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

An appeal made in terms of Section 451 of the Criminal Procedure Act No. 15 of 1979 as amended by Act No. 28 of 1988 against the Judgment in the High Court at Bar Case No. 7193/2014 dated 17.11.2015.

S.C. Case No. SC/TAB 01A-01F/2017

High Court Colombo Case No. 7193/2014

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

1. Andravas Patabendi Ganendra De Vas Gunawardane
2. Bamunusinghe Arachchige Lakmina Indika Bamunusinghe
3. Atapattuge Gamini Sanath Chandra
4. Ananda Pathiranage Priyantha Sanjeewa
5. Dissanayake Mudiyanselage Kelum Rangana Dissanayake
6. Andravas Patabendi Ravindu Sameera De Vas Gunawardane

1st to 6th Accused

AND NOW BETWEEN

1. Andravas Patabendi Ganendra De Vas Gunawardane

2. Bamunusinghe Arachchige Lakmina Indika Bamunusinghe

3. Atapattuge Gamini Sanath Chandra

4. Anantha Pathirage Priyantha Sanjeewa

5. Dissanayake Mudiyanselage Kelum Rangana Dissanayake

6. Andravas Patabendi Ravindu Sameera De Vas Gunawardane

1st to 6th Accused-Appellants

Vs.

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

Complainant-Respondent

BEFORE : **VIJITH K. MALALGODA, PC., J.**
P. PADMAN SURASENA, J.
E.A.G.R. AMARASEKARA, J.
ACHALA WENGAPPULI, J.
ARJUNA OBEYESEKERE, J.

COUNSEL : Gamini Marapana, PC with Navin Marapana PC, Nandapala Wickramasooriya, Nishanthi Mendis, Kaushalya Molligoda and Uchitha Wickremasinghe for the 1st and 6th Accused-Appellants
Darshana Kuruppu with Sajini Elvitigala, Sudarsha de Silva and Dineru Bandara for the 2nd Accused-Appellant.
Anuja Premaratne, PC with Imasha Senadeera and Vivendra Ramesh for the 3rd Accused-Appellant
Ranjan Mendis with Ms. Ashoka C. Kandambi, Shyamantha Bandara and Wishwa Jayaweera for the 4th Accused-Appellant.

Anil Silva, PC with Asitha Vipulanayake, Nandana Perera and Dale Gunarathne for the 5th Accused-Appellant.
Ms. Ayesha Jinasena, PC ASG with Ms. Varunika Hettige, SDSG, Rajinda Jayaratne, SC and Arindra Jayasinghe SC for the Hon. Attorney General.

ARGUED ON : 12.09.2022, 20.09,2022, 26.09.2022, 30.09.2022, 10.10.2022, 12.10.2022, 14.10.2022, 17.10.2022, 21.10.2022, 27.10.2022, 31.10.2022, 11.11.2022, 14.11.2022, 15.11.2022, 22.11.2022, and 05.12.2022.

DECIDED ON : 08th August, 2024

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ACHALA WENGAPPULI, J.

The 1st to 6th Accused-Appellants (1st to 6th Appellants), by their individual petitions of appeal preferred to this Court, seek to set aside their convictions entered by a High Court at Bar on several counts contained in the charge sheet along with sentences imposed on them. The Attorney General exhibited information before the High Court of *Colombo* on 12.03.2014, naming the six Appellants, accusing them in a total of ten counts of committing several offences. Chief Justice, by an order made under Section 450(3) of the Code of Criminal Procedure Act No. 15 of 1979 as amended on 15.10.2014, directed that the trial against the said Appellants be held before a High Court at Bar without a jury.

The Appellants were served with a charge sheet by the High Court at Bar on 31.03.2014, which contained the following counts against them:

1st count : conspiracy by all Appellants to commit the murder of *Mohammed Asamdeen Mohammed Shiyam* on 22.05.2013,

2nd count : abduction of *Mohammed Asamdeen Mohammed Shiyam* by 2nd and 5th Appellants, in order to commit his murder or disposed of as to be put in danger of being murdered,

3rd count : the 1st Appellant aided and abetted the 2nd Appellant to commit the said abduction,

4th count : the 1st Appellant aided and abetted the 5th Appellant to commit the said abduction,

5th count : the 2nd to 5th Appellants for committing the murder of *Mohammed Asamdeen Mohammed Shiyam,*

6th count : the 1st Appellant aided and abetted the 2nd Appellant to commit the murder of *Mohammed Asamdeen Mohammed Shiyam*

7th count : the 1st Appellant aided and abetted the 3rd Appellant to commit the murder of *Mohammed Asamdeen Mohammed Shiyam,*

8th count : the 1st Appellant aided and abetted the 4th Appellant to commit the murder of *Mohammed Asamdeen Mohammed Shiyam,*

9th count : the 1st Appellant aided and abetted the 5th Appellant to commit the murder of *Mohammed Asamdeen Mohammed Shiyam,*

10th count: the 1st Appellant aided and abetted the 6th Appellant to commit the murder of *Mohammed Asamdeen Mohammed Shiyam*

Trial against the Appellants commenced before the High Court at Bar on 01.12.2014 and reached its conclusion with the delivery of the impugned

judgement on 27.11.2015. The prosecution called 113 witnesses and produced a substantial body of oral and documentary evidence while the Appellants, in addition to each of them making statements from the dock, called several witnesses on their behalf.

With the pronouncement of the judgement, which contained 802 pages in total, the High Court at Bar found the 1st to 6th Appellants guilty of 1st count, 2nd and 5th Appellants guilty of 2nd count, 2nd to 6th Appellants guilty of 5th count and the 1st Appellant guilty of 3rd , 4th , 6th, 7th, 8th, 9th and 10th counts.

At the commencement of the hearing of their appeals before this Court, the 1st to 6th Appellants identified their respective grounds of appeal and presented them for consideration of Court in the following form.

The 1st and 6th Appellants complained that they were deprived of substance of a fair trial due to the failure of the prosecution to disclose all material that were gathered during investigations conducted by CID, including CCTV footage and phone records of the deceased. It was contended by the 1st and 6th Appellants that the prosecution "starved" them of vital information by withholding them contrary to the *dicta* of the judgement of ***Wijepala v The Attorney General*** (2001) 1 Sri L.R. 46 They also complained that the High Court at Bar erred in relation to evaluation of accomplice's evidence, when it failed to apply the principle of law that their evidence lacks credibility unless corroborated. It also erred in holding *Anuradha* is not an accomplice totally ignoring the admission made by ASP *Abeysekera* that he is and as such treating him as another ordinary lay witness.

These two Appellants further complained that the High Court at Bar erred in relation to principles of circumstantial evidence, as that Court, in its evaluation of phone records, held that the tower records corroborate the contents of a conversation carried through a phone call whereas they only

indicate the identity of the two callers, and not the contents. In addition, the High Court at Bar acted on highly prejudicial statements that were falsely attributed to 1st and 6th Appellants on the basis that they are in fact true.

The 2nd to 5th Appellants indicated that they too associate themselves with the ground of appeal raised by the 1st and 6th Appellants in relation to accomplices, while presenting their own individual grounds for consideration of Court.

The 2nd Appellant complained of an error committed by the High Court at Bar when it failed to hold that the two accomplices' evidence were not corroborated, and it also failed to hold that the prosecution proved no motive against him. He also complained that the High Court at Bar failed to consider that the evidence presented against him is wholly inadequate to sustain the convictions entered against him on counts 1, 2 and 5.

The 3rd Appellant's complaint is that the High Court at Bar erred in relation to the 1st count, when it failed to consider that one conspirator cannot corroborate the other. He contended that the Court erred once more when vital contradictions *inter partes* were not properly analysed but were acted upon that evidence as a truthful and reliable account. He also complained that the High Court at Bar failed to analyse the items of circumstantial evidence in its proper perspective.

The 4th Appellant's grievance is that the evidence presented against him by the accomplices are insufficient to prove the accusation against him beyond reasonable doubt as even if the prosecution case is placed at its best, it only established that he merely acted as a driver, which is his form of employment, upon being assigned to serve under the 1st Appellant.

It is the complaint of the 5th Appellant that the evidence presented by the prosecution on tower records along with the narrative of the accomplices

were accepted by the High Court at Bar with all of its deficiencies, while his valid explanation was unreasonably rejected by that that Court. the 5th Appellant also complained that it appears the High Court at Bar had applied two standards to evaluate the evidence of the prosecution and of the Appellant's.

In view of the wide spectrum of issues covered by these multiple grounds of appeal, for the convenience of presentation, it is proposed to deal with the common ground of appeal urged by all the Appellants, based on accomplices and evaluation of their evidence at the outset of this judgment. Remaining grounds of appeal that were relied upon by the 1st to 6th Appellants shall be considered thereafter.

Among the oral evidence of 133 witnesses led by the prosecution, evidence of prosecution witness No. 2, *Mohammed Fausedeen Muflin* and prosecution witness No. 3, *Gammedda Dadayakkara Koralage Krishantha Vishwaraj Koralage* assumes greater significance, as their names were also included in the 1st count as co-conspirators, who allegedly conspired with the 1st to 6th Appellants to commit the murder of *Mohammed Asamdeen Mohammed Shiyam* as well as in the 2nd count, which alleged that they abducted *Shiyam* along with the 2nd and 5th Appellants, in order that he may be murdered or may be so disposed of as to be put in danger of being murdered. The High Court at Bar, at the conclusion of the trial against the Appellants, arrived at the conclusion that the two witnesses *Fausedeen* and *Krishantha* had no intention or knowledge that the deceased would be put to death, as alleged in the 1st and 2nd counts.

Hence, it is understandable that all Appellants opting to challenge the validity of their convictions on the basis that the said prosecution witnesses *Mohammed Fausedeen Muflin* and *Krishantha Koralage* should have been considered by the High Court at Bar as accomplices. On the said footing, the

1st and 6th Appellants mounted their challenge on the conviction on the premise that the evidence of the said two witnesses should have been totally rejected by the High Court at Bar, and in the unlikely event of it deciding to accept that evidence for some reason, at least the Court should have insisted on corroboration of their evidence on material particulars.

Learned Addl. SG in her reply strongly defended the conclusion reached by the High Court at Bar that the evidence presented before that Court clearly indicated that the two witnesses *Mohammed Fausedeen Muflin* and *Krishantha Koralage* were not privy to the conspiracy of the 1st to 6th Appellants and therefore could not be considered as accomplices to the murder.

Learned President's Counsel, who appeared for the 1st and 6th Appellants, was critical of the said submission made by learned Addl. SG in defending the said finding of the trial Court. He submitted that the prosecution, having presented a case before that very Court on the basis that both of them were in fact accomplices by including their names in the body of counts 1 and 2 of the charge sheet and cannot take a totally different stance at the stage of appeal. He further submitted that such an approach is contrary to applicable law.

When queried by this Court, learned President's Counsel for the 1st to 6th Appellants rightly conceded that it was for the High Court at Bar to determine whether to treat *Fausedeen* and *Krishantha* as accomplices or not, which it had decided in favour of the two witnesses. It is to be noted that the decision of the Attorney General, to offer a conditional pardon under Section 256(1) of the Criminal Procedure Code, in itself does not make any suspect who accepts such a conditional pardon, necessarily an accomplice for the reason that it is the function of the trier of facts to determine that issue upon the evidence presented before him. The decision to offer a conditional pardon

to a suspect is based on the material presented before the Attorney General by the investigating officers. These materials may contain information book extracts of the statement of witnesses, recorded under Sections 110 and 127 of the Code of Criminal Procedure Act, notes of the investigators and of forensic and ballistic reports etc. It is upon consideration of these materials, the decision to offer a conditional pardon is made.

But a Court, in determining the question whether the testimony of such a person, who received a conditional pardon, should be treated as that of an accomplice, would take into consideration the evidence presented before it under oath by all witnesses, whose testimony is challenged by cross examination by those who are implicated by it. Unlike the material considered by the Attorney General, the evidence presented before the Court are filtered through different statutory provisions of the Evidence Ordinance for its relevance and admissibility. The credibility of that evidence is also vigorously tested.

The Court would therefore consider the body of evidence presented before it in its entirety and arrive at a finding in light of judicial precedents, which lay down applicable principles of law, as to whether the testimony of the particular witness should be treated as that of an accomplice and whether corroboration is needed before it accepts and acts on such testimony.

Before embarking on a long journey of considering the multiple grounds of appeal, it is preferable that the factual narrative that had been placed before the High Court at Bar is referred to at this stage. A more detailed factual analysis of the evidence presented by the prosecution shall be made further down in this judgment, when dealing with other grounds of appeal. In that context and in order to minimise the instances of repetitive reproduction of evidence, it is proposed at this stage to make a very brief and a superficial reference of the evidence given before the High Court at Bar by

three key lay witnesses, which would facilitate the task of placing the said detailed analysis in the proper perspective.

According to the prosecution, the chain of events that eventually led to the murder of the deceased, had its genesis to an investment of Rs. 50 Million, made by *Fausedeen* into a business owned by *Shiyam*. After some time, as his investment failed to make the expected yield, *Fausedeen* wanted to withdraw from that business and to have his share of investment returned. He felt his business partner, the deceased, was adopting evasive tactics to avoid returning his capital. Similarly, *Fausedeen* had invested around Rs. 18.5 Million with *Krishantha Koralage*. At that point of time, *Krishantha* was not in a position to return that investment either. But *Fausedeen* was in an urgent need of capital. When *Fausedeen* described his predicament to *Krishantha*, he volunteered to speak to the 1st Appellant, whom he associated with almost as a family member. The 1st Appellant was serving as the Senior DIG of *Colombo* north at that time and functioned from his *Peliyagoda* office.

Krishantha, as promised, had arranged a meeting with the 1st Appellant for *Fausedeen*. They met at the 1st Appellant's private residence at *Nedimala.* The 1st Appellant, in order to help *Krishantha,* agreed to intervene. It was the understanding between *Krishanta* and *Fausedeen* that if the 1st Appellant could secure the return of Rs. 50 Million from *Shiyam*, *Fausedeen* in return would forgo the Rs. 18.5 Million due from *Krishantha,* provided that he meets the police officer's demand of Rs. 10 Million on his own.

The deceased was engaged in manufacturing footwear for local market at his factory at *Sarankara Mawatha*. *Krishantha* arranged three visits to the factory of the deceased with *Fausedeen*. First and second visits were to show the 1st Appellant and 3rd Appellant of its location and the third was, on the instructions of the 1st Appellant, arranged to 'arrest' the deceased. The attempt to make an 'arrest' did not proceed as planned and, thereafter, on the

directions of the 1st Appellant, *Krishantha* wanted *Fausedeen* to bring the deceased to a convenient location to facilitate his 'arrest'.

Fausedeen brought the deceased to a point in *Balapokuna* Road as agreed. *Krishantha* joined them and proceeded to a point in *Kandewatta* Road. At *Kandewatta, Fausedeen* and *Krishantha* lured the deceased to walk up to a double cab, in which the 2nd and 5th Appellants were waiting. After forcibly taking the deceased in, *Krishantha* and the group proceeded in that vehicle towards *Biyagama.* The double cab was owned and driven by *Anuradha.* The deceased, having realised the reason for his 'abduction', agreed to transfer the machines and stocks in lieu of returning *Fausedeen's* capital. *Krishantha,* with this turn of events, wanted to return to *Nedimala* to meet up with the 1st Appellant to finalise the deal. They returned to *Nedimala,* did not meet the 1st Appellant as expected, instead were joined by 3rd, 4th and 6th Appellants. A T56 weapon was also brought in. *Krishantha* protested to 1st Appellant after meeting the latter in person and conveyed that he does not wish to take any further part in this affair. He was threatened to provide a van, which he did. *Krishantha* went with the others up to a point near *Biyagama.*

Late in the night of 22.05.2013, the party of 2nd, 3rd, 4th, 5th and 6th Appellants proceeded towards *Biyagama* in a van with the deceased. *Krishantha* and *Anuradha* returned to *Pita Kotte* in the double cab on the instructions of the 5th Appellant. On his way back *Krishantha* was told by the 5th Appellant that they would 'finish' the deceased off and to collect the van from the 1st Appellant's residence in the morning.

Following morning, naked body of *Shiyam* was recovered at *Meepawita, Dompe* at about 6.15 a.m., with firearm injuries to his head. *Krishantha* collected his van from *Nedimala* at the same time and was told by the 5th Appellant the deceased was shot by them. A few days later *Krishantha* was arrested by CCD along with *Fausedeen.* After investigations were taken over

by the CID, both of them made statements to a Magistrate and were offered a conditional pardon by the Attorney General.

Learned President's Counsel for the 1st and 6th Appellants extensively addressed us on the point that the prosecution witnesses *Fausedeen* and *Krishantha Koralage* should have been considered as accomplices. The 1st, 3rd and 6th Appellants, in addition, have advanced the contention that the High Court at Bar similarly erred when it failed to consider the evidence of the prosecution witness *Anuradha Edirisinghe* as that of an accomplice. Learned Counsel for all the Appellants, in their respective submissions, made references to several items of evidence, which they relied on to impress upon this Court that there were strong motives on the part of *Fausedeen* and *Krishantha* entertained against the deceased and therefore both had actively participated in his murder.

Since the main thrust of the Appellant's contentions is based on the attributes of an accomplice, it is prudent to examine the applicable principles of law in that regard as the first step.

The Evidence Ordinance makes reference to the word "accomplice" in two of its Sections but does not provide any definition for the same. Section 133 states " *[A]n accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.*" The other reference is found in Section 114(b). That Section, while dealing with evidence that may be considered as presumptive, states "*[T]he Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.*"

In the absence of a statutory definition to the term accomplice, several judicial precedents that were relied upon by the Appellants as well as the State indicate that the appellate Courts have, over the years, laid down several

attributes of an accomplice, primarily following English common law principles. In my view, before this Court proceeds to consider the contentions advanced by the Appellants on attributes of an accomplices for its relative merits, it is prudent to devote some space in this judgment to make at least a notional reference to them, as laid down in those judicial precedents.

The applicability of English common law principles in dealing with accomplices and their evidence was recognised in the latter part of the 18th Century itself by *Withers* J, in observing that sections 133 and 114(b) of the Evidence Ordinance are in conformity with the contemporary English practices (vide ***Anderson v Muttukarupen*** (1899) 3NLR 353). A similar view was expressed by *Wendt* J , in ***The King v Loku Nona*** (1907) 11 NLR 4, when he noted (at p. 13) " … *there was no difference, … between the Law of England and our own Law as embodied in Sections 114 and 133 of the Evidence Ordinance*." The decisions of the Supreme Court of *India,* also moulded in the English Common law traditions too contributed to the formation of these attributes. In the judgments of ***Peiris et al v Dole*** (1948) 49 NLR 142**,** ***The King v Piyasena*** (1948) 49 NLR 389 and ***The Queen v Ariyawantha*** (1957) 59 NLR 241, superior Courts of this country adopted the description of an accomplice, as given in the judgment of ***Chetumal Rekumal v Emperor*** 1934) AIR 1934 Sind 185, by *O'Sullivan* AJC. His Lordship stated that (at p. 187) "*[A]n accomplice is one who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be charged jointly with the accused."* However, *Jayetileke* J in ***The King v Piyasena*** (ibid) added a word of caution in making such a determination by inserting a quotation from *Wharton's Criminal Evidence*, 11th Ed, Volume II, at page 1229, where learned author stated thus:

> *"The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was even an admitted participant in a related but distinct offence."*

This cautious approach was reiterated in the judgment of ***Peiris et al v Dole*** (1948) 49 NLR 142, when the question, whether a particular person ought to be treated as an accomplice, arose before that Court for its consideration. In this instance, *Basnayaka* CJ, having stated that " *[I] should like to say a word of caution against the tendency to make the word 'accomplice' bear, in my opinion improperly, a larger meaning than is permissible in law",* quoted *Chandravarkar* J from the judgment of ***Emperor v Burn*** 11 Bomb L.R. 1153, where it was stated that " " *[N]o man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such hand. If the evidence of a witness falls short of these tests, he is not an accomplice; and his testimony must be judged on principles applicable to ordinary witnesses"*.

The contention presented by the learned President's Counsel for the 1st and 6th Appellants is essentially founded on the premise that *Fausedeen* and *Krishantha* in fact had all the attributes of accomplices. In this regard, learned President's Counsel referred to a section of the judgment of the High Court at Bar, where the Court reasoned out why it decided that *Fausedeen* and *Krishantha* could not be treated as accomplices. He challenged the factual and legal validity of the conclusion reached by that Court.

It is an undeniable fact that the prosecution presented both *Fausedeen* and *Krishantha* as "accomplices", before the High Court at Bar. This is primarily due to the inclusion of them in the body of counts Nos. 1 and 2. The primary factor which contributed to the decision of the High Court at Bar not to treat them as accomplices was due to the fact that the evidence presented before it did not support a conclusion that either of them had any intention or knowledge that *Shiyam* would be put to death. The conspiracy was to commit murder of *Shiyam* and his abduction was for the purpose of putting him to his death or to expose him to death. Intention to agree with

others to cause death of the deceased was integral to the 1st count. In relation to the 2nd count, by which it was alleged that the deceased was abducted to commit his murder, persons who abduct should entertain that purpose in their minds at the time of abduction of the deceased. The Court was of the view that the prosecution could not establish their complicity either to the 1st count or to the 2nd count because a reasonable doubt exists whether any of the two 'accomplices' had the intention to have *Shiyam* killed. In the absence of such an intention they could not be treated as accomplices.

It is against this backdrop, I intend to consider the process of reasoning that led to the impugned decision of the High Court at Bar that *Fausedeen* and *Krishantha* had no intention or knowledge that the deceased would be put to death, which effectively removed the tag 'accomplice' from them.

The manner in which the High Court at Bar had presented its reasoning in the body of the judgment indicates that the Court, after setting out the law applicable to conspiracy and accomplices, had proceeded thereafter to examine the sequence of events as spoken to by the two witnesses *Fausedeen* and *Krishantha* in tandem. It also considered that they made false statements to investigators from time to time. The Court then extensively considered the cross examination of these two important prosecution witnesses, along with the inconsistencies as well as the omissions that were highlighted off their evidence. Importantly, the Court also considered several suggestions that were put across to those witnesses by the 1st to 6th Appellants, who denied some of the acts and utterances that were attributed to them by those witnesses.

This segment of the judgment of the trial Court is followed by another, in which it considered the details of the tower records that were elicited through different service providers along with their relationship to each of the important factual events, as spoken to by the witnesses. The Court thereupon

found the evidence of *Fausedeen, Krishantha* and *Anuradha* are truthful and reliable accounts of the series of events that led to the death of the deceased. The Court was of the view that the conformation of some of the important items of evidence referred by the witnesses in their respective narratives, could be assessed through independent sources for its veracity, and therefore it is safe to rely on that evidence.

Interestingly, the High Court at Bar had not arrived at a specific finding that the prosecution witnesses *Fausedeen* and *Krishantha* are not accomplices, as already noted above. Instead, the Court merely concluded that neither of the two knew that the deceased would be put to death and only the 1st to 6th Appellants participated in the conspiracy to commit the murder of *Shiyam* and abducted him in order to commit his murder.

Fausedeen and *Krishantha* were under a conditional pardon given by the Attorney General, granted in terms of Section 256(1) of the Code of Criminal Procedure Act No. 15 of 1979 as amended. Their names were included as co-conspirators to the offences of conspiracy to commit murder of *Shiyam* in the body of the 1st count contained in the information, along with the 1st to 6th Appellants as other conspirators. The 2nd count too contained the names of the two witnesses in its body accusing them of having abducted the deceased in order that he may be murdered or may be so disposed of as to be put in danger of being murdered.

However, only the 1st to 6th Appellants were named in the information as accused, while names of *Fausedeen* and *Krishantha* were included in the list of prosecution witnesses Nos. 3 and 2, respectively. They were called by the prosecution in support of its case and in terms of Section 256(2) of that Code. Thus, throughout the trial as well as in the body of the impugned judgment, *Fausedeen* and *Krishantha* were referred to by the High Court at Bar as "accomplices". It must also be noted that the said references to *Fausedeen* and

Krishantha were correctly made by the trial Court at that stage, as the fact they were accused along with the 1st to 6th Appellants in two of the counts, in itself satisfied the attributes of an accomplice, per ***Peiris et al v Dole*** (supra). The specific finding of the High Court at Bar about *Fausedeen* and *Krishantha* that neither of them had any intention to cause death of the deceased was made at the concluding stage of the trial. It is a finding which had the effect of removing tags that were attached to them initially by the prosecution as "accomplices". The Court also found witness *Anuradha* too is not an accomplice.

The High Court at Bar, in its presentation of the factual analysis, had highlighted the several items of evidence that are indicative of the fact that either *Fausedeen* or *Krishantha* did not intend the death of the deceased, whenever it came across them. Given the extra-large volume of relevant facts that were placed before it, this manner of dealing with an important element of the prosecution case could be understood, although a dedicated section dealing solely with this aspect would have been more helpful to the appellate Court.

These multiple references, during which the Court considered the intention and knowledge of *Fausedeen* and *Krishantha* as regard to the death of the deceased, are found at different parts of the impugned judgment, and, therefore, shall be referred to individually while dealing with the contentions that were advanced by the Appellants.

Learned President's Counsel for the 1st to 6th Appellants urged following factors before this Court for its consideration which, according to him, the trial Court had failed to consider, in coming to the conclusion that *Fausedeen* and *Krishantha* are not accomplices.

(i) During his cross examination, *Fausedeen* admitted having told the investigators that *Krishantha* had threatened him "*If you don't bring Siyam to me today you will not be able to live in this country*", " *If Siyam is not handed over to me today I will kill you also*" and these words are clearly illustrative of *Krishantha's* complicity in the murder of the deceased,

(ii) *Krishantha* owed over Rs. 20 Million to one *Lee,* a Chinese national. The deceased alerted *Lee* of *Krishantha's* presence in *China.* This led to *Krishantha* being kept in 'house arrest' in *China* by *Lee*, until the former pays his dues. *Krishantha* admitted he was angry over the act of the deceased and vouched he would take revenge for his act of treachery,

(iii) Similarly, *Fausedeen* too had admitted to *Shaheen* (PW No. 10) that the Deceased torments him ("වද දෙනවා"),

(iv) Certified copy of the 3rd further report filed before the Magistrate's Court (4V1), reveals that the investigators have reported to Court that *Fausedeen* and *Krishantha,* who were already named therein as suspects, have abducted six businessmen, killed three of them, and extorted money from them in order to resurrect the LTTE, which tends to support their propensity to commit the murder of *Shiyam,*

(v) ASP *Abeysekara* admitted that *Anuradha,* too is an accomplice.

Before proceeding to consider the 1st, 2nd and 6th Appellants' complaint on the failure of the High Court at Bar to consider the factors that were

brought to the notice of this Court in this regard, it is helpful if a brief reference is made at this stage to the factors that were in fact considered by the Court, in arriving at this particular finding. As already noted, these factors were referred to by the Court at different points of its judgment as and when it considered each aspect separately and thus, are found scattered throughout its 802-page judgment.

The High Court at Bar was of the view that:

a. *Krishantha* had no idea of the plan of action that had been developed by the 1st Appellant in relation to the abduction of the deceased and the manner of dealing with him thereafter (pgs. 69, 95 and 96 of the judgment). Court also found that none of the others, who are involved with the abduction and murder, expected *Fausedeen's* participation in their plan to abduct the deceased near his factory at *Saranakara* Road, which was aborted subsequently (p.91 of the Judgment),

b. the evidence does not indicate that neither of the two had entertained any intention to murder the deceased (pgs. 100 109 and 115 of the judgment). Court further observed that *Fausedeen* consented to handover the deceased to *Krishantha*, only when it was assured by the 1st Appellant that he would see to it that the deceased would not make a complaint to any authority. Court considered this as a factor that negates any intention on the witness's part to commit murder (pgs. 109 and 115 of the Judgment). Court also noted that when the Appellants suggested to the two witnesses during cross examination that it was they who wanted to murder the deceased, both had denied and reiterated their intention was

to get their monies back (p. 155) and that there would not be any benefit accrued to *Krishantha* by the death of the deceased (p.220 of the judgment),

c. the conduct of the two, particularly after *Biyagama* incident, and the manner *Krishantha* had disclosed, "**වාස්ල ෂියාම්ව මරන්නයි යන්නෙ**" to *Fausedeen*. *Krishantha* also warned his business partner that "*if we are to disclose that, we too would suffer same fate*" (p.126 of the Judgment). Court also noted that *Fausedeen* confided to his driver *Shaheen* (PW 10) regretting for getting involved with this affair at all. Court found his claim on this point is probable, when considered in the light of him issuing instructions to destroy deceased's phone, only after realising that the deceased would be killed (pgs. 291 and 295 of the judgment),

d. *Krishantha*, although he knew that the deceased was in danger, failed to inform any law enforcement agency about it due to fear of his own life (p. 219 of the judgment). The Court was of the view that *Krishantha's* act of borrowing a van from his brother's residence at *Baddegana,* on the direction of the 1st Appellant, is corroborated by the phone records (pgs. 276 and 577of the judgment), along with the act of the 1st Appellant of verifying with *Krishantha* whether the deceased was taken in (p. 561 of the judgment), after abduction of the deceased, *Fausedeen* and *Krishantha* travelled in opposite directions (p. 563, of the judgment), while 5th and 6th Appellants travelled in same direction (p.581 of the judgment), *Krishantha* initiating a conference call (p. 582 of

the judgment), calling his wife after arriving at his home (p.583 of the judgment) and getting the gate to the 1st Appellant's house open in order to get the van back by taking a call from his nephew, *Shenal's* phone in the following morning (p.588 of the judgment),

e. two accomplice's evidence were corroborated by phone details along with that of *Anuradha's* (p. 617 of the judgment).

Returning to the several factors highlighted by the learned President's Counsel which said to have escaped consideration of the High Court at Bar, it is appropriate to consider the highlighted portion of *Fausedeen's* 'evidence' "*If you don't bring Siyam to me today you will not be able to live in this country*" and "*If Siyam is not handed over to me today I will kill you also*" as these words, as submitted by Counsel, are clearly illustrative of at least *Krishantha's* complicity in the murder of the deceased. In view of the said finding of fact made by the High Court at Bar that neither *Fausedeen* nor *Krishantha* intended the death of the deceased, despite their complicity in his 'abduction', this particular submission assumes a greater significance, since if accepted, its benefit should accrue in favour not only to the 1st, 2nd and 6th Appellants but to the other Appellants as well.

This submission essentially presupposes the fact that the evidence relating to the statements that were attributed by *Fausedeen* to *Krishantha* "*If you don't bring Siyam to me today you will not be able to live in this country*" and "*If Siyam is not handed over to me today, I will kill you also*" were presented to the High Court at Bar by them during the trial as portions of legally admissible evidence in relation to the facts that it speaks of. If the Court had failed to

consider such "evidence" in the correct perspective, would certainly have the effect of causing grave prejudice to the Appellants.

The particular segment of the evidence of *Fausedeen* that was referred to by the learned President's Counsel is as follows:

ප්‍ර : ඊට පස්සෙ ආපසු තමා කට උත්තරයක් දුන්නා 30.05.2013 දවල් 12.00ට?

උ : ඔව්.

ප්‍ර : ඒ කට උත්තරයේ ආපසු තමා කිව්වද ක්‍රිෂාන්ත මට තර්ජනය කරනවා උඹගේ යාලුවා නිසා මට පාඩුවුනා උඹට සල්ලි ඕනේ නම් ෂියාම්ව බාරදෙන්න කියල?

උ : මම එහෙම කියලා ඇති මම බයට කියලා ඇති මම ඇත්ත කිව්වෙ නැහැ කියලත් මම කිව්වා.

ප්‍ර : දෙවෙනි අවස්ථාවේදි ඔය කට උත්තරය දෙන කොටත් එය කිව්වෙ නැහැ?

උ : නැහැ.

ප්‍ර : දැන් තමාට තර්ජනය කිරීමෙක් කලාද ආපසු සැරයක් උඹවත් මරනවා. ඉස්සරාලාම තමාට කිව්වෙ සල්ලි ඕන නම් ෂියාම්ව මට දීපන්. එවැනි කතාවක් කිව්වා. දැන් ඒ කතාව තවත් ඉදිරියට ගිහින් තමා කිව්වාද උඹවත් මරනවා කියලා. ෂියාම්ව දුන්නෙ නැත්නම් උඹවත් මරනවා කියලා?

උ : මම පවසලා ඇති.

ප්‍ර : ඒ කියන්නෙ තමා කියන්නේ එහෙමත් උනේ නැහැ?

උ : නැහැ ස්වාමීනි.

Careful consideration of this segment of cross examination by the 1st and 6th Appellants reveal that it is relation to an attempt to bring in material from a statement made by *Fausedeen* in order to highlight a contradictory position taken up by him before the High Court at Bar to the one he had taken

up in that statement. In his evidence before the High Court at Bar, *Fausedeen* had consistently denied of having entertained any intention to take the life of the deceased. He was emphatic that he was only interested to get his Rs, 50 Million back from the deceased. It was also his evidence that he got to know through *Krishantha* of the arrangement made by the 1st Appellant to recover his investment. The 1st Appellant was to 'arrest' *Shiyam* and to keep him in detention for a period of about three hours to induce him to part with his assets. The moment *Shiyam* agreed, he was to be returned back to *Fausedeen.*

The utterances attributed to *Krishantha* are indicative that he knew beforehand that the deceased would be put to death, when he said "**ෂියාම්ව දීපන්, නැත්නම් උඹවත් මරනවා**" and thereby threatening *Fausedeen* also with death along with *Shiyam*. These two sentences were readout by the learned Counsel from the statement made by *Fausedeen* to the officers of the CCD, whilst in their custody. When he was confronted with these two statements, *Fausedeen* candidly admitted that he did make such statements. However, in replying to the last question put to him by the 1st and 6th Appellants (as reproduced above), *Fausedeen* clarified that such a conversation did not take place, he had lied to the CCD and thereby denying any truth in these two statements that were attributed to *Krishantha.* The matter was not pursued any further in the cross examination by the learned President's Counsel who defended the 1st and 6th Appellants before the trial Court.

Clearly, the statement containing the said two sentences, was recorded in terms of Sections 109 and 110 of the Code of Criminal Procedure Act. Section 110(1) authorises any police officer to examine orally any person supposed to be acquainted with the facts and circumstances of the case, and was duty bound to reduce any statement made by such a person in to writing following the format prescribed by Section 109 of that Act. Thus, the use of such a statement is qualified to the extent as set out in Section 110(3), which

states such a statement could be used " … *in accordance with the provisions of the Evidence Ordinance, except for the purpose of corroborating the testimony of such a person in Court* … ". The resultant position is *Fausedeen* had made a statement to CCD, in which he admittedly made false claims to the recording officer indicating that *Krishantha* had told him "*If you don't bring Shiyam to me today you will not be able to live in this country*" and "*If Shiyam is not handed over to me today I will kill you also*".

It appears from the submission of the learned President's Counsel that he expected the High Court at Bar to have considered the contents of these two sentences as items of substantive evidence, which indicative of the position that *Krishantha* in fact had threatened *Fausedeen* that "*If you don't bring Siyam to me today you will not be able to live in this country*" and *"If Siyam is not handed over to me I will kill you also"* (" **ෂියාම්ව දුන්නෙ නැත්නම් උඹවත් මරනවා**") compelling him to hand over the deceased and therefore had knowledge that the decease would be put to death. In my view this contention is not in inconformity with the jurisprudence built over the years as to the proper use of the contents of statements that were recorded during investigations. The words of Section 110(3) which states " *[A] statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in Court …"* does not envisage a situation where the contents of such a statement could be used in a criminal proceedings as substantive evidence. The legitimate use of such statements is limited to highlighting that the position taken by a witness in his evidence is different to the one taken in the statement. Of course, such a statement could also be used to refresh the memory of the person who recorded it.

Would the situation be any different, if *Fausedeen* had accepted the highlighted parts of contents of his statement made to CCD, as a truthful description of the event it speaks of ?

In my view, the answer would still be in the negative. A clear pronouncement on this issue was made by Court in ***Binduwa v Siriya*** (1926) 28 NLR 126, where *Jayawardene* J, following the reasoning adopted in ***Rex v Charles Perera*** 3 S.C.D. 57. In this instance, the Court considered whether a previous statement made by a witness, which he admits being true, but which is contradicted by his evidence in Court, could be used as substantive evidence. It was held (at p. 128) that " … *the statement of the complainant to the Korala has been used, not to contradict or corroborate evidence given in Court, but as substantive evidence against the accused, because the witness who made the statement says it is true. I do not think that such a use of a former statement is authorized by law. The question whether a former statement is true or false does not arise in a case like this, and it seems to me doubtful whether a Court can ascertain from a witness whether such a statement is true or not for the purpose of utilising it as evidence in the case. It would, of course, be different if the witness repeats on oath what he had said in his former statement. Further, the Korala appears to have been acting in this matter as an Inquirer under Chapter XII of the Criminal Procedure Code, as he says he held the preliminary inquiry into the case. If so, then section 122 (3) prohibits the use of a statement made to an Inquirer in the course of an investigation otherwise than to prove that a witness made a different statement at a different time or to refresh the memory of the person recording it.*" It must be clarified here that when *Jayawardene* J said "*It would, of course, be different if the witness repeats on oath what he had said in his former statement*" it was said in relation to the evidence of that witness which is consistent with his pervious statement and in such a situation the eliciting of the contents of his statement to show that he made a similar claim on his previous statement does not arise. If that was elicited, it

would be to show his consistency, and such a purpose is not permitted by the statute.

In this context, it is also relevant to note the view expressed by *Basnayaka* CJ, in ***The Queen v Mapitigma Buddharakkita and Others*** (1962) 63 NLR 433, (at p 482) *" … the use of the oral statement made to a police officer in the course of an investigation under Chapter XII is as obnoxious to it as the use of the same statement reduced into writing".* However, in the judgment of ***Wanasinghe v Attorney General and Others*** (2011) 1 Sri L.R. 1, *Amaratunge* J, considered the question whether the admission of the evidence relating to the act of pointing out the accused by the complainant during investigations as the person who solicited a bribe as evidence is prohibited under Section 110(3) of the Code of Criminal Procedure Act.

His Lordship stated (at p. 7) such evidence is admissible, since the *"[Section 110(3) of the Code of Criminal Procedure Act prohibits the use of the written record of a statement recorded under and in terms of Section 110(1) in the course of an investigation. In this case there was no such statement in existence. Section 110(3) does not shut out direct evidence of a police officer of anything done or said by a witness or an accused (except a confession of an accused) in his presence and seen or heard by such police officer."*

In view of the reasoning adopted in these judicial precedents, it must be noted here that *Fausedeen,* during his examination in chief as well as in cross examination by all the Appellants, had consistently maintained the position that he did not disclose the whole truth to the officers of the CCD. He was particularly determined not to make any reference to the 1st Appellant or to any of other officers who were with him, namely the 2nd to 5th Appellants, to the officers of the CCD. He had no knowledge that the 6th Appellant had joined the deceased at a later point of time. *Fausedeen* clearly admitted deliberately lying on this issue in his statement to CCD, in addition to lying to

the deceased's wife, who called him to find out the whereabouts of her husband, after *Shiyam* was handed over to *Krishantha* by the witness. This aspect of *Fausedeen's* evidence would be dealt with in another context further down in this judgment. In relation to the complaint of the Appellants that the trial Court failed to consider the contents of the statement as substantive evidence in the case, should therefore necessarily fail.

The second factor relied upon by the 1st, 2nd and 3rd Appellants, that *Krishantha* had entertained a strong motive to eliminate the deceased, should be considered next. Learned President's Counsel invited attention of this Court to the evidence where *Krishantha* had vouched that he would take revenge from the deceased, along with *Fausedeen's* brother, for their action resulted in his 'house arrest' in *China* by one Lee, which made him to suffer a substantial financial loss, and gross humiliation.

The evidence relating to this incident is as follows. *Krishantha* is a businessman who regularly imported textiles from *China*, through a Chines national called *Lee.* In order to coincide with the festive season sale in the month of April, *Krishantha* arranged with *Lee* for a consignment of garments. Unfortunately, the said consignment could not be cleared from Customs in time and there was a delay on the part of *Krishantha* in the repayment of dues to *Lee* which was said to be in a sum of Rs. 20 Million. During a subsequent business visit to *China*, *Krishantha* was prevented returning to *Sri Lanka* by *Lee,* who kept him in house arrest, until the monies for the delayed consignment are fully settled. *Krishantha* had eventually paid all of his dues in full to *Lee* by raising funds, after adopting several desperate means, and managed to return to *Sri Lanka*.

In order to raise funds for his ' release', *Krishantha* had to borrow Rs. 6 Million from *Fausedeen,* mortgage his own house and was forced to pull out capital from his businesses. Owing to this factor, *Krishantha* suffered severe

financial difficulties. The 1st Appellant, in his statement from the dock too had referred to this fact and said that he offered his vehicle, which was imported under the duty concession permit, to be mortgaged to raise funds to secure the release of his friend. *Krishantha* had later learnt that it was the deceased and *Fausedeen's* brother who had passed information of his presence in *China* to *Lee*. *Krishantha* admitted he was angry over the said act of the deceased, which he thought as an act of jealousy, motivated by business rivalry. *Krishantha* had vouched that he would take revenge from the deceased for all the trouble he had to endure.

It is on this admission made by *Krishantha,* the Appellants have contended that it was he who had a real motive to kill the deceased and not the 1st and 6th Appellants, who only said to have a grudge against *Shiyam* over a trivial incident, which the prosecution relied on as the motive for the abduction and murder of the deceased. Learned Counsel submitted that the High Court at Bar rightly rejected the said motive attributed to the 1st and 6th Appellants, thus making *Krishantha* the only party who admittedly had a real motive against the deceased. According to the Appellants, the High Court at Bar failed to take note of this important factor.

