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

In the matter of an Appeal in terms of Section 331of the Code of Criminal Procedure Act No.15/1979.

C.A.No.151-152/2015

H.C. Negombo No. HC 445/2005

1. Makawitage Suresh Gunasena.
2. Polwaththa Rathubaduge Ajith Nishantha.

Accused-Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

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BEFORE	:	**HON, DEEPALI WIJESUNDERA, J.** **HON, ACHALA WENGAPPULI, J.**
COUNSEL	:	Anil Silva P.C. with Isuru Jayawardhena for the 1st Accused-Appellant. Shanaka Ranasinghe P.C. with Niroshan Mihindukulasuriya and Sandamali Peiris for the 2nd Accused-Appellant Priyantha Nawana P.C. , ASG with Anoopa de Silva S.S.C. and S. Narampanawe S.C. for the respondent
ARGUED ON	:	04th July, 2019, 05th July, 2019, 09th July, 2019 10th July, 2019, 11th July, 2019, 22nd July, 2019, 23rd July, 2019 & 26th July, 2019
DECIDED ON	:	30th October, 2019

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HON. ACHALA WENGAPPULI, J.

The 1st and 2nd accused-appellants (hereinafter referred to as the 1st and 2nd appellants, respectively) were indicted before the High Court of Negombo; firstly, on a count of conspiracy to commit the murder of *Waragoda Mudalige Jerad Mervyn Perera* on or about 21st November 2004, and secondly, for committing his murder in the same course of transaction at *Wattala*.

They were tried before the High Court without a jury and, at its conclusion, were convicted on both counts on 22nd June 2015. Both appellants were sentenced to death accordingly. They have challenged their conviction and sentence imposed by the trial Court by seeking intervention of this Court through the instant appeal .

In support of his appeal, the 1st appellant relied on the following grounds of appeal;

a. he was denied of his right to a fair trial due to below stated reasons:

    i. the effect of the order made by the trial Court remanding witness *Jayashantha* (PW7) on witness *Pradeep Kumara* (PW2) who was called by the prosecution as the next witness,
    ii. there was no fair prosecution presented by the State,
    iii. there was no fair investigation conducted by the State,

b. the trial Court had erroneously admitted a "confessionary" statement against the 1st appellant,
c. the trial Court had failed to consider the items of circumstantial evidence, presented by the prosecution, that were "tainted with fundamental vice"
d. the trial Court had failed to properly consider the *alibi* of the 1st appellant.

The 2nd appellant claims that he too was denied of a fair trial since the trial Court had failed to consider the multiple infirmities in the evidence presented by the prosecution in support of the two counts it had levelled against the appellants.

It was thought best to undertake an examination of the items of circumstantial evidence that had been presented before the trial Court, *albeit* briefly, at this stage of the judgment, in order to fully appreciate their scope and relevance in the correct perspective even before this Court ventures to consider the several grounds of appeal as raised by the appellants for their relative merits.

The basic structure of the prosecution case is that the 1st appellant, an Inspector of Police, who was heading a special unit tasked with special operations, referred to as *Unit – C* of *Biyagama* Police, was named as a respondent in an application filed by the deceased before the Supreme Court alleging violation of his fundamental rights. The incident referred to in the said application has happened during the 1st appellant's tenure at *Wattala* Police as its Officer-in-Charge of Crimes Branch. Apparently the deceased was arrested by the 1st appellant mistakenly and was severely assaulted during detention before his eventual release from Police custody upon realisation of the mistake. Consequent to the hearing of the said application before the Supreme Court, the deceased was awarded compensation. The 1st appellant too had to make a payment to the deceased in his personal capacity. The said application also had resulted in a prosecution against the 1st appellant and several others in the High Court of *Negombo* under Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Act No. 22 of 1994. The efforts

initiated by the 1st appellant to have the allegations of torture withdrawn by the deceased were proved unsuccessful and the trial against him was about to commence, as indicative by the fact that the deceased was served summons to appear before the said High Court on 2nd December 2004. The prosecution claimed this looming threat to the 1st appellant had motivated him to terminate the life of the deceased and therefore had conspired with the 2nd appellant, who presumably shot the deceased, acting on the instructions of the 1st appellant.

The evidence led by the prosecution revealed that, in the morning of 21.11.2004, the deceased was travelling in a public bus. He was followed by the appellants in a white car with tinted windows. In addition to the appellants, *Amarakoon* (PW1) and *Pradeep Kumara* (PW2) were also in the car. *Amarakoon* functioned as one of the private informants of the 1st appellant and was picked up by the said appellant on his way that morning. The other passenger of the car, *Pradeep Kumara* was one of the police officers who was attached to the special unit in which the 1st appellant functioned as the OIC. This witness had reported to the unit for duty that morning. He was ordered by the 1st appellant to join him to apprehend a person connected to the underworld called "*Madhura*". He was also told that it was a task assigned to their unit. They set off from the Police Station soon after. They travelled in a car driven by the 1st appellant. It belonged to the 1st appellant. It was a locally assembled car and therefore had no proper registration papers. It bore a false registration number. One of the number plates used in the car, was recovered subsequent to the shooting, upon information provided by the 1st appellant. The number

plate had been cut into three pieces and was found lying concealed in a shrub.

After a failed attempt to locate the deceased using *Amarakoon* as a scout the 1st appellant had followed a bus realising that the deceased was travelling in it and at some point when the bus stopped, the 1st appellant too stopped his vehicle. He then instructed the 2nd appellant and *Pradeep Kumara* to board the bus.

The 2nd appellant had boarded the bus in which the deceased travelled with *Pradeep Kumara.* They have travelled in the bus for a short distance. 1st appellant followed the bus in his car with *Amarakoon.* The bus had come to an abrupt halt in the middle of the road as gun shots were heard. As the bus has halted, the 2nd appellant got off from the bus in a hurry, carrying a hand gun with him and got into the 1st appellant's car that was waiting behind the bus.

Jasaseelan was the conductor of the bus in which the deceased travelled at the time of shooting. He had identified the 2nd appellant, who rushed out of the bus with a gun in his hand immediately after the cracking noise was heard. In the process, the 2nd appellant had trampled two female passengers who tried to board the bus. Witness *Ajith Shantha* was employed as a tyre mechanic in a tyre repair shop close to the location where the bus had stopped after the incident. He also saw the 2nd appellant who emerged from the bus with a gun in hand and running towards the white car that was halted behind the bus and getting into it. The car then sped off from the scene along with the 2nd appellant while *Pradeep Kumara* was left stranded.

The deceased was found bleeding inside the bus and had died two days later. He was immediately rushed to *Ragama* Hospital and later transferred to National Hospital where he succumbed to injuries on 24.11.2004. Before his death, he told IP *Abeysekara,* who served as the OIC of *Kandana* Police Station, when he visited the deceased at the ICU of *Ragama Hospital* , that he was shot at by an unknown person owing to the "*Wattala* incident".

It is in this backdrop, this Court now ventures to consider the several contentions advanced by the appellants, in support of their grounds of appeal.

In support of his contention that the 1st appellant was denied of the substance of a fair trial, learned President's Counsel submitted that main prosecution witnesses were "*intimidated*" by the prosecution by remanding a witness who had previously given evidence. Thereby, the prosecution denied them of any opportunity to "speak out the truth" but forced them to present a version they wanted. It was highlighted that, a remand order was issued subsequent to the prosecution application to treat some of those witnesses as "adverse witnesses". They were subjected to cross examination under Section 154 of the Evidence Ordinance. This course of action adopted by the prosecution and the consequential orders made by the trial Court in favour of those applications have cumulatively resulted in a fear psychosis in the minds of the remaining witnesses, who were subsequently called by the prosecution in support of its case.

Learned President's Counsel claimed those witnesses would have had the impression in their minds that if they do not give evidence in line

with the prosecution story, they would also be treated as "adverse witnesses" as the previous witnesses and also be remanded. Learned President's Counsel therefore submits that they were therefore forced by the circumstances to suppress their intention to speak the "truth".

He further added that Article 4 and 13 of the Constitution of the Republic has imposed duties on all organs of the State for the observance of individual rights that are recognised therein and the Courts are no exception to this constitutional obligation.

It was highlighted by the learned President's Counsel that after the witness *Jayashantha* (PW7) was treated as an "adverse" witness, the prosecution called witnesses *Pradeep Kumara* (PW2) as its next witness. After his evidence, the prosecution had treated yet another witness as an "adverse" witness. *Pradeep Kumara* was arrested by the Criminal Investigations Department during its investigations and several statements were recorded off him. He then made another statement to *Wattala* Magistrate, under Section 127 of the Code of Criminal Procedure Act No. 15 of 1979, and thereby presented a different version to the one taken at the CID, regarding the incident.

It was contended that when the Court had remanded the witness, who preceded *Pradeep Kumara,* for giving evidence contrary to what he stated in the statements to Criminal Investigations Department, it is highly probable that *Pradeep Kumara* being the next witness to be called, was giving evidence under the apprehension that if he did not support the prosecution story, then he too would be dealt with a similar manner. Therefore, learned President's Counsel submitted that the witness was not

clearly in an environment where he felt he was free to speak the "truth" whilst in the witness box, a fundamental requirement in any criminal justice system, but was forced by the circumstances to toe the line the prosecution had taken. In effect, learned President's Counsel added that he had no alternative but to come out with the version that is favourable to the prosecution by which it sought to implicate the two appellants.

Moving to substantiate his claim that there was no fair prosecution, learned President's Counsel highlighted the approach of the learned prosecutor had adopted, in leading witnesses. He pointed out that the prosecution commenced its evidence by leading comparatively an insignificant witness, instead of calling its "star" witness who speak about the circumstances under which the death of the deceased had occurred. It was highlighted that the prosecution had led the evidence of witness *Jayaseelan* as its first witness and had kept back the most important witness *Pradeep Kumara*. He was called to give evidence only after witness *Jayashantha,* who was treated "adverse" by the prosecution and remanded on that account.

It was also highlighted that the learned prosecutor had commenced witness *Jayashantha's* evidence by directly reminding him of the statement he made under Section 127 before the Magistrate's Court, even before his evidence, in relation to the introductory material, is elicited as normally a prosecutor would do in any other average prosecution, and thereby reminding the witness of the dire consequences that might follow, should he resile from that position.

In support of his complaint that there was no fair investigation conducted by the State, learned President's Counsel referred to the inconsistency of the evidence of *Pradeep Kumara* in relation to the time, date and place of his arrest with the evidence of CID officers on these vital issues. After his arrest, he was kept in a cell which was "infested with rats" and with no adequate lighting. It was submitted that the witness was assaulted and kept in the custody of the investigators in trying conditions, exceeding the legally permissible period which would have had a negative impact on the witness's resilience. He also referred to the fact that even though the CID, during its investigations, made certain recoveries which included live ammunition, a magazine, a set of handcuffs from the possession of *Pradeep Kumara*, but strangely there was no corresponding legal process was initiated for the said illegal possession. He contended that this was clearly a concession granted to the witness so that the investigators could have used it as leverage to compel the witness to implicate the appellants.

Learned President's Counsel placed heavy reliance on the dicta of judgments of the Supreme Court and High Court of India, in which those Courts have made certain observations upon the proper manner of conducting investigations and the entitlement of an accused to a fair trial.

In his reply, learned Additional Solicitor General submitted that it was transpired during the trial that, prior to the incident, the 1st appellant offered to settle some of the debts incurred by prosecution witnesses and had handed over about Rs. 40,000.00 to a witness for that purpose. In addition, soon after the incident of shooting he had threatened them with physical harm if they chose to divulge what they know. The 1st appellant

also influenced the prosecution witnesses to maintain a version he had "fabricated" to cover his tracks.

Learned Additional Solicitor General further added that the reason to implicate the appellants despite the initial reluctance to do so was due to the fact that the witnesses were apprehensive with the possible eventuality that they too would be held responsible for the murder they did not commit. In the circumstances, he contended that the witnesses chose to speak the "truth", as they did in Court, not due to any "inducement" by the CID as the appellants contended but due to realisation of the predicament they were forced into by the 1st appellant. This fact is clearly illustrated by the very words expressed by witness *Pradeep Kumara* who let his frustration out in vernacular terms. Witness, referring to the 1st appellant's conduct, had said " අපි සුරේෂ් මහත්තය හින්දනේ මෙච්චර පරිප්පුවක් කෑවෙ" and that grievance only prompted him to make a truthful statement before the learned Magistrate and then repeat it before the trial Court.

