

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

In the matter of an Application for
leave to Appeal

SC TAB 01/2016
SC. Appeal No. 19/2003 (TAB)
HC Colombo 1092/2002

Rathnayake Mudiyanseelage Sunil
Ratnayake.
(Presently at Welikada Prison)

1st Accused-Appellant

Vs.

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

Respondent

BEFORE: Buwaneka Aluwihare, PCJ,
Sisira J. De Abrew, J,
Priyantha Jayawardena, PC, J,
H. N. J. Perera, J &
Murdu N. B. Fernando, PC, J.

COUNSEL: Anil Silva, PC with Sahan Kulatunga, G. Gunaratne,
Dhanaraj Samarakoon and Asela Serasinghe for
the 1st Accused-Appellant

Thusith Mudalige, DSG with Viraj Weerasooriya, SC
for Attorney General

ARGUED ON: 04.09.2018, 05.09.2018, 19.09.2018
20.09.2018 and 08.10.2018

DECIDED ON: 25.04.2019

Aluwihare, PC, J:

Mirusavil, a northern Sri Lankan village in the Jaffna peninsula had faced the ferocity of the civil war that had engulfed the country, at the dawn of the millennium.

In the early part of the year 2000, the fighting has intensified and in April 2000, the combatants of the Liberation Tigers of Tamil Eelam (LTTE) had overrun one of the key and strategic Army bases at Elephant Pass. With this debacle, the army had had to reposition their defence lines, and a forward defence line was established at Ellathumadduwal. Straddled by the areas of Ellathumadduwal and Kodikaman, stray shells fell on Mirusavil, which forced the villagers of Mirusavil to abandon the village and to seek refuge at locations some distance away from their village. They, however, kept a tab on their abandoned houses and had developed the habit of visiting their houses once in a while to clean up the places and to collect whatever produce that they could make use of. The visits, however, were done during the day time and they ensured that they left before dusk.

On the 18th December, 2000 a military unit of the Gajaba Regiment was airlifted and deployed in the general area of Mirusavil. This military unit consisted of a reconnaissance unit as well. On the day following, i.e. on the 19th December, 2000, eight villagers cycled to Mirusavil from the places where they had taken temporary residence, in order to visit their respective houses. One of them happened to be a toddler of 5 years who accompanied his father on his cycle.

Having attended to the chores and having collected whatever produce they could lay their hands on, by 4.00 in the afternoon, they were getting ready to cycle back to their temporary residences. The toddler Prasad, having noticed Guava fruits on a nearby tree, pestered his father Wilvarasa to get him some fruits. Probably not having the heart to disappoint the child, they had walked towards the vicinity of the Guava tree lugging along the bicycles on which they had stacked whatever they had collected from their compounds. They, however, could not proceed the full distance, because they were stopped by some soldiers. It would, at this point, be pertinent to identify the villagers who visited their houses on this day. The group comprised of Raviwarman, Thaivakulasingham, Wilvarasa, and his two sons; the toddler Prasad, who was 5 and his 13-year-old other son Pradeepan Jayachandran, Gnanachandran and his 15-year-old son Shanthan and finally Maheshwaran who happened to be the brother-in-law of Gnanachandran and the solitary survivor of this ordeal who lived to relate the tale.

Maheswaran's story:

By the year 2000, Ponnadurai Maheshwaran was a youth of 21 years. Maheswaran in his testimony had said that they abandoned their house as their houses were hit by artillery and as such had to move to the village of Karaweddi. Maheswaran had testified to the effect that on the day in question, he along with the group referred to earlier, came to Mirusavil and engaged in cleaning their houses and others who accompanied him also had cleaned their respective houses. Of this crowd, Raviwarman alone was slightly conversant in Sinhala. Raviwarman, however, had a disability, in that when he was a child of seven, while playing in his surroundings, he had come across a live shell which is said to have been ammunition used by the Indian Peace Keeping force (The IPKF). He had dashed it on the floor, causing it to explode. Due to the explosion, he had lost his left arm below the elbow. The significance of this injury, I shall advert to, later in this judgement.