The High Court at Bar, in dealing with the said issue of motive of the 1st and 6th Appellants, had the evidence before it which revealed of a reference made by the 1st Appellant in respect of the deceased as "අර යකා". The nature of the relationship between the deceased and the 1st Appellant could be seen from the evidence that surfaced from a statement made by the deceased to *Fausedeen* referring to an incident with 6th Appellant, over several pairs of shoes. The apprehensions entertained by the deceased to personally meet up with the 1st Appellant at *Kandewatta* Road, is indicative from the very term he used to address the 1st Appellant. When the deceased was taken to the vehicle under the pretext that the 1st Appellant wants to speak to him, the deceased

addressed him in total submission as "ඉදු සර්", thinking the 1st Appellant was in fact inside of the vehicle. The Court also considered the proposition posed by the 6th Appellant in his dock statement whether it is believable that a father and son would be plotting together to kill a man over an incident involving shoes worth of only Rs 3,500.00. Similarly, the 1st and 6th Appellants contend that *Fausedeen* too had admitted to *Shaheen* (PW No.10), a relative who served him as his driver, that *Shiyam* had regularly harassed or mentally tormented him ("වද දෙනවා") and the High Court at Bar had taken note of that evidence (at p.290 of the judgment).

The Court apparently did not specifically act on the evidence of motive presented by the prosecution but, in the course of its judgment, noted that sometimes murders are committed over trivial reasons (referring to the motive attributed to the 1st and 6th Appellants), and cited the incidents of the murder of "*Judge Ambepitiya*" and "*Angulana* double murders", as a justification for its observation. It must be noted that this had been the view taken by Courts since 1856, when Lord Campbell stated in ***R v Palmer*** that "*the adequacy of motive is of little importance. We know from the experience of criminal Courts that the most atrocious crimes of this sort have been committed from very slight motives …*", as seen from the judgment of ***The Attorney General v Potta Naufer and Others*** (2007) 2 Sri L.R. 144.

Another factor relied on by the learned President's Counsel for the 1st to 6th Appellants in this regard was ASP *Abeysekera,* conceded that *Anuradha* is an accomplice. It is a suggestion *Anuradha* himself had admitted. Although this factor was highlighted by the Appellants in relation to their contention on motive entertained by the two 'accomplices', *vis a vis* the strength of the motive attributed to the 1st and 6th Appellants, the admission of a police officer or even a witness himself that he is 'an accomplice' to the abduction and murder of *Shiyam,* has no impact on the duty of the trial Court in determining

whether the person concerned is an accomplice, in view of the attributes of an accomplice identified by Courts, for it is for the trier of fact to determine that question of fact. The fact of granting a conditional pardon by the Attorney General to a person in itself does not necessarily make such a person an accomplice in the eyes of law, as Section 256 of the Code of Criminal Procedure Act provides the consideration that are applicable in exercising that discretion only if the person is " *directly or indirectly concerned in or privy to any such offence*". It is relevant to point out in this context that this Court, in ***Ajit Fernando and Others v The Attorney General*** (2004) 1 Sri L.R. 288, considered the propriety of granting a conditional pardon on a person under Section 256. After consideration of several factors, the Court was of the view (at p.303) that " *[A] close scrutiny of his statement clearly reveals that he cannot be regarded as a person who could have been directly or indirectly concerned in or privy to the offence under inquiry."*

After undertaking a careful evaluation of the complex body of evidence that had been placed before the High Court at Bar, I am inclined to agree with the conclusions reached by that Court (as reproduced in the preceding paragraphs of this judgment) in determining the question whether *Fausedeen* and or *Krishantha* knew that the deceased would be put to death when they handed him over to the 2nd and 5th Appellants at *Kandewatta* Road in the negative. In addition to agreeing with the reasoning adopted by the High Court at Bar, I wish to fortify my said conclusion with following reasons.

Clearly the case presented by the prosecution against the 1st to 6th Appellants is essentially a one based on circumstantial evidence. Of course, both *Fausedeen* and *Krishantha* have had the opportunity to specifically deny in their evidence under oath that they did not individually or collectively entertain any intention to terminate life of their business acquaintance *Shiyam,* upon being suggested so by the 1st to 6th Appellants. Despite the said specific

denials made by *Fausedeen* and *Krishantha* in responding to those suggestion for obvious reasons, it is important for this Court to consider, in addition to the several factors that contributed to the conclusion reached by the High Court at Bar to arrive at a finding in the negative, whether there are other circumstances that tend to point towards the contrary, in addition to the factors that were pointed out by the Appellants. This could be determined after consideration of the conduct of each of the two witnesses prior to, during and immediately after *Kandewatta* episode, coupled with their conduct when they first got to know that *Shiyam* would be put to death.

The starting point of the series of events that ended with the death of the deceased was the obvious reluctance on the part of the deceased to return the capital invested in his business by *Fausedeen,* despite the latter's repeated requests. These business transactions were made on mere verbal undertakings and not on formally signed legally enforceable contracts. When *Fausedeen* realised that his investment did not yield profits to satisfy his expectations, he decided to divert that investment to another project, and also to part ways with *Shiyam*. This he intended to do only after getting his capital back.

With regular checking of accounts of their partnership business and in view of its actual financial status, *Fausedeen* had realised that it is not possible to get his total investment of Rs. 50 Million back. Instead, he opted to be content with only Rs. 30 Million, in view of a pragmatic assessment of the circumstances and decided to forego Rs. 20 Million. Given the fact that *Shiyam* was in the habit of making veiled threats to divulge the relationship *Fausedeen* had with another woman, whenever the topic of recovering of his investment was brought up for discussion, even this goal seemed an unattainable one. Naturally, *Fausedeen* was frustrated and dejected, particularly over the conduct of his business partner.

Similarly, *Krishantha* too was indebted to *Fausedeen* in a sum of Rs. 18.5 Million. In view of the financial difficulties faced by *Krishantha* over the incident with *Lee, Fausedeen* was aware that his friend was unable to pay back the full amount owed to him in one payment. He had unsuccessfully tried that option for last two years. In these circumstances, all he could do was to entertain an expectation to collect his dues in small instalments and, that too, spread over for a long period of time. But *Fausedeen* needed some capital urgently. It was in this mindset that the teary eyed *Fausedeen* had laid bare his predicament in the presence of *Krishantha* and complained of the cold response received from *Shiyam. Krishantha* had already helped *Fausedeen* many a time to recover monies from his defaulters, through the intervention of his family friend, the 1st Appellant. *Krishantha* apparently seized the opportunity to propose *Fausedeen* that if he could secure Rs. 50 Million from the deceased, instead of *Fausedeen's* expectation of Rs. 30 Million, whether the amount he owed to *Fausedeen* could be set off against that. *Fausedeen* agreed with this proposition.

When *Krishantha* arranged a meeting with the 1st Appellant at his residence, *Fausedeen* requested whether the 1st Appellant could help him to recover his dues legally from *Shiyam* if he makes a formal complaint to Fraud Bureau. The 1st Appellant was its director at some point of time. The 1st Appellant rebuked *Fausedeen* not to talk rubbish in his presence and indicated his plan to recover the dues.

The declared plan of action by the 1st Appellant was to compel the deceased to transfer the ownership of his factory and premises along with the stock of footwear to *Fausedeen.* The deceased was to be held in for period of few hours and, once the transfer of assets is made, he was to be released. But *Fausedeen* was worried about what the deceased would do after his release, even though he might agree to transfer property under compulsion. The

response of the 1st Appellant was that he is in charge of the *' white van squad'* and the people who come to them only return "*blind, mute and deaf*" ("**අපි ගාවට එන මිනිස්සු අඳ, ගොළු, බිහිරි වෙලා යන්නෙ**"). After this meeting there were requests from the 1st Appellant to facilitate the 6th Appellant's trip to Thailand and also made a demand of Rs. 500,000.00 for incidental expenses.

Despite the said plan of action in place, there was no positive action on the part of the 1st Appellant to arrange a meeting with the deceased to compel repayment, even though *Fausedeen* responded positively to all of his requests for financial support. Naturally *Fausedeen* was frustrated and regularly pestered *Krishantha* for some positive action. An attempt was made to take the deceased in near his factory. That did not succeed. With that failed attempt, *Krishantha* told *Fausedeen* (on instructions of the 1st Appellant) that it was for him to bring *Shiyam* to a point and hand him over to the officers who work with the 1st Appellant.

Fausedeen lured the deceased to drive to a point with *Krishantha* where *Anuradha* would wait for them in his cab with the 2nd and 5th Appellants. After taking the deceased into the cab they left for an unknown destination, leaving *Fausedeen* stranded there without any means of transport, as the car keys were with the deceased. He picked up the deceased's phone from that car, before leaving *Kandewatta* in a taxi.

After *Kandewatta* incident, *Fausedeen* was constantly in touch with *Krishantha* over the phone, checking out their movements and progress made of their plan of action. *Krishantha* promised to get back him once the transaction was over. When *Shiyam's* wife called *Fausedeen* to find out whereabouts of her husband, he lied to her knowing fully well that once the deceased returns, she will get to know the truth. When he contacted *Krishantha* around midnight, he was told that they are at *Biyagama. Krishantha* said he would call back again. After some time, seeing several missed calls

from *Krishantha, Fausedeen* returned the call only to be told that the deceased would be murdered, and he would lose all his investment.

Strangely, the prosecution did not elicit any evidence as to the immediate reaction of *Fausedeen* when the news *Shiyam* would be put to death conveyed to him by *Krishantha.* The 3rd Appellant, during his cross examination, clarified this aspect. *Fausedeen* said in his evidence that he was frightened to hear that the deceased would be killed. *Krishantha* also conveyed the threat issued by the 1st Appellant, if *Fausedeen* were to reveal what happened, not only him but his family too would be eliminated.

After hearing the death of the deceased, *Fausedeen* asked his driver to destroy the phone through which *Krishantha* communicated with him, along with the phone used by the deceased. *Fausedeen* had re-traced his route in *Kandewatta* in order to verify for himself whether there were any CCTV cameras that may have recorded his movements. In an attempt to double check on that aspect, he asked his driver to drive along *Kandewatta* Road once more, making sure that there were no CCTV cameras in the vicinity of the place of 'abduction'. The evidence of *Fausedeen* that he told his driver *Shaheen* after meeting him that he now regretted for getting involved with this transaction remains unchallenged.

It must be noted in this regard, that even after an intense session of continued cross examination on behalf of all the Appellants by different Counsel representing them, *Fausedeen* was able to maintain his consistency on his motive and the reasons for his decision to handover the deceased to the 2nd and 5th Appellants through *Krishantha*. When suggested that *Fausedeen* was aware that *Shiyam* would be murdered, he posed a question back to the cross examiner, if that is the case, how he was to recover his investment. *Fausedeen* added that, as a result of *Shiyam's* murder, he did in fact lost his entire investment.

In view of these considerations, it is reasonable to conclude that *Fausedeen* had no intention to cause the death of the deceased. His primary concern was to get his substantial investment recovered from *Shiyam.* When he failed in his repeated attempts to recover his dues from the deceased on his own, *Fausedeen* looked for other options and when *Krishantha* made the proposal which benefited both of them, he decided to proceed with the same, having had previous incidents of successfully recovering monies from other defaulters with the help of the 1st Appellant. The threats of 'blackmailing' by *Shiyam* may have certainly dented his relationship. But to murder *Shiyam* solely for that reason alone, while losing all of his investment of Rs. 50 Million, seemed a mere possibility, rather than being a realistic probability. It is evident that *Fausedeen* had faith in the assurance of the 1st Appellant that the deceased could be persuaded to part with the ownership to the factory premises and its stock after a period of confinement, with no legal consequences to follow.

The degree of *Krishantha's* interest in the death of the deceased, particularly in view of his declared intentions to take revenge from the deceased over the incident with *Lee,* must be considered carefully. It is with *Krishantha's* intervention only the 1st Appellant agreed to help out *Fausedeen* to get his investment back. In the process *Krishantha* brokered a deal by which a sum of Rs. 18.5 Million he owed to *Fausedeen* is deemed settled. *Krishantha* maintained that the 1st Appellant wanted Rs. 10 Million for him to secure what *Fausedeen* wanted, and it was confirmed by the 1st Appellant at a subsequent meeting. The arrangement was for *Krishantha* to pay the 1st Appellant a sum of Rs. 10 Million after the completion of the operation and *Fausedeen* would not press for the balance Rs. 8.5 Million from *Krishantha.*

Despite the demand of Rs. 10 Million, the 1st Appellant did not insist that it be paid before he intervenes. He said Rs. 10 Million could be settled

after *Shiyam* transferred his assets. There is no evidence that he strongly reminded any of the two witnesses about of what they owe him at any point of time thereafter or the consequences that would follow, should they breach the said undertaking. Whether this demand of Rs. 10 Million for the 1st Appellant is only a sham to deceive *Fausedeen,* following an understanding between *Krishantha* and the 1st Appellant owing to their close friendship, could not be determined either way in the absence of any evidence. Whatever the circumstances, the successful completion of the project would accrue a benefit to *Krishantha* of at least Rs. 8.5 Million, if not Rs. 18.5 Million.

It is through *Krishantha* only *Fausedeen* got to know of the plan of action, and to facilitate an effective persuasion, the deceased would be kept in for few hours in the 'custody' of the 1st Appellant and his team after his "arrest". This being the general agreement, the specific modalities of the manner of taking the deceased in, and where he would be kept until he agrees to transfer ownership were not known either to *Krishantha* or to *Fausedeen.* It was *Krishantha's* evidence that the 1st Appellant issued instructions from time to time, which he merely carried out or conveyed. It was also his evidence that the 1st Appellant would privately speak to one of the officers in his team to give instructions (the 2nd to 5th Appellants) and directing *Krishantha* to facilitate their task by coordinating with *Fausedeen.*

This pattern could be seen from the two scouting visits that were made to the deceased's factory as well as to his residence and the failed attempt to take him in near that factory. When the attempt to "take in" the deceased at *Saranakara* Road failed, it was the 1st Appellant who instructed *Krishantha* to inform *Fausedeen* to hand the deceased over to his men. This task was accomplished at *Kandewatta.* The evidence also disclosed the 1st Appellant instructed his officers from time to time, who also claimed they act only on the instructions of their DIG.

The degree of control the 1st Appellant had over the actions of *Krishantha* throughout the whole sequence of relevant events could be assessed in its correct perspective by consideration of evidence in relation to two prominent incidents that had taken place on the day of the *Kandewatta* incident. In this regard a more descriptive reference to the evidence of *Krishantha* is required.

When the attempt to take the deceased in near his factory had failed, *Krishantha* met the 1st Appellant along with the 5th Appellant and described what happened. *Krishantha* also conveyed to 1st Appellant that *Fausedeen* had lost confidence in them over their failure to make any progress in the matter. The 1st Appellant's response was to ask *Fausedeen* to bring in *Shiyam* to some point and thereby facilitate his men to 'arrest' him. He further directed *Krishantha* to come to his office on the flowing day to discuss the matter further.

Krishantha thereafter met *Fausedeen* on his way home and after quoting the 1st Appellant, requested him to bring along *Shiyam* to a halfway point. *Fausedeen* agreed with that plan when *Krishantha* assured him that the 1st Appellant will solve his problem with no consequences to follow and with the deceased being returned to him. When *Krishantha* met the 1st Appellant at his office, he was instructed by the DIG to go along with the two men he would assign for the operation and to 'bring' *Shiyam.* This was conveyed to *Fausedeen* by *Krishantha.*

That evening the 1st Appellant returned to his *Nedimala* residence with *Krishantha.* He instructed *Krishantha* to go with the 2nd and 5th Appellants to 'bring in' the deceased. Just before leaving the 1st Appellant's residence at about 8.15 p.m., the 5th Appellant had a private discussion with the 1st Appellant. *Krishantha* was told by the 1st Appellant that he had already given

instructions to the 5th Appellant and directed for him to go with them to 'bring in' the deceased.

It is important to note that the repetitive use of the words 'bring in' ("අරන් වරෙන්") used by the 1st Appellant, whenever *Krishantha* referred to the instructions of the 1st Appellant. It had obviously created an impression in the mind of *Krishantha* what the Senior DIG expected of him was to 'bring in' *Shiyam* to his *Nedimala* residence, after his "arrest" made by the two police officers, who are assigned to go with him.

Fausedeen called *Krishantha* to find out where they were. *Krishantha* and his party met *Fausedeen* who came with *Shiyam* in a white *Honda Fit* car at some point along *Balapokuna* Road. *Fausedeen* had told a lie to *Shiyam,* that *Krishantha* knew a place where a *Rolex* watch is available for sale for a low price, and he would take them there, in order to convince the deceased to come with him. *Krishantha* then joined *Fausedeen*. *Shiyam* drove his vehicle following *Krishantha's* instruction to a point in *Kandewatta* Road. *Anuradha,* having already arrived at that point, as instructed by *Krishantha,* was waiting with his two passengers, the 2nd the 5th Appellants, in his double cab expecting the arrival of *Krishantha* and others. Upon seeing the double cab, *Krishantha* told *Shiyam* to stop his car and lied that he stopped the car in order to speak to the 1st Appellant, who was said to be in that double cab. *Shiyam* was initially reluctant to meet the 1st Appellant as he knew the Senior DIG was angry with him. Upon being informed that the 1st Appellant wants to talk to him, *Shiyam* walked up to the cab, taking along with him the car keys but leaving his phone behind.

After coming up to the double cab, the deceased bended down and put his head into the vehicle, in order to speak to the passenger seated on the rear seat. He did so very submissively while addressing the 1st Appellant as " ඔය සර්". As he peeped into the vehicle, *Shiyam* was pushed into the double cab by

the 5th Appellant, who too got into the vehicle after the deceased. *Krishantha* also got into the double cab and while driving on, contacted the 1st Appellant to inform him that they got *Shiyam.* When *Krishantha* checked up with the 5th Appellant, in order to verify what he understood from the instructions given by the 1st Appellant that after the abduction, the deceased was to be taken to *Nedimala* residence was correct, he was told that they should head to *Biyagama* instead and the 5th Appellant would follow the 1st Appellant's instructions. Along *Pagoda* Road, the 1st Appellant contacted *Krishantha,* where the latter complained that, instead of coming to his residence, the 5th Appellant wants to take the deceased to *Biyagama.* The 1st Appellant confirmed it was his instructions to do so and directed *Krishantha* also to accompany them by adding that he had already given instructions to the 5th Appellant as to what should be done.

On their way to *Biyagama,* the deceased after realising the motive behind his 'abduction' pleaded with *Krishantha* to take him to a lawyer, before whom he would transfer all his machinery along with the entire stock of footwear in lieu of his dues to *Fausedeen.* With this development, *Krishantha* stopped the double cab and called the 1st Appellant and conveyed what the deceased indicated. The 1st Appellant wanted to speak to the 5th Appellant and gave some instructions, which *Krishantha* realised through the 2nd Appellant, as they were instructed to return to *Nedimala.*

They reached *Nedimala* at about 10.00 p.m. and as the double cab approached the gate, the 3rd, 4th and 6th Appellants came up to the vehicle with a T 56 weapon and tried to get in. When *Krishantha* asked 5th Appellant for the reason for them to join, he received a veiled threat indicating for him to do what they say. *Krishantha* then got off from the cab and walked up to the 1st Appellant and told him that the issue of recovery of money is now sorted out and questioned what this set up was all about. The 1st Appellant directed

Krishantha to go with his team and when he refused, demanded to provide a van. *Krishantha*, having realised from the way the 1st Appellant and others behaved towards him, that the situation is well beyond his control, agreed to provide a van, but wanted to keep away from the happenings.

Krishantha travelled with the others in two vehicles, and after switching vehicles they stopped after passing *Kaduwala* bridge on *Biyagama* Road. When *Krishantha* came up to the double cab, the 5th Appellant got down with the T56 weapon. He instructed *Krishantha* and *Anuradha* to go back but not to talk about this incident (**"කිෂාන්ත මහත්තය දැන් ඔයගොල්ල යන්න, හැබැයි මේ ගැන කටක් හොල්ලන්න එපා"**). *Krishantha* realised that the 2nd to 6th Appellants were about to do some cruel act to *Shiyam* and was told that they were to follow the 1st Appellant's "orders".

The van proceeded on with the deceased. *Krishantha* and *Anuradha* returned to Colombo in the double cab. On their way to Colombo and were nearing *Kotte*, the 5th Appellant called *Krishantha* to convey a message "**කිෂාන්ත මහත්තය අපි මුව ඉවරයක් කරනව, වැන් එක හෙට උදේට ඇවිල්ල අරන් යන්න**" . The 5th Appellant then informed *Krishantha* that the 6th Appellant wants to speak to him. The 6th Appellant requested *Krishantha* to initiate a conference call to his father, the 1st Appellant. Once the call was initiated, the 6th Appellant wanted to know from the 1st Appellant how to deal with the deceased. The reply of the 1st Appellant was that he had already given necessary instructions to the 5th Appellant, who would do the "job" once they reach "his area". *Krishantha* once more asked the 1st Appellant for a reason why things happened in this manner and was threatened to keep quiet. The 1st Appellant threateningly reminded *Krishantha* of who he is.

During the journey towards *Biyagama, Fausedeen* called *Krishantha* to find out the progress made on their plan to recover money from the deceased.

Krishantha said he would call him later in the night and did call him only after reaching home. It is important to reproduce the exact evidence of *Krishantha,* that was presented to the trial Court regarding their conversation, which appears in the transcript as follows.

ප්‍ර:- මොනවද ඔබ සහ ෆවුස්ඩීන් කතා කලේ ඒ ඇමතුමෙන්?

උ:- ෆවුස්ඩීන්ට මම කිව්වා ෆවුස්ඩීන් අපි හිතුවේ නැති දෙයක් මෙතන සිද්ධ වෙන්න යනවා මම දන්නෙ නැහැ මම මොකක්ද කරන්න ඕනේ කියලා මගේ ඔලුව පිස්සු වගේ ෆවුස්ඩීන් කියලා කිව්වා.

ප්‍ර:- ෆවුස්ඩීන් ඒකට ප්‍රතිචාරයක් දැක්වුවාද?

උ:- ඔව්.

ප්‍ර:- මොකක්ද කිව්වෙ?

උ:- මගෙන් ඇහුවා ඇයි ක්‍රිෂාන්ත අයියා ඔයා මොනවද කියන්නේ කියලා මම කිව්වා ෆවුස්ඩීන්ට ෆවුස්ඩීන් වාස්ලා ෂියාම්ව මරන්න යන්නේ අපිට කට හොල්ලන්න එපා කිව්වා හෙල්ලුවොත් අපිටත් ඒ දේම සිද්ධ වෙයි කියලා කිව්වා.

ප්‍ර:- ෆවුස්ඩීන් එයට යම් ප්‍රතිචාරයක් දැක්වුවාද?

උ:- ඔව්.

ප්‍ර:- මොකක්ද ඔහු දක්වපු ප්‍රතිචාරය?

උ:- ෆවුස්ඩීන් මගෙන් ඇහැව්වා මොකක්ද ක්‍රිෂාන්ත අයියා මේ වෙන්න යන්නේ අපි දෙන්නම අනවශ්‍ය දේකට නේද පැටලුනේ කියල.

ප්‍ර:- ඔබ එයට පිළිතුරක් දුන්නද?

උ:- මම පිළිතුරක් දුන්නා.

ප්‍ර:- මොකක්ද ඔබ කිව්වෙ?

උ:- මම ෆවුස්ඩීන්ට කිව්වා ඒක තමයි ෆවුස්ඩීන් මේක අනවශ්‍ය දෙයක් අපිට දැන් මේකෙන් අපි නිකම් ප්‍රශ්ණ වලට නිකම් පැටලෙන්න තමයි යන්නේ.

ප්‍ර:- කොච්චර විතර වෙලාවක් ඔබත් ෆවුස්ඩීනුත් ඔය ආකාරයට කතා කලාද?

උ:- මට ඒ ගැන කියන්න අමාරුයි. මේ විස්සතර ටික තමයි අපි කතා කලේ.

It is natural to expect from a person, who gives evidence under a conditional pardon, to make an attempt to distance himself as much as possible from the perpetrators of the crime along with whom, he too could have been charged. This being the natural tendency of a person, the Courts, in assessing such evidence were mindful of this aspect as reflected in many a judicial pronouncement. In this instance too, both *Fausedeen* and *Krishantha* were introduced by the prosecution as 'accomplices' to the 1st to 6th Appellants and their names were included in the body of the 1st and 2nd counts to reflect that position. This decision was arrived at by the Attorney General, upon consideration of the material presented before him at the time of exhibiting information in the High Court of the Republic. Thus, it is prudent that their evidence be assessed with extra caution.

However, in the appeal before us, the High Court at Bar concluded that both *Fausedeen* and *Krishantha* had no intention or knowledge that the deceased would be put to death, which the 1st ,2nd and 6th Appellants collectively challenge as an erroneous finding. The legal effect of the said finding is both *Fausedeen* and *Krishantha* could not have been included in the charges as co-accused along with the 1st to 6th Appellants and, more importantly, due to this very reason the rules of evidence that are applicable to accomplices are no longer applicable to them. As such, they ought to have been treated as any other ordinary lay witness.

Perusal of the impugned judgment indicates that the High Court at Bar not only assessed the testimonial trustworthiness of the evidence of *Fausedeen* and *Krishantha* with a fine-tooth comb, but, in addition, it also looked for corroboration of their evidence by independent sources. In a similar situation, it was held in ***Anderson v Mutukaruppen Kangani*** (1899) 3 NLR 353 by

Withers J (at p. 355) that " … *an accomplice's evidence was always open to the gravest suspicion, not because he had participated in a crime, but because his expectation of pardon depended on the accused's conviction. But it is not every participation in a crime which stamps a man as an accomplice, so that his testimony has to be confirmed*."

Since the Appellants, in respect of their individual grounds of appeal, sought to challenge the assessment of the High Court at Bar on its assessment of credibility of the two witnesses as well, this Court must examine the reasons on which the lower Court had decided to accept their evidence as credible for its validity, even though credibility of a witness, being a question of fact, is best left to the original Court, which has a distinct advantage to observe the demeanour and deportment of each witness, to decide. I intend to undertake this task after this segment of the judgment that deal with the issue of whether the two witnesses are accomplices is completed and, for now, continue to deal with the question whether *Krishantha* had any intention or knowledge that *Siyam* would be murdered.

The two prominent incidents, which I have referred to in the previous section of this judgment are, in my view effectively negates any intention or knowledge on the part of *Krishantha* to the murder of *Shiyam*, and therefore should now be specified at this juncture and reasoned out. The first of the two is *Krishantha's* conduct immediately after *Shiyam* indicated his willingness to pay up what he owed to *Fausedeen.* The second incident is *Krishantha's* conduct over the response of the 1st Appellant, after he returned to *Nedimala* with the deceased after he agreed to pay up.

After the failed attempt at *Sarankara* Road to take in the deceased, the 1st Appellant directed *Fausedeen* and *Krishantha* that they need to handover the deceased to his team. *Krishantha* passed that task on to *Fausedeen.* Up until the deceased was taken into the double cab at *Kandewatta,* neither of them

knew exactly where they should head therefrom. *Krishantha* was under the impression that after taking the deceased into their charge, they were to take him before the 1st Appellant for his intervention to secure the recovery of monies. This belief entertained by *Krishantha* is evident from the fact that he invited *Fausedeen* to come with him in the double cab to see the 1st Appellant.

When the 5th Appellant, after taking in the deceased, said that his instructions were to take the deceased to *Biyagama* instead of *Nedimala*, that had surprised *Krishantha.* He immediately contacted the 1st Appellant for his confirmation of that strange course of action. Then only *Krishantha* realised that the Senior DIG had planned the operation differently to the way he indicated it to him initially. It is relevant to note that when the 2nd and 5th Appellants got into the double cab to take the deceased in, they did not carry any firearms or, even if they had them concealed, did not use them at any point of time to force the deceased to get into the vehicle or to subdue him when he struggled with them. It is also relevant to note that neither of the 2nd and 5th Appellants ever mentioned anything, giving an indication to *Krishantha* as to what they had in their minds, involves the death of the deceased, except to claim that they only act on their DIG's instructions. Both these Appellants were serving as police officers at that time. *Krishantha* knew that the recovery process they were engaged in is without a formal complaint being made to any law enforcement agency. However, it is highly probable that he may have been under the impression that the actions of the two Appellants were within their powers as police officers, as he had no indication that the 'abduction' of the deceased would lead to his death.

The other significant incident that I wish to highlight is the conduct of *Krishantha* after the deceased had agreed to transfer some of properties in favour of *Fausedeen* in settlement of the monies he owed. The deceased indicated his willingness to a compromise only after reaching *Biyagama*

junction. This was the end result both *Krishantha* and *Fausedeen* expected to achieve through the persuasive power of the 1st Appellant. When the deceased indicated his willingness to settle his dues, all *Krishantha* wanted from the 1st Appellant was to cement that undertaking into a reality, as he would then be released from his debt to *Fausedeen*. What is important to note from the conduct of *Krishantha* is that, while being excited with the success of obtaining deceased's agreement on his own, he failed to realise that the deceased only consented to transfer ownership of his machinery and stocks and not the most valuable part of his assets, the factory and its premises at *Saranakara* Road. In *Fausedeen's* assessment it is the total of all these assets, including the factory and its premises, machinery and stock, taken together would satisfy his expectation of Rs. 50 Million. *Krishantha* lost sight of that important fact and decided to return to the 1st Appellant's residence after securing only a part of the total dues.

This is a factor that undoubtedly supports the conclusion reached by the High Court at Bar that *Krishantha* had no intention to kill the deceased, as it shows that if he really entertained an intention to put the deceased to his death, there was no reason at all for him to turn back after reaching *Biyagama* junction and that too by first convincing the 1st Appellant. The only reason that compelled *Krishantha* to turn back was the unexpected willingness of the deceased to transfer some of his property. If not for that indication of willingness, they could have simply proceeded on. If *Krishantha* intended the death of the deceased with or without such an agreement on the part of the deceased, all he had to do was to proceed as instructed, regardless of the compromise offered by the latter.

After turning back from *Biyagama* junction and just before they almost reached the 1st Appellant's residence, there was a call from the 1st Appellant to *Krishantha* verifying where they were. *Krishantha* replied that they will be

there in a two-or three-minutes time. When the double cab arrived at the gate of the *Nedimala* residence, the 3rd, 4th and 6th Appellants were already waiting there to get into the vehicle. The 3rd Appellant carried a T56 with him. When the 5th Appellant directed *Krishantha* to do what he says hereafter in a stern voice, the latter got alarmed and suspected that something sinister is about to happen. With that thought he got down from the vehicle and walked into the premises and met the 1st Appellant to clarify what was happening. *Krishantha* questioned the 1st Appellant stating *Shiyam* was brought there to settle the monies but what happens before him is not what he expected. The 1st Appellant's only response was directing *Krishantha* to accompany the team which he refused. The 1st Appellant then ordered, "if you can't go, give your van". *Krishantha,* being disturbed and worried with the manner in which the 1st Appellant and others had behaved towards him, replied that he would give the van but would not participate in this affair any further.

Krishantha provided a van, after borrowing one from his brother, as demanded by the 1st Appellant and travelled with the others up to *Malabe* junction, where the team switched vehicles by bringing the deceased to the van, being held from either side by 2nd and 3rd Appellants. The 5th Appellant went somewhere in the double cab, now driven by *Anuradha* and directed the van to come towards *Kaduwela* and from there to *Biyagama.* The purpose of the 5th Appellant's travel was to buy a coil of rope and some cigarettes as *Anuradha* stated in his evidence. At some point they stopped and the 5th Appellant, after alighting from the cab with the T56 weapon, instructed *Krishantha* to return home with *Anuradha* and to keep silent. *Krishantha* meekly complied.

On their way back and nearing *Kotte*, *Krishantha* received a call from the 5th Appellant, to inform the former to collect the van on the following morning and for the first time indicated their intentions. The 5th Appellant said "අපි මුව

ඉවරයක් කරනව"". What the 5th Appellant said was once more confirmed by the 1st Appellant, who conversed with the 6th Appellant, through a conference call initiated by *Krishantha* by using his smart phone, which enabled him to hear their conversation.

In view of this evidence, it is clear that when they reached *Nedimala* for the second time with the deceased, *Krishantha* realised for near certainty that the 1st Appellant had not attached any significance to the recovery of the monies due to *Fausedeen* from the deceased but was determined to achieve something else. This is clear from the consideration of the fact that the 1st Appellant knew *Krishantha* was coming to meet him with the deceased at his residence shortly, but instead of personally intervening in the matter, had prepared a party of the 3rd, 4th and 5th Appellants with a T56 rifle, ready to receive them and thereafter to take the control over the deceased, and to transport him once more to *Biyagama.*

Krishantha decidedly indicated his protest by informing the 1st Appellant that he cannot participate any longer in this transaction and in order to mitigate for his personal participation agreed to provide a van, as demanded. However, he did follow the double cab carrying the deceased, until he was told to return home, empty handed and without any solution to the problem of recovering *Fausedeen's* dues.

Why the High Court at Bar approached the question of accomplices, by considering the different roles played by *Fausedeen* and *Krishantha* in this whole transaction, could be understood by examining the reasoning it had adopted. The Court concluded that (at p. 798 of the judgment) even though both 'accomplices' (*Fausedeen* and *Krishantha*) had a hand in the conspiracy to the 'abduction' of the deceased, they clearly had no intention to cause the death of the deceased. The Court further concluded that it was the 1st to 6th Appellants who conspired to commit murder of the deceased. This specific

finding of fact by the trial Court in respect of these two witnesses was necessitated due to the reason that in the information as well as in the charge, *Fausedeen* and *Krishantha* were included in the 1st and 2nd counts with the accusation of conspiring with 1st to 6th Appellants to commit murder of the deceased and abducting the deceased in order that he may be murdered or be so disposed of as to be put in danger of being murdered. Since *Fausedeen* and *Krishantha* were charged along with the Appellants in the same charge sheet, the prosecution proceeded on the footing that both of them had the attributes of an accomplice, in view of the pronouncement in ***Chetumal Rekumal v Emperor*** (supra) that "*[A]n accomplice is one who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be charged jointly with the accused.*"

Learned Addl. Solicitor General, defended the said finding of fact by the High Court at Bar during her submissions in reply before us, despite the fact that *Fausedeen* and *Krishantha* have given evidence as 'accomplices'. Learned President's Counsel submitted that the de-classification of the two witnesses at the appeal stage from their original status of accomplices to be mere lay witnesses, would be " *pulling the rug, from under the Accused's feet and change the entire set of evidentiary rules ex ipso facto*". This complaint, according to the learned Counsel, arises on the premise that the Appellants are " *entitled to the rules of evidence and safeguards and exceptions which come with the State's position before the Judgment, they will be judged in appeal under a different set of rules*." In further elaborating the prejudice caused by adopting such a change in its approach by the State, learned President's Counsel submitted that throughout the course of the trial, the Appellants were led into the belief by the State that they are entitled to rely on the law relating to the evidence of accomplices, which justifying them in insisting on the need for corroboration in regard to the evidence led at the trial.

With due respect to the learned President's Counsel, I am unable agree with his submissions on this aspect. He himself conceded that it was for the trial Court to determine whether a particular witness is an accomplice or not upon the material presented before that Court. That being the case, the said question of fact would be decided by a trial Court only after all the evidence for the prosecution and defence were led before it and also after the closing addresses by the respective Counsel. The prejudice complained of, being different application of evidentiary rules at trial and appeal stages, does not arise as, by then, the defence had already concluded its case on the basis that the two witnesses are accomplices, with the full knowledge that it is a fact that the Court would be considered and decided only at the concluding stages of the trial.

If the accused failed to utilise his right to cross examine the witnesses for the prosecution on the inference that the initial tag attached to a witness as an accomplice would remain with him permanently, and if the trial Court concluded otherwise, the responsibility for his failure to present his case effectively before the trial Court would naturally be attributable to that accused, as he had obviously taken a serious risk, rather recklessly.

The reliance placed on the admitted animosity between the deceased and the two witnesses in varying degrees should also take note in the present context. Clearly the relationship between *Fausedeen* and the deceased had suffered a blow when the latter had issued veiled threats, whenever the former brought up the topic of returning his share of investment from their partnership. The threat of disclosing *Fausedeen's* relationship with another woman to his wife does not itself create a strong motive to eliminate the deceased. In fact, *Fausedeen* had considered the options that are available to him if such an eventuality presented itself.

During cross examination, he said that he could marry that woman to be his second wife, as the personal law applicable to him did permit such a course of action. With this option available, it is almost an improbability that *Fausedeen* would opt to lose all hope of getting his substantial investment back, should he decide to take the life of the deceased. The situation is somewhat different with *Krishantha's* involvement as he had to undergo a financial crisis and an embarrassment over the incident happened in *China,* to which the deceased is directly responsible. In addition, *Krishantha* had vouched to take revenge for what happened. It could well be, as the Appellants contend, that *Krishantha* was waiting for an opportunity to strike back at the deceased and when *Fausedeen* presented his tale of woe, it is highly probable that *Krishantha* would have considered that as an opportunity that had presented itself to even out the humiliation.

But did he intend to take the life of *Shiyam* over the incident in *China* ?

The preceding section of this judgment has dealt with this aspect and having viewed the evidence, I have reached a conclusion on this question in the negative. In this part of the judgment, I intend to consider that evidence in yet another angle to find an answer to the said question.

Krishantha admittedly had a serious grievance with the deceased. At the same time, *Krishantha* found himself in another predicament, namely, to find sufficient funds to return Rs. 18.5 Million back to *Fausedeen,* who indicated that he needed that money as a part of his capital to another business venture he wishes to pursue. When *Fausedeen's* request for his intervention to get at least Rs. 30 Million from the deceased, *Krishantha* readily agreed to speak to this friend, the 1st Appellant. What motivated *Krishantha* to spring into action immediately was *Fausedeen's* willingness to write off his debt of Rs. 18.5 Million, only if he could secure the repayment of his entire investment of Rs. 50 Million from the deceased. Even if *Krishantha*

entertained an intention to 'punish' the deceased with death, instead of plotting for his murder, he is now presented with an opportunity to make the deceased lose his main business in its entirety and at the same time to write off his debt of Rs. 18.5 Million with *Fausedeen*.

This is because, as the evidence indicates, after the *Tsunami*, the deceased was financially down to the extent that he could not even afford to buy milk powder for his child. Being sympathetic to his plight, *Fausedeen* agreed to provide capital for a shoe manufacturing business on profit sharing basis with the deceased. Thus, it is clear that the only substantial asset the deceased had, apart from his apartment and vehicles, was the factory and its stock in trade. If that asset is taken away from the deceased, whilst erasing a substantial debt owed to *Fausedeen* in the same process and at the same time, *Krishantha* could achieve a significant victory at the expense of the deceased. The recovery of money through the intervention of the 1st Appellant guaranteed that there would be no legal consequences. Thus, it is highly probable *Krishantha* would opt for this option, rather than trying the other option, which would undoubtedly entail very serious consequences.

Thus far in this segment, I have dealt only with the factual aspect of the impugned finding of the trial Court on the status of accomplices. It is important to test such factual findings against the applicable legal principles that had already been laid down and applied by this Court.

The judgment of ***The King v Loku Nona and Others*** (1907) 11 NLR 4, is in relation to an appeal by which the appellants challenged their conviction for murder of one *Carlina*. The evidence was *Carlina, Jane* and *Kaitan* were employed by *Loku Nona* as domestic servants, and after *Carlina* made a derogatory remark to *Punchi Nona*, a sister of *Loku Nona,* over the paternity of a child, *Loku Nona* was naturally enraged. *Carlina* was killed by cutting her throat and her body was dumped in the sea. *Jane,* who saw the killing was the

witness for the prosecution. During the incident, *Loku Nona* ordered *Jane* to bring a knife, and when she did and handed it over to *Loku Nona*, who then passed it on to *Punchi Nona,* who slit *Carlina's* throat with it.

In the course of the trial for committing the murder of *Carlina*, which was held before a jury, it became necessary to determine the question whether *Jane* is an accomplice to the said murder. In determining the appeal, *Hutchinson* CJ held thus (at p. 11),

> *"[I]t was for the jury to decide whether or not Jane was an accomplice. If they believed the whole of her story, they must of necessity find that she was not an accomplice; for the case says that Jane stated that she was so afraid and confused that she did not think of the use to which the knife was to be put, and that, if she had known that it was to be applied to Carlina, she would not have brought it. If, however, they disbelieve that part of her evidence, and believe the rest of it, they might find that she was an accomplice."*

The principle on which the said pronouncement was made by *Hutchinson* CJ, is applicable to the instant appeal in relation to *Fausedeen* and *Krishantha* in full force. The distinguishing feature that made *Jane,* an accomplice to the murder or not, was dependent on her intention she said to have entertained in her mind when she brought in the knife, following an order of her mistress *Loku Nona*. *Jane* said, she did not think of the use to which the knife was to be put, and that, if she had known that it was to be applied to *Carlina,* she would not have brought it. If the jury accepted her evidence as credible, which they did, *Jane* could not be treated as " an accomplice" because she had neither an intention nor any knowledge that the knife, she had brought into the crime scene, would be put to commit murder.

The reasoning I have adopted is also consistent with the determination of the question of fact presented before Court in ***The King v Piyasena*** (1948)

49 NLR 389. The issue was whether witness *Ranbanda* is an accomplice to the accused who shot the deceased. The evidence revealed *Ranbanda* came twice over to the deceased's house on the previous day to convey a message that someone wants to see the deceased, and for him to come to the bund.

Podiappuhamy, who lives close to the deceased's house, said in evidence that he saw the deceased with gunshot injuries on his abdomen. The deceased told him that he went to the bund of the tank with *Ran Banda*, because he was told that he was wanted by someone. The deceased also said when he was returning, he was shot by the accused, and when he fell down, *Ran Banda* ran away.

Ran Banda had offered a slightly different narrative and said that the deceased came to his house at about midnight and called him to go and bring something. Both of them went into the jungle, and the deceased was looking for someone whom he expected to meet there. That person was not to be found and they proceeded along the bund of the tank. He then noticed the figure of a man about 100 feet in front of him. It was the accused. The deceased went towards him followed by *Ran Banda*. When they got close to the accused, he fired a shot, which struck *Dingiri Banda*. *Dingiri Banda* fell down saying that he was shot by the accused.