With these submissions of the 1st Appellant in mind, this Court now proceeds to consider them against the evidence that had been placed before the trial Court; in order to determine the validity of the said grounds of appeal.

The trial against the two appellants commenced on 03.08.2006 and the prosecution had led evidence of *Jayaseelan* (PW4), *Ajith Shantha* (PW5), *Amarakoon* (PW1) and *Jayashantha* (PW7) in that order. At that stage the presiding trial Judge was succeeded by her successor on 23.03.2007. It was the succeeding trial Judge who presided over the partly heard trial until its

conclusion and had delivered the impugned judgment. In between these two points, there was yet another High Court Judge who presided over the trial Court during three dates in which this case was called in open Court. However, no evidence was led and recorded before her.

On 23.03.2007, when the trial resumed before the succeeding trial Judge, both the appellants have made applications to recall the prosecution witnesses who have already given evidence before his predecessor. The prosecutor resisted the application but the learned trial Judge, with his order on 31.08.2007, decided only to have their evidence re-recorded before him. The learned High Court Judge also made order that there would not be a trial *de novo*.

Then the prosecution recalled *Jayaseelan* (PW4), *Jayashantha* (PW7), *Pradeep Kumara* (PW2) and *Amarakoon* (PW1) in that particular order before the trial Court and thereafter continued with the task of presenting its case by calling the remaining witnesses who were listed in the back of the indictment. As evident from this sequence, the "star witness" as termed by the 1st appellant was called by the prosecution only after the evidence of *Jayashantha* (PW7). *Jayashantha* has commenced his evidence for the 2nd time before the trial Court on 16.11.2007 and after his examination in chief was over, the 1st appellant had immediately commenced his cross examination. The 2nd appellant commenced his cross examination of the witness only on 25.01.2008. Halfway through the cross examination by the 2nd appellant, the prosecution made an application to the trial Court to permit them to cross examine the said prosecution witness as per the provisions contained in sections 154 and 155 of the

Evidence Ordinance. The trial Court had allowed the said application by the prosecution and the witness was cross examined by the prosecution.

At the close of the proceedings of the day, the witness was remanded by the trial Court upon an application by the prosecution. The case was called thrice before the next witness was called by the prosecution. On 15.02.2008, when the case was called for the third date, the witness *Jayashantha,* who was remanded by the trial Court at the end of the proceedings of 25.01.2008, was enlarged on bail. Witness *Pradeep Kumara* (PW2) was called by the prosecution only on 16.05.2008, after well over a period of three and half months since the evidence of the last witness *Jayashantha* was led.

Thus, it is observed that the complaint of the 1st appellant that the witnesses were deprived of an opportunity to speak the "truth" in Court because they were compelled by the circumstances is applicable only to witnesses who were arrested and remanded by the CID.

It is clear from the long list of witnesses called by the prosecution, only witnesses *Pradeep Kumara* and *Amarakoon* (PW1) belong to the said category. Witness *Amarakoon* was the other person to travel in the car along with the two appellants and *Pradeep Kumara* on the day of the shooting. He is a civilian who acted as a private informant of the 1st appellant at that point of time.

During his submissions, the 1st appellant had conferred the title, "star witness of the prosecution", to witness *Pradeep kumara.* In a way, the 1st appellant's recognition of the witness's importance for the case presented by the prosecution could not be downplayed. He is the only

witness who was with the appellants throughout the sequence of events, in its entirety which culminated with the shooting of the deceased by mid-day. He also testified as to what the appellants have discussed about the events that took place in the morning, and when they met again in the same evening at *Biyagama Village* over some drinks. His evidence is therefore relevant to the prosecution not only to establish criminal liability to the charge of murder but also to establish the charge of conspiracy to commit murder.

The 1st appellant's contention that he was deprived of the substance of a fair trial is fundamentally stems from certain circumstances that might have had a bearing as to the determination of truthfulness and reliability of the testimony of these two witnesses before trial Court. His grievance then could be summarised to read that the attendant circumstances in relation to their arrests, detention, making statements to the CID, making a statement to the Magistrate and finally giving evidence before the trial Court have effectively prevented these witness from telling the "truth" and were forced to come out with a script already prepared by the CID to implicate the appellants. He added that the situation was exacerbated with the remanding of a witness *Jayashantha* who apparently had shifted positions during cross-examination.

In ***Attorney General v Lateef and another*** (2008) 1 Sri L.R. 225, the Supreme Court noted that *"... a fair trial is also not capable of a clear definition"*. Nonetheless, it had listed out some of the concepts that are involved in the said judgment.

It is obvious that the trial Court was not the proper forum to address the issues of illegal arrest, detention under unsatisfactory conditions in which the witnesses were said to have been held. The witnesses *Pradeep Kumara* and *Amarakoon* have never sought any legal redress over the said issues. In the circumstances, those considerations are relevant, as far as the trial Court is concerned, only in determining the truthfulness and reliability of the testimony of these witnesses. In short, these complaints boils down essentially to a credibility issue that should be decided by the trial Court, as in the case of any prosecution.

Now the complaint that the witness was prevented by the circumstances to tell the truth should be examined in detail.

The "truth" as perceived by the 1st appellant might not necessarily be the "truth" as perceived by the prosecution or of its witnesses. The trial Courts, when they undertake to determine any relevant questions of fact, are expected to consider not only the truthfulness of a version of events as narrated by witnesses in relation to that particular question of fact, but also the reliability of that version as well. It must consider the whole of the evidence, presented to Courts through witnesses and apply the time tested evaluation techniques in coming to conclusions as to the testimonial trustworthiness of those witnesses. It must satisfy itself that each of the witness is telling the truth. It is the duty of the trial Court to ascertain and discover the truth in its true sense, and not what a party wants it to accept as "truth" as they perceive it. In ***Premaratne v Republic of Sri Lanka*** (1998) 3 Sri L.R. 341, it was emphasised by this Court that *"the trial judge should not play the role of a mere umpire but must take effective action to ascertain and discover the truth."*

The complaints of assault, ill treatment during detention and adopting coercive methods, are common to witnesses *Jayashantha, Pradeep Kumara and Amarakoon. Jayashantha* and *Pradeep Kumara* were serving members of the Police Department at the time of their arrests. *Amarakoon* was the only lay person. However, during the trial before the succeeding trial Judge, witness *Jayashantha* was treated adverse and therefore the prosecution indicated that they did not rely on his evidence as part of its case. Hence, if at all, the effects of those complaints on illegal arrests and acts of assaults are now only relevant in assessing the evidence of the witnesses *Pradeep Kumara* and *Amarakoon.*

In determining this ground of appeal, this Court must bear in mind that there was no challenge mounted by the 1st appellant as to the admissibility of the evidence that had been led through these witnesses. The questions whether the trial Court erred in the reception of inadmissible evidence and whether the conviction is bad since it was founded upon inadmissible evidence, were not argued before this Court under this ground. The 1st appellant's complaint simply is that under these circumstances he was denied of a substance of a fair trial.

In assessing whether *Pradeep Kumara's* evidence before the trial Court is a truthful account of what took place that day or not, while keeping in mind the challenges mounted by the 1st appellant on that same issue, it is relevant to consider the background of the witness, as revealed through his evidence.

At the time of giving evidence in May 2008, witness *Pradeep Kumara* has served in the Police Department for well over 18 years. He had served

in crimes branch of some of the stations and was attached to special unit that had been established due to the high rate of crimes in the *Biyagama* area, at the time of the incident. Therefore, it is clear that he was not a stranger to investigative techniques adopted by the Police and also to criminal justice system in general. It is probable that as an officer attached to a special unit dealing with crimes, he had knowledge of how and why certain suspects would make statements to judicial officers. He obviously had knowledge as to how the system worked and therefore had a distinct advantage about the institutions involved in the criminal justice system, when compared with the knowledge of an uninformed villager, whose interaction with the executive arm of the Government is limited to dealing with *Grama Niladhari* or *Samurdhi Niyamaka* of the area at the most.

He clearly admitted that he had altogether made four statements to CID and had lied in all of them. He said that he was influenced by the 1st appellant to make these false statements. He claimed that what he stated in these statements are what he had been asked to state by the 1st appellant. There were contradictions marked off these statements during the cross examination by the 1st appellant. The witness admitted that when questioned as to who got into the bus with the 2nd appellant, he did not tell the truth due to fear and had placed his signature to statements whilst under mental stress. Then he had made a statement to the Magistrate and in that statement, however, he claims that he told the "truth".

The witness explained the reason for making such a statement. He stated that " අපි සුරේෂ් මහත්තය හින්දනේ මෙච්චර පරිප්පුවක් කෑවෙ." When he was suggested by the 1st appellant that in order to palm off responsibility of the

murder to someone else he had lied in Court, the witness denied the suggestion and added :

"උ: නෑ ස්වාමීනි මම සත්‍ය කතාව කිව්වෙ. සුරේෂ් මහත්තයා නිසා තමයි මම මේ විදියට කළේ. ඒ නිසා තමයි මට මේ විදියට වුනේ."

As the witness claimed, he had apparently decided to disclose what he termed as the "truth" to the Magistrate who recorded his statement in Chambers. There were two others along with the witness to make such statements. Even assuming that the witness was coerced by the CID to tell the "truth", to the Magistrate, as they perceived it, the witness had the opportunity to admit that position before the trial Court. In fact, he courageously admitted before trial Court that he lied only to CID and told them what the 1st appellant wanted him to tell.

Then the impact of the remanding of the overnight witness on *Pradeep Kumara* should be considered by this Court. It was *Jayashantha* (PW7) who was treated adverse by the prosecution and remanded. *Pradeep Kumara* testified thereafter as the next witness for the prosecution. Both *Pradeep Kumara* and *Jayashantha* were serving in the Police Department at that time. *Jayashantha* had already given evidence before the trial Court but was recalled upon application of the appellants to give evidence before the succeeding trial Judge. It was during his cross examination only he was treated adverse by the prosecution. It is correct to state that when the order of remand was made by the trial Court, *Pradeep Kumara* was present in the well of Court and had been warned thereafter to appear on the next date. When *Pradeep Kumara* was called to testify on the next date of trial, *Jayashantha* was already enlarged on bail by the trial

Court, and the prosecution had indicated its intention to prosecute him for perjury.

There is no necessity for this Court to consider whether the prosecution's application to treat *Jayashantha* as an adverse witness before the trial Court is justified in the circumstances or not. The only concern relevant on this particular event is the presumed psychological impact of the remand order of *Jayashantha* made on *Pradeep Kumara* and *Amarakoon* which could have had a bearing on their ability to tell the "truth" in Court. It could well be that the said order of remand would have made *Pradeep Kumara* more cautious in giving evidence since he had taken up a different stance in Court to the one he took in making statements to CID. Both these witnesses knew *Jayashantha* gave evidence once and there was no problem. When *Jayashantha* was recalled and cross-examined only the application to treat him adverse was made by the prosecution. It is also probable that *Pradeep Kumara* may have been under the apprehension that he should repeat the "truth", that he told the Magistrate, to steer clear of trouble. But the witness was emphatic that he told the "truth" to the Magistrate and offered a very probable explanation for coming out with the "truth" in his statement to the Magistrate, thereby changing his stance taken at the CID at the behest of the 1st appellant. The several contradictions that were marked off the several statements witness had made to CID concerns the falsified factual version given on the instructions of the 1st appellant. The witness clearly stated that he had lied in all four statements. There is no significant contradiction that had been marked off his statement to the Magistrate which had the effect of going to the root of the matter and thereby *"shake the basic version of the witness"* per judgment of this Court in

Best Footwear (Pvt.) Ltd., and two Others v Aboosally and Others (1997) 2 Sri L.R. 137.

