mainly with regard to the circumstances in which a VAT (Value Added Tax) claim could emanate and the procedure adopted thereafter at the IRD. According to the evidence of PW 17 Rajarathnam, at the trial, a VAT claim is submitted only when a local manufacturer, manufactures or produces a value-added item for the export market from raw material purchased locally. Such an exporter is entitled to reclaim the VAT which he had incurred to purchase the raw material.

It is evident that, according to the VAT Act No.14 of 2002, for a company or a person to be entitled to claim a VAT refund, he or she must first register with the IRD. In order to register, the applicant must produce a copy of proof of identity with a duly filled VAT 2 form. If an application is with regard to a registered company, then the VAT 2 form must essentially include the Company Registration issued by the Registrar of Companies. Subsequent to the registration, the IRD submits a VAT 20 form to the registered VAT claimant.

Thereafter, the claimant must submit the duly filled VAT 20 form annexed with the details of the locally purchased material, which is referred to as the "purchasing schedule". The said prosecution witness had also stated that when a fresh VAT claim is submitted, an assessor from the IRD consequently visits the manufacturing premises of the applicant to verify the accuracy of the details forwarded by the applicant. Upon the assessment, the IRD processes the VAT refund claim. Then the completed refund is finally authorized and approved by a Deputy Commissioner of the IRD. Thereafter, the authorized refunds are released by way of cheques by the IRD from the Peoples' Bank Account which is maintained by the IRD for the purpose of releasing VAT refunds.

In the indictment, the prosecution mainly alleged that the appellant with others had fraudulently submitted false VAT claims to the IRD and had misappropriated monies received from such claims. In order to establish the alleged offence, the prosecution had led evidence with regard to the submission of fraudulent VAT claims and the approval granted for the same by the assessor: the 2nd accused, Neville Shantha Wattaladeniya (now deceased), and the Deputy Commissioner: the 1st accused of the IRD.

The prosecution also alleged that all accused named in the indictment conspired to misappropriate public funds by submitting false VAT claims and as a result fraudulently obtained 259 cheques. In order to establish the above count, the prosecution had led evidence that the 4th accused had collected 241 cheques from the IRD using forged identifications. Furthermore, Tissa Perera (PW 228) in his evidence had stated and admitted that he had collected 18 cheques from the IRD on behalf of 1st accused-appellant.

The prosecution had also presented testimonies of several other witnesses to exhibit that some of the accused had used their personal current accounts to withdraw the monies obtained from the false VAT claims. At the conclusion of the prosecution case, the learned Trial Judge had called for the defence of all accused. During the case of the defence, the 1st accused-appellant, the 2nd accused-appellant, the 10th accused-appellant, the 11th accused-appellant, the 13th accused-appellant and the 14th accused-appellant, had pleaded guilty to all the charges against them and the learned Trial Judge had convicted and sentenced all the accused who pleaded guilty.

Thereafter, the prosecution continued the case against the other accused persons namely, the 3rd accused-appellant, the 4th accused-appellant, the 5th accused-appellant, the 6th accused-appellant, the 7th accused-appellant, the 8th accused-appellant, the 9th accused-appellant and the 12th accused-appellant. The case against the remaining accused had continued to proceed in absentia and they had been continuously represented.

The 1st accused-appellant, the 2nd accused-appellant, the 10th accused-appellant, the 11th accused-appellant, the 13th accused-appellant and the 14th accused-appellant had pleaded guilty to all counts against them. The learned Trial Judge in the judgment had considered the evidence only against the following accused persons;

3rd accused-appellant,
4th accused-appellant,
5th accused-appellant,
6th accused-appellant,
7th accused-appellant,
8th accused-appellant,
9th accused-appellant and
12th accused-appellant.

Being aggrieved by the judgment of the learned Trial Judge, the 8th accused-appellant preferred the instant appeal to this Court on the following grounds.

i. The learned Trial Judge had failed to consider the correctness and the validity of the counts and thereby had wrongfully convicted the appellant.
ii. The learned Trial Judge has failed to apply her judicial mind to arrive at a finding whether the prosecution has proved its case beyond reasonable doubt.
iii. The learned Trial Judge had reversed the burden of proof, thereby denying the appellant a fair trial.
iv. The learned Trial Judge had failed to consider the plausible alternative inferences drawn from the circumstantial evidence of the prosecution
v. The conviction is contrary to law and against the weight of the evidence.
vi. The learned Trial Judge has failed to properly analyse and legally consider the dubious, unrealistic and improbable evidence of the prosecution witnesses.
vii. The learned Trial Judge has failed to analyse and evaluate the narrative of the defence properly.
viii. The learned Trial Judge has drawn incorrect inferences from the matters in evidence.
ix. The learned Trial Judge has arrived at an incorrect and inappropriate finding without properly considering the testimonial validity and the admissibility of the evidence presented at the trial.

x. The learned Trial Judge has not considered the required and necessarily the best and crucial evidence to arrive at a just and fair decision.

xi. The learned Trial Judge who delivered the judgment had been prejudiced from the commencement of the Trial and had not properly evaluated all the evidence.

According to the available evidence at the trial, the 8th accused-appellant is a proprietor and a businessman who had been involved in several business ventures in Sri Lanka. It is evident that the appellant was a director of K Port (Pvt) Ltd, which initiated the launch of Sri Lanka's first rail-driven dry port in the year 2004. The learned Trial Judge in the judgment had specifically emphasized that the prosecution, in order to establish the alleged counts against the appellant, had mainly relied upon the evidence of the witnesses from the Pan Asia Bank, Kotahena Branch. Namely, Prosecution Witness Namal Liyanagunawadena, in place of (PW 125), The General Manager of Pan Asia Bank, Kotahena Branch Noel Wijendra, Prosecution Witness Lilesha Athawuda, in place of PW 134 Cashier S. Premanath and PW 135 Rajeev Perera.

The prosecution had failed to place the evidence of Noel Wijendra (PW 125) - Manager of the Pan Asia Bank Kotahena Branch - who had been originally listed as a prosecution witness. The prosecution also failed to place the evidence of PW 134 S. Premanath - one of the cashiers of the Pan Asia Bank Kotahena Branch - originally listed as a prosecution witness. Both these persons were reported to have absconded. In the above circumstances, on 03.09.2009, the prosecution had made an application to the learned Trial Judge to substitute PW 125 and PW 134 with Namal Liyanagunawardena and Lilesha Namindi Athawuda to testify and had added them as witnesses. Thereupon, the appellant objected to the said application. However, the learned Trial Judge had decided that the appellant could object to the testimony of the added witnesses at the time of testifying.

The added witness Namal Liyanagunawardena (PW 125) had testified to the effect that the Pan Asia Bank, Kotahena Branch was declared open on 28.11.2003. He had been transferred to the said branch only in the first week of November 2003 and was surprisingly retransferred in August 2004 to the Wattala Branch of Pan Asia Bank. The witness Namal Liyanagunawardena had stated that the appellant Kamil Kuthubdeen and 11 other customers had been invited to the opening ceremony of the Pan Asia Bank Kotahena Branch on 28.11.2003. He further states that the customers who were invited to the opening ceremony had collectively deposited 100 million rupees on the same day.

The prosecution also had led the evidence of added witness Namal Liyanagunawardena to the effect that several current accounts have been opened by individuals allegedly introduced by the appellant. It is important to note that such evidence is solely based on the mandates prepared, endorsed and authorized by the then General Manager of the Pan Asia Bank, Kotahena Branch, namely Mr. Noel Wijendra and the other employees of the said bank including the witness Namal Liyagunawardena. Although Namal Liyagunawardena has stated that the hand-written endorsements of Mr. Noel Wijendra placed on the mandates of the above-mentioned current accounts indicate that the alleged applicants had been introduced by the appellant, by contrast, it is undisputed that there is no signature or handwriting of the appellant on the said mandates.

The prosecution also alleges that the monies misappropriated by the alleged fraudulent VAT refund claims have been deposited to the above current accounts of the applicants "who are allegedly introduced by the appellant". The above evidence is solely based on the "endorsements

placed by Mr. Noel Wijendra". In such circumstances, the learned Trial Judge had inferred and assumed that the appellant and the other accused persons had acted in furtherance of a common design to criminally misappropriate public funds.

Apart from the testimony of the added witness Namal Liyanagunawardena, the prosecution also led the evidence of the other added witness Lilesha Athauda (PW 134), the then cashier of Pan Asia Bank, Kotahena Branch, during the alleged period. She had testified to the effect that at the time of the alleged transactions, the maximum cash vault limit of the Pan Asia Bank, Kotahena Branch, was Rs. 10 million. However, if a necessity arises to pay a larger amount than the maximum cash available at the Bank, the mechanism used by the bank is to make a request for the required amount of money from the Head Office or borrow the said amount from another Branch of Pan Asia Bank.

She had categorically stated that the cheques to allegedly withdraw the misappropriated public monies had been successfully enchased by the drawer. In her testimony, she had also specifically stated that the deposits of the appellants referred to by the prosecution had in fact effectively taken place. However, considering all the evidence placed at the trial, the learned Trial Judge in her determination arrived at an inference that the monies deposited by the appellants had been fraudulently obtained using false VAT claims. However, this was not the only inference that could have been drawn in the circumstances. The inference of the learned Trial Judge was an inference based on inadmissible and unproven facts.

The prosecution also had led the evidence of Attorney-at-Law PW 27 Mohommed Cassim Mohommed Muneer, P.W (37) Edmond Kularatne, Attorney-at-Law, PW 48 Paul Tissa Hettiarachchi, a real estate broker and PW 18 Dushyantha Aloysius, to place evidence with regard to the purchase of land and property by the 1st accused person and his family. The appellant had provided funds to purchase the said properties. The prosecution had also led the evidence of Chinthaka Prasad Kumara (PW 83) and Nalin Edirisinghe (PW 82), the Manager Pan Asia Bank Nugegoda Branch, to place evidence before the court that the appellant had taken part in the introduction of the 13th accused-appellant to the Pan Asia Bank Nugegoda Branch. It is crucial to note that the Manager of the Nugegoda Pan Asia Bank Branch, PW 82, Nalin Edirisinghe in his evidence had specifically stated that it was the 3rd accused person who had introduced the 13th accused person, from which it is clear that the appellant had nothing to do with the introduction of the 13th accused person to the said Nugegoda Branch.

The learned Trial Judge, failing to consider the above material, has arrived at the above inference as the only inference that the appellant together with the other accused persons has connived or acted with the common intention to withdraw the monies illegally obtained by the fraudulent VAT claims.

The learned Trial Judge considering the above evidence had also assumed and inferred that the relationship of the appellants with the 1st accused person establishes a common criminal intention to commit the alleged fraud. From the very outset of her judgment, the learned Trial Judge has wrongfully, arbitrarily and prejudicially identified and labelled the appellant as the "main person" and or the "mastermind" behind the alleged submission of fraudulent VAT claims.

The above finding of the learned Trial Judge has not been established by any admissible evidence against the appellant. The learned Trial Judge in the judgment, considering the evidence placed before the court, has concluded that there is no evidence against the 8th accused-appellant to

prove or establish that he had placed his signature or submitted any fraudulent document. Even so, the learned Trial Judge without a proper legal analysis had continued to presume and infer that the appellant had acted with the other accused to commit the offences as alleged. The learned Trial Judge had failed to consider and determine the admissibility and competency of the added prosecution witness (PW 125) Namal Liyanagunawardena, who had testified with regard to facts and circumstances known only to Mr. Noel Wijendra, the then Manager, Pan Asia Bank, Kotahena Branch.

The learned High Court Judge, without considering evidence elicited from the cross-examination and the objections raised by the 8th accused-appellant and the other accused persons, had wrongfully decided to accept Namal Liyanagunawadena as a competent witness to testify to the acts and actions of Mr. Noel Wijendra. The learned Trial Judge, while stating that the conviction is purely "based on circumstantial evidence", had not properly and legally considered whether the available material was sufficient to establish the only inference that the 8th accused person was involved in committing the offences alleged by the prosecution. Therefore, the benefit of the inaccuracy, insufficiency, inconsistency, inadmissibility and incompetency of the witnesses and their testimonies have not been properly analysed and considered, which should ensure the benefit of the 8th accused-appellant.

The determination by the learned Trial Judge to convict the 8th accused-appellant on counts 30-34 in the indictment is not proper and legal. The prosecution with regard to the above counts had not established any connection of the 8th accused-appellant. The prosecution patently had also not established that the 8th accused-appellant had forwarded any VAT claims from any of the companies named in the counts to obtain public monies nor had he received any monies. Pertaining to counts 30-34, the evidence placed before the court was only with regard to the involvement of the 1st accused person in releasing the fraudulent VAT claims. Also, as per the evidence of the prosecution witness Tissa Perera, the 1st accused was the sole beneficiary of such claims.

The learned High Court Judge had only considered the personal relationship between the 1st accused and the 8th accused-appellant to convict the 8th accused-appellant for counts 30-34 in the indictment and even with regard to the other counts. In the tenth and eleventh counts as alleged by the prosecution, during the period between 01.04.2003 and 31.03.2004 and 01.04.2004 to 31.08.2004, the 8th accused-appellant in connivance with 1st accused-appellant, 2nd accused-appellant, 4th accused-appellant, 6th accused-appellant and 7th accused-appellant had fraudulently released Rs. 175,856,722.85 and Rs. 159,666,571.80 to Pro Garment and thereby misappropriated the said monies.

In relation to counts twenty-one to twenty-five, the prosecution alleged that the 1st and 2nd accused had released and misappropriated monies to the following entities;

- Rs. 328,105,163.00 fraudulently obtained from VAT refunds by "Euro Clothing",
- Rs. 319,171,745.65 fraudulently obtained from VAT refunds by "Uniline Apparels",
- Rs. 245,512,851.21 fraudulently obtained from VAT refunds by "Kobi Apparels",
- Rs. 101,509,472.75 fraudulently obtained from VAT refunds by "Kobi Apparels",
- Rs. 177,112,186.50 fraudulently obtained from VAT refunds by "Lord and Taylor (Pvt) Ltd.

It is evident that the prosecution had not led any evidence to the effect that the 8th accused-appellant had benefited or connived in the commission of the said misappropriation. However, the only evidence placed against the 8th accused-appellant is the alleged introduction of the account holders. Therefore, these counts have not been proved beyond reasonable doubt. The prosecution had only placed evidence against the 8th accused-appellant based on the testimony of Namal Liyanagunawardena, who had testified with regard to the "introduction endorsement" written by the Manager, Noel Wijendra in the mandate of the current accounts opened by the partners and directors of the companies named above.

Even in the said circumstances, the prosecution had not placed any evidence with regard to any relationship between the 8th accused-appellant and any of the alleged account holders. At the trial, there is evidence that the then Manager of the Pan Asia Bank, Kotahena Branch, Noel Wijendra, prior to joining the Pan Asia Bank, was employed as the Manager of the Nations Trust Bank, Colpetty Branch. It is also evidence that the allegedly fraudulent current account holders were prior customers of Nations Trust Bank who were known to Noel Wijendra. Therefore, it is paradoxical to state that the 8th accused-appellant had introduced them to Pan Asia Bank. In such circumstances, the learned Trial Judge had not considered the alternative inferences which could been drawn from the acts and actions of the Kotahena Pan Asia Bank Manager Noel Wijendra and the other employees of the bank, including the prosecution witness Namal Liyanagunawardena.

The learned Trial Judge had also incorrectly assumed the extent of the authority and the influence wielded by the 8th accused-appellant as a customer of the Pan Asia Bank Kotahena Branch, wrongfully and erroneously inferring that the 8th accused-appellant had interfered and intervened with the process of opening of the accounts. Thereafter the transactions in such accounts in circumstances where there is no evidence to show that such customers were ever known to the appellant. Therefore, the learned Trial Judge had only assumed that the 8th accused-appellant was influential in the actions of the Bank Manager Noel Wijendra. The learned Trial Judge had completely disregarded the possible connivance on the part of the bank and its senior officers namely, Namal Liyanagunaweardena, Siyumi Fernando, S. Premanath, Lilesha Athauda and other employees as accessories to the criminal misappropriation committed by the customers.

Even the plea of guilt tendered by the other 8th accused-appellant had been used or had prejudiced the finding of the learned Trial Judge in convicting the 8th accused-appellant for the first count and the other counts in the indictment without a fragment of evidence to prove the 8th accused-appellant had acted in furtherance of a common design. The prosecution had not established a common design on the part of the 8th accused-appellant and any of the other accused persons. The majority of the companies referred to in the indictment were in existence even prior to the time period referred to in the indictment.

Therefore, the allegation against the 8th accused-appellant had not been proved beyond reasonable doubt to establish that the 8th accused-appellant is involved in the conspiracy and in the commission of the alleged offence of misappropriation. The 8th accused-appellant had not been properly and legally convicted based on cogent, proper evidence and reasoning. When the specific counts against the 8th accused-appellant have not been proved beyond reasonable doubt, the conviction of the appellant for committing the offence of conspiracy is completely misconceived and untenable.

In establishing the offence of conspiracy, the following must be borne in mind.

1. The actus reus is agreement and there is no necessity to establish any other act beyond agreement to complete the offence of conspiracy.
2. No overt act needs to be done / object need not be accomplished.
3. Types of agreements relating to conspiracy.
4. There is no necessity to establish direct communication between each and every conspirator.
5. No necessity for the prosecution to establish that the conspirators met physically.
6. The prosecution need not prove that the perpetrators expressly agreed. The agreement can be proved by necessary implication.
7. No necessity for the prosecution to establish that conspirators were equally well informed of the details.
8. Requirement of a Common Design.
9. Applicability of the words "With or without previous concert or deliberation".
10. The Charge of conspiracy can often be proved only by an inference from the subsequent conduct of the parties in committing some overt acts.
11. One conspiracy may contain several acts.
12. Applicability of section 10 of the Evidence Ordinance.
13. Ingredients of section 10 of the Evidence Ordinance.
14. The court must enquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object.
15. Conspiracy is a continuing offence.
16. A co-conspirator is an agent of other conspirators.

Supreme Court of India in Mohd. Khalid vs State Of West Bengal; Appeal (Crl.) 1114 of 2001 provided that “no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof' The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operating for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act.”

In relation to the question of *actus reus*, it has been held in Attorney General Vs Potta Naufer [2007] 2SLR 144 at 162 that the essence of conspiracy lies in the common agreement or concurrence or accord of minds, which is arrived at between the accused. This view was endorsed by Gratiaen J in Cooray Vs AG as follows:

"Under our law as it now stands it is the agreement per se to commit or abet a criminal offence which is intended to be penalized, whether or not an overt act follows the conspiracy, so long as the existence of the conspiracy can be proved... the common concurrence of minds of more minds than one- with a view to achieving an object which is an offence under our law that constitute criminal conspiracy under the Penal Code."

It is stated by Prof. GL Peiris in Offences under the Penal Code pages 71- 74 thus:

"Agreement is an act in advancement of the intention which each person has conceived in his mind. It is the acknowledgement of one another's intention, as opposed to the formation of one's own intent, that is treated as the actus reus of the conspiracy."

The Supreme Court of India in Mohd. Khalid vs State Of West Bengal; Appeal (Crl.) 1114 of 2001 addressed the issue that acts need not be overt as follows.