In appeal, delivering the judgment of the Court of Criminal Appeal, *Jayetileke* J was of the view that (at p. 393) " *If they believed the whole of Ran Banda's evidence, they must necessarily have found that he was not an accomplice. If, on the other hand, they believed that he knew that the accused intended to shoot the deceased, and that he took the deceased out that night, at the request of the accused, on a false pretence, they might have found that he was an accomplice.*" What must be emphasised here is the knowledge, on the part of *Ran Banda,* that the accused intended to shoot the deceased, was the determinant factor in the determination of the factual issue of whether he is an accomplice or not.

Similarly, when *Fausedeen* agreed to bring in *Shiyam* to be handed over to *Krishantha,* who would then take him to the 1st Appellant to compel to pay up his dues to *Fausedeen,* had no intention or knowledge that the deceased would be put to death. *Krishantha,* who acted as the middleman to the whole transaction ending with the 'abduction', was only interested to get him released from his Rs. 18.5 Million obligations to *Fausedeen*, while enjoying the sweet taste of revenge for what the deceased did to him by betraying his presence in *China* to *Lee.* These factors would undoubtedly negate any probability of entertaining an intention or knowledge of taking the deceased's life on the part of *Krishantha*. It thereby reduces the Appellant's contention that both witnesses intended the death of the deceased to a mere proposition.

The 1st count, as well as the 2nd count alleged that the accused were engaged in conspiracy to commit murder and abducting the deceased in order that he may be murdered or be so disposed of as to be put in danger of being murdered respectively. It is incumbent on the prosecution to prove to the required degree of proof that *Fausedeen* and *Krishantha* acted with the requisite mental element in committing these two offences for them to be accomplices. This is because the accomplice had to be " … *a person who could have been directly or indirectly concerned in or privy to the offence under inquiry"* as stated in ***Ajit Fernando and Others v The Attorney General*** (supra)) 1 Sri L.R. 288 (at p.303). The requirement that an accomplice should be "*privy to the offence under inquiry"* must be emphasised in this regard. In relation to the 1st count the prosecution was to establish that the actions of *Fausedeen* and *Krishantha* indicate that they shared an intention to conspire to commit murder. The prosecution was also under a duty to place evidence to establish that the two witnesses had an agreement with others to commit the death of the deceased.

The offence of abduction, as described in count 2, is an offence coupled with aggravation of liability on account of a specific intent, i.e. death of the deceased. Accordingly, it was for the prosecution to establish that the two witnesses had the intention or knowledge that the abduction of the deceased was for the purpose of murder or to put him in danger of being murdered and therefore are accomplices to the Appellants. Hence, in order to convict *Fausedeen* and *Krishantha* on these two charges, the prosecution must prove beyond reasonable doubt that either of them had participated in the conspiracy and the abduction with the requisite intention to commit those two specific offences, and not any other offence.

It is clear from the evidence that the manner in which *Fausedeen* and *Krishantha* acted, in order to achieve their own objectives, is most reprehensible and should be condemned as they violate basic social norms of a civilised society. Their actions do not conform to the actions of a reasonable human being who is conscious of his civic duties. Learned President's Counsel, in order to impress upon us of the culpability of the two 'accomplices' strongly commented on their repeated acts which he termed as "*acts of treachery*". *Fausedeen,* after having prayed with the deceased in the mosque, lured the latter to visit *Kandewatta* Road with him on the pretext of availability of a *Rolex* watch for low price. This he did with the concealed intention of handing the deceased over to the 1st Appellant's men, who would "arrest" him ("අත් අඩංගුවට ගන්න"). When the deceased's wife became worried about her husband, who failed to return home for the evening, *Fausedeen* lied to her as to whereabouts of her husband, joined the search party that night pretending to be innocent of what had taken place. In the following morning, with the full knowledge that the deceased had already been killed in the same night, he made a false complaint to *Bambalapitiya* police that the deceased went missing after meeting him in the previous evening.

On the part of *Krishantha,* when *Fausedeen* sought his help to recover his investment from the deceased, he used that opportunity to entice *Fausedeen* to agree to erase his debts, by passing that burden on to the deceased by ensuring that the deceased to pay the entire capital of Rs. 50 Million. Whilst achieving his objective of taking revenge from the deceased for the role he played in relation to the incident in *China, Krishantha* cunningly utilised the opportunity to settle what he owed to *Fausedeen* from the deceased's assets. All these actions certainly deserve unreserved condemnation. But a Court of law cannot make its judgment by applying a set of moral or ethical standards to assess the actions of the two witnesses. In this context, I wish to insert a quotation from the text of ***Principles of Criminal Liability in Ceylon*** by Prof Peiris (at p.70);

> "*[W]hile the link between mens rea and morality is clear, in that moral blame is treated as an element of criminality, mens rea is not synonymous with morality. The postulates of criminal law, expressed in relation to the mental element of an offence, do not give effect to ordinary moral conceptions in any degree of detail. Indeed, it is manifestly unsatisfactory that legal guilt should depend exclusively on moral ideas because of the wide range of attitudes which are prevalent in regard to moral issues. It is important that the criminal law should be clear and certain in content.*"

The 1st and 2nd charges are for conspiracy to commit murder and abduction with a view to commit murder. Thus, in the absence of evidence to establish that *Fausedeen* and *Krishantha* are accomplices, they could not be considered as such on an application of moral standards. Even if *Krishantha,* having agreed to commit murder with his co-conspirators, at a later point withdrawn from participating any further in that conspiracy at *Nedimala*

(after the 3rd, 4th and 6th Appellants joined him and others), his initial agreement to 'abduct' alone would not make him an accomplice.

In the case of ***Gunawardene v The King*** (1950) 52 NLR 142, it was held that (at p.144) a guilty associate in a conspiracy to cause the death of someone cannot divest himself of the character of an accomplice merely because he refrained thereafter from participating in the murder which had already been planned. In this instance of course, there is no evidence to prove that *Krishantha* did agree with others in conspiracy to murder the deceased in the first place and therefore, his act of protest by asserting that he no longer wishes to participate in this affair, should accrue to his advantage when the question, whether he is an accomplice or not, is to be decided.

However, it must not be overlooked that a person, who could not be considered as a co- accused to the offence with which the perpetrator of the crime is charged, could still be considered as an accomplice if the offence he is involved in could be accepted as a lessor of kindred offence to the offence, with which the main perpetrator is charged. *Soza* J, in ***Attorney General v Seneviratne*** (1982) 1 Sri L.R. 302, stated that (at p.329), "*[T]here may be occasions when an accomplice though a particeps criminis cannot be charged with the same offence. His guilty participation may not go far enough for this. Further it does often occur that an accused person though charged with a particular offence is found guilty only of a lesser or kindred offence. More properly therefore an accomplice is a guilty associate whether as perpetrator or inciter or helper in the commission of the criminal acts constituting the offence charged or a lesser or kindred offence of which the accused could be found guilty on the same indictment.*"

Learned Addl. SG rightly contended, that the evidence presented before the High Court at Bar only indicated that *Fausedeen* and *Krishantha* were only involved in the 'abduction' simpliciter of the deceased and therefore their acts do not constitute a kindred offence, with which both of them could have been

charged in the same indictment. This is due to the reason that there is no offence of 'abduction' simpliciter defined in the Penal Code as a punishable offence.

In the absence of any evidence to indicate that *Fausedeen* and *Krishantha* had any intention to commit murder, the allegations contained in the 1st and 2nd counts could not be maintained against *Fausedeen* and *Krishantha*. I therefore concur with the said finding of fact made by the High Court at Bar in relation to the 'accomplices' *Fausedeen* and *Krishantha,* upon the reasons that were adverted to in the preceding paragraphs of this judgment.

It was also urged before this Court that not only *Fausedeen* and *Krishantha,* but *Anuradha* too should have been considered as an accomplice by the High Court at Bar, particularly in view of his own admission. *Anuradha* admitted that he realised that the deceased was taken in and being transported against his will. The Court found, in relation to *Anuradha's* complicity in the 'abduction', that he had no knowledge of what would happen to the deceased after taking him in at *Kandewatta* or as to the fate of the deceased, after the 2nd to 6th Appellants took him under their control. Court specifically found that in all the important discussions *Krishantha* had with the 1st Appellant about the deceased, *Anuradha* had not participated. Having noted that his evidence at certain point contradictory with *Fausedeen* and *Krishantha*, the Court was of the view that there is no reason to reject the same merely on that account.

It is also important to note that *Anuradha* was not even arrested by any of the three different police units that successively investigated into this incident, in spite of the fact that he was taken to obtain legal advice by the 1st Appellant before the latter's arrest. *Anuradha* did not give evidence under a conditional pardon, nor a reference was made in any of the charges in the information or charge sheet to him. The admission he made was that he

realised that *Shiyam* was forcefully 'abducted' without his consent and that he drove the vehicle on, in which the deceased was taken to *Biyagama,* regardless of that realisation.

I am in agreement with what the High Court at Bar eventually found, namely, that the evidence presented before it clearly revealed that *Anuradha* was not involved with any of the discussions during which the 'abduction' of the deceased was taken up and the fact that he drove on with the 'abducted' deceased, itself would not make him having attributes of as an accomplice either to the conspiracy to murder or to the abduction to commit murder.

My reasoning derives support from a pronouncement made by a divisional Bench of this Court in ***Kumarasiri and Others v Kumarihami, Chief Registrar, Colombo, and another*** (SC TAB Appeal No. 2/2012 - decided on 02.04.2014). In that judgment, having inserted a quotation from the judgment of ***Emperor v Burns*** (11 BLR 1153), which stated " *[N]o man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious mind in the crime, or he makes an admission of facts showing that he had such hand. If the evidence of a witness falls short of these tests, he is not an accomplice and his testimony must be judged on principles applicable to an ordinary witness",* and this Court was of the view that therefore the " … *definition of an accomplice in Sri Lankan law, as accepted by Courts clearly indicates that an accomplice must demonstrate common intent and knowingly unite with the principal offender to commit the crime but excludes the mere presence of a witness in the vicinity of the scene from coming within this definition."*

Before I part with this section of the judgment, it its necessary to refer to another contention advanced on behalf of the 1st and 6th Appellants. The said contention was to the effect that, since the 1st and 2nd counts read that the 1st to 6th Appellants have conspired to murder and to abduct in order to murder "with" *Fausedeen* and *Krishantha* and in view of the finding made by the High

Court at Bar that they are not accomplices, those two charges must fail as they remained without being amended.

Learned Addl. SG's submission on this point was the prosecution had no opportunity to make any amendments to the charges after the Court delivered its verdict and when it decided that *Fausedeen* and *Krishantha* are not accomplices, there was no provision to make amendments to reflect that finding.

The contention advanced by the 1st and 6th Appellants in this regard cannot succeed for the reason that if it reflects the correct position, then in a charge of a conspiracy, if the Court found that the evidence against one of the co-conspirators is insufficient to enter a conviction against him for that charge or it entertains a reasonable doubt as to his participation in the conspiracy, then all the accused who are charged along with him to the said conspiracy must necessarily be acquitted. I am afraid this is not the law. As long as there is evidence of conspiracy between two of the many accused, still the Court could proceed to convict those two for conspiracy, even though it had acquitted others. Similarly, if the accused are charged for an offence on the basis of common intention, in conjunction with Section 32 of the Penal Code, and if one or more of the accused are acquitted for want of common intention shared with others for that offence, even one of the accused could be convicted. Hence, I find no merit in that contention and proceed to reject the same.

After stressing the point that the High Court at Bar erred in its failure to consider *Fausedeen* and *Krishantha* as accomplices, learned President's Counsel further contended that the Court also failed to evaluate the testimonial trustworthiness of these two witnesses, in view of judicial pronouncements, which laid down following principles in relation to evaluation of the evidence of accomplices.

(a) an accomplice's evidence must be reliable,

(b) it must adequately be corroborated,

(c) the corroboration must come from an independent source and not from another accomplice,

(d) the corroborative evidence must link the accused to the crime.

The reason for making reference of these principles in relation to accomplice's evidence by the learned Counsel was to invite attention of this Court to a quotation from ***Sarkar, Law of Evidence,*** 19th Ed., p.2830, where the rationale behind those principles were explained.

> "*[A]n approver is most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility. The testimony of a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin and who is a criminal and has purchased his liberty by betrayal, must be received with great caution … the principal reasons for holding accomplice's evidence untrustworthy are:*
>
> *(1) because an accomplice is likely to swear falsely in order to shift the guilt from himself,*
> *(2) because an accomplice being a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath,*
> *(3) because an accomplice gives his evidence under the promise of a pardon, or in the expectation of an implied pardon; if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the Prosecution."*

Learned Counsel placed heavy reliance on a passage, reproduced below from ***A Commentary on the Ceylon Criminal Procedure Code*** by *Reginald F. Dias,* Vol II, at p. 723, in order to impress upon this Court that the evidence of accomplices should not be relied or acted upon for the reason such evidence is essentially tainted with an obvious act of treachery and therefore lacks any credibility.

> *"[O]ne class of accomplice evidence is that given by 'approvers' or persons who have turned 'King's evidence' i.e. accomplices who have received a conditional pardon from the Crown on the understanding that they are to tell all they know about the crime in question … Such an accomplice, when called, does not cease to be an accomplice; in fact, he is one of the worst types of accomplices that can be imagined, for he gives his evidence in the hope of saving himself at the expense of the lives or liberty of his companions in crime. The fact that he gives his evidence under the shadow of a pardon counts for nothing for no pardon can restore his respectability or his credit.*

He cited the judgment of ***The Queen v. Liyanage and Others*** (1965) 67 NLR 193, where it was held " *in the case of fellow conspirators or accomplices the established practice, virtually equivalent to a rule of law, requires independent corroboration of their evidence, in material particulars. What is required is some additional evidence, direct or circumstantial, rendering it probable that the accomplice's story is true and reasonable safe to act upon, and connecting or tending to connect the particular defendant with the offence. The degree of suspicion attaching to an accomplice's evidence varies according to the extent and nature of his complicity."* It was particularly urged before us by the learned Counsel that the corroboration of such evidence is now "*virtually equivalent to a rule of law*".

Learned Counsel thereupon contended that the entire body of evidence that had been presented by the prosecution before the High Court at Bar,

particularly against the 1st Appellant, consists only of several incriminating and prejudicial statements that are attributed to him by *Fausedeen* and *Krishantha,* totalling to 54 of such statements. In view of the requirement of corroboration of their evidence, it was contended that none of these statements could be relied upon for the reason that the two accomplices cannot corroborate each other's evidence, an important factor the High Court at Bar had failed to take into account in coming to a conclusion against the 1st Appellant. Similarly, that Court had fallen into serious error once more when it considered phone records as items of corroborative material which adds to the credibility of the already tainted evidence of *Fausedeen* and *Krishantha.*

In relation to the assessment of credibility of the evidence given by *Fausedeen, Krishantha* and *Anuradha,* learned President's Counsel submitted that the manner in which their evidence ought to have been assessed was considered in the judgment of ***The Queen v Liyanage and Others*** (supra). He invited attention of Court that the said approach is a deviation from the English practice of looking for corroboration of accomplice's evidence, if only it is accepted as truthful and reliable account in the first place, and thereby in effect adopting a two-tier approach per ***Director of Public Prosecutions v Hestor*** (1972) 3 WLR 910. In ***The Queen v Liyanage and Others*** (supra), the Court stated (at p.214) *"… it is wrong … to treat the evidence of an accomplice and the corroborating pieces of evidence in two different compartments. In other words, the reliability of the accomplice's evidence should not be judged apart from the evidence led to corroborate him."*

In order to arrive at a finding that neither *Fausedeen* nor *Krishantha* had any knowledge or intention to kill the deceased, the High Court at Bar had assessed their testimonial trustworthiness on certain considerations which it found to have enhanced their credibility while certain other considerations provided independent corroboration, thereby following the said approach. In

the end of its assessment, the Court found that their evidence is credible and reliable to act upon.

In view of the strong reliance placed by the learned President's Counsel on the above quoted sections from the texts of ***Sarkar, Law of Evidence*** and ***A Commentary on the Ceylon Criminal Procedure Code*** by *Reginald F. Dias,* where the authors have stressed the point that the credibility of the evidence of an accomplice should be placed its lowest in strong language. *Sarkar states* an accomplice " … *must prove his worthiness for credibility",* whereas *Dias* too states *"[T]he fact that he gives his evidence under the shadow of a pardon counts for nothing for no pardon can restore his respectability or his credit."* In addition to the said statement, learned author once more emphasised the requirement of corroboration of such an accomplice (at p. 728) as he states that " … *He is as a rule most untrustworthy witness unless his evidence is corroborated by independent testimony on some material particulars."* It seems that the underlying rationale for these statements was the act of giving evidence on behalf of the prosecution by an accomplice is an act of betrayal in the highest order. ***Sarkar*** equated such an act to a situation akin to throwing his erstwhile associates and friends to the wolves, in order to save his own skin.

Clearly the tendency to shift one's criminality on to the others, in order to save himself from punishment, could be taken as a natural tendency of a person, when faced with the prospect of criminal prosecution. When it concerns a capital offence, this aspect assumes a greater significance. Apart from the assessment of evidence of such an individual by employing the traditional tests of credibility for its trustworthiness and reliability, using ethical considerations or moral values in order to condemn his act of giving evidence seemed such statements were " … *incorporated in the English criminal law in medieval times by schoolmen who were influenced not only by general moral*

ideas but their familiarity with the ethical refinements of the Roman Law" (vide ***Principles of Criminal Liability in Ceylon,*** *Prof. G.L. Peiris,* p.70).

When learned President's Counsel for the 1st and 6th Appellants, submitted that the High Court at Bar should have rejected and discarded the evidence of *Fausedeen* and *Krishantha,* by placing heavy emphasis on ***Sarkar's*** statement " "*[A]n approver is most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility. The testimony of a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin and who is a criminal and has purchased his liberty by betrayal, must be received with great caution",* his submission seems to be moulded more on principles of morality rather than on principles of law.

In criminal prosecutions, the Courts are bound to admit legally admissible evidence, as sanctioned by the provisions of Evidence Ordinance, in discharging its responsibility to determine the guilt or innocence of an accused. Section 133 of the Evidence Ordinance states that an accomplice shall be a competent witness against an accused person, and thereby legally approved admissibility of his evidence, subject to other provisions of the said Ordinance. Corresponding to the provisions of Section 133 of the Evidence Ordinance, Section 256 of the Code of Criminal Procedure Act permits the Attorney General to grant conditional pardon to any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry for the purpose of obtaining his evidence.

When an accomplice gives evidence in a criminal proceeding as a witness for the prosecution, especially under a conditional pardon, there would be an attempt by the accused to discredit such a witness by trying to exaggerate his involvement in the offending transaction. On the other hand, the prosecution may, on behalf of its witness, attempt to portray him as a

victim of circumstances and thereby limiting his role in the commission of the offence to a bare minimum, in order to justify its decision to offer conditional pardon. Whilst being conscious of the competing interests of the prosecution as well as of the accused, the Courts must also be cautious enough not to lose sight of why such evidence is made admissible in the first place by enactment of specific provisions of law, as a part of public policy. However, in the assessment of that evidence, the safeguards that were developed over the years by the Courts should be applied to mitigate the adverse impact on the accused person.

In this regard, I intend to digress from the current considerations to make a quick foray into the past practices of English Courts to trace the origins of presenting evidence of accomplices in criminal trials against a co-accused.

The policy considerations that were enacted into statutory provisions and thereby legalising the admissibility of accomplice's evidence was not a result of an overnight decision but had evolved over past three centuries in European societies. The State policy in offering a pardon to an accomplice was founded upon the recognition of the more pressing need to punish offenders who otherwise would be left unpunished for their crimes and continue to be in the society posing a threat to its members. Interestingly, historical aspect of these policy changes was considered in detail by *Leon Radzinowicz,* in his work "***A History of English Criminal Law and its Administration from 1750***" in Vol. 2, Chapter 2, under the title "*Impunity for Accomplices*" (at p. 33). It was noted by the learned author, similar to the accepted practice that prevailed in early 18th Century in *France* that thieves were needed to catch other thieves, *England* too had adopted the same policy, and the Government, local authorities, private companies, and even private individuals all offered

inducement to robbers, thieves, embezzlers, and murderers to betray their accomplices.

Referring to the judgment of ***R v Rudd*** (1775) 1 Leach, 119, where *Mansfield* CJ, following the prevalent common law practices, admitted an accomplice as a witness for the Crown and made use of his evidence to convict the others for a capital offence, learned author states (at p. 43), "*… the hope of receiving a free pardon or at least a more lenient punishment was held out to any accomplice, who having made a full and fair confession …"* was recognised by English Courts. He further states (ibid) " *[T]his was based on the practice of the Courts and amounted to the promise of a recommendation to mercy, not pardon by right, and it was known as equitable title to the mercy of the Crown."*

Justification for the adoption of such a State policy was explained in ***R v Turner and Others*** (1975) 61 Cr. App. R. 67, by stating " *If the inducement [to offer evidence] is very powerful, the judge may decide to exercise his discretion; but doing so he must take into consideration all factors, including those affecting public. It is in the interests of the public that criminals should be brought to justice; and the more serious the crime the greater is the need for justice to be done."*

Indeed, the morality of the State in offering a pardon to an accomplice and, not the morality of the accomplice in accepting such a pardon, was considered by scholars as far back as early 18th Century. Referring to *Samuel March Phillips* and to his "*Treatise on the Law of Evidence", Radzinowicz* (supra) states (at p. 54); "*[P]hillips probably knew better than anyone else in England the grave dangers inherent in this method of bringing offenders to justice …".* But " *… their evidence must be used … in order to prevent [the] entire failure of justice in those cases where without the aid of an accomplice's testimony, offenders remain undetected."* Thus, the public policy justification of this approach was convincingly established. In view of Lord *Ellenborough*'s statement, which was made during the trial of *E.M. Despard* for high treason in 1803, to the effect

that an accomplice's evidence is to be received and acted upon with "*an attentive and scrupulous consideration of its merit and value*", *Radzinowicz,* noted that (at p. 55) "*[T]he practice of convicting an offender on the unsupported evidence of an accomplice had been somewhat modified, and it was generally accepted that confirmation of such testimony was necessary and that, unless it were corroborated in a material part, the judge should advice the jury to acquit the prisoner.*" Accordingly, a pragmatic approach was adopted by Courts by insisting on corroboration of an accomplice's evidence in order to negate the inherent dangers of placing total reliance on such a testimony to convict another co-accomplice.

Since the introduction of statutory recognition of a formal offering a pardon to an accomplice by Ordinance No. 15 of 1898 into the criminal justice system of this country, it had since retained the said discretion, in spite of many subsequent changes made to the law on criminal procedure. Interestingly, the power to offer conditional pardon to an accomplice is also included in the Constitution since 1972. Article 22(1) of 1972 Republican Constitution and Article 34(3) of the 1978 Constitution contain such provisions. The ordinary enactments such as the Administration of Justice Law No. 44 of 1973 contained provisions governing conditional pardons in Section 118(1) while Sections 256(1) and 257 of the Code of Criminal Procedure Act No. 15 of 1979, contained similar provisions to that of Section 283 the Ordinance No. 15 of 1898, which conferred power on the Attorney General to tender a pardon, either directly by himself or through a Magistrate.

Thus, irrespective of the moral propriety of offering a pardon to an accomplice and him accepting such a pardon with the undertaking of making a full and fair confession, the Courts, nonetheless should give effect to intention of the Legislature in the enactment of these statutory provisions,

which lays down the applicable law. *Dias,* under the heading "*Considerations which should guide the Attorney General in the granting or withholding the pardon*" (supra – at p. 727) recommends that the Attorney General " *should consider the degree of complicity of the accomplice*" as there are "*involuntary accomplices*" who acts as servants of the principal offender or under his coercion, along with "*accomplices by implication*" i.e., a person who pays a bribe under pressure. Importantly, the learned author stresses the point " *[W]here possible the pardon should be tendered to the least guilty of the accomplices, with the object of securing the conviction of the most guilty amongst their number."* This has been the case in almost all such instances where the evidence of an accomplice is obtained under a conditional pardon, as indicative from judicial precedents.

In fact, the scheme presented by Sections 256(1) and 257, in selecting the person who would be offered a conditional pardon does reflect the said considerations expressed by *Dias,* as these two Sections permit the Attorney General to grant conditional pardon only to " *… any person supposed to have been directly or indirectly concerned in"* or importantly "*privy to any such offence…".*

In these circumstances, the contention of the 1st and 6th Appellants, that the High Court at Bar should have refused to act upon the testimony of *Fausedeen* and *Krishantha* by totally rejecting the same, could not be accepted as a valid contention for two reasons.

First, having already granted a conditional pardon, the accomplice, who turned himself to be a prosecution witness, is not prosecuted for the offence in view of his pardon and, if the Courts were to reject his testimony simply on the footing of him being an accomplice, it would result in the acquittal of the main perpetrator of the crime as well, which would obviously be against the public policy consideration which identified by *Dias* as "*… the object of securing the conviction of the most guilty amongst their number*".

Secondly, over the past three centuries, the Courts have consciously and effectively mitigated for most of the ill effects of an accomplice in testifying against his partners in crime "*… in the hope of saving himself at the expense of the lives or liberty of his companions in crime*". Courts achieved this mitigation by insisting on independent corroboration of his testimony. Statutory recognition for necessity of corroboration of such evidence could be found with the discretion conferred on Courts by Section 114(f) of the Evidence Ordinance by which a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. *Dias* recommends that (at p.723) " … *the necessity for corroboration, which is insisted upon in the case of generally, applies with even greater force to the case of approver witness."*

Therefore, rejecting a testimony of an accomplice, who gave evidence under a conditional pardon, solely on that basis, would undoubtedly make the relevant statutory provisions contained in Sections 256(1) and 257 of the Criminal Procedure Code Act and the jurisprudence that had built over a long period of time obsolete and redundant. Adopting such an approach would undoubtedly defeat the very purpose of enacting those statutory provisions, which were retained in the Code of Criminal Procedure Act despite the changes it had acquired over the years, for the reason that it was regarded as an effective tool for the prosecution in the administration of criminal justice.

Returning to the point at which I have digressed from, the emphasis laid on the need to corroboration of the evidence of an accomplice was necessitated due to the presumed intention of such an accomplice (as observed by *Dias*) in offering himself as a witness for the prosecution i.e. to accept the benefit of impunity from punishment offered along with it, the level of corroboration needed is not a rigid and inflexible standard that could universally be applicable to all situations.

Coomaraswamy identified three categories of witnesses (at Vol. II, Book 2, p.625), i.e., those who are wholly reliable, those who are wholly unreliable and those who are neither wholly reliable nor wholly unreliable. Corroboration is required in relation to the evidence of those witnesses who fall under the third category and is used as a cautionary rule, with statutory recognition of that requirement.

In this perspective, the term corroboration is understood as facts, " … *which tends to render more probable the truth of the testimony of a witness on any material point*" (vide *Coomaraswamy,* at Vol. II, Book 2, p.627). These facts should come from someone other than the witness to be corroborated and must arise out from an independent source and support direct testimony of the accomplice, in material particulars to connect the accused to the crime.

R.F. Dias, under the heading "*Considerations which should guide the Attorney General in the granting or withholding the pardon*" (supra – at p. 727) recommends that the Attorney General " *should consider the degree of complicity of the accomplice*". With the recognition of accomplices with multiple degrees of complicity with the crime with which the main perpetrator is accused of, it is reasonable to apply varying degrees of corroboration, in assessing their testimonies for credibility and reliability. A similar observation was made by *Coomaraswamy* (Vol.2, Book I, p.365), "*[T]he degree and gravity of the complicity of the accomplice may vary. The degree of suspicion attaching to the evidence of an accomplice varies according to the nature and the extent of accomplice's complicity*" in view of a pronouncement to that effect made by the Privy Council in ***Queen-Empress v Bastin*** (1897) AIR PC 135.

In ***The Queen v Liyanage and Others*** (supra), it was stated (at pgs. 212-213) that the " … *nature and extent of corroboration required by the rule of prudence must, from the very nature of things, vary with the circumstances of each case. What is required is some additional evidence, direct or circumstantial, rendering it probable*

that the accomplice's evidence is true and reasonably safe to act upon, and connecting or tending to connect the particular defendant with the offence."

Thus, even if a witness is proved to be an accomplice, there is no static or universal standard, that is applicable to the assessment of his evidence, which sets out the degree to which such evidence should be corroborated. But that standard, which commensurate with the degree of complicity of that accomplice, is a factor, which in turn should depend on the facts and circumstances of each case.

Learned President's Counsel for the 1st and 6th Appellants, despite presenting the contention that the evidence of *Fausedeen* and *Krishantha* should have been totally rejected by the High Court at Bar, as it failed the multiple tests in the assessment of credible evidence, also contended that even if their evidence is accepted for some reason, the trial Court should have insisted for independent corroboration of that evidence , as it is a mandatory requirement in relation to assessment of an accomplice's evidence. Therefore, he complains that the trial Court had ignored that vital aspect in arriving at the said erroneous determination to the detriment of the two Appellants.

Learned President's Counsel for the 1st and 6th Appellants, in extending his contention further, submitted that the trial Court was wrong in accepting phone records, as items of evidence that provide independent corroboration of their evidence, particularly what they claimed to have spoken during those calls. It was further contended by the Counsel that the evidence of *Fausedeen* and *Krishantha* consists of 54 instances where they made gravely prejudicial statements that are falsely attributed to the 1st and 6th Appellants, in relation to *one-to-one* telephone conversations they had with the 1st Appellant. These 54 instances were highlighted by the 1st and 6th Appellants in *Annexture* I to their written submissions. The complaint of the Appellants is that the Court had

simply narrated each and every one of such statements in its judgment on the assumption that those statements were in fact made by the 1st and 6th Appellants. Learned Counsel complained that these assumptions were made by the trial Court without undertaking any analysis and without any consideration whether the contents of such were corroborated individually.

In this regard, the 1st and 6th Appellant's contention is whenever a tower record shows that there has been contact between two phones, that factor alone cannot be taken as corroboration of the content attributed to that call, as the tower records do not contain details of call content.

The graph annexed to the written submissions (WS2) of the learned President's Counsel in order to impress upon this Court that the evidence regarding the "conference call" during which the 1st, 5th and 6th Appellants have conversed with *Krishantha,* is neither supported by the witness who gave evidence on behalf of the service provider nor by the details retrieved from tower records.

However, in assessing the credibility and reliability of the testimony of these two witnesses, whom the Appellants contend as "accomplices", the necessity for the trial Court to have looked for corroboration of such testimony as a rule, arises only if they were "accomplices" in the eyes of law. Despite the finding made that the two witnesses had no intention or knowledge that the deceased was to be murdered in that evening, the High Court at Bar nonetheless was of the view that owing to the very nature of their evidence, it is prudent to look for corroboration. In dealing with the issue of assessing credibility of the lay witnesses who spoke of the circumstances relating to the abduction and murder of the deceased, the trial Court had, in its process of reasoning, considered some of these items of evidence as evidence that enhances credibility of the witnesses while certain other

evidence was considered as items of evidence that tends to corroborate their evidence in material particular.

Since this is the manner in which the Sri Lankan Courts consider the evidence of an accomplice for its credibility, it is of importance to clarify a particular submission made by learned President's Counsel regarding corroboration. It was submitted that none of those prejudicial statements that were attributed to the 1st Appellant had been corroborated by independent evidence, but the High Court at Bar was of the erroneous view that the call records relating to each of these telephone conversations had corroborated the contents of the two-way conversation that had taken place between the caller and receiver during its duration.

It appears that the said contention carries two components within it. While stressing for independent corroboration of call content, it also emphasised that contents of each telephone conversation must have been corroborated individually. This contention is obviously not a convincing one. If this submission is accepted as a one that reflects the nature of corroboration that is needed to assess credibility of a witness, the resultant position would be that the prosecution is required to present independent evidence in respect of each and every item of evidence its witnesses speak of in Court and thus negates the necessity to lead evidence of that accomplice.

Coomaraswamy (Vol. II, Book 1, p.373) states in relation to the requirement that it should connect the accused to the crime, that " *[T]he corroboration need not be direct evidence that he committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with it. Nor it is necessary that the accomplice should be confirmed in every detail of his evidence, if it were, the evidence would be merely confirmatory of the independent testimony and would not be essential to the case.*" This statement echoes what has already been quoted above in relation to the nature of corroboration from *Coomaraswamy* (supra)

that it means facts " … *which tends to tender more probable the truth of the testimony of a witness on any material particular.*" Thus, manner of application of relevant principles by the High Court at Bar in the assessment of credibility of *Fausedeen* and *Krishantha* could not be faulted.

Moving to consider the remaining part of the submissions, it is important to note that, the several instances referred to by learned President's Counsel with the term '54 highly prejudicial statements attributed to the 1st Appellant', are in fact limited only to 5 such instances of conversations carried out through phones. Remaining 49 instances are in relation to conversations the 1st Appellant had with *Krishantha* and *Fausedeen*, which are person to person conversations. After considering the five telephone conversations first, these instances too will be dealt with.

It is relevant to note in this context that several admissions were recorded under Section 420 of the Code of Criminal Procedure Act, including the telephone numbers of the witnesses as well as the 1st to 6th Appellants. Importantly, the details of calls initiated from these phones, the ones received by them, duration of the conversation and location of the phone were also tendered by the prosecution.

The first of the telephone conversations was in relation to a one *Krishantha* had with the 1st Appellant. During this conversation, that had taken place in the first week of April, the 1st Appellant had brushed aside the suggestion to present *Fausedeen's* problem to CID and instructed *Krishantha* to come to his office to discuss over this matter. The complaint of the 1st Appellant is that there was no corroboration of this item of evidence and the High Court at Bar had merely made a repetition of the evidence without a proper analysis. A perusal of the section in which this reference is made in the judgment reveals that the High Court at Bar was merely making a reference to the evidence of *Krishantha,* and thereby taking note of this item of evidence.

The second instance refers to the demand made by the 1st Appellant that he should be given Rs. 10 Million after he secures repayment of Rs. 50 Million. Complaint against this item of evidence of the Counsel is that, in spite of the Admission No.123, where it was admitted *Krishantha* made no such reference in his statement to CID, in the absence of any corroboration of that evidence, the High Court at Bar simply accepted and repeated that evidence without undertaking any analysis.

Contrary to the claim of the 1st Appellant, the High Court at Bar considered *Krishantha's* evidence on this point and, after having ascertained the nature of the omission, it was of the considered view that the said omission be attributed to the threats the witness had received compelling him to supress the involvement of the 1st Appellant, while making statements. Court found that his evidence over this meeting with the 1st Appellant was confirmed by P7,P7A and P8.

Third telephone conversation is related to a call received by *Krishantha* from the 1st Appellant. After the *Kandewatta* Road 'abduction', the 1st Appellant, after verifying with *Krishantha* that they had taken the deceased in, instructed him to proceed to *Biyagama,* as he had already given instructions to the 5th Appellant regarding what is to be done with him. The Court was of the view that the tower records confirmed the call between the two and accepted the same as an independent corroboration of *Krishantha's* evidence. The complaint of the 1st Appellant against that finding is that there was no independent corroboration of the contents of the call as the tower records would only confirm the call and its duration. Despite *Krishantha's* failure to mention this fact to the Magistrate, the trial Court erroneously accepted that evidence as a corroborated item of evidence.

The fourth conversation referred to a conference call involving *Krishantha* the 1st,5th and 6th Appellants. The evidence as to the contents of this

call, if accepted as credible, indicate the complicity of the 1st , 5th and 6th Appellants to the abduction and murder of the deceased. Since this call also featured in the statements made from the dock by the 5th and 6th Appellants, who offered an alternative content to the conversation attributed by the prosecution to that call, in order to impugn their respective convictions, it is intended to undertake a detailed consideration of this contention at the stage where the grounds of appeal of the 5th and 6th Appellants are examined for its merits.

Lastly, the contents of the call referred to as the 52nd item of *Annexure 01* to the written submissions of the 1st and 6th Appellants indicate that the 1st Appellant, using the 3rd Appellant's phone, had checked up with *Fausedeen,* whether he was able to arrange some cash for the 6th Appellant, for his tour in Thailand. The Appellants contend that there was no corroboration to the evidence regarding that it was the 1st Appellant, who spoke to *Fausedeen,* and also to the claim that *Fausedeen* remitted cash in favour of the 6th Appellant, consequent to that call.

Learned Addl. SG, submitted that the call contents could only be obtained through a specific software, after recording such conversations by one party or through the engagement of the practice known as 'eavesdropping', which is an act prohibited by law. It is her contention that a total number of 19 telephone connections were used during the entire period of conspiracy until its common purpose was achieved, and in view of the totality of the evidence that had been presented before the High Court at Bar, it had correctly held that the tower details generally corroborate the oral testimony of the two witnesses as to the contents of the specific conversations.

The question whether the tower details of a telephone conversation could corroborate the contents of a conversation attributed to that call arose for consideration of this Court, in slightly a different perspective, in the High

Court at Bar appeal of ***The Attorney General v Potta Naufer and Others*** (2007) 2 Sri L.R. 144. In that appeal, this Court considered the evidence of a prosecution witness, who was contacted by the 1st Appellant *Potta Naufer,* through a number not registered under his name. The question of fact that arose for determination by Court was whether it was the 1st Appellant, who in fact initiated that call.

Having regard to the totality of the evidence presented before the High Court at Bar, this Court held (at p. 176):

> *"[A]ccording to his evidence this witness had travelled to Hambantota passing Suriyawewa and Ambalantota with one Sunil Gamage who had arrived from Japan with his traditional dancing troupe. For this purpose, the witness had borrowed a vehicle belonging to the 1st accused. The witness stated that he was on his way back to Colombo when he received a call from the 1st accused on 19.11.2004, at around 2.40 p.m. while he was in Hanwella. The records produced by Mobitel Lanka Pvt., Ltd., and Celltel Lanka Pvt., Ltd. corroborates this statement of the witness. The witness observed that the number 418 from which the call was made was not the usual number used by the 1st accused, but states that he could easily identify the voice of the 1st accused as they have been in regular phone contact, and by virtue of their long-standing friendship."*

In reaching that conclusion, this Court utilised evidence presented before the trial Court through expert witnesses, who are academically and professionally qualified in the fields of electronics and telecommunications and therefore are capable of describing the manner of collection and preservation of data regarding their customer communications and the technology that facilitates identification of their respective locations of both the caller and the receiver, based on technology. There was also evidence led

through these experts to the effect that every call made and received by a mobile phone, passes through a mobile switching centre where its details are recorded, which then analyses the number and determines whether the call is meant for a particular subscriber within that network or any other network.

Information recorded in this mechanical process includes the calling number, receiving number, duration of the call, identity of the tower or base station, and the time and date of the call. It is this bundle of technical evidence that had cumulative effect in the finding that the tower records corroborate the oral evidence of that witness.

Similarly, in the appeal before us, the prosecution presented evidence through the several expert witnesses on those aspects as referred to in the preceding paragraph. In addition, the prosecution also led evidence of an expert in network planning and mapping, *Dhananjaya Ponnamperuma,* through whom it was elicited that even during the time LTTE terrorist movement was active, they co-operated with the security establishment by making available the maps indicating the geographical locations of a particular subscriber, who used his mobile phone to initiate and receive calls.

Those technical evidence would undoubtedly indicate all the details of the calls that were initiated and received, but as learned President's Counsel contended can that be extended to corroborate the contents of the conversation?

Contents of a conversation that had taken place during a call is obviously known only to the person who initiated the call and to the person who received that call, excluding the instances where a conference call was initiated between multiples subscribers or if the phone was put on speaker mode, enabling others to hear a conversation. When a witness, having described the relevant background, makes a disclosure of the content of what

he had conversed with a particular accused during that call, the acceptance of that evidence as to the content, would depend on the testimonial trustworthiness of that witness. When such a disclosure is made, the accused person could either simply deny the content that had been attributed to him or, in addition to the denial, could offer an alternative content, which the Court would consider along with the evidence of that witness.

This is because, in a criminal trial the accused has the opportunity to hear the exact words of the conversation that are attributed to him by a prosecution witness, which tends to connect him to the counts contained in the indictment. In the absence of an alternative content, a Court would only have one version of the call content to deal with and, if that witness is found to be credible and reliable, it could rely on that evidence in its reasoning to determine guilt or innocence of the accused. Of course, it must be emphasised here that there is no burden on an accused at all to offer an alternative content. Similarly, it cannot be said that what the prosecution witness said is simply accepted because there was no alternative content provided by an accused.

If the content of a telephone conversation, as spoken to by a witness, is thereafter transformed into an action or inaction, consequent to that call or traceable to that conversation, that fact would tend to corroborate the content attributed to conversation with the accused. Thus, if the totality of the surrounding circumstances tends to support the witness's version of the conversation, a Court could accept that particular content as an instance of truthful disclosure.

If the act that A and B were engaged in a conversation was seen by C, and if A denies the fact that he spoke to B on that occasion and thus becomes a disputed fact, in order to establish that A and B were in a conversation, the evidence of C could be relied upon by B to corroborate the fact that he

conversed with A. However, the complaint of the Appellant is that the tower records alone cannot corroborate the disputed contents of a conversation.

In this context, it must be stated that the purpose of the call details obtained from tower records are to substantiate the fact that a particular subscriber is electronically connected to another subscriber in order to facilitate communication between the two, over a particular duration of time and, to that extent, the tower records can be accepted as corroborating that fact. In the strictest sense, the question whether the technical evidence could be extended to corroborate the contents of the conversation should be answered in the negative. However, it must also be emphasised that in an appropriate situation, surrounding circumstances that are indicative as to the contents of a call, as referred to above, could well be taken along with technical evidence as items of corroboration of call content.