It is observed that at the early stages of the investigations by CID, *Pradeep Kumara* was influenced by the 1st appellant to come out with a version, presumably favourable to the 1st appellant which he wanted the witness to convey as the "truth". *Pradeep Kumara* had been arrested, detained and questioned by CID officers. With his arrest and detention by the CID, in connection with the murder of the deceased, the witness had realised that the physical hardships and mental agony that he had to endure were, not because he did something illegal, but because he suppressed what really happened that day, being the actual "truth" to CID, and had instead narrated what the 1st appellant wanted him to convey. The witness, being a serving police officer, had to languish in a cell where the criminal suspects were generally kept, and that humiliation coupled with more realistic threat of being treated as a suspect to a murder he did not commit had cumulatively forced the witness to ponder over the predicament he was in. It is upon realisation of this frightening reality, as he said in evidence, that he had decided to disclose the "truth", which is more in line with the realistic version of the events that took place on the day of the shooting, to the Magistrate, whom the witness had looked up to as a reliable person in authority.

There is a time gap of over three and half month in between the order of remand and *Pradeep Kumara's* recording of evidence. He had ample time to assess the two situations. He could have told Court what the 1st appellant told him before making the statements to CID, as the "truth". Then he had the other option of coming out with the "truth" he himself

told to the Magistrate after realising that the "truth" of the 1st appellant had already made his life difficult. He opted for the latter cause of action for obvious reasons.

It is correct that this witness gave evidence for the first time in the trial Court since the indictment against the appellants were directly presented by the Hon. Attorney General, without a preliminary inquiry. He was to be called during the proceedings before the preceding trial Judge but she was transferred out before that and the succeeding trial Judge decided to "recall" the witnesses already given evidence and thereby delaying his turn to give evidence.

It is obvious, therefore, that the trial Court, which has had the distinct advantage of observing the demeanour and deportment of *Pradeep Kumara* in giving evidence, was satisfied to accept his evidence as credible and reliable account of the events that led to the death of the deceased in convicting the appellants, after evaluating his performance as a witness in the witness box.

It is evident from the judgment that the trial Court had accepted *Pradeep Kumara* as a truthful and reliable witness after evaluating his evidence by applying the tests of probability, consistency and partiality. It was mindful of the fact that there were minor infirmities in the evidence, but when his evidence is viewed with the other items of evidence presented by the prosecution, the trial Court was satisfied that his evidence was amply supported by them and that factor had dispelled any uncertainty over these infirm segments.

The 1st appellant contention is witness *Amarakoon's* evidence also similarly tainted. He invited the attention of this Court to his cross examination where the witness admitted that he urgently needed to get himself released from the remand custody to attend to his child's school admission, in support of the position that the witness had falsely implicated the 1st appellant to this murder to get himself released from detention. The 1st appellant relied on the judgment of ***Attorney General v Theresa*** (2011) 2 Sri L.R. 292, to emphasis that both *Amarakoon* and *Pradeep Kumara* are partial and interested witnesses.

This claim of partiality highlighted by the 1st appellant is evident from the evidence of *Amarakoon.* But his partiality seemed tilted not towards the prosecution but in favour of the 1st appellant. During his cross examination, the witness had admitted that about two three months before this incident he was arrested by Fort Police in connection to a robbery of a van. It was the 1st appellant who intervened on his behalf to secure his release. Even then the witness had been an informant of the 1st appellant. Not only his release, the 1st appellant had also intervened to secure the release of another person, described by the witness as a friend of the 2nd appellant, who was also arrested along with him. This close association continued even after the shooting incident. Before the arrest of the witness by the CID, he was forewarned by the 1st appellant who visited his house and conveyed that the witness would be arrested by CID.

It was suggested to this witness by the 1st appellant that his desire to avoid serving a time in jail and to return to his home made him lie about the incident. The 2nd appellant suggested that the witness's desire to return to his child made him implicate the appellant. The witness denied both

these suggestions and explained his reasons for taking this particular stance. The witness said in examination in chief itself that he had nothing to do with the murder and as such he made a statement to the Magistrate to prevent any injustice being meted out to himself. He repeated this position during cross- examination by the 1st appellant and stressed that all he wanted to tell is the truth. During cross examination of the 2nd appellant, the witness said

" උ: මගේ සම්බන්ධයක් නැති හන්දා මම බය වුනේ නෑ. ප්‍රශ්ණ කරන කොට කිව්වා මමත් එකතු වෙලා මේ මිනීමැරුම කරා කියලා කියන නිසා මට බය හිතුනා මම සම්බන්ධ නැති නිසා"

This consistent stance maintained by witness *Amarakoon* is indicative of the truthfulness of his account. His explanation of making a statement to the Magistrate is acceptable since it is highly probable that the moment he realised that he too would be accused of murder to which he had no connection, decided to reveal what he know of the sequence of events leading up to the point of shooting. The fact that he had realised the potential threat of Police treating him as a suspect for the murder of the deceased soon after the act of shooting is indicative from his conduct of concealing the SIM card given to him by the 1st appellant that morning in a till of his young son, as a precautionary step. This item was later recovered by the CID during its investigations and the phone records revealed that it had been used in the morning of shooting to communicate with the other phone with which another SIM was fitted in, that had been later found inside the car used by the 1st appellant.

The trial Court, in its undertaking of assessing credibility of this witness, had considered his evidence in detail and found that except for a

few minor discrepancies it had matched substantially with the testimony of *Pradeep Kumara* and also with the other items of circumstantial evidence such as the phone call records and recovery of a SIM. The trial Court had found this particular witness's narration of events was amply supported by the evidence of *Jayaseelan* and *Nishantha,* who are totally unconnected persons to any of the parties and therefore could undoubtedly be considered as impartial and independent witnesses.

The concerns highlighted by the learned President's Counsel that both these witnesses are in fact "accomplices" and the mandatory caution with which such evidence should be treated had escaped the attention of the trial Court, need not be considered at length. The evidence is clear that both these witnesses were in the car in which the appellants travelled due to the false claim by the 1st appellant that they were to apprehend a person called *Madhura. Pradeep Kumara* had reported to his unit on that morning and was told by the 1st appellant to join him to apprehend the said underworld figure while *Amarakoon* was picked up from roadside on their way. *Amarakoon* was given the bodily features of the deceased by the 1st appellant who maintained they are the features of the underworld figure they were supposed to arrest that morning.

None of these items of evidence were challenged by the appellants or offered an alternative narration of the factual position to the one advanced by these witnesses. There was no suggestion that it was them who actually shot the deceased. Therefore, it is uncontroverted that both of them joined the two appellants under the mistaken belief that they were to arrest one *Madhura.* As far as *Pradeep Kumara* was concerned this was his official duty assigned to him by the 1st appellant. Clearly these

circumstances does not make any of these witnesses' accomplices, in its legal sense, to the murder of the deceased as they did not know the existence of the conspiracy or of the latent intentions of the appellants have entertained in respect of the deceased. This factor is clearly indicative from the evidence where both these witnesses have seen a gun in the hand of the 2nd appellant only after the shooting. It is also significant to note that there was no suggestion by the appellant put to any of these witnesses that they knew the fate that awaited the deceased that morning.

In ***De Silva and Others v Attorney General***(2010) 2 Sri L.R. 169, this Court has, in dealing with the issue of credibility of witnesses held:

> *"Credibility is a question of fact, not of law. Appeal Court Judges repeatedly stress the importance of the trial Judge's observations of the demeanour of witnesses in deciding questions of fact. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge, since he or she is in the best position to hear and observe witnesses. In such a situation the Appellate courts will be slow to interfere with the findings of the trial Judge unless such evidence could be shown to be totally inconsistent or perverse and lacking credibility.*
>
> *Evidence must be weighed and never counted. In reviewing the veracity of a witness Appellate Courts employ certain rules and guidelines as they do not have the benefit of observing and questioning the witness first-hand."*

This being the position with regard to the credibility of the witness, the 1st appellant complaint of denial of a fair investigation, fair prosecution and a fair trial needed to be considered in the light of the judgment he cited.

Learned President's Counsel relied on an unreported judgment of the *Gauhati* High Court, in Writ Appeal No. 20 of 2010 decided on 28.04.2011 to guide this Court on the principles of fair investigation. The High Court had, in its judgment stated that " ... *every victim of offence has the right to demand a fair trial meaning thereby that he or she has the right to demand that the State discharges its Constitutional obligation to conduct a fair investigation so that the investigation culminates into fair trial.*"

Over two decades ago, the Supreme Court of Sri Lanka in ***Victor Ivan v S N. Silva, Attorney General and another*** (1998) 1 Sri L.R. 340, had recognised the right to a fair investigation when it said that *"A citizen is entitled to a proper investigation - one which is fair, competent, timely and appropriate - of a criminal complaint, whether it be by him or against him."*

In another unreported judgment cited by the 1st appellant, the importance of conducting fair investigation and the effects of the failure to conduct an investigation fairly had been considered by the Supreme Court of India. This was an instance where the Supreme Court of *India* had reviewed a determination by a lower Court on an application filed by certain accused seeking its intervention for a direction to handover investigations of an instance of triple murder by a specialised agency, alleging bias on the part of local police. In the judgment of ***Babu Bhai v***

State of Gujarat and Others (Criminal Appeal No. 1599/2010 - decided on 26.08.2010), it was stated by the Court:

> *"... If the investigation has not been conducted fairly, we are of the view that such vitiated investigation cannot give rise to a valid charge sheet. Such investigation would ultimately prove to be precursor of miscarriage of criminal justice. In such a case the Court would simply try to decipher the truth only on the basis of guess or conjectures as the whole truth would not come before it. It will be difficult for the Court to determine how the incident took place wherein three persons died and so many persons including the complainant and the accused got injured. Not only the fair trial but fair investigation is also a part of Constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. Investigating agency cannot be permitted to conduct an investigation in tainted and biased manner. Where non-interference of the Court would be ultimately result in failure of justice, the Court must intervene."*

It is clear from the text of the said judgment, the emphasis by the Court is placed on "fair, transparent and judicious" investigation by the relevant authorities where there is no bias or taint could be attributed to its manner of conducting investigations. The matter before the Supreme Court was concerned with an instance where the Police was heavily biased

towards a particular ethnic group, where its members had an exchange of blows with members of a rival community over plying rickshaws which thereafter ballooned to a mass altercation leaving three persons dead. The Court affirmed the finding by the lower Court that "*... the investigation has been one sided. Statements of witnesses belonging to only one community had been recorded, and the members of the other community had been totally excluded from recording their statements, indicating bias in favour of one community and against the other.*"

The instant appeal reveals no such gross partiality or even a reasonable basis to infer the investigators have used unlawful methods to implicate the appellants to the crime they were charged with, whilst conducting investigations.

In addition to his complaint of unfair investigation, the 1st appellant also complained of an unfair prosecution on the basis that the prosecution had withheld important witnesses until the late stages of the prosecution by presenting relatively unimportant witnesses at its commencement. During his submissions on this issue, the 1st appellant did not challenge the prosecutorial discretion on the order of calling witnesses who are listed on the back of the indictment. His grievance thus is limited to the issue of calling witness *Pradeep Kumara* after three witnesses whom the 1st appellant termed as unimportant witnesses.

During the trial before the succeeding judge, the prosecution commenced its case with witness *Jayaseelan* who was followed by *Jayashantha, Pradeep Kumara and Amarakoon.* The wife of the deceased was

the next lay witness called by the prosecution followed thereafter by a long line of lay and official witnesses.

It is correct that the most critical evidence regarding the complicity of each of the appellants were presented through the witnesses *Pradeep Kumara* and *Amarakoon.* They were the two witnesses who travelled in the car along with the two appellants and are therefore privy to what the appellants discussed and have done during that journey.

But similarly the witnesses *Jayaseelan* and *John Ajith Shantha* are equally important witnesses since they were the only lay witnesses who are total strangers to any of the parties and therefore could be regarded as a highly impartial witnesses. *Jayaseelan* was the conductor of the bus in which the deceased was shot at. He identified the 2nd appellant with a gun in his hand soon after the shooting. *Ajith Shantha* was the employee of the nearby tyre shop who also saw the 2nd appellant with a gun.

Jayashantha, although treated adverse at the latter stage of his evidence, was the immediate neighbour of the deceased. He had knowledge of the several failed attempts made by the 1st appellant to reach a settlement over the prosecution founded upon the complaint by the deceased. This witness was given Rs. 40,000.00 by the 1st appellant for acting as the go between the two, in the discussions about the settlement.

This was a trial without a jury and it had been noted by this Court in many a judgment that unlike the jurors, the Judges who preside over trials have sufficient judicial experience and understanding of the legal principles that are involved in determining the culpability of the accused they try. Certainly the prosecution did not attempt to corroborate the

testimony of any particular witness in advance by adopting this particular order of calling witnesses (vide the judgment of ***King v Silva*** 30 N.L.R. 193). The case for the prosecution is purely based on several items of circumstantial evidence and as such, it is unreasonable to impose any restriction to the way in which the case should have presented or the order in which each of the witnesses are called.