'The essence of a criminal conspiracy is the unlawful combination and ordinarily, the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co- conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.'

The provisions of sections 120-A and 120-B, IPC have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well settled. Russell on crime (12 Ed. Vol. I, p. 202) states that the gist of the offence of conspiracy then lies, not in doing the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in citing others to do them, but in the forming of the scheme or agreement between the parties, the agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.

Sarkar on evidence on page 193 cites R Vs Aspinall 1876 QBD 48, 58, Queen v. Aspinall [5 (1872) 2 Q. B, D. 48.1. and R. v. Mulcahy [6 L. R. 3 H. L. 306.J.]which held as follows.

"Now first the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence, that any one thing should be done beyond the agreement. The Conspirators may repent and stop; The conspirators may repent and stop ; or they may have no opportunity, or may be prevented, or may fail ; nevertheless, the crime is complete and was completed when they agreed…In other words, if acts are committed in pursuance of the agreement which preceded them, proof of such acts is, on a charge of conspiracy, relevant only in so far as they furnish evidence from which the prior agreement, which is the essential ingredient of the offence concerned, may legitimately be inferred."

King Vs Cooray 51 NLR 433 sheds light on types of agreements relating to the offence of conspiracy and holds that '…such agreements might be made in various ways. There may be one person around whom the rest revolve. The metaphor is the metaphor of the centre of the circle and the circumference. There may be a conspiracy of another kind when the metaphor would rather be that of a chain. A communicates with B, B with C, C with D, and so on, to the end of the list of conspirators…It seems to us that the words " with or without previous concert or deliberation were advisedly introduced into the language of section 113A of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of " agreement " which needs to be proved is an " agreement with a common design " as explained in the judgments to which I have referred. Another argument which was addressed to us was that, if

" agreement " be the vital ingredient of every form of conspiracy contemplated by section 113A, the words " agree to .... act together with a common purpose for or in committing or abetting an offence " would be redundant because they are in effect synonymous with the earlier words " agree to commit or abet an offence ". We are not convinced that the meaning of these phrases is necessarily identical. One can conceive, for instance, of an agreement between A and B to commit acts (of preparation) which, though designed to further the commission of an offence by C, might possibly fall short of the actual abetment of a criminal act. In any event, the mere circumstance that redundant words have been introduced into a statute out of an abundance of caution would not justify an attempt to attribute to the sentence in which those words appear some meaning which, though eliminating redundancy, was not intended by the draftsman. The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made, and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be.'

On the question of whether there is any necessity to establish direct communication between each and every conspirator, it has been held, in R. v. Meyrich [2 21 Cr. A. R. 94.] by Lord Hewart that "In order that persons may conspire together it is not necessary to prove that there should be direct communication between each and all …"

There is no necessity for the prosecution to establish that the conspirators met physically.

In The Queen v. Parnell [1 14 Cox C. C. at p. 515] it was observed that, '… the common law offence of "conspiracy " in England has from time to time been developed and clarified by a high judicial authority, and it is now well established that the kind of " agreement " which is regarded in England as forming the gist of this offence does not necessarily mean that the alleged conspirators " actually met and laid their heads together, and then and there actually agreed to carry out the common purpose".

In that judgment Fitzgerald J. made reference by way of illustration to an unusual case of two guilty " conspirators " who never saw each other until they stood face to face in the dock; "It may be" said the learned Judge "that the alleged conspirators have never seen each other and have never corresponded. One may have never heard the name of the other, and yet by the law, they may be parties to the same common criminal agreement".

The prosecution does not need to prove that the perpetrators expressly agreed. The agreement can be proved by necessary implication. It has been held by the Supreme Court of India in Ram Narain Popli vs Central Bureau Of Investigation Case No.: Appeal (crl.) 1097 of 1999 thus: ' For an offence punishable under section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. The offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means…No doubt in the case of conspiracy, there cannot be any direct evidence. The ingredients of offence

are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.'

In Halsbury's Laws of England (vide 4th Ed. Vold 1, page 44, page 58), the English Law as to conspiracy has been stated thus; "conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court."

In Kehar Singh and Ors. v. The State (Delhi Administration), AIR (1988) SC 1883 at p. 1954, the Supreme Court of India observed:

"Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial."

It is not necessary to establish that all conspirators were equally well informed of the details of the offence. According to Liyanage 67 NLR 203, There must be proof against each conspirator that he had knowledge of the general purpose of the plot and the common design, although it is not necessary that each should have been equally well informed of the details.

In Attorney General Vs Potta Naufer 2007 (2) 144, it was held that "while an agreement is at all times the essence of conspiracy, it does not necessarily contemplate a physical meeting of the conspirators or prior contact and correspondence between or among the accused as being an essential or necessary ingredient to prove a charge of conspiracy. There is no legal requirement regarding a mode of concurrence in the common purpose or the manner in which such concurrence may be established by the prosecution. In a case of conspiracy, it is possible that there could be one person around whom the rest revolves…The prosecution must simply establish an agreement to act together with a common purpose for or in committing an offence. Hearne, J. in Sundaram (4) has stated explicitly that; 'the gist of the offence of conspiracy is agreement…This court further observed that a conjectural interpretation is placed on each isolated act and an inference is drawn from an aggregate of these interpretations. Therefore, the detached acts of conspirators relative to the main design are admissible as steps to establish the conspiracy itself the circumstances attendant on the acts of a conspirator may indicate association with others and as such these circumstances may be availed of as a valid part of the proof of a conspiracy. There must be proof against each conspirator that he had knowledge of the common plot and design although it is not necessary that each should be equally knowledgeable in this regard."

Yashpal v. State of Punjab [1977] SCR 2433 held that "the very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to

achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfiring or over-shooting by some of the conspirators ".

In a similar vein, Slate of Kerala v. P. Sugathan and Anr. 2000] 8 SCC page 203 too held thus:

“Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use."

“There is no necessity for co-conspirators to be equally knowledgeable. But, there should be proof against each conspirator that he had knowledge if the common plot or design.”

As far as the requirement of a common design is concerned, it is necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other or directly consulting together, but that they entered into an agreement with a common design.

This point was highlighted in King Vs Cooray 51 NLR 433 .

"In order that persons may conspire together it is not necessary to prove that there should be direct communication between each and all .... It is necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other or directly consulting together, but that they entered into an agreement with a common design.”

The court was of the view in Mohd. Husain Umar Kochra ETC. Vs. K. S. Dalipsinghji & Anr. ETC; 1970 AIR 45 1969 SCR (3), 130 1969 SCC (3) 429 , R 1979 SC1761 (5A) RF 1991 SC1463 (5) that ‘ In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for the advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons cooperate towards their separate ends without any privity with each other. each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only.’

The applicability of the words "with or without previous concert or deliberation " was explained in King Vs Cooray 51 NLR 433 thus, ‘It seems to us that the words " with or without previous concert or deliberation " were advisedly introduced into the language of section 113A of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the

only form of " agreement " which needs to be proved is an " agreement with a common design " as explained in the judgments to which I have referred.'

Conspiracy is generally proved by circumstantial evidence and subsequent conduct of the parties.

Liyanage 67 NLR 193 at page 206 states that, "conspiracy can ordinarily be proved only by an inference from the subsequent conduct of parties in committing some overt act which tend so obviously towards the alleged unlawful results to suggest that they must have arisen from an agreement to bring them about. On each of the isolated act a conjectural interpretation is placed and from the aggregate of these interpretations an inference is drawn. For this purpose, the detached acts of the different conspirators relative to the main design are admissible as steps to establish the conspiracy itself. It is not, however, necessary that each conspirator should have been in communication with every other."

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence. (See: Bhagwan Swarup Lal Bishan Lal etc. etc. v. State of Maharashtra, AIR (1965) SC 682 at p. 686.

One conspiracy may contain several acts.

In G.L. Peiris — Offences Under the Penal Code (Page 69 the principles applicable may be stated as follows: "So long as the conspiracy to commit, say the offence of criminal misappropriation, the fact that several separate acts of misappropriation were committed, does not suggest the existence of more than one conspiracy."

"A series of acts may be relied on to prove one conspiracy It is probable that the accused persons would commit different acts in pursuance of the conspiracy, but the divergent nature of their acts does not detract from the oneness of the conspiracy in which they are involved."

Sundaram (1943) 25CLW 38 referred to in GL Peiris: Offences under the Penal Code page 62, states thus.

"The gist of the offence of conspiracy is agreement. In this case three distinct acts of cheating were committed in consequence of the agreement arrived at among the accused persons. As far as the charge of conspiracy was concerned, however, it was held that the liability of the accused was for one conspiracy to commit cheating "One agreement to commit cheating does not become three agreements to commit cheating, because, as it transpires, three offences of cheating are committed in pursuance of the agreement."

Section 184 governs joinder of defendants in criminal conspiracy (Page 68 of Offences Under the Penal Code by G.L. Peiris.)

It's states in Sarkar on evidence page 196 Volume 1 citing Babulal Chokkani Vs R 651A, 158 , 1938 2Cal 295, that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy, these acts are committed in the course of the same transaction which embraces the conspiracy and the acts done under it. The common concern and agreement which constitute the conspiracy serve to unify the acts done in pursuance of it

"The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties

should agree to do a single illegal act. It may comprise the commission of a number of acts. Under section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law."

In Yash Pal Mittal v. State of Punjab, [1977] 4 SCC 540 the rule was laid as follows:

'The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. Unity of object but plurality of means and several offences may be committed by some conspirators even unknown to others. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators.'

In Mohammad Usman Mohammad Hussain Maniyar and Ors. v. State of Maharashtra, [1981] 2 SCC 443, it was held that, “for an offence under section 120B IPC, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication."

After referring to some judgments of the United States Supreme Court and of the Supreme Court of India in Yash Pal Mittal v. State of Punjab, [1977] 4 SCC 540, and Ajay Aggarval v. Union of India, [1993] 3 SCC 609 the court in State of Maharashtra v. Som Nath Thapa, [1996] 4 SCC 659 summarized the position of law and the requirements to establish the charge of conspiracy, as under:

"The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use.”

The charge of conspiracy can often be proved only by an inference from the subsequent conduct of the parties in committing some overt acts,

In this regard, it has been held in, Attorney General Vs Potta Naufer 2007 (2) SLR 144 as follows:

" With respect to the degree of proof, it has been held in Queen v Liyanage, that the question is not whether the inference of conspiracy can be drawn but whether the facts are such that they cannot reasonably admit any other inference but that of conspiracy. As the evidence in support of a charge of conspiracy is often circumstantial, the actual facts of the conspiracy may be inferred from the collateral circumstances of the case. A charge of conspiracy can often be proved only by an inference from the subsequent conduct of the parties in committing some overt acts, which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen

from an agreement to bring them about. In Liyanage's case 67 NLR 204 "The question is not whether we can draw the inference of conspiracy but whether the facts are such that, they cannot properly admit of any other inference being drawn from them. We have also to be satisfied that there is an irresistible inference before he is found to have conspired did so conspire. The evidence must show a common plan so as to exclude a reasonable possibility of the acts having been done separately, and connected only by coincidence"

When discussing the applicability of section 10 of the Evidence Ordinance to this matter at hand, it is worth noting what is stated therein.

“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustrations ;

Reasonable ground exists for believing that 'A' has joined in a conspiracy to wage war against the Republic. The facts that B procured arms in Europe for the purpose of the conspiracy,

C collected money in Colombo for a like object,

D persuaded persons to join the conspiracy in Kandy,

E published writings advocating the object in view at Galle,

F transmitted from Kalutara to G at Negombo the money which C had collected at Colombo,

and the contents of a letter written by H giving an account of the conspiracy, are each relevant

, both to prove the existence of the conspiracy and to prove A’s complicity in it, although,

1) he may have been ignorant of all of them, and 2) although the persons by whom they were done were strangers to him, and 3) although they may have taken place before he joined the conspiracy or after he left it.”

Applicability of ingredients of section 10 of the Evidence Ordinance was raised in Sardar Sardul Singh Caveeshar vs State of Maharashtra; Date of judgment :18/03/1963.

" This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression 'in reference to their common intention’ is very comprehensive and it appears to have been designed to give it

a wider scope than the words "in furtherance of in the English law; with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it". Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy."

" In short, the section can be analysed as follows:

(1) There shall be prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; Plea of guilt by IA, 2A and 4A;

(2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other;

(3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them;

(4) it would also be relevant for, the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it;

and (5) it can only be used against a co-conspirator and not in his favour;"

The court must enquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object.

The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to the transmission of thoughts sharing the unlawful design may be sufficient. conspiracy can be proved by circumstances and other materials.

It was observed in State of Bihar v. Paramhans, (1986) Pat LJR 688, that "to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so, so long as it is (known that the collaborator would put the goods or service to unlawful use. See State of Maharashtra v. Som Nath Thapa, JT 1996 4 SC 615."

It was noticed that sections 120-A and 120-B of IPC have brought the law of conspiracy in India in line with English law by making an overt act inessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence is the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must

inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy, some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient.

A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty.

In straightening out the above, I refer to Ajav Agarwal v. Union of India and Ors, JT (1993) 3 SC 203, wherein it was held:

"It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree to the design or object of the conspiracy. conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement or may constitute the means or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones' case that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in Mulcahy v. Reg and House of Lords in unanimous decision reiterated in Quinn v. Leathern: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; punishable of for a criminal object, or for the use of criminal means."

The Supreme Court of India Mohd. Khalid vs. State of West Bengal [2002(7) SCC 3341 (supra) held the legal position thus:

"We cannot overlook that the basic principle which underlies section 10 of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under section 10."

"The general principle is that no person can be made liable for the acts of another except in cases of abetment in criminal proceedings and contract of agency in civil proceedings. But in conspiracy, the persons who take part in the conspiracy are deemed to be the mutual agent or confederates for the purpose of the executive of the joint purpose. [S.R. Myneni Law of Evidence]. In Emperor v. Shafi Ahmed [(1925) 31 Born. 515] It has been held that if two or more persons conspire together to commit an offence, each is regarded as the agent of the other, and just the principal is liable for

the acts of the agent, so each conspirator is liable for what is done by his fellow conspirator, in furtherance of the common intention entertained by both of them. In Badri Rai v. State[AIR 1958 SC 953], it has been held that section 10 of the Evidence Act has been deliberately in order to make such acts or statements of the co-conspirator admissible against the whole body of conspirators, because of the nature of the crime. A conspiracy is hatched in secrecy, and executed in darkness. Naturally, therefore it is not feasible for the prosecution to connect each isolated act or statement of one accused with the acts or statements of the others unless there is a common bond linking all of them together."

Furthermore, it has been held in Attorney General Vs Potta Naufer 2007 (2) SLR 144, as follows.

'Once there is prima facie evidence of conspiracy between certain defendants the acts and declarations of a person party to the conspiracy and done or made before it was completed are admissible under section 10 to all those who were party to it.'

A further ground of appeal submitted is that the learned Trial Judge failed to recognize the legal requirements of common intention in relation to the offences of criminal misappropriation set out in the indictment. In the the application of section 32 of the Penal Code to the facts of the instant case, section 32 of the Penal Code provides that, "Where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if it were done by him alone. "

The law relating to common intention that is applicable in Sri Lanka has been succinctly set out in Galagamage Indrawansa Kumarasiri and Others Vs The Attorney General; S.C. TAB Appeal No. 02/2012 as follows.

'…the law pertaining to common intention has developed greatly since the decision in The King v. Asappu (1950) (50 NLR 324), and thus must be updated prior to consideration. In this regard, the Court endeavours to summarise the law relating to common intention as follows:

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

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

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

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

e. It must be noted that common intention can be formed on the „spur of the moment";

f. The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention;

g. The question whether a particular set of circumstances establish that an Accused person acted in furtherance of common intention is always a question of fact;

h. The Prosecution case will not fail if the Prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred.

i. The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.'

The law in Sri Lanka follows the view expressed by the Privy Council in Barendra Kumar Ghose vs King-Emperor; AIR 1924 Cal 545 in which it was observed that where 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 act as if he did it alone. As per the dictum in King Vs. Mudalihamy; 47 NLR 139 the effect of the application of section 32 is that the casual effectiveness of the act of each accused to produce the harm is no longer treated as a relevant consideration.

The operation of the section preconceives a shared intention by all the accused but does not depart from the principle that each accused is punished based on his or her individual intention. The section also requires that a criminal act be conducted by each of the accused in furtherance of the common intention of all.

There exists an important distinction between a common intention and the same or similar intention or common object. While each of the accused may have a similar intention with a common object in view, this does not attract the application of section 32 of the Code. The same intention becomes a common intention only when it is shared by all. This principle emerges clearly in R Vs. Ranasinghe; 47 NLR 373 and the judgment of Weeramantry J. in Wilson Silva v. The Queen; 76 NLR 414, in which he pronounced that "... the crucial distinction they (the jury) should have in mind was that, even if this was a simultaneous attack such attack should have been in consequence of a sharing of intentions ..."

In a case of murder against all the accused where the accused are sought to be made liable on the basis of section 32, the common intention must necessarily be a murderous common intention. In a similar vein in the instant matter at hand, when criminal misappropriation is concerned as per section 386 of the Penal Code, it must be proved that the accused harboured the relevant degree of dishonesty in misappropriating property.

In King V. Asappu; 50 NLR 324, several persons were accused of being responsible for an attack which caused the death of the victim.

Dias J. in his judgment laid down the rules that in order to justify the inference of common intention there must be evidence, direct or circumstantial, either of pre-arrangement or a prearranged plan or a declaration showing common intention or some other significant fact at the time of the commission of the offence. This principle has also been recognized in the Indian case of Mahbub Shah V. Emperor (1925) (A. C. 118).

The distinction between common intention and common object was emphasized by Basnayake C.J. in Ekmon. In King V. Appuhamy; 46 NLR 128 Sansoni, J. observed that "a common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the offence is committed.

Significantly, in Wasalamuni Richard v The State,76 NLR 534, eyewitness testimony was conclusive only against the 1st and 2nd accused. The evidence against 3rd accused the younger brother of the 1st accused was circumstantial in that he was present on the road at the time of the abduction at the time and place of the killing and at the direction of the 1st accused he prevented the witness

from leaving the scene of the crime. The court in this case held that the circumstantial evidence against him was sufficient in the absence of any explanation tendered by him with regard to his presence, to establish that he acted in furtherance of a common murderous intention shared with the other accused as his presence was a participating presence.

In Weerasinghe v Kathoramahathamby, several indicia were used by the court in coming to a conclusion of common intention. The fact that the accused had arrived together at the scene of the crime, that one accused was carrying an explosive substance and used it without protest from the other accused, that the other accused had taken action in furtherance of their common intention, and that they all made away upon the approach of officers, were considered relevant by a court in determining liability based on common intention.

It is clear that the case against each person must be considered separately and that the application of section 32 of the Code is attracted only upon the fusion of the relevant mens rea by reference to a common intention. While Sri Lankan courts have consistently held that mere presence at the scene of the crime does not by itself support an inference of common intention. Basnayake, C.J. in Vincent Fernando has clarified that this principle does not extend to a person whose act of standing and waiting is itself a criminal act in a series of criminal acts done in furtherance of the common intention of all. Reference is made to the observations of Lord Summers in Barendra Kumar Ghose (supra)that "even if the appellant did nothing as he stood outside the door it is to be remembered that in crimes as in other things, they also serve who only stand and wait."