When they approached the Guava tree, they were confronted by two military personnel-one armed with a firearm and the other with a knife. The group of civilians was ordered to kneel and were questioned by the soldiers. Raviwarman with his limited knowledge of Sinhala had explained the reason for their presence in the area. At this point, one soldier had left the place leaving behind the other to guard them. A short while later the soldier who had left had returned in the company of four other military men. The soldiers had then assaulted Maheshwaran and the other villagers who were with him. Maheshwaran according to him, had been blindfolded with his sarong. Even at this point, the other villagers who came with him had been present. Thereafter he had been assaulted and had lost consciousness. After a while, however, he had regained his senses. At that point, two military men had carried him by his arms and had tossed him over a fence. In the process his blindfold had got entangled with the barbed wire of the fence and had come off. At this point, Maheshwaran had not seen any of the other villagers who was with him just before he was assaulted. He had then been taken to a location where there was a cesspit. According to Maheshwaran he had noticed patches of blood on the cesspit slab and also sensed some movements emanating from inside the cesspit. Fearing that the others who came with him had been harmed and that he too would face the same fate, he had pushed the two soldiers who approached to blindfold him again and had run for his life through the thicket. He had reached the home of Sinnaiah Wilvarasa who is one of the deceased in this case. He was clad only an underwear as his sarong had been used to blindfold him. Having borrowed a sarong from the wife of Wilvarasa, he had spent the night at a house of one of his aunts, about a quarter of a mile away from Wilvarasa's house. The following morning, on his way home, he had met his father and had returned to their temporary residence at Karaweddi. Maheshwaran had related the events he encountered to his father. The same evening his mother had complained about the incident to the office run by the political party –Eelam Peoples Democratic Party, which is commonly referred to by its acronym, EPDP. Some of the party officials had visited Maheshwaran in the evening and had

subsequently admitted him to Chandiger hospital. On the 22st December he had left the hospital and had come home. On the following day he had been visited by military personnel who had questioned him about the events he encountered, in the company of the villagers a few days prior. On the following day (24th December) officers of the military police had visited him again. On the same day Maheshwaran accompanied by his parents, members of the EPDP, the Gramasevaka of the area along with the Military Police officers had visited the location of the cesspit. What they found inside the pit were parts of the carcass of a goat and a reptile.

While the group of people, including Maheshwaran were near the cesspit, a few military personnel had approached the crowd. Significant as it would seem, Maheswaran spontaneously had pointed out two persons as two of the soldiers that who had been involved in the incident where they were asked to kneel, blindfolded and assaulted, when he and the other villagers who accompanied him, were approaching the Guava tree.

Kandaiah Ponnadurai, father of Maheshwaran had left his home in search of his son as he had not returned after he went with a group of people to visit their homes at Mirusavil the previous day. He had met him on the way and had related the escapade. He, however, had also stated that the other eight people were still in the Army custody, presumably as Maheswaran did not know as to the fate others had faced at that point. Ponnadurai also had accompanied the group of persons who visited the location of the cesspit on the 24th. He had said in his evidence that when his son saw the army personnel who came to the scene after they reached the location, he had shouted saying that they were the people who assaulted them.

Major Sydney de Soyza was in charge of the supervision of the military police, based in the Jaffna region, and he had received orders from Brigadier Thoradeniya on 23rd December, 2000 to inquire into the killing of eight persons. He had gone to the house of Maheshwaran and had had his statement recorded. Then he had proceeded to the location where Maheshwaran alleged the incident had happened.

On Maheshwaran's directions, they had gone through shrub jungle and had first reached the abandoned home of Maheshwaran at Mirusavil. Thereafter they had proceeded to the location of the Guava tree and then to the location of the cesspit. Major Soyza had observed blood like stains on the concrete slab covering the cesspit. When the slab was removed, they had seen parts of an animal. On making inquiries he had come to know about 20 army soldiers of the Special Operations Unit of the 6th Gajaba Regiment were occupying the building that Major Soyza had observed in the vicinity. The Chief Officer of that Unit Sergeant Ranasinghe accompanied by several other officers had approached the location of the cesspit and witness Maheshwaran had suddenly shouted. What Maheshwaran had said was that two of the soldiers who came with the Sergeant Ranasinghe were the soldiers who restrained and assaulted him. Inquiries made by Major Soyza had revealed that the two officers identified by Maheshwaran were Lance Corporal Rathnayake (the Accused-Appellant) and Private Mahinda Kumarasinghe. Major Soyza having identified the Accused-Appellant in court, however, had stated that his recollection is faint with regard to Private Kumarasinghe.

Major Soyza had placed in custody, five soldiers inclusive of Lance Corporal Rathnayake (The Accused-Appellant) and Private Kumarasinghe.

On the 24th December, 2000, on being pointed out by the Accused-Appellant, the Military Police had searched the terrain around the area of the cesspit and had come across an area with loose soil which had been covered with twigs and small branches. The witness, through the Superintendent of Police had produced the Accused-Appellant along with other military personnel taken into his custody before the Magistrate.