The other complaint of the 1st appellant that witness *Jayashantha* was reminded by the learned prosecutor of him making a statement under Section 127 before the Magistrate at the very commencement of the examination in chief itself needed consideration at this stage.

Learned President's Counsel commented that it was very unorthodox to commence leading of a witness's evidence by straightaway reminding him of the statement he made to the Magistrate and continuing on that line eliciting the relevant evidence. It was his submissions that the approach of the prosecutor is indicative of issuing a veiled threat to the witness, reminding him of the fate of the witness who was treated adverse in a very subtle way and therefore to be consistent with what he already said in the Section 127 statement implicating the appellants. This is one possible interpretation one could attribute to the way in which the learned prosecutor had commenced examination in chief of this witness.

The witness *Jayashantha* by then had already given evidence once before the predecessor of the trial Judge who continued with the partly heard trial. The witness therefore was familiar with the Court atmosphere and the manner of giving evidence having faced, cross-examination by the two Counsel who represented the appellants separately before the trial

Court. However, this Court need not consider this contention of the 1st appellant any further since this particular witness was treated adverse and thereby the prosecution had indicated that it would not rely on his evidence in support of its case. The trial Court also had not referred to his evidence in reaching the conclusion it had arrived a ton the culpability of the appellants. Therefore this aspect has become an irrelevant consideration at this juncture.

As already noted the contention presented by the 1st appellant before this Court is unfair investigation, unfair prosecution coupled with certain other contributory factors that had transpired during trial had culminated in the denial of his right to a fair trial.

The term fair trial has been broadly defined in ***Wijepala v Attorney General*** (2001) 1 Sri L.R. 46, where the Supreme Court has held that the "... *right of the Appellant to a fair trial which was his fundamental right under Article 13(3). That Article not only entitles an accused to a right to legal representation at a trial before a competent Court, but also to a fair trial, and that includes anything and everything necessary for a fair trial.*" With this judgment, the apex Court had introduced the concept of "equality in arms" into our criminal justice system based on jurisprudence that had been developed by the judiciary of the Republic of South Africa.

In ***Tillekeratne v Officer in Charge, Pugoda Police Station*** (1997) 1 Sri L.R. 7, the Supreme Court unhesitantly quashed the conviction on the footing that the appellant before their Lordships was deprived of a fair trial for the following reasons:

"(i) the charge sheet contains no particulars of the alleged offence;

(ii) the record does not show that the appellant was given any further information or an opportunity of defending himself;

(iii) even a perusal of the appellant's evidence in case No.400/L does not enable us to gather the facts material to the charges."

When the 1st appellant's contention of denial of the substance of a fair trial is viewed against the principles that had been laid down in these judicial precedents, it becomes clear that there was hardly any material to hold that in fact there was a denial of fair trial to the appellants. The reasons for the said conclusion are set out below.

The appellants have taken up a defence of *alibi*. There was no accusation that the CID did not investigate that claim or had interfered with the evidence in support of such a claim by the appellants. The veracity of this claim of *alibi* is discussed elsewhere in this judgment in more detail. Although the 1st appellant complained that the witnesses *Pradeep Kumara* and *Amarakoon* were coerced by the CID to make statements to the Magistrate, implicating the appellant's complicity to the murder, with assaults, illegal detention and non-prosecution for obvious criminal conduct, that was not the position suggested to those witnesses during their cross examination. Already some of the suggestions and answers of these witnesses have been reproduced above and are clearly

indicative of the positions taken up by the appellants during their trial. This Court had already noted that these two witnesses have repeatedly said in evidence that the reason to make statements to the Magistrate was due to the justifiable apprehension of being accused of a murder they did not commit. The concerns that had been raised by the 1st appellant under fair trial had already been addressed to in the process of evaluating credibility of the important witnesses. The circumstances that were relied on by the 1st appellant in support of his contention that he was denied of the substance of a fair trial therefore assumes insignificant position since there was no impact of these concerns on the validity of the conclusion reached by the trial Court.

The complaint of the denial of a fair trial, appears to be a cleverly developed strategy by the learned President's Counsel for the 1st appellant since it was only advanced during the hearing of the appeal by placing reliance upon his interpretation of certain factual positions that had surfaced during trial. The 1st appellant had particularly highlighted the unfair investigation that had been carried out by the CID against them in order to falsely implicate the appellant for the murder of the deceased. None of these concerns were put to the Investigating officer IP *Chanaka de Silva* during cross examination by the 1st appellant. IP Silva is the best person to answer the allegation that the "truth" was altered using coercive methods on important witnesses to implicate that appellants, against whom the CID desired to foist this murder, when they made statements before the Magistrate. Nonetheless this Court had considered them and is

of the firm view that there was no justifiable basis to entertain such a complaint.

The trial Court had adequately dealt with the issue of credibility of the witnesses in its judgment and was satisfied that what they related before trial Court were a truthful and reliable account of the events that led to the death of the deceased. This determination reached by the trial Court is a question of fact concerning credibility and is well supported by the evidence presented before the trial Court and accordingly this Court concurs with the aforesaid conclusion reached by the Court below.

Thus, it is the opinion of this Court that the ground of appeal based on the denial of a fair trial is an implausible and it finds no support from the evidence presented before the trial Court, when viewed in the light of the above considerations. Therefore, the proposition of the 1st appellant that the witnesses who implicated the appellants have done so falsely to ward off imputation of criminal liability on themselves upon the promise of certain concessions and thereby resulting in denial of a fair trial, ought to be termed as an unconvincing argument.

The 1st appellant, in support of his 2nd ground of appeal that the trial Court had erroneously admitted a "confessionary" statement had submitted that the prosecution had presented evidence through witness *Pradeep Kumara,* to the effect that he made a statement which had been admitted by the trial Court, in violation of the prohibition imposed by the statutory provisions containing Sections 25 and 26 of the Evidence Ordinance.

It was highlighted by the 1st appellant that the disputed item of evidence is an utterance attributed to him which states that "ඒ ගැහුවෙ මගේ නඩුවෙ එකාට"

The 1st appellant added that when that particular utterance was made, it was made to *Pradeep Kumara* and at that time he was a serving police officer. Hence, the 1st appellant contended that he is entitled to the protection under Sections 25 and 26 of the Evidence Ordinance as that item of evidence should have been rejected by the trial Court as an item of inadmissible evidence, instead it had allowed its reception and erroneously relied on it in imputing criminal liability.

In order to consider this contention, it is important to consider the context in which the said utterance was made by the 1st appellant.

Witness *Pradeep Kumara* said in evidence that after the shooting, the 2nd appellant had got into the vehicle driven by the 1st appellant. They sped away leaving him stranded in the company of the other passengers who got out of the bus after the shooting incident along with the witness. He then took a bus to *Peliyagoda* and upon reaching *Kiribathgoda*, contacted the 1st appellant by calling him on his number. The witness was then instructed by the 1st appellant to come to the Police. In the same evening the 1st appellant came to pick the witness up from his house and was taken to *Biyagama Village* Restaurant. There they were joined by the 2nd appellant, who consumed liquor with the 1st appellant. The witness questioned the 1st appellant " මොකක්ද අර කළේ." The 1st appellant replied " "ඒ ගැහුවෙ මගේ නඩුවෙ එකාට. උඹ කට වහගන්,"

In effect, according to what the 1st appellant contended that his utterance to the effect that "ඒ ගැහුවෙ මගේ නඩුවෙ එකාට." to witness *Pradeep Kumara,* a serving police officer, is clearly a "confession" and therefore the prohibition imposed by Sections 25 and 26 of the Evidence Ordinance for its admission as evidence, should apply automatically.

Section 25(1) of the Evidence Ordinance reads as follows:

> *"No confession made to a police officer shall be proved as against a person accused of any offence."*

Plain reading of the said section indicates that the prohibition imposed by this section applies to "confessionary" statement made to a "police officer". This prohibition on the admissibility of confessionary statements which were made to police officers received recognition by Courts as an absolute prohibition. In ***Seyadu v The King*** 53 N.L.R. 251, the Court of Criminal Appeal reiterated this position as its judgment states:

> *"In **The King v. Kiriwasthu** (1930) 40 N. L. R. 289, a Divisional Bench of the Supreme Court, dealing with a precisely similar objection, upheld the submission that, in the present state of the law of this country, the prohibition contained in Section 25 of the Evidence Ordinance is absolute. The unanimous opinion of the Court was that " a confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself."*

In order to qualify for the absolute prohibition imposed by Section 25, the disputed statement attributed to an accused must first satisfy the

criterion of a "confession" as laid down by the relevant judicial precedents. It is therefore necessary to examine whether the said utterance of the 1st appellant that "ඒ ගැහුවෙ මගේ නඩුවෙ එකාට." is in fact qualifies to be treated as a confession or merely as an admission.

The question whether, an "admission made by the appellant should have been excluded on the general ground of exclusion" if it leads to an inference of admission of guilt, was considered by the Court of Criminal Appeal in ***R v Anandagoda*** 62 NLR 241, in the light of the provisions contained in Section 17(1) of the Evidence Ordinance. Having considered a long line of authorities, on this point the Court held:

> *"Subsection (1) defines an admission as a statement suggesting any inference (i) as to any fact in issue or (ii) as to any relevant fact. The illustrations to section 5 show that on a charge of murder the facts in issue are only whether the person charged did a particular act, whether that act caused the death, and whether that act was done with a murderous intention. Hence it is reasonable to assume that the first kind of statement referred to in subsection (1) of section 17 is an admission of one of these facts, and of no other. When subsection (2) is then examined, it becomes clear that the law declares to be a confession, only that kind of statement which is an admission of one of the self-same facts or an admission suggesting the inference that one of the self-same facts is correct An admission by an accused of facts which can establish motive, or opportunity or knowledge of a death, does not suggest an inference that offence was committed -by*

him; the inference which such a- fact suggests is only that he may have had a reason or an opportunity for, or knowledge as to the commission of, the offence. They are only relevant facts and are not facts in issue, and (to use the language of the judgments in ***The King. v .Fernando*** *(1939) 41 N. L. R. 151, and* ***Seyadu*** *(1951) 53 N. L. R. 251., are not facts the intrinsic terms of I which are such as to be capable of establishing a prima facie case. If then each of the admissions of the appellant, considered by itself, was relevant and admissible, all taken together were equally admissible."*

Applying this principle of law, as enunciated by the Court of Criminal Appeal, to the words "ඒ ගැහුවෙ මගේ නඩුවෙ එකාට", it is obvious that the said utterance of the 1st appellant had none of the attributes of a "confession". The relevant considerations that, whether the 1st appellant did admit a particular act, whether he did admit that act caused the death of the deceased, and whether he did admit that particular act was done with a murderous intention should be applicable to and only if the answer is in the affirmative a statement can be considered a confession. At the most, the 1st appellant had admitted that he knew the identity of the person who was shot at inside the bus by the same evening and as such, it is clear that the said utterance does not qualify to be termed as a "confession", triggering in the absolute prohibition under Section 25 of the Evidence Ordinance, for admitting it as an item of evidence. The evidence is clear that the 1st appellant was in the car and the deceased was shot at inside a bus. The 1st appellant had not seen the shooting. He may have wished for the death of the deceased because of the impending trial before

the High Court and must have felt relieved upon hearing the news that he was shot at when he uttered those words. But that is not the required criterion for the said utterance to be treated as a "confession". Hence, this contention by the 1st appellant must be termed as a contention without merit.

The contention by the 1st appellant that the trial Court had failed to consider the *alibi* of the 1st appellant should be considered next.

It is observed by this Court that in respect of the *alibi*, the 1st appellant, in his dock statement stated that on 21.11.2004 he was patrolling the areas of *Biyagama, Sapugaskanda, Waduwegama* and *Siyambalape* with RPC *Pradeep* in a private vehicle bearing No. 65 - 8621 and had thereafter visited the garage in which he had put his own vehicle for repairs at 11.30 a.m. Then he went on to inspect the perimeters of the *Biyagama* Investment Promotion Zone, after making entries at 11.45 a.m. in the books maintained at the police post of the said Zone.