Section 31 of the Penal Code the word "act" denotes as well a series of acts as a single act. The "presence of the accused" in terms of Section 32 of the Sri Lankan Penal Code and the "presence of the accused" requirement under section 34 of the Indian Penal Code can be compared with the following Indian authorities.

In Tukaram Ganpat Pandare vs the State of Maharashtra on 6 February 1974 the Supreme Court of India observed that mere distance does not free one from liability under Section 34, essentially implying that presence at the scene of the commission of the criminal act is not a necessary requirement to prove common intention. Rather, the essence of the section is "criminal sharing" which may be evidenced either through active presence or even with distance.

Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. In Barendra Kumar Ghosh v. The King- Emperor (1924) 52 IA 40: AIR 1925 PC 1, the Judicial Committee drew into the criminal net those 'who only stand and wait. This does not mean that some form of presence, near or remote, is not necessary, or that mere presence, without more, at the spot of crime, spells culpability. Criminal sharing, overt or covert by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of section 34.

In Ramaswami Ayyangar and Ors vs State of Tamil Nadu, the Supreme Court of India held ‘In the case of an offence involving physical violence, it is essential for the application of S. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. The "act" spoken of in S. 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons" in S. 34, may be construed to mean "when criminal acts are done by several persons". The acts

committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the 'criminal act'. The essence of S. 34 is the simultaneous consensus of the minds of persons participating in the 'criminal action' to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them.'

In Prakash vs State of Madhya Pradesh, the Supreme Court of India held that section 34 of the Indian Penal Code provides for vicarious liability. It reads as under:

"S. 34. When a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as it was done by him alone."

'Before a person can be held liable for acts done by another, under the said provision, it must be established that … (i) there was common intention in the sense of a pre-arranged plan between the two; and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. The reason why the persons having common intention are deemed to be guilty is that the presence of accomplices gives encouragement, support and protection to the person actually committing an act. To attract the provisions of Section 34 IPC, the physical presence of the accused at the place of occurrence need not be proved. He may not be present at the actual scene of occurrence. He may, however, stand guard outside the room, or be ready to warn his companions. His presence at the place of occurrence in a given situation may be found to be sufficient. He must participate in the commission of the crime, but the same does not mean that some overt act must be attributed on his part. His participation may be in one way or the other at the time crime is actually committed.'

Proof of participation by acceptable evidence in certain circumstances would lead to a conclusion that the accused had a common intention to commit the offence. The presence or absence of a community of interests may not be of much significance. Each case, however, has to be considered on its own merit. Facts of each case may have to be dealt with differently. Common intention may develop on the spot. Although a pre-arranged plan and meeting of minds is one of the prerequisites to infer common intention, a prior concert, however, can be inferred from the conduct of the accused. The role played by him, the injuries inflicted or the damage caused and the mode and manner in which the same was done as also the conduct of all the accused are required to be taken into consideration for arriving at a finding as to whether the accused shared a common intention with others or not. Common intention may have to be inferred also from other relevant circumstances of the case. The totality of the circumstances must be taken into consideration in arriving at such a conclusion

Jasdeep Singh Jassu vs The State of Punjab held thus,

'Normally, in an offence committed physically, the presence of an accused charged under Section 34IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case-to-case basis. The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion. There may be cases where all acts, in general, would not come under the purview of Section 34IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be

one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offense. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.'

Suresh v State of U.P. ((2001) 3 SCC 673) held that,

'Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purpose of Section 32IPC. So, the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face-to-face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act, the law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention.

Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention.'

A Division Bench of the Patna High Court in Satrughan Patar v. Emperor, AIR 1919 Pat 111 held that 'it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied."

In Lallan Rai v. State of Bihar, [(2003) 1 SCC 2681, it was observed thus,

"The above discussion in fine thus culminates to the effect that the requirement of the statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused — though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefore."

Chhota Ahirwar v. State of MP., [(2020) 4 SCC 126] emphasizes thus:

" Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were done by all the offenders. This section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The essence of liability under Section 34 is the simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed on the spot as held in Lallan Rai v. State of Bihar, (2003) 1 SCC 268. There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused"

Barendra Kumar Ghose v. King-Emperor (AIR 1925 PC 1): held that "the words of S. 24 are not to be eviscerated by reading them in this exceedingly limited sense. By S. 33 a criminal act in S. 34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S. 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things, "they also serve who only stand and wait". By S. 38 when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself for "that act" and "the act" in the latter part of the section must include the whole action covered by 'a criminal act' in the first part because they refer to it. S. 37 provides that when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to cooperate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

The charges against the 5th accused-appellant are set out in the 1st, 8th and 9th counts of the indictment.

Count 1 - 5th accused, along with the rest of the accused, having conspired to commit criminal misappropriation of public money belonging to the Department of Inland Revenue and, as a result of such conspiracy, having committed criminal misappropriation of a sum of Rs. 3,996,018,151.55 (Rs. 3.9 billion).

Count 8 - 5th accused of having committed criminal misappropriation of a sum of Rs. 93,447,903.95 during the period 01.02.2003 to 31.12.2003 acting with a common intention with the 1st, 2nd and 4th accused.

Count 9 - 5th accused of having committed criminal misappropriation of a sum of Rs. 157,854,483.65 during the period 01.02.2004 to 31.08.2004 acting with a common intention with the 1st, 2nd and 4th accused.

The 5th accused, being the owner of the garment manufacturing company South Lanka Garments (Private) Limited ("South Lanka"), made false claims for Value Added Tax (VAT) refunds paid on the 'inputs' used in the manufacture of his products. The case for the prosecution was that the 5th accused's company, South Lanka Garments, had made false claims for VAT refunds and thereby misappropriated the sums mentioned in the charges. The prosecution attempted to establish that the claims for VAT refunds were false by showing that there was no production at the factory. It was an essential element that the prosecution had to establish.

The 5th accused was tried in absentia. It is clear from the circumstances that the 5th accused was not a fugitive from justice. At the time he left the country, even a statement had not been recorded from him. He had no reason whatsoever to anticipate that a criminal investigation of this nature would take place. He was receiving medical treatment abroad and his condition necessitated his continued stay overseas. It was revealed that at the time the 5th accused left the country, he was not a person wanted by the police. The fact that the police had not even recorded a statement from him, proves this.

The learned counsel for the 5th appellant states that this is different from a situation where a suspect flees the country after institution of action or interrogation by the police. The indictment was presented even without ascertaining his position. This is a serious irregularity which vitiates the charges and proceedings against the 5th accused.

The burden of the prosecution however, the absence of an accused, even where such absence is deliberate and intended to evade liability, would not lessen the burden that lies on the prosecution to prove the case beyond reasonable doubt in accordance with established principles. The absence of the accused does not exempt the prosecution from compliance with any of the requirements of the law with respect to the burden of proof. The prosecution's burden to establish that there was no production at the factory. The most important element the prosecution has to establish is that the claims alleged to have been made by South Lanka for VAT refunds were false. The only way the prosecution could do that was by proving that there was no production using the inputs in respect of which claims were alleged to have been made, either due to the nonexistence of the company or due to nonproduction. In respect of South Lanka, the existence of the company was admitted by the prosecution. It only attempted to establish that there was no production during the period relevant to the charges. Thus, in the case of South Lanka, it was essential for the prosecution to prove that the company did not produce any garments.

The prosecution called three witnesses for this purpose. They were Mohammed Luthuf, Hemalatha Hettiarachchi who was the Grama Niladharini of the area in which the factory of South Lanka was situated, and R.M. Karunarathne, an Executive Director of the Board of Investment. As witness Luthuf had been abroad for a long time including the period relevant to the charges, the prosecution did not proceed to elicit from him about the activities of South Lanka during the period relevant to the charges.

The learned High Court Judge in her judgement has wrongly concluded that this witness has, in fact, testified to the effect that the factory was closed down during the period and that there was no production. This conclusion is grossly contrary to the evidence of the witness. While counts

eight and nine of the indictment relate to the periods 01.02.2003 to 31.12.2003 and 01.02.2004 to 31.08.2004 respectively, the evidence of this witness is that he came to the factory only in 2005.

witness Hemalatha Hettiarachchi speaks only of the situation that prevailed after the commencement of the police investigations which is long after the period relevant to the charges. She states that the CID came to record a statement from her in July 2006 and, under examination-in-chief, states that South Lanka had remained closed for a period of four years by that time.

Under cross-examination the witness admits that she has never gone inside the factory premises and that what she said about its closure is based on information she got from other people who have not been identified by her or called by the prosecution to testify. Page 2 to page 5 were taken after the break on 25.08.2009. In the circumstances, her evidence becomes absolute hearsay. The fact that she is the Grama Niladharini and stating that certain information was ascertained in such an "official capacity" does not make hearsay evidence admissible. It is important to note that such statements have no legal significance. Therefore, the prosecution has failed to establish through this witness that the factory was not in operation during the period relevant to the charges and that therefore, there was no production.

witness Karunaratne from the BOI stated that, based on documents P 222 and P 223 which were computer printouts, there had been no exports by South Lanka during the period relevant to the case. The defence objected to the production of documents P 222 and P 223 as the prosecution had failed to comply with the provisions of the Evidence (Special Provisions) Act No. 14 of 1995. The prosecution contended that it is relying on the provisions of the Electronic Transactions Act No.19 of 2006.

It was argued on behalf of the 5th accused that the Electronic Transactions Act did not enact any provisions that permitted non-compliance with the Evidence (Special Provisions) Act. While the former sets out certain types of electronic documents as validly acceptable in evidence, the latter sets out the mandatory procedure that should be followed for the production of such documents. It was further contended on behalf of the 5th accused person that the Electronic Transactions Act cannot apply to this case as it came into effect only in May 2006 which was long after the period relevant to the indictment. Although the order on the matter was reserved to be made in the final judgement of the High Court case, the Judgement of the learned High Court Judge does not make any ruling on the matter. In the circumstances, documents P 222 and P 223 have been wrongly admitted against the accused-appellants.

Under cross-examination on behalf of the 10th accused this witness has also admitted that he is unable to say anything with regard to the correctness of the information fed into the computer from which reports P 222 and P 223 have been generated. Under cross-examination on behalf of the 5th accused, the witness admits that he does not know anything about the computer system which produced documents P 222 and P 223. In the circumstances, documents P222 and P223 are not admissible.

The prosecution has made no attempt to prove these documents independently of witness Karunaratne's evidence. Therefore, the prosecution has failed to establish through documents P 222 and P 223 that South Lanka was not engaged in production during the period relevant to the charges and that the acceptance of documents P 222 and P 223 by the learned High Court Judge was incorrect.

The prosecution has totally failed to establish that the claims for VAT refunds in question were false, the most important element in the case. This is the most important element that the prosecution must establish, since, without any proof that the claims made were false, a case answerable by the accused does not arise. It was the argument of the learned counsel for the 5th accused-appellant that the case of the 5th accused must be considered separately from others.

It is important to focus whether there was a burden on the prosecution to show that there was "no production" or was the burden on the defence to show that "there was production"? The learned High Court Judge remarks that, as production was a matter within the knowledge of the 5th accused person, the 5th accused should have produced evidence to show production. This is a misinterpretation of the relevant principle. A burden on an accused to establish something within his exclusive knowledge cuts in only where the prosecution has established all relevant ingredients of an offence including the matter in question and cannot be relied upon to supply a missing link in the prosecution case. In other words, the burden shifts to the accused only where there is evidence led by the prosecution that would lead to a contrary conclusion, if not for an explanation by the accused.

The prosecution cannot keep blanks in its case to be filled with the knowledge or assistance of the accused especially `blanks' which the prosecution ought to have found evidence to fill in. The conspiracy charges the prosecution has also failed to establish a meeting of minds between the 5th accused and any of the other accused which is essential to prove a conspiracy. It applies to other appellants too. In the circumstances, the conspiracy charge must fail and it results in the vitiation of the basis on which the charges have been joined.

The joinder of charges is illegal and is highly prejudicial to the accused. The prosecution has also failed to establish a common intention among the 1st, 4th and 5th accused. On that account, too, counts 8 and 9 must fail.

There is no evidence implicating the 5th accused-appellant in any other way. In the absence of proof that the VAT refund claims were false, the prosecution has failed to establish that there was no production during the period relevant to the charges. It is very clear that there is no case against the 5th accused-appellant.

In the circumstances, the 5th accused-appellant should be acquitted and discharged from this case.

In the indictment, the following counts were preferred against the 6th accused appellant who was tried in absentia but defended by a learned counsel.

Count No. 1

> Between 15.11.2002 and 15.08.2004 at Colombo conspiring with the rest of the accused to misappropriate a sum of Rs. 3,996,008,151.55/- (3.9 billion) belonging to the government and thereby committing an offence punishable under section 386 of the Penal Code read with sections 113 (b) and 102 of the Penal Code and section 5(1) of the Public Property Act No 12 of 1982, as amended.

Count No. 10

> Between 01.04.2003 and 31.03.2004 at the aforesaid place and during the course of the same transaction along with the 1st, 2nd, 4th, 7th and the 8th accused fraudulently releasing a sum of Rs. 175,856,722.85/- (175.8 million) belonging to the government to "Progarment

Company", misappropriating same and thereby committing an offence punishable under section 386 of the Penal Code read with section 32 of the Penal Code and section 5(1) of the Public Property. kt No 12 of 1982, as amended.

Count No. 11

Between 01.04.2004 and 31.08.2004 at the aforesaid place and during the course of the same transaction along with the 1st, 2nd, 4th, 7th and 8th accused persons fraudulently releasing a sum of. Rs. 159,666,571.80/- (159.6 million) belonging to the government to "Progarment Company", misappropriating same and thereby committing an offence punishable under section 386 of the Penal Code read with section 32 of the Penal Code and section 5(1) of the Public Property Act No 12 of 1982, as amended.

Count No. 21

Between 01.10.2003 and 30.09.2004 at the aforesaid place and during the course of the same transaction along with 1st, 2nd, 3rd, 4th and 8th accused persons fraudulently releasing a sum of Rs. 328,105,163.00/-(328.1 million) belonging to the government to "Euro Clothing (Pvt) Ltd.," misappropriating same and thereby committing an offence punishable under section 386 of the Penal Code read with section 32 of the Penal Code and section 5(1) of the Public Property Act No 12 of 1982, as amended.

Count No.23

Between 01.06.2003 and 31.05.2004 at the aforesaid place and during the course of the same transaction along with 1st, 2nd, 3rd, 4th and 8th accused persons fraudulently releasing a sum of Rs. 245,512,851.21/-(245.5 million) belonging to the government to "Kobe Apparels Company", misappropriating same and thereby committing an offence punishable under section 386 of the Penal Code read with section 32 of the Penal Code and section 5(1) of the Public Property Act No 12 of 1982, as amended.

Count No. 24

Between 01.06.2004 and 31.08.2004 at the aforesaid place and during the course of the same transaction along with 1st, 2nd, 3rd, 4th and 8th accused persons fraudulently releasing a sum of Rs. 101,509,472.75/-(101.5 million) belonging to the government to the "Kobe Apperals Company", misappropriating same and thereby committing an offence punishable under section 386 of the Penal Code read with section 32 of the Penal Code and section 5(1) of the Public Property Act No 12 of 1982, as amended.

Count No.25

Between 01.12.2003 and 30.08.2004 at the aforesaid place and during the course of the same transaction along with 1st, 2nd, 3rd, 4th and 8th accused persons fraudulently releasing a sum of Rs. 177,112,186.50/-(177.1 million) belonging to the government to "Lord & Taylor (Pvt) Ltd.", misappropriating same and thereby committing an offence punishable under section 386 of the Penal Code read with section 32 of the Penal Code and section 5(1) of the Public Property Act No 12 of 1982, as amended.

The case for the prosecution was that the 3rd to the 14th accused persons or some of them, other than the 10th accused, either singly or jointly on several occasions submitted false VAT refund forms

in the name of five fake business entities and with the connivance of 1st accused and 2nd accused, who were senior officers of the Inland Revenue Department, got VAT refund cheques issued in the names of the said entities and having deposited same in bank accounts specifically opened for that purpose in the name of the said entities defrauded money belonging to the government, namely, the Inland Revenue Department.

The allegation was the same, against the 10th accused person, the false VAT refund claims were made in respect of his ongoing business entities.

In respect of the tenth count of the indictment, the case for the prosecution was that sequel to false VAT refund claim forms being submitted to the Inland Revenue Department, by a business entity, called "Progarments" the following cheques issued in the name of "Progarments" were handed over to 4th accused, a representative of "Progarments", during the period 01.04.2003 to 31.03.2004;

Wasantha Padmalatha (PW 14), an officer of the Accounts Branch at Inland Revenue Department had given evidence regarding the following cheques on the following pages in Book 10 of the proceedings in the appeal brief;

i. Cheque for Rs. 7.0 million marked PF6 (Vide p. 246)
ii. Cheque for Rs: 4.9 million marked PF10 (Vide p. 255)
iii. Cheque for Rs. 5.4 million marked PF14 (Vide p. 263)
iv. Cheque for Rs. 5.8 million marked PF16 (Vide p. 267)
v. Cheque for Rs. 11.9 million marked PF21 (Vide p. 273)
vi. Cheque for Rs. 19.2 million marked PF24 (Vide p. 298)
vii. Cheque for Rs. 25.1 million marked PF28 (Vide p. 301)
viii. Cheque for Rs. 25.6 million marked PF31 (Vide p. 313)
ix. Cheque for Rs. 25.5 million marked PF34 (Vide p. 336)
x. Cheque for Rs. 24.3 million marked PF37- erroneously marked P38 (Vide p. 353)
xi. Cheque for Rs. 27.01 million marked PF40 (Vide p. 361)

When considering the aforesaid cheques, the prosecution's position is that;

PF 6, PF 10, PF 14 and PF 16 were credited to Sampath Bank, Bambalapitiya Branch Current Account No. 061110003214, which is a partnership account, opened in the name of "Progarments" by the following persons;

(a) Mohommed Nazeer Carder, holder of NIC No. 630754100 V
(b) Abdul Ibrahim, holder of NIC No. 601875012 V.

The photocopies of the above NIC submitted at the time of opening the account were marked as PF 60 and PF 60 (i), respectively at the trial. It was revealed by the evidence of M. Dimuthu Sampath, Execute Officer of Sampath Bank. (on pages 872-873 of Book 9 of the appeal brief)

ii. PF 21, PF 24, PF 28 and PF 31 were credited to Nations Trust Bank (NTB), Union Place Branch Current Account No. 006100004003, which is a joint account, opened on 08.08.2003 in the name of "Progarments" of No.7, Subodharama Road, Dehiwela by the following persons;
    (c) Mohommed Nazeer Carder, holder of NIC No. 630754100 V
    (d) Abdul Ibrahim, holder of NIC No. 601875012V.