In the five instances highlighted by the 1st and 6th Appellants, as referred to in the preceding section, except for the conference and the calls made by the 6th Appellant, there was no alternative content suggested by them. In respect of the 1st and 2nd instances, during cross examination by the 1st Appellant, it was highlighted that *Krishantha* failed to mention to the Magistrate that these demands were made. No alternative content was suggested, although a suggestion of total denial was made. However, no cross examination of the witness on the 3rd incident was made by the 1st Appellant. Challenging the evidence of *Krishantha* on the fifth incident, the 1st Appellant suggested that he never demanded any money for the 6th Appellant's trip to Thailand.

In view of the material elicited during examination in chief and cross examination of *Fausedeen* and *Krishantha* by the 1st Appellant and others, the High Court at Bar was inclined to accept their evidence as credible and reliable. The 1st and 6th Appellants invited the attention of this Court that in

most of the remaining 49 out of the total of 54 instances, the witnesses failed to state what they said in evidence either to the investigators or to the Magistrate.

High Court at Bar was mindful of the several omissions that were highlighted by the Appellants off the narrative of *Fausedeen* and *Krishantha,* when it had undertaken the task of evaluating same for credibility. The Court did consider these omissions, in the light of the answers given by the witnesses, when these omissions were brought to their notice during cross examination. *Krishantha,* upon being challenged with an omission from what he stated before the Magistrate, replied that after having determined to tell the truth, he had divulged what he thought was relevant to the Magistrate. He further added that, unlike in the High Court, during his statement, there was no questioning of the incident in detail. The Court considered the admitted fact of the witnesses that they have either deliberately supressed material or simply lied to the investigators, when they were being interrogated by the CCD or CID, as they made these statements under threats.

In relation to the circumstances that were presented before the High Court at Bar, there appears to be a reasonable assessment of credibility on the specific omissions that were highlighted. Generally, the lay witnesses on whose evidence the prosecution would rely on to prove the charges against the accused are mainly the relatives, friends, or acquaintances of the victim of crime. They would truthfully describe the incident and what they know of the incident to the investigators on the first available opportunity when their memories are fresh. They would then repeat that narrative during the non-summary proceedings or in the High Court, to the best of their ability to recollect the incident. They would vouch for the accuracy and truthfulness in what they stated to police and to Court.

The considerations that are generally applied for evaluation of evidence of a witness in such a situation, might be proved ineffective especially when the witnesses clearly admit that they supressed details and deliberately lied to the investigators under compulsion. In the instant appeals, the admitted acts of suppression of material are also attributed to the actions of the 1st Appellant, who had issued death threats to dissuade them from disclosing the truth. In such a situation, trier of facts will have to be alive to the ground realities, whilst being extra cautious in the assessment of such evidence on his quest to discover truth. Perusal of the impugned judgment did not reveal any reason for that Court to look for corroboration, nonetheless, it had looked for same. The approach adopted by the High Court is indicative that it was alive to the fact that the witnesses have admittedly lied to investigators, and they omitted to mention certain items of evidence in their statements to the Magistrate, and therefore the Court ought to be cautious over those considerations.

In fact, the High Court at Bar noted and considered certain *inter se* inconsistence between *Fausedeen* and *Krishantha* as well as these two and *Anuradha* (pgs. 70 and 244 of the judgment) and attributed the inconsistencies to faulty memory of the witnesses. The Court, in evaluating *Krishantha's* evidence on each of the incidents he spoke of during his narrative, considered same along with the other evidence and found them either to have been corroborated or as instances that enhances his credibility.

These large number of individual incidents, referred to in the judgement of the High Court in this regard could be identified as follows; calling *Anuradha* on his mobile in order to pump diesel to the van (p.276), *Shenal's* act of joining them in the van near *Naga Vihara Temple* (p.278), *Anuradha* going to the 1st Appellants residence on his invitation (p.281), borrowing a van used to take the deceased before he was murdered (p.282),

Fausedeen, Krishantha and *Anuradha* were at the 1st Appellant's residence (p.523),during that time 2nd Appellant too had been there (p.525), calling *Krishantha* due to his delay to turn up at *Polhengoda* junction (p.526), 6th Appellant visiting *Sheshadri's* residence (p.227), *Fausedeen* did not continue to travel along with the rest after reaching *Mayura Kovil* (p.531), *Krishantha* dropped off 1st Appellant at his residence along with the 3rd Appellant (p.533), *Fausedeen* and *Krishantha* started using two phone connections on the directions of the 1st Appellant (p.533), *Krishantha* leaving for Thailand (p.533), *Krishantha* sending a text message to *Fausedeen* to contact 1st and 3rd Appellants(p.534), *Krishantha* meeting the 1st Appellant in his office at *Peliyagoda* (p.539), *Krishantha* was near *Shiyam's* factory at *Saranankara* Road (p.541), *Kirhantha* and *Anuradha* were at *Peliyagoda* office (p.548), *Krishantha* visiting the 1st Appellant's relative at *Barnes* Place (p.550), *Krishantha* came to *Balapokuna* Road with *Anuradha* (p.556), *Krishantha* using *Shenal's* phone to get the gate of the 1st Appellant's residence open (p.588), *Anuradha* travelling along with *Krishantha* to *Polgahawela* Courts (p.590) and *Krishantha* and *Anuradha* were at *Peliyagoda* office (p.594 of the judgment).

The High Court at Bar also considered *Fausedeen's* evidence in a similar manner and found it to have been also corroborated by other evidence. These incidents are related to *Fausedeen* instructing *Shafeen* to travel along *Kandewatta* Road after the deceased was killed (p.291), destroying *Fausedeen's* phone along with the deceased by *Shafeen* on instructions of *Fausedeen* (p.295), obtaining Rs. 500,000.00 from *Nazeer* to be given to the 1st Appellant (p.302), *Fausedeen* calling *Krishantha* to enquire about the delay in coming to *Polhengoda* junction (p.526), *Fausedeen* had got off near *Mayura Kovil* after showing the deceased's factory (p.531), *Fausedeen* was near *Shiyam's* factory when the 5th Appellant came to see that (p.542), after the failed attempt to 'arrest' the deceased, *Fausedeen* came to 1st Appellant's residence to plan out

the next step (p.544), when *Krishantha* left *Kandewatta* Road with the deceased, *Fausedeen* called *Shafeen* to bring his vehicle (p.586) and before the 'abduction' of the deceased *Fausedeen* and *Krishantha* were together (p.556 of the judgment).

These incidents that are far too numerous to be referred descriptively and individually in this judgment, along with the reasoning of the High Court at Bar. However, the most significant incidents that were referred to by the trial Court regarding the charges levelled against the 1st to 6th Appellants, will be included in this section, as we progress along the issue of evaluation. Of these, the most important incidents are the 'abduction' of the deceased from a point at *Kandewatta* Road, and the departure of the 2nd to 6th Appellants in two vehicles from the 1st Appellant's residence at *Nedimala*, with *Krishantha, Anuradha* and the deceased. These incidents are needed to be considered as they are directly linked to the conviction of the Appellants. These individual incidents had taken place on the evening of 22.05.2013, and the tower records indicate the different geographical locations they were served with during the period commencing from early evening to the late evening of that day.

Krishantha, in his evidence described the sequence of events that led to the act of failed 'abduction' of the deceased in the following sequence. *Krishantha, Anuradha* and the 5th Appellant were waiting in their parked vehicle along *Saranankara* Road, in anticipation of the deceased to leave his factory at any moment. *Fausedeen* was the first to arrive at that place in his vehicle. Tower Records indicate that *Fausedeen's* mobile phone was served by *Saranankara* Road North – C tower from 5.46 p.m. to 7.12 p.m. *Krishantha's* mobile phone was served by the same tower 6.47 p.m. for the first time in that evening along with *Anuradha's* mobile phone at 6.52 p.m. The 5th Appellant's mobile phone was served by *Pamankada* DCS-1 tower at 6.34 p.m. and by *Saranankara* Road DCS-2, at 7.28 and 7.29 p.m.

After their attempt to take the deceased in was called off by the 5th Appellant, *Krishantha* returned to the 1st Appellant's residence with him in *Anuradha's* double cab. *Fausedeen* went away on his own. After listening to 5th Appellant, the 1st Appellant asked *Krishantha* to inform *Fausedeen* to bring the deceased to a halfway point from which his men could take him. *Krishantha* then responded to the 1st Appellant with a long story, stating *Fausedeen* is fast losing confidence in them and suspects all their actions as mere pretence. He insisted that they take the deceased in without further delay. It is at that point the 1st Appellant decided that they should "arrest" the deceased tomorrow and directed *Krishantha* to ask *Fausedeen* to bring him along. The 1st Appellant instructed *Krishantha* to go in the double cab with others to bring in the deceased.

At 7.20 p.m. *Fausedeen's* mobile phone was served by *Iswari* Road DCS-3 tower, whereas *Krishantha's* mobile phone was served by *Nedimala* tower at 7.55 p.m., with that of *Anuradha's* at 8.04 p.m. The 5th Appellant's mobile phone was served by *Nedimala* Reloc DCS tower at 8.23 and the 1st Appellant was served by *Nedimala- A* tower at 6.11 p.m., *Nedimala-U* tower at 7.04 p.m., *Anderson* Road-B at 8.33 p.m., and *Kalubo-V* tower at 8.35 p.m.

On instructions of the 1st Appellant, *Krishantha* and *Anuradha* met him on the following day at his *Peliyagoda* office some-time after 1.30 p.m., the day on which the deceased was expected to be 'abducted'. When they met, *Kirishantha* conveyed that *Fasedeen* agreed to bring the deceased along with him up to some point. 1st Appellant's response was that he would give two of his men and to bring in the deceased. *Krishantha* and *Anuradha* was asked by the 1st Appellant to stay back as he intended to go home with them. *Krishantha* contacted *Fausedeen* to confirm that he needed to bring the deceased with him that very evening.

On their way to *Nedimala,* the 1st Appellant visited one of his relatives who resides along *Barnes* Place and then arrived at his residence with *Krishantha, Anuradha* and the 3rd Appellant. The 1st Appellant assigned 2nd and 5th Appellant to accompany *Krishantha* to bring the deceased. The 5th Appellant had not returned from *Kurunegala* by then, and *Krishantha* had to wait until he arrived at *Nedimala*.

The tower records indicate that the 1st Appellant's mobile phone was served by *Peliyagoda* New Bridge *DCS-2* at 12.32 p.m. and continued to be served by the *Peliyagoda* New Bridge *DCS-2, Peliyagoda* and *Peliyagoda New Bridge A* towers until 5.06 p.m. and was thereafter served by *Barnes* Place tower at 5.52 p.m. *Krishantha's* mobile phone was served by *Peliyagoda New Bridge A* tower at 1.13 p.m. while *Anuradha's* was served by the same tower at 1.11 p.m. These two witnesses either received or initiated calls through *Peliyagoda* tower until 5.11 and 5.16 p.m. respectively. At 7.49 p.m. K*rishantha's* mobile phone was served by *Nedimala* tower and *Anuradha* too was served by the same tower at 7.35 p.m.

The 5th Appellant who was assigned to accompany *Krishantha* that evening, was served by the tower at *Peliyagoda* New Bridge *DCS-2* at 12.32 p.m., *Kurunegala* Town Hall tower at 3.27 p.m., *Kurunegala* Bus Stand- 1 tower at 3.48, *Kadurugas Jun* tower at 4.30 p.m., *Polgahawela-1* tower at 5.25 p.m., *Warakapola* tower at 5.50 p.m., *Ambepussa* tower at 5.52 p.m., *Imbulgoda* tower at 6.54 p.m. *Peliyagoda* tower at 7.18 p.m., and *Nugegoda* tower at 7.56 p.m. The other person who was assigned to bring in the deceased, the 2nd Appellant, too was served by *Nedimala* tower at 8.04 p.m.

After the 5th Appellant returned, *Krishantha* set off to meet up with *Fausedeen,* who agreed to bring the deceased. *Fausedeen,* having verified with *Krishantha* of his whereabouts, met them at a point along *Balapokuna* Road. *Krishantha* joined *Fausedeen* in the car driven by the deceased and proceeded

to *Kandewatta* Road. Then the 'abduction' had taken place and *Krishantha* left taking the deceased with him, leaving *Fausedeen* stranded. *Krishantha* clarified in his evidence as to why he chose *Kandewatta* Road for this operation. There is a 'garage' near the place where the 'abduction' had taken. *Krishantha* gets all mechanical repairs to his vehicles, attended to in that establishment and, for that reason, was quite familiar with the area.

Fausedeen, who was served by *Saranakara* Road – 2 tower form 6.07 p.m. to 7.02 p.m., served by *Havelock* tower at 8.09 p.m., *Col 5 – Dickman's Road GGI3* tower at 8.39 p.m., *Col 5 Maya Ave – GSI* at 8.43 p.m. and *Kohuwala DDI - 4* tower at 8.4 p.m. while *Anuradha* and *Krishantha* too were served by *Balapokuna B, Balapokuna* East C towers between 8.35 p.m. to 8.51 p.m. and 8.51 to 8.57 p.m. *Fausedeen* was thereafter served by *Polhengoda Junc – GS* tower at 9.04 p.m., *Narahenpita Lanka Hosp* tower at 9.10p.m., *Col 5 Maya Ave* tower at 9.12 p.m., *Col 5 Skelton Rd DDI 6* at 9.18 p.m., *Col 5 Maya Ave* tower at 9.21 p.m., followed by *Col 6 Peterson Ln DSI* tower at 9.28 p.m.

Contrary to the belief of *Krishantha* that after taking the deceased in, they were to proceed to *Nedimala,* the 5th Appellant directed *Anuradha* to proceed to *Biyagama,* instead. Only after the deceased agreed to transfer property, nearing *Biyagama,* they were instructed to return to *Nedimala.*

The 5th Appellant was served by *Nedimala-1* tower at 9.10 p.m. Tower records also indicate that *Krishantha* and *Anuradha* were served by *Biyagama* tower between 9.32 to 9.46 p.m. and then once more served by *Nedimala* tower at 10.22 p.m.

At *Nedimala* the 3rd , 4th and 6th Appellants also joined *Krishantha,* who arranged a van from his brother's residence at *Baddegana* and travelled along with the deceased. After turning towards *Malabe* from *Koswatta* junction, they switched vehicles, after passing *Kaduwela* bridge they turned towards

Biyagama, travelled up to a point. On instructions of the 5th Appellant, *Krishantha* returned home with *Anuradha* in his double cab. The 2nd, 3rd, 4th, 5th, and 6th Appellants proceeded on in the van with the deceased.

Krishantha's as well as *Anuradha's* call details obtained from tower records indicate that they were served by *Duwa* Road tower at 9.41 p.m., *Baddegana* tower at 10.42 p.m., *Battaramulla* tower at 10.46 p.m., *Talahena* tower at 10.54 p.m., *Malabe* tower at 11.05 and 11.07 p.m., *Kaduwela -A* tower at 11.14 and 11.16 p.m., and then *Etulkotte* tower at 11.39 p.m., for a 'conference call' and finally for the day, *Kotte* tower at 11.41 and 11.42 p.m.

The 2nd Appellant was served by *Nedimala* tower at 10.54 p.m., along with the 3rd Appellant at 8.18 p.m. and 4th Appellant at 8.15 p.m. The mobile phone of the 6th Appellant too was served by that tower at 10.48 p.m. After being served by *Nedimala* tower at 9.10 p.m., the 5th Appellant was served by *Kaduwela-2* tower at 10.28 p.m., *Anula Vidlaya-2* tower at 10.32 p.m., *Pagoda* Road tower at 10.32 and 10.33 p.m., *Delgoda* tower for a 'conference call' at 11.39 p.m., *Dompe* town tower at 11.56 p.m. and finally by *Kanduboda* tower at 12.58 a.m.

When tower records are aligned with the narrative of *Fausedeen, Krishantha* and *Anuradha,* it is apparent that their movements within the day of 22.05.2013 do perfectly tally with them. The two parties were in the service area of *Balapokuna* tower during the same time period, is a factor at least supports all three witnesses for consistency. This is because all three witnesses claim they had their mobile phone with them and thus provide a tool to verify their claims against a contemporaneously made digital record, which could not be tampered with. The High Court at Bar, however, did not solely rely on tower records when it looked for corroboration of the evidence of the three witnesses.

There are no tower records supporting the presence of three witnesses for the 'abduction' which had taken place at *Kandewatta* Road. But the recovery of the deceased's vehicle from *Kandewatta* Road by the CCD, along with the contents of CCTV footage from the deceased's factory premises as well as Dr. *Ratnayake's* residence at *Kandewatta* Road supported *Fausedeen's* claim that he had accompanied the deceased immediately after their evening prayers to *Kandewatta* Road. In both these locations, *Fausdeen* appeared in CCTV footage with his shirt sleeves and trousers rolled up, ready to enter Mosque for prayers. The fact that *Fausedeen* was picked up from a point along *Kandewatta* Road too is supported by *Shafeen,* who was called by the prosecution as a witness.

The prosecution presented evidence regarding the recovery of a damaged mobile phone recovered by the CID during its investigations, after being thrown into a canal by *Shafeen*. This was the phone that was used by *Fausedeen* to communicate with *Krishantha.* After learning from *Krishantha* that the deceased may have been murdered in the early hours of 23.05.2013, he instructed *Shafeen* to destroy that phone. *Shafeen* gave evidence confirming the instructions he received and what he did pursuant to those instructions.

The decision to provide a van to be used by the 2nd to 6th Appellants to take the deceased was a spontaneous one. When *Krishantha* refused to take part in the activities any further, the 1st Appellant demanded that he provide a van for the 2nd to 6th Appellants to travel in. *Krishantha* borrowed one from his brother's residence at *Beddagana.* He had travelled in the van following the cab, in the direction of *Kaduwela.* Then the switching of vehicles occurred on the instructions of the 5th Appellant. The deceased was brought into the van, and the 2nd to 6th Appellants proceeded along with him. On his way, *Krishantha* was contacted by the 5th Appellant by phone in order to inform him that the van could be picked up from the 1st Appellant's residence in the

following morning. When *Krishantha* took the van parked in the garden in the morning, there was a T56 weapon inside the van. After *Krishantha* spoke to the 1st Appellant, before leaving to *Polgahawela,* he was instructed to thoroughly clean both vehicles. The prosecution presented evidence of the employees of the two vehicle service centres, where the two vehicles were cleaned.

There is no doubt that the deceased had travelled in that van at some point between 10.00 p.m. on 22.05.2013 to 6.15 a.m. on 23.05.2013. This fact was confirmed after DNA profiling by Prof *Illangasinghe* on a sample obtained from a faded patch of body fluids, found on surface of the upholstery of the middle seat of that van, located close to the sliding door. This patch was first identified by the Government Analyst, only after it tested positive for human blood.

Anuradha said in his evidence that after switching of vehicles, the 5th Appellant who travelled with him in the cab, after passing *Pittugala* bridge, bought a coil of rope and some cigarettes. At some point, the 5th Appellant had picked up the T56 weapon from the double cab and joined the others in the van, and *Krishantha* was instructed to return home with *Anuradha*. During cross examination by the 4th Appellant, *Anuradha* admitted that he threw away pieces of rope found inside the van, after collecting it from *Nedimala,* in the following morning. *Dias* speaks of an incident where he was instructed by the 3rd Appellant to throw away a nylon cord, a few days before the arrest of the 1st Appellant. The postmortem examination confirmed a ligature mark around the neck of the deceased, which, in the opinion of the medical witness, may have caused by ligature, when it was tightened around the neck of the deceased, probably in order to subdue any resistance offered by the deceased, as his death was due to firearm injuries to the head.

The High Court at Bar also considered the suggestion put to these witnesses that they connived with the investigators to fabricate a case against

the 1st Appellant by weaving a narrative based on the tower records of calls received and initiated by him. Almost all the Appellants, levelled the same allegation against the investigators, particularly against ASP *Abeysekera,* in their respective dock statements. The Court considered these complaints extensively and concluded that the sheer complexity of the factual narrative as spoken to by the witnesses supported by similarly complex technical evidence made it simply impossible for one to remember all these individual incidents in such a detailed manner and to describe them in Court purely from memory and therefore the allegation of a fabricated narrative at the instance of CID has no validity.

In my view, the act of weaving facts to fit into tower records could be accepted as a reasonable proposition but only in a very limited sense. The factual basis on which the said complaints are founded is that the 'accomplices' did not implicate any of the Appellants during their initial statements and did so only after making several statements after taking contradictory positions. Admittedly, *Fausedeen* and *Krishantha* did not volunteer information to assist investigations at the initial stages and they did so only when they were confronted with the details of their phone records. *Fausedeen* was also shown the CCTV footage obtained from *Kandewatta* Road, to persuade him to volunteer information. Both of them had reluctantly divulged the details of what had taken place between them but did not implicate the 1st and 6th Appellants or any of the officers involved with the incident. *Fausedeen* and *Krishantha* did implicate them only after their family members obtained legal advice on their behalf and conveyed that advice to them, when they were kept under detention orders.

It is the evidence of the investigators that they persisted on with interviewing *Fausedeen* and *Krishantha* until they disclosed all their actions. The investigators were aided in their investigations with the details of tower

records. In that sense, the contention of the 1st to 6th Appellants that the case against them was built upon phone records is partially a correct proposition, although it is only valid to a very limited sense, as noted above.

On behalf of the 1st to 6th Appellants, the three prosecution witnesses, *Fausedeen, Krishantha* and *Anuradha* were cross examined extensively by a team of Attorneys at Law, including several President's Counsel. All three witnesses have survived this most effective, time tested and universally accepted method of verifying truthfulness of their evidence. The High Court at Bar, having had the benefit of observing the demeanour and deportment of these witnesses during their examination in chief as well as during their cross examination, which continued for several consecutive days, eventually decided to accept their evidence, by making references as to their demeanour.

It is these factors that were considered by the High Court at Bar in determining to accept the evidence of the three principal witnesses, as credible and reliable evidence, supported and corroborated by independent sources. Indeed, these factors clearly satisfy the requirements of corroboration that is needed, in view of what *Coomaraswamy* states (supra) regarding items of corroboration, which he describes as the facts " … *which tends to render more probable the truth of the testimony of a witness on any material point*."

Having carefully perused the entire body of evidence presented before the Court below, I am unable to find any fault in the finding made by the High Court at Bar, on the credibility of these witnesses, or on the process of reasoning it had adopted in arriving at that finding.

The remaining ground of appeal relied on by the 1st and 6th Appellants was the alleged deprivation of a fair trial due to the prosecution's failure to disclose all matters that the CID had gathered during its investigations. They strongly relied on the *dicta* of Fernando J in ***Wijepala v The Attorney General***

(2001) 1 Sri L.R. 46, which brought in the principle of "*equality of arms*" in criminal prosecutions. Learned President's Counsel's complain in this regard was that the prosecution, by its failure to provide those important material, had "starved" them of vital information.

It was contended by Counsel that the disclosure of those information became vital as there are no eyewitnesses or any CCTV footage to place 1st and 6th at the scene or in the journey to the place of murder, no murder weapon recovered and there was no DNA evidence to indicate any involvement of 1st and 6th Appellants. Learned President's Counsel particularly referred to the failure of the prosecution to produce phone records of the deceased and accused the prosecution of withholding certain CCTV footage which had the tendency to indicate that several others were involved in the abduction.

Since the complaint by the 1st and 6th Appellants relates to the alleged failure to disclose certain items of information that may have come to light during investigations were not provided to them, it is relevant to consider the applicable statutory provisions which govern the issue. These statutory provisions describe what should be provided to an accused with the service of an indictment.

Section 5 of the Code of Criminal Procedure Act states that all offences under the Penal Code, under any other law, unless otherwise specially provided for in that law or any other law, shall be investigated, inquired into, tried and otherwise dealt with in according to the provisions of that Code. Despite the fact that the trial against the Appellants proceeded on a charge sheet upon exhibition of information by the Attorney General under Section 450(3), these provisions are applicable to determine the entitlement of an accused, in view of Section 5 of the Code of Criminal Procedure Act .

Section 450(5)(a) states " *[A] trial before the High Court at Bar under this Section shall be held as speedily as possible and shall proceed nearly as possible in the manner provided for trials before the High Court without a jury, subject to such modifications as may be ordered by the Court or as may be prescribed by rules made under this Code."*

The contents of an indictment are statutorily governed by the provisions contained in Section 162(1), which imposes a mandatory duty on the prosecution to make a list of witnesses whom the prosecution intends to call, and another list of documents and things intended to be produced at the trial, termed as "productions". The explicit provision contained in Section 162(2) similarly imposes a mandatory obligation to attach those documents it had identified and listed out in sub sections 162(2)(a) to (f) to an indictment, so that those documents could be served on an accused along with an indictment at the time of his arraignment.

Since this is a situation where there was no preliminary inquiry which preceded the institution of proceedings before the High Court at Bar, the provisions of Section 162(2)(b) become most applicable to the complaint of the Appellants. Section 162(2)(b) states that " *where there was no preliminary inquiry under this Chapter, copies of statements to the police, if any, of the accused and the witnesses listed in the indictment"* should have been provided.

The phrases that appear in Section 162(1) that " *a list of witnesses whom the prosecuting intends to call*" along with "*documents or things intended to be produced at the trial"* are applicable to Section 162(2)(B) which make it mandatory to the prosecution to make available copies of statements made to police by "*the witnesses listed in the indictment*". Thus, the mandatory duty to make available the statements of the witnesses and documents or things, are in relation to such statements of the "*witnesses whom the prosecuting intends to call*", and documents or things "*intended to be produced at the trial"* and not any

other. This being the scheme provided by the Legislature in affording an accused an opportunity to effectively defend himself from a prosecution by State, it might be of interest to consider whether *Fernando* J, in ***Wijepala v The Attorney General*** (supra) did introduce any expansion to that scheme. That was an instance where the prosecution failed to provide a copy of the 1st information of the crime to the appellant before this Court but instead had served another statement that was recorded during the course of the investigations.

It is evident from the judgment itself that his Lordship identified the question whether the witness *Senaratne*, actually saw the deceased being stabbed. This question arose for consideration because *Senaratne* did not disclose the identity of the assailant to the *Gramasevaka* of the area, who took him and the deceased to hospital. It was *Senaratne* who provided the first information to police. In determining whether he implicated the accused in providing first information to police, the Court considered *Senaratne's* claim that he did provide first information at 9.30 p.m., to the hospital police post, whereas the prosecution maintained it was provided only to *Anguruwathota* police at 11.30 p.m., while maintaining throughout that there had been no 9.30 p.m. statement.

Upon consideration of this evidence, this Court observed (at p. 48) " *if Senaratne was truthful in claiming that he had made a statement at 9.30 p.m., then that statement would have been the first information. Whether in that statement Senaratne had claimed that he had seen the stabbing, and had identified the Appellant as the assailant, would have been of very great importance.*" The Court further observed that "*If indeed the 11.30 p.m. statement was the first information, then obviously Senaratne had not made an earlier statement at the police post, if so, his evidence on that point was not credible; and the finding of the Court of Appeal that he did make such a statement was erroneous. On the other hand, if Senaratne was*

truthful in claiming that he had made a statement at 9.30 p.m., then that statement would have been the first information. Whether in that statement Senaratne had claimed that he had seen the stabbing, and had identified the Appellant as the assailant, would have been of very great importance."

The Court then considered the statutory provisions contained in Sections 147 and 159 of the Code of Criminal Procedure Act (at p.49) *"[A]n examination of the High Court record reveals, however, that such a statement was neither among the documents listed in the indictment nor included in the statements furnished in terms of sections 147 and 159 of the Code of Criminal Procedure Act, No. 15 of 1979. Section 147 provides that the officer in charge of the relevant police station shall at the commencement of the non-summary inquiry furnish to the Magistrate two certified copies of the notes of investigation and of all statements recorded in the course of the investigation. When the Magistrate commits the accused for trial, section 159(2) requires him to send one of those copies to the High Court and the other to the Attorney-General."*

It is in this backdrop of facts, *Fernando* J stated (at p.49):

> *"[E]ither Senaratne made a statement at the police post, or he did not. If he did not, his credibility was seriously in question. If, on the other hand, he had made that statement, then a very serious irregularity had occurred at the trial: the first information had neither been disclosed nor furnished to the accused and to the Court. Quite apart from that being a failure to make such disclosure as the statutory provisions require, the non-disclosure of that statement to the defence and to the Court resulted - for the reasons I set out below - in the impairment of the right of the Appellant to a fair trial which was his fundamental right under Article 13(3). That Article not only entitles an accused to a right to legal representation at a trial before a competent Court, but also to a fair trial, and that includes anything and everything necessary for a fair trial.*

> ***That would include copies of statements made to the police by material witnesses.***" (emphasis added)

It is important to note that when his Lordship stated, "*anything and everything necessary for a fair trial*" include copies of statements made to the police, the said reference was made, laying emphasis on the statements made "*by material witnesses*", not by any other.

The complaint of the 1st and 6th Appellants that the prosecution did not provide them with phone records of the deceased. They accused the prosecution of withholding certain CCTV footage which would tend to indicate that several others were involved in the abduction. This complaint is therefore would more or less concerns with 'documents' that are to be made available under Section 162(1) being qualified to be termed as " *documents or things*".

In terms Section 162(1), the mandatory duty on the prosecution to provide such " *documents or things*" are in relation to what it "*intended to be produced at the trial*". It is important to consider whether this operative part of the Section was modified by the judgment of ***Wijepala v The Attorney General*** (supra). Section 6 of the Code of Criminal Procedure Act states that "*[A]nything in this Code shall not be construed as derogating from or limiting the powers or jurisdiction of the Supreme Court or of the Court of Appeal or of the Judges thereof or of the Attorney General.*"

His Lordship, in the said judgment, reproduced several principles from a judgment from South Africa (***State v. Botha*** (1994) 4 SA 799) of which the one that applies to the Appellant's complaint is " *there is a general duty on the state to disclose to the defence all information which it intends adducing and also all information which it does not intend to use, and which could assist the accused in his defence.*"

Article 6(3)(b) of the European Charter of Human Rights states everyone charged with a criminal offence has the minimum right " *to have adequate time and facilities for the preparation of his defence*" and in ***Rowe and Davis v the United Kingdom*** [2000] ECHR, stated (at paragraph 60), " *[I]t is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party*". The Court further stated, "*In addition, Article 6 requires, … that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.*"

In this regard, it is pertinent to note that the UN Human Rights Committee, in ***Van Marcke v Belgium*** (U.N. Doc. CCPR/C/81/D/904/2000) stated (at paragraph 8.3), "*[T]he Committee observes that the right to a fair hearing contained in article 14, paragraph 1 [of ICCPR], does not in itself require that the prosecution bring before the Court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the Courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence.*"

It is my considered opinion that the proceedings before the High Courts or the High Courts at Bar are governed by explicit statutory provisions that contained in Section 162, which laid down as to what the prosecution must make available to the accused in preparation of his defence, under its mandatory duty to do so. In terms of Section 444(1), an accused is conferred with a right to obtain certified copies of the first information and of any statement made by the person against whom or in respect of whom he is alleged to have committed an offence. In terms of Section 162(2)(a) to (f), not

only the first information and the victim's statement, but an accused is also entitled to have copies of all statement of witnesses the prosecution intends to call and copies of documents, including reports and sketches or scene observations, it intends to produce against him, be served along with the indictment.

In addition, Section 450(7) enables a person indicted or charged before the High Court at Bar to make a written request during a specified time period before the commencement of trial, that he be furnished with copies of statements made by the witnesses whom the prosecution intends to produce, and the Court could, in its discretion, direct that copies of all such statements or documents, or of only such statement and documents it thinks fit, be made available.

Thus, the provisions of Sections 162 and 450(7) are in line with the Articles 14(1) and Article 14(3)(b) of ICCPR, where it is recognised that all persons are entitled to a fair public hearing, along with the entitlement to have adequate time and facilities for the preparation of his defence, as stated by the Committee. The European Court of Human Rights defined the principle of 'equality of arms' in ***Rowe and Davis v the United Kingdom*** (supra) as " … *in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.*" This pronouncement also indicates that 'equality of arms' is not a one-way street where only the prosecution is bound to disclose what they intend to produce, but also the accused too must make a disclosure on his part.

The entitlement of an accused to a fair trial conducted before a competent Court as a fundamental right was recognised by Article 13(3) of the 1978 Constitution. The Code of Criminal Procedure Act was enacted in 1979, after that right was recognised by the Constitution. Section 162 was

formulated to be in line with that right. The material that should be provided along with an indictment as per Section 162 was therefore moulded in the fair trial principle. This is clearly evident if one were to make a comparison between the relevant Sections in the Administration of Justice Law No. 44 of 1973 and Code of Criminal Procedure Act.

Section 190(2) of the Administration of Justice Law made it mandatory that every indictment shall be annexed a copy of statements, made by the accused and by the person against whom or in respect of whom the offence is alleged to have been committed, and of each statement recorded in the information book and made by a person who is intended to be called as a witness by the prosecution. The rationale of recognising this entitlement in the Administration of Justice Law is founded on the observation made by the Supreme Court in ***The Queen* v *Liyanage and Others*** (1963) 65 NLR 337, (at p.340) where it was stated that :

> *"… on a trial upon Indictment, by the very essence of the pre-trial procedure, an accused person becomes aware of all the evidence relied upon by the Crown in support of the Indictment and which the Crown intends to place against him at the trial. He is entitled in law to know such evidence before he is called upon to plead to the Indictment. It is a right of his, inherent in that procedure.*
>
> *Acting in accord with the broad principles of Justice, if this trial by information is to proceed as nearly as possible, in the manner provided for trials on indictment, the defendants should not be deprived of so important a right necessary to fully formulate their defence, when their very lives are at stake.*
>
> *On grounds of practical exigency, a summary trial may be justified for offences which are not of a very serious nature and where the facts and issues are not complicated. The present case is for capital offences and*

the evidence to establish the charges of Conspiracy will undoubtedly be of a complicated nature. It will be very difficult for Counsel to do justice by their clients in a case of this nature if they do not have a full picture of the evidence in the possession of the Crown."

With the conferment of the entitlement to a fair trial as a fundamental right, the Legislature, in enacting Section 162 of the Code of Criminal Procedure Act, ensured that an accused who is tried upon an indictment is entitled to not only to the statements made by himself along with that of the witnesses who are listed in the indictment but also to copies of preliminary inquiry proceedings, inquest proceedings, reports, sketches, notes of identification parade, statements made under Section 127 by the accused and any witness listed in the indictment along with copies of such portions the notes, scene observations made during investigations by a police officer. In relation to trial before a High Court at Bar, Section 450(7), reaffirms the duty on the prosecution to provide such material and ensures that the accused person could also make a request to Court and thereby ensuring the fundamental right conferred by Article 13(4).

In ***Wijepala v The Attorney General*** (supra), this Court had thought it fit to re-emphasise that entitlement of the appellant to the 1st information but was denied of. The 1st information, being a document caught up in the list of contents of an indictment in terms of Section 162 of the Code of Criminal Procedure Act, the prosecution was under a mandatory statutory duty to have made it available to the appellant.

Thus, the answer to the question whether *Fernando* J, in ***Wijepala v The Attorney General*** (supra) did introduce any expansion to the scheme set out in Section 162, clearly is in the negative. His Lordship did not observe any inadequacy of the provisions contained in the Code in this regard as it was stated (at p.51) " … *the Code of Criminal Procedure Act contains no inconsistent*

provision" to the principles that were recognised in the judgment of ***State v. Botha*** (supra).

The complaint of the learned President's Counsel of the failure of the prosecution to produce phone records of the deceased and the act of withholding of certain CCTV footage, which, according to him, had the tendency to indicate that several others were involved in the abduction should be considered first in the light of the statutory provisions and secondly along with the principle that "… *unless the failure to make the information available to the Courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence*" (emphasis added).

It is clear that these two items of evidence, referred to by learned President's Counsel, were not listed as an item of production, which made it obligatory for the prosecution to supply them to the Appellants, along with the exhibition of information. None of the prosecution witnesses made any such reference to them. If at all, these items could only be termed as information that were reviewed by the prosecution in preparation of a criminal charges against the Appellants. It was submitted on behalf of the 1st Appellant that the section of CCTV footage, that had been withheld from him by the prosecution, affects his defence for the reason it would have indicated the falsity of the allegation of *Fausedeen* and *Krishantha* that he personally visited the factory owned by the deceased before the latter's abduction.

Indeed, if this was the case, then that item of evidence would become qualified to be termed as an instance of "*withholding exonerating evidence.*" But that is not the evidence before High Court at Bar. *Fausedeen* said in evidence that he "showed" (පෙන්නුව) the factory to the 1st Appellant. He did not state that they got off from the vehicle, entered the factory premises and the 1st Appellant made an inspection tour of the factory. Similarly, *Krishantha* too stated in evidence that *Fausedeen* had taken the 1st and 3rd Appellants in his

vehicle and went near the factory and "showed" it to him. This is the position he maintained in his cross examination by the 1st Appellant as he reiterated the fact that they only went near the factory. Thus, the evidence is clear as to what was undertaken by the 1st Appellant was not an inspection tour of the factory premises but rather of its location, as what was shown by *Fausedeen* and *Krishantha* to the 1st and 3rd Appellants was confined only to its location .

The electronic record of the CCTV footage obtained by the CCD from the storage device installed in the factory building only shows the area covered by the camera and therefore is confined to an area within the front yard of the factory premises. The CCTV footage that was presented before Court shows that *Fausedeen* was leaving factory premises from its main gate in the evening of 22.05.2013, along with the deceased. The camera does not reach any area beyond the gate, which confirms the limited field of vision of that camera. Related to the complaint of withholding of information, learned President's Counsel's other contention that CCTV footage, retrieved at *Kandewatta* Road, had the tendency to indicate that several others were involved in the abduction of the deceased should be considered now. This is a position suggested by the 5th Appellant to *Krishantha* during cross examination and denied by the witness. The suggestion to the witness was there was another vehicle in addition to the double cab of *Anuradha* and *Honda Fit* car of the deceased. The High Court at Bar, in its impugned judgment considered this evidence and was of the view that when the CCTV footage was played before the Court, no such position was suggested by the 5th Appellant nor was it brought to its notice.

If the CCTV footage that was withheld from the 1st Appellant is to be capable of being termed as an item of "*exonerating evidence*", it must record the arrival of the 1st and 3rd Appellants into the factory premises and their departure. In relation to *Kandewatta* incident it must show that there was

another vehicle parked along with the double cab and the car. That is not the evidence presented before the High Court at Bar and therefore, CCTV footage that was recorded on the evening of the 1st Appellant's visit to *Saranankara* Road would not have recorded any such movement, in relation to the first complaint due to its limited field of vision. In relation to the second complaint, it did not happen that way contended by learned Counsel. Hence, even if that footage was withheld by the prosecution, it would not "*amount to a denial of justice, … by withholding exonerating evidence.*"

The other factor, on which the 1st Appellant placed reliance to present this contention, was that the prosecution had withheld phone records of the deceased. The prosecution, presenting its case, did not rely on the tower records in relation to the calls initiated and received by the deceased, before he was 'abducted' at *Kandewatta* Road. The prosecution did not present any evidence even to infer that there was any form of communication between any of the Appellant with the deceased any time prior to his death. Neither did it rely on details of calls between *Fausedeen* or anyone else had with the deceased tending to connect the 1st Appellant with any of the circumstances that were presented before the High Court at Bar.

It was the evidence of ASP *Abeysekera* that he recovered damaged parts of the deceased's phone from a canal in *Maligawatta,* upon information received from *Shafeen,* who acted as a driver to *Fausedeen,* who threw it into that canal. Even though the 1st Appellant made a very serious accusation of fabricating a case against him, no suggestion was put to ASP *Abeysekera* during his cross examination that he withheld call details of the deceased after receiving them from the relevant service provider. In these circumstances, I find it hard to accept that the phone details of the deceased too are capable of being considered as an item of "*exonerating evidence*".

The resultant conclusion is that the ground of appeal that had been presented on the basis of denial of a fair trial, is devoid of any merit and, on that account, ought to be rejected.

With the issue of credibility of the witnesses *Fausedeen, Krishantha* and *Anuradha* being considered in the preceding section of the judgment, I have arrived at a finding on the validity of the conclusion reached by the High Court at Bar on that issue. I now turn to the 1st Appellant's contention that the trial Court erred in relation to violation of principles governing cases presented on circumstantial evidence in arriving at a finding prejudicial to the 1st Appellant.

In this regard the contention that had been advanced on behalf of the 1st Appellant is that the prosecution failed to exclude the possibility of a 3rd party committing the murder of the deceased at *Fausedeen's* behest. This factor was partly considered earlier on, along with the issue of whether *Fausedeen* or *Krishantha* had the intention or knowledge of the fact that the deceased would be put to death. In this instance, however, learned President's Counsel coupled this factor with the instruction allegedly issued by the 1st Appellant to *Krishantha* to obtain two other SIMs and to use them to converse with him regarding the deceased.

The High Court at Bar, in its judgment (at p. 58) concluded that the fact that the 1st Appellant instructed *Krishantha* to buy and use two new SIMs, is established by P7, P7A and P8A. Learned President's Counsel challenges the said finding by posing a question, how is that the act of *Krishantha* buying two SIMs, would corroborate the fact that the 1st Appellant gave him such instructions ?

The High Court at Bar was of the view that since this item of evidence could not be manufactured artificially, and, as the evidence establish that he

secured a new connection for himself and provided another to his business partner *Fausedeen* supports his claim that he did receive such instructions.

In order to appreciate the contention of the 1st Appellant in its proper context, it is helpful if the evidence relating to the two SIMs are referred to at least briefly. *Krishantha* in his evidence said he discussed with 1st Appellant about the *Fausedeen's* predicament in recovering his investment from the deceased. The 1st Appellant after having agreed to intervene, instructed *Krishantha* in the presence of *Fausedeen* to use new two SIMs and also to use two new phones thereafter whenever they converse about the deceased. When *Krishantha* questioned the 1st Appellant for a reason to use new SIMs, the 1st Appellant curtly responded by stating not to talk rubbish. The 1st Appellant also insisted that *Krishantha* to do things the way he instructs (" **උඹ දන්න කෙහෙල්මලක් නැහැ. මම කියන විදියට වැඩේ කරපන්**").

Krishantha already had a SIM issued by *Etisalat* network with him, which he obtained from a wayside boutique after filling in an application form (the application was produced marked P7, with *Krishantha's* signature at the end marked as P7A). Subsequent to the 1st Appellant's instructions, *Krishantha* applied for another SIM, this time from *Airtel* network (the application was produced marked P8, with his signature at the end marked as P8A). It is *Krishantha's* position that he used *Airtel* SIM, while *Fausedeen* used *Etisalat* SIM. *Fausedeen* in his evidence confirmed that he did receive a *Etisalat* SIM from *Krishantha,* after about five days since they met the 1st Appellant at his residence. *Fausedeen* also confirmed that he used this new connection to contact *Krishantha* as well as the 1st Appellant. *Fausedeen* also recollects that he had called the 5th Appellant from the said SIM once or twice on *Krishantha's* advice. The fact that the two witnesses used new connection after their meeting with the 1st Appellant was established through the tower records.

During cross examination by the 1st Appellant, this aspect was further probed. *Krishantha* maintained that it was the 1st Appellant who instructed him to do so and added that initially he had not acted on those instructions, and when the 1st Appellant verified whether they use two new SIMs and receiving an answer in the negative, had faulted *Krishantha* for his know-all attitude ("උඹ පණ්ඩිතයනේ, පණ්ඩිතය නොවී මම කියන දේ කරපන්, SIM දෙකක් අරන් පාවිච්චි කරපන්"). *Krishantha* denied a suggestion put to him that the instruction on SIMs, which he alluded to the 1st Appellant, is totally a false claim. Thereafter the witness was questioned by the 1st Appellant whether he did state to the Magistrate that if he had any intention to kill the deceased, he would not have given a SIM to *Fausedeen*, which was under his own name. The witness admitted and added that it is the complete truth. *Krishantha* did admit that his to recollection the SIM was given to him after about two days from receiving the said instructions, may not be correct as he could not recollect the time duration accurately.

In addition to the evidence of two SIMs, *Krishantha's* evidence also reveal another instance where he was offered another SIM. This time, it was the 6th Appellant, who offered him one. This incident occurred when *Krishantha* came to visit the 1st Appellant after the deceased was killed. After noticing *Krishantha's* worried appearance, the 6th Appellant assured him that his father would look after everything and handed him a SIM and asked him to use it when calling his father from that point onwards.

Perusal of the reasoning of the High Court at Bar, adopted to reach the impugned finding on the two SIMs, reveals that the Court was in the process of evaluating credibility of *Krishantha,* when it arrived at the said finding with a short sentence. Although, the Court did not reason out its finding on this isolated item of evidence in great detail, the evidence referred to in the preceding two paragraphs which were presented by the parties were available

before it for consideration. Said finding could not be termed as a perverse one, in view of the fact that both *Krishantha* and *Fausedeen* used these new connections to communicate with each other during the series of activities that culminated with the 'abduction' of the deceased. *Krishantha* signing up for a new connection with *Airtel* and activated another SIM, which he had not used any time prior to the date of the 1st Appellant's instructions, tends to make *Krishantha's* assertion in this regard a more probable one than not. The well supported fact of *Fausedeen* taking steps to destroy the phone with *Etisalat* connection along with the phone used by the deceased no sooner he realised that the deceased would be put to death, not only is consistent, but well supportive of the said assertion.

In view of this evidence, the conclusion reached by the High Court at Bar that the phone records did corroborate the fact that *Krishantha* acted on the 1st Appellants' instructions to secure two phone connections for himself as well as for *Fausedeen* could not be faulted. It is also relevant to note that the term used by the Court is "සනාථ වන්නේය" which means proved or established and not "තහවුරු වන්නේය", which is the generally used term to denote corroboration, as it did on many other places.

The last set of complains made on behalf of the 1st Appellant is that the High Court at Bar adopted a standard more favourable to the prosecution than to the defence to its detriment in the assessment of evidence and, the Court failed to follow the principles of law applicable to a case presented essentially on items of circumstantial evidence, namely that the evidence must point irresistibly to the guilt of the Appellant.

Prosecution presented following evidence against the 1st Appellant during its case. The 1st Appellant agreed to help *Krishantha* and his business partner *Fausedeen* to recover Rs. 50 Million from the deceased. When *Krishantha* and *Fausedeen* wanted the 1st Appellant to help them to recover

monies through CID, the 1st Appellant took over the responsibility of recovering monies on their behalf and demanded Rs. 10 Million. The 1st Appellant asked *Krishantha* to accompany the 3rd Appellant and show him the location of the decease's factory and of his apartment. After seeing the location of the factory and the apartment, the 3rd Appellant wanted a photograph of the deceased and was given one by *Fausedeen*.

When *Krishantha* met the 1st Appellant afterwards, he asked for details of the plan that latter had in his mind to recover monies. The 1st Appellant replied he intends to take the deceased in near his factory at *Sarankara* Road. When *Krishantha* suggested that the 1st Appellant could simply summon the deceased to his office, the 1st Appellant scoffed at that idea and said "**උඹ දන්නෙ නැහැ මේව කරන විදිය. උඹට පැහැදිලි කරල කියන්නම් මම ප්ලෑන් කරාට පසුව**". During this period there were requests to *Fausedeen* to provide financial support to the 6th Appellant as well as to the 1st Appellant.

With pressure mounting from *Fausedeen* for some action, *Krishantha* too insisted for some positive action on the part of the 1st Appellant, who then assigned 5th Appellant to accompany *Krishantha* in order to "arrest" the deceased near the factory and also indicated that he would send the 3rd Appellant there as well in a 'white van', which undertaking he did not fulfil. After that attempt failed, it was the 1st Appellant who instructed *Krishantha* to ask *Fausedeen* to bring the deceased to a halfway point where he could be taken. *Fausedeen* was reluctant to get personally involved fearing the deceased would make a complaint against him. The 1st Appellant assured him that people who come to them turn blind, mute, and deaf and he would ensure there will be no consequences legal or otherwise. It was the 1st Appellant who decided that the deceased could be taken on that day itself, only if *Fausedeen* could bring the deceased along with him.

When *Krishantha* left the 1st Appellant's residence to meet up with *Fausedeen* and the deceased, the latter had already assigned the 2nd and 5th Appellants to accompany him. The 1st Appellant had a private conversation with the 5th Appellant before leaving. After the deceased's 'abduction' at *Kandewatta* Road and when *Krishantha* verified with the 1st Appellant why the deceased should be taken to *Biyagama* instead of *Nedimala*, he was told that the 5th Appellant had already been given instructions in that regard. This happened after the 1st Appellant verified by calling *Krishantha* whether the deceased was taken.

As the cab carrying them was nearing *Biyagama*, *Shiyam,* agreed to transfer ownership of his machinery and stocks to *Fausedeen. Krishantha* agreed and wanted to return to *Nedimala* to cement that proposal. They did so only after the 5th Appellant confirmed with the 1st Appellant whether they should return to *Nedimala*. Having verified that *Krishantha* and the group almost reached his residence after turning back at *Biyagama*, the 1st Appellant arranged the 3rd, 4th and 6th Appellants to board the double cab with a T56 rifle. *Krishantha* wanted to know the reason and was asked by the 1st Appellant to do what the 5th Appellant says. When *Krishantha* refused to take part any further, it was the 1st Appellant who demanded a van for his team to take the deceased away. The 5th Appellant was in control and *Krishantha* and *Anuradha* merely followed his instructions, who in turn said he follows 1st Appellant's 'orders'. After switching vehicles and having asked *Kishantha* and *Anuradha* to return home, the 5th Appellant called *Krishantha* once more to instruct him to collect the van from the 1st Appellant's residence in the following morning. This is the call that had been transformed into a conference call by *Krishantha*. The van was picked up by *Krishantha* from the residence of the 1st Appellant and when asked why he did this, the response was that it was due to the deceased's arrogance. When *Krishantha* queried as

to why he was dragged into this, the 1st Appellant replied that he had no other way to take hold of the deceased (“මට මූව ගන්න විදියක් නැතිව හිරියෙ”).

On their return from *Polgahawela* Courts, *Krishantha* and *Anuradha* met the 1st Appellant at his office and was asked by him to clean the cab and van and to meet up with him in the evening. At his residence, the 1st Appellant assured *Krishantha* if the police want to arrest him, he will personally accompany him and settle the issue. The 1st Appellant also assured *Krishantha* even if IG came, he would still look after him.

Krishantha regularly visited the 1st Appellant’s residence and office, until his arrest. As promised, the 1st Appellant came to *Krishantha’s* residence when CCD officers arrested him. The 1st Appellant spoke to the officers of the CCD. The 1st Appellant also wanted to know the phone records of the 2nd Appellant urgently and instructed an officer to insert those numbers into a request for a Court order to release call details. The 1st Appellant, after having assessed the situation, concluded that only the 5th Appellant needed to worry. He instructed *Krishantha* what to state to investigators about the 5th Appellant’s movements on that evening the deceased was murdered, on the lines suggested by him. After the arrest of *Krishantha,* the 1st Appellant took *Anuradha* to an Attorney and sought legal advice. He instructed *Anuradha* not to divulge anything about the 6th Appellant.

The High Court at Bar, in its judgment considered the evidence regarding the use of the two SIMs and stated its view. The Court held that the evidence indicated that it was the 1st Appellant who devised a plan on *Shiyam*. Court also considered the two meetings that had taken place at *Peliyagoda* office and *Nedimala* residence with the 1st Appellant, during which he referred to the deceased as that devil (“අර යකා”). After making reference to the 1st Appellant’s reaction when a photograph of the deceased was shown to him, the Court referred to his instructions to the 2nd Appellant to have two

weapons cleaned, as they are needed to settle a transaction. A reference was made by the Court to the demand of Rs. 500,000.00 made by the 1st Appellant along with his act of seeing the location of the deceased's factory with *Krishantha.* Court further noted that the 1st Appellant said to *Krishantha* "උඹ පණ්ඩිත නොවී හිටපන්. මම මේක හරියට ඉවරයක් කරනව. කරල මම මුදල් අරගෙන දෙනව, හැබැයි සල්ලි අරන් දුන්නට පස්සෙ මම ඉල්ලුව ගාන මට අවශ්‍යයි". It also considered the assurance made by the 1st Appellant that "මේ ගැන බය වෙන්න එපා, අපේ ලඟට එන එවුන් අඳ, ගොළු, බිහිරි වෙලා යන්නෙ. ඒ නිසා උඹ පාඩුවෙ ඉඳපන්. වැඩේ කරල දුන්නොත් ඇති නේ?". The Court took note of the instructions issued by the 1st Appellant regarding the 'abduction' and the place the deceased should be taken in the consideration of his complicity to the abduction and murder.

The High Court at Bar had then turned to consider the long statement made by the 1st Appellant from the dock. The Court, having considered its content, noted that he had not taken any interest to investigate into the discovery of an unidentified dead body found at *Meepawita,* which fact was conveyed to him as the Senior DIG of that area. The admissions made by the 1st Appellant of his close relationship with *Krishantha* over a long period of time and *Fausedeen* and *Krishantha* coming to see him at his office over *Shyam's* problem were noted by the Court along with an 'admission' erroneously contained in his statement that he instructed 2nd Appellant to have two weapons cleaned and ready, which the Court disregarded as a typographical error not corrected. The Court, having considered the 1st Appellant's denial of requesting 500 Baht for 6th Appellant's trip to Thailand, and that he went to inspect the location of the decease's factory or sending anyone on his behalf, he directed *Krishantha* to use two SIMs, there was enmity between him or his sons with the deceased, he ever received Rs. 500,000.00 from *Krishantha* and thereafter proceeded to consider the admitted meeting of *Krishantha* at his office with *Anuradha* on 22.05.2013 after noon, admitting his wife had to attend a land transaction at *Kurunegala,* admitting he used to borrow vehicles

from *Krishnatha* due to security reasons and admitting that he returned home with *Krishantha* that evening after visiting a relative *en route,* was of the view that some of these factors failed make any adverse impact on the prosecution's case.

Regarding the deceased's murder, the 1st Appellant denied any complicity with that crime and maintained the position that he had no knowledge of that incident nor had any motive against him at all.

The High Court at Bar, in its assessment of the dock statement of the 1st Appellant, observed that the admitted meeting with *Krishantha* on 22.05.2013 was an attempt to offer an explanation to evidence presented by the prosecution as to the movements of the three of them (the 1st Appellant, *Krishantha* and *Anuradha*) as shown by tower records. The Court noted that the 1st Appellant's position is that, after dropping him off at his residence, *Krishantha* had thereupon proceeded to *Kandy*, following his advice, which he offered, in order to settle a dispute *Krishantha* has had with his wife over an extra marital affair. The admission of the 1st Appellant that he repeatedly called *Krishantha* that night to remind of the case scheduled to be taken up in *Polgahawela* Courts in the following morning too were taken note of.

The fact that the intervention of the 1st Appellant at the time of arrest of *Krishantha* was admitted by him and the explanation offered by him to justify his actions were also noted by Court and, in addition, it made references to his conduct in obtaining call details using another pending case after the arrest of *Krishantha*. After a lengthy analysis of the statement made by the 1st Appellant from the dock, the Court rejected the same and concluded it made no impact on the prosecution's case.

In view of the oral evidence presented before Court and the supporting evidence in the form of tower records and other forensic evidence, it had

arrived at the finding that a plan was developed by 1st Appellant, following a conspiracy to commit the murder of the deceased, with which all the other Appellants have agreed, and was put into execution by 2nd and 5th Appellants as well as the 3rd, 4th and 6th Appellants.

The complaint presented by the 1st Appellant on this finding is a two tiered one. While stating that the Court erred in its failure to hold that the totality of the circumstantial evidence does not necessarily point irresistibly to his guilt, the 1st Appellant also contended that the erroneous finding was reached by the trial Court on his guilt was due to it applying varying standards to evaluate evidence presented before Court.

It is trite law that in a prosecution based on items of circumstantial evidence, the Court, in order to convict, must be satisfied that the evidence is consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence. It must not arrive at a finding of guilt if the evidence points only to a strong suspicion against the accused. The 1st Appellant relies on this principle to impress upon us that the evidence presented by the prosecution, placed at its best, only raises a mere suspicion of his involvement with regard to the murder but is wholly insufficient to establish that it is inconsistent with any reasonable hypothesis of his innocence.

Before dealing with the complaint of applying varying standards, I intend to deal with the part of the said complaint that the prosecution failed to establish its case to show that it is inconsistent with any reasonable hypothesis of his innocence.

Perusal of the 14-page statement from the dock, made by the 1st Appellant, it is evident that he relies on two primary points for consideration of Court in favour of his innocence. The 1st Appellant denied any knowledge

or complicity in the murder of the deceased and also denied having entertained any motive attributed to him by the prosecution. The main thrust of his statement was to impress upon the trial Court that he was a victim of professional jealousies entertained by some of his colleagues, particularly Senior DIG *Anura Senanayake* and, also became a victim of the animosity of the officers of the Criminal Investigations Department, generated over a report he submitted to the Inspector General of Police regarding certain lapses and defects in the investigations conducted by that Department over a series of murders committed in *Kahawatta* of *Ratnapura* division. An abridged version of the said complaint is once again presented to the High Court at Bar by the 1st Appellant at the conclusion of his statement, which is reproduced below.

> **" මේ සම්පූර්ණ නඩුවම ගොතල තියෙන්නෙ ස්වාමීනි මා ක්‍රිශාන්ත සමග 2013.05.22 දින කතා කරගත්, ඒ කතා කල දුරකථන බිලෙන් ලබාගත් කරුණු මත. ඒත් ඒ සම්බන්ධව වෙනත් ම කුමන්ත්‍රණය කලා යැයි යන්නද, මේ සම්බන්ධව දුරකථන ලේඛණ ලබගෙන එයින් තමයි ස්වාමීනි මෙම නඩුව සම්පූර්ණයෙන් ගොතල තියෙන්නෙ."**

The High Court at Bar, after considering this allegation on two different angles, was of the view (at p. 755 of the judgment) that the totality of the evidence presented by the prosecution does not enable the Court to arrive at a conclusion that the prosecution either manufactured or fabricated evidence against any of the Appellants.

The Court already considered the issue of fabrication when it considered the challenge mounted by the Appellants that *Fausedeen* and *Krishantha,* being accomplices, connived with the investigators and weaved a fabricated story to fit into tower records, as they were being kept under detention orders issued under Prevention of Terrorism Act. The Court once more considered the same issue when the 1st Appellant's presented claim of *mala fides* on the part of the CID.

In arriving at the said conclusion that there was no fabrication on the part of the CID, the Court considered the fact that subsequent to *Fausedeen's* complaint of the disappearance of the deceased to *Bambalapitiya* police, nothing substantial had been done by them to investigate that complaint. It was the officers of the CCD that obtained CCTV footage from *Kandewatta* Road and discovered the involvement of *Fausedeen* to the alleged disappearance. It in fact commended the role played by IP *Saman Prematillaka* of CCD, in identifying *Fausedeen* from CCTV footage. The Court also noted that *Fausedeen* made only a partial disclosure of the facts and circumstances to the CCD after his arrest, as he feared for his life and of his family, since a full disclosure would involve complicity of a serving Senior DIG of the police force.

The Court accepted *Krishantha's* evidence, who was arrested by CCD, that he was under threat not to disclose the complicity of the 1st Appellant and 6th Appellant to the investigators and noted that both these witnesses made a full disclosure only when their relatives induced them to do so, and that too on legal advice. In view of the sheer complexity of the factual narration of the three witnesses that withstood a long session of piercing cross examination, which corroborated by tower records and other forensic evidence in material particulars, the Court concluded that there is no rational basis to accept the proposition that the case against the Appellants is a fabricated one, either by the witnesses or at the behest of the investigators.

The High Court at Bar, in its impugned judgment considered the accusation of the 1st Appellant that he was framed into this crime being motivated by professional jealously as well. The Court held that claim made by the 1st Appellant that his rapid rise in rank after joining the police force in 1981 as a Sub Inspector of Police to the rank of Senior Deputy Inspector General of Police and of his appointment to Colombo – West and North

ranges on 01.03.2013, in itself negates that the forces that worked against him were successful in its efforts.

The decision to reject the dock statement of the 1st Appellant was made by the trial Court after it had considered several factors that he stated in that statement. The Court considered the fact that he did not clarify why he took no action when the deceased's body was found. Court also found that his assertion of advising *Krishantha* to go to *Kandy* after he fought with his wife was not tenable and rejected his explanation that he called *Krishantha* repeatedly to remind of the case in *Polgahawela* Court, as it was not even suggested to *Krishantha.* Court further noted that there was no denial of the evidence that *Krishantha* arrived at his residence to collect the van in the following morning or directing him to clean vehicles. Similarly, the Court rejected the explanation offered to justify his involvement in the prevention of the arrest of *Krishantha* since a wrong date mentioned by the 1st Appellant as the day of the arrest, along with the explanation offered by the 1st Appellant to justify urgency to obtain call records through a Court order. Court also considered his conduct of taking *Anuradha* to a lawyer and advising him of what to state, if questioned by police.

The premise on which the 1st Appellant founded his complaint that the Court adopted varying standards to evaluate evidence and acted more favourably to the prosecution is the decision to reject his dock statement. Why the Court had rejected his evidence totally was partly due to its conclusion that the case against him is a total fabrication and is not acceptable to it. The rejection is also due to the view taken by Court, when he sought to justify requesting phone details of 2nd Appellant by stating that he did so only after becoming aware that an investigation was about to commence concerning the 2nd Appellant. The Court found that assertion by the 1st Appellant does not reflect the correct factual position as the request for call details of his own

phone, his wife's, 2nd Appellant's, 6th Appellant's and *Sheshadri* was made on 23.05.2013 and the IG had directed the CID to takeover investigations only on 01.06.2013.

The Court was of the view that there is a factor indicative of his complicity to suppress evidence pertaining to the crime already under investigation. In order to arrive at that finding, the Court considered the 1st Appellant's familiarity with the tower records that he gathered during an investigation he conducted regarding abduction of a five-year-old girl, as the Superintendent of Police for *Trincomalee.* The Court also noted that the 1st Appellant made no reference to *Anuradha's* assertion that he had taken steps to consult a lawyer after getting down *Anuradha* to his residence and instructing him to avoid making reference to the 6th Appellant.

The complaint of adopting varying standards by the High Court at Bar in the evaluation of evidence and acting in a manner more favourably to the prosecution, as made by the 1st Appellant, therefore has no validity at all for the reason that the trial Court, even after its finding that *Fausedeen* and *Krishantha* did not conspire to murder the deceased or participated in his abduction to murder, which made both of them to be treated as any other witness as the tag 'accomplice' is removed, nonetheless, decided to look for corroboration of their evidence to substantiate their version of events. These witnesses gave evidence under oath and were cross examined by Counsel, giving an opportunity for the Court to effectively evaluate their evidence for credibility. On the other hand, the trial Court noted that the 1st Appellant presented evidence only through a dock statement, which he made without any oath or being subjected to any cross examination by the prosecution. It then found that his evidence on some important aspects did not reflect the correct factual position and therefore his evidence should be rejected altogether.

In view of the foregoing, I endorse the conclusions reached by the High Court at Bar that the rejection of the evidence presented by the 1st Appellant as well as that the prosecution established the complicity of the 1st Appellant to the offences specified in the 1st , 3rd, 4th, 6th, 7th, 8th, 9th and 10th counts in the information and charge sheet is sufficient to establish that it is inconsistent with any reasonable hypothesis of his innocence.

The ground of appeal, which is specific to the 2nd Appellant, that there was no corroboration of the evidence of the accomplices who implicated him to the charges should be considered now. Learned Counsel itemised these multiple instances where the two 'accomplices' implicated the 2nd Appellant, but not corroborated which are identified as follows:

1. the 1st Appellant asked the 2nd Appellant to clean two weapons,
2. discussion between the 1st Appellant and the 5th Appellant at *Nedimala* residence,
3. taking part in the transfer of the deceased from *Anuradha's* cab to the van,
4. evidence of *Dias Samaratunga* implicating the 2nd Appellant
5. 2nd Appellant's phone thrown to *Kimbula Ela* by *Krishantha,*
6. throwing off the clothes worn by the deceased near a bridge,
7. obtaining his phone details by the 1st Appellant.

It is the submission of the learned Counsel for the 2nd Appellant that, in the absence of any independent corroboration, all these items of evidence against the 2nd Appellant remains mere statements of accomplices of the crime, who sought to attribute these acts on him. Each of these items of evidence shall be considered for its merits in the light of the complaint made by the 2nd Appellant in relation to them as well as the submissions of the State

along with the manner in which they were considered by the High Court at Bar.

The first complaint refers to a segment of the evidence where *Fausedeen* had said he met the 1st Appellant at his residence either on 5th or 6th of May 2013. He was sure that the meeting that had taken place before 10.05.2013. This visit was after *Fausedeen* and *Krishantha* accompanied the 3rd Appellant to show the location of decease's factory and of his apartment. As they sat down to talk, the 1st Appellant instructed the 2nd Appellant, who happens to walk past them, to have two weapons cleaned as there is a need to settle a transaction on the following day. The 2nd Appellant responded he could do that even after the job, as there was no urgency. Tower records indicated that the 2nd Appellant was at *Nedimala* on 06th to 08th of May 2013. *Krishantha* who was present along with *Fausedeen* for the said meeting with the 1st Appellant but did not speak of this incident in his evidence.

In the dock statement the 2nd Appellant denied having received any such instructions to clean any weapon. It is his position that it is a task attended by officers of lower ranks.

Learned Counsel submitted that the evidence of *Fausedeen* on this point should have been corroborated, on account of him being an accomplice and that in the absence of any reference to the said incident by *Krishantha* it had not even been supported for consistency. The mere presence of the 2nd Appellant during the relevant time period at *Nedimala* in itself is not corroborative of the fact that the 1st Appellant in fact gave those instructions or that the 2nd Appellant responded in that manner.

In her submissions, learned ADDl SG refereed to the evidence of the tower records *Fausedeen's* and *Krishantha's* phones and that is a factor that independently corroborates that they too were present along with 1st and 2nd

Appellants and there was no contest to the fact that there was a meeting as spoken to by the witnesses since the 1st Appellant admitted so in his dock statement. Thus, it is a reasonable inference a Court could draw in the circumstances.

High Court at Bar considered the evidence and was of the view that the presence of 2nd Appellant at *Nedimala* during the same time with that of the meeting, was established by the tower records. It also found that the evidence of *Fausedeen* and *Krishantha* were corroborated with tower records that they had handed over 500 Baht to 6th Appellant at a point near *Appollo* Hospital, following the request of the 1st Appellant, which too was made during the said meeting with the two witnesses.

Krishantha in his evidence said that the 1st Appellant wanted to meet *Fausedeen* to discuss over the impending trip to Thailand by the 6th Appellant and also about the recovery of money. *Fausedeen,* having vented his frustration over the delay in action, wanted to know what the plan of action the 1st Appellant had in mind. The 1st Appellant replied *Fausedeen* that "I have already discussed with my men and once plans are finalised; would convey its details through *Krishantha"*. The 1st Appellant also said that he too needed to see the factory on the following day, as they got up to leave. This evidence supports *Fausedeen's* assertion that they discussed his problem in addition to the discussion on the foreign currency for the foreign trip of the 6th Appellant, thus making it more probable that the 1st Appellant, to impress upon *Fausedeen* that he had already discussed the matter with his men, asked the 2nd Appellant, who casually gone past the place where they were, to clean up two weapons.

The confirmation of the presence of four persons involved with the incident under discussion at *Nedimala, Krishantha's* evidence on what they discussed, the subsequent acts of *Fausedeen* and *Krishantha* of handing over

Baht to the 6th Appellant, as agreed during the discussion, all made the claim that the 1st Appellant making a direction to the 2nd Appellant a more probable event. It is already stated earlier on that the corroboration required need not be on each individual event the witness speaks about.

Learned Counsel's second submission was that the discussion between the 1st Appellant and the 5th Appellant at *Nedimala* residence, which *Krishantha* referred to in his evidence, was considered by the High Court at Bar to arrive at the conclusion that *Krishantha* had no knowledge of what they conversed on and therefore not privy to the intentions of the 1st Appellant had over the deceased. In this backdrop, learned Counsel contend that the 2nd Appellant, who too was there, but left out from the said dialog between the 1st and 5th Appellants is indicative of the fact that the 1st Appellant had chosen to have his discussion only with the 5th Appellant and thus, refrained himself from giving any instructions to the 2nd Appellant. It was contended on behalf of the 2nd Appellant that this fact should raise a reasonable doubt as to his complicity to the conspiracy to commit murder.

Learned Counsel also invited attention of Court to the fact that the 2nd Appellant is a Sub Inspector in rank while the 5th Appellant served as a police constable. This comparison was highlighted in order to raise a point on relative probabilities. Learned Counsel submitted that an officer of a higher rank would not take orders from a junior officer, and it was the 5th Appellant, who was chosen by the 1st Appellant to place at command. Therefore, Counsel contended that the 2nd Appellant could not be considered as a co-conspirator with the others as a reasonable doubt exists as to his agreement to the conspiracy.

Prosecution's case against the 2nd Appellant was that on or about 07.05.2013 the 1st Appellant instructed him to have two weapons cleaned to settle a business, and that on the instructions of the 1st Appellant, the 2nd

Appellant joined *Krishantha* and 5th Appellant to 'bring in' the deceased from *Kandewatta* Road, in a double cab driven by *Anuradha.* The 2nd Appellant continued to be in the team of officers who proceeded from *Nedimala* with the deceased. When the party switched their vehicles at *Malabe,* the 2nd Appellant too got into the van along with the 3rd, 4th and 6th Appellants taking the deceased along with them. On their way back to *Pita Kotte, Krishantha* found the 2nd Appellant's phone in the cab and threw it into *Kimbula Ela.* When *Krishantha* met the 2nd Appellant after they took away the deceased, he found fault with what they did ("**බමුණුසිංහ මොකක්ද මේ ඔයගොල්ලො කලේ, අනවශ්‍ය වැඩක්නේ ඔයගොල්ලො කලේ**"). The 2nd Appellant's reply was "**මේක මහත්තය දුන්න ඕඩර්ස්, ඒක අපි කලා, ඉන් එහා අපි දන්නෙ නැහැ.**" The 2nd Appellant also revealed to *Krishantha* that the clothing worn by the deceased was removed from his body and threw them over a bridge. The 2nd Appellant had changed his IMEI and IMSI numbers from 24.05.2013, indicating he had acquired another mobile phone and a new connection.

During cross examination by the 2nd Appellant, *Krishantha* repeated the statement attributed to the former and conceded when suggested that no mention of that fact was made to the Magistrate. He offered an explanation for that by stating that, in making the said statement, he merely narrated the sequence of events that led to the death of the deceased in the way he recalled from his memory and unlike in the High Court, there was no questioning made clarifying the details. However, the witness assured the Court that what he states before it is the absolute truth, and he had no reason at all to falsely implicate the 2nd Appellant.

In dealing with the evidence presented against the 2nd Appellant by the prosecution, the High Court at Bar also considered the contents of his dock statement. The complaint that the Court had failed to grant the benefit of doubt, arising out of the act of 1st Appellant in selecting only the 5th Appellant

to give his instructions and the exclusion of the 2nd Appellant from that discussion involving conspiracy, is founded on the premise that the only item of evidence against him is that particular part of *Krishantha's* evidence. That is not the position borne out by the evidence that had been elicited by the prosecution before the High Court at Bar. I have referred to that evidence in the preceding paragraphs and needs no repetition here.

The High Court at Bar considered the improbabilities of some of the events as spoken to by the 2nd Appellant in his dock statement, and found that in certain instances, he had uttered lies. It also found that the 2nd Appellant lied in relation to his phone, as indictive from P43, which is a letter dated 05.06.2013 calling for call details of his lost phone, after obtaining a new connection. The Court also made a very pertinent observation when the 2nd Appellant said that he did not make official entries of the duties he had performed under the supervision of the 1st Appellant due to the fear of exposing his senior officer for a security breach. In explaining of the duties which the 2nd Appellant said to have performed on the 22.05.2013, it was said that he returned to Colombo that evening from *Tanamalwila* where he wanted to check up with an information he received. Having considered this evidence , the Court was of the view of that it is unable to accept this explanation as if he did conduct a raid as he claim, it is imperative that he made relevant entries in the official records. Any of his official activity, without any entries to justify the manner in which they were conducted, could be liable to be termed as illegal. At the conclusion of its reasoning, the Court decided to reject his dock statement.

Turning to consider the complaint of the 2nd Appellant that the evidence revealed only the 5th Appellant was given instructions by the 1st Appellant, leaving him out from that conversation. It is correct that only the 5th Appellant was given some last-minute instructions by the 1st Appellant, just before they

left *Nedimala.* But the evidence of *Krishantha* on this aspect is that the 1st Appellant told him to go along with the 2nd and 5th Appellants to bring in the deceased. When *Krishantha* queried the 1st Appellant that none of them were there at that point of time to come along with him, the 1st Appellant replied that they would arrive there shortly. A vehicle arrived at *Nedimala* and the 1st Appellant took *Krishantha* to a room down stairs. *Krishantha* noted that the 2nd and 5th Appellants were already there. The 5th Appellant was singled out by the 1st Appellant, who instructed him privately. The 1st Appellant then said to *Krishantha* that he had instructed the 5th Appellant and directed him to go with the 2nd and 5th Appellants, to bring in the deceased.

The evidence presented by the prosecution in this regard did not indicate that the 2nd Appellant was clueless about what was about to take place. At *Kandewatta* Road, *Shyam* walked up to the double cab in order to speak with the passenger who was occupying the rear seat, and when he bent his head down and peeped into vehicle to speak with him, he was pushed in by the 5th Appellant, who too got into the vehicle along with him. It was the 2nd Appellant who was seated there on the other end of the rear seat of the double cab. *Shiyam* was told that it was the 1st Appellant. The conduct of the 2nd Appellant indicated that he was not surprised by the way the deceased was pushed into the double cab. He also had no qualms over the act of taking an uncooperative passenger forcefully into the cabin and taking him along despite of his struggles to resist his abduction. The evidence is that as the deceased was pushed in, it was the 2nd Appellant who held him. Having returned to *Nedimala* from *Kaduwela,* the 2nd Appellant voluntarily remained with the 'abducted' deceased while the 3rd, 4th and 6th Appellants too had joined with them to continue the journey. There is no evidence presented before the High Court at Bar that the 2nd Appellant was surprised of the subsequent events as they unfolded or made any queries from any of the

officers for the reason to bring in a T56 weapon or what they intend to do with the deceased.

The subsequent conduct of the 2nd Appellant, as revealed from *Krishantha's* evidence, taken in conjunction with his previous conduct, supports the inescapable inference reached by the High Court at Bar that he was truly a part of the conspiracy to commit murder and abducted the deceased to put him to his death. Therefore, the isolated fact that had been relied upon by the 2nd Appellant, that the 1st Appellant gave private instructions to only the 5th Appellant, does not suffice to raise a reasonable doubt in the said inference of guilt.

The third factor on which learned Counsel for the 2nd Appellant relied on was in relation to the evidence of *Anuradha* that he took part in the transfer of the deceased from his cab to the van. Learned Counsel invited attention of Court to the inconsistency between *Krishantha* and *Anuradha* on this point and contended that that the said item of evidence could not have been relied upon as *Anuradha* failed to state same to CCD, CID or the Magistrate and the High Court at Bar erroneously held that *Krishantha* corroborated same when in fact said nothing to that effect.

It was *Krishantha's* evidence that after reaching *Malabe* junction, they proceeded on about 800 meters or more and stopped. The double cab, which followed them also stopped. The 2nd and 3rd Appellants have taken the deceased to the van from the cab. They held him from either side. During cross examination, the 2nd Appellant suggested to *Krishantha* that he failed to mention that fact to the Magistrate. The witness replied that he would accept that if it is not recorded, but insisted on his claim by stating that it is the truth. However, *Anuradha* said in evidence that after passing *Pittugala* bridge, they stopped, and the 3rd and 6th Appellant transferred the deceased to the van. Thereafter, he drove behind the van with 5th Appellant. The 2nd Appellant, by

cross examining *Anuradha,* elicited that he had failed to mention that fact to CCD, CID or to the Magistrate, as pointed out by learned Counsel.

It is clear that *Anuradha's* evidence on the point was presented before the High Court at Bar for the first time after a lapse of 19 months since the death of the deceased. *Krishantha* failed to mention what he said in evidence only to the Magistrate, leading to the inference that he did so to CCD and CID. Of course, the weight that could be attached to *Anuradha's* evidence on this particular aspect is reduced due to his failure to mention this fact at the earliest opportunity. *Krishantha's* evidence, though contradictory to that of *Anuradha* on this point is more credible than his relative.

The complaint of the 2nd Appellant is that the High Court at Bar failed to take note of this 'material inconsistency' along with the fact that there was no corroborative evidence that were placed before Court to substantiate that claim. The reference made by the learned Counsel to page 250 of the judgment, where the Court considered the evidence on the basis that it was the 3rd and 6th Appellants who transferred the deceased to the van, without referring to the inconsistency of that with *Krishantha's* evidence. The way the trial Court presented its process of reasoning on this aspect, indicates that it had taken a bundle of facts into consideration and found some of them were corroborated. As such, there is no finding of fact in relation to the persons who transferred the deceased to the van and that is corroborated by other evidence. Clearly the High Court at Bar overlooked the contradiction on this point.

But the fact remains that the deceased was taken in the van, as proved beyond any doubt by the DNA evidence, and therefore this particular omission of the part of the High Court at Bar to consider the said contradiction, in my opinion, did not result in causing any prejudice to the 2nd Appellant, neither it adversely affected their credibility as witnesses, given the

multitude of other factors that supported the conclusion that had been eventually reached by the trial Court. In converse, it could be said that said failure had not resulted in an adverse finding made against the 2nd Appellant.

Connected to this submission, learned Counsel also referred to another inconsistency between these two witnesses for the prosecution. The evidence of *Anuradha* revealed that there was a scuffle when the deceased was pushed into the cab whereas *Krishantha,* who also travelled in the same vehicle did not make any such reference to offering resistance. Learned Counsel submitted this too is a very material inconsistency between the two which the High Court at Bar failed to consider. Apparently, this submission was made by learned Counsel with the impression he had over *Krishantha's* evidence that the witness had nowhere in his long evidence ever mentioned the way the deceased reacted to the act of aggression towards him. In fact, *Krishantha* did mention in his evidence that the deceased resisted after he was pushed into the vehicle. Naturally, the deceased was fearful as to what they would do to him (at p. 743 of Vol. VIII). This is not the only instance where the resistance offered by the deceased is referred to. It was the 6th Appellant, who wanted *Krishantha* to come to the cab, because the deceased was making a ruckus and demanding his presence.

In addition, another inconsistency between *Krishantha* and *Anuradha* was pointed out by the 2nd Appellant. This time it was in reference to who took away the T56 weapon from the van in the following morning when *Krishantha* went to 1st Appellant's residence to collect same, as instructed by 5th Appellant in the previous evening. *Anuradha* said it was the 3rd Appellant who took away the firearm whereas *Krishantha* was not sure whether it was the 2nd or the 3rd Appellant. Both the witnesses support each other to the fact that there was a T56 weapon in the van. *Krishantha,* when asked who picked it up, qualified his answer by adding that according to his recollection it was

either the 2nd Appellant or the 3rd Appellant. The point raised by the 2nd Appellant in this instance is in relation to assessment of credibility of a witness. These types of inconsistencies are quite natural in the testimonies presented by lay witnesses for their powers of observation and recalling memory or even their inability to express themselves may contribute to such inconsistencies, in varying degrees. This is perhaps one of the reasons why the High Court at Bar had looked for independent corroboration of their evidence and being satisfied that there was, decided to accept as truthful and reliable account of what had actually taken place.

The fourth point relied on by the 2nd Appellant was that the evidence of *Dias Samaratunga* who he made references to him of participating in a discussion with the 1st Appellant, his wife, 6th, 4th and 5th Appellant on 30.05.2013 and loaded a *cache* of weapons into a "*Batta*" car on 31.05.2013, along with the witness. He also said that in the same evening the 2nd Appellant went for a consultation with a lawyer. Learned Counsel pointed out that the prosecution presented evidence through tower records that the 2nd Appellant was present at *Nedimala* only in the evening at 7.31 p.m. on that day whereas the witness states he was present there from the morning, a fact not supported by an independent source. In relation to the evidence that he loaded weapons, the witness, in his statement to the Magistrate, which the witness said that contains the truthful account of the circumstances, failed to mention that fact.

This point need not be considered in detail. These items of evidence are related to certain activities of the 2nd Appellant, subsequent to the murder of the deceased. The only item of evidence that tends to generate an inference of his complicity to the murder is the consultation he had with a lawyer. The High Court at Bar treated the evidence of *Dias* as a testimony offered by a lay witness, rather than an experienced police officer, who is familiar with Court

proceedings and offering evidence after refreshing notes. The Court, after a detailed consideration of his evidence elicited during cross examination, noted his answer admitting the suggestion that he omitted to mention the 2nd Appellant's name to the Magistrate. These factors were taken into account by the trial Court in assessing his evidence.

Learned Counsel's next contention was based on the evidence that revealed the 2nd Appellant's phone being thrown into *Kimbula Ela* by *Krishantha* on their way back after the 2nd to 6th Appellant proceeded on with the deceased. It was submitted that *Anuradha* during his re-examination only said about this act attributed to *Krishantha.* Learned Counsel submitted that *Krishantha* in his evidence made no reference to the said act and therefore this item of evidence, which the prosecution tried to utilise against the 2nd Appellant is wholly inadequate to establish that he tried to dispose of his own phone on 22.05.2013.

This contention was presented by the 2nd Appellant upon a clear misappreciation of the evidence that were presented before the High Court at Bar. In his examination in chief, *Anuradha* did not speak of this incident at all. It was during cross examination of *Anuradha* by 4th Appellant (at p. 37 and 38 of Vol. X) this fact was elicited through the witness. *Anuradha* said he discarded pieces of rope from the coil, which the 4th Appellant had purchased the previous evening. It was also elicited from the witness that *Krishantha* threw a mobile phone to *Diyawanna Ela.* In re-examination the State clarified from the witness (at p.104 of Vol. X) that it was the 2nd Appellant's phone thrown into water at *Kimbulawala, Madiwela.* It is evident from the proceedings that *Krishantha* gave evidence before *Anuradha* and accordingly the prosecution had no opportunity to lead that evidence from *Krishantha* himself, although the evidence on this point is an important item of evidence for the prosecution. But the prosecution did present evidence that the SIM

through which the 2nd Appellant operated his mobile phone was changed after 22.05.2013, along with the phone.

In his statement from the dock, the 2nd Appellant said that he had misplaced his phone after as the last call, which was at 7.49 p.m., on 22.05.2013. According to the 2nd Appellant at 7.49 p.m. on 22.05.2013, he was still at *Kirulapona,* whilst on his way to *Nedimala.* Since he misplaced his phone, he applied for a new connection. In justifying his act of making a request for call details in relation to the misplaced phone number, the 2nd Appellant stated that he was apprehensive of the fact that his lost phone could be used by someone to commit a crime, but opted not to make a complaint for he thought it would be inappropriate for him to lodge a complaint that he lost a phone at a Senior DIG's residence.

The High Court at Bar considered the contents of his dock statement and decided to totally reject the same, in view of the improbabilities and false claims it contained.

The individual fact of his phone was found lying in the double cab belonged to *Anuradha* by *Krishantha* is clearly indicative of the 2nd Appellant's act of travelling in that vehicle at some point of time on 22.05.2013, as claimed by the witnesses. The opportunity for the 2nd Appellant to travel in that vehicle arose only when *Krishantha* proceeded with him to "arrest" the deceased at *Kandewatta* after meeting him at *Balapokuna* Road. *Dias* said the 2nd Appellant returned to *Nedimala* in a van with others at about 1.00. a.m. The fact that the phone was not available with the 2nd Appellant either due to its misplacement or the phone being thrown into water too is confirmed by his prompt application to obtain a new SIM on 23.05.2013. Since the new SIM was obtained immediately after 22.05.2013, that is a fact which coincide with what *Anuradha* said regarding the fate of 2nd Appellant's phone. This factor made his evidence more probable on this point. Thus, the item of evidence that the

2nd Appellant applied for a new SIM on 23.05.2013, in effect corroborates the evidence of witness on this particular aspect. In these circumstances, it is highly unlikely that the 2nd Appellant's act of obtaining call details of his lost phone is for the purpose he claims. In view of the infirmities that were highlighted by the trial Court on his dock statement, and, owing to the reasons set out above, I am unable to take a different view to the one already taken by that Court.

In view of these considerations, I find no merit in the submission made on behalf of the 2nd Appellant, based on these multiple points referred to above.

Learned President's Counsel, in articulating grounds of appeal on behalf of the 3rd Appellant, submitted to Court that the totality of the circumstantial evidence presented by the prosecution do not justify drawing an irresistible conclusion as to his guilt for the conspiracy to murder the deceased or for the commission of his murder.

During his submissions, learned President's Counsel identified individual items of circumstantial evidence that were presented against the 3rd Appellant and analysed them in order to support his contention. The several items of circumstantial evidence that were identified by the 3rd Appellant are as follows:

a. the 3rd Appellant was part of the security contingent assigned to the 1st Appellant and stayed at *Nedimala* residence,
b. the 3rd Appellant was shown the location of the factory of the deceased at *Saranakara* Road,
c. *Krishantha* gave the contact number of 3rd Appellant to *Fausedeen* before his departure to *China,*

d. the 3rd Appellant was shown the location of the factory and was given a photograph of the deceased as requested,
e. the 3rd Appellant assured *Fausedeen* that they would deliver to his expectations acting on the instructions of the 1st Appellant,
f. when the 1st Appellant wanted to see the location of the deceased's factory, the 3rd Appellant accompanied him,
g. during the failed attempt to 'abduct' the deceased on 21.05.2013, the 1st Appellant said that he would send the 3rd Appellant in a white van to *Saranakara* Road, but he never came.

In his attempt to provide an innocent explanation to these circumstances, learned President's Counsel submitted that the 3rd Appellant, being a resident of *Kurunegala,* staying behind with the 1st Appellant at *Nedimala* as commuting from his place of residence on a daily basis was not practical. *Krishantha* said in evidence that while waiting at the airport, the 1st Appellant instructed him to give the 3rd Appellant's number to *Fausedeen* for him to speak, a fact confirmed by *Fausedeen* by admitting that he contacted the 1st Appellant through that number. In an attempt to providing an explanation to *Krishantha's* claim, it was submitted that the 1st Appellant, being a Senior DIG, might not be available on his personal numbers all the time and as such the 3rd Appellant's number too was given to others, as a contact number.

Regarding the evidence of the 3rd Appellant's first visit to the location of the factory, it was submitted that the oral evidence of the two witnesses who speak to this event are inconsistent as to who travelled with whom in whose vehicle. Learned Counsel highlighted that *Krishantha* said that he travelled in his vehicle, whereas *Fausedeen* said that he drove *Krishantha's* vehicle with both of them as his passengers. Similarly, there was another inconsistency

between these two witnesses as to what they did on their return trip. *Krishantha* said in evidence that after seeing the factory, they arrived at the residence of *Fausedeen*. The 3rd Appellant wanted to have a photograph of the deceased. *Fausedeen* found a family photo of the deceased and made it available him. *Krishantha* admitted that he failed to mention this incident to the Magistrate.

Fausedeen in his evidence, though speaks about driving *Krishantha's* vehicle up to his residence, made no reference to an incident involving a photograph of the deceased at all. Learned President's Counsel submitted that the High Court at Bar, in view of this "glaring contradiction", had stated that there is only an inconsistency. His compliant is that this item of circumstantial evidence had not been proved by reliable and acceptable evidence and as such it ought to have been disregarded.

Moving on to the next, it was brought to our attention that the statement attributed to the 3rd Appellant by *Krishantha* after their factory visit, **" වාස් මහත්තය කියන විදියට තමයි අපි කරන්නෙ, වාස් මහත්තය වැඩේ කරයි, වාස් මහත්තය කියන විදියට වැඩ ටික කරල ඔයාට අවශ්‍ය දේ අරන් දෙන්නම්. "** was not found in the witnesses' statement to the Magistrate, on which he was granted a conditional pardon.

The challenge mounted by the 3rd Appellant on his conviction to the 1st count of conspiracy to commit murder was that although there was no acceptable or credible evidence to establish that charge, the High Court at Bar erroneously concluded that the evidence of *Fausedeen, Krishantha* and *Anuradha* are corroborated by tower records notwithstanding the fact that they contradicted each other at times. The Court also ignored that the witnesses failed to mention the several items of circumstantial evidence that were taken into consideration against the 3rd Appellant, thus failing the requirement that the evidence must justify an irresistible inference of guilt.

Learned President's Counsel also contended that the High Court at Bar erred when it found the 3rd Appellant guilty to the count of murder, which in turn was founded on the evidence of the two accomplices *Krishantha, Anuradha* and also on the evidence of witness *Samarapala Dias,* a fellow inmate of the 1st Appellant's residence. Learned President's Counsel devoted significant time in his submissions to convince this Court that the original Court was in serious error when it failed to hold against *Dias* on truthfulness and reliability of his evidence, in spite of the discrepancies.

It is correct that the prosecution presented a case based on circumstantial evidence against the 3rd Appellant, as it did against all the other Appellants. However, the prosecution version of the items of circumstantial evidence differs with that of the 3rd Appellant as itemised above. According to the prosecution the several items of evidence presented against the 3rd Appellant are as follows:

a. the 3rd Appellant was shown the location of the factory, the route he takes, location of his apartment and noted the car used by him. He also collected a photograph of the deceased, assured *Fausedeen* of what he wanted, showed the photo to the 1st Appellant after returning to *Nedimala*, accompanied the 1st Appellant on his trip to the location of the factory,
b. maintained contacts with *Fausedeen* during *Krishantha's* absence,
c. after 'abduction' of the deceased, got into the double cab at *Nedimala* with a T56 weapon, held the deceased when they switched vehicles at *Pittugala,*
d. was not available at *Nedimala* at 11.00 p.m., and returned at 1.10 a.m. on the 23.05.2013, with the 2nd , 4th and 6th Appellants, went upstairs to speak to the 1st Appellant,

e. at 6.30 a.m. told *Dias* to open the gate for *Krishantha* and was there when they took the van away,
f. picked up the T56 weapon and took it into his room,
g. on instructions of the 1st Appellant, 3rd Appellant came to *Nedimala* on 31.05.2013 and suggested that the *cache* of weapons should be moved out, loaded them to a *Maruti* Car on instructions of the 1st Appellant, transferred them to the double cab once more when it was brought into *Nedimala* premises by IP *Willawarachchi,*
h. did not report to CID when summoned, handed over a nylon string to *Dias* to be thrown away,
i. reported to CID on 05.06.2013.

The High Court at Bar, in consideration of the evidence against the 3rd Appellant considered the evidence of *Fausedeen* and *Krishantha* and found that it could accept same as truthful and reliable account since the movements of the three of them (two witnesses and the 3rd Appellant) are corroborated by the details contained in the tower records during the time period they were together. *Krishantha* said in his evidence the three of them left in *Fausedeen's* vehicle to show location of the factory to the 3rd Appellant at about 6.30 to 7.30 p.m. *Fausedeen* did not mention any time period in his evidence. After the 6th Appellant left for *Thailand, Krishantha* accompanied the 3rd Appellant for another visit to factory with *Fausedeen*. This time, the 1st Appellant himself joined them. They reached near the factory at about 8.00 – 8.30 p.m. Since the 1st Appellant said he need not see the deceased's apartment, *Krishantha* first dropped *Fausedeen* off at the mosque near *Mayura Kovil* and thereafter the 1st and 3rd Appellants at *Nedimala.*

The tower records indicate that *Fausedeen* and *Krishantha* were at *Nedimala* as they were served by *Nedimala Relocation – DCS 1* tower at 7.05 p.m. and *Nedimala U* tower at 7.07 to 7.20 p.m., respectively. During the same

time period, the 1st Appellant too was served by *Nedimala U* tower from 6.42 p.m. to 7.17 p.m. At 7.30 p.m. *Fausedeen* received an overseas call from *India* and was served by *Mangala* Road tower.

During his visit to *Saranankara* Road, the 1st Appellant used his phone four times, i.e. at 7.37 p.m., 7.43 p.m., 7.46 p.m. and 7.49 p.m. through the towers of *Saranankara* Road – V, Edward Av and *Pamankada- A* while the 3rd Appellant used his phone thrice, 7.46 p.m., 7.51 p.m. and 7.52 p.m. and was served by *Pamankada- 9D, Welwat-BEL-9D* and *Hampdon – 8D* towers. *Krishantha* was served by *Havelock – W* tower at 7.44 p.m., and at 7.45 p.m. by *Havelock – V* tower. *Fausedeen* too was served by *Havelock- DCS 2* tower at 7.44 p.m. This evidence coincides with *Krishantha's* evidence that they dropped *Fausedeen* off at the mosque for his evening prayers.

The High Court at Bar considered this body of evidence and concluded that the evidence of *Krishantha* and *Fausedeen* were corroborated by the tower records, which corresponds with their movements as spoken to by the two witnesses during their oral testimonies. At the hearing, the 3rd Appellant took up the position that the tower records show only that he was served by them during the specified time slots, but this is because he regularly travels in the bus that ply along *Horana* Road on his way to *Nedimala* and he may have been served by these towers on such instances. This position was not put to any of the prosecution witnesses, nor did he present it during his dock statement. It is only in appeal that he presented this position to counter a determination of fact made by the trial Court. Even if it was put to the witnesses, the said explanation is clearly a false statement as the time duration of his call records at *Saranankara* Road and surrounding areas is little over an hour. It is highly unlikely that a passenger bus would take over an hour to pass about three kilometres distance along the 120-bus route as the 3rd Appellant claims.

The evidence regarding the 3rd Appellant was waiting with a T56 weapon, when *Krishantha* returned from *Biyagama* after *Shiyam* agreed to transfer his assets, was considered by the High Court at Bar and concluded that the tower records indicate that he was there at *Nedimala* during relevant times. The last call for the day was either taken or answered by the 3rd Appellant at 9.17 p.m. and was served by *Dehiwala-Zoo -8DD* tower. The fact that *Krishantha* arriving at *Beddegana* to borrow his brothers van and leaving there between 9.30 and 10.00 p.m. too was found to be corroborated by tower records to the satisfaction of Court.

The remaining set of circumstances relates to the events that had taken place subsequent to the murder of the deceased and would be relevant as subsequent conduct of that particular Appellant. This evidence primarily led through the witness *Dias,* and the complaint of the 3rd Appellant about the Court acting on that evidence could be considered after dealing with the evidence referred to in the preceding paragraphs.

It is seen from the complaints made by learned President's Counsel on this section of evidence primarily concerns with the assessment made by the trial Court on its truthfulness and reliability. In this context, submissions were made about the status of the witnesses as they are being accomplices in need of corroboration, their admitted falsehoods, the several inconsistencies and omissions. Credibility is essentially a question of fact. Since the trial Courts are in the best position to observe witnesses, unlike the transcript of the proceedings presented before the appellate Courts, the decision to accept or reject evidence of witnesses is therefore a question of fact for those Courts to decide and is best left to them, given the priceless advantage it has over an appellate Court of observing the demeanour and deportment of witnesses. The appellate Courts would be reluctant to interfere with the findings of the

trial Courts, unless such findings could be termed as totally inconsistent with the evidence presented before that Court or as perverse findings.

The question of accomplice had already been dealt in detail earlier on in this judgment. The remaining complaints were in relation to the assessment of credibility in view of the admitted falsehoods of the witnesses, the several inconsistencies that were apparent within their assertions and omissions that were highlighted off their evidence. This aspect of the evidence of *Fausedeen* and *Krishantha* too had already been dealt with and need to be revisited.

During his submissions, learned President's Counsel referred to the inconsistencies of whose vehicle *Krishantha, Fausedeen* and the 3rd Appellant travelled to reach *Saranankara* Road factory, the handing over of a photograph to the 3rd Appellant by *Fausedeen,* the way *Fausedeen* got to know when the 1st Appellant said that he needs to know the location of the factory, who caried the T56 weapon at *Nedimala,* who accompanied the deceased when he was switched to the van and the failure to mention in the statement to the Magistrate that the 3rd Appellant wanted a photograph of the deceased, that he too joined them when the 1st Appellant's visit to location and who accompanied the deceased when he was taken to the van.

The issue of credibility of the principle witnesses for the prosecution, *Fausedeen, Krishantha, Anuradha* and *Dias,* was relied upon by all the Appellants at varying degrees, and already dealt with by this Court in consideration of the basis of accomplices and the requirement of corroboration. Although, the issue of credibility of *Dias* was highlighted by the 1st and 6th Appellants, in relation to their application under Section 351 of the Code of Criminal Procedure Act, it is the 3rd Appellant, who chose to assail the decision of the High Court at Bar to accept his evidence as a truthful and reliable account, particularly in relation to the counts with which he is accused of and, on that basis, needs a detailed consideration at this point.

The High Court at Bar considered these discrepancies among the evidence of *Krishantha* and *Fausedeen* along with the omissions that were highlighted off their statements to CCD, CID and the Magistrate and decided to accept their evidence upon being corroborated in material particulars by other independent sources, which made their respective narratives more probable.

In coming to that conclusion, the High Court at Bar considered *Krishantha* admitting his mistake in stating that *Fausedeen* invited him to get into his vehicle (at p. 225)and that he made an error regarding the day of factory visit (at p.179). After evaluation of the evidence as a whole, the Court was of the view that parts of his story were confirmed by other evidence while some of his assertions were not even challenged, it is likely that the rest of his narrative could be accepted (at p.282). In doing so, the Court considered the inconsistencies and omissions that were highlighted by all Appellants, and not only by the 3rd Appellant.

The High Court at Bar observed that it is highly unlikely that these witnesses repeat a concocted story (at p.169) and also noted that the omissions were explained by witness. Court accepted *Krishantha's* explanation for his omissions were due to the fact that he made a statement only from his memory and there were no probing questions for details as in High Court at Bar. He also stated that he was under immense mental pressure for his own safety during the period of his detention. These factors were referred to by the High Court at Bar in pages 165,175,207, 223 and 233.

Similarly, *Fausedeen* said in evidence that, while making the statement before the Magistrate, he was told not to come out with irrelevancies and confine himself to the basic narrative. Court also noted the threats that were issued to *Anuradha* in the consideration of his evidence for credibility. Having taken all these factors into consideration (at pages 119 to 125, 135,233,259

261,273 and 274) the High Court at Bar decided to disregard those inconsistencies and omissions of the witnesses. The approach of the High Court at Bar adopted in the evaluation of inconsistencies could not be faulted. In ***Bandaranike v Jagathsena and Others*** (1984) 2 Sri L.R. 397, when a similar situation arose for consideration, this Court said (at p.415);

> *"[W]hen versions of two witnesses do not agree the trial judge has to consider whether the discrepancy is due to dishonesty or to defective memory or whether the witness' powers of observation were limited. In weighing the evidence, the trial judge must take into consideration the demeanour of the witness in the witness box. Was she trying to the best of her ability to speak the truth ? The learned Magistrate had to bear in mind that Kamala was giving evidence eight and a half months after the incident. Could she be expected to remember every detail of the incident ? She was unable to remember how many papers were taken from the bag. She made these entries at night. Can she be expected to remember precisely several months later what shade of blue ink she used ? According to her recollection she used a black coloured (ink) ballpoint pen which was clearly an error."*

A similar view was expressed by a divisional bench of this Court in ***Attorney General v Potta Naufer*** (supra- at p. 185),

> *"[W]hen faced with contradictions in a witness testimonial the court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness. The court must also come to a determination regarding whether this contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead court. Too great a significance cannot be attached to minor discrepancies, or contradictions*

as by and large a witness cannot be expected to possess a photographic memory and to recall the exact details of an incident."

Some of the more significant omissions that were marked off the evidence of these witnesses came from their statements to CCD and CID. They also made statements before the Magistrate, before the 1st Appellant was arrested by the CID. All these witnesses feared for their lives and had specifically been threatened not to mention the involvement of the 1st and 6th Appellants or his team of officers to anyone in authority. It is natural for a witness to avoid making references against a serving senior police officer, when questioned by another police officer over a serious crime, without having a very firm assurance for his safety. But the witnesses could not expect that kind of an assurance either from the CCD or CID.

One of the main grounds that were presented before this Court for determination in ***Dharmasiri v Republic of Sri Lanka*** (2012) 1 Sri L.R. 268, was where the main witness for the prosecution failed to name the accused in the first information to police due to fear of reprisals, even though she said to have identified him accurately at the time of commission of the offence and, as such her evidence should not have acted upon in view of such a serious and material omission. This Court, in rejecting that contention stated that (at p. 272);

"[T]he Courts must look at the broader spectrum and must take into account the holistic picture of the occurrences that the family had been affected by, not forgetting the civil unrest and political tension in the country during 1980's to early 1990's during which the JVP (Janatha Vimukthi Peramuna, a Marxist Sinhalese Political Party) insurrection took place accounting to a large number of killings [Gunaratna, R. (1990), (Sri Lanka, a lost revolution?: The inside story of the JVP', Institute of Fundamental Studies, Sri Lanka).The famous Embilipitiya

abduction and murder case, ***Dayananda Lokugalappaththi and eight others v. The State*** *(2003) 3 Sri L.R. 362, illustrates the dark and bleak time period that brought consternation and struck an almost unshakable fear into the hearts of the people of Sri Lanka.*

It was in the backdrop of such times, that the husband of the deceased was murdered in 1989 and four years later, in this particular incident, the deceased was murdered at her residence, in front of her mother and her 9-year-old son, who were the main eyewitnesses at the trial in the High Court."

Thus, the High Court at Bar, making a specific reference as to the demeanour and deportment of the main witnesses for the prosecution, especially during their probing cross examination by a team of defence Counsel, decided to accept their evidence as truthful and reliable accounts of the events they vouch to have been witnessed. The trial Court observed (at p. 169 of the judgment) that the witnesses had no difficulty in recalling any of the events they spoke about in details during cross examination and were natural and effortless in their demeanour in replying to the questions put across by Counsel. The Court also noted that they described the multiple incidents as it had happened, indicating there was no exaggeration or embellishment.

Turning to the contention that witness *Dias* is a creation of the investigators, who falsely pretended before the trial Court that he did not volunteer information to investigators fearing the 1st Appellant (who by then was in custody). I must now consider the basis on which the 3rd Appellant sought to challenge the decision of the High Court at Bar to accept his evidence as credible account of certain circumstances that had been relied upon by the prosecution.

Learned President's Counsel submitted that witness *Dias* fails all the tests that are applied on a testimony of a witness to ascertain its credibility. He invited our attention to several observations made by the trial Court as to his demeanour, in addition to citing questionable parts of his testimony in support of his complaint, that the witness had presented an inconsistent version of events coupled with many omissions regarding the several acts he attributed to the Appellants.

Of the many observations made by the President of the High Court at Bar during *Dias's* evidence, the important observation was made in relation to his tendency to evade questions put to him by the Appellants, without giving a direct answer. Learned High Court Judge also observed his ability to recall events from his memory without any note as an interesting feature and strangely questioned the witness when he said that he knew what the 1st Appellant and others read from the newspapers, by asking whether he had nothing else to do other than spying on the activities of his senior officer.

However, the High Court at Bar, in its judgment had taken the view, in spite of the observation on evasive manner, that factor alone would not justify rejection of his evidence in total. Court noted that unlike other police officers, *Dias* had no note to refresh his memory and had to totally rely on his ability to recall events from his memory in order to testify before Court, and at times he may have even exaggerated some of the details. It also noted that the witness was under intense scrutiny by the Appellants as well as by the Court. The High Court at Bar had taken into consideration of the fact that he had not conducted any investigation during his entire career in the police force. The Court also considered the comment made by the President of the High Court at Bar that the witness had acted as a spy to observe activities of the 1st and 3rd Appellants and concluded that it is not possible for it to infer from the evidence that he acted as such. In assessing his evidence for credibility, the

Court took into consideration that he never had any investigative experience or made entries denoting the duties he performed. In view of these factors, the Court proceeded to accept certain sections of his evidence as truthful account of the incident, following the *dicta* of ***Samaraweera v Attorney General*** (1990) 1 Sri L.R. 256.

Returning to consider the specific instances of his evidence found to be inconsistent with his former statements and where he failed to mention a fact in any one or more of his statements, learned President's Counsel invited our attention to his evidence regarding the return of the 2nd, 3rd, 4th and 6th Appellants on the early hours of 23.05.2013, and highlighted that he did not mention the 3rd Appellant opening the gate from outside. Another omission was highlighted that he omitted to mention that the said Appellants, having gone upstairs, have returned. The omission regarding that *Dias* failed to mention that 6th Appellant came to the room in which he slept was also highlighted by the Counsel.

The High Court at Bar considered the inconsistencies and omissions that were brought to its notice before it proceeded to accept the section of his evidence that can be accepted as truthful accounts of the events they speak of. This approach was in line with the view taken by this Court on omissions in the judgment of ***Rev. Matthew Peiris v The Attorney General*** (1992) 2 Sri L.R. 372, that (at p. 383), *"[W]here the evidence was challenged on the ground of delay or omissions or ill will the Court also scrutinise such evidence intrinsically, applying the test of probability, to consider whether the facts spoken to are established beyond reasonable doubt."*

Perusal of the evidence of *Dias* clearly indicative of his mental dilemma when summoned by the CID and questioned him on the events that had taken place in the night of 22.05.2013 at *Nedimala* residence of the 1st Appellant and the conduct of the Appellants, up to the point of their arrests. The 1st

Appellant, after obtaining call details of his team of officers, said that only the 5th Appellant had a problem and he had seen to rectifying it. The 1st Appellant similarly instructed *Dias* on what to say when CID questions him, which made the witness to present a fabricated version by supressing what he saw and heard. This was a difficult choice for the witness to make for he was serving the 1st Appellant from his *Kurunegala* days up until his arrest. Not only the 1st Appellant influenced him to lie to CID, but also an Attorney at Law, who was known to the Senior DIG, also reminded that his master would be released very soon .

When questioned by the 5th Appellant regarding the circumstances that led him to make a second statement to CID to correct the first one he already made, the witness laid bare his internal conflict in making a choice between disclosing the truth or supressing the truth by making out a story on someone else's instructions for the sake of being loyal to his master. The decision to tell the truth had been a very difficult choice for him.

Offering an explanation for the reason to deliberately make a false narrative to CID, the witness said (at p. 251 of Vol. XI)

> **ප්‍ර: ඇයි තමුන් ඔය වගේ අසත්‍යය කරුණු සී.අයි.ඩී. එකට කිව්වේ කියලා,?**
>
> **උ: මහත්තයා සම්බන්ධව වාස් මහත්තයා සම්බන්ධව තුසිත මහත්තයා ඇවිල්ලා කිව්වට පස්සේ මම අවි සම්බන්ධයෙන් කිව්වේ නැහැ, ප්‍රශ්නය තියෙන්නේ මගෙන් ඇහුවේ සී.අයි.ඩී. එකෙන් ඇහුවේ වෙපන් එකක් සම්බන්ධයෙන් පමණයි. නමුත් උතුමාණෙනි මට වෙපන් එකක් ගැන කියන්න බැහැ, මම දැක්කා වෙපන් ගොඩක් තියෙනවා ඒකයි උතුමාණෙනි මම වෙපන් එකක් ගැන කියලා ඉවරවෙලා අර අනිත් වෙපන් ටික සොයා ගත්තොත් එහෙම මට ප්‍රශ්ණයක් වෙනවා, වෙපන් ගොඩක් ගැන කිව්වොත් එහෙම මහත්තයාගෙන් ප්‍රශ්ණයක් වෙනවා ඒ ප්‍රශ්ණයට ආයෙත් මම අහුවුනා උතුමාණෙනි.**

The following sections of the proceedings amply illustrate his strong loyalty towards the 1st Appellant.

ප්‍ර: නිවැරදි කරන්න තමුන් සම්පූර්ණ අවශ්‍යතාවය තිබුනා නේද?

උ: තිබුනා. 22 වෙනිදා උදේ තුසිත ගුණසේකර මහතා මට ඇවිල්ලා කිව්ව නිසා තමයි. තුසිත ගුණසේකර මහතා උදේ ඇවිල්ලා කාර් එකට නැගලා මහත්තයාගේ ඔප්පු තිරප්පු වල කටයුතු කරන්නනේ ඒ මහතා. මමත් දන්නවා හොඳට. වාස් මහත්තයාට විරුද්ධව මොනවත් කියන්න බැහැ. වාස් මහත්තයා තව ටික දවසකින් එලියට එනවා කියලා. එතකොට කිසිම දෙයක් අපිට ප්‍රකාශ කරන්න බැහැ. හිතා ගෙන ඉන්න ඒවා කියන්න වෙන්නෙ නැහැ. යන කොට CID එකට බය වෙනවා. මේ පැත්තෙන් මහත්තයා ගැන හිතනවා. එතකොට අපි ගිරේට අසු වෙච්ව පුවක් ගෙඩියක් වගේ මම.,

The High Court at Bar nonetheless decided to accept his evidence by applying the probability test, as ***Rev. Matthew Peiris v The Attorney General*** (supra) recommended and found that most of his assertions were supported by other credible evidence.

Prosecution relied on *Dias's* evidence in order to highlight the conduct of the Appellants during the time period commencing from the evening of 22.05.2013 and ending with the arrest of the 1st Appellant on 10.06.2013. The fact that the 1st Appellant returned home that evening at about 7.30 p.m., with *Krishantha, Anuradha* and 3rd Appellant, return of 2nd, 5th and 6th Appellants from *Kurunegala* at about 8.10 p.m., arrival of two friends of the 6th Appellant to install a projector about the same time, having dinner with *Susantha,* the two policemen and the civilian at about 9.00 p.m., noting that 2nd and 5th Appellant were not there along with *Krishantha* and *Anuradha,* served tea and biscuits around 11.00 p.m., to all those who were up at that time, noting that 1st Appellant did not sleep until late into that night, did not see the 2nd, 3rd, 4th, 5th and 6th Appellant when serving tea, continued to help the three from *Mirigama* with their task of decorating the lanterns which they concluded at about 12.30 p.m., was preparing to sleep at about 1.00 a.m., saw the 2nd, 3rd, 4th and 6th Appellant returning home in a van, did not pay much attention to them as it is usual for them to arrive at late after attending parties, they all

went up-stairs and after few minutes returned and went to sleep, got up at 5.00 a.m., prepared tea for the 1st Appellant at 5.15 a.m., 1st Appellant asked the witness to take a call to *Krishantha,* could not connect, swept the front garden at 5.40 a.m., saw a dark coloured van parked similar to the one used by *Krishantha,* 3rd Appellant said *Krishantha* had arrived, opened the gate and saw *Krishantha* and *Anuradha* were waiting, *Krishantha* asked whether the 1st Appellant was up, *Krishantha* spoke to the 1st Appellant for few minutes, *Krishantha* invited the witness to come along as he is travelling to *Polgahawela, Krishantha* left with *Anuradha* in that van, saw a T56 weapon lying on a concrete slab in the garden, which was not there in the morning. He described the weapons as a "කවල් බට T56", which the 3rd Appellant picked and took it into his room. The 1st Appellant left for office with the 3rd Appellant as usual.

The witness also stated that that he visited his hometown during *Wesak* period and returned to *Nedimala* only on 29.05.2013, relieving the 3rd Appellant from his duties. He learned on the evening of 30.05.2013 that *Krishantha* was arrested and remembered that 1st Appellant left home that morning at about 6.15 a.m., in a hurry and in casual clothing. He returned home only after about 1 ½ hours.

After his return, the 1st Appellant had a discussion with his wife, along with the 2nd, 4th and 6th Appellants. He instructed to send out messages to 2nd, 3rd , 4th and 5th Appellant to return to *Nedimala* after *Krishantha's* arrest. They arrived in the evening of 31.05.2013, and the 3rd Appellant suggested that the stack of firearms should be dispatched to a safer location, witness joined the others to load an assortment of arms to the boot of the *Maruti* car of the 6th Appellant, the arms included T56 weapons of three models, including a "කවල් බට ", two mortar shells and a bundle of shot guns wrapped in a polysack bag. IP *Villavarachchi* came to *Nedimala* either on the 2nd or 3rd June in a black double cab, loaded those firearms into that vehicle and took them away. The

2nd, 3rd, 4th and 5th Appellants were arrested by CID on 05.06.2013; when they presented themselves, upon being notice to appear, and the 1st Appellant was arrested by the CID on 10.06.2013. Witness made a statement to CID on the lines he was instructed by the 1st Appellant that all of them were there on the evening of 22.05.2013, helping him with *Wesak* decorations. He was directed by the CID to appear once more on 21.06.2013 with the other officer, *Susantha,* who also served at *Nedimala* with *Dias.*

The evidence thus presented indicate that the 2nd, 3rd, 4th, 5th and 6th Appellants were not seen at *Nedimala* residence when tea was served at about 11.00. p.m. It was also elicited that the 2nd ,3rd, 4th and 6th Appellants returned to *Nedimala* residence in a van at about 1.00 a.m. The other significant item of evidence was that a T56 weapon, which was lying on a concrete slab was noticed by *Dias* only after *Krishantha* and *Anuradha* took away the van that had been parked in the compound since early morning. The prosecution also presented evidence that the said weapon was removed by the 3rd Appellant, who took it to his room, after *Dias* alerted of its presence.

The reason for *Dias* to stay up late in that night was to help the two police officers and another civilian, who arrived at *Nedimala* that evening in a lorry with a number of *Wesak* lanterns from *Meerigama*, who were busy pasting glass papers onto them. *Dias* provided them with dinner and refreshments until their task was over. The three of them, after finishing their work on *Wesak* lanterns, left *Nedimala* around 12.30 a.m. This was supported by the witness who arrived with *Wesak* lanterns. It was also *Dias's* evidence that, as he prepared to lie down to sleep after *Meerigama* team left, he saw the 2nd, 3rd, 4th and 6th Appellants retuning home. Significantly, *Dias* did not say 5th Appellant too arrived there with the others. The 5th Appellant was there at *Nedimala* after returning from *Kurunegala.* But, he was not seen when tea was served at 11.00. p.m. It is an undisputed fact that the 5th Appellant was in

Dompe area between 12.00 midnight and 1.30 a.m. on 23.05.2013, and thus *Dias* unwittingly provided credence to his own evidence, by being consistent with already established facts.

During their submissions, learned President's Counsel for the 1st and 6th Appellants as well as learned President's Counsel for the 3rd Appellant strongly challenged the credibility of witness *Dias,* particularly with regard to his evidence on the loading of a *cache* of weapons to the 6th Appellant's car. It was contended that it is a near impossibility that these number of weapons with long barrels could be loaded into the relatively smaller boot of a *Maruti* car and it was emphasised that T56 weapons could not be loaded to such a limited space of its spare wheel bay. It was also suggested to the witnesses that he makes this accusation against the 1st Appellant on the instructions of the CID officers. This position was in fact suggested to the witness. *Dias* offered clarification that a T56 weapon, when folded, would be of about two feet in length and even challenged the cross examiners, that he could load these weapons into a boot of a *Maruti* car once more in order to convince them.

It is clear from his evidence that *Dias* did not disclose the incident of transporting the *cache* of weapons voluntarily, when he was questioned by the CID. The CID questioned him about a single T56 weapon during investigations and the witness then decided to disclose this incident because he feared that if the investigations revealed the fact that there was a *cache* of weapons, he would be in trouble for misleading the investigators. The reasons for his reluctance to volunteer this piece of information to CID is revealed from his evidence, as he stated thus; "**මගෙන් ඇහුවේ සී.අයි.බී. එකෙන් ඇහුවේ වෙපන් එකක් සම්බන්ධයෙන් පමණයි. නමුත් උතුමාණෙනි මට වෙපන් එකක් ගැන කියන්න බැහැ, මම දැක්කා වෙපන් ගොඩක් තියෙනවා ඒකයි උතුමාණෙනි මම වෙපන් එකක් ගැන කියලා ඉවරවෙලා අර අනිත් වෙපන් ටික සොයා ගත්තොත් එහෙම මට ප්‍රශ්ණයක් වෙනවා, වෙපන් ගොඩක් ගැන කිව්වොත් එහෙම මහත්තයාගෙන් ප්‍රශ්ණයක් වෙනවා**".

The evidence regarding a T56 weapon that was found in the van in the morning was presented by *Anuradha,* who left it on a concrete slab, before driving away with *Krishantha*, on the morning of 23.05.2013. *Dias* only states that he saw a weapon lying on the concrete slab which he did not notice when he swept the garden. This claim is confirmed by *Anuradha's* evidence. If *Dias* wants to implicate any of the Appellants, he could have added more details to embellish his evidence and thereby making the T56 weapon as the probable murder weapon, but he did not.

The investigators knew that the death of the deceased was due to a rifled firearm injury to his head, as a penetrating core of a T56 ammunition was recovered embedded into the soil, immediately below the exit wounds of the deceased. It is natural in these circumstances for the investigators wanting to recover weapon used to commit the murder, and therefore diverting their efforts to obtain some information in that regard. The information regarding the *cache* of arms, instead of the murder weapon, was thus an unexpected result, but considered relevant to the investigation conducted by the CID.

His evidence on the point also indicate *Dias* did not implicate the 1st Appellant as the person who initiated the move of the cache of weapons. According to *Dias,* it was the 3rd Appellant who initially proposed the idea in anticipation of a search, but it was implemented with the instructions of the 1st Appellant.

It is proposed to deal with the impact of this evidence had over the finding of guilt entered against the Appellants by the High Court at Bar, when the application made by the 1st and 6th Appellant under Section 351 of the Code of Criminal Procedure is considered for its merits. But for the purpose of this part of the judgment, where the truthfulness and reliability of *Dias's* evidence is considered to test the decision of the trial Court to accept them, I am of the view that it is a probable scenario.

Dias's evidence on subsequent conduct of the 1st Appellant, that he was worried about the 5th Appellant's phone records and assured that he had already devised a solution to that issue was independently confirmed by *Anuradha* in stating that the 1st Appellant instructed him what to state about the 5th Appellant, if he was questioned by the CID. The narrative provided by the witness *Dias* before the High Court at Bar is clearly a probable one. Being one of the two lower rankers who were assigned to the 1st Appellant, who personally requested *Dias* be released to him, could not be expected to reveal the truth to CID acting on the dictates of his conscience, knowing very well that if he did, his senior would be exposed to a criminal prosecution. He was under immense pressure to provide a narrative that had already been scripted out to suit those who are involved. A lawyer said that 1st Appellant would return soon adding to his fears.

Dias complied with his instructions up to a point, and the moment he realised that the investigators knew much more than him of the incident, he reluctantly revealed what he saw and heard. Perusal of his narrative indicate that he wanted to offer more details during his evidence, which was interpreted by the trial Court as an attempt to exaggerate. However, the Court decided to accept his evidence that are found to be supported by other evidence. This was a prudent approach, given the fact that he, on his own admission, lied in relation to 90% of the contents of his first statement to the CID, of course faithfully following instructions to do so.

Thus, the decision of the High Court at Bar to accept *Dias's* evidence by applying the probability test, as ***Rev. Matthew Peiris v The Attorney General*** (supra) recommended, is justified as his evidence was supported and corroborated by other credible evidence. Having accepted his evidence as credible, the High Court at Bar however did not rely on the evidence related to the transporting of arms in the determination of the complicity of the

Appellants to the charges they were accused of. The evidence presented before that Court was sufficient to drawn the irresistible inference of guilt of the 3rd Appellant. Therefore, it is my considered view that the 3rd Appellant's contention regarding the failure of the prosecution to prove the charges against him on credible and acceptable evidence is without any merit and ought to be rejected on that account.

In addition to the ground of appeal that *Krishantha* and *Anuradha* should have been treated as accomplices, the 4th Appellant also urged following grounds of appeal before us, in support of his petition of appeal:

a. The High Court at Bar failed to hold that there was no direct or circumstantial evidence against the 4th Appellant,
b. the High Court at Bar failed to consider the evidence relating to the 'confessional statement' of the 4th Appellant,
c. the High Court at Bar erred when it expected the 4th Appellant to offer an explanation,
d. the High Court at Bar reached several factually erroneous conclusions,
e. conditional pardon offered by the Attorney General and the journal entry.

Learned Counsel for the 4th Appellant submitted that none of the tower records indicate that the 4th Appellant participated in the journey along with the deceased in the late evening of 22.05.2013. In the absence of any electronic evidence, Learned Counsel submitted that the prosecution case against the 4th Appellant is essentially based on direct evidence, but the High Court at Bar, in its analysis of evidence, had fallen into error in finding him guilty to conspiracy to murder and committing murder, when there was no direct or circumstantial evidence placed against him by the prosecution.

It was submitted on behalf of the 4th Appellant that the only item of evidence presented against him is that he joined the others, quite some time after the abduction of the deceased had taken place at *Kandewatta* Road and drove the double cab at one stage of the journey and a van at another stage. In light of this evidence, learned Counsel contended that since the prosecution has provided no material whatsoever that the 4th Appellant had any motive to cause harm to the deceased or that he had any kind of murderous intention to cause his death, the conviction entered by the High Court at Bar is clearly erroneous. He further submitted that the prosecution also failed to adduce any evidence that other than driving the two vehicles, the 4th Appellant was in some way connected to the others, who may have abducted the victim or those who were wielding dangerous weapons or those who planned out the manoeuvres which culminated in the death of the victim.

Learned Counsel added that the 4th Appellant, being a serving policeman, it is not unusual for him to act in this manner as it regularly happens that a man being taken in a vehicle in relation to purposes connected with various investigations in order to make discoveries in terms of Section 27 of the Evidence Ordinance. He stressed that, being a " low-salt policeman", it is not for him to question his senior colleagues and that his duties did not cover ascertaining from them about the rights and wrongs of this entire undertaking. Learned Counsel also invited attention of Court that the prosecution did not present any evidence of the role played by the 4th Appellant beyond *Bandarawatta* junction and as such there was no material to suggest even inferentially that he acted on "instructions" given to him by others in the team.

Learned Addl. S.G. itemised the evidence that were presented against the 4th Appellant before the High Court at Bar, which I shall refer to in detail

as we proceed further in this segment in relation to the other grounds of appeal.

The first reference to the 4th Appellant in *Krishantha's* evidence could be found regarding the events that unfolded when the double cab carrying the deceased arrived at *Nedimala* residence. The 4th Appellant, along with 3rd Appellant, who carried a T56 weapon, and the 6th Appellant, emerged out from the gate of the 1st Appellant's residence. They came up to the vehicle to join its passengers. *Krishantha* said he was frightened after seeing the way the three had emerged out of the gate and coming up to the double cab. *Krishantha* wanted to speak to the 1st Appellant and when he returned to the vehicle, the 3rd Appellant had already occupied the front left seat while the 4th Appellant had taken the driver's seat, replacing *Anuradha*. *Anuradha* confirms this incident in his evidence. It was the 4th Appellant who drove the double cab carrying the deceased from *Nedimala* up to the point at which he stopped the vehicle, after passing *Pittugala* bridge.

This is the point at which the deceased was transferred to the van and so did the 4th Appellant, who thereafter got into the driver's seat of that vehicle, replacing *Anuradha* once more. After the 5th Appellant's instructions to *Krishantha* to return home in the double cab, in all probability, the 4th Appellant would have continued with the journey by driving the van towards *Biyagama,* in the absence of any evidence to show the driver was changed.

Dias is a witness who served as a member of the team of officers who served the 1st Appellant and stayed in his *Nedimala* residence. It was *Dias* who provided evidence of the return of the 4th Appellant, along with the 2nd, 3rd, 5th and 6th Appellants, back to the 1st Appellant's *Nedimala* residence in a van. According to him, he went to sleep around 1.00 or 1.15 a.m. on 23.05.2014, after helping others to make *Wesak* lanterns and saw a van returning to the compound through the gate and thereafter saw 2nd, 3rd, 4th, and 6th Appellants

going up stairs. He also said that at 11.00 p.m. on 22.05.2013, he served tea to the persons who made *Wesak* lanterns, and these Appellants were not at home.

Dias further said in his evidence that after getting up at 5.00 a.m. in the following morning (23.05.2013) he prepared tea for the 1st Appellant and swept the garden. At about 6.30 a.m. *Krishantha* came with *Anuradha* and took the van away after speaking to the 1st Appellant. The 3rd and 4th Appellants too were seen near the van and after *Krishantha* left, the 3rd Appellant picked up a T56 weapon that was lying on a concrete slab and taken it into his room. This weapon was not there when he swept the garden in the early morning.

The High Court at Bar rejected the 4th Appellant's dock statement in which he said *Krishantha, Anuradha* and *Dias* lied in stating that he drove a double cab and a van and arrived at *Nedimala* late in that night. He totally denied any participation. The Court also considered his accusation against officers of the CID in implicating him for this crime.

When the evidence that were presented against the 4th Appellant is considered it is clear that he was not performing a duty of a police driver, who drove around some officers who were involved in an investigation along with a suspect as the learned Counsel contended on his behalf. The 4th Appellant was assigned as the 1st Appellant's driver and not assigned to any investigative unit. There was no investigation that the 2nd, 3rd and 5th Appellant conducted, and the 6th Appellant is neither a suspect nor an informant to this 'investigation' to travel along with the group of serving police officers, as the 4th Appellant contend. It is the same with the deceased. The 4th Appellant was obviously instructed by the 1st Appellant to drive the deceased to a place under the direction of the 5th Appellant. He knew what was expected of him, when he got into the driver's seat, replacing *Anuradha* who owned the double cab. *Anuradha* had no place to sit, and finally sat on

the legs of the 2nd Appellant, until they reached *Baddegana* to pick up the van. There is no evidence pointing to the fact that any of the Appellants were issuing directions on the 4th Appellant to shift from the double cab to the van and to drive on. He clearly had his instructions spelt out to him and acted faithfully to follow them.

These items of evidence point to the reasonable inference that he drove the van to the point where the deceased was killed and brought back his 'senior' colleagues from the place of a crime back to the residence of the 1st Appellant, but only after dropping off the 5th Appellant, who lived just 15 km away from the place the deceased was shot at. Clearly, this is not an investigation to which the 4th Appellant could claim he merely performed the function of a police driver and had no idea of what others did. It is correct to say that the prosecution had no evidence against the 4th Appellant other than his act of driving the two vehicles, only if one leaves out the admission, he made to *Krishantha* in the following morning (which will be considered next). But the inferences that could reasonably draw from the proved facts of his driving the vehicles to and from the crime scene tend to establish that the 4th Appellant was connected to the others, who abducted the victim and wielded dangerous weapons under the direction of the person who planned out the manoeuvres which culminated in the death of the victim.

Secondly, learned Counsel contended that the High Court at Bar erred when it failed to properly consider the evidence relating to the 'confessional statement' of the 4th Appellant.

The item of "confessional" evidence that had been relied upon by the 4th Appellant in advancing his contention contains an answer given by him to *Krishantha,* who posed the question "මොකක්ද සංජීව මේ කෙලේ, දැන් සියාම් කෝ", when he met the 4th Appellant in the following morning at the 1st Appellant's residence. The 4th Appellant responded to *Krishantha* with a smiling face "අපි

සියාම් ව මැරුව, වාස් මහත්තයගෙන් විස්තර දැනගන්න". Learned Counsel for the 4th Appellant contended that the said statement attributed to his client by *Krishantha* is not an unconditional admission of guilt, as the prosecution wants it to be taken, but only an instance of giving second hand information about the fate of the deceased, as he wanted *Krishantha* to ask the 1st Appellant for a more descriptive account of what happened to the deceased. Learned Counsel thereupon submitted that this gives rise to a reasonable doubt as to his guilt and the High Court at Bar failed to consider this aspect of the said items of evidence.

In advancing the said contention, learned Counsel did not elaborate from where the 4th Appellant obtained this item of "second hand information", which he passed on to *Krishantha,* and also the reason as to why his client claimed credit for what others did by stating " අපි සියාම් ව මැරුව." The words used by the 4th Appellant to answer *Krishantha* " අපි සියාම් ව මැරුව", placed at its lowest, is an admission that he was a part of the group of persons who were responsible for the murder and thereby qualifies to be taken in as such. That being an item of admissible evidence against him, the High Court at Bar rightly decided to accept and act on it. The Court also decided to treat such evidence as subsequent conduct of that particular Appellant, as they are not relevant under Section 10 of the Evidence Ordinance, after the murder was committed.

Extending this submission further, learned Counsel argued that on their way to *Polgahawela*, what *Krishantha* told *Anuradha* was " කැළුම්ල ඔහුට වෙඩි තියල මරල දාල", and that indicates *Krishantha* implicated both the 4th and 5th Appellant are responsible for the killing of the deceased, and thus it would be entirely unsafe to accept his evidence as credible in view of the reasoning of the judgment of ***Indrananda de Silva v Lt. Gen. Waidyaratne and Others*** (1998) 1 Sri L.R. 175. According to Counsel there was no justification to accept

the prosecution version that a witness could be an accomplice in relation to one segment of the case and at the same time a non-accomplice in regard to another department of the same case.

This contention has three components built into it. First, it presupposes that *Krishantha* made a specific accusation that the deceased was killed by the 4th Appellant at one point and by the 5th Appellant at another. Secondly, *Krishantha* is an accomplice, and his evidence should have been treated as such. Thirdly, the *ratio* of ***Indrananda de Silva v Lt. Gen. Waidyaratne and Others*** is applicable to the instant appeal.

Learned Counsel conveniently ignored what the 4th Appellant stated as "අපි සියාම් ව මැරුව" to denote as if his client had said "මම සියාම් ව මැරුව" in order to present his contention that the prosecution, having implicated the 5th Appellant for the murder of the deceased, now implicates 4th Appellant for the same murder. The prosecution allegation is that it was the 2nd, 3rd, 4th, 5th and 6th Appellants who committed the murder, and the 5th charge made reference to Section 32 of the Penal Code. Prosecution did not present any evidence as to the person who in fact shot the deceased that night, but accused the 2nd, 3rd, 4th, 5th and 6th Appellants have committed his murder, being actuated by common murderous intention, which they shared among themselves.

The second component that *Krishantha* is an accomplice had already been considered earlier on in this judgment and needs no repetition here.

Applicability of the *ratio* of the judgment ***Indrananda de Silva v Lt. Gen. Waidyaratne and Others*** needs consideration as the last point. This is a judgment of this Court pronounced in relation to an instance where the appellant before this Court was tried by a General Court Martial on two counts. During the preliminary investigation, the appellant made a confessionary statement and, later during an inquiry conducted for the

purpose of recording a summary of evidence, also made another statement from the dock. After a *voir dire* inquiry, which considered the voluntariness of the confession, the Court Martial decided to reject same. Then, the prosecution relied on the dock statement made by the appellant, which the Court accepted.

In appeal, this Court concluded that " *… the statement from the dock turned out to be a verbatim repetition of the thirty-page confession made by the appellant to Lt. Karunasena, which was earlier rejected by the self-same Court after a voir dire inquiry, as not having been voluntarily made. It is inconceivable by any stretch of the imagination that this appellant or anyone else, for that matter, could ever have made a statement from the dock repeating word for word what he is alleged to have spelled out in detail in a lengthy thirty-page confession seven months earlier. In any event, there is not even a suggestion that the appellant referred to any document when he made the statement from the dock. It does not need much imagination to conclude that, when the appellant told Major Abeywickrema that he was prepared to make a statement from the dock, what Major Abeywickrema in fact did, was to simply introduce the earlier thirty-page confession into the summary of evidence as being the appellant's statement from the dock.*"

It appears that the learned Counsel relied on the said judgment to impress upon us, that the prosecution witness *Krishantha* made two conflicting claims in relation to the person who killed the deceased. But that is not the case. *Krishantha* and *Anuradha* did not know what fate befell on the deceased after they were directed to return home by the 5th Appellant. It was through the conference call *Krishantha* had realised what might be the fate that awaits the deceased. This he conveyed to *Fausedeen.* Only in the following morning that he received a conformation from 4th Appellant of what he feared most in the last night, which happened after they parted ways at *Malabe.* This fact was once more confirmed to *Krishantha* by the 1st and 6th Appellants. I am unable

to find a similarity either in facts or in the applicable principles of law, in relation to the appeal before us to the *ratio* of the judgment cited by the 4th Appellant.

Learned Counsel, as his third ground of appeal, contended that the High Court at Bar erred when it expected the 4th Appellant to offer an explanation in a situation where the prosecution itself failed to establish a strong *prima facie* case against him and cited the principles enunciated in the judgment of ***Ajith Fernando v Attorney General*** (2004) 1 Sri L.R. 288, in support.

Learned Counsel for the 4th Appellant was critical of the prosecution for its keenness to promote the proposition that in a criminal matter there exists a burden on the accused person to prove his innocence and also to promote that the norm that exists in the criminal justice system that there is no burden on an accused person to prove his innocence is presently outdated. Learned Counsel submitted that the said principle is so well entrenched in the criminal justice system, which has not changed, except that the *Ellenborough dictum* has introduced a modification to that where in a case where the prosecution has been able to establish a *prima facie* case. Only then it becomes incumbent upon the accused person to offer an explanation. He then quoted *Coomaraswamy* (Vol. I, p.21) where learned author stated:

> "*[T]he recent tendency of the Supreme Court of Sri Lanka also appears to be to expect an explanation of telling circumstances, though the failure that is commented on is the failure of the accused to offer evidence and not to give evidence himself. A party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive. Whether prima facie evidence will be converted into presumptive evidence by the absence of an explanation depends upon the strength of the evidence and*

that operation of such rules as that requiring a especially high standard of proof on a criminal charge."

Learned Counsel submitted that said statement was accepted by a divisional bench of this Court in ***Ajith Fernando v Attorney General*** (2004) 1 Sri L.R. 288 and insisted on the fulfilment of the requirement of a *strong prima* facie case against an accused, before the Court expects him to offer an explanation. He also added, even if the trial Court did hold there was a *prima facie* case, no mention was made of the material on which it reached that conclusion. According to learned Counsel, it was not for the appellate Court to find material and determine whether there exists a *prima facie* case against the 4th Appellant or whether he needed to offer an appropriate explanation.

Since the learned Counsel referred to *Ellenborough dictum* in a critical tone, it is important to refer to the view expressed by *Amaratunge* J in ***Attorney General v Potta Naufer*** (2007) 2 Sri L.R. 107, when an appellant sought to challenge its authenticity in much stronger terms by stating it is a non-existent *dictum* of Lord *Ellenborough,* and it does not form part of the judgment in ***R v Lord Cochrane*** (1814) Gurney's Report 479 and therefore is a "creation by *Wills*".

His Lordship, after having undertaken a survey of judicial precents in England and United State of America dealing with this aspect, concluded (at p.199) that these "*… judicial pronouncements reflect the consensus of judicial opinion on the effect of an accused person's failure to offer an explanation in the circumstances referred to in those passages. What those learned Judges have indicated in their pronouncements is the process of reasoning of a prudent trier of fact, well informed of the relevant legal principles, in the circumstances referred to in those pronouncements. In short, they indicate the use of logic and common sense in the process of reasoning*". His Lordship then added that (at p. 200), "*[T]he correct legal view appears to be that, in civil and criminal proceedings alike, whereas a party's*

failure to testify must not be treated as equivalent to an admission of the case against him, it may add considerably to the weight of the latter."

When the prosecution presented the evidence of the 4th Appellant's own admission that " අපි සියාම් ව මැරුව", within a matter of few hours since the deceased was seen alive last, in itself established a *prima facie* case. *Krishantha* saw the deceased alive for the last time when he alighted from the van, when it stopped on the direction of the 5th Appellant, after passing *Kaduwela* junction and turning towards *Biyagama*. He did not indicate the exact time when he was told to return home. But *Krishantha* was in touch with *Anuradha* over his mobile phone as they travelled in two different vehicles. The tower records indicate that two of them communicated with each other at 11.10 p.m. through *Kaduwela* tower, 11.12 p.m. through *Kaduwela South W* tower, 11.14 p.m. through *Kaduwela A* tower and also at 11.16 p.m., through the same tower, supporting *Krishantha's* narrative that he travelled through *Kaduwela* that night separately from *Anuradha*. The necessity to take these several calls within a short duration of time arose due to the fact that it was the 5th Appellant who was issuing instructions, and that he was travelling in the double cab, driven by *Anuradha* whereas *Krishantha* was traveling in the van driven by the 4th Appellant.

Dias in his evidence said he saw 2nd, 3rd, 4th and 6th Appellants retuning home at about 1.00 – 1.10 a.m. on 23.05.2013 and they went up to speak to 1st Appellant.

A few hours later on the same day *Ramyalatha Jayasundera* was walking along a lane that connects to *Malwana – Dompe* main road in *Udamapitigama, Dompe* at about 6.45 a.m. As she walked past a land, overgrown with shrubs and trees called *Jayamali Watta,* saw a naked man lying on the ground. This was the body of the deceased. IP *Hettiarachchi* of *Dompe* police received information about the said body at 7.15 -7.30 a.m. on the same day, visited the

place and made observations. He saw a naked male body lying face down. He also noted two small holes located just above right ear and a large gaping injury in front of his head. He observed that the blood from that injury had pooled near the head had already clotted. The back side of the body had turned pale. Dr. *Hewage,* Consultant JMO, who performed postmortem examination on that body, was of the opinion that his death was due to two necessarily fatal rifled firearm injuries to the head, although a ligature mark too was seen around the neck. Since he performed the said examination after a period of 8 days, is unable to form an opinion as to the estimated time since death, but noted hypostasis on the front parts of the body and explained that it was due to body fluids being accumulated in the areas of the body which it rests on, due to gravity and thereby leaving the upper parts pale, as observed by IP *Hettiarachchi.* The police also found a distorted inner core of a T56 bullet, embedded about 4 inches into the ground right under the place where the large gaping was noted.

The 4th Appellant joined with others, who by then brought in the 'abducted' deceased in a double cab to the residence of the 1st Appellant. One member of that group carried a T56 weapon with him. The 4th Appellant, without a direction from any one replaced *Anuradha* as the driver of the double cab. When the deceased was transferred to the van, the 4th Appellant too switched vehicles and drove it once again without anyone issuing him any direction to do so. Deceased's blood was found by the Government Analyst in that van, and confirmed by *Dr. Illeperuma,* when it matches with the DNA of the deceased. It is not clear who drove the van, when they returned to *Nedimala* in the early hours of 23.05.2013 along with 2nd, 3rd and 6th Appellants. A T56 weapon was removed from the van, after *Krishantha* came to pick that vehicle up after 7.00 a.m. That is the time the 4th Appellant informed *Krishantha* " අපි සියාම් ව මැරුව". This was in response to *Krishantha's* query

directed to the 4th Appellant, seeking an answer as to the fate of the man whom he drove away the previous night in the company of the 2nd, 3rd, 5th and 6th Appellants. The question put to the 4th Appellant speaks for itself. The question was "මොකක්ද සංජීව මේ කෙලේ, දැන් සියාම් කෝ". The question clearly suggested that the 4th Appellant had done something to the deceased, but it does not necessarily infer that he killed him, as it further queries from him where the deceased now. The response was " අපි සියාම් ව මැරුව". This was the opportunity for the 4th Appellant to disclose his alleged limited role of being only a police driver. But the 4th Appellant voluntarily accepted credit for being a part of the team that killed the deceased.

Krishantha accepted that the deceased was killed by the 4th Appellant and others simply on that admission and, on their way to *Polgahawela,* he told *Anuradha* " කැළුම්ල ඔහුට වෙඩි තියල මරල දාලා,". The reference to the 4th Appellant as " කැළුම්," is significant. It reflects the impression created in the mind of *Krishantha* that it was the team of that the 1st Appellant sent out last night that was responsible for the death of the deceased, and the 4th Appellant was one of its willing participants. This being the summery of prosecution case against the 4th Appellant, during his statement from the dock, it was stated that he does not know anything about this incident, and that he had only acted as the driver to the 1st Appellant. The 4th Appellant denied of having said " අපි සියාම් ව මැරුව" in replying to *Krishantha,* while also totally denying the allegation that he drove a double cab or a van that night, a position contrary to the one he had advanced before this Court. He too accused the CID officers of falsely implicating him to this crime simply because he refused to toe the line the way they want him to. The 4th Appellant also claimed that he refused the conditional pardon offered to him as he had done no wrong.

The High Court at Bar, while dealing with the position advanced by the 4th Appellant, in addition to the one in which he totally denied the allegations

made by the prosecution witnesses, that he was falsely implicated by the officers of CID, concluded as follows:

> **" 4 වන විත්තිකරු සඳහන් කරන ආකාරයට ඔහු මෙම නඩුවට සම්බන්ධ කිරීම සඳහා අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුවේ විමර්ශකයින් වූ ප්‍රධාන පොලිස් පරීක්ෂක මුණසිංහටත්, සහකාර පොලිස් අධිකාරී ශානි අබේසේකරටත් තිබුණු අවශ්‍යතාවය කුමක් ද යන්න සලකා බැලිය යුතුය. එසේම මෙම විත්තිකරු සඳහන් කරන පරිදි ක්‍රිෂාන්තට සහ අනුරාධට ඔවුන්ගේ වගකීමෙන් බේරී මෙම 4 වන විත්තිකරු මෙම අපරාධයට සම්බන්ධ කිරීම සඳහා තිබුණු අවශ්‍යතාවය කුමක් ද යන්න සලකා බැලිය යුතුය. මෙම විත්තිකරු මෙම අපරාධ සඳහා සම්බන්ධ නොවූයේ නම් සම්බන්ධ වූ බවට ව්‍යාපාරිකයෙකු වූ ක්‍රිෂාන්තට සාක්ෂි ඉදිරිපත් කිරීමට තිබූ උවමනාව කුමක් ද? ක්‍රිෂාන්ත සහ මෙම විත්තිකරු අතර තිබුණු සම්බන්ධතාවය කුමක් ද? යන කරුණු සලකා බැලිය යුතුය. ක්‍රිෂාන්ත 1 වන විත්තිකරුගේ හිතමිතුරෙකු වශයෙන් සිටිය දී 1 වන විත්තිකරු යටතේ සේවය කළ නිලධාරීන්ගෙන් ඇතැම් කණ්ඩායමක් පමණක් තෝරා ගෙන එම කණ්ඩායමේ සිටි 4 වන විත්තිකරුට සියාම් පැහැර ගෙන යාම පිළිබඳව චෝදනා ඉදිරිපත් කිරීමට අවශ්‍යතාවයක් තිබී ඇති බව මෙම අධිකරණයට සොයා ගත නොහැකිය. අනෙක් අතට පැ.සා. 1 අනුරාධ පැ.සා.2 ක්‍රිෂාන්ත කෝරලගේ සහ පැ.සා. 3 ෆවුස්ඩීන් යන තිදෙනාම 4 වන විත්තිකරු සියාම් පැහැර ගැනීමේ ක්‍රියාදාමයේ දී 4 වන විත්තිකරු ඩිසින් කරන් ලද ක්‍රියාදාමයන් එකින් එක පැහැදිලි කර දී ඇති අතර එම සාක්ෂි බිඳ හෙලීමට විත්තිය සමත් වී නොමැති බව පෙනී යයි. එම පදනම යටතේ 4 වන විත්තිකරු ඉදිරිපත් කරන ලද විත්තිවාචකය ප්‍රතික්ෂේප කිරීමට තීරණය කරමි."**

Perusal of the process of reasoning adopted by the High Court at Bar in reaching the said conclusion reveals that it had considered the relative probabilities of the existence of a valid reason for those officers to falsely implicate the 4th Appellant to this crime or of any motive entertained by them in that regard. It is not that the High Court at Bar expected the 4th Appellant to offer an explanation to a *strong prima* facie case that had been established by the prosecution, but when he did offer one on his own, the Court had undertaken a detailed consideration of the acceptability of the explanation.

The Court was of the view that the detailed description of the relevant facts, as spoken to by the prosecution witnesses, remained unshaken by the evidence presented by the 4th Appellant and his witnesses.

This is the basis on which the Court decided to reject his dock statement and therefore, it is my considered view that the complaint of the learned Counsel that the High Court at Bar applied the *dictum* attributed to Lord *Ellenborough* without first determining that a strong prima facie case had been established is devoid of any merit.

One of the remaining complaints about the said judgment concerns with certain reference made by the trial Court to the 4th Appellant during its presentation. Learned Counsel invited our attention to the section that stated (at p. 107 of the judgment)" **තවද පැ.ස. 2 ක්‍රිෂාන්ත කඩුවෙල හන්දියේ දී අනුරාධ සහ කැලුම් සිටි කැබ් එක දුටු පසුව නැවත දුරකථනයෙන් අනුරාධට කථා කොට 4 විත්තිකරුගෙන් ඉදිරියට කළයුතු කාර්ය විමසා සිටි ආකාරයත් ඒ අනුව අනුරාධගෙන් 4 වන විත්තිකරු දුන් උපදෙස් වූ තවදුරටත් කඩුවෙල පහු කොට බියගම දෙසට යන ලෙස පැ.සා. 2 ක්‍රිෂාන්ත අනුරාධට දැනුම් දුන් පදනමත් පැ.සා. 2 ක්‍රිෂාන්ත කියා ඇත.**" and also where the trial Court stated (at p. 775 of the judgment) " **4 වන විත්තිකරුට සියාම් පැහැර ගෙන යාම පිලිබඳව**" and submitted that both these findings of fact were made by that Court without any evidence to support them.

It was the submission of the 4th Appellant that, in view of the above, the High Court at Bar made a very serious misdirection on the most imperative questions and, even if that Court came to a conclusion that a *prima facie* case has been made out against him. Hence, it was contended by the 4th Appellant that the said conclusions are most certainly *ex facie* defective.

The context in which the said section referred to by learned Counsel at page 107 made by the Court was, it considered the narrative of *Krishantha* describing his journey towards *Kaduwela* and the role played by the 5th Appellant during that journey by giving directions via *Anuradha,* who

conveyed them through his phone. It is in this context the section referred to by the learned Counsel appears in that segment of the judgment. It is clear from the sequence of the narrative, as set out by the Court, it had referred to the 4th Appellant's complicity in that part, instead of the 5th Appellant, as the next part deals with the call initiated by the 5th Appellant and converted to a conference call by *Krishantha*. Nowhere in the judgment, I could find a place where the High Court at Bar imputed criminal liability on the 4th Appellant by making a reference to the said section, which obviously made an erroneous reference to him, instead of the 5th Appellant. Obviously, this reference is a mistake on the part of the High Court at Bar. This is confirmed when the Court made no reference to the 4th Appellant in dealing with that evidence at all. Nor did the learned Counsel for the 4th Appellant point out any such reference in the impugned judgment during his submissions.

On the contrary, the High Court at Bar, in its consideration of the evidence against the 5th Appellant, referred to the role played by the 5th Appellant during the entire sequence of events that resulted in the death of the deceased (at pages 228, 247, 250 and 251 of the judgment). The Court concluded (at p. 797 of the judgment) that the 3rd, 4th and 6th Appellants joined the deceased and others on 1st Appellant's instructions at *Nedimala* and that the 5th Appellant had a T56 weapon at that time were established by the prosecution. Thus, the accidental reference to the 4th Appellant, instead of the 5th, in the said section of the judgment had not resulted in any adverse finding against him nor did it, at least, give rise to an adverse inference being drawn against him.

The last of the complaints by the 4th Appellant was that the finding arrived at by the High Court at Bar that the evidence presented before it does not indicate that the Attorney General had offered a conditional pardon and therefore, he uttered a falsehood in this regard could not be sustained.

Learned Counsel tendered a photocopy of a document marked "X" along with written submissions and states that it is a journal entry from the M.C. Colombo Case No. B 3729/5/13 for date 01.10.2013.

Perusal of the judgment of the High Court at Bar revealed that the Court found no evidence that had been presented before it regarding an offer of a conditional pardon made by the Magistrate to the 4th Appellant or that the Attorney General had offered a conditional pardon to him. The Court made no finding that he is a perjurer or lied in his statement from the dock as submitted by the 4th Appellant. The impugned finding is a correct finding made by the High Court at Bar since the 4th Appellant, in addition to making a statement from the dock, did call two witnesses and tendered certified copies of certain Court proceedings and documents marked 4V1, 4V1A, 4V2, 4V2A, 4V2B, 4V3, 4V3A, 4V4 and 4V4A that were obtained from the record of M.C. Colombo Case No. B 3729/5/13. But the document "X" was not marked and tendered by the 4th Appellant through any of his witnesses. This is after the 4th Appellant made a reference to an offer of a conditional pardon in his statement from the dock.

There is no application by the learned Counsel made to this Court to permit reception of additional evidence in appeal, in terms of Section 329(1) of the Code of Criminal Procedure Act, as the 1st and 6th Appellants did, when this appeal was taken up for hearing. In any event, this Court, in considering whether the Court below had arrived at a reasonable conclusion after considering all the material placed before it, should not take note of any item of ' additional evidence' that had not been placed before that Court, unless presented in terms of Section 329.

The 4th Appellant totally denied having driven any vehicle in his dock statement. At the hearing, learned Counsel submitted that all his client did was to follow orders and acted only as a driver of the two vehicles. This is

exactly what the prosecution also presented primarily before the High Court at Bar through *Krishantha* and *Anuradha,* in addition to his admission that" අපි සියාම් ව මැරුව ". Clearly, the role played by the 4th Appellant in the murder of *Shyiam* qualifies to be taken as falling within the statutory provisions contained in Section 256 of the Code of Criminal Procedure Act.

The moment the 4th Appellant emerged out of the gate of *Nedimala* residence of the 1st Appellant on his instructions, it is highly probable that he was aware of the fate that awaits *Shyiam*, as the 3rd Appellant was carrying a T56 weapon with him. None of the others carried any weapons. This was not an instance where the 6th Appellant went out in a sightseeing visit, the 3rd Appellant to act as his personal security carrying a firearm and for the 4th Appellant was to drive him around. This happened immediately after the 1st Appellant verified from *Krishantha* as to his current location, who just 'taken in' the deceased to the double cab and on their way to *Nedimala*. *Krishantha* answered that they are almost there. The 4th Appellant was waiting at the gate with others for *Krishantha* and *et al* to arrive. Once they reached there, no one instructed the 4th Appellant to take the driving seat, replacing *Anuradha*. *Krishantha* was driving the van from *Baddegana,* when the 4th Appellant took over same at *Malabe* after deceased was transferred to it.

Irrespective of whether he was offered a conditional pardon and/or whether he declined to accept that offer, the fact remains that he did participate with the others to take the deceased on his last journey, with full knowledge and intention of the purpose of that journey. The evidence presented by the 4th Appellant did not reveal that he had no knowledge of the purpose of that journey to counter the strong inference that could be drawn from the prosecution evidence. The difference between the 4th Appellant and the prosecution witnesses *Fausedeen* and *Krishantha* is only the former knew that the deceased would be put to death. That is the distinction made by the

High Court at Bar to treat *Fausedeen* and *Krishantha* as ordinary witnesses and not accomplices, as perceived by the Attorney General. Of course, the High Court at Bar, rightly insisted on corroboration of their evidence on material particulars.

The fact that the 4th Appellant was offered a conditional pardon, or that he declined to accept a pardon when offered on the basis that he did no wrong, will not help him to absolve from criminal liability imputed on him by the prosecution, based upon sufficiently corroborated evidence of two prosecution witnesses, who states otherwise. It may be this factor was highlighted before this Court in support of the 4th Appellant's claim that he was pressurised to become a State witness, and his refusal, asserting that he did no wrong, resulted in him being named an accused. But, when the 4th Appellant wants to rely on the fact that he was offered a conditional pardon, that shows he was at least privy to the commission of murder, along with the others. The allegation that he was made an accused by the CID was already referred to and rejected. The inference that he knowingly participated in the crime drawn by the High Court at Bar is confirmed by his own admission " අපි සියාම් ව මැරුවා", sharing credit for what " අපි", did that night at *Dompe*, and thereby bringing him in. Why should he admit something which others did, if he had no hand in it ? He made the admission, because like the others, he too did participate in the crime knowingly and voluntarily, claiming his share of credit for it. In view of foregoing reasons, I find no merit in any of the grounds of appeal that were urged on behalf of the 4th Appellant at the hearing of the instant appeal.

5th Appellant

Learned President's Counsel for the 5th Appellant, while associating himself with the ground of appeal already presented before this Court by the 1st and 6th Appellants regarding *Fausedeen* and *Krishantha*, also sought to

challenge the judgment of the High Court at Bar on the basis that the High Court at Bar accepted the evidence presented by the prosecution with all its faults but opted to reject the explanation offered by the 5th Appellant after highlighting similar faults, and thereby applied two standards in the evaluation of the evidence of the two competing sides, contrary to the principles enunciated in ***The Queen v Kularatne and Others*** (1968) 71 NLR 529. He also submitted that the trial Court failed to assess the prosecution evidence that are in favour of the 5th Appellant.

He also relied on a Court of Appeal Judgment (***Kithsiri v Attorney General*** (2014) 1 Sri L.R. 38), where the Court, inserting a quotation from the judgment of the Indian Supreme Court in ***D. N. Pandey Vs. State of Uttar Pradesh*** AIR 1981 SC 911, said (at p. 43) "*… Courts, in evaluating evidence, should not look at the evidence of an accused person with a squint eye.*"

In support of his contention that the trial Court failed to assess the prosecution evidence that are in favour of the 5th Appellant, learned President's Counsel submitted that:

1. Tower records indicate *Anuradha's* phone was served by *Nedimala* tower at 8.30 p.m. on 22.05.2013 with *Krishantha* being served by *Balapokuna* tower whereas the abduction had taken place at *Kandewatta* at 8.39 p.m. on the same day and therefore presence of *Anuradha* along with *Krishantha* for the abduction is reduced to an almost impossibility. If that is an impossibility then that fact should equally apply to the 5th Appellant as well,
2. *Krishantha's* evidence which indicated that the 6th Appellant told the 1st Appellant in his presence that it was the 5th Appellant who shot the deceased in the head, could not be accepted as a confession of the 5th Appellant in terms of Section 30 of the Evidence Ordinance, as Section 10 of that Ordinance has no application at that point of time

this event said to have taken place. This was due to the reason that Section 10 could only be utilised during the existence of the conspiracy and after the completion of the act to which they all conspired to commit, namely the murder of the deceased, provisions of that Section could not be utilised to admit that evidence.

The main plank on which the 5th Appellant mounted his challenge to the validity of his conviction is the decision to reject the contents of his statement made from the dock. It was contended by Counsel that while making that statement, the 5th Appellant offered his explanation to the circumstances under which he had taken several calls on 22.05.2013, that were relied upon by the prosecution, as items of evidence that are against him. These calls include a 'conference call', the one he made in order to request for a vehicle from *Krishantha* to take his wife to Castle Street Hospital, and the reason for receiving a call from the 6th Appellant's, initiated through the 1st Appellant's phone.

In this regard, it is preferable that a brief reference is made here as to the contents of the dock statement made by the 5th Appellant.

During his 9-page statement, the 5th Appellant after making a reference to his tenure in the Police Department, stated that he was placed under the 1st Appellant only from 09.05.2013 and was assigned to provide security to the Senior DIG, and in addition was to perform his official duties by conducting raids along with vice squads. On 21.05.2013, having accompanied the 1st Appellant to his residence, he found that no specific duty was assigned for him to perform at *Nedimala* and, with the approval of the Senior DIG, he returned home. On 22.05.2013, he was instructed by the 1st Appellant to accompany Mrs. *Vas Gunawardena* to *Kurunegala* to attend a transaction over a land. After returning from *Kurunegala* and having waited at *Nedimala* residence for some time, the 5th Appellant returned to his home at *Dompe* with

permission of the 1st Appellant as he did on the previous night. The 5th Appellant had an appointment with a Doctor at Castle Street Hospital on 23.05.2013, regarding a medical issue of his wife. In order to attend hospital for that appointment, the 5th Appellant requested a vehicle from *Krishantha* on 21.05.2013 and was told to contact him on the following day, which he did. *Krishantha* promised to call back with an answer but did not. The 5th Appellant returned to his house at *Kanduboda* and on his way had collected some money from his mother from her residence at *Dompe.* That night he received a call from the 1st Appellant's phone, and it was the 6th Appellant who spoke. The 6th Appellant conveyed that *Krishantha* was unable to provide a vehicle as he had to attend a matter in *Polgahawela*. On 23.05.2013, it rained heavily, and the 5th Appellant decided to put off the appointment with the Doctor to 30.05.2013 and decided to report to work. The 5th Appellant had admitted that he had two SIMs from *Dialog* and *Hutch* networks.

He denied in his statement that he never went to see the location of the deceased's factory at *Saranakara* Road, never introduced to *Fausedeen* as a best person working with the 1st Appellant, never had a discussion with the 1st Appellant away from *Krishantha,* never went to *Balapokuna* Road to abduct any person, denied the claim of *Krishantha* and *Anuradha* that he went with the deceased to *Biyagama* and returned to *Nedimala,* denied visiting the residence of the *Krishantha's* brother to pick up a van, never got into the van at *Kaduwela* with a T56 weapon, never loaded weapons to a car, never got involved with any transaction of committing murder.

The 5th Appellant made a counter accusation that the prosecutors implicated him with these offences due to the fact that his residence at *Kanduboda* and maternal house in *Dompe* are close to the place where the body of the deceased was found. He further accused that he was implicated to the murder because he worked under the 1st Appellant.

It would be convenient at this stage to consider the basis on which the High Court at Bar decided to reject the dock statement of the 5th Appellant, before venturing into consider the merits of his complaint on the impugned judgment.

The Court considered his evidence and had a trouble with accepting his claim of performing duties of conducting raids with the vice squad, without even signing in or making any entries in the relevant information books or in any other official documentation. The Court was not convinced of also with his claim that he returned home as there was no specific duty assigned to him at *Nedimala,* despite his own admission that he was to provide personal security to the 1st Appellant. The Court similarly was not convinced of his explanation provided to the circumstances under which he initiated and received calls during the evening of 22.05.2013, particularly in relation to the 'conference call'. This finding was due to the improbability of calling *Krishantha* at 11.39 p.m. to find out the availability of a vehicle for the following morning.

High Court at Bar also considered the probability of the basis of the 5th Appellant's accusation that he was implicated in this incident due to him being attached to the 1st Appellant's team and rejected same on the basis that there was no compelling reason for *Krishantha* to implicate the 5th Appellant to the crime. Court also considered the probability of implicating the 5th Appellant to the crime by the CID officers simply for the reason of residing in *Kanduboda.* In view of these considerations, the trial Court decided to reject the dock statement made by the 5th Appellant.

Returning to the complaint that the High Court at Bar erred in applying two standards in the evaluation of the evidence of the two sides, contrary to the principles enunciated in ***The Queen v Kularatne and Others*** (1968) 71

NLR 529, it is important to refer to the principle of law laid down in that authority. The Court of Criminal Appellant held (at p. 551):

> *" … dock statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,*
>
> *(a) If they believe the unsworn statement, it must be acted upon,*
>
> *(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and*
>
> *(c) That it should not be used against another accused".*

It is important to note in this context that in ***Yahonis Singho v The Queen*** (1964) 67 NLR 8, the Court introduced the 'intermediate position' in the evaluation of a dock statement as it held (at p. 9), " … *if Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection*."

Since the High Court at Bar totally rejected the 5th Appellant's dock statement, the question of applicability of the intermediate position would arise only if that rejection could be considered as an unreasonable finding made by the High Court at Bar, in view of the evidence presented before that Court.

Upon perusal of the process of reasoning adopted by the High Court at Bar to arrive at the said conclusion very carefully, it is revealed that the Court considered the evidence of *Fausedeen* and *Krishantha* which the 5th Appellant sought to contradict by his statement from the dock, before arriving at that finding. The Court viewed the conflicting claims by considering them side by side and rejected the dock statement primarily by applying the test of probabilities. It is this process, learned President's Counsel found fault with by citing the judgment of ***Kithsiri v Attorney General*** (supra).

The judgment of the Indian Supreme Court, cited by the Court of Appeal, in ***D. N. Pandey Vs. State of Uttar Pradesh*** (supra) held thus*:* "*Defence witnesses are entitled to equal treatment with those of the prosecution and, Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses.*"

There is no doubt that the assessment of evidence transcends the partisan interest of the competing parties on a disputed but relevant fact in issue. On one hand the High Court at Bar had a narrative that implicates the 5th Appellant and on the other, there is an alternative narrative to the prosecution as presented by the 5th Appellant coupled with a denial of the accusations levelled against him. The evidence of the prosecution witnesses, particularly *Fausedeen, Krishantha* and *Anuradha* presented as testimonies under oath and were subjected to severe cross examination by all the Appellants. The evidence presented by the 5th Appellant, through a statement made from the dock, was a result of him "deliberately refraining" from giving sworn testimony, as noted by ***The Queen v Kularatne and Others*** (supra) and could not be tested for its truthfulness by cross examination. But the 5th Appellant had no burden to discharge. If his statement is accepted or could not be rejected nor accepted, he is entitled to the resultant reasonable doubt created in the prosecution's case. The fact that his statement was totally

rejected by the High Court at Bar is the grievance presented before us by the learned President's Counsel.

It is already stated earlier on that the main plank of the 5th Appellant's challenge on his conviction is mounted on the rejection of his evidence. In effect, by rejecting the 5th Appellant dock statement, the High Court at Bar rejected the alternate narrative offered by him for its consideration *vis a vis* the narrative of the prosecution.

Did the High Court at Bar reject the 5th Appellant's dock statement for a valid reason ?

The alternative narrative offered by the 5th Appellant in explaining the purpose of the calls he initiated from his mobile phone and received after 10.00 p.m., on 22.05.2013 was purely for the innocent purpose of securing a vehicle for his wife to be taken for her medical appointment scheduled for the following day. The desired effect of the alternative narrative offered by the 5th Appellant was to impress upon the trial Court that *Krishantha* was lying when he attributed a different content to those calls. This alternative narrative was offered by the 5th Appellant as the tower records indicated that he initiated a call to *Krishantha's* number and also received a call from the 1st Appellant's phone.

Tower details of the 5th Appellant's phone during this time period indicate that he did initiate a call from his phone (077- 2415750) to *Krishantha* (077-1303304) at 11.39.33 p.m. on 22.05.2013 through Delgoda- DCS 1 tower. This call continued for a total duration of 89 seconds. The 5th Appellants phone (077- 2415750) received a call initiated from the 1st Appellant's phone (077- 0452711) and served through *Nedimala* A tower at 12.58.46 on 23.05.2013. Duration of this phone call is 48 seconds. In between, the 5th Appellant also

did receive a call, initiated by one PC 61784 *Thabrew* (077-9022280) at 11.56.44 p.m. on 22.05.2013 for a total duration of 30 seconds (Admission No. 14) .

It is the 5th Appellant's position with regard to the said tower records that he wanted to verify from *Krishantha* of the availability of a vehicle and that was the sole purpose of the call he initiated at 11.39 p.m. The 5th Appellant claims he wanted check with *Kirhsnahta* on this issue, and during that call *Krishantha* promised to call him with a definite answer. But *Krishantha* did not call back with an answer. Instead, it was the 6th Appellant, who contacted him using the 1st Appellant's phone (077- 0452711) at 12.58 a.m. to convey that *Kirshantha* is unable to provide a vehicle.

The High Court at Bar considered the probabilities of these conflicting versions of events. After returning from *Kurunegala* the 5th Appellant was at *Nedimala* residence. *Krishantha* too was there along with *Anuradha* at the same time as per the phone records. These records also indicate that the 5th Appellant was served by Nugegoda-West 3 tower at 7.56.57 p.m. on 22.05.2013, while *Krishantha* was served by Col-Dehi-190 tower at 8.19.20 p.m. and *Anuradha* was served by *Nedimala* tower 8.01.28 p.m. The 5th Appellant admitted in his evidence that he did return to *Nedimala* that evening after returning from *Kurunegala*. Thus, the evidence points to the fact that both the 5th Appellant and *Krishantha* was there at the 1st Appellant's residence at the same time, as claimed by *Krishantha.* This undoubtedly provided an opportunity to the 5th Appellant to make enquires from *Krishantha* in person, without waiting till the eleventh hour to verify the availability of a vehicle for him to take his wife to an important medical appointment. The 5th Appellant does not state that he forgot to check with *Krishantha* and remembered about the vehicle late into the night and calling *Krishantha* at that time was an act of desperation. His position simply is that he called *Krishantha* only at 11.39 p.m.

This is not the conduct of an average person, who had such an urgent requirement of a vehicle for the following morning. Hence, application of the test of probabilities on this point does not favour the 5th Appellant.

The High Court at Bar was of the view that the claim of the 5th Appellant that it was the 6th Appellant who spoke through the 1st Appellant's phone was to provide an alternative version to the one provided by *Krishantha* and *Anuradha* that the 6th Appellant too travelled with them to *Malabe* in the van, along with the deceased and the 2nd to 5th Appellants. The phone records do not indicate that *Krishantha* received a call from the 6th Appellant that night, on behalf of the 5th Appellant, to confirm with him of the availability of a van for the following morning.

This is a convenient point to refer to a contention advanced by the 1st Appellant on the telephone call under consideration. This was referred to in the judgement as the conference call. It was submitted by learned President's Counsel that *Krishantha* had lied under oath in his attempt to pin liability on the 1st and 6th Appellants, as the analysis of call details contained in WS-2, tended to this Court with written submissions.

Krishantha's evidence on this point is, after he received a call from the 5th Appellant's phone and he was instructed to collect the van on the following morning from 1st Appellant's residence, the 6th Appellant spoke to him through the 5th Appellant's phone and wanted *Krishantha* to initiate a conference call connecting his father, the 1st Appellant. *Krishantha* did comply with that request and 6th and 1st Appellants conversed with each other through the conference call, while *Krishantha,* who initiated the conference call was able to listen to their conversation. *Krishantha* said after the conversation between the 6th and 1st Appellants ended, the 5th Appellant hung up, but he continued with the call he initiated and conversed with the 1st Appellant.

The phone records indicate that the 5th Appellant's call to *Krishantha* continued for a total duration of 89 seconds. The call initiated by *Krishantha* connecting the 1st Appellant in a conference call continued for a duration of 50 seconds. This call was initiated by *Krishantha* halfway through the call initiated by the 5th Appellant, which was continuing.

Tower records indicate the call received by *Krishantha* as well as the call initiated by him to the 1st Appellant. Importantly, both calls ended simultaneously at 11.41.02 p.m. on 22.05.2013, confirming that *Krishantha* did call the 1st Appellant, whilst engaged in a call through the 5th Appellant's phone. But it also created an inconsistency in the evidence of *Krishantha* when he stated the 5th Appellant hung up halfway, when in fact that call too continued until *Krishantha,* and the 1st Appellant ended their call. What *Krishantha* stated in evidence was the 5th Appellant had "cut" the call after the 6th Appellant spoke, but he wanted to continue with the call with the 1st Appellant, in order to ask him for the reason of taking this course of action.

What established by the tower records beyond any doubt is the fact that *Krishantha,* whilst engaged in a call with the 5th Appellant, also initiated another call to the 1st Appellant. What was the urgency that compelled *Krishantha* to call the 1st Appellant in that manner? He could have easily taken that call after the 5th Appellant's call ended. *Krishantha's* explanation is that the 6th Appellant wanted to speak to his father through a conference call initiated by him, instead of calling directly through the 5th Appellant's phone after the call with *Krishantha* had ended. This explanation fits in perfectly to the electronic records of the call details and supports the truthfulness of that assertion.

The High Court at Bar concluded that the position taken up by the 5th Appellant on this issue is an attempt to introduce the 6th Appellant as the

person who initiated a call to replace the 1st Appellant, through whose phone, that particular call was initiated. Learned President's Counsel also challenged *Krishantha's* evidence that it was a conference call as the witness called by the prosecution on behalf of the relevant service provider was unable to specifically confirm that it was a conference call. It could be that *Krishantha* may have put the 5th Appellant's call on hold and, dialled the 1st Appellant's number to initiate call or in fact initiated a conference call through which all three could speak. When *Krishantha* said 5th Appellant "cut" the call, no clarification was sought on the basis he said so. It is clear that the perceived act of "cutting" was not by *Krishantha* but by the 5th Appellant, who did not speak, after 6th Appellant came on line. In view of these considerations, the statement by *Krishantha* that the 5th Appellant had "cut" the call, when it actually continued, cannot be the basis of a justification to reject his evidence in its totality, as this is a trivial inconsistency that could be attributable to a genuine mistake made by him.

Moving on to another factor connected to the issue under discussion, it is interesting to note that *Krishantha,* during his examination in chief itself, did reveal a pre-emptive defence already prepared for the 5th Appellant by the 1st Appellant, almost similar to the one presented by the 5th Appellant during his dock statement, providing an alternative narrative.

Krishantha, after realising that the deceased had been killed, was naturally frightened that he would be arrested for that murder and frequently visited the 1st Appellant at his residence for advice. During one of those meeting *Krishantha* learnt that the body of the deceased was dumped in the area supervised by the 1st Appellant. *Krishantha* asked for advice from the 1st Appellant, in order to prepare himself to face an investigation and the way he should answer if he was questioned by police over this murder.

The 1st Appellant advised *Krishanth* to state that:

> **"වාස් මට කිව්වා උඹව නිකම් හරි පොලිසියෙන් අරගෙන ප්‍රශ්ණ කරන්න හැදුවොත් එදින දවසේ මම වාස්ලා ගෙදර හිටියේ, කැලුම්ට අසනීප වෙලා කැලුම්ව දොම්පේ ගෙදරට ගිහිල්ලා බස්සලා එන්නේ කියලා කියන්න කිව්වා. ඒ යන අතරෙදි වාස් කිව්වා කැලුම් කියන විදිහට මට දැන් ටිකක් හොඳයි මට ගෙදර යන්න අවශ්‍ය නැහැ, මාව ආයෙත් ගෙදරට බස්සන්න කියලා ඊට පස්සෙ ආයෙත් එන ගමන් කැලුම් කියන විදිහට මට කියන්න කිව්වා කැලුම්ට ටිකක් අමාරුයි එයාව ඉස්පිරිතාලේ ඇඩ්මිට් කරන්න කියලා. ඒ නිසා තමයි අපි ආයෙත් හරවලා ආවේ කියලා ආවේ කෙලින්ම වාස්ලගෙ ගෙදරට. ඊට පස්සේ ආයෙත් කැලුම් කිව්වා කියලා කියන්න කිව්වා සර් මට හොඳයි මාව ඉස්පිරිතාලේ නතර කරන්න ඕනේ නැහැ මාව ගෙදරට ගිහිල්ලා බස්සන්න මම ගෙදර ගිහිල්ලා රෙස්ට් කරලා එන්නම් කියලා."**

Except for his wife's medical condition, all other details of the 5th Appellant's dock statement did match perfectly to the proposed statement prepared by the 1st Appellant on behalf of him. It is evident from this prepared version of events, that the 1st Appellant was making an attempt to line up the movements of the 5th Appellant with the tower details. Of course, the 5th Appellant suggested the position he had presented to Court, during his cross examination of *Krishantha,* who denied such a happening. Strangely, neither the 1st Appellant nor the 5th Appellant, thought it fit to challenge *Krishantha* over this particular segment of evidence that is reproduced above during their long sessions of cross examination. This is an important observation since the 5th Appellant did cross examine *Krishantha* at length to cover 79 pages of proceedings. Thus, there was uncontroverted evidence before Court that the alternative narrative presented by the 5th Appellant during his statement from the dock, is actually a creation by the 1st Appellant, and made for the benefit of the former and with the expectation to be presented through *Krishantha*.

It was created by the 1st Appellant even before *Krishantha* was arrested by CCD. Connected to this issue, the fact that the 1st Appellant sought phone details of his family members along with that of the 2nd Appellant by surreptitiously introducing their numbers to a pending criminal matter in order to obtain a Court order for release of that information, becomes very relevant. When the fact of the 1st Appellant obtaining phone details very urgently and had them specially delivered to his residence is taken in to consideration with the fact that he used that information to advise *Krishantha* what to say to police, clearly points to a reasonable inference that could be drawn against the 1st Appellant, that he used his understanding of the investigative technics of using tower records to trace suspects, in order to concoct a false narrative on behalf of the 5th Appellant with the intention of shielding him from punishment, which also could be used to help the 6th Appellant with his own defence at the same time. It is relevant to note that *Dias,* in his evidence did say the 1st Appellant said that only the 5th Appellant has a problem, after examining phone records.

Therefore, the evidence of the 5th Appellant on this point could clearly be termed as an artificially created false narrative containing multiple improbabilities. Thus, the decision taken by the High Court at Bar to reject the dock statement of the 5th Appellant was made not because of it had applied evaluation principles differently to him but due to its own inherent defects, that justified its total rejection.

At the commencement of the 5th Appellant's contention, it was noted that he had advanced a contention before this Court stating that the tower records indicate *Anuradha's* phone was served by *Nedimala* tower at 8.30 p.m. on 22.05.2013 with *Krishantha* being served by *Balapokuna* tower, while the abduction had taken place at *Kandewatta* at 8.39 p.m. on the same day.

Therefore, the presence of *Anuradha* along with *Krishantha* for the purpose of abduction at *Kandewatta* Road is a near impossibility. Learned President's Counsel for the 5th Appellant submitted that if it is an impossibility, that impossibility should equally be applied to the 5th Appellant as well.

It appears that the time of *Kandewatta* Road 'abduction' was placed at 8.39 p.m. by the learned Counsel. In making that submission, he did not indicate from where he obtained that information. During cross examination by the 5th Appellant, *Krishantha* said they left 1st Appellant's residence at about 8.15 or 8.30 p.m. on 22.05.2013. Tower records indicate that from 7.12 p.m. and until 8.19 p.m., *Anuradha* was served by *Nedimala* tower and at 8.43 p.m. only he was served by Col-Wel 143-CB indicating a location near *Balapokuna* Road. In view of the evidence referred to above, I find no merit in that contention.

The second point raised by the 5th Appellant is related to *Krishantha's* evidence which indicated that the 6th Appellant told the 1st Appellant in his presence that it was the 5th Appellant who shot the deceased in the head. Learned President's Counsel contended that item of evidence should not be accepted as a confession of the 5th Appellant in terms of Section 30 of the Evidence Ordinance, and Section 10 of that Ordinance has no application in view of the point of time at which this event said to have taken place. He further submitted that Section 10 could be utilised only during the existence of the conspiracy and with the completion of the act to which they all conspired to commit, namely the murder of the deceased, provisions of that Section could no longer be utilised to admit that evidence.

Learned President's Counsel made this submission regarding the evidence of *Krishantha* which indicated that when he met the 1st Appellant, the 6th Appellant said that it was the 5th Appellant who shot the deceased in the head. I did not come across a section in the judgment where the trial Court considered this evidence against the 5th Appellant or in respect of any other

matter. Contrary to the submission, the High Court at Bar made a specific pronouncement that it would only admit evidence up to the point of the death of the deceased under Section 10 of the Evidence Ordinance, but subject to the limitations imposed under Section 30 and any evidence that relates to the events that had taken place after the murder, it would be considered only under Section 8(2) of the Evidence Ordinance, as subsequent conduct of the person (p.119 of the judgment). When the prosecution led that item of evidence through *Krishantha* there were no objection to its admissibility or of its relevance. The trial Court had on its own imposed that limitation by following the applicable statutory provisions regarding such evidence.

Thus, in view of the reasoning as referred to above, it is my view that the several grounds of appeal that were urged on behalf of the 5th Appellant are without any merit and ought to be rejected.

Learned President's Counsel, during his submissions, specifically raised a ground of appeal on behalf of the 6th Appellant when he submitted that the High Court at Bar gravely erred in rejecting his statement from the dock, without giving adequate reasons. It was submitted that the 6th Appellant had taken up the position that he was at home attending to some work related to his business in the night of 22.05.2013, a fact corroborated by the 5th Appellant. Furthermore, the 6th Appellant also said in evidence that he used his father's phone that night to call his then girlfriend *Sheshadri,* as evident from tower records.

The tower records indicate that the phone used by *Sheshadri* (077-8034046 – 6V1) received a call from a phone used by 1st Appellant (077-0452711 – call details marked as P49) at 10.55 p.m. on 22.05.2013, which continued for a duration of 24 seconds (2V6). This is the call on which this particular ground of appeal was raised. Thus, if the 6th Appellant's evidence that the said call was taken by him is accepted by Court or the Court is unable

to accept or reject that claim, it raises a reasonable doubt in the prosecution's case as it establishes his *alibi.*

The 6th Appellant, in his dock statement stated that he returned from *Kurunegala* with his mother at about 8.30 or 8.45 that evening with the 5th Appellant. He then put his phone to charge as its battery was low. After some time, he noted that *Sheshadri* had sent him a text message to his phone (077- 7940034 – P54). He thereafter had called her that night, using one of the three phones used by his father. According to the 6th Appellant, the reason to use his father's phone to take calls to *Sheshadri* instead of his own phone was clarified to Court by him. This was due to the fact that he used to switch off his phone during night, in order to avoid his friends constantly troubling him to get them released through the intervention of 1st Appellant, whenever they are booked for traffic offences. He emphasised that he used his parents' phones to call *Sheshadri* from the time they got to know each other, and this is why he used the 1st Appellant's phone that night as well to call *Sheshadri*.

Learned President's Counsel invited attention of this Court to the fact that the 6th Appellant had presented his position consistently by suggesting to *Krishantha* that he never got into the double cab with others. *Krishantha* denied the said suggestion and replied that he mentioned the 6th Appellant's name because he too joined the other to take the deceased from *Nedimala*. He emphasised that there was no personal animosity with the 6th Appellant for him to falsely implicate him. The 6th Appellant suggested that position to *Krishantha* once more as the last question put to him during cross examination, along with suggestion that that he gave a call to *Sheshadri* that night. *Krishantha's* answer was the question is not clear to him. With that answer his cross examination was concluded by the 6th Appellant.

The grievance of the 6th Appellant is in relation to this evidence is that the trial Court rejected his evidence of calling *Sheshadri* from his home, using his father's phone without giving adequate reasons.

The High Court at Bar considered the contents of the dock statement in detail for over 11 pages of its judgment at the very end and decided to reject the same. This decision was made by that Court after having observed following improbabilities and inconsistencies in the sequence of events, as spoken to by the 6th Appellant, in his statement from the dock.

The 6th Appellant claimed that *Krishantha* was angry with him for his resentment for his father in taking up appointment in Colombo. The Court, having noted that this position was never suggested to *Krishantha,* concluded that it was presented for the 1st time by the 6th Appellant in his dock statement. Court then considered the 6th Appellant's position that *Krishantha* called on the 1st Appellant's number in late evening. The 6th Appellant claimed that he declined to give the phone to his father, when requested to do so by *Krishantha,* but asked for the reason to talk to him. *Krishantha* replied that he wanted to talk to the 1st Appellant over 5th Appellant's request for a vehicle for the following morning. The 6th Appellant, having refused the request, directed *Krishantha* to make some arrangement to help the 5th Appellant and to keep him informed. The 6th Appellant thereafter contacted the 5th Appellant, using his father's phone once more, to verify the request he made to *Krishantha.* Then the 6th Appellant indicated to the 5th Appellant that his expectation of a vehicle might not work out and it is better he looks for an alternative arrangement.

The Court noted that the position taken by the 6th Appellant in his dock statement is an attempt to paint a picture that the phone conversation *Krishantha* had with the 1st Appellant that night was in fact between *Krishantha* and him. The Court was of the view that it was very unlikely that

Krishantha, if he was denied access to the 1st Appellant, would not use other two connections to contact him. The 6th Appellant admitted his father had three phone connections in his dock statement. The Court also did not find any reason attributed to by the 6th Appellant, why only this particular call was denied, when *Krishantha* had no difficulty in contacting the 1st Appellant during the entire period under consideration as the call records and his evidence revealed. It was also noted by the Court that the refusal to hand over the phone to 1st Appellant when *Krishantha* requested to do so seemed very unlikely, given the nature of the relationship he had with the 1st Appellant and his family. Thus, the position of the 6th Appellant taken on this point could not be accepted.

When the 6th Appellant, in alluding a reason for *Krishantha's* arrest, said that it was a regular happening as he was known to get into trouble quite often by assaulting people, the Court noted that the total indifference displayed by the 6th Appellant, over an arrest of a close family friend, seemed an artificial claim. It is relevant to note that the 6th Appellant was taken on a trip to Thailand by *Krishantha* on his expense a few weeks ago along with his father and mother.

The Court also considered probabilities of the reasons attributed by the 6th Appellant for evading arrest after the arrest of the 1st Appellant and decided not to accept them.

With regard to the call to *Sheshadri,* the High Court at Bar observed (at p. 788 of the judgment) that the phone records indicate that there was large number of text messages sent and received by the 6th Appellant using his phone on that day and noted that his phone was switched off over a specific period of time. *Sheshadri,* who would have provided the best evidence that it was the 6th Appellant, who called her on 1st Appellant's phone was not called as a witness. The 6th Appellant sought to offer an explanation for that failure

by stating that that the CID officers have harassed her to the extent that she lost interest to live. However, this position was not put to ASP *Abeysekera,* as the 6th Appellant did not cross examined him, although he was accused of fabricating a case against all the Appellants using tower records.

The Court also had the evidence placed before it that the 6th Appellant's phone was used during the time period between 7.00 p.m. and midnight on a regular basis before and after 22.05.2013 and thereby effectively challenging the validity of his claim that he regularly switches off his phone in the night to avoid calls from his friends. A Court cannot take a particular item for its consideration in total isolation, ripped off from the rest of the attendant circumstances, and evaluate for its credibility by ignoring the rest. The applicable test being the probability of that version, relevance of the attendant circumstances, in the evaluation process could not be ignored. It must do so after only consideration of all the relevant factors, for it is for the Court to satisfy itself whether a witness's evidence is a truthful and reliable account of the events he speaks of. In this instance, if the 6th Appellant was to be afforded the benefit of doubt created by his evidence, which presented through a statement from the dock, it must be evidence that is acceptable to Court, or the Court must find itself to be in a situation of being unable to decide whether to accept that evidence or to reject.

The specific segment of evidence presented by the prosecution, which the 6th Appellant sought to contradict by making this claim, is that he spoke to the 1st Appellant through a conference call initiated from *Krishantha's* phone. The evidence of *Krishantha* on this point does not reveal a reason for the 5th Appellant to request him to place 6th Appellant on a conference call to his father. The fact that 6th Appellant, left *Nedimala* with others, is spoken to by *Krishantha* and *Anuradha* only. *Dias* only states that the 6th Appellant was not at home when he served tea at 11.00 p.m. and saw arriving with others at

1.00.a.m. *Fausedeen* is not a witness to this event. High Court at Bar decided to accept the evidence of *Krishantha* and *Anuradha* as truthful accounts of the events that led to the death of the deceased, upon their narrative being corroborated in material particulars. It is evident that the 6th Appellant did not carry his phone with him when he joined others for the journey from *Nedimala* to *Kaduwela.* When he wanted to contact the 1st Appellant, it was obvious he had to rely on someone else's phone.

Then why he did not call the 1st Appellant directly from phone of the 5th Appellant ?

It appears from the evidence that, from the very early stages of the conspiracy, the 1st Appellant was careful not to leave a trail of phone calls, which would tend to implicate himself or the others, who carried out his orders. The advice to use two other SIMs to *Krishantha* and strongly insisting on that they used them is indicative of this intention. The fact that 6th Appellant had travelled with the 2nd, 3rd, 4th and 5th Appellants leaving his phone at home cannot be a mere coincidence. It was a deliberate move taken with due consideration not to leave any electronic record of his journey. Even in relation to the 2nd, 3rd, 4th and 5th Appellants , their phones did not register any activity during this journey, except for the 5th Appellant's. But these phones were active when they were at *Nedimala* per the tower records. Hence, there is no tower records to indicate the 2nd, 3rd 4th and 6th Appellants travelled along with the deceased. The inference that the Appellants were careful not to leave a trail of phone calls is further fortified with the 1st Appellant's act of advising *Anuradha* not to reveal anything about the 6th Appellant to the investigators, and that too was made after a consultation with a lawyer, for he knew very well that it is through *Krishantha's* and *Anuradha's* verbal assertion only the police could establish the participation of the 6th Appellant to the abduction and murder. In addition, the 1st Appellant

had taken extra precaution to call for call details of the 2nd , 6th Appellant as well as of *Sheshadri* to assess the ground situation, even before the CCD discovered *Fausedeen* as a person who is concerned with the disappearance of the deceased from CCTV footage. The evidence is that the 6th Appellant too was aware of the importance of tower reports which might provide information to implicate him and his father. When offering a new SIM to *Krishantha,* sometime after the murder, the 6th Appellant instructed him to use it thereafter if when contacting his father. All these factors point to the conclusion that the 6th Appellant's request to put him through to his father on a conference call was to hide his presence with the rest of the team, who were tasked to commit the murder.

Coming back to the call taken to *Seshadri* through the 1st Appellant's phone, it is very likely that the said call of 24 seconds was taken by himself, knowing very well that he needed to establish an *alibi* for his son, the 6th Appellant, being a very natural reaction of a father, who is faced with such a situation. The High Court at Bar attached a significant weightage to the fact that there was no reason, either apparent from the evidence or suggested by the Appellants, for *Krishantha* (who was treated almost as a family member by the 1st Appellant and others) to implicate the 6th Appellant at all, simply by stating that he joined the 2nd, 3rd, 4th and 5th Appellants to take the deceased for his last journey. *Krishantha* could have even suppressed making any reference of the 6th Appellant at all as he did in so many instances during investigations. Court also noted that there is no apparent gain for the officers of the CID making them to fabricate a version to include the 6th Appellant's involvement, even if they had entertained some animosity towards the 1st Appellant for his act of complaining to IGP of the investigative lapses they made during *Kahawatta* murders.

I have already referred to the approach of the High Court at Bar to consider certain items of evidence that were in relation to the events that had taken place after the death of the deceased, as subsequent conduct of the particular accused. This is relevant in the present context. While dealing with evidence which indicate that the 6th Appellant, upon seeing *Krishantha* was very worried, tried to instil confidence in him by stating not to worry about this and his father would look after everything. The 6th Appellant's subsequent conduct in making a reference to the manner in which the death of *Shiyam* was caused, by making a declaration that he was shot right in the head, sounded as if he was delighted to have witnessed the last moments of a man, being put to death. This claim was made by the 6th Appellant when *Krishantha* came to meet the 1st Appellant at his residence, looking a very worried man. But that admission rightly places the 6th Appellant at the crime scene as he did not quote from anyone but presented that description as an eyewitness.

The complaint of the 6th Appellant that the High Court at Bar had rejected his evidence without giving adequate reasons is clearly without merit and ought to be rejected on that account. It is for these reasons, I find myself in agreement with the conclusion reached by the High Court at Bar to reject the evidence of the 6th Appellant, presented before it by way of a statement from the dock.

At this stage of the judgment, the applications made by the 1st and 6thAppellants under Section 351 of the Code of Criminal Procedure Act, seeking permission of Court to present additional evidence, in the instant appeal needs to be considered.

On 14.10.2021, learned President's Counsel for the 1st and 6th Appellants appraised this Court of two applications tendered to Court, through which they seek permission to present additional evidence in this appeal. learned

Addl. SG resisted the applications and the Court provided for an opportunity for them to be heard in presenting their respective submissions.

The 1st and 6th Appellants, in their respective applications (both of which are almost identical in content) made under Section 351, read with Section 451 of the Code of Criminal Procedure Act and also read with Article 139(2) of the Constitution, moved this Court to allow admission of additional evidence in appeal, in order to prevent a serious miscarriage of justice on the cogent and compelling reasons that were pleaded therein.

In setting out the factual basis of the application, the affirmant *Kahawala Gamage Shyamali Priyadharshani Perera,* being the wife of the 1st Appellant and mother of the 6th Appellant, averred that she was alerted to the fact that some officers of the CID have made statements in Court proceedings to the effect that they had previously, at the behest or on instructions of ASP *Shani Abeysekera,* fabricated, falsified or manipulated evidence with regard to alleged weapons belonging to him were discovered from a location in *Kalagedihena, Gampaha* and said ASP *Shani Abeysekera* was arrested and remanded in connection *inter alia* with the allegation of having provided false evidence in a judicial matter.

Upon enquiries being made on this development, it was discovered by the affirmant that there were similar allegations made before the Presidential Commission of Inquiry against the former Director of CID. It is the 1st Appellant's allegation that ASP *Shani Abeysekera,* who conducted the investigations which led to the prosecution of the Appellants before the High Court at Bar, had manipulated investigations and created false evidence against him with regard to alleged discovery of a *cache* of weapons at a land in *Kalagedihena, Gampaha.* The affirmant further averred that the said discovery of weapons was made during the investigation conducted by the ASP *Shani Abeysekera* in relation to the death of *Syhiam.*

Learned President's Counsel referred to the evidence presented by the prosecution in the instant appeal through the witness *Dias* regarding subsequent conduct of the Appellants. When the said witness stated that a few days after the murder, at *Nedimala* residence, a *cache* of weapons was loaded into a *Maruti Zen* car belong to the 6th Appellant on instructions of the 1st Appellant and thereafter it was transferred to a double cab, brought in by IP *Villavarachchi,* who then transported them away, the High Court at Bar considered that evidence. The 1st and 6th Appellants also submitted that the evidence regarding the *cache* of weapons was referred to in the judgment of the High Court at Bar, after accepting evidence of *Dias.* The Court failed to note that the prosecution did not call IP *Villavarachchi* to give evidence before that Court, although he was already listed as a prosecution witness. He further submitted that ASP *Shani Abeysekera* was suggested repeatedly during cross examination that he fabricated, falsified or manipulated evidence, but the Court decided to reject them and proceeded to accept his evidence.

With this subsequent development, the 1st Appellant further stated that fresh evidence, which has come to light through the officers of the CID as well as other witnesses, if accepted and admitted in appeal, would have a material bearing and influence on the outcome of his appeal as they are *ex facie* credible, being comprised of statements/evidence already forming part and parcel of judicial proceedings that were recorded by a Magistrates and Special Presidential Commission. The 1st Appellant therefore moved Court to take evidence of *Neligamage Dileep Asanga Neligama, Ranasinghe Arachchige Chitrani Sanjeewanie, Rampath Deveyalage Sameera Susantha* and *Ratnayaka Mudiyanselage Irosh Chaminda Villavarachchi* and admit them in the instant appeal.

In making the application for additional evidence, the 1st Appellant referred to Sections 351 and 451 of the Code of Criminal Procedure Act, along with Article 139(2) of the Constitution.

Before I proceed to consider the merits of the 1st Appellant's application, the question whether this Court is legally empowered to receive additional or fresh evidence should be considered first.

Article 139(2), empowers the Court of Appeal that it " … *may further receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of First Instance touching the matters at issue in any original case, suit, prosecution or action, as the justice of the case may require.*" Similarly, Section 351(b) of the Code of Criminal Procedure Act too states that the Court of Appeal, in dealing with an appeal, may "*if it thinks it is necessary or expedient in the interests of justice*" it may take additional evidence itself or direct it to be taken by any judge of an original Court or other person appointed by the Court of Appeal for that purpose.

Thus, the Court of Appeal was conferred with a discretion to take additional evidence, subject to the Constitutional and statutory provisions, in situation where it thinks it is necessary or expedient in the interests of justice. The instant appeal is a direct appeal from a judgment of a High Court at Bar constituted by the Chief Justice under Section 451(2). Section 451(3) states notwithstanding anything contrary an appeal shall lie from any judgment, sentence or order pronounced at a trial under Section 450 to the Supreme Court, not to the Court of Appeal.

In Section 451(4) provided for the procedure in preferring an appeal in such a situation by stating that the " … *provisions of this Code and of any other written law governing appeal to the Court of Appeal from any judgment, sentence or order pronounced to the High Court in cases tried without a jury shall, mutatis mutandis, apply to appeals to the Supreme Court, under subsection (3) from* judgments, *sentences or orders pronounced at a trial held before the High Court at Bar under Section 450."*

This section, being a provision of an ordinary legislation, alone is incapable of conferring jurisdiction to this Court, for it is a creature created by the Constitution itself. However, Article 118, whilst conferring the status of final appellate Court to the Supreme Court, by sub-Article 118(g), also confers jurisdiction in respect of such other matters which Parliament may by law vest or ordain. Thus, the provisions of Section 451(4) which confers jurisdiction to hear appeals preferred from judgments, sentences or orders pronounced at a trial held before the High Court at Bar under Section 450 are applicable to this Court with necessary modifications in terminology. Similarly, the powers conferred to Court of Appeal under Article 139(2) and by Section 351 applies *mutatis mutandis* to this Court as well.

Turning to consider the 1st Appellant's application, I intend to identify the basis on which learned Addl.SG raised objections to the two applications under Section 351. It is her submissions that:

a. the proposed additional evidence is not relevant to the instant appeal,
b. the proposed additional evidence is not expedient in the interest of justice,
c. the proposed additional evidence, if admitted would not have an important influence on the result of the appeal,
d. the proposed additional evidence could not be relied upon as credible evidence.

Article 139(2) as well as Section 351 of the Code of Criminal Procedure Act confers a discretion on an appellate Court to permit an application to receive additional evidence in appeal, not as a mere procedural step in the admissibility of evidence, but only if it thinks "… *it is necessary or expedient in the interests of justice*"**.**

The discretion thus conferred on appellate Courts must be exercised with great caution and circumspect and only for the sake of interest of justice. In ***Jandiris et al v Deve Renta et al*** (1932) 33 NLR 200, where it was sought to admit a document from a case record as an item of fresh evidence in appeal, *McDonnel* CJ observed (at p. 201) "*[C]ertainly, this power must be exercised with every caution, partly because the Supreme Court is not in civil matters a Court of trial but of appeal and review, and chiefly perhaps because of the danger that evidence not produced below but sought to be produced to it for the first time, will be manufactured for the occasion. This is a very real danger which was fully before us in considering the application to admit X*." In ***Ramasamy v Fonseka*** *(1958) 62 NLR 90, Weerasooriya J,* added another qualification by citing a note which appeared at page 74 of 1 Balasingham's Notes of Cases, that " … *the fresh evidence which is sought to be admitted must be of a decisive nature or, to put it in other words, must be such that on a new trial being ordered would almost certainly prove that an erroneous decision had been given in the case*".

The authoritative pronouncement on which the 1st and 6th Appellants strongly relied on was made by Lord *Denning*, in ***Ladd v Marshall*** [1954] 3 All ER 745, where it was stated (at p.748) that:

> "*[I]n order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must apparently be credible, although it need not be incontrovertible.*"

These tests were adopted by our Courts, in addition to developing its own jurisprudence, while dealing with the applications to present

additional/fresh evidence in appeal, in ***Ratwatte v Bandara*** (1966) 70 NLR 231 and followed since that judgment (***Dep v Meemeduma*** (1997) 3 Sri L.R. 379, ***Ekanayake and Others v Ratranhamy*** (2013) 1 Sri L.R. 305 and ***Nizam v Jaideen and Others*** (SC/SPL/LA 230/2012 - decided on 15.02.2016).

Therefore, I intend to consider the merits of the two applications adopting the three tests, as set out in ***Ladd v Marshall*** (supra).

It is the contention of the 1st and 6th Appellants that the evidence which they now seek to present before this Court was not available at the time of the trial before the High Court at Bar and had surfaced only after year 2020, that too from the statements made to *Gampaha* Magistrate in Case No. B/3250/2014 by *Asanga Neligama, Chiranthi Sanjeewanie, Sameera Susantha* and *Irosh Villavarachchi.* The 1st and 6th Appellant have annexed copies of these statements marked as "E" to their application.

Learned Addl. SG, in her submissions invited attention of Court to the dates on which these statements were made. *Asanga Neligama* made his statement on 21.07.2020, along with his wife *Chiranthi Sanjeewanie. Sameera Susantha* and *Irosh Villavarachchi* made their statements to the Magistrate on 23.07.2020. This factor was relied upon by the learned Addl. SG in support of her contention that the CID, having investigated into the murder, detected that a *cache* of weapons was transported to a location from *Nedimala. Villavarachchi,* who served as an IP, was the first person to be arrested on 26.02.2014 in this connection and was produced in Colombo Magistrate's Court on the following day in Case No. B 3250/2014. The subsequent investigations conducted by CID discovered a sizable quantity of firearms from an estate belong to *Asanga Neligama* at *Raniswela, Kalagedihena* on 11.03.2014. These weapons included a T56 described as a "කවල් බටT56".

With the investigations proceeding on that information, the 1st and 6th Appellants as well as the 3rd and 4th were arrested and were produced before Courts as suspects. Learned Addl. SG contends that all suspects of the Colombo Magistrates Court in Case No. B 3250/2014 had the opportunity to make complaints against the alleged fabrication of a case by introducing a cache of weapon to their possession but none of them made any accusation against ASP *Abeysekera.* She further submitted that neither did they present any such accusation of fabrication by introducing a *cache* of weapons, when *Abeysekera* gave evidence before the High Court at Bar and therefore submitted that the applicants are now trying to have a second bite at the cherry.

It is evident that ASP *Abeysekera* was arrested by CCD on 31.07.2020, after being interdicted from his services, in respect of an allegation of introducing several firearms and offensive weapons as items that were recovered from an estate in *Raniswela* after keeping them in his possession for nine months. Thereby he was accused of committing offences under Section 2(1)(b) of the Offensive Weapons Act and Section 22(3) of the Firearms Ordinance in M.C. Gampaha Case No. B 1536/20.

The sequence of events that preceded the arrest of ASP *Abeysekera* includes making of statements by *Neligama* and his wife, followed by the two police officers who were attached to the 1st Appellant's protection. *Villavarachchi* and *Susantha,* who made statements after *Neligama,* have also featured in *Dias's* evidence. There is no material to suggest that *Villavarachchi* or *Susantha* were prosecuted for commission of any offence related to the instant appeal and their names were not included in the information exhibited by the Attorney General, in the High Court of Colombo. The alleged act of fabrication of evidence against the 1st and 6th Appellants, made by ASP *Abeysekera* was in February 2014. *Neligama et al* made their statements implicating ASP

Abeysekera only in July 2020, more than six years later. I did not see any explanation as to why they waited that long to make the allegation against *Abeysekera,* upon an incident which they all were privy to.

In ***Appuhamy et al v The Officer in Charge, Police Station, Pallebedde et al*** (1986) CALR Vol.III. 281, *Sharvananda* CJ emphasised that (at p. 285) " *[F]resh evidence connotes evidence from a new source – such a source could be oral or documentary- but it should be a new source."* His Lordship further added that (at p.286), *"[A] party who had ample opportunity to produce certain evidence in the lower Court but failed to do so, cannot have it admitted in appeal. Evidence which is not within the knowledge of the party, or which could not be produced in trial in spite of due diligence can alone be admitted in this Court, provided that it has an important bearing on the issues in the case."*

More importantly, the proceedings that were instituted against the 1st Appellant with three others is still pending before that Court. At the time of this application, facts were reported to Court on the allegation made by the 1st and 6th Appellant, and ASP *Abeysekera* was named a suspect, but in that instance also no prosecution was commenced.

The claim that the *cache* of weapons was introduced by ASP *Abeysekera* would obviously be the defence of the Appellants, if and when they are formally accused of any offence relating to the *cache* of weapons. The 1st Appellant relied on the fact that the report of the Government Analyst, who carried out various tests on the multiple firearms from the said cache of weapons, in order to identify the weapon used to commit the murder of *Shiyam* returned a negative report, in order to bolster his contention of wilful fabrication. If this Court were to consider credibility of the allegation levelled against the 1st Appellant and others or of the allegation against *Abeysekera*, it would be inappropriate for this Court to do so collaterally at this juncture, in view of the fact that these issues, remains facts that are disputed by parties

and therefore were to be determined by the respective trial Courts, upon hearing evidence. There is no precedent cited either by the 1st or 6th Appellants that additional evidence was permitted by an appellate Court, regarding a matter that was pending before another Court and remains to be determined.

In view of these considerations, the applicability of the third test, as pronounced by *Denning* LJ, namely "*the evidence must be such as is presumably to be believed, or in other words, it must apparently be credible, although it need not be incontrovertible*" should be confined to the already made observation that the proposed evidence could not be termed as an item of evidence that did not come to light when the 1st and 6th Appellants were tried, and surfaced only at a subsequent point of time. The claimed position of making the 'discovery' of that evidence by the Appellants, after the trial before High Court at Bar is not an acceptable one. Since consideration of the probability of such evidence being "*manufactured for the occasion*", per *dicta* in ***Jandiris et al v Deve Renta et al*** (supra), would touch upon credibility of the evidence which sought to be presented, is omitted for the reason that it would be a disputed fact in issue before a Court of First Instance, where the two Appellants are named as suspects.

The determinant factor that should be considered in the first component of the three tests adopted by *Denning* LJ, whether "*the evidence could not have been obtained with reasonable diligence for use at the trial*", is that *Villavarachchi* and *Susantha* knew that the 1st Appellant was produced before the Magistrate's Court in connection with the recovery of the *cache* of weapons but chose not to disclose that position.

Villavarachchi himself was named a suspect in that case, and thus, it is reasonable to expect him to come out with this allegation for the sake of his own sake . The allegation relating to the *cache* of weapons, according to these

witnesses, is a total fabrication in the hands of *Abeysekera*, and it is a fact they claimed to have known all along. Clearly the alleged act of fabrication was not committed in 2020. It was said to have been done in 2014. Nonetheless, they waited six long years for no apparent reason to make that fact known to others by making statements under Section 127. Similarly, no explanation was tendered for their obvious failure to offer that vital evidence during the proceedings before the High Court at Bar, where they could have easily called *Villavarachchi, Neligama* or *Susantha* as witnesses for the Appellants, if the prosecution failed in its duty to call them.

The 1st and 6th Appellants, in support of their application under Section 351, relied on an averment of *Priyadharshani Perera* that she was alerted to the fact that some officers of the CID have made statements in Court proceedings to the effect that they had previously, at the behest or on instructions of ASP *Shani Abeysekera,* fabricated, falsified or manipulated evidence with regard to alleged weapons belonging to him. However, the supporting material they relied on and were tendered along with the application, does not reveal the fact that some officers of the CID have made statements in Court proceedings to the effect that they had previously, at the behest or on instructions of ASP *Shani Abeysekera,* fabricated, falsified or manipulated evidence with regard to alleged weapons belonging to him, but only reveal that *Neligama,* his wife, *Villavarachchi* and *Susntha* alleged that a *cache* of weapons was introduced. In view of these considerations, I am not convinced that the 1st and 6th Appellants have satisfied the first and third of the three tests formulated by *Denning* LJ.

Proceeding to consider the second component, that "*the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive*", attention must once again be turned to *Dias's* evidence and the manner the High Court at Bar dealt with that

evidence. Learned President's Counsel already referred to a section of the impugned judgment where the High Court at Bar considered evidence of *Dias* in this regard. He invited attention of this Court to certain pages of the judgment, where the trial Court reasoned out why it decided to accept that evidence. He relied on that section of the judgment to impress upon us, in view of the finding of that Court, proposed additional evidence would probably have an important influence on the result of the appeal, although it need not be decisive.

The High Court at Bar in its judgment refers to *Dias's* evidence regarding the *cache* of weapons from his examination in chief from pages 369 to 371 of the judgment. The Court considered his evidence where he admitted having uttered falsehood to CID during his first statement and was of the view that it is probable for a junior ranker not to disclose material that would implicate a senior officer upon being questioned by other junior police officers, citing *Angulana* TAB Appeal. The Court then considered *Dias's* evidence under cross examination by 1st Appellant (pages 373 to 375), followed by the 2nd Appellant (pages 375 to 377) and assessed the probability of the 2nd Appellant, being an officer of the police force, sharing a room with police constable *Dias* and sleeping on the floor. The Court concluded that, as these officers are assigned to the security contingent of the 1st Appellant, it could not be expected that the lodging facilities that were made available to officers in such a situation may not be similar to the facilities that are available to them when serving in their respective stations.

Proceeding to consider the cross examination of the 3rd Appellant (pages 378) the High Court at Bar examined the probability of *Dias* spying on the 3rd Appellant by following him, upon being suggested so. Determining that such a proposition is a very unlikely scenario, the Court noted that the 3rd Appellant consumed liquor while serving at *Nedimala* despite his official

duties. It was also noted by the Court that these factors were not elicited by the prosecution but by the Appellants themselves during cross examination. Consideration of the 4th Appellant's cross examination occurs at pages 379 and 380 which continued with the 5th Appellant's at page 380. The 6th Appellant's cross examination was referred to at page 381 by the High Court at Bar and in view of a suggestion put to the witness, the Court considered his lack of any investigative exposure. The evidence indicates that *Dias*, after joining the force as a reservist, served as a member of the Special Task Force, before being assigned to the 1st Appellant. These factors were considered by the High Court at Bar, in relation to the manner in which he gave evidence as a witness for the prosecution and during cross examination. At this point, the Court once again considered the probabilities of loading several T56 weapons which would have to fit into the boot of a *Maruti Zen* car.

Contrary to the contention advanced by the 1st and 6th Appellants, the High Court at Bar did not consider about the *cache* of weapons in any of the instances that were highlighted (pages 369, 370, 381, 382 and 383 of the judgment) as they were mere reference to the evidence presented by witness *Dias*.

The High Court at Bar, in its consideration of each significant item of circumstantial evidence, acted on the tower records to test for consistency before accepting its reliability. Perusal of the judgment from page 525, where the High Court at Bar commenced its exercise of considering the multiple items of circumstantial evidence presented by the prosecution witnesses, revealed that there are over forty-five instances it had considered such evidence and found them to have been corroborated by the other evidence (pages 525, 526, 527, 529, 531, 532, 533, 539, 541, 542, 544, 548, 550, 553, 556, 557, 558, 561, 563, 564, 565, 566, 568, 569, 570, 572, 575, 577, 578, 579, 580, 581, 585, 586, 587, 588, 590, 592, 594, 600, 602 and 617 of the judgment). Only in page

589 a reference was made by the trial Court to *Dias's* evidence, that too in the context of the presence of a van in the *Nedimala* compound, a fact that witnesses *Krishantha, Anuradha* and *Shenal* had already testified to.

The Court also noted that during CI *Munashinghe's* evidence (one of officers of CID who investigated the murder), a reference was made to the fact that during his investigations, they received information about a "කවල් බට T56" weapon. The High Court at Bar made its only reference to a cache of weapons in the impugned judgment, other the instance where it reproduced the narrative of the witness *Dias*, was at page 727. In this instance, the Court was considering the statement made by the 1st Appellant from the dock. Referring to the fact that the 1st Appellant's assertion that, whilst serving in *Valachchenai* area, he made a discovery of a large stock of weapons at *Mannar,* acting on information he received from some LTTE informants. The Court noted that the 1st Appellant made no assertion in his evidence of formally handing over that stock of weapons to any authority.

This is a clear indication that the High Court at Bar had utilised other evidence, that were corroborated by independent sources, to act upon and to arrive at a finding of guilt against the 1st and 6th Appellants, and, more importantly, did not utilise the evidence regarding a *cache* of weapons in its reasoning as a factor that warrants imposition of criminal liability at all. Significantly, the High Court at Bar desisted from making even a single reference to the presence of a "කවල් බටT56" found from the premises of the 1st Appellant in its impugned judgment, except to make a mere reference to that fact in the process of reproducing evidence presented by the prosecution.

Thus, it is my considered view that the contention presented by the 1st and 6th Appellants that the High Court at Bar had considered and acted on the evidence that related to the *cache* of weapons is not supported by the material placed before us and therefore had no impact on the imposition of criminality

on the two Appellants. Hence, the 1st and 6th Appellants have failed to satisfy this Court of the second component, "*the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive*" .

In an application made under Section 351 of the Code of Criminal Procedure Act for admission of additional evidence in appeal, the operative criterion for the Court to allow such an application, as formulated by the Legislature, is " … *if it thinks it is necessary or expedient in the interests of justice.*" Having considered the attendant circumstances that were relied upon by the 1st and 6th Appellants as well as the learned Addl. SG, it is my considered opinion that their application to lead additional evidence should be rejected, in view of their failure to satisfy this Court that it is expedient in the interest of justice, for this Court to exercise its discretion in their favour. The applications of the 1st and 6th Appellants seeking permission of Court to present additional evidence in the instant appeal are therefore refused.

Before I part with this judgment, the unreserved assistance rendered to this Court by learned Presidents Counsel for the 1st, 3rd, 5th and 6th Appellants, learned Counsel for the 2nd and 4th Appellants and the Senior Additional Solicitor General, should be recorded with much appreciation. I should also mention here that this Court also notes with appreciation of the courage of the CCD officers, which they displayed in carrying out their lawful duties, without bowing down to the dictates of a then serving Senior Deputy Inspector General of Police, who personally intervened to prevent an arrest of a suspect.

In conclusion, I hold that the multiple grounds of appeal that were presented by the 1st to 6th Appellants do not merit any interference with the judgment of the High Court at Bar as they failed to disclose sufficient grounds for such an interference by exercising appellate powers of this Court. The

judgment of the High Court at Bar is hereby affirmed along with the sentences imposed on each of the Appellants. Accordingly, the appeal Nos. SC TAB 01A to 01F/2017 are dismissed.

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA, PC., J.

I agree.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT