IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

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

Veerasamy Sivathasan
Pillaiyar Kovil,
Uppukulam,
Mannar.

1st Accused – 1st Appellant – Appellant

Vs.

SC Appeal 208/2012
CA Appeal No. 46/2008
HC Vavuniya Case No. HCV/1946/07

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

Complainant – Respondent – Respondent

Before : **B.P. Aluwihare, PC, J**
Yasantha Kodagoda, PC, J
Janak De Silva, J

Appearance: Anil Silva, PC with Nandana Perera, instructed by Gowry Thavarasha for the 1st Accused – 1st Appellant - Appellant.
Ayesha Jinasena, PC, Additional Solicitor General with Chathuranga Bandara, State Counsel for the Complainant – Respondent - Respondent.

Argued on: 22nd January, 2021

Written Submissions:
For the 1st Accused – 1st Appellant – Appellant filed on 4th January 2013 and 16th February 2021.
For the Complainant – Respondent - Respondent filed on 16th February 2021.

Decided on: 15th December, 2021

Yasantha Kodagoda, PC, J

This judgment relates to an Appeal against a judgment of the Court of Appeal. The impugned judgment of the Court of Appeal resulted in the dismissal of an Appeal against a conviction and sentence imposed on the Appellant before this Court (1st Appellant before the Court of Appeal) by the High Court of Vavuniya. By the same judgment, the Court of Appeal had allowed the Appeal of the 2nd Appellant before the Court of Appeal, and accordingly acquitted him.

The two Appellants before the Court of Appeal had been indicted in the High Court of Vavuniya by the Honourable Attorney-General for having on or about 16th August 2004, in Mannar, trafficked 1,503 grammes of Diacetyl Morphine (Heroin) and in the course of the same transaction, for having possessed the same quantity of heroin. Thereby, the Honourable Attorney-General had alleged that both accused had committed offences in terms of sections 54A (b) and 54A (d), respectively, of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984. It is common ground that the two accused who are brothers were indicted on the footing that these offences had been committed by them jointly. Following a trial before the High Court of Vavuniya, both Accused were found "*guilty*" of having committed the afore-stated offences. Accordingly, they were convicted, and sentenced to serve life imprisonment. Both Accused appealed to the Court of Appeal against their convictions and sentences, and following argument, the Court of Appeal allowed the Appeal presented on behalf of the 2nd Accused – 2nd Appellant, and set aside his conviction and sentence. The conviction and sentence of the 1st Accused (the present Appellant) was affirmed, and accordingly his Appeal was dismissed.

Having considered a Petition seeking Special Leave to Appeal against the afore-mentioned judgment of the Court of Appeal, this Court has been pleased to grant Special Leave to Appeal on the following three questions of law, which are reproduced verbatim:

(i) Did the learned Judges of the Court of Appeal misdirect themselves in not considering the defence version at all, and affirming the conviction of the Appellant?

(ii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to consider that although credibility of a witness is primarily the function

of the trier of facts, when the said trier of facts has failed to analyse the defence evidence and has deprived the accused of his constitutional protection to a *fair trial*, a duty is cast on the Court of Appeal to ensure that a miscarriage of justice does not occur?

(iii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to appreciate that the learned trial judge did not analyse the evidence led by the prosecution with caution resulting in a miscarriage of justice?

Case for the prosecution

Albeit brief, the case for the prosecution is that the commission of the offences of trafficking and possession of heroin, jointly committed by the two accused was detected on 16th August 2004, in Mannar, by officers of the Police Narcotics Bureau (PNB). According to prosecution witnesses Inspector of Police (IP) C.K. Welagedera and Woman Sub Inspector of Police (WSI) Dayanee Gamage (who had been promoted as a Woman Inspector of Police at the time of the trial), the commission of offences was detected sequel to an information received by WSI Gamage from a personal informant of hers and an ensuing raid (planned detection of the committing of the offence) conducted by officers of the PNB.

Upon receipt of information, WSI Gamage had communicated its contents to IP Welagedera. On 15th August 2004, a team of police officers of the PNB which included IP Welagedera and WSI Gamage left Colombo to Mannar. On the way, at Medawachchiya (located on the Anuradhapura – Mannar Road), WSI Gamage met with the informant and discussed matters with him. Thereafter, the informant proceeded to Mannar. On the early hours of the 16th, WSI Gamage received further information from the informant, and accordingly, the PNB officers also proceeded to Mannar. They met the informant near the Mannar Hospital.

Based on the guidance given by the informant (who proceeded with them), the team had gone up to the Pillaiyar Kovil (also referred to as the *Sithy Vinayagar Alayam Kovil*) in Uppukulam, Mannar. According to the testimony of WSI Gamage, they stopped the van in which they were travelling near a culvert opposite the kovil. Two persons were seen standing in front of the entrance to the kovil. The informant pointed them out and said that they were the drug traffickers he previously referred to, and that there was heroin in the bag one of them was carrying. (As the informant did not testify at the trial, the contents of the information received are inadmissible and hence were not treated as substantive evidence against the accused. However, it is admissible and relevant for the limited purpose of providing an explanation of the conduct of the two PNB officers. Thus, the afore-stated reference to what the informant told the two PNB officers.) Consequently, IP Welagedera and WSI Gamage got down from the van. The driver of the van was asked to drive the van away to Mannar town and drop off the informant.

According to IP Welagedera, the two accused were seen initially standing near some pillars that were at the entrance to the kovil, and was subsequently seen walking out of the kovil. IP Welagedera saw the 1st Accused carrying a bag (referred to by him as a *'polysack bag'* and by WSI Gamage as a *'manure bag'*, which is evidently colloquial synonyms) and the 2nd accused walking besides him. IP Welagedera approached the 1st accused, introduced who he was to the two accused, and attempted to apprehend him while taking control of the bag the 1st Accused was carrying. Both accused resisted. The 2nd Accused started assaulting IP Welagedera and attempted to regain control of the bag, which by that time was under the control of IP Welagedera. Meanwhile, the 1st Accused put his hand around the neck of IP Welegedera and clutched his neck. WSI Gamage intervened. In the ensuing struggle, WSI Gamage bit the hand of the 1st Accused and thereby relieved IP Welegedera. In the meantime, she apprehended the 2nd Accused and hand-cuffed him. Soon thereafter, IP Welagedera arrested the 1st Accused. At this time, two other persons came towards IP Welagedera and WSI Gamage. The two police officers

assumed that they came to aid the two apprehended accused. Thus, two police sergeants of the PNB team who had previously got down from the van, arrested those two persons as well. PNB officers were able to apprehend them (Veerasamy Sivabalan and Wickremasinghe Gunasinghe) without much difficulty.

According to prosecution witnesses, the incident involving the arrest of the two accused and the other two suspects had given rise to a commotion in the area. There is some evidence that IP Welagedera was assaulted. In the circumstances, the officers had concerns about their security. Thus, they rushed away from the scene along with the four suspects in the two vans they travelled in, and proceeded initially to Medawachchiya. WSI Gamage reported what had happened to SSP Pujitha Jayasundera who was their superior officer (at that time, the officer-in-charge of the PNB). On his instructions, on the same day they proceeded to Anuradhapura, and instead of producing the suspects before the Magistrate of Mannar (before whom, ordinarily the suspects ought to have been produced), they produced all four suspects before the Magistrate of Anuradhapura. On the request of the PNB (made in terms of section 82(3) of the Poisons, Opium and Dangerous Drugs Ordinance), the learned Magistrate had issued permission for the PNB to detain the suspects in police custody for a period not exceeding seven days. Subsequently, the suspects had been brought to Colombo and detained at the PNB Headquarters. This had been to facilitate the conduct of further investigations. On the 19th, the suspects had been taken to Mannar, and on the 20th produced before the Magistrate of Mannar. On an application by the PNB, the learned Magistrate had discharged suspect Sivabalan from the proceedings. The other suspects had been placed in remand custody. On a subsequent occasion, once again on an application by the PNB, suspect Wickremasinghe Gunasinghe had also been discharged by Court.

The position of IP Welagedera supported by the testimony of WSI Gamage is that, on an examination of the *polysack* bag, it transpired that inside the bag was a black colour parcel

on which the term *'tulip'* was printed. This parcel was found to contain four smaller parcels containing a brown colour powder, which they believed to be heroin. Subsequent investigations conducted using a field test kit had revealed that the powder which the 1st accused was carrying inside the *polysack* bag contained heroin. These parcels were later sealed and forwarded directly by the PNB to the Government Analyst, for analysis and report. By his report dated 5th October 2004 (produced by the prosecution marked "P9"), the Government Analyst had reported that the gross weight of the powder that was received by his department inside sealed parcels, weighed 4,120 grammes. An analysis of the powder revealed that it contained 1,503 grammes of Diacetyl Morphine (heroin). The evidence relating to the submission of the productions recovered during the raid to the Government Analyst (the integrity of the chain of evidence regarding the productions) and the findings and related expert opinion of the Government Analyst has not been challenged by the Defence.

Case for the defence

Three witnesses including the two accused, testified for the defence. The first defence who testified was Veerasamy Sivabalan - the elder brother of the accused. It is necessary to note that the trial procedure pertaining to the receipt of the defence evidence had been flawed, in that, Sivabalan had been permitted to testify before the two accused testified. Section 201 of the Code of Criminal Procedure Act regulates the receipt of defence evidence in a criminal trial in the High Court presided over by a judge of the High Court sitting without a jury. Though section 201 does not specifically state so, when the defence is called and the accused indicates that he will be giving evidence either from the witness box or by making a statement from the dock, the testimony of the accused must be first received by Court, before permitting other defence witnesses to testify. That procedure is adopted to prevent the accused from listening to the testimonies of other defence witnesses and then shaping his evidence in a particular manner, so as to make it compatible with the testimonies of other defence witnesses who testified before him. In

The Queen v. Tennakone Mudiyanselage Appuhamy*, 60 NLR 313,* Chief Justice Basnayake has observed that permitting an accused to testify after other defence witnesses have testified, is contrary to the practice of both our country and England. Requiring the accused to give evidence (if he chooses to) before other witnesses on his behalf testify, should be necessarily adhered to, unless due to attendant circumstances, doing so is not possible. Where this procedure has not been followed and following the correct procedure was possible, as in this case, the evidence of the accused would be of little value.

Be that as it may, according to Sivabalan, his residence is situated very close to the Sithy Vinayagar Alayam Kovil. The two accused lived with him. On 16th August 2004 around 11.00 – 11.45am, as a child of his had not returned from school, he ventured out in search of the child. On that occasion, he saw three people dragging a known person - one Wickremasinghe Gunasinghe *alias* Ragu and attempting to put him into a van. Sivabalan went up to them, and made inquiries. Then, he had also been apprehended by a member of the team that had apprehended Ragu, and bundled him into the van. He shouted for his safety. His brothers (the two accused) who were at the nearby kovil, came running towards the van. A fight erupted between them and those who apprehended Ragu and him. In the process, Sivabalan had been assaulted. He had also heard a gunshot. Consequently, the group had put the two brothers of the witness (the two accused) into the van, and the van had left the area. The witness denies that any heroin was found in the possession of either of the accused or from the possession of anyone else. Subsequently, all four of them had been taken to the Anuradhapura police station. He had been questioned and his statement had been recorded. The rest of the narrative regarding subsequent events is similar to evidence given by prosecution witnesses.