The photocopies of the above NIC submitted at the time of the opening of the accounts were marked as PF 72 and PF 73 respectively at the trial. It was revealed by the evidence of HDCM Gurukula Adhiththiya, Accounts Officer of NTB. (on pages 892-897 of Book 9 of the appeal brief)

iii. PF 34, PF 37 and PF 40 were credited to the Pan Asia Bank, Kotahena Branch current account No. 428850118, which is a Joint Account, opened on 28.11.2003 in the name of "Progarments" of No.7, Subodharama Road, Dehiwela by the following persons;
   (e) Mohommed Nazeer Carder, holder of NIC No. 630754100 V
   (f) Abdul Ibrahim, holder of NIC No. 601875012 V.

The photocopies of the above NIC submitted at the time of the opening of the account were marked PF 94-3 and PF 94-4 respectively at the trial. It was revealed by the evidence of Namal Liyanagunawardena Assistant Manager of Pan Asia Bank, Kotahena branch. (at page 321 of Book 11 of the appeal brief)

In respect of the eleventh count of the indictment, the case for the prosecution was that sequel to false VAT refund claim forms being submitted to the Inland Revenue Department, by the said business entity called "Progarments" the following cheques issued in the "Progarments" were handed over to representatives of the business entity during the period 01.04.2004 to 31.08.2005; It was revealed by the evidence of Wasantha Padmalatha (PW 14) an officer of the Accounts Branch of the Inland Revenue Department. (on page 321 of Book 10 of the appeal brief)

(1) Cheque for 27.6 million marked PF 43 (Vide page 388)
(2) Cheque for 31.2 million marked PF 46 (Vide page 407)
(3) Cheque for 31.01 million marked PF49 (Vide page 437)
(4) Cheque for 35.1 million marked PF 52 (Vide page 449)
(5) Cheque for 34.6 million marked PF55 (Vide page 467)

When considering the aforesaid cheques, the prosecution's position is that;

i. PF 43, PF 46, PF 52 and PF 55 were credited to the said Pan Asia Bank, Kotahena Branch current account No. 428850118, which is a Joint Account, as aforesaid opened on 28.11.2003 in the name of "Progarments" of No.7, Subodharama Road, Dehiwela by the following persons;

   (a) Mohommed Nazeer Carder holder of NIC No. 630754100 V
   (b) Abdul Ibrahim holder of NIC No. 601875012 V.

In regard to the withdrawals from Sampath Bank Bambalapitiya Account No. 061110003214, there was no evidence that had been led.

It was the prosecution's position that the following withdrawals were made from the said NTB Account bearing No. 006100004003 and the said Pan Asia Bank Account bearing No. 428850118.

Withdrawals from NTB, Union Place Branch Account No. 006100004003 (Joint Account) are as follows;

1. Cheque for a sum of Rs. 3.9 million issued to one Ibrahim on 15.08.2003(PF75)
2. Cheque for a sum of Rs. 4.5 million issued to one Ibrahim on 21.08.2003(PF76)
3. Cheque for a sum of Rs. 3.4 million issued to one Ibrahim on 27.08.2003(PF77)
4. Cheque for a sum of Rs. 6.7 million issued to one Ibrahim (PF78)

5. Cheque for a sum of Rs. 5.2 million issued to one Ibrahim on 25.10.2003(PF79)
6. Cheque for a sum of Rs. 25.5 million issued to R.M Murshid & Company on 07.11.2003 (PF 43)
7. Cheque for a sum of Rs. 4.2 million issued to one M.A Irshad which has been credited to Selan Bank Pettah Bank Account No. 0640547813001 (PF 80)
8. Cash cheque for a sum of Rs. 2.4 million which has been credited to Commercial Bank Foreign Branch Account No. 1390073301 (PF81)
9. Cheque for a sum of Rs. 12 million issued to World Gate Apparels (Pvt)Ltd, 20.11.2003 (PF58)
10. Cheque for a sum of Rs. 13 million issued in favour of H R M Murshid (PF48)
11. Cash Cheque for a sum of Rs. 1.4 million credited to People's Bank Fort Branch Account No. 01011900(PF82)

It was revealed by the evidence of Gurukula Adhiththiya (on pages 900 - 916 of Book 9 of the appeal brief)

Withdrawals from Pan Asia Bank Account Kotahena Branch No. 428850118 (Joint Account)

1. Cash cheque dated 24.12.2003 for Rs. 25 million (PF 95)
2. Cash cheque dated 26.02.2004 for Rs. 24million (PF96)
3. Cash cheque dated 03.03.2004 for Rs. 27 million (PF97)
4. Cash cheque dated 11.03.2004 for Rs. 29.2 million (PF98)
5. Cash cheque dated 21.04.2004 for Rs. 28 million (PF99)
6. Cash cheque dated 14.05.2004 for Rs. 31.5 million (PF100)
7. Cash cheque dated 29.06.2004 for Rs. 31.5 million (PF101)
8. Cash cheque dated 19.07.2004 for Rs. 35 million (PF102)
9. Cash cheque dated 16.08.2004 for Rs. 34.5 million (PF103)

In respect of the twenty-first count of the indictment the case for the prosecution was that sequel to false VAT refund claim forms being submitted to the Inland Revenue Department, by a business entity called "Euro Clothing (Pvt) Ltd", the following cheques issued in favour of "Euro Clothing (Pvt) Ltd", were handed over to representatives of the company during the period 01.10.2003 to 30.09.2004;

It was revealed by the evidence of Wasantha Padmalatha (PW 14) an officer of the Accounts Branch at Inland Revenue Department. (at the following pages in Book 10 of the appeal brief.)

1. Cheque for 3.9 million marked PN7 (Vide page 275)
2. Cheque for 25.09 million marked PN12 (Vide page 297)
3. Cheque for 26.4 million marked PN19 (Vide pages 278 and 325)
4. Cheque for 31.4 million marked PN22 (Vide page 341)
5. Cheque for 33.06 million marked PN25 (Vide page 370)
6. Cheque for 34.1million marked PN28 (Vide page 386)
7. Cheque for 36.1million marked PN31 (Vide page 409)
8. Cheque for 38.1 million marked PN37 (Vide page 451)
9. Cheque for 37.9 million marked PN40 (Vide page 476)

When considering the aforesaid cheques, the prosecution's position was that;

i. PN 7 and PN 12 were credited to Nations Trust Bank (NTB), Union Place Branch current account No. 006100004039. which is a Joint Account, opened on 13.08.2003 in the name of "Euro Clothing (Pvt) Ltd" of No. 76, Jawatta Road, Colombo 05 opened by the following persons;

a) Mohommed Nazeer Carder
b) Abdul Ibrahim.

No photocopies of the above NIC submitted at the time of opening the said Account were not marked at the trial.

It was revealed by the evidence of HDCM Gurukula Adhiththiya, Accounts Officer of NTB. (at page 961 in Book 9 of the appeal brief)

ii. PN 19, PN 22, PN 25, PN 28, PN 31, PN37 and PN 40 together with a cheque for 25.6 million, marked PN14 and a cheque for 35.9 million, marked PN34 were credited to Pan Asia Bank, Kotahena Branch Current Account No. 140428830117, which is a partnership account, opened in the name of "Euro Clothing (Pvt) Ltd" of No. 76, Jawatta Road, Colombo 05 opened by the following persons;

(c) Mohommed Nazeer Carder holder of NIC No. 630754100 V
(d) Abdul Ibrahim holder of NIC No. 601875012 V

The photocopies of the above NIC submitted at the time of opening the account were marked PN 54 and PN 55 respectively at the trial.

It was revealed by the evidence of Namal Liyanagunawardena, Assistant Manager of Pan Asia Bank, Kotahena branch. (On page 321 in Book 11 of the appeal brief)

The prosecution's position is that the following withdrawals were affected from NTB Account No. 006100004039 and the Pan Asia Bank Account No. 14042883017.

Withdrawals from Nations Trust Bank (NTB) Account No. 006100004039 were as follows;

1. Cheque drawn in favour of Haji R M Marshood for Rs. 9.5 million (PN41)
2. Cash cheque dated 08.10.2003 for Rs. 4 million (PN44)
3. Cash cheque dated 23.10.2003 for Rs. 5.7million (PN45)
4. Cash cheque dated 28.10.2003 for Rs. 5.2million (PN46)
5. Cash cheque dated 07.11.2003 for Rs. 4.8 million (PF47)
6. Cash cheque dated 19.01.2004 for Rs. 69,000/- (PN48)

It was revealed by the evidence of Gurukula Adhiththiya (on pages 965- 969 of Book 9 of the appeal brief).

Withdrawals from Pan Asia Bank Account No. 140428830117 were as follows;

1. Cash cheque dated 17.12.2003 for Rs. 40 million (PN57)
2. Cash cheque dated 17.12.2003 for Rs. 7million (PN58)
3. Cash cheque dated 24.12. 2003 for Rs. 3 million (PN59)
4. Cash cheque dated 22.01.2004 for Rs. 1 million (PN60)
5. Cash cheque dated 22.01.2004 for Rs. 17million (PF61)

6. Cash cheque dated 23.02.2004 for Rs. 30 million (PN62)
7. Cash cheque dated 03.03.2004 for Rs. 33 million (PN63)
8. Cash cheque dated 11.03. 2004 for Rs. 84.3 million (PN64)
9. Cash cheque dated 21.04.2004 for Rs. 34.5 million (PN65)
10. Cash cheque dated 14.05.2004 for Rs. 36 million (PN66)
11. Cash cheque dated 20.07.2004 for Rs. 34 million (PN67)
12. Cash cheque dated 27.08. 2004 for Rs. 38 million (PN68)
13. Bank Draft dated 06.09.2004 for Rs. 1.23 million (PN69)

It was revealed by the evidence of Namal Liyanagunawardena, Assistant Manager of Pan Asia Bank, Kotahena branch (on pages 380- 392 of Book 11 of the appeal brief)

In respect of the twenty-third count of the indictment the case for the prosecution was that sequel to false VAT refund claim forms being submitted to the Inland Revenue Department, by a business entity called "Kobe Apparels" the following cheques issued in the name of "Kobe Apparels" were handed over to representatives of the company during the period 01.06.2003 to 31.05.2004;

It was revealed by the evidence of Wasantha Padmalatha (PW 14) an officer of the Accounts Branch of the Inland Revenue Department (at the following pages of Book 10 of the appeal brief).

1. Cheque for 4.7 million marked PQ4 (Vide p. 256)
2. Cheque for 7.9 million marked PQ7 (Vide p. 265)
3. Cheque for 6.8 million marked PQ10 (Vide p. 266)
4. Cheque for 10.9 million marked PQ15 (Vide p. 272)
5. Cheque for 18.7 million marked PQ18 (Vide p. 301)
6. Cheque for 24.4 million marked PQ21 (Vide p. 301)
7. Cheque for 25.3 million marked PQ26 erroneously marked PQ28 (Vide p. 307)
8. Cheque for 25.6 million marked PQ29 erroneously marked PQ39 (Vide p. 328)
9. Cheque for 26.8 million marked PQ32 (Vide p. 354)
10. Cheque for 29.5 million marked PQ35 (Vide p. 370)
11. Cheque for 31.2 million marked PQ38 (Vide p. 377)
12. Cheque for 33.1 million marked PQ41 (Vide p. 407)

When considering the aforesaid cheques, the prosecution's position was that;

i. PQ10, PQ15, PQ18, PQ21 and PQ26 were credited to the Nations Trust Bank (NTB) Head Office, Current Account No. 006100003898, opened on 22.07.2003 in the name of "Kobe Apparels" of No. 57, Vistwyke Mawatha, Colombo 15 opened by the following persons;
    a. Mohommed Nazeer Carder, holder of NIC No. 630754100 V
    b. Abdul Ibrahim, holder of NIC No. 601875012 V

No photocopies of the above NIC submitted at the time of opening the said Account were marked during the trial. (It was revealed by the evidence of HDCM Gurukula Adhiththiya, Accounts Officer of NTB (on page 961 of Book 9 of the appeal brief).

ii. PQ 29, PQ 32, PQ 35, PQ 38 and PQ 49 were credited to the Pan Asia Bank, Kotahena Branch Current Account No. 140428810119, which is a joint current account, opened on 28.11.2003 in the name of "Kobe Apperals" of No. 57, Vistwyke Mawatha, Colombo 15 opened by the following persons;
    a. Mohommed Nazeer Carder, holder of NIC No. 630754100 V

b. Abdul Ibrahim, holder of NIC No. 601875012 V

The photocopies of the above NIC submitted at the time of the opening of the Account were marked PQ 84 and PQ 82 respectively at the trial.

It was revealed by the evidence of Namal Liyanagunawardena Assistant Manager of Pan Asia Bank, Kotahena branch (on page 321 of Book 11 of the appeal brief.)

There was no evidence pertaining to the fate of PQ 4 and PQ 7.

The prosecution's position was that the following withdrawals were effected from the said NTB Account No. 006100003898 and the said Pan Asia Bank Account No 140428810119.

Withdrawals from Nations Trust Bank (NTB) Head Office Account No. 006100003898 was as follows;

a. Cheque for Rs. 19.1 million in favour of Wold Gate Apparels (Pvt)Ltd (PQ53)
b. Cheque for Rs. 18.2 million in favour of Wold Gate Apparels (Pvt)Ltd (PQ54)
c. Cheque for Rs. 25 million in favour of Wold Gate Apparels (Pvt)Ltd (PQ55)
d. Cash cheque dated 23.07.2003 for Rs. 3 million (PQ59)
e. Cash cheque dated 31.07.2003 for Rs. 3.5 million (PQ60)
f. Cash cheque dated 18.08.2003 for Rs. 6.5 million (PQ61)
g. Cash cheque dated 25.08.2003 for Rs. 4.5 million (PQ62)
h. Cash cheque dated 31.10.2003 for Rs. 6 million (PQ63)
i. Cash cheque dated 19.01.2004 for Rs. 337,000.00/- (PQ64)

It was revealed by the evidence of HDCM Gurukula Adhiththiya, Accounts Officer of NTB (on page 944 of Book 9 of the appeal brief).

PQ 64 has been credited to Account No. 064054781300 of a person named Mohommed Moujood Ameer Irshad, whose name is the same as the 6th accused person.

It was revealed by the evidence of Chaminda Jayaprakash Wikrama Ratnayake, Executive Selan Bank (PW 148) (on page 1000 of book 10 of the appeal brief).

Withdrawals from Pan Asia Bank Kotaketana Branch Account No. 140428810119

a. Cash cheque dated 17.12.2003 for Rs. 25 million (PQ86)
b. Cash cheque dated 26.02.2004 for Rs. 26 million (PQ87)
c. Cash cheque dated 203.03.2004 for Rs. 29 million (PQ88)
d. Cash cheque dated 3103.2004 for Rs. 31 million (PQ89)
e. Cash cheque dated 13.05.2004 for Rs. 33 million (PQ90)
f. Cash cheque dated 25.06.2004 for Rs. 35.5 million (PQ91)
g. Cash cheque dated 21.07.2004 for Rs. 34.5 million (PQ92)
h. Cash cheque dated 17.08.2004 for Rs. 34 million (PQ93)
i. Bank Draft dated 19.08.2004. for Rs. 283,493.16 (PQ94)

It was revealed by the evidence of Namal Liyanagunawardena Assistant Manager of Pan Asia Bank, Kotahena branch (on page 419 of Book 11 of the appeal brief).

In respect of the Count No.24 of the indictment, the case for the prosecution was that, sequel to false VAT refund claim forms being submitted to the Inland Revenue Department, by a business

entity called "Kobe Apperals". The following cheques issued in the name of "Kobe Apperals" were handed over to representatives of the company, the 4th accused person during the period 11.06.2004 to 31.08.2004;

It was revealed by the evidence of Wasantha Padmalatha (PW14) an officer of the Accounts Branch of the Inland Revenue Department. (at the pages in Book 10 of the appeal brief)

i. Cheque for 32.9 million marked PQ44 (Vide page 433)
ii. Cheque for 34.5 million marked PQ47 (Vide page 451)
iii. Cheque for 34.01 million marked PQ50 (Vide page 469)

It was the position of the prosecution that the aforesaid cheques were deposited into the said Pan Asia Bank Kotahena Branch Account No. 140428810119.

It appears that the prosecution's position was that the composite proceeds of PQ29, PQ32, PQ35, PQ 38, and PQ 49 which were referred to in count twenty-three and the proceeds of PQ44, PQ47 and PQ50 referred to in count twenty-four have been withdrawn from the said Pan Asia Bank Kotahena Branch Account No. 140428810119 by cheques marked PQ 86, PQ 87, PQ 88, PQ 89, PQ 90, PQ 91, PQ 92, PQ 93 and PQ94 referred to above.

It was revealed by the evidence of Namal Liyanagunawardena, Assistant Manager of Pan Asia Bank, Kotahena branch (on pages 421-428 of Book 11 of the appeal brief).

In respect of count twenty-five of the indictment, the case for the prosecution was that, sequel to false VAT refund claim forms being submitted to the Inland Revenue Department, by a business entity called "Lord & Taylor (Pvt) Ltd". The following cheques issued in the name of "Lord & Taylor (Pvt) Ltd" were handed over to representatives of the company, the 4th accused person during the period 01.12.2003 to 30.08.2004;

It was revealed by the evidence of Wasantha Padmalatha (PW 14) an officer of the Accounts Branch of the Inland Revenue Department. (at the following pages in Book 10 of the appeal brief)

1. Cheque for 12.6 million marked PR23 (Vide page 318)
2. Cheque for 18.7 million marked PR26 (Vide page 341)
3. Cheque for 20.1 million marked PR29 (Vide page 366)
4. Cheque for 22.7 million marked PR34 (Vide page 397)
5. Cheque for 25.6 million marked PR37 (Vide page 409)
6. Cheque for 25.4 million marked PR40 (Vide page 431)
7. Cheque for 26.1 million marked PR43 (Vide page 451)
8. Cheque for 25.6 million marked PR48 (Vide page 462)

The prosecution's position was that the above cheques have been credited to Pan Asia Bank Account No. 140448030116 opened on 22.01.2004 at Pan Asia Bank, Kotahena Branch in the name of "Lord and Taylor (Pvt) Ltd" of No.07, Subhodarama Road, Dehiwela by the following persons;

a. Mohommed Nazeer Carder, holder of NIC No. 630754100 V
b. Abdul Ibrahim, holder of NIC No. 601875012 V

No photocopies of the above NIC submitted at the time of opening the account, were marked during the trial.

It was revealed by the evidence of Namal Liyanagunawardena Assistant Manager of Pan Asia Bank, Kotahena branch (on pages 434-439 of Book 11 of the appeal brief).

It appears that the composite proceeds of the aforesaid cheques have been withdrawn by issuing the following cheques;

(a) Cash cheque dated 27.01.2004 for Rs. 13 million (PR55)
(b) Cash cheque dated 23.02.2004 for Rs. 18 million (PR56)
(c) Cash cheque dated 03.03.2004 for Rs. 20 million (PR57)
(d) Cash cheque dated 14.05.2004 for Rs. 26 million (PR358
(e) Cash cheque dated 17.05.2004 for Rs. 36 million (PR59)
(f) Cash cheque dated 23.06.2004 for Rs. 26 million (PR60)
(g) Cash cheque dated 20.07.2004 for Rs. 26 million (PR61)
(h) Cash cheque dated 16.08.2004 for Rs. 25.5 million (PR62)
(i) Bank Draft date 06.09.2004 for Rs. 0.52 million (PR63)

It was revealed by the evidence of Namal Liyanagunawardena Assistant Manager of Pan Asia Bank, Kotahena branch (on pages 447- 453 of Book 11 of the appeal brief).