On the orders of the Magistrate the area had been searched and eight bodies were unearthed. It was established that those bodies were of the persons who accompanied Maheshwaran on the 19th December to visit Mirusavil.

Steps thereafter had been taken to have identification parades held where a number of military personnel who were suspected of committing the crime, were

produced (13 in all) as suspects and five of them had been identified by Maheshwaran. In the context of this case, I do not see much significance of the evidence relating to the identification parade, as such I do not perceive any necessity to engage with that evidence at length here.

It was based on the above material that the Attorney General indicted five persons inclusive of the present accused-appellant on the following counts:

- Count 1: Committing an offence punishable under Section 140 of the Penal Code being a member of an unlawful assembly with the common object of causing intimidation to Raviwarman.
- Count 2: Committing the murder of Raviwarman, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.
- Count 3: Committing the murder of Thaivakulasingham, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.
- Count 4: Committing the murder of Wilvarasa Pradeepan, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.
- Count 5: Committing the murder of Sinnaiah Wilvarasa, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.
- Count 6: Committing the murder of Nadesu Jayachandran an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.
- Count 7: Committing the murder of Kadeeran Gnanachandran an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 8: Committing the murder of Gnanachandran Shanthan an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 9: Committing the murder of Wilvarasa Prasad, an offence punishable under Section 296 of the Penal Code read with section 146 of the Penal Code.

Count 10: Causing hurt to Maheshwaran, an offence punishable under Section 314 of the Penal Code read with Section 146 of the Penal Code.

Counts 11 to 18 are again counts of murder in respect of the persons referred to in counts 2 to 9, however the basis of liability under the said counts is Common Intention articulated in Section 32 of the Penal Code and Count 19 again is the corresponding charge of causing hurt, referred to in Count 10, based on Common Intention.

The Trial-at-Bar before which the trial was held, however, acquitted the 2nd to the 5th accused, but convicted the 1st Accused (the present Accused-Appellant) on all counts referred to above, and proceeded to impose sentences in respect of each count on which the convictions were entered. I shall advert to in detail, the sentences imposed later in this judgment. At this point, however, I wish to consider whether the Trial-at-Bar had erred in finding the Accused-Appellant (hereinafter referred to as the 1st Accused) guilty of the offences on which he was indicted.

Pivotal to the conviction is Maheshwaran's credibility, for the entire prosecution case hinges on Maheshwaran's testimony. Before I deal with the issue of Maheshwaran's credibility it would be pertinent at this juncture to consider the other circumstantial evidence. It is only then, one could decide whether the other circumstances are compatible with and are supportive of Maheshwaran's testimony. This will have a decisive bearing on the acceptability or otherwise of Maheshwaran's testimony.

There is no dispute that Maheshwaran along with the other eight persons who died came to their houses at Mirusavil on the 19th of December.

According to the father of Maheshwaran, Ponnadorai, his son had gone to Mirusavil on 19th December and as he had not returned, in the early morning of the 20th December he had left for Mirusavil, in search of Maheshwaran and on the way had met him. It was then that Maheshwaran had related the story as to what he and the other eight persons faced on the previous day evening. This was confirmed by witness Letchchimi who happened to be Maheshwaran's mother.

The testimonies of both Ponnadorai and Letchchimi had been led by the prosecution to establish the consistency of Maheshwaran's version as to the incident and this is permitted in terms of Section 157 of the Evidence Ordinance, for the reason that the narration of events to these two witnesses by Maheshwaran had taken place contemporaneously or in or about the time the incident took place.

Evidence of Major Sydney de Soyza

By the year 2000, Major de Soyza had been serving in the capacity of a Major attached to the Military Police as the officer in charge of the Military Police in the Jaffna Peninsula. According to Major de Soyza it had been the 55th Army division, which was entrusted with the security, covering a large swath of land to which Mirusavil was central, under the command of Major General Sunil Tennekoon. According to Major de Soyza, consequent to the attack on the Elephant Pass in April, 2000, the Army had retreated to Mirusavil area and the forward defence lines were positioned about 700 – 800 meters in front of the location in question which was under Army control. He also has said that due to firing of shells, the people in Mirusavil had abandoned their houses and had moved out.

On the 23rd of December, 2000, around 9.00 a.m. Brigadier Thoradeniya had phoned him and had said that the Army had taken 9 civilians into custody and 8 of them were alleged to have been murdered and for him to take necessary action to trace the civilian who had survived and to inquire into the incident.

Consequently, Major de Soyza and his team had gone to Maheswaran's house at Nelliadi.

They had met Maheswaran's parents and who had taken the Major to the room where Maheswaran was seated on the floor. Major de Soyza had observed bandages on his body.