The second witness for the defence was the 1st accused (Appellant) Sivathasan. According to his testimony, he and his younger brother Pavadasan, are Davil players. They regularly

perform at the kovil. At the time of the incident, he and Pavadasan had been inside the kovil. When he heard his elder brother Sivabalan shouting, he along with Pavadasan had rushed out. He saw Sivabalan being dragged into a van by some persons. He went up to the group of persons and started to assault them. Subsequently, he and his brother had also been bundled into the van and taken away. He denies that at the time he was apprehended, he had in his possession any offensive substance.

The testimony of the 2nd accused – Pavadasan, is parallel to that of Sivathasan. He too denies having along with Sivathasan, been in possession of heroin.

Submissions made on behalf of the Appellant

Learned President's Counsel for the Appellant submitted that, as in the instant matter, when there are two divergent narratives as to how the incident occurred, the trier of facts (High Court judge) without superficially looking at the evidence presented by the prosecution, should have carefully analysed the evidence, including that of the defence, and arrived at a final decision. His position is that the learned judge of the High Court had believed the evidence of the two prosecution witnesses on the basis that there were no *'reasonable contradictions observed'* (quoting words contained in the judgment of the learned judge of the High Court). On the other hand, the learned judge had disbelieved the testimony of defence witness Sivabalan, notwithstanding the absence of any contradictions *per-se*; that being, notwithstanding Sivabalan having made a prompt statement in a hostile situation. Learned President's Counsel further submitted that in those circumstances, the evidence of Sivabalan should not have been rejected.

Turning on to the prosecution evidence, learned counsel for the Appellant submitted that the two key witnesses for the prosecution, namely Welagedera and Gamage were experienced officers of the PNB, and had been trained to give evidence based on notes purported to have been written immediately after the raid. Under such circumstances, he

submitted that it would in any event be difficult to find contradictions in their testimonies. He submitted that therefore, the testimonies of prosecution witnesses should have been considered cautiously. He further submitted that there were *inter-se* contradictions between the testimonies of IP Welagedera and WSI Gamage, regarding the manner in which accused were arrested. Learned judge of the High Court had 'brushed them aside', on the basis that, *'what one person had seen the other witness need not necessarily have seen'*. Counsel's position was that the learned judge had gravely misdirected himself in assessing the evidence of the two prosecution witnesses, which in the circumstances of the case amounted to a denial of a *fair trial*.

Learned President's Counsel for the Appellant also submitted that the learned judge of the High Court had misdirected himself in having formed the view that there existed a contradiction between the testimonies of Sivabalan and the Appellant. This purported contradiction arose due to the cross-examination of Sivabalan, regarding the alleged existence of a 'room' or a *'mudam'* for the two accused, inside the kovil. It was submitted that, the Appellant had testified that while he did not have a 'room' inside the kovil, they had been given a *'mudam'* which was situated within the kovil premises. According to Sivabalan too, the accused did not have a 'room' inside the kovil but they had been given a *'mudam'* by the kovil authorities, which was situated within the kovil 'premises' on the Kovil Road. He thus submitted that Sivabalan had not contradicted himself, nor had a contradiction arisen between the testimonies of Sivabalan and the Appellant. He submitted that this purported non-existent contradiction was not a valid ground for the rejection of Sivabalan's testimony.

Learned counsel also submitted that, if Sivabalan's evidence is accepted, at the lowest, it creates a *'reasonable doubt'* regarding the case for the prosecution, and hence the Appellant would be entitled to an acquittal.

It was further submitted by the learned President's Counsel, that the Appellant (1st accused) and the 2nd Accused gave evidence under oath and were subjected to cross-examination. Their evidence did not give rise to any contradictions or omissions, and there were no contradictions *inter-se* between their testimonies. He submitted that therefore, there was no basis for the Court to have rejected their testimonies.

Finally, learned President's Counsel submitted that the failure on the part of the Appellant to show a reason for the officers of the PNB to have fabricated a story and falsely implicate him and the 2nd Accused, should not be viewed as a factor that strengthens the case for the prosecution or *ipso facto* justifies the rejection of the case for the defence.

In view of the foregoing submissions, learned President's Counsel for the Appellant submitted that the conviction of the Appellant cannot be sustained in law, and hence should be set aside and the Appeal be allowed.

Submissions made on behalf of the Respondent

Learned Additional Solicitor General representing the Respondent prefaced her submissions by submitting that the questions of law raised on behalf of the Appellant were based on *'frivolous and unsupported grounds'*, and therefore should be answered by this Court in the negative. She submitted that the duty of an appellate court is to be satisfied affirmatively, that the prosecution's case was *'substantially true'* and that the guilt of the appellant has been *'established beyond reasonable doubt'*. Unless the appellant has on reasonable grounds satisfied the appellate court that the trial judge had erred in arriving at the finding of guilt, the Court of Appeal cannot reverse the finding of the trial judge. She highlighted that in this matter, the Court of Appeal had arrived at its findings, having carefully examined the evidence placed before the High Court by the prosecution and by

the defence. She submitted that when considering the evidence, the Court of Appeal had been conscious of the denial of the commission of the offence by the defence.

Learned ASG submitted that the Court of Appeal had initially considered the credibility of prosecution witnesses, and satisfied itself regarding the credibility of the two key witnesses, namely Inspectors Welagedera and Gamage. The Court of Appeal had considered the particular aspect of the case which revolved around WSI Gamage's testimony that she bit the hand of the 1st accused and thereby relieved IP Welagedera from the firm grip of the 1st accused, and that aspect of the prosecution's narrative not having been testified to by IP Welagedera. Citing certain observations of Justice Shiranee Tilakawardane in ***The Attorney General v. Sandanam Pitchi Mary Theresa***, *[2011] 2 Sri L.R. 292,* and those contained in ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat***, AIR 1983 SC 753, the learned Additional Solicitor General submitted that *"it was human for IP Welagedera to not have recalled the incident of 'biting', which resulted in his release of the 1st Accused – Appellant who had tightened the grip"*. She further submitted that in the impugned judgment, the Court of Appeal has observed that, *"… when things occurred in rapid succession it would not be possible for some witnesses to observe as well as certain other witnesses, the sequence and the things that happened."* She submitted that, as concluded by both the High Court and the Court of Appeal, this particular omission in IP Welagedera's testimony had not affected the credibility of prosecution witnesses and the overall case for the prosecution.

Learned Additional Solicitor General further observed that the learned trial judge had the benefit of observing the demeanour and deportment of both key witnesses for the prosecution. They had been subjected to lengthy cross-examination. She submitted that *"their Lordships had been mindful of the priceless advantage the trial judge had over the Court of Appeal in observing the demeanour and deportment of the witnesses … their Lordships had been reluctant to disturb the findings of the learned trial judge …"*. Learned Additional Solicitor

General brought to the attention of this Court the following paragraph in the impugned judgement:

> *"A witness may not observe and remember better than another, the manner in which the incident took place, especially when he was the person who was attempting to subdue and overpower a criminal in order to apprehend him with the contraband, rather than a witness who observes the incident. The person really involved may sometimes be oblivious to the blows he received and the injuries suffered or how and the manner in which he received and suffered, his primary concern being the arrest of the accused, come what may."*

Learned ASG submitted that in view of the prosecution having established *"a very strong prima facie case against the accused … the defence had to offer an explanation for their conduct"*. She submitted that the Court of Appeal had given due consideration to the evidence presented on behalf of the defence. She quoted the following passage contained in the impugned judgment of the Court of Appeal:

> *"… in considering the totality of the evidence, the judge could not be faulted for his conclusions and findings with regard to the 1st Accused – Appellant."*

Learned Additional Solicitor General in her post-argument written submissions submitted that *"… although their decision confined to a single sentence, a careful perusal of the judgment proves that their Lordships had arrived at this conclusion only after giving due consideration to the culpability of the two accused and their conduct"*. Referring to the acquittal of the 2nd accused by the Court of Appeal, learned ASG submitted that, *"… judges of the Court of Appeal did not disbelieve the prosecution witnesses or doubted their credibility in entering the acquittal, but had purely acted in abundance of caution"*.

Due to the defence of 'denial of the commission of the offence', learned ASG submitted that it was necessary to consider whether there was any basis to doubt whether prosecution witnesses had falsely implicated the accused due to some personal animosity. She submitted that the accused being previously unknown to the prosecution

witnesses, and the detection having been conducted in Mannar whereas the witnesses were from Colombo, militates against the possibility of a false implication of the accused by PNB officers. Furthermore, that the gross quantity of heroin detected being 4.12 kg (with a net weight of 1,503 grammes of pure heroin), necessitates the possibility of an 'introduction' being ruled out. She further submitted that the Court of Appeal had observed that there was no reason suggested by the Accused – Appellants as to the motive or a very good reason to foist such a large quantity of heroin on the 1st accused and then arrest the 1st and 2nd accused – Appellants.

Referring to the position of the defence, learned ASG submitted that the defence version was presented to the High Court for the first time only after the case for the defence commenced, and that the position of the defence was not suggested to the two main witnesses for the prosecution during their cross examination.

In this regard, the learned ASG submitted the following:
"It is to be noted that courts have considered the importance of a party putting its case in cross-examination to the witnesses of the other party. This will facilitate the opposing party to challenge such positions. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought not to be accepted. Sri Lankan Courts have followed this line of thinking with approval."

Learned ASG also highlighted the fact that the defence did not present the testimony of Wickremasinghe Gunasinghe *alias* Ragu, who could have supported the defence position, particularly as he was, according to the defence, the first person to have been apprehended by PNB officers.

In conclusion, learned ASG submitted that, the Court of Appeal had very carefully examined the evidence submitted by both the prosecution as well as the defence and

following careful consideration had decided that the decision of the learned trial judge to convict the 1st Accused – Appellant was correct and can be justified.

In view of the foregoing, learned ASG for the Respondent submitted that the questions raised by the Appellant should be answered in the negative, and that this Appeal should be dismissed.

Consideration and analysis of the evidence

The Appellant launched challenges against his conviction, from two frontiers.

(i) That the version presented by the prosecution is not credible, and hence should be rejected in toto. This assertion was made by learned President's Counsel alternative to the main submission that the prosecution had failed to prove its case beyond reasonable doubt. In both these scenarios, if the Appellant is successful, the accused-appellant would be entitled to an acquittal.

(ii) That the defence version gives rise to a minimum of a reasonable doubt regarding the case for the prosecution, and hence the Appellant should have been acquitted. This assertion is premised upon the footing that, should the case for the defence give rise to a reasonable doubt, the accused would be entitled to an acquittal.

These two issues are necessarily inter-related. A case for the prosecution not being proven beyond a reasonable doubt, arises out of the existence of a reasonable doubt emanating from the case for the prosecution itself. Nevertheless, for clarity, I will deal with these two issues separately. The second argument will be considered first, and consideration will be given to whether the defence version is credible and gives rise to a minimum of a reasonable doubt regarding the case for the prosecution.

Does the case for the defence give rise to a minimum of a reasonable doubt?