The learned counsel for the accused-appellant argued that learned Trial Judge has failed to appreciate that the prosecution hasn't proved beyond reasonable doubt that the person named Mohammed Nazeer Carder, one of the persons who had opened the aforementioned accounts is in fact, Mohammed Moudjood Amir Irshad, (6th accused-appellant). It appears that the prosecution's position has been, that it is the 6th accused-appellant who opened the following bank accounts using the name Mohammed Nazeer Carder and photocopies of an NIC bearing No. 630754100V containing the name Mohammed Nazeer Carder.

The prosecution has named the 6th accused-appellant in the indictment as Mohammed Manjoor Amir Irshas alias Mohammed Nazeer Carder.

a. Account No. 001110003214 at Sampth Bank, Bambalapitiya in the name of "Progarment." (Vide PF 60).
b. Account No.428850118 at Pan Asia Bank, Koahena in the name of "Progarments". (Vide PF94-3).
c. Account No. 140428830117 at Pan Asia Bank, Kotahena in the name of "Euro Clothing". (Vide PN 55).
d. Account No. 140428810119 at Pan Asia Bank, Koahena branch in the name of "Kobe Apparels". (Vide PQ 84).

The evidence of A K Piyatissa of the Registration of Person's Department (PW 2) as per the records maintained by the Registrations of Person's Department, NIC bearing No. 630754100V has been issued to one D Wijepala Karunaratne (at page 160 of Book 13 of the appeal brief). It is clear that the person named Mohammed Nazeer Carder has used photocopies of a forged NIC to open the said accounts. In order to prove the aforesaid Charges number, 10, 11, 21, 23, 24 and 25 against the 6th accused-appellant, it must be established that the person named Mohammed Nazeer Cader is, in fact, the 6th accused-appellant.

In order to establish that the person named Mohammed Nazeer Carder is the 6th accused-appellant, what has been shown to the 6th accused-appellant's wife, Inul Piyaza and the 6th accused-appellant's father, Moujood by the Investigating Officer, Police Sargent Maharoof

(PW250), is a document marked PN 42-1, which is photocopy of a NIC of a person named Mohammed Nazeer Carder, tendered to the NTB Bank at the time of opening the said Bank Account bearing No. 0061004039 in the name of the Euro Clothing(Pvt) Ltd. It was revealed by the evidence of witness Gurukula Adhiththiya (PW 124) (on page 961 of Book 9 of the appeal brief).

Evidence of PS Maharoof (PW 250) is that he showed the document marked PN 42-1 to the said Piyaza and Moujood and they identified the person whose photograph is depicted in PN 42-1. PS Mahroof does not say that Piyaza and Moujoof identified the photograph in PN 42-1 as that of the 6th accused person, Mohammed Moudjood Amir Irshad.

It was revealed by the evidence of PS Maroof (PW 250). (at pages 747-749 of Book 13 of the appeal brief)

It is important to be noted that, PN42-I also has not been marked at the time, although it was shown to PS Maharoof as a document marked as PN 42-1. (at page 748 of book 13 of the appeal brief).

In the circumstances, it is my view that the prosecution has failed to prove beyond reasonable doubt that the person named Mohammed Nazeer Carder is in fact Mohammed Moudjood Amir Irshad, the 6th accused-appellant. The learned Trial Judge in relation to the tenth count on page 479 of Book 17 of the appeal brief has held that the evidence of PW 250 Maharoof establishes that the person named Mohammed Nazeer Carder, who had opened the aforesaid bank accounts, is in fact Mohammed Moudjood Amir Irshad, the 6th accused-appellant.

In regard to the eleventh count, the learned Trial Judge has held that the evidence of PW 250 Maharoof establishes the fact that Mohammed Nazeer Carder who had opened the aforesaid bank accounts is in fact 6th accused-appellant, according to vide page 489 of Book 17 of the appeal brief. In regard to the twenty-first count, above also the learned Trial Judge has held that the evidence of PW 250 Maharoof establishes the fact that Mohammed Nazeer Carder who had opened the aforesaid bank accounts is in fact the 6th accused-appellant, according to page 538 of Book 17 of the appeal brief.

As regards Count No. 23 above, the learned Trial Judge has held that the evidence of PW 250 Maharoof establishes the fact that Mohammed Nazeer Carder who had opened the aforesaid bank accounts is in fact 6th accused-appellant, according to page 556 of Book 17 of the appeal brief. Similarly, in regard to Count No. 24 above the learned Trial Judge has held that the evidence of PW 250 Maharoof establishes the fact that Mohammed Nazeer Carder who had opened the aforesaid bank accounts is in fact 6th accused-appellant (Vide at page 563 of Book 17 of the appeal brief).

In regard to Count No. 25 (on page 572 of Book 17 of the appeal brief) the learned Trial Judge has held that the evidence of P S Maharoof (PW 250) establishes the fact that Mohammed Nazeer Carder who had opened the aforesaid bank accounts is in fact 6th accused-appellant. Accordingly, the learned Trial Judge at pages 479 (re-count 10), 489 (re-count 11), 538(re-count2l), 556(re-count 23), 563(re-count 24), 527(re-count 25) and 626 based on the evidence of the said PW 250 Maharoof has wrongly come to the conclusion that the prosecution proved beyond reasonable doubt that the person named Mohammed Nazeer Carder is in fact Mohammad Moujeed Amir Irshad, the 6th accused-appellant.

Therefore, it is our view that;

a. the prosecution has failed to prove beyond reasonable doubt the person named Mohammed Nazeer Carder is in fact Mohammad Moujeed Amir Irshad, 6th accused-appellant.
b. the learned Trial Judge has got himself mislead on the facts and he could not come in to the conclusion that the prosecution has proved beyond reasonable doubt that the person named Mohammed Nazeer Carder is in fact Mohammad Moujeed Amir Irshad, the 6th accused-appellant.

It is my contention that the learned Trial Judge considered material what did not transpire in evidence to hold that the identity of the 6th accused-appellant has been established by witness Mohammed Saleem Ahamed (PW 131).

The above witness Mohammed Saleem Ahamed (PW 131), *inter alia*, stated that he ran a tyre sales and repair and a wheel alignment shop called "Auto Care" at 87, Union Place, Colombo 02. whilst engaged-in his business he came to know a customer called Mohammed who is a second-hand car dealer and, on the latter's, request he introduced him to the Commercial Bank for the purpose of opening a bank account by signing a document marked PQ 56, which is an application to open a bank Account at Commercial Bank. similarly, he introduced Mohammed to the Sampath Bank for the purpose of opening a bank Account by signing a document marked PF 59, which is an application to open a bank account at Sampath Bank.

The said PQ 56 and PF 59 were not filled at the time he signed the same. when PQ 56 and PF 59 which bore the name Mohammed Nazeer Carder, were shown to him in Court and he said that he did not know that the said Mohammed had a name called Mohammed Nazeer Carder. He also did not know that the said Mohammed had a name called Mohammed Moujood Ameer Irshad. Shown a photocopy of NIC bearing No. 630754100V of Mohammed Nazeer Carder (6th accused-appellant) and a photocopy of NIC bearing No. 601875012V of Abdul Ibrahim (7th accused-appellant), the document marked P 60, which was annexed to the form used to open the said bank accounts, he said he does not know the person in the photocopy of the NIC bearing No. 630754100V, whose name is Mohammed Nazeer Carder but he knows the person in the photocopy of the NIC bearing No. 601875012V and his name, is Abdul Ibrahim (7th accused-appellant) (at pages 630 at 644 and 645 of Book 9 of the appeal brief).

The learned Trial Judge, however, whilst considering the case against the 6th accused-appellant in respect of Count 10 at page 484 of Book 17 of the appeal brief, and in considering the case against 6th accused-appellant in respect of Count 11 at page 493 of Book 17 of the appeal brief, without any evidence has stated;

i. that the said witness Mohammed Saleem Ahamed (PW 131) stated that he introduced Mohammed Nazeer Carder (6th accused-appellant) and Abdul Ibrahim (7th accused-appellant) to the Sampath Bank to open an account in the name of "Progarments" whereas in his evidence is that he does not even know the holder of NIC No. 630754100V, whose name is Mohammed Nazeer Carder.
ii. that the 6th accused-appellant and the 7th accused-appellant requested tyres on credit, on the basis that they knew the 8th accused person very well, and have thereby got themselves misdirected on the facts by considering non-existent evidence against the 6th accused-appellant.

The learned Trial Judge has failed to appreciate that the only connection that the 6th accused-appellant, has had to this transaction was that those cheques have been credited to an account bearing No. 0640547813001 of a person named Mohammed Moudjood Ameer Irshad of 59/3/8, 1st Cross Street, Pettah at Seylan Bank Pettah and that the money so credited is not public property under the provisions of the Offences Against Public Property Act No. 12 of 1982. According to the witness Chaminda Jayaprakash Wikrama Ratnayake, Executive of Seylan Bank Pettah (PW 148), a person named Mohammed Moujood Ameer Irshad of 59/3/8, 1st Cross Street, Pettah had opened the above account, introduced by one Basheer Ahamed and the following cheques have been credited to the said account;

1. Cheque issued from a business entity called "Euro Clothing (Pvt)Ltd" for a sum of 5.2 million on 28.10.2003 (PN 46)
2. Cheque issued from a business entity called "Progarment" for a sum of 4.2 million on 20.11.2003. (PF 80)
3. Cheque issued from a business entity called "Uniline" for a sum of Rs. 530,630.00 on 20.01.2004 (P0 52)
4. Cheque issued from a business entity called "Kobe Apparels" for a sum of 0.33 million on 12.02.2004(PQ 64)

The above evidence does not establish that the said account is in fact that of the 6th accused-appellant for there is no conclusive evidence that the 6th accused-appellant opened the said account and withdrew money from the said account. Even, if it held that the proceeds of the said four cheques, were credited into the said account opened and maintained in fact by the 6th accused-appellant, it is submitted that the prosecution has failed to prove that the money so credited has been withdrawn and used by 6th accused-appellant. The prosecution has failed to prove that the said money is public property within the meaning of the Offences Against Public Property Act No. 12 of 1982.

The learned Trial Judge has failed to appreciate that the evidence led in the case does not establish that the 6th accused-appellant conspired with the rest of the accused persons against whom the indictment has been presented to commit the offence set out in Count 1 of the indictment. The learned Trial Judge on pages 391-439 of the judgement (vide Book 17 of the appeal brief) considered Count No. 1, which is the count of conspiracy. In the said judgement, the count of conspiracy against the 6th accused-appellant and the 7th accused-appellant has been considered on pages 410-415 of Book 17 of the appeal brief.

The said count against the 6th accused-appellant and the 7th accused-appellant has been considered relying on items of circumstantial evidence that has been led by the prosecution against the 6th accused-appellant and 7th accused-appellant. The proper consideration of count No. 1 required the learned Trial Judge to consider whether there was direct or circumstantial evidence against the 6th accused-appellant and the 7th accused-appellant of an agreement between the 1st accused-appellant to the 5th accused-appellant and the 8th accused-appellant to the 14th accused-appellant to misappropriate the sum of Rs. 3,996,008,151.55/- (3.9billion) set out in Count No 1.

Since there wasn't any evidence, either direct or circumstantial, that 6th accused-appellant conspired with the 1st accused-appellant to the 5th accused-appellant and 7th accused-appellant to 14th accused-appellant to misappropriate the aforesaid sum of Rs. 3,996,008,151.55/-

(3.9billion), the conviction entered by the learned Trial Judge against 6th accused-appellant on the basis that he conspired with 1st accused-appellant to 5th accused-appellant and 7th accused-appellant to 14th accused-appellant to misappropriate the aforesaid sum of Rs. 3,996,008,151.55/- (3.9billion) is unlawful and unfair.

The learned Trial Judge, in order to hold that Count No 1 has been proved against the 6th accused-appellant beyond reasonable doubt, has taken into account the fact that the 1st accused-appellant and the 2nd accused-appellant pleaded guilty to the charges. The 1st accused-appellant to counts 1-34 of the indictment (vide page 323 of Book 17 of the appeal brief) and 2nd accused-appellant to Count 1 of the indictment (Vide page 1498-1500 of Book 16 of the appeal brief) prior to the conclusion of the trial, as an item of circumstantial evidence. (Vide page 400 of Book 17 of the appeal brief).

The learned counsel for the 6th accused-appellant argued and submitted taking into account, the fact that the 1st accused-appellant and the 2nd accused-appellant pleaded guilty to charges preferred against them to hold that the 6th accused-appellant conspired with 1st accused-appellant to 5th accused-appellant, and 7th accused-appellant to 14th accused-appellant to commit the offence set out in Count 1 of the indictment is contrary to law and as such the conviction of the 6th accused-appellant in respect of Count No 1, is unlawful on that ground as well.

The learned Trial Judge has not identified what facts he considers as having been proved by the prosecution beyond reasonable doubt for him to come to the unerring conclusion, that from the proven set of facts, the only irresistible conclusion that one can reach is one of guilt against 6th accused-appellant in respect of Count 1. In order to prove a charge of conspiracy under section 113(a) of the Penal Code, the prosecution has to prove that two or more persons agreed to commit or abet or act together with a common purpose for or in committing or abetting an offence whether with or without any previous consort or deliberation.

The learned Trial Judge has failed to identify;

a. whether the 6th accused-appellant agreed with the other accused persons or any of them to commit an offence or
b. whether the 6th accused-appellant abetted the other accused persons or any of them to commit an offence or
c. whether the 6th accused-appellant acted together with a common purpose in committing or abetting an offence.

The learned Trial Judge has failed to bring the case against the 6th accused-appellant, under any of the heads set out in section 113(a) of the Penal Code to constitute the commission of the offence of conspiracy. In the circumstances, it is my considered view that the learned Trial Judge misdirected himself in fact and in law by holding the 6th accused-appellant guilty of the offence of conspiracy set out in the first count of the indictment.

There is no evidence whatsoever that the 6th accused-appellant conspired with all the other accused or any of the other accused to misappropriate the sum of Rs. 3,996,008,151.55/= (3.9billion) and accordingly the conviction entered against the 6th accused-appellant in respect of the first count of the indictment is bereft of evidence. The learned Trial Judge has proceeded on the basis that the prosecution has proved that Mohammed Nazeer Carder who opened the said bank accounts in various banks in the name of "Progarments", "Euro Clothing", "Kobe Apparels"

and "Lord and Taylor", is in fact Mohammed Moujood Ameer Irshad, who has been named as the 6th accused-appellant. In the circumstances, the first count against the 6th accused-appellant hasn't been proved beyond reasonable doubt. This Court has to acquit the 6th accused-appellant from the said count.

Another argument raised by the learned counsel for the 6th accused-appellant was that the trial Judge failed to appreciate that the evidence led by the prosecution does not establish that the 6th accused-appellant shared a common intention with the other suspects mentioned in counts 10, 11, 21, 23, 24 and 25 to commit the said offences. Although counts 10, 11, 21, 23, 24 and 25 have been preferred against the 6th accused-appellant on the basis of common intention. The learned Trial Judge has failed to consider whether the evidence establishes that the 6th accused-appellant, in fact, shared a common intention with each of the other accused persons named in counts 10, 11, 21, 23, 24 and 25 of the indictment; the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 7th accused-appellant and the 8th accused-appellant as far as counts 10, 11 and 25 of the indictment are concerned and the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant and the 8th accused-appellant as far as counts 21, 23 and 24 of the indictment are concerned.

In the circumstances, bringing home the aforesaid charges against the 6th accused-appellant on the basis that he shared a common intention with the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, and the 7th accused-appellant and the 8th accused-appellant in respect of counts 10, 11 and 25 of the indictment and on the basis that the 6th accused-appellant shared a common intention with the 1st accused-appellant, the 2nd accused-appellant, the 3rd accused-appellant, the 4th accused-appellant and the 8th accused-appellant in respect of counts 21, 23 and 24 of the indictment is unlawful and accordingly, it is submitted that the learned Trial Judge has got himself misdirected in facts and in law in finding that 6th accused-appellant is guilty of having committed the aforesaid offences set out in counts 10, 11, 21, 23, 24 and 25 of the indictment.

The learned Trial Judge has convicted the 6th accused-appellant for the aforesaid counts on the basis of common intention. It is as follows;

a. The 6th accused-appellant collected the cheques from the Inland Revenue Department issued in favour of "Progarments", "Euro Clothing", "Kobe Apparels" and Lord and Taylor.

b. The 6th accused-appellant and the 7th accused-appellant opened the said bank accounts in the name of "Progarments", "Euro Clothing", "Kobe Apparels" and Lord and Taylor to which the said cheques got credited.

c. The 6th accused-appellant and 7th accused-appellant were introduced to the respective banks by the 8th accused-appellant.

d. The 1st accused-appellant and 2nd accused-appellant pleaded guilty to the charges levelled against them in the indictment; counts 1 to 34 of the indictment as far as the 1st accused-appellant is concerned and Count 2 of the indictment as far as the 2nd accused-appellant is concerned.
   - (Vide pages 487-488 (in respect of Count 10),
   - 496-497 (in respect of Count 11),

- 546 (in respect of Count 21),
- 561-562 (in respect of Count 23),
- 570(in respect of Count 24)
- 577(in respect of Count 25) of Book 17)

As far as item (d) above is concerned, the fact that the 1st accused-appellant pleaded guilty to counts 1 to 34 of the indictment (vide page 323 of Book 17 of the appeal brief) and 2nd accused-appellant pleaded guilty to Count 1 of the indictment (vide pages 1498 - 1500 of Book 16 of the appeal brief) cannot in law be considered as evidence against 6th accused-appellant and as such it further submitted that the learned Trial Judge has got herself misdirected in law. The said counts 10, 11, 21, 23, 24 and 25 of the indictment, the rest of the counts have nothing to do with the 6th accused-appellant and as such the learned Trial Judge considering the fact that 1st accused-appellant and 2nd accused-appellant pleaded guilty to counts 1 to 34 of the indictment. The fact that the 2nd accused-appellant pleaded guilty to Count 1 of the indictment against the 6th accused-appellant is in no way warranted by law and as such the learned Trial Judge has got herself misdirected in law.

As far as Count 1 of the indictment is concerned, it is crystal clear that, there is no evidence what so ever that the 6th accused-appellant conspired with the 1th accused-appellant to the 5th accused-appellant and the 7th accused-appellant to the 4th accused-appellant to misappropriate the aforesaid sum of Rs. 3, 996,008,151.55/ = (3.9billion). It was argued that the learned Trial Judge considering the fact that the 1st accused-appellant and the 2nd accused-appellant pleaded guilty to the said counts as evidence against the 6th accused-appellant is totally unwarranted in law. It was further proved that the learned Trial Judge got herself misdirected in fact and in law.

The ingredients of the offence, criminal misappropriation is as follows;

i. misappropriating or converting to one's use movable property that does not belong to the offender and
ii. doing so dishonestly.