The 1st appellant submitted that the prosecution evidence itself had supported his *alibi* and therefore the trial Court was clearly in error when it rejected his defence and convicted for the two offences he was charged with.

In order to determine the validity of the basis of rejection of the *alibi* of the 1st appellant by the trial Court, it is relevant to consider the submissions he made before the said Court in support of his defence. It is revealed that the submissions were made by the 1st appellant before the trial Court on the footing that OIC of *Kandana* Police *Chandana Abeysekera*

confirmed that he received information that a person was shot at inside a bus only at 12.00 noon. But the books maintained at the checkpoint located in the *Biyagama* Investment Promotion Zone indicate that on 21.11.2004, the 1st appellant had visited and inspected it at 11.45 a.m. It was also highlighted before the trial Court that this fact is confirmed by the Manager of the *Biyagama* Investment Promotion Zone *Ariyadasa Rajapakse* who stated in evidence that 1st appellant had left its main gate at 12.45 p.m. in a vehicle bearing No. 65-8625, although due to some oversight there was no corresponding entry in relation to the time of his arrival. The 1st appellant had stressed that the prosecution had therefore failed to call any evidence in rebuttal of his position and accordingly he ought to be cleared of any criminality over the two counts.

However, the trial Court was not convinced of the *alibi* of the 1st appellant and that it had created a reasonable doubt in its mind. The Court had rejected the said defence as there was clear evidence from the evidence of "independent" witnesses *Jayaseelan* and *Ajith Shantha* who stated that the actual shooting occurred sometime between 10.30 and 11.00 that morning and therefore the 1st appellant's presence at the Investment Promotion Zone at 11.45 a.m. had no bearing on the probability of the claim of the prosecution that he was at the place of shooting. The 1st appellant was in control of the vehicle and the distance between the place of incident and Investment Promotion Zone is not an impossible one to travel in the given period of time. The trial Court supported its view considering the subsequent conduct of the 1st appellant in removing the books maintained the police post of Investment Promotion Zone without the approval of its Officer-in-Charge which lead to the justifiable inference

that the entries relied on by him might not reflect the actual position. It was the 1st appellant himself made those entries.

The task before this Court is to examine the validity of the conclusion reached by the trial Court in consideration of the totality of the evidence that had been placed before it and determine whether the said rejection of the *alibi* could be supportable on those evidence.

The proceedings indicate that the 1st appellant had cross-examined *Jayaseelan* and *Ajith Shantha* on the incident but did not suggest that he was elsewhere at the time of shooting probably due to the fact that none of them had stated that he was there inside the bus. But strangely when witness *Pradeep Kumara* was cross examined by the 1st appellant, only two references were made about the appellants visit to *De la Rue*. The witness was only questioned about whether he was taken to the said place by the CID and was replied in the negative. He was then questioned whether the CID questioned him about *De la Rue* and was answered it in the affirmative. Except for these two references, the 1st appellant did not suggest that at the time of shooting he was elsewhere at 11.45 a.m.

Similarly, the 1st appellant had failed to suggest his *alibi* to witness *Amarakoon* and even omitted to make any reference to *De la Rue* at all during his otherwise lengthy cross-examination.

IP *Chanaka de Silva,* is the principle Investigating Officer and he gave evidence for the prosecution regarding his investigations of the *alibi* taken up by the 1st appellant by stating that he visited the *De la Rue* check point. In the process, IP *Silva* had recorded statements of SI *Herath, Chandimal Jayasinghe, Prasad Perera, Anil Kushantha* and *Vinitha Bandara,* in addition to

that of the two appellants, in verifying this claim. When he wanted to take charge of the Information Book maintained at Investment Promotion Zone check point in order to verify the claim of the 1st appellant on 29.11.2006, it was learnt that those books were already removed from the point by the said appellant. Having examined the CCTV footage recorded by the security camera system of *De la Rue* security printing facility, located within the said Investment Promotion Zone, he noted that the 1st appellant had entered the said premises at 12.31 p.m. and had left it at 12.39 p.m.

The 1st appellant claims that he made entries of his visit to the check point at 11.45 a.m. and had left there by 12.45 p.m.

These items of evidence clearly establish the fact that the 1st appellant had in fact visited the said facility. Whether this was at 12.31 p.m. as the CCTV footage indicates or at 11.45 a.m. as the entry made by the 1st appellant indicate was hardly material when one considers the evidence available before trial Court in this regard. The reasons for this conclusion are discussed below.

The all-important question in this regard is what is the correct time of shooting of the deceased.

Witnesses *Jayaseelan* states that his bus had commenced its journey towards Colombo around 9.30 or 9.45 as usual from *Avariwatta*. He estimates the time of the shooting as 10.25 a.m. Then he went to *Kandana* Police Station at about 11.30 a.m. or 12.00 noon. During cross-examination by the 1st appellant, it was elicited that in his statement to Police the witness had stated that the bus reached to *Mabole* Junction (located in

close proximity to the place of the incident) at about 11.50 a.m. It was also his evidence that after the deceased was rushed to *Ragama* hospital he had gone initially to *Wattala* Police Station to inform them of shooting. They have directed him to report the incident to *Kandana* Police Station which the witness did at about 11.30 a.m.

Ajith Shantha states that the incident took place sometime between around 11.30 a.m. and 12.00 noon that morning. *Amarakoon* admitted that he is unable to estimate time while *Pradeep Kumara* states that by 11.20 a.m. he had got into a bus after the incident.

Thus, it is clear that the times indicated in the evidence of these witnesses are only rough estimates of time and does not reflect an accurate position.

However, the evidence of IP *Wasantha Kumra* reveals that *Wattala* Police Station had relayed information over radio communications to his mobile patrol vehicle at 11.45 a.m. informing them of the shooting and directing them to proceed to the place of the incident. This could well be due to *Jayaseelan* informing the Police about the shooting at about 11.30 a.m. as he claims. If he was to convey that information to Police by 11.30 a.m. he would have left the crime scene sometime before 11.30 a.m.. For the witness to reach *Kandana* Police Station at 11.30 a.m. having first gone to *Wattala* Police Station, it is safe to assume that he would have left the place of shooting at least 15 - 30 minutes prior to 11.30 a.m. This estimation is exclusive of the time the witness *Jayaseelan* had spent soon after the shooting contemplating over what should be done in the circumstances. This places the time of shooting within the time period

between 10.30 and 11.30 that morning. If the car driven by the 1st appellant had left the scene by 11.15 a.m. then he could well have reached the Investment Promotion Zone at 11.45 a.m. as he claims. If the 1st appellant had reached there by 12.31 p.m. as per CCTV footage, then he had more than one hour to reach the Investment Promotion Zone.

In addition to this evidence, it was elicited by the 1st appellant through witness *Pradeep Kumra* that he lied when he stated to CID that the 1st appellant visited the garage of one *Chuti* and then visited *De la Rue* with him and returned at 12.30 p.m. During cross examination by the 2nd appellant, witness *Pradeep Kumara* stated that before he went to CID on 4th December to make a statement, the 1st appellant instructed him to remember a certain thing ("යම් දෙයක්"). When probed by the 2nd appellant, the witness had disclosed in his evidence what that "thing" was;

" ප්‍ර: තව මොනවහරි කිව්වාද?

උ: වේලාවත් මතක තබා ගන්න කිව්වා.

ප්‍ර: මොනවද වේලාවත්?

උ: මිනිමැරුම සිද්ධවුනේ 11.45 විතර වෙලා. ඒ වේලාව පන්නලා කියන්න කියලා තමයි මට කිව්වේ. අපි බියගමින් පිටට ගියේ නෑ කියන අදහස කියන්න කියලා තමයි කිව්වේ.

ප්‍ර: ඊලඟට අසන්න ඇති තෝමස් තිලාරුත් ගියාද කියලා තමාගෙන්?

උ: ඇහුවා.

ප්‍ර: තමුන්ට තෝමස් තිලාරු පුද්ගලයා මොනවාහරි උපදේශයක් දුන්නාද?

උ: සුරේෂ් මහතා පොත අත්සන් කලා කියලා මට කිව්වා, ඒ වෙනකොට රෙකෝඩින් වෙලා තිබුණා 12,30 සී..අයි.ඩී. මහත්වරු එක්ක එක ගෙනිහිල්ලා තිබුණා. මට කිව්වා උඹත් කාර් එකේ හිටියා කාර් එකෙන් බැස්සෙ නෑ කියලා කියන්න කියලා කිව්වා. මම ඒ ටික කිව්වා."

Except for the omnibus suggestion that the witness is lying, there was no specific suggestion that this item of evidence, that challenged the validity of the *alibi* of the 1st appellant, is a fabrication either by the witness himself or by the CID.

It is therefore clear from the available evidence that the shooting had taken place sometime before 11.30 a.m. that morning since that information had reached the Police Station and conveyed to the mobile unit by 11.45 a.m. There is no entry regarding the time the 1st appellant had entered the Investment Promotion Zone but there is one indicating he left at 12.45 p.m.

When IP *de Silva* viewed the CCTV footage, he noted that the 1st appellant had entered the *De la Rue* facility only at 12.31 p.m. and that fact coupled with the evidence of *Pradeep Kumara* that he was instructed to skip the time of shooting in his statement to CID, indicate the status of his *alibi.*

According to the statement made by the 1st appellant from the dock, he had visited a garage at 11.30 a.m. to check on his vehicle and then visited *De la Rue* checkpoint at 11.45 a.m. But he did not offer any explanation as to the time gap between 11.45 a.m. and 12.31 p.m. No witness from the garage was called by the 1st appellant in support of his *alibi.* This is relevant because the 1st appellant stated he visited the garage at 11.30.am.

Even if the 1st appellant's timing is accepted, still he could well be at the murder scene as the trial Court has held.

This is a clear indication that the trial Court had considered the *alibi* of the 1st appellant in the light of the three positions as enumerated by the

Court of Criminal Appeal in ***Yahonis Singho v The Queen*** 67 N.L.R. 8. The trial Court had rejected the *alibi* of the 1st appellant but nonetheless considered it in the light of the time gap since the shooting which took place sometime around 11.30 a.m.. The Court was of the view, yet the appellants could have been at the crime scene. This reflects that the Court had considered the *alibi* in its intermediate position and rejected. Although the 1st appellant challenged the time of the shooting, as determined by the trial Court, he merely stated that the said assumption is wrong.

In the circumstances, this Court endorses the view adopted by the trial Court in relation to the *alibi* of the 1st appellant. This ground of appeal therefore necessarily fails.

Lastly, in relation to the appeal of the 1st appellant, the ground of appeal that the trial Court had failed to consider the items of circumstantial evidence, presented by the prosecution, were "tainted with fundamental vice" should be considered by this Court.

In presenting this particular contention, the 1st appellant relied on most of the complaints he had already made under his ground of appeal on fair trial principles.

Perusal of the judgment of the trial Court clearly indicate that it had approached the case presented by the prosecution as a case based on items of circumstantial evidence. At the very outset of its judgment, the trial Court had noted so when it discussed the applicable legal principles. It had then proceeded on to itemise the relevant primary facts that had been established by the prosecution. Having summarised the several items of circumstantial evidence that had been placed before it, as spoken to by the

witnesses, the trial Court had then proceeded to analyse them in the latter part of its judgment. During this analysis, the trial Court had made references to the proved primary facts and the inferences it had drawn upon those primary facts.

In ***Kusumadasa v State*** (2011) 1 Sri L.R. 240, this Court had identified and listed out the fundamental principles which govern the applicable considerations of the cases that are based on items of circumstantial evidence by making references to principles already laid down in the long line of authorities it had referred to. *Sisira de Abrew* J. states:

> *"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 the only inference that the accused committed the offence.*
>
> *On a 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 a consideration of the proved items of circumstantial evidence 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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence."

Applying the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence if proved facts are consistent with the innocence of the accused, he must be acquitted. Further if the proved facts are not consistent with the guilt of the accused, he must be acquitted. I have earlier pointed out that some proved facts are consistent with the innocence of the accused and also not consistent with the guilt of the accused. Therefore, the appellant should be acquitted.

In my view, in a case of circumstantial evidence, if an inference of guilt is to be drawn such inference must be the one and only irresistible and inescapable inference."