A reasonable doubt is a real or actual and a substantial doubt, as opposed to an imaginary or flimsy doubt that may arise in the mind of the decider of facts (judge or the jury, as the case may be), following an objective consideration of all the attendant facts and circumstances. It is a doubt founded on logical and substantial reasoning (well-founded) which a normal prudent person with not less than average intelligence and learnedness in men, matters and worldly affairs, would naturally and inevitably develop in his mind following a comprehensive, objective, independent, impartial and neutral consideration of the totality of the evidence and associated attendant circumstances. It is a doubt that makes the case for the prosecution significantly less probable to have occurred than in the manner purported to have occurred.

A reasonable doubt is not the type of doubt that arises due to incorrect, abnormal or unreasonable comprehension of testimonies and other material which amount to evidence presented at the trial, or due to irrational fear, inappropriate sympathy, or unjustifiable mercy. It is not a doubt that develops in the mind of an imbecile, indecisive or timid person, or in a weak or vacillating mind. A shadow of a doubt, an imaginary doubt, a vague doubt or a speculative or trivial doubt should not be confused with a reasonable doubt. A reasonable doubt is not a doubt that a partisan individual with vested interests would entertain in his mind, or a doubt that such a person would advocate that purportedly exists.

The principle that the prosecution must prove its case beyond reasonable doubt and the accused is entitled to an acquittal if there exists a reasonable doubt, has been engraved in the criminal justice system of this country and in the rest of the common law world. That is to ensure that only those actually guilty of having committed crimes are convicted and the innocent are acquitted. Thus, the application of this principle should cause the advancement of the primary objective of criminal justice (that being 'the conviction of the

guilty through a lawful and fair trial and if found guilty the imposition of an appropriate punishment, and the acquittal of the innocent) and not frustrate it.

In ***Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra***, *AIR 1973 SC 2622,* the Supreme Court of India has commented that, "*the cherished principles of the golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch and degree of doubt. … Only reasonable doubts belong to the accused. Otherwise any practical system of justice will break down and lose credibility with the community.*"

In ***Dharm Das Wadhwani v. The State of Uttar Pradesh***, *1974 Cri. LJ (SC) 1249,* the Supreme Court of India has observed that, "*… The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct. …*"

In ***Wijesekera (Excise Inspector) v Arnolis***, *(1940) [17 CLW 138],* Justice Wijeyewardene has held that "*… it is not every kind of doubt the benefit of which an accused person is entitled. An accused person could claim only the benefit of a reasonable doubt. It is always possible to conjure up a doubt of a very flimsy nature. But an accused person cannot be acquitted on the ground of such doubt…The guilt or innocence of an accused person must be determined on evidence and not on some suggestion made in the course of an argument…*".

If the testimonies provided by Sivabalan and the two accused are true, the testimonies of IP Welagedera and WSI Gamage are totally false other than for the fact that the incident in issue occurred on 16th August 2004 near the Pillaiyar Kovil (also known as the '*Sithy Vinayagar Alayam Kovil*') in Uppukulam, Mannar. Further, if the defence version is true, the arrest and custody of the two accused, Sivabalan and Wickremasinghe Gunasinghe *alias* Ragu had been without any valid reason and had been unlawful. Thus, in those

circumstances, one would expect them to have reacted in a different manner, without succumbing in silence to the allegedly unlawful conduct of the PNB officers. Had they initiated legal action against the officers for having unlawfully arrested them (which action they were not legally obliged to take), it would have enabled them to have got themselves vindicated. Neither of the accused nor Sivabalan claim to have taken such action. That, to say the least, is somewhat surprising.

According to the defence version, the string of events surrounding the arrest of Wickremasinghe Gunasinghe *alias* Ragu, Sivabalan, and the two accused had commenced when the police team apprehended Wickremasinghe Gunasinghe *alias* Ragu for no valid reason. In fact, the defence version offers no explanation as to why PNB officers would have wanted to apprehend Wickremasinghe Gunasinghe. Thus, the all-important probabilities factor does not support the defence version. Wickremasinghe Gunasinghe would have been in an ideal position to reveal what exactly happened. According to the case record relating to the trial proceedings, the defence has not even attempted to procure his attendance at the trial by moving for the issue of summons on him. As pointed out by the learned Additional Solicitor General, the absence of the testimony of Wickremasinghe Gunasinghe *alias* Ragu in support of the position of the defence, casts a doubt regarding the authenticity of the position of the defence.

Learned Counsel for the Appellant relied heavily on the testimony given by defence witness Sivabalan, who is admittedly the elder brother of the two accused. Therefore, he is to be treated an 'interested witness', who would have certainly wanted to protect his two brothers from being convicted. That a particular witness is an 'interested witness' causes a negative impact on the assessment of that witness's credibility. In ***The Attorney General v. Sandanam Pitchi Mary Theresa****, [(2011) 2 Sri L.R. 292],* which was brought to the attention of this Court by the learned ASG, Justice Shiranee Tilakawardane has made

the following observations regarding the assessment of credibility of interested witnesses:

> *"… not all witnesses are reliable. A witness may fabricate or provide a distorted account of the evidence through a personal interest or through genuine error. …* ***A key test of credibility is whether the witness is an interested or disinterested witness****. …* ***when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care****. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive and reliability have all to be weighed.* ***Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness.*** *…"*
> (Emphasis added by me.)

It is noteworthy that Justice Tilakawardane had made these observations in the course of commenting upon the credibility that may be attached to the testimony given by a defence witness, who in that case was a sister of the accused. In that case, the evidence of an officer of the PNB which was sought to be contradicted by presenting the evidence of this particular defence witness, was rejected by Court, primarily on the footing that she was an interested witness and therefore had reasons to give false evidence to secure the acquittal of the accused. The observations of Justice Tilakawardane in this regard is of particular relevance to this Appeal, as defence witness Sivabalan is a brother of the two accused.

Furthermore, a careful scrutiny of the proceedings of the trial, reveals that the main position taken up by the defence, that (i) Wickremasinghe Gunasinghe *alias* Ragu was initially apprehended for no valid reason, (ii) thereafter when Sivabalan approached the police to find out why Wickremasinghe Gunasinghe *alias* Ragu was being bungled into a van, he was arrested, and (iii) the two accused were thereafter apprehended, has not been

put in the form of specific **suggestions** to either IP Welagedera or WSI Gamage, when they testified. It has not been suggested to prosecution witnesses that the team of police officers initially apprehended Wickremasinghe Gunasinghe *alias* Ragu, then apprehended Sivabalan and bungled both of them into the police van, well before the two accused were arrested. All what has been suggested to prosecution witnesses is that at the time the two accused were arrested, they did not have anything offensive in their possession, and thus a mere denial of the accusation against them.

In ***Mananage Susil Dharmapala v. Officer-in-Charge, Special Crimes Division, Colombo*** (SC Appeal No. 155/14, SC Minutes of 28th June 2021) this Court has observed the following:

> *"It is necessary to observe that **suggestions** are in fact a component of a comprehensive cross-examination. **Suggestions are factual assertions or propositions put to a witness during cross-examination** by the counsel conducting such cross-examination, for the purposes of (i)impeaching the credibility and testimonial trustworthiness of a witness, (ii) attempting to elicit an item of evidence favourable to the party on whose behalf the cross-examination is being conducted, such as an admission, (iii) indicating to Court the position of the party on whose behalf the cross-examination is being conducted, regarding the testimony given by the particular witness, and (iv) **indicating to Court the position of the party on whose behalf the cross-examination is being conducted, the overall case of the opposing party**."* (Emphasis added by me.)

It would therefore be seen that **suggestions** to prosecution witnesses are very important, and *inter-alia* serve as an opportunity for the defence to place before prosecution witnesses the position of the defence. It enables the Court to take early cognizance of the position of the defence, and also enable prosecution witnesses to respond to the defence position. That the defence placed before Court their position at the first available opportunity also enables it to satisfy the 'test of spontaneity'. Therefore, it is of importance that the defence uses this opportunity to specifically and in unambiguous

terms indicate both to the Court and to prosecution witnesses, the position of the defence. Should the defence not make use of this opportunity and take up a particular position for the first time during the case for the defence, that position will suffer from the weakness of 'belatedness'. Furthermore, when the defence takes up its position belatedly, without putting it to prosecution witnesses, it is not possible to check its veracity. A belatedly taken up defence position would affect the credibility that may be attached to defence witnesses who testify in support of that position, and will also have a negative impact on the evidential weight that could be attached to the position of the defence. I must record my agreement with the submission made in this regard by the learned Additional Solicitor General. Her submission in this regard reflects the *cursus curiae* of both this Court and that of the Court of Appeal on this matter.

According to a suggestion made by learned counsel for the accused to IP Welagedera, the heroin which the prosecution claims to have been in the possession of the 1st Accused (Appellant) had been found by the police on a bicycle parked near the kovil. However, none of the defence witnesses have testified that they saw an occurrence to that effect. It is to be noted that the contents of a suggestion unsupported by evidence, does not have any evidential value. In ***The King v Andris Silva,*** *[(1940) 41 NLR 433],* Moseley, SPJ held that it was not a misdirection to tell the jury that they must not pay the slightest attention to any suggestion put to a witness in cross-examination, unless such suggestion is supported by proof. Thus, a suggestion unsupported by evidence serves hardly any purpose.

Another suggestion made to IP Welagedera has been, that at the time of the incident the two accused were playing drums inside the kovil. Neither of the accused have testified to that effect. In fact, such suggestions which are not subsequently supported by evidence, negatively affect the *bona-fides* of the party that made such suggestions. Furthermore, in their testimonies, the accused have not explained why they were inside

the kovil at that particular time. Furthermore, if at the time the other two suspects were apprehended, the two accused were inside the kovil and they came out when they heard their brother Sivabalan shouting *'ayyo'* (as claimed by the accused), they could have provided some corroborative evidence to that effect from an independent person who was at the kovil at that time, such as a *Poosari.* [Also referred to as a *'Pujari'*, a *Poosari* is a Hindu priest who performs *pooja* (temple rituals) in a *Kovil* (Hindu temple).]

Whether or not the two accused had a room inside the kovil proper or whether it was in the form of a *'mudam'* in the compound of the kovil, and whether there existed a contradiction within the testimony of Sivabalan or between the testimonies of the Appellant and Sivabalan, were matters highly debated between the learned President's Counsel for the Appellant and learned Additional Solicitor General for the Respondent. As to whether there are such contradictions cannot be conclusively determined particularly because neither party has clarified whether the term *'mudam'* is synonymous with the word 'room' and the exact coverage which comes within the purview of the 'kovil premises' and the 'compound of the kovil'. Further, the Appellant and Sivabalan had testified in Tamil language and what was used by both the Court of Appeal and the Supreme Court was an English translation of the trial proceedings. In the circumstances, this Court has decided not to pronounce a finding on that matter. In any event, this Court is of the view that a determination on that matter would not be necessary for the final determination of this Appeal, due to the abundance of reasons which justifies the conclusion reached by this Court.