As far as the above-mentioned offences are concerned, they have admittedly taken place on different dates and on different occasions. Thus, it is the view of this court that the case against the 6th accused-appellant cannot be maintained and he should be acquitted of all the charges in the indictment. The essence of common intention is not physical presence at the time of the commission of the offence but participatory presence (vide page 314 of Volume I of Gour's Penal Law of India 11th edition). Entering a conviction against the 6th accused-appellant on the basis that he committed the offences set out in counts 10, 11 and 21 of the indictment along with the 1st accused-appellant, the 2nd accused-appellant, the 4th accused-appellant, the 7th accused-appellant and the 8th accused-appellant and the offences set out in counts 23, 24 and 25 of the indictment along with the 2nd accused-appellant, the 3rd accused-appellant, the 7th accused-appellant and the 8th accused-appellant is not in conformity with the law. The learned Trial Judge has caused himself to be misdirected in facts as well as in law as far as the convictions entered in respect of the above counts are concerned against the 6th accused-appellant.

The evidence led in the case against the 6th accused-appellant does not establish that the 6th accused person has committed the offences set out in counts 10, 11, 21, 23, 24 and 25 of the indictment and accordingly this Court decides to set aside the conviction and the sentence imposed against the 6th accused-appellant and acquit him.

The prosecution was unsuccessful in proving all the elements of the offence beyond reasonable doubt.

The infirmities in the judgment support the contention that the finding of the learned trial judge's judgment is unsound in law. For the reasons set out above, I conclude that the learned trial Judge had misdirected herself by failing to evaluate the said material in favour of the 5th, 6th and 8th accused-appellants.

I, therefore, decide to set aside the conviction and sentence dated 26.09.2014.

The appeal of the 5th, 6th and 8th accused-appellants are allowed. Three of them are acquitted from all charges in the indictment.

President of the Court of Appeal

Sampath Abeykoon, J.

I have had the advantage of reading the draft judgment of His Lordship the President of the Court of Appeal, and I would like to say with respect that I do not find myself in agreement with the decision to acquit the 5th, 6th, and 8th accused-appellants from the charges for which they were found guilty by the learned High Court Judge of Colombo.

Therefore, I am compelled to pronounce this Judgement, while disagreeing with the reasoning given to acquit the appellants.

Since the P/CA has mentioned the charges upon which the 14 accused before the High Court was indicted, the witnesses called by the prosecution to prove the charges, and the evidence led before the High Court relating to the conviction of the accused-appellants in his judgment, I find it unnecessary to summarize the evidence placed before the High Court as a part of my judgment.

Out of the 14 accused indicted before the High Court, the trial has proceeded against several accused in absentia after taking steps in terms of section 241 of the Code of Criminal Procedure Act. The learned High Court Judge of Colombo of her Judgement dated 26-09-2014 has convicted the accused-appellants along with several others and sentenced them accordingly.

Being dissatisfied with the said conviction and the sentence, the 3rd, 5th, 6th, 7th and 8th accused of the High Court indictment preferred appeals challenging the conviction and the sentence. While the appeal was pending before this Court, the 3rd accused-appellant passed away, and the 7th accused-appellant decided to withdraw his appeal.

Therefore, it was only the appeals preferred by the 5th, 6th, and the 8th accused-appellants (hereinafter sometimes collectively referred to as the appellants) that were considered at the hearing of this appeal.

It needs to be noted that all the appellants were absent from the trial before the High Court, and the trial went ahead against them in absentia in accordance with the Code of Criminal Procedure Act. However, all the appellants were represented by their respective Counsel throughout the trial.

Since the learned Counsel for the appellants formulated separate grounds of appeal, I will now proceed to consider the said grounds of appeal separately from each other.

Although separate grounds of appeal were raised, the 1st count preferred against them was a common count against all the accused before the High Court, including the appellants.

The common 1st count preferred against them was a count based on conspiracy, where the appellants were charged with conspiracy to commit the offence of criminal misappropriation of the monies belonging to the Inland Revenue Department (IRD), or aiding and abetting to commit the same and or agreeing to commit with a common intention and or conspired to commit or aided and abetted the said offence and as a result of the said conspiracy, committed criminal misappropriation pertaining to public money to the value of Rs. 3,996,008,151.55 (රුපියල් තුන්සිය අනූනම කෝටි හැට ලක්ෂ අටදහස් එකසිය පනස් එකයි සත පනස් පහයි), and thereby committing the offence of criminal misappropriation in terms of section 386 read with sections 113B and 102 of the Penal Code, punishable in terms of section 5 (1) of the Offences Against Public Property Act No. 12 of 1982 as amended by Amendment Act No. 76 of 1988 and 28 of 1999.

I am of the view that before considering the grounds of appeal separately, it would be prudent to consider the essential ingredients of the charge of conspiracy and the law relating to it, along with the provisions relating to abetment to commit criminal misappropriation.

Section 113A of the Penal Code defines the offence of conspiracy in the following manner.

> **113A. (1) If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be.**

The essence of the offence is the agreement between the parties to commit the alleged offence, whether it was committed or not.

It was held in the case of **The King Vs. M. E. A. Cooray 51 NLR 433** that,

> *"The commission of the offence of conspiracy is established within the meaning of section 113A of the Penal Code in one or the other of the following circumstances.*
>
> *a. If two or more persons agree with or without any previous concert or deliberation to commit an offence or to abet an offence to, or*
> *b. If two or more persons agree with or without any previous concert or deliberation to act together with a common purpose for or in committing or abetting an offence.*
>
> *In either set of circumstances, conspiracy consists in the agreement or confederacy to do some criminal act, whether it was done or not. In order to establish the offence of 'abetment of conspiracy' under section 100 of the Penal Code, an agreement is an essential prerequisite."*

Towards understanding the proof of conspiracy, section 10 of the Evidence Ordinance and its illustration provides a clear picture as to how a certain thing can become relevant in each context.

Section 10 of the Evidence Ordinance reads as follows.

> **10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as to the purpose of showing that any such person was a party to it.**
>
> ***Illustration-***
>
> **Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.**
>
> ***The fact that B procured arms in Europe for the purpose of conspiracy, C collected money in Colombo for a like object, D persuaded persons to join the conspiracy in Kandy, E published writings advocating the object in view at Galle, and F transmitted from Kalutara to G at Negombo the money which C had collected at Colombo, and the contents of a letter written by H giving an account of the conspiracy are each relevant, both to prove the existence of the conspiracy and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him and although they may have taken place before he joined the conspiracy or after he left it.***

As a matter of fact, it needs to be stated that an offence of conspiracy can be established by way of eyewitness accounts as well as circumstantial and documentary evidence, more often than not, by considering all such evidence cumulatively.

In the case of **The Attorney General Vs. Potta Naufer and Others (2007) 2 SLR 144**,

> Held:
>
> In a case of conspiracy there is no legal requirement regarding a mode of concurrence in the common purpose or the manner in which such concurrence may be established by the prosecution. To establish conspiracy, it is possible that there could be one person around whom the rest resolves.
>
> **Shirani Thilakawardena, J.** observed;
>
> *"While agreement is at all times the essence of conspiracy it does nor necessarily contemplate a physical meeting of the conspirators or prior contact or correspondence between or among the accused as being an essential or necessary ingredient to prove a charge of conspiracy. There is no legal requirement regarding a mode of concurrence in the common purpose or the manner in which such concurrence may be established by the prosecution. In a case conspiracy it is possible that there could be one person around whom the rest revolve. [Vide Meyrick 21 Cr. AR 94 cited with approval by Gratian, J. in Cooray].*

The prosecution must simply establish an agreement to act together with a common purpose for or in committing the offence. Hearne, J. is Sundaram (1943) 25 CLW 38 has stated explicitly that the gist of the offence of conspiracy is the agreement.

With respect to the degree of proof, it has been held in Queen Vs. Liyanage (1965) 61 NLR 193 that the question is not whether the inference of conspiracy can be drawn but whether the facts are such that they cannot reasonably admit any other inference but that of conspiracy. As the evidence in support of a charge of conspiracy is often circumstantial, the actual facts of the conspiracy may be inferred from the collateral circumstances of the case. A charge of conspiracy can often be proved only by an inference of the subsequent conduct of the parties in committing some overt acts, which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to bring them about."

In **Mohd. Hussain Umar Kochra etc. Vs. Respondent: K. S. Dalipsinghji and Anr., etc.**

Date of Judgement 31-03-1969

Citation 1970 AIR 45, 1969 SCR (3) 130, 1969 SCC (3) 429,

It was held that,

"In order to constitute a single general conspiracy, there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of common design of his group only."

In **Kehar Singh vs State (Delhi Admin) AIR1988 SC1883 (Indira Gandhi Assassination Case)** the Supreme Court of India summarized the law on the subject as follows;

"Generally, conspiracy is hatched in secrecy, and it may be difficult to adduce direct evidence of the same. The prosecution view often relies on evidence of acts of various parties to infer that they were made in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly ruled by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them require

some kind of physical manifestation of agreement. The express agreement however, need not be proved. No actual meeting of two persons is necessary, nor it is necessary to prove that the actual words of communication the evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

With the above requirements as to the proof of a conspiracy and the necessary ingredients of the offence of dishonest misappropriation in terms of section 386 of the Penal Code in mind, I will now proceed to consider the grounds of appeal urged by the appellants.

For matters of clarity, the grounds of appeal urged by the three appellants will be considered separately.

There was no dispute at the trial, that the total sum mentioned in the 1st count relates to money belonging to the IRD and thereby to the state, from which cheques had been drawn on the basis of Value Added Tax refunds.

The grounds of appeal raised by the 5th accused-appellant, namely, Mohamad Zubair Fouzul Awam

1. The allegation of the prosecution that there was no production taking place in the garment factory was based on hearsay evidence and, therefore, cannot be treated as evidence against the 5th accused-appellant.
2. It is the burden of the prosecution to prove that there was no production taking place as against the burden placed on the appellant.
3. That the prosecution has wrongly relied on the provisions of the Electronic Transactions Act.

Making submissions, the learned Counsel for the 5th accused-appellant contended that any of the witnesses called by the prosecution to prove that there was no manufacturing had taken place in the garment factory belonging to the 5th accused-appellant had failed to establish that fact. He pointed out that the Grama Niladhari of the area visited the factory in 2006 and her evidence that there was no production for more than 4 years was based on mere hearsay evidence and the witness had failed to give a clear time period as to when the production was halted.

It was his position that the evidence of the witness Yoosuf, called by the prosecution to prove the fact that there was no production carried out in the factory was not a witness who could speak about that fact either. He has spoken only about the fact that when he visited the factory premises in 2005, the factory was not functioning.

PW-38, the official from the Board of Investment and the evidence of the Customs Official who stated that there was no export of garments manufactured in the factory belonging to the 5th accused-appellant does not prove that the appellant conspired with others to commit the offences he was charged was the position taken up by the learned Counsel for the appellant.

He was of the view that the submitting of computer-generated documents to show that no production had taken place in the factory, was not admissible as the prosecution had failed to follow the provisions of Evidence (Special Provisions) Act No. 14 of 1995. He submitted further that the Electronic Transactions Act No. 19 of 2006 relied on by the prosecution to lead such evidence was not applicable for this instance.

He was also vocal about the evidence given by the witness called on behalf of the IRD namely, Rajaratnam, to argue that the witness has failed to produce any document in relation to the necessary facts other than the document marked 1V183.

It was submitted by the learned Counsel for the 5th accused-appellant that the evidence relied on by the prosecution to prove the charges against his client has failed to establish the charges against him beyond reasonable doubt. The learned Counsel further submitted that there was no reasonable attempt by the prosecution to serve summons to his client about this action or by the investigators to summon him for the purposes of investigation. He submitted that when his client left the country, he was not treated as a suspect for the offences attributed to him and thereby, a fair trial was denied to him.

Consideration of the Grounds of Appeal

Out of the 34 counts mentioned in the indictment, count 1, namely the conspiracy charge and counts 8 and 9 are the relevant counts in relation to the charges against the 5th accused-appellant.

Apart from the conspiracy charge, the 8th count relates to committing misappropriation of public property, amounting to a sum of Rs. 93,447,903.55 (93.4 million) along with 1st, 2nd and the 4th accused by getting the said amount released to South Lanka Garment Industries (Pvt) Ltd, between the period of 1st February 2003 and 31st December 2003.

The 9th count relates to committing a similar offence relating to a sum of Rs. 157,854,483.65 (157.4 million) of public money during the period of 1st February 2004 and 31st August 2004.

The 5th accused was charged for committing the above offences punishable in terms of section 386 read with section 32 of the Penal Code and in terms of section 5(1) of the Offences Against the Public Property Act.

Before considering the 1st and the 2nd grounds of appeal, I will now consider the 3rd ground of appeal, as in my view, it should be the ground that needs consideration before the other two grounds since it relates to a question of law.

Consideration of the 3rd Ground of Appeal

The submission of the learned Counsel for the 5th accused-appellant relates to the documents marked as P-222 and P-223 when witness Karunaratne, who was from the Board of Investment of Sri Lanka, was giving evidence. The said documents had been marked to show that South Lanka Garment Industries (Pvt) Ltd, which belonged to the 5th accused-appellant, has not done any exports of garments during the relevant period.

The objection had been on the premise that the said documents cannot be allowed to be led in evidence as the prosecution has failed to comply with the provisions of the Evidence (Special Provisions) Act No. 14 of 1995.

It appears that although the learned High Court Judge has reserved the order in relation to this objection, no order has been pronounced. Therefore, it becomes necessary to consider whether the two documents tendered are documents that cannot be accepted as evidence before the trial Court.

The contention of the prosecution had been that it produced these two documents in terms of the Electronic Transactions Act No. 19 of 2006 (hereinafter referred to as the Act) and the Evidence (Special Provisions) Act No. 14 of 1995 has no application.

The objectives of the Act had been spelt out in section 2 of the Act, where it states that the Act has been enacted to facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty, to encourage the use of reliable forms of electric commerce, to facilitate electronic filing of documents with government and to promote efficient delivery of government services by means of reliable forms of electronic communications, and to promote public confidence in the authenticity, integrity and reliability of data messages, electronic documents, electronic records or other communications.

The documents marked as P-222 and P-223 are computer printouts generated using the data available with the Board of Investment, which can be termed as an instance where electronic records had been used as evidence in Court.

The Board of Investment is a statutory body that comes within the provisions of section 8 of the Act.

Relevant section 8 (1) of the Act reads as follows.

> **8. (1) Where any written law for the time being in force requires-**
>
> > **(a) The filing of any form, application, or any other document with any government department, office, body or agency owned or controlled by the govt or a statutory body in a particular manner;**
> >
> > **(b) The issue of grant of any license, permit or approval; or**
> >
> > **(c) The receipt of payment of money, procurement or other transaction to be effected in a particular manner,**
>
> **Then, notwithstanding anything to the contrary contained in any other law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, creation, retention, as the case may be, is effected in the form of electronic records as may be specified by the relevant Ministry, government department, institution, statutory body or public corporation or other similar body.**

The above section amply provides for the Board of Investment, being a statutory body to maintain its documents in the form of electronic records.

The applicability of rules governing evidence with regard to such an electronic record has been provided for in section 21 of the Act. The relevant section reads as follows.

> **21. (1) Notwithstanding anything in the contrary in the Evidence Ordinance or any other written law, the following provisions of this section shall be applicable for the purposes of this Act.**

(2) Any information contained in a data message, or any electronic document, electronic record or other communication-

(a) touching any fact in issue or relevant fact; and

(b) compiled, received or obtained during the course of any business, trade or profession or other regularly conducted activity,

shall be admissible in any proceeding:

Provided that direct or oral evidence of such fact in issue or relevant fact if available, shall be admissible; and there is no reason to believe that the information contained in a data message, or any electronic document, electronic record or other communication is unreliable or inaccurate: …

(3) The Court shall, unless the contrary is proved, presume the truth of information contained in a data message, or in any electronic document or electronic record or other communication and in the case of any data message, electronic document, electronic record or other communication made by a person, that the data message, electronic document or record or other communication was made by the person who is purported to have made it and similarly, shall presume the genuineness of any electronic signature or distinctive identification mark therein.

The above section clearly provides for the admission as evidence, the documents marked P-222 and P-223 as they are electronically generated documents that were in the possession of the Board of Investment (BOI) to establish that there had been no exports by South Lanka Garment Industries (Pvt) Ltd.

Other than the argument that the said documents cannot be produced without following the provisions of the Evidence (Special Provisions) Act No. 14 of 1995, there had been no challenge to the information contained in the electronic record. Therefore, the trial Court is duty-bound to presume the truth of the information.

I find no basis for the argument that the provisions of Evidence (Special Provisions) Act No. 14 of 1995 shall still be applicable to a document of this nature. Section 22 of the Act clearly provides that the said Evidence (Special Provisions) Act have no applicability to the documents produced in terms of the Act.

The relevant section 22 of the Act reads as follows.

22. Nothing contained in the Evidence (Special Provisions) Act No. 14 of 1995 shall apply to and in relation to any data message, electronic document, electronic record or other document to which the provisions of this Act applies.

For the reasons considered as above, I find no basis for the 3rd ground of appeal urged on behalf of the 5th accused-appellant.

I am of the view that even if the learned trial Judge separately considered this matter in relation to the objection taken at the time of marking of the document, the resultant order would be the same. Therefore, it has not caused any prejudice towards the 5th accused-appellant.

Consideration of the 1st and the 2nd Grounds of Appeal

As the 1st and the 2nd grounds of appeal are interrelated, I will now proceed to consider both the grounds of appeal together.

The fact that the sums mentioned in counts 8 and 9 had been deposited to the account of the 5th accused-appellant was not a disputed fact in this action. Therefore, it is clear that the cheques relating to the said sums had been issued on the basis of VAT refund.

The prosecution has led evidence to establish that, in fact, there was no production in the garment factory called South Lanka Garment Industries (Pvt) Ltd during the relevant period. As I have considered before, the prosecution has relied on the Grama Niladhari of the area, namely, Hemalatha Hettiarachchi, to show that there was no such production. The prosecution has also called a former employee of the said garment factory to speak about the same fact.

The contention of the learned Counsel for the 5th accused-appellant was on the premise that the Grama Niladhari relied on hearsay evidence to come to her conclusions that there was no production in the garment factory. However, it is amply clear from the evidence of the Grama Niladhari as well as the former employee of the factory that both of them had actually gone to the factory and had observed that there was no production going on. The Grama Niladhari, in her investigations, had found that, in fact, there was no production for the last several years. It would not have been necessary for the Grama Niladhari to determine the truthfulness of her findings by going inside the factory as any factory that had been closed for several years can be visible to anyone who goes near it.

The evidence of the former employee of the factory was also to the same effect. Although both of them have gone near the factory after the relevant dates mentioned in the charges, that would not mean that their observations of not having productions prior to their visits were wrong conclusions. I find no reason to accept that their evidence amounts to hearsay, as the evidence clearly shows that it was not.

Apart from the above evidence, the earlier mentioned officer from the BOI had given clear evidence and established before the Court that there had been no exports by South Lanka Garment Industries (Pvt) Ltd during the period relevant to the charges. The official who gave evidence on behalf of the Sri Lanka Customs had also confirmed the same. Therefore, I am of the view that the prosecution has proved beyond reasonable doubt that VAT refund payments had been made to the 5th accused-appellant in a situation where there was no basis to claim a VAT refund.

The evidence of the Deputy Commissioner of the IRD, PW-17 Rajaratnam, who has spoken about the relevant procedures that should be adopted for an exporter to become entitled to a VAT refund, clearly establishes the fact that the 5th accused-appellant had no right to claim a VAT refund under any circumstances.

This Court is well aware that in a criminal case of this nature, an accused person has to prove nothing. It is up to the prosecution to prove the case against an accused person beyond reasonable doubt. Any weaknesses in the case of the defence cannot be taken against an accused person as the burden of proof still remains with the prosecution.

In a criminal case, it is sufficient for an accused person to show that there is a reasonable doubt as to the prosecution case against him or at least to give a reasonable explanation as to any incriminating evidence against him. In such a scenario, any reasonable doubt accrued as a result should be held in favour of the accused and he should be acquitted of the charge.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148**, it was held that;

> *1. The Judge should have avoided using such language as the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies Court or at least is sufficient to create a reasonable doubt as to his guilt.*
>
> *2. As the trial Judge was a trained Judge who should have been aware that the burden of proof was on the prosecution to prove its case beyond reasonable doubt if a reasonable doubt was created in his mind as to the guilt of the accused, he should have given the benefit of the doubt to the accused and acquit him.*

However, it is my considered view that although there is no burden for an accused person in a criminal case, in view of section 106 of the Evidence Ordinance, when there are facts established before a Court that can only be within the knowledge of an accused and can only be explained by such an accused, there must be a reasonable explanation as to the said facts which directly connects the charge against such a person.

The relevant section 106 of the Evidence Ordinance reads as follows.

> **106. When any fact is specially within the knowledge of any person, burden of proving that fact is upon him.**

It is my view that since the prosecution has proved that the VAT refund equivalent to the sums mentioned in counts 8 and 9 has been released to the account belonging to the 5th accused-appellant, it was up to him to provide a reasonable explanation before the Court as to his entitlement to such sums or at least for the reasons for such sums to come to his bank account, which the appellant has failed to reasonably explain to the Court.

I am of the view that this does not amount to casting a burden of proof upon the accused-appellant under any circumstances, but expecting a reasonable explanation as to the incriminating evidence placed against him by the prosecution. That does not mean that a burden has been imposed upon the accused or shifted to show that there was production, which has taken place during the relevant period in the factory belonging to him and exports were done.

The evidence, taken cumulatively, shows that the issuing of cheques to the entity belonging to the 5th accused-appellant was not due to actions of the 5th accused acting alone, but as a result of several persons, including the other accused in the case, especially the 1st, 2nd and the 4th accused, acting collectively or individually to accomplish their goal of misappropriating the money belonging to the state. This goes on to establish the essential ingredients of conspiracy and abatement against the appellant.

For the reasons as considered above, I find no merit in the 1st and 2nd grounds of appeal urged by the 5th accused-appellant either.

The grounds of appeal raised by the 6th accused-appellant, namely Mohommed Moudjood Ameer Irshad alias Mohammed Nazeer Carder.

The learned President's Counsel for the 6th accused-appellant formulated the following grounds of appeal for the consideration of the Court.

1. The learned trial Judge had failed to appreciate that the prosecution has proved beyond reasonable doubt that the person named Mohammed Nazeer Carder, one of the persons who had opened the aforementioned accounts, is in fact Mohommed Moudjood Ameer Irshad, (6A).
2. The learned trial Judge considered material that did not transpire in evidence to hold that the identity of 6A has been established by witness Mohammed Saleem Ahamed (PW-131).
3. The learned trial Judge has failed to appreciate the mere fact the cheques credited to account bearing number 0640547813001 of a person named Mohommed Moudjood Ameer Irshad of 59/3/8, 1st Cross Street, Pettah at Seylan Bank, Pettah does not in itself establish that the said account was opened by 6A or belonged to 6A.
4. The learned trial Judge has failed to appreciate that the evidence led in the case does not establish that 6A conspired with the rest of the accused against whom the indictment has been presented to commit the offence set out in count 1 of the indictment.
5. The learned trial Judge has failed to appreciate that the evidence led by the prosecution does not establish that 6A shared a common intention with the other suspects mentioned in counts 10, 11, 21, 23, 24 and 25 to commit the said offences.

Although five separate grounds of appeal were urged by the learned President's Counsel, since it is clear that the grounds are primarily based on the argument that the prosecution has failed to establish the true identity of the 6th accused-appellant as the person who is responsible to the charges relating to him, and that the prosecution has failed to establish that the 6th accused-appellant was a part of the conspiracy, and also common intention in terms of section 32 of the Penal Code has not been proved, the said grounds of appeal will be considered together to find whether there is any basis for the said grounds urged.

Apart from the 1st count where the 6th accused-appellant was charged with conspiracy along with the other accused named in the indictment, count numbers 10, 11, 21, 23, 24 and 25 relate to the 6th accused-appellant.

In count 10, he was charged for committing the offence of criminal misappropriation for a sum of Rs. 175,856,722.85 (175.8 million) belonging to the State by fraudulently getting the said sum released to a company called Progarment, between the period of 01-04-2003 and 31-03-2004 acting along with 1st, 2nd, 4th, 7th and 8th accused, and thereby committing an offence punishable in terms of section 386 read with section 32 of the Penal Code, and section 5 (1) of the Offences Against Public Property Act as amended.

In count 11, the charge against him was that he, along with others mentioned earlier, similarly misappropriated a sum of Rs. 159,666,571.80 (159.6 million) belonging to the State by getting the said sum released to the earlier mentioned Progarment company between the period of 01-04-

2004 and 31-08-2004, and thereby committing the offence of criminal misappropriation punishable as mentioned before.

Similarly, under count no. 21, he was charged for misappropriating a sum of Rs. 328,105,163.00 (328.1 million) between 01-10-2003 and 30-09-2004 by getting released the said sum belonging to the State to an entity called Euro Clothing (Pvt) Ltd.

Under count no. 23, the charge against him was that between 01-06-2003 and 31-05-2004, the 6th accused-appellant along with others mentioned in the charge fraudulently got released a sum of Rs. 245,512,851.21 (245.5 million) belonging to the State to an entity called Kobe Apparels Company, and thereby misappropriating the said sum.

Under count no. 24, he was charged for fraudulently getting a sum of Rs. 101,509,472.75 (101.5 million) belonging to the State to the same earlier mentioned Kobe Apparels between 01-06-2004 and 31-08-2004, and thereby committing the offence of criminal misappropriation as mentioned earlier.

Under count no. 25, the charge against him was that he, along with others mentioned in the charge fraudulently got a sum of Rs. 177,112,186.50 (177.1 million) belonging to the State released to an entity called Lord and Taylor (Pvt) Ltd between 01-12-2003 and 30-08-2004.

The prosecution has led evidence as mentioned by the P/CA in his Judgement in order to prove the charges against the 6th accused-appellant. It has been shown that the 6th accused-appellant along with another (the 7th Accused), acting under false identities, had opened several accounts in the names of the entities mentioned in the charges in the Sampath Bank- Bambalapitiya Branch, Nations Trust Bank- Union Place Branch, Pan Asia Bank- Kotahena Branch and had deposited the cheques issued based on fraudulent VAT refund claims to the said bank accounts. It has been established that the said accounts had been opened under the names of two persons and the 1st person was one Mohommed Nazeer Carder, holder of NIC No. 630754100V. It has been established that subsequently, the monies had been withdrawn over several withdrawals.

The contention of the prosecution had been that the 6th accused, namely Mohommed Moudjood Ameer Irshad was the person who opened those accounts under a false National Identity Card and a false name by the name of Mohammed Nazeer Carder.

It has also been established that, apart from depositing the cheques issued in favour of the said entities, the 6th accused Mohommed Moudjood Ameer Irshad has deposited 4 cheques issued by the earlier mentioned entities namely, Euro Clothing Pvt Ltd, Progarment, Kobe Apparels and another entity called Uniline to his own account at Seylan Bank- Pettah under his correct name of Mohommed Moudjood Ameer Irshad.

The cheque issued by Euro Clothing on 28-10-2003 (PN-46) was for a sum of Rs. 5.2 million. The cheque issued from the entity called Progarment on 20-11-2003 (PF-80) was for a sum of Rs. 4.2 million. The cheque issued from the entity called Kobe Apparels on 12-02-2004 was for a sum of Rs. 0.33 million (PQ-64), while the cheque issued from a business entity called Uniline on 20-01-2004 (PO-52) was for a sum of Rs. 530,630.00.

Although the entity called Uniline is not an entity relating to the charges preferred against the 6th accused, the said entity is an entity that features in the charges relating to the other accused, including the 8th accused-appellant in this case, where similar methods have been used to

misappropriate money belonging to the State. The 8th accused-appellant had been one of the persons who had introduced the 6th accused-appellant to open accounts.

The main argument put forward by the learned President's Counsel on behalf of the 6th accused-appellant was that the prosecution has failed to establish that the 6th accused is the person who opened the accounts attributed to him using a false identity by the name of Mohammed Nazeer Carder.

He pointed to the evidence of PW-250 who was one of the police officers investigated into the matter, where it has been stated that he showed the photocopy of the National Identity Card marked as PN-42 (i) during the trial, to the parents of the 6th accused and they only identified the photograph in the said photocopy, but stated that they know nothing about the name and the address contained in the said identity card. The learned President's Counsel was of the view that cannot be termed as a positive identification of the 6th accused.

The learned President's Counsel pointed out that the mentioned father and the mother of the 6th accused were never called to give evidence, and the evidence led by the prosecution as to the identity of the 6th accused had been limited to the above piece of evidence only.

It was his contention that although cheques issued from the entities mentioned in the charges using the accounts opened using the name of Nazeer Carder had been deposited to the account of the 6th accused maintained at the Seylan Bank Pettah branch since the cheques have been issued by private entities, there was no evidence to substantiate the fact that the money transferred was the money belonging to the State, and hence it cannot be termed as public property.

He was also of the view that there was no evidence to show that the 6th accused was part of the conspiracy and there was no evidence to show that the 6th accused acted with the common intention with others to misappropriate the monies mentioned in the charges.

Consideration of the Grounds of Appeal of the 6th Accused appellant

It has not been disputed that by producing fraudulent VAT claims to the IRD under the names of the bogus companies relating to the charges against the 6th accused, VAT refund cheques had been obtained from the IRD.

There is no doubt that the 1st accused, being a higher official of the IRD, and the 2nd accused, also being an official of the IRD, had facilitated this fraudulent scheme to issue cheques on the basis of VAT refunds. It was also undisputed that the accounts opened under the names of Progarment, Euro Clothing, and Kobe Apparels had been opened using forged National Identity Cards, and one of the persons who opened those joint accounts under the name of Mohammed Nazeer Carder had used an Identity Card number issued to another person called Karunaratne. The official who has given evidence on behalf of The Registrar of Persons has confirmed that the NIC used under the name of Mohammed Nazeer Carder was a fraudulent document.

As contended correctly by the learned President's Counsel, it was necessary for the prosecution to establish that the person mentioned as Mohammed Nazeer Carder was one and the same person as the 6th accused-appellant, namely, Mohommed Moudjood Ameer Irshad, in order to prove the charges attributed to him.

When the police commenced investigations, the 6th accused had disappeared, and there was no way for the police investigators to record his statement to verify as to his identity. The only material available to them was the copies of the NIC under the name of Mohammed Nazeer Carder available at the relevant bank branches. According to the evidence, it was the 8th accused-appellant who introduced the person called Mohammed Nazeer Carder to some of the bank branches to facilitate opening bank accounts for him. As the 8th accused-appellant was also missing at that time, the investigators could not record a statement from him either. Now, he is trying to take advantage of his own evasion of Court and law enforcement authorities.

The PW-250 has done the next best thing possible in order to establish the identity of the 6th accused applicant. He had taken the photocopies of the NIC used to open bank accounts under the name of Mohammed Nazeer Carder to the parents of the 6th accused Mohommed Moudjood Ameer Irshad, whose identity was known to the police investigators by that time. It was in relation to that, the PW-250 has given evidence in Court. Under examination-in-chief, as appeared in Brief Book-13 at page 478 onwards, it transpires that he has gone to No. 24/4, Old Hospital Road, Warakapola address, and had met the father and the mother of the 6th accused-appellant and shown them the photocopy of the NIC marked PN-42 (i).

The relevant portion of the evidence reads as follows.

> ප්‍ර : මෙම අවස්ථාවේදී PN-42 (i) ඡායාරූපයේ පිටපත් ඒ අයට පෙන්වා සිටියාද ?
>
> උ : එහෙමයි
>
> ප්‍ර : ඒ අය එම ඡායාරූපය හඳුනාගත්තද ?
>
> උ : ඡායාරූපයෙන් පමණක් හඳුනාගත්තා.
>
> ප්‍ර : එම ජාතික හැඳුනුම්පතේ අනෙකුත් නම, ලිපිනය ආදිය අනෙකුත් තොරතුරු සම්බන්දයෙන් මොකක්ද කිව්වේ ?
>
> උ : ඒ සම්බන්දයෙන් ඔවුන් නොදන්නා බව ප්‍රකාශ කර සිටියා.

Although the learned President's Counsel argued that the above limited evidence does not establish that the 6th accused was the person called Nazeer Carder, who opened these bank accounts relevant to the charges against the 6th accused-appellant, I am in no position to agree.

The prosecution has sufficiently established that the identity card used by the person who opened the accounts was a fraudulent identity card and the fact that only the photograph used in the identity card belongs to the 6th accused-appellant. The investigating officer has gone and met the parents of the 6th accused-appellant, where they had confirmed the photograph appeared on the identity card. Although the witness has not specifically stated that in his evidence when taken as a whole, it is abundantly clear that PW-250 was referring to the fact that the parents of the 6th accused-appellant identified the photograph shown on the fraudulent identity card as their son's. The evidence clearly establishes that apart from the photograph, the parents have said that the information provided in the identity card as to the other name and the address is unknown to them.

When the witness was cross-examined on behalf of the 6th accused-appellant, the learned Counsel who represented the 6th accused-appellant had not cross-examined the witness on the basis that

the identity of the 6th accused-appellant had not been established. Where no question is put to a witness in cross-examination, in the absence of such question, the necessary inference arises that the answer, if given, would not have helped the party omitting to put the question.

Although the learned President's Counsel contended that there was no necessity for the learned Counsel to challenge the identity as it has not been proved, it is my considered view that since the indictment has been filed against the 6th accused-appellant on the basis that he used a fraudulent NIC prepared in the name of Nazeer Carder to misappropriate money belonging to the State, if it was the stand of the 6th accused-appellant, that he had been named as an accused based on a wrong identity, that should have been a position taken up at the trial and at the appropriate time. Throughout the trial, I find that such a position has not been taken.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655 and 3656,** it was stated that;

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

The evidence of PW-131 had been that, it was he who introduced a person he knew as Mohammed, enabling him to open bank accounts at Commercial Bank as well as Sampath Bank. He has identified his signature in the document marked PF-59, which was an application to open a joint account at the Commercial Bank, and on the document marked PQ-56, the application to open an account in the Sampath Bank. When he was shown the copy of the NIC marked PF-60, which was the NIC used to open the said accounts, the witness has failed to identify the person shown in the photograph. However, he has been very specific that he knew the person called Mohammed because of the dealings he had with him previously. I am of the view that he had been deprived of the opportunity of identifying whether the 6th accused-appellant was the person whom he knew as Mohammed, because the 6th accused-appellant was never arrested or made a statement to the investigators, and had apparently fled the country by that time.

Although the learned High Court Judge may have misdirected herself as to the evidence of PW-131 on some facts, I am not in a position to conclude, that misdirection has the effect of vitiating the establishment of the identity of the 6th accused-appellant. I am also of the view that for a person who was suspected of an offence and chose not to respond to the allegations made against him, and evade arrest as well as fled the country, cannot make use of his actions of not assisting the investigations to argue that he was not properly identified as the perpetrator of a crime.

When it comes to the argument that the charge of conspiracy had not been proved against the accused-appellant, it is my view, as I have stated before, that a conspiracy can be proved not only by way of oral and documentary evidence but also using circumstantial evidence, as well as a combination of all. It is clear that the prosecution has used documentary as well as circumstantial evidence to prove the charge of conspiracy against the accused mentioned in the indictment.

In the case of **Don Sunny Vs. The Attorney General (1998) 2 SLR 1**, it was held,

1. *When a charge is sought to be proved by circumstantial evidence, the proved items of circumstantial evidence when taken together must irresistibly point towards only inference that the accused committed the office. On consideration of all the evidence*

the only inference that can be arrived at should be consistent with the guilt of the accused only.

2. *If on a consideration of the items of circumstantial evidence, if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.*
3. *If upon consideration of the proved items of circumstantial evidence, if the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*

In this context, a trial Judge also has to be mindful that suspicious circumstances do not establish guilt and the burden of proving a case beyond reasonable doubt against an accused is always with the prosecution.

In the case of the **Queen Vs. M. G. Sumanasena 66 NLR 350**, it was held,

> *"In a criminal case, suspicious circumstances do not establish guilt, nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence."*

However, in considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as to the guilt or the innocence of an accused, although each piece of circumstantial evidence when taken separately may only be suspicious in nature.

In the case of **Regina Vs. Exall (176 English Reports, Nisi Prius at page 853)**, Pollock, C.B. considering the aspect of circumstantial evidence remarked;

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like of a rope composed of several codes. One strand of the rope might be insufficient to sustain the weight, but stranded together may be quite of sufficient strength."*

As I have considered previously of the necessary ingredients of conspiracy, it is quite apparent that the 6th accused-appellant had been a part of the conspiracy to defraud and misappropriate the money belonging to the State. It is quite clear that the bogus accounts had been used to channel money passed on to the bogus companies by way of cheques to siphon them off. The evidence clearly establishes that there were no such garment manufacturers existing during the time relevant to this action under the name of Progarment, Euro Clothing or Kobe Apparels, and the accounts created have been exclusively used to deposit the cheques issued fraudulently as VAT refunds.

Although the learned President's Counsel argued that the money withdrawn from the earlier mentioned three accounts and deposited to the account maintained by the 6th accused-appellant in his own name in the Seylan bank – Pettah branch could not be considered as state properly, I find no reason to agree with such a contention.

Clearly, at least part of the money deposited to the earlier mentioned three bank accounts obtained by way of fraudulent VAT refund claims had been channelled to the account of the 6th accused-appellant. If the position of the 6th accused-appellant that the said was money belonging to him earned through legal means, it was up to the 6th accused-appellant to explain the transfer of such monies to his account.

In view of the overwhelming evidence against the 6th accused-appellant as to his involvement in the grand scheme of conspiracy, and in view of the matters that only he can explain, the provisions of section 106 of the Evidence Ordinance become applicable to him as well. The Court is entitled to draw certain inferences as to the culpability of the 6th accused-appellant to the crimes he was charged in the absence of any reasonable explanation in that regard.

As I have considered earlier, this should not be mixed up with any burden of proof that lies on the 6th accused-appellant. I am of the view that there should have been a reasonable explanation as to the evidence against the 6th accused-appellant or at least some material to create a reasonable doubt as to the prosecution evidence. I find no reason to believe that such an explanation has been provided or a reasonable doubt had been created in this case against the evidence adduced against the 6th accused-appellant.