Upon being questioned, Maheswaran had come out with the same version, he gave in Court. He had also said that he could point out the location of the cesspit where Maheswaran believed the bodies of the other villagers might be. However, he had refused to accompany the army, unless officials of the EPDP and the Gramasevaka came along with them. The group had travelled in two vehicles up to a point and then had walked a distance of about 1 ½ kilometers to reach the location. First, they had been shown Maheswaran's house. In addition, Maheswaran also had shown the spot where they had, on the 19th, left their bicycles in order to approach the Guava tree. The bicycles, however had not been there. Maheswaran also had taken the witness to the location where they were confronted by the army near the Guava tree. At that point Maheswaran had said that he and the others were assaulted after being blindfolded and heard the wailing of the others who had come along with him.

From that point, Maheswaran had taken them to the location of the cesspit where he had suspected the bodies of the other 8 villagers might be. Maheswaran had shown signs of fear when they came up to the cesspit which was covered with a concrete slab.

When asked what Maheswaran had to say with regard to the incident, he had responded by saying, that it was the spot where his blindfold had come off and he had seen stains like blood. Fearing that he would be killed, he had run for his life. When Major de Soyza got the slab covering the cesspit removed, they had seen parts of a dead animal. Witness also had said that Maheswaran expressed his suspicions that the bodies of the other 8 persons could be in the pit.

Having observed a building which was of a distance about 50 meters, Major Soyza had approached the building and had found about 20 army officers of the Special Operations of the 6th Gajaba Regiment, occupying the building.

According to Major de Soyza, he had confronted Sergeant Ranasinghe who was in charge of the unit and had questioned him about the blood stains, the wire in the shape of a noose and the parts of the dead animal (goat). Sergeant Ranasinghe was told to summon the officers who were responsible for the slaughter of the goat. Consequently, 2 soldiers had come forward.

As they came up to the cesspit, all of a sudden, the witness had heard a groan accompanied by a loud shout. When he turned in the direction where the sound came from, he had seen Maheswaran clinging on to his father, and shouting. The two army men who had come forward also had become restless and had shown signs of fear.

The witness had walked up to Maheswaran with the interpreter and had questioned him as to why he shouted. Maheswaran had said that the two soldiers who came there were the two people who detained and assaulted them on the 19th December. Major de Soyza had then directed Major Premalal to question the two soldiers and even at this point the two soldiers have been very restless, so much so that Major Premalal had to tell them that there was no reason for them to be so disturbed. Major de Soyza had referred to the two soldiers as Corporal Rathnayake the Accused-Appellant and Private Mahinda Kumarasinghe and the witness had identified the Accused Appellant in court. Altogether at this point 5 soldiers had been taken into custody, including the Accused-Appellant and Private Kumarasinghe.

This witness had said that after the 5 soldiers were handed over to the military Police, again on the 24th of December of the same year he was involved in the investigation pertaining to the accused-appellant and the other soldiers who were taken into custody. Based on the statement made by the accused appellant, this witness along with a team of Military Police officers had visited the area where the

incident was alleged to have taken place. Upon reaching the location with the directions given by the 1st Accused-appellant, they had walked through a shrub jungle and the Accused- Appellant had pointed out a location. Witness had observed an area with loose soil covered with small branches. Witness had taken steps to secure the area and had placed Military Police personnel to guard the location. Then steps had been taken to inform the Police. Accordingly, Police had arrived at the scene headed by Senior Superintendent of Police Kankesanthurai followed by the Magistrate who ordered the police to dig the area pointed out by the Accused-appellant. In the process 8 bodies had been recovered and relations had identified them as those of the deceased referred in the murder charges on the indictment.

The District Judge of Chavakachcheri Mr. Premashankar, in his evidence had said that it was the Accused-Appellant and Major Soyza who pointed out the location from where the bodies were unearthed.

Reference also must be made to the evidence of Dr. Sinnathurai Kadiravelu, the District Medical Officer who had examined the main witness Maheswaran on the 20th December, 2000 at the Point Pedro Hospital. The history given by Maheswaran according to the doctor was that he was assaulted by army personnel on 19th December, 2000 around 4.00 p.m. According to Dr. Kadiravelu, he had observed a number of contusions on Maheswaran's body, in the area around the eye, on the back of the chest and on both legs. The Doctor's evidence was that all the injuries were compatible with blunt trauma and Maheswaran had sustained them within a day or two prior to the examination. When one considers the testimony of Maheswaran, in the backdrop of the medical history, the vintage of the injuries and the nature of the injuries, all are compatible with his story. The doctor had also noted that Maheswaran appeared to be frightened and restless. According to Dr. Kadiravelu he had been the only Medical Officer in that area.