It must be noted that the trial Court, although it did not refer to all of the above quoted principles in its judgment, by and large, had applied those principles in its evaluation of the evidence, on the primary facts proved by that evidence and finally entering a verdict of guilt against the appellants.

Learned Additional Solicitor General had listed out the several items of circumstantial evidence that had been placed before the trial Court in his submissions in support of the conviction of the appellants. In this judgment, most of these circumstances have already been considered in detail. However, it is appropriate at this stage of the judgment to refer to

them, at least briefly, to facilitate consideration of the 1st appellant's concerns that had not been addressed so far by this Court.

The prosecution had invited attention of this Court of its case primarily on three main sectors. Firstly, it submitted that there was a very strong motive for the 1st appellant to eliminate the deceased as he posed a very serious threat of giving evidence against the appellant in the case before the *Negombo* High Court, upon the failure of his repeated and desperate attempts to arrive at a "settlement" with the deceased. Secondly, it was submitted that on the day of the shooting the conduct of the appellants justifies an inference of the existence of a conspiracy to murder the deceased and the execution of that conspiracy with active participation of both the appellants. Thirdly, it was highlighted that the conduct of the appellants, particularly the 1st appellant, in the aftermath of the shooting coupled with his attempt to create an artificial defence of *alibi* is supportive of the conclusions reached by the trial Court.

In the preceding paragraphs of this judgment, evidence regarding the second and third sectors have been dealt adequately and it would be superfluous to record here the findings already reached.

With regard to the strong motive, the 1st appellant had highlighted the fact that the deceased had said that he was not assaulted by the said appellant and is prepared to say that in Court. Upon this evidence, the 1st appellant had contended that this factor had heavily diluted the prosecution's contention that there was "strong" motive for him to plan some harm on the deceased.

The evidence is that the 1st appellant had initially made attempts through *Jayashantha* to persuade the deceased to withdraw his complaint. The 1st appellant had even paid the debts of *Jayashantha* amounting to Rs. 40,000.00 as a reward for his part in persuading the deceased. The deceased, however, was reluctant to take such a drastic step and wanted to consult his lawyers who apparently had discouraged him from withdrawing his complaint. The deceased then conveyed that he would tell Court that the 1st appellant did not assault him during his period of detention. In addition to *Jayashantha* the 1st appellant had enlisted a Provincial Councillor to intervene on his behalf to negotiate with the deceased. This local politician had visited the deceased twice at his residence. There was no shift of the position of the deceased, yet the 1st appellant persisted through the politician. The second visit by the politician was on the night of the 20th November, just hours before the mid-morning of 21st November, on which, the deceased was shot at and wounded fatally.

When the chronology of the events in relation to the reconciliation efforts initiated by the 1st appellant is considered the desperation shown by him in trying to arrive at a "settlement" even prior to few days to the commencement of the High Court prosecution becomes evident. The apparent "softening" of stance by the deceased to exclude him from the list of persons who assaulted whilst in custody had not made any impact at all with the 1st appellant. Therefore, this Court is inclined to accept the submissions of the learned Additional Solicitor General on this point.

Having considered the several grounds of appeal as urged by the 1st appellant, this Court now moves to consider the appeal of the 2nd appellant.

Learned President's Counsel for the 2nd appellant, in support of his appeal invited the attention of Court to the following items of evidence that had not been considered by the trial Court before it arrived at an adverse finding, thereby depriving him of a fair trial.

a. the fact that witness *Pradeep Kumara* did not make any reference to the 2nd appellant in the first of his three statements made to CID and made a reference to him only in his 4th statement,
b. the fact that the Magistrate's Court, in holding the identification parade with the 2nd appellant's participation, had failed to verify the identity of the witnesses who had covered their faces,
c. the fact that *Jayaseelan's* evidence had been challenged by the appellants, erroneously noted as it had not been challenged,
d. that witness *Jayaseelan* did not mention that 2nd appellant had carried a gun in his hand as he alighted the bus,
e. the fact that during initial stage of investigation no employee of *"Manoj Tyre Service Centre"* had volunteered any information about the incident of shooting,
f. the fact that *Manoj Tyre Service Centre* was located away from the main road, and there was no clear view was available to it of the place where the bus was stalled
g. the fact that prosecution had failed to elicit clear evidence to the exact time of shooting,

h. the telephone call details between the two SIM cards does not support the prosecution case,

i. the recovery of the SIM from *Gayan* amounts to a discovery of fact under Section 27 of the Evidence Ordinance,

j. the failure of the trial Court to consider the several inconsistencies marked off the evidence of the prosecution witnesses,

k. the prosecution had failed to prove the identity of the body on which the post mortem examination was held and report was prepared and produced by the medical witness.

The claim by the 2nd appellant that witness *Pradeep Kumara* did not mention his name in the first of the three statements that were recorded and only mentioned about him in the 4th statement was not considered by the trial Court is factually incorrect. The witness was cross-examined by the 2nd appellant of the dialog that he claimed to have overheard that took place between the 1st appellant and SI *Herath*, who is a co-accused in the pending case before the High Court of *Negombo* case about the deceased. These statements were made by the witness to the CID. Then the 2nd appellant marked a contradiction marked as 2V10, where the witness stated to CID that he had left in search of one *Jerad* on the following morning with the 2nd appellant and two others. Then he was cross-examined about a statement he made to CID whilst in remand custody where he claimed to have stated that the 2nd accused was not in good terms with him. No omissions were marked and no dates of these statements were elicited where the above references have been made.

This is essentially a factor in assessing credibility of the witness, if the position advanced by the 2nd appellant is factually correct and if that had been highlighted before the trial Court it could have considered it. The 2nd appellant failed to do that and therefore cannot expect the trial Court to consider any imaginary grounds in order to discredit a witness.

The 2nd appellant complained about witness covering their faces at the Identification Parade. This is a ground that had been raised before the trial Court itself by the 2nd appellant. This ground is based on the factual basis that the witnesses who identified the 2nd appellant at an Identification Parade held before the Magistrate's Court of *Wattala* have covered themselves up in order to conceal their identities when they inspected the parade. Therefore, the 2nd Appellant contended that there was no opportunity for the learned Magistrate to satisfy that the person who pointed out the 2nd appellant is the witness who was produced before her prior to the line-up. The 2nd appellant's claims that this fact raises a reasonable doubt as to the identity of the witnesses who claimed to have identified him at the said Identification parade.

The prosecution led the evidence of the Magistrate who conducted the Identification Parade. She was emphatic that having verified the identities and other details of the four witnesses, prior to the parade she had then placed them under the supervision of a Court sergeant in a secluded room adjacent to her Chambers. It had no other access. When the witnesses were interviewed before the parade, they were in their normal attire but when each of them came before the parade, they have covered themselves with rain coats and only their eyes were visible. She verified

their identities by asking for names and did identify them through their voices.

During cross-examination by the 2nd appellant, the witness reaffirmed that she identified the witnesses through their voice. The 2nd appellant did not challenge this claim of identity by the witness by suggesting that she did not know who was under the rain coat or whether she had any doubts as to who could be under the concealed identity. He did not even challenge at least that voice identification of strangers is unreliable to the witness who could have offered clarifications to her claim of identity. In addition, there was no corresponding challenge when each of these witnesses gave evidence on this point. This is therefore clearly a claim by the 2nd appellant without any valid ground in support.

The law provides for the witnesses to make identifications from a concealed position and thereby not risking revelation of their identities to the suspects who are produced for the parade. Section 124 of the Code of Criminal Procedure Act No. 15 of 1979 was amended by Section 2 of the Act No. 11 of 1988 to facilitate implementing this important safeguard to protect the interests of witnesses. The practical constraints that exists in the criminal justice system unfortunately do not enable our Courts to hold parades by providing the witnesses with required infrastructure facilities where they could examine the parade behind the cover of a one-way mirror so that the suspects who are placed on the other side cannot see the witnesses who pointed out them from their side.

In the instant appeal, the prosecution however employed the unorthodox method already described to conceal the identity of the

vulnarable witnesses who may have been under threats at the time of their participation at the Identification Parades. The rights of the suspects were ensured by the learned Magistrate who took extra precautions to hold the parade probably and none of the parties were prejudiced.

In relation to the complaint made by the 2nd appellant that the trial Court was wrong when it stated that he did not challenge the evidence of witness *Jayaseelan* since he had marked a contradiction (2V3) over the witness's claim that he had a gun in his hand and thereby failed to note that the appellant had challenged his credibility should be examined next.

It should be observed that the trial Court, in its narration of the evidence of *Jayaseelan* noted that the 2nd appellant had cross examined the witness but was of the view that there were only trivial inconsistencies that were highlighted in the process. However, in the analysis of evidence, the trial Court states that his evidence was "not challenged". When this statement is considered in the light of its earlier statement in the judgment, it is clear that what the trial Court means with the phrase "not challenged" is that there was no sufficient challenge to rule that the evidence of witness *Jayaseelan* is not truthful and therefore unreliable.

The 2nd appellant also highlighted that the witness *Jayaseelan,* although claims to have seen the appellant with a gun in his hand, failed to mention that fact in his statement resulting an inconsistency on this vital item of evidence and the trial Court failed to take note of it when it considered his evidence. The 2nd appellant sought to fortify his submission on this issue by pointing out the inconsistencies as to the distance the 2nd appellant seems to have travelled after boarding the bus.

It must be noted that even though an inconsistency was marked 2V3, there appears to be no such inconsistency. The witness speaks of a gun in the hands of the 2nd appellant in evidence and it appears that what he told elsewhere is that the 2nd appellant had no "goods"(" බඩු මොකුත් තිබුනේ නැහැ") in his hand. The witness is from a different ethnicity and he gave evidence in Sinhalese and not in his mother tongue. Strangely, the 2nd appellant failed to highlight an omission that he did fail to mention that the appellant carried a gun in his hand and was content with marking only 2V3. Hence, this could not be taken as a contradiction in its technical sense and even if it is considered as a contradiction, makes no dent in the credibility of the witness on that score only.

Another inconsistency highlighted by the 2nd appellant was the variance of evidence between IP *Chanaka* and IP *Kudagoda* as to who had the custody of the witnesses when they were presented for the identification parade. IP *Silva* denied having taken any part in the production of witnesses but *Kudagoda* claims it was IP *Chanaka* who brought the witnesses to Court. Witness *Ajith Shantha* offered a clarification to this apparent inconsistency. According to him it was IP *Chanaka* who accompanied him to the Magistrate's Court and was then handed over to a Jailer and some Police Officers. This shows IP *Chanaka's* limited role in relation to the witnesses.

In its evaluation of evidence, it is clear that the trial Court was aware of the discrepancies that existed between the testimonies of the witnesses for the prosecution, but was convinced that despite those infirmities they

were speaking the truth in Court. The infirmities that had been brought to the notice of the trial Court are certainly attributable to human weaknesses in observation and faulty memory. Is it reasonable to expect from a conductor to keep a tab on every passenger who boards a bus with exact details of them? The answer is clearly in the negative. This Court also holds the view that none of these inconsistencies are sufficient to assail the testimonial trustworthiness of these witnesses.

Consideration of the approach adopted by the trial Court in its undertaking of evaluation of the evidence for its credibility, one could identify the application of the principles that had been enunciated in the judgment of ***Samaraweera v Attorney General*** (1990) 1 Sri L.R. 256. In the said judgment, this Court adopted a pragmatic approach even in an instance where the witness was found to have uttered falsehood under oath. In assessing the truthfulness and reliability of such evidence it was held:

> *" The maxim falsus in uno falsus in omnibus could not be applied in such circumstances Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by*

a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

None of the prosecution witnesses belong to this category of witnesses and since almost all of the inconsistencies that have been highlighted seemed to have not affected the impression created in the mind of the trial Court as to their the truthfulness of the sequence of events the witnesses have spoken of, this Court is reluctant to interfere with this finding of fact.

It is apparent that the trial Court, in dealing with the *inter se* and *per se* inconsistencies that were highlighted off the evidence of prosecution witnesses, have applied the principles that are laid down in the judgments of ***Bandaranike v Jagathsena*** (1984) 2 Sri L.R. 397 and ***Best Footwear (Pvt) Ltd., and Others v Aboosally and Others*** (Supra).