Another point taken up by the learned President's Counsel was that there was no evidence as to the common intention against the 6th accused-appellant. The definition of common intention as stated in section 32 of the Penal Code reads as follows.

> **32. When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.**

I am of the view that there was ample evidence before the trial Court beyond reasonable doubt that the 6th accused-appellant was part of the furtherance of the common intention of misappropriating the money belonging to the State by establishing an elaborate scheme to misappropriate the money. The 1st and the 2nd accused who were officials of the IRD, as well as outsiders who posed as businessmen who are entitled to VAT refund claims including the 6th accused-appellant, are part of the said conspiracy. As I have considered previously, this goes on to establish beyond reasonable doubt that the 6th accused-appellant was liable for the criminal acts, which led to the State losing billions of rupees due to this fraudulent scheme.

Therefore, I am of the view that the common intention aspect of the charge had been proved beyond reasonable doubt against the 6th accused-appellant.

For the reasons as considered above, I find no merit in the grounds of appeal urged on behalf of the 6th accused-appellant.

The grounds of appeal urged by the 8th accused-appellant, namely Mohomed Kamil Kuthubdeen

Although the 8th accused-appellant has raised 11 grounds of appeal in his written submissions filed before this Court, at the hearing of this appeal, the learned President's Counsel who represented the 8th accused-appellant restricted himself for the following grounds of appeal for the consideration of the Court.

1. The learned trial Judge had failed to consider the correctness and validity of the counts, and thereby had wrongly convicted the appellant.
2. The learned trial Judge had erred in law and fact in determining the culpability of the 8th accused-appellant in respect of all counts when there is no evidence placed by the prosecution as to the involvement of the 8th accused-appellant to misappropriate the total amount of 3.8 billion.
3. The learned trial Judge had failed to determine the admissibility and failed to judicially evaluate the evidence of substituted witness PW-125 Namal Liyanagunawardena, PW-134 Lilescha Athauda and PW-135 Rajeev Perera, who had no specific knowledge of actual circumstances of the evidence testified and placed by them.
4. The learned trial Judge had failed to properly consider alternative inference, which could be drawn from the available circumstantial evidence against the 8th accused-appellant, thereby had denied a fair trial to the accused-appellant.
5. The learned trial Judge had failed to apply his judicial mind to arrive at a finding whether the prosecution had proved its case beyond reasonable doubt.

It is clear from the indictment that out of the 34 counts preferred against the accused named in the indictment, the common count, namely, the count number 1 and counts 10, 11, 21, 22, 23, 24, 25, 30, 31, 32, 33, and 34 are the counts relating to the 8th accused-appellant. Out of the above-mentioned counts, counts 1, 10, 11, 21, 23, 24, and 25 are counts where the 6th accused-appellant was also charged along with the 8th accused-appellant and several others. Therefore, the said counts relate to the sums mentioned by me when the grounds of appeal preferred by the 6th accused-appellant were considered.

Out of the other counts, count number 22 refers to a misappropriation of Rs. 319,171,745.65 (319.1 million) between the period of 14-08-2003 and 13-08-2004, acting along with the 1st, 2nd, 3rd, 4th and the 7th accused indicted. The allegation was that the 8th accused-appellant, with the connivance of the others mentioned in the charge, got the above-mentioned sum released fraudulently to an entity called Uniline Apparels, and thereby misappropriated money belonging to the State, committing an offence punishable in terms of section 386 read with section 32 of the Penal Code and section 5(1) of the Offences Against Public Property Act No. 12 of 1982.

The 30th count had been to the effect that the 8th accused-appellant, along with the 1st and the 2nd accused in the indictment, misappropriated public property of Rs. 51,976,532.00 (51.9 million) during the period of 01-05-2004 and 30-08-2004, and thereby committing offences punishable as stated above. In the said count, they have been charged for getting the said sum released to an entity called KIL Apparels fraudulently.

The 31st count preferred against the 8th accused-appellant had been that during the period of 01-04-2004 and 30-07-2004, he, along with the 1st and the 2nd accused in the indictment, fraudulently misappropriated a sum of Rs. 69,938,968.00 (69.9 million) belonging to the State by getting the said government property released to an entity called Randunu Garments.

In count number 32, the 8th accused-appellant along with the 1st and the 2nd accused in the indictment was charged for getting a sum of Rs. 52,538,002.00 (52.5 million) belonging to the State getting released fraudulently to an entity called Fashion Garments between the period of 01-02-2004 and 30-08-2004, and thereby committing the offence of misappropriation.

Under count number 33, the 8th accused-appellant was charged along with the 1st and the 2nd accused in the indictment for misappropriating a sum of Rs. 71,618,564.00 (71.6 million) belonging to the State, by getting the said sum released to an entity called DTN Apparels between the period of 01-04-2004 and 30-08-2004.

Under count 34, the charge against the 8th accused-appellant was that he, along with the 1st and the 2nd accused in the indictment, misappropriated a sum of Rs. 69,294,974.00 (69.2 million) belonging to the State by getting the said sum released to an entity called Supreme Garments during the period of 01-04-2004 and 30-07-2004.

Interestingly, counts number 30 to 34, are charges against the 8th accused-appellant on the basis that he committed the offences mentioned along with the 1st and the 2nd accused in the indictment.

The 1st accused had been the Deputy Commissioner at the IRD responsible for refunding the VAT payments, and the 2nd accused had been an accessor who functioned under the 1st accused.

Both of them had pleaded guilty to the respective charges preferred against them, and had been sentenced before the Judgement was pronounced in this case.

The fact that the entire sum of little over 3996 million (3.996 billion) had been the money belonging to the State and released by the IRD as VAT refunds on the false VAT refund claims tendered to the IRD by various entities relating to the 34 counts preferred in the indictment, was not a fact disputed at any stage of the trial. As noted earlier, apart from the 1st and the 2nd accused, the 10th, 11th, 13th and 14th accused had also pleaded guilty to the charges and had been convicted and sentenced.

When the indictment was presented, the PW-125 named in the indictment had been one Noel Wijendra, the Manager of the Pan Asia Bank- Kotahena branch during the relevant period. PW-134 had been one S. Premalal who was also from the same bank, and PW-135 had been one M. Kumaran of the same bank. However, during the trial, since the named PW-125 Noel Wijendra had gone overseas and could not be located, the prosecution has taken steps to nominate one Namal Liyanagunawardena in his place. He had been an Assistant Manager at the Kotahena branch of Pan Asia Bank, and it is he who has given evidence in place of PW-125, the originally named witness, bank manager Noel Wijendra. The prosecution has also named and called witness Lilescha Athauda in place of the originally mentioned PW-134, as he, too, could not be traced. The said witness, Lilescha Athauda, had also been an employee of the Pan Asia Bank- Kotahena branch during the relevant period.

The learned President's Counsel made extensive submissions before the Court to stress that the said two substituted witnesses are not competent witnesses to testify as to the evidence that should have been given by PW-125 Noel Wijendra, who was the manager of the Pan Asia bank-Kotahena branch during the relevant period. It was his view that the only person who could have spoken of the events that took place during the time relevant to this action was Noel Wijendra. The learned president's Counsel stressed that the learned High Court Judge was wrong to rely on the substituted witnesses Namal Liyanagunawardena and Lilescha Athauda on the basis that their evidence cannot be relied upon and should have been rejected. He was also of the view that the prosecution's failure to call Noel Wijendra has to be presumed that, if called, his evidence would

not have been favourable to the prosecution, and was also of the view that not calling the said witness had caused a grave prejudice to the 8th accused-appellant.

The learned President's Counsel was vocal that the only basis for the conviction of the 8th accused-appellant had been that it was he who introduced the persons who opened accounts used to deposit the VAT refund cheques obtained from the IRD, and was of the view that without calling bank manager Noel Wijendra, there was no way for the prosecution to establish that fact, and the learned High Court Judge was misdirected when the evidence given by Namal Liyanagunawardena was accepted to come to the findings against the 8th accused-appellant.

His submissions were mainly pointed towards suggesting that it was the bank manager Noel Wijendra who should be held responsible for the opening of these accounts, whereas, not calling him to give evidence shall have to be considered fatal for the prosecution's case. He also pointed out that none of the cheques issued by the IRD has been deposited to the account maintained by the 8th accused-appellant at the Pan Asia Bank- Kotahena Branch and monies deposited to his account through other bank accounts cannot be considered as depositing the money belonging to the IRD as stated by the prosecution.

Admitting that the 8th accused-appellant had a close connection with the 1st accused, it was his submission that it does not mean any conspiracy with him to commit misappropriation of state property.

The learned President's Counsel submitted that the appeal of the 8th accused-appellant should be allowed as the prosecution has failed to prove the charges against him beyond reasonable doubt.

Consideration of the Grounds of Appeal

I will now proceed to consider the grounds of appeal urged by the 8th accused-appellant together as they are interrelated.

The primary focus of the submissions made by the learned President's Counsel was that Namal Liyanagunawardena was not a competent witness to speak about the actions of Noel Wijendra who was not called as a witness, hence, any documents identified and attributed to Noel Wijendra cannot be considered as evidence.

In other words, the learned President's Counsel has relied on the best evidence rule under the English law, where it was considered that the best evidence must be given to prove a particular fact.

There can be no doubt that the manager of the Kotahena branch of Pan Asia bank during the time relevant to the charges in the indictment against the 8th accused-appellant would be the best person who can provide the best evidence relating to the charges since the main contention of the prosecution had been that it was the 8th accused-appellant who introduced persons based on forged identities to open accounts in the name of the companies relating to the charges.

However, I must emphasize that the English rule of the best evidence is no longer the norm under the English law as well as our law.

E. R. S. R. Coomaraswamy in the book, ***'The Law of Evidence'*- Volume 1 at page 42** considers the present applicability of this rule under the English law principles in the following manner;

"But this principle, once considered so fundamental, is hardly more than a maxim. It is now not true, that the best evidence must, or even may, be given though it is non-production may be a matter for comment or affect the weight of that which is produced. Thus, section 114F of the Evidence Ordinance provides that the Court may presume that evidence which could be, and if not, produced, would, if produced be unfavourable to the person who withholds it. The Court must however have regard to the extenuating circumstances. Section 114F is a reproduction of the best evidence rule which according to Taylor, 'does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any, which from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated."

At page 44, **Coomaraswamy** narrates the position in Sri Lanka in the following manner;

> The Supreme Court of Sri Lanka has recognized that the best evidence rule has been whittled down in the country of its birth and is no longer of general application. Thus, in the King Vs. Peter Nonis (1947) 49 NLR 16 at 17 Windham, J. said:
>
> *"In any case, what is the meaning of 'best evidence' in the English law sense? It certainly does not and never did mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits … The best evidence rule in England has been subjected to whittling down process for over a century and today it is not true that the best evidence must be given, though its non-production where available may be a matter for comment and may affect the weight to be attached to the evidence that is produced in its stead."*

In the case of **Vanderbona Vs. Perera (1985) 2 SLR 62 at 67**, the Supreme Court recognized the fact that the best evidence rule is now whittled down, and though the non-production of the best evidence may be a matter for comment or may affect the weight of the evidence that has been produced, it is not true that the best evidence must be given to prove a fact.

It is clear from the evidence led in this case that the originally named PW-125 in the indictment, namely, Noel Wijendra, has left the country and cannot be contacted. At the investigation stage, he has given statements to the police and had assisted in the investigations. It appears that after considering the relevant statements and the investigations carried out in that regard, the Hon. Attorney General has decided to make him a witness.

The only assumption that can be reached under the circumstances would be that there was no material before the Hon. Attorney General to treat Noel Wijendra as an accused in this case, although the learned President's Counsel took pain to create a picture that he was also an accessory to the whole scheme of fraudulent Vat refund claims. Namal Liyanagunawardena who has given evidence in place of Noel Wijendra had been no stranger either to the 8th accused-appellant or to the operations of the Pan Asia Bank- Kotahena Branch. He had known manager Noel Wijendra even previously when he was working in another bank with him and was well conversant with the writing and signature of Noel Wijendra.

Namal Liyanagunawardena has given evidence based on his own knowledge as well as the documents available in the bank where Noel Wijendra has made certain entries and signed. Since Noel Wijendra was not available to give evidence, the prosecution has decided to call Namal Liyanagunawardena as the next best option to furnish evidence in the case. I am of the view that he is a competent witness to give evidence before the Court, and there was no basis for the learned trial Judge to disallow his evidence.

However, as I have pointed out before, it may be a matter of comment in the process of evaluating the evidence, which does not mean that his evidence should be disregarded. If the learned trial Judge found his evidence to be cogent and reliable, there was no bar for the learned trial Judge to act upon it.

I find it necessary to note that the evidence of Namal Liyanagunawardena as to the introductions made by the 8th accused-appellant of the customers introduced to the bank had not been materially challenged when the said witnesses and the other witnesses gave evidence during the trial.

The evidence of Namal Liyanagunawardena clearly establishes the fact that it was the 8th accused-appellant who introduced the 6th and the 7th accused in the indictment to open accounts in their fictitious names using fraudulent NIC numbers. Using such fraudulent documents and identities, accounts under the names of Progarment, Euro Clothing, Kobe Apparel and Lord and Taylor had been opened by the 6th and the 7th accused.

Evidence shows that the 8th accused-appellant has opened four fixed deposits to the value of 93 million rupees using three cheques issued through the accounts of Kobe appeal, Progarment, and Lord & Taylor entities.

The evidence also shows that several Millions of rupees had gone through the account maintained by the 8th accused-appellant at Pan Asia Bank- Kotahena Branch using cheques issued from the earlier mentioned bank accounts created under the names of Progarment, Euro Clothing, Uniline Apparel, Kobe Apparel, Lord and Taylor on several occasions.

Similarly, in relation to the 30th to 34th counts against the 8th accused-appellant, the evidence clearly shows that it was the 8th accused-appellant who introduced the persons who opened five bank accounts at the Pan Asia Bank- Kotahena Branch under the name of KIL Apparels, Randunu Garments, Fashion Garments, DTN Apparels, and Supreme Garments. It has been established that the said accounts had been opened using fictitious NIC numbers and there had been no exports through any of the companies, which entitled them to claim VAT refunds. However, VAT refund cheques had been issued in their name and deposited in the accounts and taken away using other bank accounts, obviously with the connivance with the 1st and the 2nd accused.

It has been shown that during the period under consideration, the 8th accused-appellant had made several property investments in expensive neighbourhoods in Colombo like Horton Place, Colombo 07, Rosemead Place, Colombo 7, Albert Place, Colombo 03, R. A. De Mel Mawatha, Colombo 03, as well as outstations.

The 8th accused-appellant also had been instrumental in facilitating the wife of the 1st accused in the case to buy property. It is to be noted that the 8th accused was not even a taxpayer. One of the important points of the subsequent conduct of the 8th accused is the accumulation of huge sums of money in his accounts, which he never explained.

The prosecution has led evidence to establish the transactions relating to each of the charges preferred against the 8th accused-appellant.

The evidence goes on to establish the fact that the 8th accused-appellant had played a major part in assisting or collaborating with the 1st and the 2nd accused indicted to misappropriate money belonging to the state by fraudulent means.

As I have considered when determining the grounds of appeal urged by the 5th and the 6th accused-appellant, I am of the view that the prosecution has adduced sufficient evidence to show that the money obtained as VAT refunds had gone through accounts created with the connivance of the 8th accused-appellant which establishes a strong connection to the conspiracy and the part played by him to execute the conspiracy to misappropriate state funds.

Under the circumstances, I am of the view that it was up to the 8th accused-appellant to establish facts that were within his exclusive knowledge as to the introduction of these fictitious persons to open bank accounts, which facilitated the VAT refund cheque deposits, in situations where no VAT refunds were not due to them.

This does not mean that a burden has been cast upon him to prove the defence taken up by the 8th accused-appellant or shifting any burden to him. As I have stated before, in a criminal case, when the prosecution produces evidence that can directly attribute towards an accused person, connecting him to a crime, there is a burden cast upon such a person to create a reasonable doubt as to the evidence placed before the Court or at least offer a reasonable explanation in relation to the evidence against him.

The 8th accused-appellant has never made a statement to the police investigators or has cooperated in investigations regarding this massive loss of government money. Instead, he has chosen to flee the country and has never appeared before the Court, but has chosen to defend the action against him while remaining overseas.

In the absence of any reasonable explanation as to the evidence against him, I am of the view that the learned trial Judge was justified in considering the 8th accused-appellant as one of the main perpetrators of the crimes mentioned in the indictment along with the 1st accused of the indictment who has chosen to plead guilty to the charges.

For the reasons as considered above, I find no merit in the grounds of appeal urged on behalf of the 8th accused-appellant.

When it comes to the argument that the learned High Court Judge was misdirected in her determinations as to the relevant law and evidence led on behalf of the prosecution, it is my considered view that such a misdirection in itself does not have a vitiating effect on a judgement, unless it can be established that it has created a prejudicial effect on the substantial rights of the parties or occasioned a failure of justice.

The proviso of Article 138 of The Constitution, which provides for the Court of Appeal appellate jurisdiction, reads as follows;

> **Provided that no judgement, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.**

The corresponding section 436 of the Code of Criminal Procedure Act No. 15 of 1979 reads as follows.

> **436. Subject to the provisions hereinbefore contained, any judgement passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-**
>
> > **(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgement, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Court; or**
> >
> > **(b) of the want of any sanction required by section 135 unless such error, omission, irregularity or want has occasioned a failure of justice.**

In the case of **Lafeer Vs. Queen 74 NLR 246, H.N.G.Fernando, C.J.** stated;

> *"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

In **Mannar Mannan Vs. The Republic of Sri Lanka (1990) 1 SLR 280**, in dismissing the appeal, the following view was expressed by **Bandaranayake, J**.

> *"The judgment of House of Lords in Stirland V. D.P.P. (1944) A.C.315 has been received and adopted in Sri Lanka for many years, and the tests suggested there have influenced the development of the law in this area in this country. It provides for a flexible and sensible approach to the facts and the circumstances of each case which must be the underlying criteria of decision and in consonant with the language of section 334(1) of the Criminal Procedure Code. I am satisfied that this is an appropriate case where the exception could be applied."*

It was held in the case of **Hiniduma Dahanayakage Siripala Alias Kiri Mahaththaya and Others Vs. Hon. Attorney General S.C. Appeal No. 115/2014**, decided on 22-01-2020,

> **Per Aluvihare P.C. J.,**
>
> *"With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that;*
>
> *"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*
>
> *The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must*

be observed that no such Constitutional provision is to be found either in the '1948 Soulbury Constitution' or the 'First Republican Constitution of 1972."

It is my considered view that in this action, even if the learned High Court Judge had elaborated more on the evidence and analysed it more substantially, the ensuing result would have been the same, as held by the learned High Court Judge.

Therefore, I am of the view that no prejudice has been caused to the appellant, nor has it occasioned a failure of justice due to the alleged misdirection in the judgment.

For the reasons as considered above, I find no reason to interfere with the conviction and the sentence of the learned High Court Judge of Colombo.

Accordingly, the appeals of the 5th, 6th, and 8th accused-appellants are dismissed for want of any merit.

The convictions and the sentence affirmed.

Judge of the Court of Appeal

R. Gurusinghe, J.

I agree.

Judge of the Court of Appeal