Dr. Kadiravelu also had been present when the ground was dug to search for the bodies and had been present when the bodies were taken out. The bodies had been

placed in body bags and transported to the hospital morgue. He had performed the postmortem examinations on the 26th December, 2000. The witness had commented that he was 69 years of age at the time and was fatigued on the day the post mortems were conducted.

The doctor had observed a solitary cut injury on the front of the neck about 2 inches deep, on each of the deceased and had opined that death had resulted due to shock and hemorrhage resulting from the cut injury on the neck. The doctor had also said the cut injury had severed the main two arteries on either side of the neck and which was necessarily fatal. In the course of the hearing it was contended by the learned Deputy Solicitor General that the person or persons who were responsible for the killings had been cautious in tactically resorting to a silent mode of killing quite unlike the use firearms which would have caused alarm to the warring factions, given the volatility in the area at the relevant time. Thus, the learned DSG submitted that it is a factor indicating that the persons responsible for the killings were well aware of the war situation and had taken precautions to avoid making any noise.

Credibility of witness Maheswaran

It would be pertinent at the outset, to consider whether Maheswaran can be treated as a credible witness in view of the submissions made by the learned President's Counsel on behalf of the accused-appellant.

It is correct to say that none of the learned judges of the Trial-at-Bar who delivered the judgement had the benefit of observing Maheshwaran's demeanour and deportment, as they were not members of the Trial-at-Bar when Maheswaran testified. The learned judges, however, had not relied on the demeanour and the deportment of the witness and on the other hand, no application had been made on behalf of the accused-appellant to have the witness Maheswaran recalled. The defence had the right to do so and could have done.

The Trial-at-bar, had considered the credibility of witness Maheswaran (Pages 381 to 415 of the proceedings or pages 19 to 52 of the judgment) at length and had considered the contradictions 1V1 to 1V12 and the omissions 1 to 12; and after evaluating his testimony, the Trial-at-Bar had decided that it is safe to act on Maheswaran's evidence.

I have carefully considered the contradictions and the omissions referred to above and am of the view that in the context of the incident and Maheswaran's state of mind at the time, that the contradictions and omissions are insignificant. One needs to bear in mind that Maheswaran spoke Tamil and not Sinhala. Thus, it appears that what he said in Tamil, had been straight away translated into Sinhala and thereafter reduced to writing. It is not difficult to fathom his disturbed state of mind when he made the statement. He even refused to go with the army without the EPDP officials or the ICRC. Such was the fear Maheswaran entertained on this occasion.

This is a case where the court has to decide, mainly on circumstantial evidence. The court is required to consider the cumulative effect of the entirety of the evidence which I shall advert to now.

The fact that Maheshwaran went along with the deceased persons to Mirusavil on the 19th of December; the fact that he did not return home on that day, which was the usual practice of the villagers; that he had sustained blunt trauma injuries compatible with the history of assault; that Maheshwaran obtained treatment for the said injuries on the 20th, December the day following the alleged incident; that he gave a history of assault by Army personnel to the doctor; that he narrated the very incident to his father and mother at or about the time the incident took place of which he gave evidence years later in court are matters on which independent evidence is available to test both the veracity and the credibility of Maheshwaran's evidence. On the other hand, there is not even a hint that Maheshwaran had any reason to implicate the Accused-Appellant or other accused falsely.

What stands out is the conduct of Maheshwaran, by his spontaneous reaction, when in a raised voice he pointed out the Accused-Appellant and Private Kumarasinghe, who had not been indicted, as two of the persons who assaulted them on the 19th December, out of a number of Army personnel that were present when they visited the scene of the incident on the 24th of December. This evidence, I am of the view is an item of positive evidence to establish the presence of the Accused-Appellant at the scene. I see no reason to doubt the identification of the Accused-Appellant by Maheshwaran at this point. It would also be significant to consider the Dock Statement of the Accused-Appellant at this point. In his dock Statement, he admits his presence in the area of Ellathumadduwal on the 18th of December and further, as they did not have a place to stay his Company split into small groups and occupied abandoned houses in the area is also admitted. He also admits that they were not assigned any duties on the 19th of December and on that day, they were engaged in cleaning the surroundings of the places they had come to occupy the previous day. The Accused-Appellant's own admission, establishes his presence in the area of the incident and the fact that he was not assigned any duty on that day, are relevant in terms of Section 7 of the Evidence Ordinance, as facts which afforded an opportunity for their occurrence.

The learned judges of the Trial-at-Bar had carefully analysed the Dock Statement of the Accused-Appellant (pages 229-232 of the judgement) and had rejected his general denial as to any complicity of the crimes alleged. I have considered this aspect and I am of the view that the rejection of the Dock Statement cannot be faulted.

The learned President's Counsel on behalf of the Accused-Appellant referred to certain aspects of Maheshwaran's testimony and submitted that in view of those alleged infirmities, the Trial-at-Bar ought not to have placed reliance on Maheshwaran's testimony.

It was submitted that after Maheshwaran escaped from his captors, the first person he met was Selvarani, the wife of the deceased Pradeepan Wilvarasa. Maheshwaran

had borrowed a sarong from her but had not told her what the group had encountered. Under the circumstances, Maheswaran's immediate reaction would have been to escape from danger and on the other hand, he may not have wanted to cause alarm to Selvarani under the circumstances. In my view, this factor cannot be considered as an infirmity of Maheswaran's testimony.

The learned President's Counsel also pointed out that according to Maheswaran's father (Ponnadurai), his son had told him that "some of them were cut by the Army". This, it was pointed out, is contradictory to Maheswaran's evidence as he did not say that he saw any one being cut by the Army. Witness Ponnadurai gave evidence years after the incident and it is very probable that events may have overtaken the witness for the reason that at the time Ponnadurai gave evidence he knew all the deceased had died of cut injuries. As such, I hold that this discrepancy is insignificant.

The learned President's Counsel also highlighted purported discrepancies in the evidence of Maheswaran and contended that there was a great possibility that Maheswaran were initially captured and assaulted close to the Guava tree, he escaped and ran away while the others were taken for questioning by the army personnel, suggesting that there is no direct evidence implicating the accused-appellant and that Maheswaran exaggerated and fabricated a story against the accused who were indicted. If that were the case, then Maheswaran could easily have said he saw the accused attacking the deceased, directly implicating them, which was, however, not the case. I have given my mind to the inconsistencies alleged, both *inter se* and *per se* of the testimony of Maheswaran and I cannot fault the Trial-at-Bar for holding that his evidence is credible and is safe to act upon.

For the reasons set out above, I conclude that the evidence of Maheswaran is credible and is safe to act upon.

It was also argued on behalf of the Accused-Appellant that the extension of the principle, expounded in the case of **Ariyasinhe and Others V. The Attorney General**

2004 2 SLR 360 with regard to a discovery of a fact in consequence of information received from a person accused of any offence, in terms of Section 27 of the Evidence Ordinance, is not applicable to the instant case. It is trite law that, all what can be inferred from a “Section 27 discovery” is that the accused had the knowledge as to the whereabouts of the ‘fact’ discovered. I am in agreement with the decisions cited on behalf of the Accused-Appellant, namely, **Etin Singho v. Queen** 69 N.L.R 353, **Heen Banda v. Queen** 75 NLR 54, **Ranasinghe v. AG** 2007 (1) SLR 223 and **Wimalaratne Silva and another v. AG** CA 483/2001 decided on 11.11.2008.

In the course of the trial, the prosecution relied on two discoveries based on the statement given by the Accused-Appellant to the police, which were marked in evidence under Section 27 of the Evidence Ordinance (T 47). The discoveries were, the location where the bodies were buried and the location where the bicycles on which some of the deceased rode, were buried.

It was contended by the learned President’s Counsel that the decision in **Ariyasinhe and others v. The Attorney General** (*supra*) which expanded the law relating to the evidentiary value of a Section 27 statement has no application to the instant case. It is to be noted that the accused- appellant had also shown the location where the bodies were buried, to Major Soyza, an item of evidence admissible under Section 8 of the Evidence Ordinance as subsequent conduct against him and which in turn gives additional credence to the Section 27 statement marked as T 47.

In the teeth of the overwhelming cogent evidence led against the accused-appellant in this case, even assuming the Trial-at-Bar had misdirected itself with regard to the evidentiary value of the Section 27 statement, in my view, such misdirection has not substantially prejudiced the rights of the Accused-Appellant and does not warrant a reversal of the decision of the Trial-at-Bar.

It was also contended on behalf of the Accused-Appellant that the judgement of the Trial-at-Bar was a compromised verdict, where the court acquitted 2nd to the 5th Accused and only convicted the Accused-Appellant, an exercise to please all

parties concerned and further if the acquittal of the 2nd to the 5th Accused resulted due the infirmities of Maheshwaran's evidence, then that benefit also must accrue to the Accused-Appellant as well. I have carefully considered the material placed before the court by the prosecution and the reasoning of the learned judges of the Trial-at-Bar. It is clear that the acquittal of the 2nd to the 5th Accused had resulted not due to disbelieving the evidence of Maheshwaran, but due to the failure on the part of the prosecution to establish the identities of the 2nd to the 5th Accused to the degree of proof required by law. The prosecution relied on the Identification Parade evidence to establish the identities of the accused and the Trial-at Bar, upon careful consideration of the evidence placed before it, quite rightly did not place any reliance on that evidence and consequently the acquittal of the 2nd to the 5th accused resulted. As far as the Accused-Appellant was concerned, however, the spontaneous identification of the Accused-Appellant by witness Maheshwaran at the scene remains unassailed. As such I do not see any merit in the argument of the learned President's Counsel that the verdict is a compromised one.

The other main issues raised on behalf of the Accused-Appellant in this case was; whether the evidence placed by the prosecution is sufficient to prove the counts 2 to 9, beyond reasonable doubt. It was contended by the learned President's Counsel on behalf of the Accused-Appellant that a charge of murder cannot be maintained as there was no direct evidence and the evidence available is also inconclusive, in particular, the prosecution evidence does not establish the common object of the unlawful assembly, namely, to commit assault on Raviwarman.

Thus, it is incumbent on this court to consider, as to whether the prosecution has established the charges on the Indictment beyond reasonable doubt. As referred to earlier, the 1st count is Unlawful Assembly (within the meaning of Section 139 of the Penal Code) the common object of the assembly being to commit "Assault" on Raviwarman.

Thus, it is incumbent on the prosecution to prove beyond reasonable doubt, two factors:

- (1) That there was an assembly of five or more persons
and
- (2) That the common object of the persons composing that assembly was to
commit Assault on Raviwarman.

When one analyses the evidence, it is clear that, initially there had been only two persons, one of them happened to be the accused-Appellant, and later four others joined them, making the total number of persons present six. In that context the prosecution had established that there was an assembly of more than five persons. The next aspect the Court is required to consider is, whether those persons assembled, with the common object of committing Assault on Raviwarman. It must be said that the learned judges of the Trial-at-Bar had not considered this aspect in detail nor did the judgement carry any reasoning for the conclusion that Assault had been committed on Raviwarman.

Section 342 of the Penal Code defines “Assault” as follows:

“Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit “an assault”.

Thus, it is necessary to consider whether the prosecution has established that any member or members of the Assembly “committed Assault” on Raviwarman. On this aspect the evidence of Maheshwaran was as follows; (proceedings of 13-02-2003). After four others had joined the initial two persons who were there, Maheshwaran and his group had been questioned by the Army personnel and it was conveyed to Maheshwaran through his uncle who had a limited understanding of Sinhala, that they were accused of being members of the LTTE. At that point Raviwarman had been separated from them and had been taken away to a distance of about 25 meters and about ten minutes later he had been brought back. As referred to earlier Raviwarman had a physical infirmity in that he had lost his left arm below the elbow. This injury probably may have given the

impression to the military personnel that Raviwarman had sustained it in battle. This also would have been the reason to separate Raviwarman from the rest of the group for questioning.

The moment Raviwarman was brought back, all of them had been assaulted by the Army personnel with fists and clubs. If, to go by the evidence of Maheshwaran, all that had happened was that Raviwarman had been taken away a distance of about 25 meters from the group of Maheshwaran's people, a distance easily visible to the naked eye, a little longer than a length of a cricket pitch for one to get an understanding of this distance. Unfortunately, the prosecutor had not asked a single question from Maheshwaran, as to whether he saw what happened between Raviwarman and the two Army personnel who took him away. Raviwarman, unfortunately, didn't live to tell the tale as to what transpired between him and the two men who took him away.

Hence the prosecution has starved the case of evidence as to whether those two who took Raviwarman made any gestures causing apprehension to Raviwarman that those two persons were about to use criminal force on him. With the paucity of evidence on this aspect, a doubt lingers as to whether the reason for taking Raviwarman away was with the object of questioning Raviwarman in order to ascertain the reasons for their presence in the locality or to commit Assault within the meaning of Section 342 of the Penal Code. In this context, I hold that the prosecution had failed to establish that there was an unlawful Assembly with the common object of committing Assault on Raviwarman within the meaning of Section 342 of the Penal Code. Thus, counts 1 to 10 of the Indictment must necessarily fail. Accordingly, I set aside the conviction of the Accused-Appellant on counts 1 to 10.

What remains to be considered are the counts 11 to 19 which are based on vicarious liability of common intention. Maheshwaran's evidence as to what transpired after Raviwarman was brought back is significant. His evidence was that, no sooner Raviwarman was brought back, the Army personnel started

assaulting Maheswaran and the other villagers who accompanied him with fists and sticks. Thereafter he had been blindfolded with his own sarong and the assault had continued. It was at this point that Maheswaran says he fainted. The rest of his evidence I have dealt with earlier in this judgement hence repeating it here would not be necessary. When one considers the participation of the Accused-Appellant coupled with the evidence with regard to the participation of the others, it is clear that the Accused-Appellant is not only liable for the acts committed by him, but also for the acts committed by others who were with him as well by virtue of Section 32 of the Penal Code.

There are significant features in this case that direct me to conclude that all persons involved had acted in furtherance of a common intention. As referred to earlier, no sooner Raviwarman was brought back, all of them had been assaulted by the group of army personnel gathered there, which included the Accused-Appellant. This assault appears to have commenced simultaneously indicating fusion of minds and a common intent, on the part of the military personnel involved. All the eight deceased persons had sustained the identical fatal injury, a cut on the neck inflicted from behind, as disclosed by the medical evidence. All bodies were buried in the same location which is proximate to the location where Maheswaran and the group were confronted by the Army personnel. In addition, four of the bicycles on which the group rode to Mirusavil on the 19th of December, were also recovered from a location close to the place where the bodies were. It is highly improbable if not impossible for a single person to commit all these acts. Thus, it is reasonable to infer that these acts have been committed by more than one person. Furthermore, the time of death is also compatible with the evidence of Maheshwaran. When the deceased were seen last, they were detained by the Accused-Appellant, and the other Army personnel who were present. When Maheswaran was carried by two men, none of the others were to be seen and even after he was tossed over the fence, he was assaulted by two men, and after that they had walked him to the location where the cesspit was. At that point he had seen another person near the cesspit armed with a Kris knife and he had also seen blood on the slab covering the

cesspit (which was confirmed by the evidence of the Government Analyst) and sensed movements emanating from the cesspit as similar to someone was shaking his limbs. At that point one of the men had collected his sarong that had got entangled in the fence and had approached Maheshwaran and made an attempt to blindfold him. It was at this juncture that Maheshwaran had pushed the man who tried to blindfold him and had run away.

Considering the above the irresistible inference that could be drawn is that it was the accused-appellant and the group of men who had inflicted the fatal injuries to the deceased and from the nature of the injuries it can be concluded that the injuries were inflicted with the intention of causing their deaths. Thus, I conclude that the prosecution has established the counts of murder (11 to 18) and the count of causing hurt to Maheshwaran, count no. 19 of the indictment.

In the course of the hearing, as I have referred to earlier, it was contended on behalf of the Accused-Appellant, by the learned President's Counsel that the evidence of Maheshwaran is infirm and as such not safe to act upon. Both in the oral submissions as well as in the written submissions the attention of this court were drawn to many contradictions and omissions in the testimony of Maheshwaran. I have carefully considered them and given my mind to the same. When one considers the context in which this incident happened, the security and the climate that prevailed in the geographical area in which the incident took place and the fear under which the people lived in those areas at the relevant time, the alleged infirmities are not of such significance as to shake the credibility of Maheshwaran's evidence.

I wish to quote Justice Thakkar with approval, who stated in the case of **Bhuginibhai Hirjibhai v. State of Gujarat** AIR1983 SC 753,

“We do not consider it appropriate or permissible to enter upon a reappraisal or reappraisal of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious: -

- (1) *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
- (2) *Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*
- (3) *The powers of observation differ from person to person. What one may notice another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.*
- (4) *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can recall the main purport of the conversation. It is unrealistic a witness to be a human tape recorder.*
- (5) *In regard to the exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*
- (6) *Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

Thus, I am of the view that the Trial-at-Bar was justified in treating witness Maheswaran as a credible witness and acting on his testimony and I conclude that the learned judges of the Trial-at-Bar were correct in coming to the conclusion that the accused-Appellant was guilty on counts 11 to 19 (inclusive of both counts) on the Indictment. As such I affirm the conviction and the sentences imposed on the accused-Appellant on the said counts.

The appeal is partially allowed.

JUDGE OF THE SUPREME COURT

JUSTICE H.N. J. PERERA

I agree

CHIEF JUSTICE

JUSTICE SISIRA J. DE ABREW

I agree

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MURDHU N. B. FERNANDO PC

I agree

JUDGE OF THE SUPREME COURT