The testimony provided by the defence does not tender any explanation from where the PNB officers had obtained the *polysack bag* containing over 4 kilogrammes of a brown powder (which contained over 1 kilogramme of heroin). Even according to the defence, the PNB officers did not have any pre-existing reason (such as a previous unsuccessful raid) or any animosity which may have propelled the PNB, to foist heroin on the

Appellant and fabricate a case. It is inconceivable that the PNB officers carried with them this large quantity of heroin from Colombo to be foisted on either the Appellant or any other person. If they found the heroin parcel from the kovil, why should they fabricate a 'story' revealing that the heroin was recovered from the possession of the Appellant? Furthermore, according to the defence version, PNB officers initially apprehended Wickremasinghe Gunasinghe *alias* Ragu. Thus, according to the defence, he had been the prime target of the PNB. If so, why did not PNB officers 'fabricate a story' alleging that it was Wickremasinghe Gunasinghe who had heroin in his possession? Thus, in my view, the version of the defence is riddled with substantial improbabilities and questions which beg answers.

In view of the foregoing, it is necessary to point out that, neither the High Court nor the Court of Appeal can be faulted for not having placed any reliance on the position and alleged version of events presented to the High Court by the defence. Both Courts have in my view, rightly rejected the defence evidence. The conclusion reached by the learned judges, that through the testimonies presented by the three defence witnesses, the defence has not cast a reasonable doubt regarding the case for the prosecution, is in my opinion well-founded.

Is the case for the prosecution of such nature that it should be rejected in its totality? In the alternative, has the prosecution proved its case beyond a reasonable doubt?

The answer to the first question above, should be founded upon a consideration of the totality of the case for the prosecution. If the evidence for the prosecution (i) suffers from inherent improbabilities or is otherwise *ex-facie* incredible and therefore the judge discredits the totality of the evidence on the part of the prosecution, (ii) even if taken at its highest and accepted fully, is insufficient to prove the ingredients of the offence (and thereby the commission of the offence charged against the accused), or (iii) does not give rise to a minimum of a strong *prima-facie* case against the accused, then, the case for the

prosecution should be rejected, and the accused should be acquitted. That could be done either in terms of section 200 of the Code of Criminal Procedure Act at the end of the case for the prosecution, or following a consideration of the defence evidence if any, at the time of the pronouncement of the verdict. If at the time of the closure of the case for the prosecution, one out of the three afore-mentioned deficiencies in the case for the prosecution is detected, then the learned trial judge shall, acting in terms of section 200 of the Code of Criminal Procedure Act, acquit the accused. The accused should be acquitted, without placing an unnecessary and heavy burden on him of having to continue facing the trial.

Though learned President's Counsel for the Appellant couched and presented an argument alleging that the case for the prosecution should be rejected in its totality, he did not advance a basis for moving for the total rejection of the case for the prosecution. His actual focus was on the ground that the case for the prosecution viewed particularly in the light of the case for the defence, was not credible, and hence the prosecution had failed to prove its case beyond a reasonable doubt. His position was that when viewed from the context of the evidence presented by the defence, the prosecution had failed to prove its case beyond reasonable doubt. Thus, the focus of this part of the judgment would be on whether the prosecution had proven its case beyond reasonable doubt.

Relying on evidence presented to Court by the prosecution, it is the legal duty (burden of proof) of the prosecution to prove its case beyond reasonable doubt. That is to prove its case to an extent which does not leave room for a reasonable doubt to arise. That is a high degree of proof, which gives rise to a mental state of satisfaction, to be convinced that the accused had committed the offence.

Former Chief Justice of India M. Monir in ***Law of Evidence*** (5th edition, 1994) (which is a commentary on the Indian Evidence Act, 1 of 1872), at page 353, has stated the following:

"The basic principle of criminal jurisprudence is that a person must be presumed to be innocent until his guilt has been established beyond reasonable doubt. A criminal trial begins with the presumption as to the innocence of the accused, and that presumption continues right up to the time when, after considering all the evidence, the Court comes to the conclusion that the commission of an offence by the accused has been proved beyond the pale of reasonable doubt. … There is no burden on the accused to prove his innocence. The difficulty of proving the necessary ingredients of the offence is no ground for exempting the prosecutor from that duty."

Marcus Stone in ***Proof of Fact in Criminal Trials*** (published by W. Green & Son, 1984, at page 354), has explained 'proof beyond reasonable doubt' in the following manner:

"The standard of proof required for conviction, i.e. beyond reasonable doubt, is stated in terms of belief and not as a degree of probability ... Proof beyond reasonable doubt transcends any acceptance of probability when it produces that state of belief. A tribunal of fact could not convict unless it was actually convinced of guilt to that extent. It must believe in the reality of guilt. A mere mechanical comparison of probabilities, however strong this might point to guilt, would not be enough. The criterion is human and not mathematical. It is a judgment that the facts are established. …

The phrase 'beyond reasonable doubt' is the essential verbal formulation which has been devised by law to express the necessary standard of belief for a criminal conviction. Attempts to improve on or to elaborate on that formulation are discouraged by appeal courts. The phrase appears to be as precise as any other words which could be substituted for it. Proof of facts in court inevitably falls short of absolute certainty, as was said by Lord Guthrie: "Outside the region of mathematics, proof is never anything more than probability. It is for the Court in each case to say whether the probability is so slight, or so equally balanced by counter-probabilities, that nothing more results than a surmise; or whether the probabilities are so strong and so one-sided as to amount to legal proof. The abstract possibility of mistake can never be excluded."

…The standard of proof beyond reasonable doubt refers to the verdict, which is based on the cumulative effect of the whole of the evidence. It may be thought to be a question of law or of logic whether the standard should also apply to each item of evidence upon which a conviction is based…"

As regards the standard of proof to be satisfied in a criminal case, there is no doubt that the prosecution must prove its case beyond reasonable doubt. However, one must take a realistic and pragmatic view of what can be reasonably expected of a prosecution. It is important in my view to bear in mind that a prosecution cannot be expected to prove its case to a degree of mathematical accuracy or scientific certainty. The degree of accuracy and certainty that a prosecution can be reasonably expected to satisfy is much less. That is quite natural, as prosecutions have to rely primarily on human testimony, which is subject to the inherent frailties associated with human observation, memory, recollection, and verbal articulation through oral testimony.

The following type of questioning and questions, (i) repetitive and unnecessarily lengthy cross-examination, (ii) strategically worded questions founded on non-existent or irrelevant facts, a confusing mixture of facts or on trivial matters, (iii) questions using an inappropriately aggressive tone, reverberating noise or intimidating body language, (iv) questions asked without reasonable grounds, (v) indecent or scandalous questions and (vi) questions intended to insult or annoy, can blur memory, cause confusion, instill fear, embarrass, or cause stress, trauma and strain in the mind of a witness. It is the duty of the trial judge to control proceedings and forbid questions which an Attorney-at-Law is precluded or disentitled in terms of the Evidence Ordinance and professional ethics from asking, or are inappropriate, and are aimed at or may result in the obstruction of the course of justice, causing secondary victimization of victims of crime who testify or denying witnesses the entitlement of testifying at a fair trial. Such questions adversely affect the ability of the witness to provide a truthful and detailed account of the incident with clarity and precision. The impact of such unlawful or inappropriate cross-

examination is compounded by the fact that to most lay witnesses, the sheer atmosphere of our Courts can be quite alien, intimidating and fear generating. It is the duty of the trial judge to prevent or control such unlawful or inappropriate cross-examination, and to provide witnesses a conducive environment in which they could testify without any fear or favour. The absence of a conducive environment can have the effect of subverting the course of justice.

Unfortunate delays in the commencement and completion of criminal trials, and long and unjustifiable intervals between successive trial dates (which must be avoided, particularly as in terms of the proviso to section 263(1) of the Code of Criminal Procedure Act, trials must be conducted on a day-today basis unless doing so is impracticable, in the literal sense of the word 'impracticable') are contributory factors that have an adverse impact on the accuracy and quality of human testimony. This is because human testimony is primarily based on human memory, which tends to fade away and get adversely affected due to the passage of time. Indeed, if the testimony of a witness contains intentionally uttered falsehood, such testimony must be rejected, particularly if there is no legal justification to separate the truth from the falsehood. Nevertheless, unintentional errors which may creep into or be embedded in human testimony should not result in the total rejection of the testimony of any particular witness.

The reasons enumerated above necessitate the adoption of a pragmatic view when assessing and determining the credibility of a witness and the trustworthiness of his testimony. Criteria pertaining to the assessment of credibility and testimonial trustworthiness must be applied, acutely conscious of the backdrop of all the attendant facts and circumstances, including (i) the background and profile of the relevant witness, (ii) circumstances pertaining to the initial observation, (iii) developments that may have occurred during the interval between the initial observation and the giving of evidence,

(iv) the situation that prevailed when the witness testified, and (v) the nature of the examination-in-chief, cross-examination and re-examination.

Natural defects in human testimony which are to be expected due to the afore-stated factors, should not be misconstrued as giving rise to a reasonable doubt. A reasonable doubt is not a theoretical legal construct which should be applied to enable a perpetrator of crime to secure an acquittal.

In ***Miller v. Minister of Pensions***, *[(1947) 2 A.E.R. 372]* Lord Denning has explained what proof beyond reasonable doubt is, in the following lucid manner:

"…the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

The trier of facts as well as appellate court judges should not fall prey to the argumentative theorizing and magnification given to theoretical, flimsy or imaginative doubts developed through a theatrical performance of skillful and robust advocacy of an ingenious counsel. The judge must decide objectively and dispassionately, upon a mature, realistic, pragmatic and fearless consideration of the totality of evidence and the entirety of the attendant facts and circumstances. During such consideration, he must take into account not only the evidence presented by both parties, but inferences and presumptions recognized by the law which arise out of such evidence, and matters in respect of which a judge is entitled to take judicial notice.

If a reasonable doubt exists, the *cursus curiae* of our courts and those of the rest of the common law world which recognize the adversarial system of criminal justice, insist on the 'presumption of innocence', which unequivocally demands that the benefit of that reasonable doubt accrues to the benefit of the accused and that the accused be acquitted.

Learned President's Counsel for the Appellant emphasized that in this case, the prosecution had not proven its case beyond reasonable doubt. In order to prove a case beyond reasonable doubt, the prosecution must present to Court the testimonies of witnesses who are subsequently assessed and determined by the trial judge or the jury, as the case may be, to be 'credible'. The trial Court must be able determine that the prosecution witnesses are not only credible, but that their testimonies are 'trustworthy' as well. For the prosecution to plead that the testimonies of their witnesses be accepted as being truthful of the facts deposed to by such witnesses, those two primary conditions must be satisfied. Thus, the trial judge must be able to assess and determine that prosecution witnesses on whose testimonies the prosecution relied on, are credible and their testimonies are trustworthy. Furthermore, the testimonies so provided by such witnesses must be compliant with section 5 of the Evidence Ordinance, and thus should relate to only 'facts in issue' and 'relevant facts'. Their oral testimonies pertaining to such facts should also be 'admissible'. Such oral evidence testified to by prosecution witnesses, along with other evidence, if any, of the prosecution's case (such as documentary evidence, real evidence, contemporaneous audio-visual recordings and computer evidence) must be capable of proving the ingredients of the offence(s) to the extent provided in section 3 of the Evidence Ordinance.

A consideration of the totality of the evidence should result in the trier of facts being convinced that the case for the prosecution is true, and that the accused is guilty of having committed the offence he has been charged with. Merely developing (i) a case for the prosecution giving rise to suspicion that the accused 'may' have committed the offence

or that it is 'probable' that the accused committed the offence, (ii) a case theory founded on 'conjecture' that it was the accused who committed the offence, or (iii) a state of mind in the trial judge or the jury (as the case may be) that the case for the prosecution is 'more probable' than the case for the defence, is wholly insufficient. On a whole, the prosecution must, relying on cogent evidence of a **high degree of probative value** presented to Court through its own witnesses, be capable of proving its case beyond reasonable doubt. That threshold reflects a high degree of **sufficiency of evidence**, which is adequate to eliminate a reasonable doubt and vacate the presumption of innocence.

The prosecution must prove its case beyond reasonable doubt, relying on its own evidence. Colloquially, it is often said that the prosecution must *'stand on its own legs'*.

The following observations of Justice P.R.P. Perera, in ***Karunadasa v OIC, Motor Traffic Division, Police Station, Nittambuwa****, [(1987) 1 Sri L.R. 155]* are of great importance.

> *"It is an imperative requirement in a criminal case, that the prosecution must be convincing, no matter how weak the defence is, before a court is entitled to convict on it. It has necessarily to be borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused. The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. This rule is based on the principle that every man is presumed innocent until the contrary is proved, and criminality is never presumed. This presumption is so fundamental and strong that in order to rebut it, the crime must be brought home to the accused, beyond reasonable doubt. There is only one final question in every criminal case; does the evidence establish beyond a reasonable doubt the guilt of the accused?*
>
> *In The Attorney General v Rawther, Ennis, J states thus "The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt." "*

Save exceptional situations [where, the dictum of *Lord Ellenborough* said to be contained in *R. v. Lord Cochrane* has been recognized, such as in *The King v. Seeder de Silva* [41 NLR 337] and *Seetin v. The Queen* [68 NLR 316], and the rule of law arising out of logical reasoning and the application of rules of evidence recognized in *Ilangatilaka and Others v. The Republic* [(1984) 2 Sri L.R. 38], *Basnayake v. OIC, Special Crimes Detection Unit, Anuradhapura* [(1988) 2 Sri L.R. 50], *The Attorney General v. Potta Naufer and Others* [(2007) 2 Sri L.R. 144], and *Somaratne Rajapakse and Others v. Honourable Attorney General* [(2010) 2 Sri L.R. 113] would be applicable], for the purpose of discharging its burden of proving the case against the accused beyond reasonable doubt, the prosecution cannot take advantage of and through prosecutorial argumentation seek the strengthening of the case for the prosecution by (i) the accused having elected to exercise his right to remain silent, (ii) the weaknesses of the case for the defence, or (iii) the case for the defence having been proven by the prosecution to be false.

In view of the foregoing analysis of the law, and in the light of the submissions made by learned President's Counsel for the Appellant and learned Additional Solicitor General for the Respondent, it is necessary to consider the testimonies provided by the two key prosecution witnesses; IP Welagedera and WSI Gamage, with the view to determining whether the prosecution has proven its case beyond reasonable doubt.

The position advanced on behalf of the Appellant was that there exists an irreconcilable contradiction *inter-se* between the testimonies given by IP Welagedera and WSI Gamage. That submission is founded upon the testimony given by IP Welagedera not having contained details of - (i) the resistance shown by the two accused against their arrest, (ii) the action taken by WSI Gamage to secure control of the situation that spontaneously arose, (iii) the manner in which she was able to loosen the grip the 1st accused had on IP Welagedera, and (iv) the manner in which she brought the 2nd Accused under control and arrest him. Particularly in view of the artful, strenuous and compelling manner in which

the learned President's Counsel for the Appellant advocated this point, I examined the proceedings relating to the testimonies given by these two prosecution witnesses with a high degree of attention and circumspection.

The examination of the proceedings and related evidence revealed the following:
IP Welagedera has not provided any testimony which 'contradicts' the testimony given by WSI Gamage. However, it remains a fact that, IP Welagedera has not provided details regarding the manner in which WSI Gamage assisted him in apprehending the two accused. He has stated that WSI Gamage participated with him in arresting the two accused. He has also briefly stated that the accused showed resistance towards their being arrested. On a consideration of the totality of IP Welagedera's testimony, it appears that his testimony has been confined to his role in the arrest of the two accused and what he personally witnessed. It is necessary to note that, the learned State Counsel who had conducted the prosecution, has also not questioned IP Welagedera about the role performed by WSI Gamage or regarding the manner in which she assisted him. Furthermore, it appears from the testimony given by WSI Gamage that her action towards relieving IP Welagedera from the grip of the 1st Accused was spontaneous and momentary. Thus, it is quite possible as well as probable that IP Welagedera may not have noticed what exactly WSI Gamage did to secure his release from the clutches of the 1st Accused. In the circumstances, I am unable to agree with the submission of learned President's Counsel for the Appellant that the difference in the testimonies of IP Welagedera and WSI Gamage affect their credibility and testimonial trustworthiness. I am of the view that the submission made in this regard by learned Additional Solicitor General that the purported omission in the testimony of IP Welagedera does not reasonably affect the credibility that may be attached to him, is quite plausible and hence acceptable. It is also pertinent to note that both the learned judge of the High Court and the learned judges of the Court of Appeal have paid attention to this aspect of the case, and concluded for reasons given in their respective judgments, that the purported

discrepancy between the testimonies of the two key prosecution witnesses does not cast a doubt regarding the case for the prosecution.

As regards the submission that the prosecution's evidence regarding the raid (given by IP Welagedera and WSI Gamage), is not full of details and mutually corroborative, I must also observe the following: In an incident of this nature, where unexpected events have occurred during a short period of time at rapid succession and some events have occurred simultaneously, and the very same witnesses were subject to resistance and attempted overpowering (and thus could not observe the incident passively), one cannot reasonably expect them to provide a picture perfect narrative complete with all details of what actually happened. Further, it is quite possible that IP Welagedera did not see the exact manner in which WSI Gamage conducted herself, particularly as he would have been concentrating on relieving himself from the grip of the 1st Accused and on preventing the 1st Accused from evading arrest and fleeing from the scene along with the polysack bag. When 'participant-witnesses' as opposed to 'passive-observer-witnesses' give evidence regarding an incident that occurred quite suddenly, it is not humanly possible for their testimonies to mirror each other. Furthermore, their testimonies which had been in response to the examination-in-chief conducted by the learned State Counsel, appear not to have been complete with all the possible details of the event, particularly as the examination of IP Welagedera seems to have been conducted in a somewhat sketchy manner; so apparently, his examination had been far less than a comprehensive examination-in-chief that may be reasonably expected of an experienced State Counsel.

It is necessary to also record that, notwithstanding lengthy cross-examination of both IP Welagedera and WSI Gamage, the defence had not been able to establish that, (i) these two witnesses had been belated in recording their detailed notes relating to the raid, (ii) there exists inconsistencies of any particular significance between their oral testimonies and the detailed notes, (iii) their testimonies suffer from inconsistencies *per-se,* (iv) the

evidence of the two main prosecution witnesses are incompatible with any other independently proven material fact, (v) the prosecution's version is either highly or inherently improbable, (vi) during their testimonies they displayed a particular demeanour or deportment which reflects that they were intentionally uttering falsehood, or (vii) the prosecution witnesses entertained a cause or a motive to falsely implicate the accused. Further, the cross-examination of these two witnesses did not give rise to an inference that they had fabricated a case by foisting heroin on the 1st Accused. Further, the defence was not able to elicit during cross-examination any admission favourable to the position of the defence.

In ***State of Uttar Pradesh v M. K. Anthony***, *[AIR 1985 SC 48]* Justice Desai, has held as follows:

> "*While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. … Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer.*"

In ***Mananage Susil Dharmapala v. Officer-in-Charge, Special Crimes Division, Colombo,*** referring to the degree of proof the prosecution is obliged to fulfill, the Supreme Court had the occasion to observe the following:

> *"In terms of section 3 of the Evidence Ordinance, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, on an application of the principle contained in section 3 of the Evidence Ordinance buttressed by the earlier mentioned judicial precedents, I am of the opinion that, a criminal case can be considered to have been proved by the prosecution beyond reasonable doubt, if in the objective mind of the Judge or the jury, as the case may be, the prosecution has presented sufficient cogent evidence which causes the Judge or the jury to believe that the accused had committed the offence he has been charged with, or the judge or the jury considers that the accused having committed the offence to be so probable that the judge or the jury ought, under the circumstances of the case, act upon the supposition that the accused committed the offence. A case is 'proven beyond reasonable doubt', when a state of mind develops in the judge or the jury as the case may be, as to belief in the truthfulness of the assertion made by the prosecution, and the absence of a logically sound reason to doubt that assertion."*

In view of the foregoing, I am convinced and therefore do not entertain a reasonable doubt in my own mind, that the narrative which has been given by IP Welagedera and WSI Gamage in their testimonies, reflect an accurate and reliable picture of the events that had taken place on 16th August 2004 in Mannar near the Pillaiyar Kovil pertaining to the 1st Accused - Appellant and the 2nd Accused. I am also of the view that the prosecution has proven its case against the Appellant beyond reasonable doubt.

The law and its application as regards the impugned judgments of the High Court and the Court of Appeal

During the course of the hearing, learned President's Counsel for the Appellant and the learned Additional Solicitor General for the Respondent addressed this Court on several aspects pertaining to the impugned judgments of the High Court and the Court of Appeal. Those submissions necessitate that a description be provided of the applicable law regarding the scope, nature and degree of scrutiny required to be performed by this Court in respect of those two judgments.

Testimony and evidence related functions of the trial judge

A key challenge launched by learned President's Counsel for the Appellant regarding the judgment of the High Court, was based on the assessment of credibility of prosecution and defence witnesses by the learned High Court Judge. Learned counsel argued that, the Judge of the High Court had not properly performed the function of assessment of credibility, and had believed the version of the prosecution while not paying due attention to the defence position and the evidence adduced on behalf of the defence. He submitted that this had resulted in the Appellant not having received a *fair trial* in the High Court. In this regard, learned Counsel for the Appellant in his post-argument written submissions has critiqued the judgement of the High Court as amounting to a *"scanty judgment"*.

In response, learned Additional Solicitor General submitted that the impugned judgment of the Court of Appeal reflects that the appellate court had given due consideration to whether the High Court Judge had correctly assessed the credibility of prosecution witnesses, and that the Judge of the High Court had, due to valid reasons, accepted the testimonies of prosecution witnesses and rejected the testimonies given by the defence witnesses.

The core submission made in this regard by learned President's Counsel for the Appellant was that the learned Judge of the High Court had not in terms of the applicable law, duly performed his functions as a trial judge. Thus, the following description of the role and functions of a trial judge is provided:

Particularly in a criminal trial conducted before a judge sitting without a jury, **testimony and evidence related functions** to be performed by the presiding judge, which I wish to refer to as the **primary functions of the trial judge to be performed after the recording of evidence**, are the following:

(i) Assessment and determination of 'credibility' of witnesses.

(ii) Determination of 'testimonial trustworthiness' of the testimonies given by witnesses.

(iii) Analysis of the evidence.

(iv) Determination of the 'probative value' (weight) to be attached to evidence and the 'sufficiency' of evidence to prove the charges.

(v) Determination of whether the prosecution has 'proven the ingredients of the offence(s)' the accused stands charged.

(vi) If the defence has relied on a 'general or special exception to criminal liability', whether the defence has proven such exception.

(vii) Determination of whether the prosecution has proven its case 'beyond reasonable doubt', and contra wise, whether the defence has raised a 'reasonable doubt' regarding the case for the prosecution.

It is to be noted that the performance of these evidence related functions would require application of certain legal principles and therefore a correct appreciation and application of such legal principles would be necessary for the lawful performance of these functions. A methodical and rational approach to discharging each of these functions is necessary. However, it must be appreciated that performing each of these functions individually,

separately from each other (as if in watertight compartments), and incrementally adopting a segmented or phased-out approach, (in the manner scientific experiments are conducted), may not be practically feasible. That is mainly due to the inter-relationship and interdependency of these functions and in view of the nature of the material to be taken into consideration. The adjudication of every criminal trial, must necessarily be founded upon *inter-alia* the performance of these critical functions. If a verdict of *'guilt'* of an accused is arrived at without performing these functions in a lawful manner, indeed, as rightly pointed out by the learned President's Counsel for the Appellant, the accused can rightfully claim that he was deprived of a *fair trial.* A judgment of a criminal trial Court which does not reflect that these functions have been carried out by the learned trial judge in a lawful and sufficient manner, cannot be relied upon to satisfy an appellate Court that the accused had received a *fair trial,* and that he had been found *'guilty'* in a lawful manner. However, a determination of whether or not the accused has been deprived of the constitutional right (in terms of Article 13(3) of the Constitution) to a *fair trial* should be founded upon not only whether or not the trial judge has correctly performed the above-mentioned functions, but also on a careful consideration of the totality of testimonies given by witnesses and the evidence of the case. However, it is important to note that a verdict arrived at without the proper performance of the afore-stated testimony and evidence related functions would be unlawful and hence should be vacated in appeal, only if such failure on the part of the trial judge had **prejudiced the substantial rights of the accused or occasioned a failure of justice**.

In this regard, it is important to note that the nature and the extent to which these testimony and evidence related functions are to be performed by the trial judge would depend upon the nature of the issues placed in dispute by the parties. For example, it would not be necessary to assess and determine credibility of a witness whose testimony has not been impeached through cross-examination or adversely commented upon during submissions of counsel. In view of the compelling need to save precious judicial

time and associated resources, what is either admitted, or not challenged or critiqued, need not be judicially considered and determined.

Jurisdiction of the Court of Appeal

As regards the impugned judgment of the Court of Appeal, learned President's Counsel submitted that the Court of Appeal had failed to consider whether the prosecution has proved its case *beyond reasonable doubt*. He asserted that the assessment of credibility of prosecution witnesses was totally flawed and hence the learned Judges' decision to believe the two main prosecution witnesses was erroneous. He further submitted that the version of the defence had not been carefully considered, and that was vital, as in his opinion, the defence evidence at its minimum raised a reasonable doubt regarding the case for the prosecution. The sum-total of those submissions was that the Court of Appeal had not properly performed its appellate functions. Learned Additional Solicitor General submitted that the Court of Appeal had performed its functions in terms of the law, and had affirmed the conviction of the Appellant, only after careful scrutiny of the evidence led at the trial by both the prosecution and the defence and upon a consideration of the judgment of the High Court. Thus, in my view it is necessary to refer to the following description of the jurisdiction and functions of the Court of Appeal:

Article 138(1) of the Constitution which confers appellate jurisdiction on the Court of Appeal, provides as follows:

> *"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law,* ***an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court****,* ***in the exercise of its*** *appellate or* ***original jurisdiction*** *or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance tribunal or other institution may have taken cognizance:*

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of parties or occasioned a failure of justice." (Emphasis added.)

It would thus be seen that while the Court of Appeal has been vested with wide appellate jurisdiction in respect of a judgment or final order of the High Court, the exercise of that jurisdiction should result in the vacation of the judgment or final order appealed against, only if in the opinion of the Court of Appeal, the procedure adopted or the impugned judgment or final order of the High Court contains an error, defect or irregularity, and such error, defect or irregularity had caused prejudice to the substantive rights of the parties or occasioned a failure of justice. As an infringement of the substantive rights of parties would also result in a failure of justice, in the final analysis, what would give rise to the Court of Appeal vacating, varying or otherwise interfering with the impugned judgment or final order, is the Court of Appeal forming the view that in the totality of the circumstances, the impugned judgment of the High Court had occasioned a **failure or miscarriage of justice**.

In practice, what defines the scope of the exercise of the appellate jurisdiction of the Court of Appeal, are the **grounds of appeal** urged on behalf of the Appellant during the hearing. The scrutiny of the procedural aspects of the impugned proceedings and the contents of the impugned judgment or final order, is founded upon the grounds of appeal actually urged before the appellate court. The Court of Appeal need not go into and focus on matters that have not been urged and argued by Counsel. That is of fundamental importance.

In the present matter, the impugned judgment of the Court of Appeal contains the 'grounds of appeal' urged by learned counsel for the Appellant during the hearing of the Appeal in the Court of Appeal. (It is noted that, in this matter, one and the same counsel

appeared for the Appellant and the Respondent before the Court of Appeal and the Supreme Court.) The grounds of appeal urged before the Court of Appeal as contained in the judgment of the Court of Appeal (reproduced verbatim), are as follows:

> *"1st ground of appeal:- The trial judge did not analyze the evidence led by the prosecution with caution, resulting in a miscarriage of justice.*
>
> *2nd and 3rd grounds of appeal:- The evidence of IP Welagedera with regard to the raid is scanty and not credible.*
>
> *4th ground of appeal:- The contradictions in the evidence and the probability or improbability of the prosecution version have not been properly evaluated by the learned judge.*
>
> *5th ground of appeal:- In any case there was no evidence whatsoever against the 2nd accused-appellant and therefore the conviction of the 2nd accused-appellant was wrong."*

Therefore, in the instant matter, the duty cast on the Court of Appeal, was to scrutinize the impugned judgment in the backdrop of the afore-stated grounds of appeal. It is evident from the impugned judgement of the Court of Appeal, that following a consideration of the afore-stated grounds of appeal and the proceedings of the High Court, it had answered the first three questions in the negative, and the fourth question in the affirmative. That had resulted in the conviction of the 1st Accused being affirmed and the conviction of the 2nd Accused being vacated and therefore he being acquitted.

From a generic perspective, in an appeal against a conviction, the primary task of the appellate court is to scrutinize the proceedings, including the recorded testimonies of witnesses and the impugned judgment of the High Court, and determine whether the trial judge had performed the functions expected of a trial judge in terms of the law, objectively, diligently and correctly; in other words, determine whether the trial judge has performed his functions **judicially**. This does not require the appellate court to assume the position of the trial judge, and re-adjudicate the case. For example, the duty cast on an appellate court does not require re-assessment of the credibility of witnesses.

What is necessary is for the appellate court to carefully consider and determine whether the functions the law requires the trial judge to perform, have been lawfully and correctly performed. This scrutiny should be performed while recognizing that the trial judge is vested by law with a degree of discretionary authority. That there could be a difference between the objective view of the learned judges of the Court of Appeal and the learned judge of the High Court, does not necessarily make the latter view unlawful or unsafe. One judge needs to recognize and respect individual, independent and objective views founded upon a judicial consideration of evidence and the applicable law, by another judge.

In the instant matter, what would be necessary is for the Court of Appeal to have considered whether the trial judge had assessed the credibility and testimonial trustworthiness of witnesses having applied criteria recognized by law, and done so correctly. However, during the hearing of the appeal, if the assessment and determination of credibility of a particular witness has not been challenged on specific grounds, the appellate court would not be required to perform the task of determining whether the trial judge had lawfully assessed and determined credibility of that particular witness. It is seen that the grounds on which the credibility of prosecution witnesses IP Welagedera and WSI Gamage were challenged was on the footing that there was a contradiction *inter-se* (inconsistency) between the evidence of the two witnesses, and that the prosecution's version of events was improbable. Therefore, the scrutiny of the assessment of credibility of those two witnesses should be based on those two grounds, only.

In ***King v. Gunaratne and Another*** *[14 Ceylon Law Recorder, 144],* the objective of the scrutiny of the trial proceedings and the impugned judgment by the appellate Court has been captured by Chief Justice Macdonnell in the following manner:

> *"This is an appeal mainly on the facts from a Court which saw and heard the witnesses to a Court which has not seen or heard them. …"* Chief Justice Macdonnell has enumerated

three tests which a Court sitting in appeal should apply when determining questions of fact. They are as follows:

(i) Was the verdict of the Judge unreasonable and against the weight of the evidence?

(ii) Was there a misdirection either on the law or on the evidence?

(iii) Has the trial Court drawn wrong inferences from matters in evidence?

Indeed, it is the *cursus curiae* of appellate Courts of this country, that an appellate Court will not lightly interfere with the assessment and determination of credibility of witnesses and testimonial trustworthiness, arrived at by a trial judge. Chief Justice G.P.S. de Silva's views regarding this aspect in ***Alwis v. Piyasena Fernando****, [(1993) 1 Sri L.R. 119]* are of particular relevance. His Lordship has held as follows:

> *"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings in this case are based largely on credibility of witnesses. …".*

In ***Kumara de Silva and two others v Attorney-General****, [(2010) 2 Sri L.R. 169] [CA Minutes of 15.11.2007],* Sarath de Abrew, J held as follows:

> *"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."*

In ***Ariyadasa v Attorney-General,*** *[(2012) 1 Sri. L.R. 84],* Sisira de Abrew, J in holding that the witness whose credibility was challenged was in fact a credible witness, and having done so based on the trial judge's finding to that effect, has held as follows:

> *"Court of Appeal will not lightly disturb a finding of a trial Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial judge has taken such a decision after observing the demeanour and the deportment of a witness. This is because the trial Judge has the priceless advantage to observe the demeanour and deportment of the witness which the Court of Appeal does not have."*

One key reason for the afore-stated approach is that the trial court has the invaluable advantage of observing the demeanour and deportment of witnesses who testify at the trial, and using such observations for the purpose of assessing and determining the credibility of witnesses. Furthermore, the gradual and incremental unfolding of human testimony and other evidence during the course of a trial, and the ability of the trial judge to question witnesses and obtain clarifications, place the trial judge in an advantageous position in appreciating the evidence and the respective positions of the prosecution and the defence. These advantages are not available to an appellate Court, which is called upon to determine the lawfulness of the finding of the trial Court, based on a consideration of the verbatim transcript of the trial proceedings together with the judgment of the trial judge, aided by submissions of counsel and the reasons for the findings contained in the judgment. That is the legal basis for an appellate Court to be hesitant to disturb the findings of a trial judge regarding the credibility of witnesses and the trustworthiness of the testimonies given by witnesses. However, for an appellate Court to be respectful of the trial judge's assessment and determination of credibility and testimonial trustworthiness of witnesses, the record of the trial proceedings and the judgment should reflect that the trial judge had paid due attention to the demeanour and deportment of the relevant witnesses, and formed a view regarding their credibility and testimonial trustworthiness *inter-alia* based on such demeanour and deportment. Furthermore, the judgment should reflect that the trial judge was acutely aware of the others tests and the criteria available for the assessment of credibility and testimonial trustworthiness, had applied those criteria in an appropriate manner to the extent that is warranted, and had objectively and diligently arrived at findings thereon. A sweeping

averment by the trial judge that he believes the testimony given by a witness without giving reasons therefor, would not enable proper judicial scrutiny of the judgment of the trial judge. He must explain the process and the criteria by which credibility and testimonial trustworthiness were assessed and determined, and give reasons for his findings.

Furthermore, the judgment must reflect that the trial judge had developed a correct appreciation of the case for the prosecution and the defence. A mere reproduction of the testimonies given by witnesses in the form of a summation, and a sweeping averment that the testimonies given by witnesses are believable and hence acceptable, would not meet with the standard expected of a trial judge.

If the judgment of the trial court depicts that -

(i) the trial judge had not functioned independently, impartially and neutrally,

(ii) the trial judge had not judicially performed the functions of assessment and determination of credibility of witnesses and testimonial trustworthiness of the testimonies given by witnesses,

(iii) the trial judge had not appreciated the evidence correctly,

(iv) the evidence had not been correctly analyzed, weighed, the sufficiency of evidence presented by the prosecution had not been considered and the probative value of such evidence had not been determined,

(v) the trial judge had taken into consideration inadmissible or irrelevant material and had been substantially influenced or prejudiced by such material,

(vi) the trial judge had not correctly appreciated and applied the applicable law,

(vii) the trial judge had not taken into consideration and determined whether the constituent ingredients of the offence(s) have been proven by the prosecution,

(viii) the trial judge had not considered whether the prosecution has proven its case beyond reasonable doubt, or conversely, whether the defence has raised a

reasonable doubt through either cross-examination of prosecution witnesses, presentation of defence evidence or through submissions, or

(ix) the trial judge had arrived at a perverse finding (verdict),

and in view of the evidence and the applicable law, a **substantial miscarriage of justice has occurred** to the accused – appellant due to one or more failures enumerated above, or in the circumstances of the case including the totality of the evidence, the conviction of the accused is wholly unreasonable, arbitrary or unreliable (unsafe), the finding of the trial judge must be classified as being **'unlawful'**, and thus the **verdict** must be **quashed** by the appellate court.

Therefore, if the appellate Court is to affirm the conviction of the accused – appellant, the impugned judgment of the trial court should *ex-facie* reflect that the trial judge has performed the earlier mentioned functions in the manner the law demands that he should perform in the circumstances of the particular case, and the finding of *'guilt'* should in the opinion of the Court of Appeal not be unreasonable, arbitrary, perverse or unreliable (unsafe).

Jurisdiction of the Supreme Court

Learned President's Counsel for the Appellant, insisted that this Court scrutinizes the evidence presented by the prosecution and the defence afresh (as if combing the evidence with a fine tooth-comb), and hold that the prosecution had failed to prove its case beyond a reasonable doubt. Somewhat hesitantly though, in deference to the detailed submissions made by both counsel with regard to the testimonies given by prosecution and defence witnesses, in the earlier part of this judgment, I have engaged in a detailed analysis of the testimonies given by witnesses for the prosecution and the defence and stated the conclusions that was reached thereon.

Nevertheless, it is necessary for me to provide the following description pertaining to the jurisdiction of the Supreme Court and its duties and functions in the consideration of an Appeal from a judgment of the Court of Appeal, in a criminal matter:

In terms of article 118 of the Constitution, the Supreme Court is the highest and final superior Court of record, and shall, subject to the provisions of the Constitution, exercise *inter-alia* final appellate jurisdiction. As regard its final appellate jurisdiction, in terms of Article 127(1) of the Constitution, the Supreme Court has been conferred with the jurisdiction to correct all errors in fact or in law which had been committed by the Court of Appeal. In terms of Article 127(2) of the Constitution, in the exercise of that final appellate jurisdiction, the Supreme Court may affirm, reverse or vary any order, judgment, or sentence of the Court of Appeal, and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require. In a criminal appeal to the Supreme Court, while answering the questions of law in respect of which special leave to appeal or leave to appeal (as the case may be) had been granted, the primary function of this Court is to determine whether in the backdrop of the grounds of appeal urged before the Court of Appeal, the afore-stated functions of the Court of Appeal which sat in appeal against the judgment of the High Court, had been performed in a lawful and correct manner. Additionally, this Court has the overarching duty to consider whether (a) the failure if any on the part of the Court of Appeal performing its appellate function had occasioned a miscarriage of justice, and (b) in any event, for cogent reasons to be enumerated, the finding of the trial court, should be allowed to stand.

The following avenues would pave the way for the Supreme Court to exercise its appellate jurisdiction:

(i) In terms of Article 128(1) of the Constitution, where the Court of Appeal either *ex-mero motu* or at the instance of any aggrieved party to a matter or proceedings, grants *leave to appeal to the Supreme Court.*

(ii) In terms of Article 128(2) of the Constitution, where the Supreme Court in its discretion grants *special leave to appeal to the Supreme Court,* in instances where the Court of Appeal has refused to grant *leave to appeal* to the Supreme Court or where in the opinion of the Supreme Court, the case is fit for review by the Supreme Court.

(iii) In terms of the proviso to Article 128(2) of the Constitution, where the Supreme Court grants *leave to appeal* in a matter or proceedings as it is satisfied that the question to be decided is of public or general importance.

It would be seen that the instant Appeal has come up through the second avenue enumerated above, due to the reason that the Supreme Court in the exercise of its discretion has deemed it fit to grant *special leave to appeal to the Supreme Court* on the premise that in view of the three questions of law identified by this Court (referred to at the outset of this judgment) this matter is fit for review by the Supreme Court. It must be noted that the entitlement granted by the Constitution to prefer an appeal to the Supreme Court, should necessarily be with *leave* first having been obtained (which is a pre-condition to be satisfied), and exercised founded upon a **substantial question of law** which arises out of the impugned judgment of the Court of Appeal. It is important to bear in mind that raising a question of law should not be strategy based, with the view to causing the Supreme Court to re-assess and re-determine fundamental testimony-related issues such as credibility of witnesses and testimonial trustworthiness of evidence contained in testimonies of witnesses.

In matters such as the instant appeal, **the findings of facts by both the High Court and the Court of Appeal are concurrent**. That the Supreme Court should not interfere with concurrent findings of fact arrived at by the trial Court and the Court of Appeal is not a cast-iron rule. Nevertheless, it is necessary for this Court to express the view that, the Supreme Court would only in '**special circumstances'** (in the true sense of that term)

founded upon compelling reasons of law and facts, disturb such **concurrent findings** of the two lower courts. As held by Justice Kulatunge in ***Rev. Mathew Peiris v. The Attorney General*** *[(1992) 2 Sri L.R. 372],* where the final decision is reached (as is the case here), on the basis of antecedent determinations of facts on several issues, a court of final appeal (the Supreme Court) should be slow to interfere with the findings of the trial court. This Court should not be called upon to perform the functions of the trial Court or that of the Court of Appeal. There should be a substantial question of law, which requires to be answered by the apex Court of this country. Thus, I would be inclined not to accept the suggestion by learned President's Counsel for the Appellant, that this Court interferes with the findings of the learned trial judge on the assessment of credibility of witnesses arrived at by him. Indeed, if the Appellant could establish that the learned trial judge had grievously erred in the application of legal criteria in the assessment of credibility and testimonial trustworthiness, and upon the attention of the Court of Appeal having been drawn to such error, the Court of Appeal had overlooked that aspect of the case, then I would not have hesitated to go to the extent of exercising jurisdiction which the Court of Appeal ought to have exercised and scrutinized whether a failure of justice had been caused regarding the assessment of credibility and testimonial trustworthiness of witnesses. I must state that in the instant Appeal, for the reasons I have stated in the earlier part of this judgement (relating to the analysis of testimonies given by witnesses and their evidence) the Appellant has not satisfied that high threshold, which warrants this Court to re-assess and determine afresh, credibility and testimonial trustworthiness of witnesses.

Ideally, in an Appeal to the Supreme Court against a judgment of the Court of Appeal, the appeal should be argued by counsel based on an agreed set of evidence-based facts which emerged at the trial. This Court should be invited to determine a substantial question of law arising out of the judgment of the Court of Appeal, which may either be a pure question of law, or be a question of law which to some extent is founded upon or

mixed with facts that have emerged through evidence presented at the trial. Whether the trial judge had performed his functions in accordance with the law and done so correctly, is a matter to be argued and considered during the first appeal, and not before this Court. The objective of this Court exercising the final appellate jurisdiction in respect of a judgment of the Court of Appeal, is to determine whether the impugned judgment of the Court of Appeal is in accordance with the law, and if the said judgment raises questions of law, to answer them in accordance with the law. An Appeal to the Supreme Court against a judgment of the Court of Appeal, unless unavoidable due to the nature of the questions of law raised pertaining to the judgment of the Court of Appeal, should not be used by the Appellant to critique the judgment of the High Court. In any event, the judgment of the High Court should not be critiqued, founded upon grounds not urged before the Court of Appeal. In colloquial terms, the Appeal to the Supreme Court should not be an occasion to *'take a bite at the cherry for a second time'*.

However, as pointed out by Justice Soza in ***Attorney General v. D. Seneviratne***, *[(1982) 1 Sri L.R. 302],* once special leave to appeal has been granted, the Supreme Court need not limit the scope of its consideration of the impugned judgment and the corresponding proceedings to the question of law in respect of which special leave to appeal has been granted. It may, in the interests of justice, consider the entire matter and correct any errors of fact or law that may have been committed by a subordinate court.

Justice Sharvananda in ***Sri Lanka Ports Authority v. Pieris*** *[(1981) 1 Sri L.R. 101],* had expressed the following view as regards the scope of the final appellate jurisdiction of the Supreme Court:

> *"Article 127 spells the appellate jurisdiction of this Court. The appellate jurisdiction extends to the correction of all errors in fact and/or in law which shall be committed by the Court of Appeal or any court of first instance. There is no provision inhibiting this Court from exercising its appellate jurisdiction once that jurisdiction is invoked. On reading Articles 127 and 128 together, it would appear that once leave to appeal is granted by the*

*Supreme Court or the Court of Appeal and this Court is seized of the appeal, the jurisdiction of this Court to correct all errors in fact or in law which had been committed by the Court of Appeal or court of first instance is not limited but is exhaustive. Leave to appeal is the key which unlocks the door into the Supreme Court, and once a litigant has passed through the door, he is free to invoke the appellate jurisdiction of this Court "for the correction of all errors in fact and/or in law which had been committed by the Court of Appeal or any court of first instance". **This Court, however, has the discretion to impose reasonable limits to that freedom, such as refusing to entertain grounds of appeal which were not taken in the court below and raised for the first time before this Court.** This Court in the exercise of its discretion will, however, look to the broad principles of justice and will take judicial notice of a point which is patent on the face of the proceedings and discourage mere technical objections."* [Emphasis added.]

In ***Bandaranaike v. Jagathsena and Others,*** *[(1984) 2 Sri L.R. 397],* Justice Colin-Thome, referring to the wide final appellate jurisdiction vested in the Supreme Court, has observed that, the wide power vested in the Supreme Court must be used with circumspection. The Court must attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence. Consequently, the Court should not disturb a judgment of fact, unless it is 'unsound'.

In ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat****, [1983 AIR SC 753],* cited by learned Additional Solicitor General, Justice Thakkar, referring to the testimonies given by two young ladies who were children at the time of the incident and sexually abused by the Appellant, has expressed the following view:

"… Their evidence has been considered to be worthy of acceptance. It is a pure finding of fact recorded by the Sessions Court and affirmed by the High Court. Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established: (1) that the finding is based on no evidence, or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value

or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it, or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded. … We do not consider it appropriate or permissible to enter upon a re-appraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. …"

I find myself in agreement with the afore-stated views.

Questions of law

I will now deal with the questions of law in respect of which special leave to appeal had been granted.

(i) Did the learned Judges of the Court of Appeal misdirect themselves in not considering the defence version at all and affirming the conviction of the Appellant?

This question of law is founded upon the assertion that an appellate court has a duty to consider the version of the defence presented at the trial, and that in the instant appeal, the Court of Appeal had failed to perform that duty. It is necessary to point out that one function of the Court of Appeal is to consider the version of the defence (if any) presented at the trial, and thereafter consider whether the High Court had considered that version and arrived at lawful conclusions thereon. Such a consideration of the version of the defence raised at the trial is necessary for the purpose of considering whether such version (a) gives rise to a reasonable doubt regarding the case for the prosecution, or (b) gives rise to a general or special exception to criminal responsibility. In the instant appeal, the first of these two grounds is applicable. Therefore, it is necessary to point out that the

afore-stated question of law will be viewed by this Court from that slightly varied legal footing.

The submission of the learned President's Counsel for the Appellant was that the Court of Appeal had not given due consideration to the evidence presented on behalf of the defence. In response, learned Additional Solicitor General submitted that the judgment of the Court of Appeal clearly reflects that it had given due consideration to the position of the defence and the evidence presented on behalf of the accused and had been mindful of that position throughout the scrutiny of the judgment of the High Court.

It is necessary to point out that the purported non-consideration by the learned High Court Judge of the evidence presented by the defence, has not been a ground based upon which the judgment of the High Court was challenged before the Court of Appeal. That is seen when one considers the grounds of appeal presented to the Court of Appeal (as contained in the judgment of the Court of Appeal and referred to previously in this judgment). That position is strengthened when one considers the contents of the written submissions tendered on behalf of the Appellant to the Court of Appeal. Thus, in my opinion, the necessity did not arise for the Court of Appeal to have considered whether the learned judge of the High Court had given due consideration to the evidence presented by the Defence. A consideration of the impugned judgment of the Court of Appeal reveals that the judgment contains and is limited, to the views of the Court of Appeal regarding the grounds of appeal urged on behalf of the Appellant. As the learned Counsel for the Appellant had not raised a ground of appeal alleging that there was a failure on the part of the trial judge to have considered the evidence presented on behalf of the defence, understandably the Court of Appeal has not considered that aspect.

However, a careful scrutiny of the judgement of the High Court reveals clearly that the learned judge had in fact considered the defence version (both the defence evidence and

the suggestions made to prosecution witnesses during their cross-examination) and decided to reject it. The judgment of the High Court reveals two more aspects. They are, that the learned Judge of the High Court had for reasons stated, decided (i) not to believe the evidence given by defence witness Sivabalan, and (ii) that the case for the defence does not give rise to a reasonable doubt regarding the case for the prosecution.

Be that as it may, it is observed that this question of law seems to have been raised on behalf of the Appellant on the footing that the position of the defence and the defence evidence give rise to a reasonable doubt regarding the case for the prosecution, which aspect is claimed by the Appellant as not having been considered by the learned trial judge and by the Court of Appeal. However, a perusal of the judgment of the High Court clearly reveals that the learned High Court Judge has considered the evidence of IP Welagedera and WSI Gamage from the perspective of (a) the probability of the prosecution's version, (b) consistency between the version of events testified to by IP Welagedera vs. WSI Gamage, (c) suggestions made to both prosecution witnesses, and (d) the evidence presented on behalf of the accused (defence evidence). The learned trial judge has concluded that the prosecution witnesses were credible and that their evidence could be acted upon. In that backdrop, the Court of Appeal while referring to the purported discrepancy between the testimonies of IP Welagedera and WSI Gamage, has observed the following:

> *"In this regard the learned High Court Judge has vividly described how certain witnesses may observe certain things the others may not. … A witness may not observe and remember better than another the manner in which the incident took place, especially when he was the person who was attempting to subdue and overpower a criminal in order to apprehend him with the contraband, rather than a witness who observes the incident. The person really involved may sometimes be oblivious to the blows he received and the injuries suffered or how and the manner in which he received and suffered, his primary concern being the arrest of the accused, come what may. … The learned Judge has also stated that*

when things occurred in rapid succession it would not be possible for some witnesses to observe as well as certain other witnesses, the sequence and the things that happened."

The above-quoted extract of the impugned judgment of the Court of Appeal shows (a) the extent to which the learned judge of the High Court had considered issues pertaining to the credibility and testimonial trustworthiness of key prosecution witnesses, and (b) the manner in which the learned judges of the Court of Appeal had addressed their minds to whether the learned judge of the High Court had correctly assessed and determined credibility and testimonial trustworthiness of key prosecution witnesses.

In view of the foregoing, I hold that, the impugned judgment of the Court of Appeal cannot be impeached on the premise that the Court of Appeal had failed to specifically consider the defence evidence. Thus, I conclude that the impugned judgment of the Court of Appeal does not contain a misdirection, and that in any event, the non-consideration of the defence evidence by the Court of Appeal has not occasioned a failure of justice.

(ii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to consider that although credibility of a witness is primarily the function of the trier of facts, when the said trier of facts has failed to analyze the defence evidence and has deprived the accused of his constitutional protection to a fair trial, a duty is cast on the Court of Appeal to ensure that a miscarriage of justice does not occur?

This ground of appeal has been formulated on the premise that the learned judge of the High Court had failed to analyze the defence evidence and has thereby deprived the accused of his constitutional protection to a *fair trial*. However, a scrutiny of the judgment of the High Court reveals that the learned judge of the High Court had after considering the case for the prosecution, engaged in a detailed consideration of the evidence given by the Appellant and defence witness Sivabalan. Consequent to the narration and

consideration of their evidence, the learned judge of the High Court has concluded that he does not believe the defence evidence. That amounts to a rejection of the defence evidence following a consideration of such evidence. Therefore, I hold that the premise on which this question had been raised is faulty, and thus does not require further consideration.

(iii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to appreciate that the learned trial judge did not analyze the evidence led by the prosecution with caution resulting in a miscarriage of justice?

Once again, this question of law is also founded on the assumption that the judge of the High Court had failed to analyze the evidence led by the prosecution.

The Judgement of the High Court clearly shows that the learned judge of the High Court had -

(a) appreciated the nature of the charges framed against the accused,

(b) recorded a summation of the evidence given by each witness for the prosecution and provided a description of the prosecution's narrative,

(c) considered the evidence given by IP Welagedera and WSI Gamage and thereby assessed the credibility and testimonial trustworthiness of their testimonies,

(d) considered whether there exists any discrepancy between the testimonies of IP Welagedera and WSI Gamage,

(e) considered whether IP Welagedera not having testified regarding certain aspects which WSI Gamage had testified, affects their credibility,

(f) arrived at the finding that notwithstanding lengthy cross-examination, defence counsel had not proved a single contradiction,

(g) considered whether the officers of the PNB had followed an unlawful procedure by producing the suspects before the Magistrate of Anuradhapura instead of producing them before the Magistrate of Mannar,

(h) considered whether the defence had suggested any reason for officers of the PNB to have falsely implicated the accused,
(i) considered the defence evidence,
(j) arrived at the conclusion that due to a reason cited in the judgment, defence witness Sivabalan had given false testimony,
(k) concluded that the prosecution version is true, and that the defence version cannot be believed, and
(l) held that the prosecution has proved its case beyond reasonable doubt.

In the circumstances, I cannot agree with the submission made by learned President's Counsel and the premise contained in the afore-stated question of law, that there has been a tangible ill-consideration of testimonies given by witnesses and an absence of analysis of the evidence presented by the prosecution and the defence. In the circumstances, I must record my strong disapproval of the classification given by learned President's Counsel for the Appellant to the judgment of the High Court, that it is a *'scanty judgment'*. Even though the judgment of the High Court does not reflect a methodical and detailed discharge of the testimony and evidence related functions expected of a trial judge, I am of the view that there has been a judicious consideration of credibility of witnesses and the evidence placed before Court by the prosecution and the defence. Particularly in view of the totality of the evidence, I hold that there has not been a failure of justice or any prejudice caused to the Appellant. In the circumstances, in my view, the Appellant has not been denied of a *fair trial*. In any event, as the available evidence amply supports the conviction of the Appellant, I hold that there has been no miscarriage of justice.

A perusal of the judgment of the Court of Appeal reveals the following features:

(i) A consideration of the charges framed against the accused by the Attorney-General.

(ii) Grounds of appeal urged by counsel for the Appellants at the hearing.

(iii) Appreciation of the law pertaining to the role of the Court of Appeal regarding finding of facts by the High Court.

(iv) A narrative of the evidence presented.

(v) A description of the main features of the case relating to assessment of credibility of prosecution witnesses: that notwithstanding lengthy cross-examination, there are no contradictions *inter-se* ; that in view of the attendant circumstances, the absence of certain details in the testimony of IP Welagedera in comparison with the testimony of WSI Gamage, does not affect the credibility that may be attached to their testimonies ; that the Court concurs with the finding of the trial judge in that regard, together with reasons thereof.

(vi) A finding that the defence had not suggested any motive on the part of prosecution witnesses to falsely implicate the accused by foisting a large quantity of heroin on the accused.

(vii) A conclusion that in the totality of the circumstances of the case, the findings of the trial judge cannot be classified as being perverse or unreasonable. That there is ample evidence presented by the prosecution to convict the 1st accused – appellant.

(viii) A conclusion that the evidence presented by the prosecution falls short of proving beyond reasonable doubt that the 2nd Accused – Appellant had the requisite knowledge of the contents of the parcel that was in the possession of the 1st Accused – Appellant, and hence that there is a reasonable doubt as to the culpability of the 2nd Accused – Appellant with regard to the offences of trafficking and possession of heroin.

In my view, the forgoing features of the impugned judgment of the Court of Appeal is clearly in consonance with the proper and lawful exercise of the appellate jurisdiction of the Court of Appeal (in a criminal matter). It is seen that, it had only been after a careful and correct consideration of the testimonies of witnesses, evidence presented at the trial

and the judgment of the High Court, that the Court of Appeal has affirmed the conviction of the Appellant.

In view of the foregoing analysis, the answers to the questions of law stated above and the totality of the evidence, I hold that the Judgment of the Court of Appeal is lawful, and the Appellant's conviction having been affirmed by the Court of Appeal should not be interfered with.

In the circumstances, I affirm the conviction of the Appellant and the sentence imposed on him, and dismiss this Appeal.

Judge of the Supreme Court

B.P. Aluwihare, PC, J

I agree.

Judge of the Supreme Court

Janak De Silva, J

I agree.

Judge of the Supreme Court