In ***Bandaranike v Jagathsena*** (ibid), it was held that:

"When versions of two witnesses do not agree the trial judge has to consider whether the discrepancy is due to dishonesty or to defective memory or whether the witness' powers of observation were limited. In weighing the evidence, the trial judge must take into consideration the demeanour of the

witness in the witness box. Was she trying to the best of her ability to speak the truth ?"

Similarly in the judgment of ***Best Footwear (Pvt) Ltd., and Others v Aboosally and Others*** (Supra) it was stressed that:

> *"In evaluating the evidence of a witness a court or a tribunal is not entitled to reject testimony and arrive at an adverse finding in regard to testimonial trustworthiness and credibility on the mere proof of contradiction or the existence of a discrepancy. The deciding authority must weigh and evaluate the discrepancy and ascertain whether the discrepancy does go to the root of the matter and shake the basic version of the witness. If it does not, such discrepancies cannot be given too much importance."*

In the circumstances, this Court is in full agreement with the view of the trial Court that the witnesses who were called by the prosecution have spoken the truth before the trial Court and were corroborated by material particulars.

Another complaint made by the 2nd appellant is that the claim by the witness *Ajith Sahantha* that he saw the appellant getting into a white car with a gun in hand is clearly an improbable one owing to two reasons. Firstly, the investigators, having visited the scene soon after the incident was reported, invited any witness to the incident to come forward and there was none. Secondly the investigating officer states that the tyre centre, where the witness attended to a tyre puncture at the time of shooting as its technician, was located some distance away from the place

where the bus was stopped and as such the witness would not have had any opportunity of witnessing the 2nd appellant getting into a car.

Both these questions undoubtedly are questions of fact but unfortunately not been raised by the 2nd appellant in his closing submissions to the trial Court. However, those questions of fact have been determined against the 2nd appellant by the trial Court.

It is his contention that the trial Court had also failed to consider evidence of CI *Attanayaka.*

It is stated by CI *Attanayaka* of *Kandana* Police that he visited the scene on the 21.11.2004 at 2.00 p.m. and questioned about fifty persons to find someone who could provide information relating to the incident. He had visited *Samarasinghe Oil Stores* and *Manoj Tyre Service Centre* in his attempt to trace any witnesses since they were located closer to the place of incident but there was no one who volunteered from the said tyre service centre to offer any information. It was also revealed through this official witness that until the CID took over investigations on 28.11.2004, the statement of witness *Ajith Shantha* was not recorded. This witness also stated that *Manoj Tyre Service Centre* was located away from the main road and also on a lower elevation to that of the main road.

In relation to the late discovery of the witness *Ajith Shantha,* this Court must consider whether the prosecution offered any explanation to the delay since it concerns the test spontaneity of the version narrated by the witness.

IP *Chanaka Silva* stated that the statement of *Ajith Shantha* was recorded on 09.12.2004 and *Manoj Tyre Service Centre* was located about 10

to 15 meters away from the scene. He further stated during cross examination by the 1st appellant that *Ajith Shantha* was reluctant to make a statement initially due to fear of reprisals and as a result his statement was finally recorded only on 17.01.2007. In replying to the 2nd appellant, the witness stated that *Ajith Shanta's* statement was recorded at 3.30 p.m. at his work place. The witness denied the suggestion put to him that the witness was in the custody of the CID for over three days prior to making a statement. However, witness *Ajith Shantha* stated in his evidence that he made a statement after a lapse of two days since the incident and he could not recollect the name of the officer to whom he made his statement. The witness claims that he was taken to CID twice. On the first occasion his statement was not recorded but subsequently they recorded one but he cannot recall exactly when. He was questioned about the facial characteristics of the person who had a gun and then a sketch was prepared upon the information he had provided.

The 2nd appellant had clarified from the witness that he was taken to CID after two days from the shooting when he was working at his tyre centre.

In his submissions, the 2nd appellant stated that the trial Court had even failed to narrate the evidence of *Ajith Shantha* and his evidence was led before the succeeding trial Judge under Section 33 of the Evidence Ordinance. Therefore, he contended that the trial Court had totally left out the evidence of this witness from its consideration.

It is correct that there is no detailed narration of the evidence of the said witness in the judgment. But the trial Court had clearly stated in its

judgment that " පැ.ස.01 ගයාන් අමරකෝන් සහ පැ.ස.02 ප්‍රදීප් කුමාර බස් රථයේ කොන්දොස්තර වන කරුපය්යා ජෙයසීලන් නැමැත්තා, ට්‍රයර්සාප්පුවේ සාක්ෂිකරු වන ජෝන් අපිත් නිශාන්ත යන සාක්ෂිකරුවන්ගේ සාක්ෂි විශේෂයෙන්ම අධිකරණයේ අවධානයට යොමුවී ඇත." Then the trial Court makes another reference to this witness as follows;. " මේ නඩුවේ තවත් ඉතා වැදගත් සාක්ෂි 02ක් ඇත. එනම් බසයේ කොන්දොස්තර ජයසීලන් හා මංජුල ට්‍රයර් ආයතනයේ සේවක අපිත් ශාන්තය. කරුපය්යා ජයසීලන් විසින් බස් රථය තුලට මරණ කරු නගින ලද ස්ථාන,ඝාතනය, දෙදෙනාම නගින ලද ආසන සම්බන්ධව සාක්ෂි දී ඇත." The reason for the absence of his evidence in the narration is explained by the trial Court as ; " ඊට පසු වැගත් සාක්ෂිකරු වූයේ ස්වාධීන සාක්ෂි කරුවකු වන මංජුල ට්‍රයර් ආයතනයේ සේවය කල ජෝන් අපිත් ශාන්තය. ඔහු විසින් පූර්වගාමී විනිසුරුතුමිය ඉදිරියේ දී සාක්ෂි මෙම අධිරකණයේ ඇති සාක්ෂියක් සේ අධිකරණය ඉදිරියේ දැනටමත් සළකා ඇත."

In assessing the evidence of the witness applying the test of spontaneity, the explanation that is evident from the material placed before the trial Court is that the witness was reluctant to come forward as a witness. This is unfortunately the reality in our times. The civic mindedness of the members of our society in assisting investigations by volunteering information is easily overshadowed by the difficulties such a person had to endure due to certain limitations in our Criminal Justice System if he presents himself as a witness. Sadly, this is the reality in the present times and the Courts must be alive to these social realities in assessing the genuineness of the reluctance shown by a potential witnesses. This was well before the enactment of Assistance to and Protection of Victims of Crime and Witness's Act No. 4 of 2015 and there was no effective mechanism to protect the witnesses from the dangers they are exposed to by virtue of being a witness to a crime at that time. Security of the witnesses may have been a serious issue in this trial since the CID

had made an application to conceal identities of the witnesses it had planned to present at an identification parade to identify the suspects.

Witness *Jayaseelan* confirms the existence of witness *Ajith Shantha* as he stated in evidence that soon after the shooting he learnt that the person who got off from his bus with a gun, had got into a white car and sped away, from an employee of a nearby tyre shop. This is a clear indication that *Ajith Shantha's* claim of seeing the 2nd appellant is not at all a fiction or a fabrication by an interested party. The 2nd appellant did not challenge *Aijit Shantha's* evidence during cross-examination when the witness stated that he provided information as to facial characteristics of the person who had a gun in his hand to CID. That fact clearly supports the prosecution version that the witness did in fact see the person with a gun.

Thus the complaint of the 2nd appellant in relation to this witness is clearly without any semblance of validity.

The 2nd appellant, in challenging the prosecution case, contended that the evidence in support of its claim that there was an exchange of telephone calls between the 1st appellant and witness *Amarakoon* where the former was giving instructions to the latter in fact destroys the prosecution theory at its base. It was submitted by the 2nd appellant that the several calls that were exchanged between the two numbers were initiated when the witness was inside the car with the 1st appellant and therefore it is highly improbable to use telephones to communicate between two individuals who travelled in the same vehicle at the same time. In fairness to the 2nd appellant, it is seen that he made identical submissions before the trial Court on this point in his closing submissions.

The trial Court rejected this contention as it observed the times of these calls and the different events as spoken to by the witnesses do match with each other.

This contention of the 2nd appellant and its corresponding finding of the trial Court should be considered for its merits and demerits in the backdrop of the evidence that had been presented before the trial Court on this point.

It is the claim of the prosecution that, when the 1st appellant dropped off witness *Amarakoon* at some point after passing the railway crossing at *Gampaha,* given him instructions that if he sees a person of dark complexion with a stocky build to call him. The witness had a mobile phone with a SIM card corresponding to the number 0722779216. The witness, during the 30 to 45 minute period he waited in anticipation with a person with the matching description, had made and received several calls to and from the 1st appellant. The prosecution also claimed that at that time, the 1st appellant was contactable under number 0776273037.

The call details among these two phone numbers on 21.11.2004 were presented through the relevant service provider by the prosecution. In order to test the validity of the contention of the 2nd appellant, it is helpful to tabulate the call details which would then reveal the correct perspective.

The details of the calls among the numbers 0722779216 and 0776273037 for the morning of 21.11.2004 are as follows:

Time of Call	Duration of the call in seconds	Time Gap between each call in minutes
10.19 a.m.	23	
10.30 a.m.	52	11
10.47 a.m.	29	17
10.53 a.m.	57	6
10.55 a.m.	23	2
11.02 a.m.	42	7
11.10 a.m.	57	8
11.12 a.m.	10	2
11.29 a.m.	22	17
11.32 a.m.	3	3
12.40 p.m.	54	8

These call details reveal a clearly identifiable pattern. There were 8 calls between 10.39 a.m. and 11.12 a.m. Then there is a comparatively a large gap of 17 minutes of silence between 11.12 a.m. call and 11.29 a.m. call, followed by another call after just three minutes at 11.32 a.m. Then the last call from any of these SIM cards was taken at 12.40 p.m. until they were finally recovered by the CID on 10.12.2004 during their investigations.

The prosecution led the circumstances under which these calls were taken through one of the callers since the caller at the other end was the 1st appellant himself.

Amarakoon stated that he had taken and received several calls when he was stationed as a lookout, and due to the failure of the deceased to turn up at that point as expected. The witness was there waiting for about 30 to 45 minutes. He was then picked up by the 1st appellant. Thereafter, the 2nd appellant and *Pradeep Kumara* have boarded the bus which was

travelling in front of them as per the instructions of the 1st appellant. After some time, the bus was stopped and only the 2nd appellant returned to the car. Then the three of them have proceeded along and on their way, the 1st appellant had taken calls from the witness *Amarakoon's* phone. At some point he was dropped off by the 1st appellant.

This sequence of physical events matches with the clear pattern of the calls. The first set of 8 calls were taken during a 43-minute period, the witness estimates as 30 to 45 minutes, is the waiting time for the deceased . Then the gap of 17 minutes of silence could be attributable to the time of his pickup by the 1st appellant, the bus episode and picking up of the 2nd appellant after gun shots were heard. Then there were two calls taken within a gap of just three minutes. The call at 11.29 a.m. lasted just three seconds. These calls are attributed to the 1st appellant by witness *Amarakoon* . Then the call log shows that the last call to be taken before the connection between the two phones died down for the next 19 days, was taken at 12.40 p.m.

Interestingly, the time period during which the shooting took place, as estimated by this Court after considering the testimony of the lay witnesses, coincide with the period of 17- minute silence between the two phones.

Contrary to the contention of the 2nd appellant, the phone details are not only consistent with the prosecution version of events but also strengthens it.

In his contention on this point, the 2nd appellant raised another concern over the recovery of the SIM from witness *Amarakoon* claiming

applicability of provisions of Section 27(1) of the Evidence Ordinance since at the time of its recovery the witness was considered as a suspect. Clearly this submission is based on misinterpretation of the provisions of Section 27(1) since it applies to situations where the person against whom the evidence relating to the recovery is sought to be proved should be "a person accused of offence" before a Court where such evidence could be led, and not in police custody where only investigations are carried out against him treating him as a suspect of an offence.

The final contention advanced by the 2nd appellant that the prosecution had failed to prove the identity of the body on which the post mortem examination was held and a report was prepared is founded upon the factual position that the witnesses who claims to have identified the body of the deceased just before the post mortem examination was not called nor listed as witnesses by the prosecution. Thereby, the 2nd appellant claims that the prosecution had failed to prove two vital element in its case, namely that *Waragoda Mudalige Jerad Mervin Perera* is dead and his death was due to gunshot injuries.

It was submitted by the 2nd appellant that the post mortem report (P11) indicates that the body of the deceased was identified by *W.M.L. Perera* said to be a younger brother of the deceased and *W.P.L. Wickramatilaka* his brother-in- law before Dr. *Dayapala,* the Consultant JMO. None of these two witnesses were called to testify before the trial Court by the prosecution and therefore there was no acceptable evidence before it in relation to the identification of the dead body.

In his attempt to counter this submission, learned Additional Solicitor General claimed that the 2nd appellant had raised this issue for the first time before this Court and that too at the very late stage of his submissions. He submitted that the two appellants did not challenge these two aspects before the trial Court and thereby admitted the death and its cause. Learned Additional Solicitor General relied upon two judgments of this Court in which similar situations have been considered and decided. In these judgments, this Court had taken noted of the fact that the failure to challenge the death would amount to an admission of that very fact. He also added that if this contention is accepted then it will not be possible to establish death of a person whose body was never found or recovered.

The claim that the prosecution did not call the two witnesses who identified the body of the deceased before the Consultant JMO is factually a correct statement. In the circumstances, this Court must then consider the basis on which this Court had approached the issue in the two judicial precedents that had been relied upon by the learned Additional Solicitor General.

In ***Baraniwala Liyanage Sunil v Attorney General*** CA Appeal No. CA 30/2009 - decided on 27.02.2017, the appellant in that appeal had raised a similar issue by making a claim that " ... *the witnesses who identified the body before the Judicial Medical Officer were not called to give evidence and thereby the corpus has not been identified.*"

The Court, having noted the fact that the Dr. *Gunawardana,* while testifying before the trial Court, had stated that the body was identified by the witnesses named in his report, relied on the judgment of ***Sarwan Singh***

v ***State of Punjab*** (2002) II AIR SC 3562, where it was held that "*it is rule of essential justice that whenever the opponent had declined to avail himself of the opportunity to cross examine the witness, it must follow that the evidence tendered on that issue ought to be accepted*" to reject the appellant's claim on the basis that " *the defence has not disputed the identification of the corpus in the High Court.*"

The judgment in ***Patirennehelage Indika Jayaratne v Attorney General*** C.A. Appeal No. CA 83/12 - decided on 18.11.2015, refers to a situation similar to the one under consideration by this Court. At the trial, the prosecution had placed evidence which proved that the deceased in that case had died on his way to the hospital and the medical officer's evidence that the body was identified before the post mortem examination was conducted was not challenged by the appellant.

In the said judgment, this Court, having quoted ***Sarwan Singh v State of Punjab*** (supra) and taking note of several other precedents including the judgment of ***State of Himachal Pradesh v Thakurdas*** (1983) 2 Cri L.J. 1964 where it had been held that "*whenever a statement of fact made by a witness is not challenged in cross examination it has to be concluded that the fact in question is not disputed*", rejected the only contention advanced by the appellant in support of his appeal that "... *body of the of the deceased was not properly identified.*"

These two judgments provide answer to the contention advanced by the 2nd appellant as to the proof of death of the deceased and to its cause.

In addition to the reasoning contained in those judgments, the contention of the 2nd appellant could be considered by this Court in

another perspective. That is when the evidence presented before the trial Court is considered in its totality whether a reasonable doubt arises as to the death of the deceased or as to its cause ?

Having noted the direction in which the prosecution witnesses, who speak about his death due to shooting were cross examined, this Court forms the view that particularly the 2nd appellant, not only failed to challenge that the deceased died due to gunshot injuries he received, actually proceeded to cross-examined them on the basis that the deceased was in fact killed by shooting. This approach adopted by the 2nd appellant in the cross-examination is amply demonstrated by the suggestion put to witness *Pradeep Kumara*. It was suggested to the said witness that it was IP *Herath* who wanted to and did kill the deceased but due to personal animosity the witness had with the 2nd appellant, he was implicated to that killing. Similarly, the 2nd appellant, during his cross examination of witness *Amarakoon* suggested that due to threats from CID he implicated the 2nd appellant to this "incident". Clearly the 2nd appellant by his reference to this "incident" meant the death of the deceased and its cause.

Witness *Jayaseelan* said in evidence a person was shot inside the bus and he saw the 2nd appellant with a gun in his hand soon after the shots were heard. He also said the driver of the bus had thereafter taken the "injured" to *Ragama* Hospital in the same bus while he took a three wheeler to report the incident to *Wattala* Police who directed him to report the incident to *Kandana* Police as it was not in their area. None of these assertions were challenged by the 2nd appellant during cross-examination and it was suggested to the witness that, the person who was seated

behind to the person who was killed, is the person who shot him using a pistol.

In addition to the evidence of the consultant JMO, in proof of the death of the deceased, the prosecution led evidence of *Padma Wickramaratne,* the wife of the deceased. She stated in her evidence she had identified the body of her husband at the inquest and her husband had died due gunshot injuries. IP *Abeysekara,* Officer-in-Charge of *Kandana* Police, had visited the deceased when he was being treated at the ICU of *Ragama* Hospital, prior to his transfer to National Hospital where he succumbed to his injuries. The deceased stated to the witness that he was shot at due to his "*Wattala* Case" and also that he would not survive the attack. The wallet that was taken charge from the critically wounded patient's possession by IP *Abeysekara* contained his National Identity Card which confirmed the fact that he is the deceased named in the indictment.

The trial Court had recorded the closing submissions made by the 2nd appellant in support of his contention that the prosecution has failed to prove the charges. Strangely the 2nd appellant did not highlight the fact that the prosecution did not prove the body identification. On the contrary, the 2nd appellant clearly submitted to trial Court highlighting the factors the prosecution must prove. He submitted " ඒ කාරණය තමයි අධි චෝදනා පත්‍රය ඉදිරිපත් කලහොත් ඒ අධි චෝදනා පත්‍රයේ තිබෙන කරුණු සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කරීමේ කාර්යය පැවරෙනවා. මෙතැනදී මේ අධි චෝදනා පත්‍රයේ සඳහන් පුද්ගලයා මිය ගිහින් තිබෙනවා. හබයක් නැහැ. ඒ පුද්ගලයා මියගොස් තිබෙන්නේ වෙඩිතැබීමකින්. හබයක් නැහැ. බස් රථයේ ගමන් කරමින් සිටියදී වෙඩි වැදීම සිදු වී තිබෙනවා. එහිද හබයක් නැහැ. නමුත් හබය තිබෙන්නේ මේ වෙඩි වැදීම සිදු කලේ මේ දෙවැනි විත්ති කරුද කියන එක."

Thereby, the 2nd appellant had taken this particular fact in issue concerning the identity of the deceased and the cause of his death by

conceding to that it was due to shooting. Thereby he had narrowed down the contest on facts only to the issue whether it was the 2nd appellant who shot the deceased.

In the circumstances, it is obvious that the trial Court was satisfied beyond reasonable doubt that the deceased named in the indictment had died and had died due to gunshot injuries as there were sufficient and uncontroverted evidence to prove those facts. In addition, the 2nd appellant conceded to these two points in his closing submissions and relieved the trial Court of its duty in determining the said issue, by undertaking a lengthy analysis of evidence. In the circumstances, it must be ruled that this contention of the 2nd appellant on this point is clearly devoid of any merit.

Having reached to the final segment of this judgment, this Court must, before it proceeds to determine the validity of the challenge mounted by the two appellants against their convictions, remind itself of the role of an appellate Court in determining an appeal challenging a determination of an original Court.

In ***King v Attygalle*** 37 N.L.R. 337, the Privy Council, cited Lord *Sumner* from ***Ibraham v. The King*** (1914) A. C. 599, to lay emphasis on the principle, that for an appellate Court to interfere with a determination of a lower Court:

> *"There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which in general tends to divert the*

due and orderly administration of the law into a new course which may be drawn into an evil precedent in future"

The Supreme Court, in its comparatively a recent judgment of ***The Attorney General v Theresa*** (2011) 2 Sri L.R. 292, had the occasion to revisit the considerations that are applicable to the exercise of appellate function, in determining appeals against determinations of an original Courts. Citing English judgments on this issue, the apex Court stated that:

> *" ... a Court of Appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial Judge and the Court of Appeal has not occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded the appellate Court) or by any other of those advantages which the trial Judge possesses."*

In relation to the appeal before this Court, the underlying complaint of the appellants was that the trial Court had accepted the evidence of several prosecution witnesses, it should not have, in view of the several infirmities as pointed out by Counsel during the hearing of appeal. As already noted this essentially is an issue concerning credibility of witnesses. The determination of credibility of witnesses was undoubtedly considered as determination of a question of fact. The Supreme Court, in ***The Attorney General v Theresa*** (ibid) stated that *"credibility is a question of fact, not law"*.

As such it was further stated by the apex Court :

> *"... appellate Court should not ordinarily interfere with the trial Court's opinion as to the credibility of a witness as the trial Judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility and whether after a careful thought or with reckless glibness and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination."*

It is seen from the proceedings before the trial Court that certain prosecution witnesses, who have already given evidence before the predecessor of the learned trial Judge, were recalled when the succeeding trial Judge commenced his hearing of the partly heard trial. It was that succeeding trial Judge who delivered the impugned judgment. That was an opportunity provided to the succeeding trial Court by the appellants themselves when they made application to recall the witness under Section 48 of the Judicature Act No. 2 of 1978 as amended. Therefore, the learned trial Judge, who delivered the impugned judgment, has had the opportunity to observe demeanour and deportment of these witnesses for himself, and opted to accept them as truthful and reliable witnesses.

It is the credibility of the evidence of those witnesses that were commented on by the learned President's Counsel before this Court in support of the appeals of both the appellants. The trial Commenced before

that particular trial Judge on 23.03.2007 and the evidence of the prosecution and defence was over by 28.11.2014. The trial Court delivered its judgment on 22.06.2015.

In identifying the role of the appellate Court in reviewing a judgment of an original Court, this Court too had identified several principles and rules for its guidance in the judgment of ***de Silva and Others v Attorney General*** (2010) 2 Sri L.R. 169. Of these rules, in determining the instant appeal this Court had particularly applied the rule that states *"the appellate Court should examine whether the trial Judge has drawn proper inferences from specific facts that are proved"* since the appeals of the two appellants are based on the common plank that the inferences that had been drawn by the trial Court upon the several items of circumstantial evidence, as to their guilt were wrong.

Having considered the evidence in its entirety, this Court is of the firm view that the trial Court had drawn inferences that are justified upon the proof of primary facts on which those inferences were drawn.

This Court is guided by the observations of the Court of Criminal Appeal in ***The King v Andiris Silva et al*** 41 N.L.R. 433. After the submissions their Lordships have stated:

> *"... We do not expect Jurymen to be endowed with legal training nor can we say that our impressions gathered by a perusal of recorded evidence are as valuable as those of persons who have heard witnesses give evidence. We might say that the arguments for the appellants created a strong*

impression on our minds, and if the Jury had seen fit to acquit the accused we should not have been able to take exception to the verdict. All that we are required to say is that it has not been shown to our satisfaction that the verdict is unreasonable or that it cannot be supported having regard to the evidence"

in view of the precedents where :

"... the English Court has shown in a series of decisions its disinclination to question a verdict given by a Jury on questions of fact."

The Court further indicated its view, even in relation to questions of law, quoting the judgment of ***R. v. Wyman*** *13 Cr. App. R. 163* where it is stated:

" Voluminous particulars illustrative of the original grounds of appeal were furnished to the Court at a late stage. They were evidently the creation or conception of some learned person, who, having the transcript of the shorthand notes of the evidence and of the summing-up, directed much ingenuity and industry to picking out from a long and careful summing up a number of small points, most of which are frivolous. On these we are asked to upset the conviction if we can find any possible slight oversight or error of statement or some inference to be possibly drawn from a chance phrase or possible immaterial misconstruction of evidence. The Court does not deal with matters of this kind.

We are here to deal only with substantial points of misdirection."

In applying the principles laid down in the exercise of appellate jurisdiction in these binding precedents, this Court, after much thought, concludes that the appeals of the 1st and 2nd appellants are devoid of merit and ought to be dismissed on that account.

The convictions of the 1st and 2nd appellants and sentences imposed them are therefore affirmed by this Court and accordingly their appeals stand dismissed.

JUDGE OF THE COURT OF APPEAL

HON. DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL