

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

In the matter of an Appeal in terms of Section 331(1) of The Code of Criminal Procedure Act No 15 of 1979.

**Court of Appeal Case No:  
CA 171-173/2012  
HC Embilipitiya Case No:  
117/2007**

The Honourable Attorney General

**Vs**

1. Kapugedera Kankanamlage Rohana Jagath Nissanka
2. Kapugedera Kankanamlage Krishan Priyantha alias Chutta
3. Gamaarachchilage Mahasen Bandara Samarakoon
4. Ranasinghe Mudiyanseelage Ananda Wasantha Kumara alias Jayapala alias Sepala Kaluwa
5. Brahmanage Dayawansa
6. Wickrama Arachchi Mudiyanseelage Upul Ranasinghe

**Accused**

**And Now**

1. Kapugedera Kankanamlage Rohana Jagath Nissanka
2. Kapugedera Kankanamlage Krishan Priyantha alias Chutta
3. Ranasinghe Mudiyanseelage Ananda Wasantha Kumara alias Jayapala alias Sepala Kaluwa

**Accused-Appellants**

**Vs**

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

**Complainant-Respondent**

**Before:**

**N. Bandula Karunarathna J.**

**&**

**R. Gurusinghe J.**

**Counsel:** Dharmasiri Karunaratne for the 01<sup>st</sup> accused-appellant (Appeal dismissed on the 18.10.2018)

Anil Silva PC with Isuru Jayawardana AAL for the 02<sup>nd</sup> accused-appellant  
Nihara Randeniya AAL for the 04<sup>th</sup> accused-appellant (Presently he is the 03<sup>rd</sup> Appellant)

Anoopa de Silva SSC for the complainant-Respondent

**Written Submissions:** By the accused-appellant on 30.01.2017

By the complainant-Respondent on 23.03.2017

By on behalf of the Aggrieved Party on 16.03.2017

**Argued on** : 05.10.2021 and 26.10.2021

**Decided on** : **16.12.2021**

**N. Bandula Karunarithna J.**

This appeal is from the judgment, delivered by the learned Judge of the High Court of Embilipitiya, dated 01.03.2012, by which, the 01<sup>st</sup> to 04<sup>th</sup> accused persons, were convicted and sentenced to death for having murdered 06 people namely;

- (i) Abeysinghalage Podi Mahattaya
- (ii) Hettiarachchige Rosalin
- (iii) Wastuhewa Siriyawathi
- (iv) Wastuhewa Dayananda
- (v) Abeysinghalage Indunil
- (vi) Abeysinghalage Maduka Sureni

The appeal of the 01<sup>st</sup> accused-appellant was dismissed by this court on 18.10.2018 on the basis that the 01<sup>st</sup> accused-appellant had violated section 331 (1) of the code of the Criminal Procedure Act. The said appeal was filed out of time.

The 03<sup>rd</sup> accused was absconding and he has not preferred an appeal against the judgement.

The 02<sup>nd</sup> and 04<sup>th</sup> accused-appellants preferred this appeal and now they are being considered as 02<sup>nd</sup> and 03<sup>rd</sup> accused-appellants.

The 05<sup>th</sup> and 06<sup>th</sup> accused persons who were indicted before the High Court were acquitted from all charges.

Against the 01<sup>st</sup> to 06<sup>th</sup> accused persons there were 19 charges in the indictment.

Count 1 : On or about the 28.04.2001 at Godakawela the accused persons committed an offence punishable under Section 140 of the Penal Code by being members of an unlawful assembly common object of which was causing injuries to Abeysinghalage Pody Mahaththaya, Hettiarachchige Rosalyn, Wastuhewa Siriyawathi, Wastuhewa Dayananda, Abeysinghalage Indunil, Abeysinghalage Madhuka Sureni, Abeysinghalage Chaminda, Wastuhewa Nelson and Abeysinghalage Dinesh Sampath.

Count 2 : In the course of the same transaction, one or more Members of that unlawful assembly, committed the death of Abeysinghalage Pody Mahaththaya which is an offence punishable under Section 296 of the Penal Code read with Section 146 of the same.

Count 3 : In the course of the same transaction, one or more Members of that unlawful assembly, committed the death of Hettiarachchige Rosalyn which is an offence punishable under Section 296 of the Penal Code read with Section 146 of the same.

Count 4 : In the course of the same transaction, one or more Members of that unlawful assembly, committed the death of Wastuhewa Siriyawathi which is an offence punishable under Section 296 of the Penal Code read with Section 146 of the same.

Count 5 : In the course of the same transaction, one or more Members of that unlawful assembly, committed the death of Wastuhewa Dayananda which is an offence punishable under Section 296 of the Penal Code read with Section 146 of the same.

Count 6 : In the course of the same transaction, one or more Members of that unlawful assembly, committed the death of Abeysinghalage Indunil which is an offence punishable under Section 296 of the Penal Code read with Section 146 of the same.

Count 7 : In the course of the same transaction, one or more Members of that unlawful assembly, committed the death of Abeysinghalage Madhuka Sureni which is an offence punishable under Section 296 of the Penal Code read with Section 146 of the same.

Count 8 : In the course of the same transaction, the accused, committed the death of Abeysinghalage Pody Mahaththaya which is an offence punishable under Section 296 of the Penal Code read with Section 32 of the same.

- Count 9 : In the course of the same transaction, the accused, committed the death of Hettiarachchige Rosalyn which is an offence punishable under Section 296 of the Penal Code read with Section 32 of the same.
- Count 10: In the course of the same transaction, the accused, committed the death of Wastuhewa Siriyawathi which is an offence punishable under Section 296 of the Penal Code read with Section 32 of the same.
- Count 11: In the course of the same transaction, the accused, committed the death of Wastuhewa Dayananda which is an offence punishable under Section 296 of the Penal Code read with Section 32 of the same.
- Count 12: In the course of the same transaction, the accused, committed the death of Abeysinghalage Indunil which is an offence punishable under Section 296 of the Penal Code read with Section 32 of the same.
- Count 13: In the course of the same transaction, the accused, committed the death of Abeysinghalage Madhuka Sureni which is an offence punishable under Section 296 of the Penal Code read with Section 32 of the same.
- Count 14: In the course of the same transaction, one or more Members of that unlawful assembly, committed the offence of attempted murder of Abeysinghalage Chaminda by assaulting him which is an offence punishable under Section 300 of the Penal Code read with Section 146 of the same.
- Count 15: In the course of the same transaction, the accused, committed the offence of attempted murder of Abeysinghalage Chaminda by assaulting him which is an offence punishable under Section 300 of the Penal Code read with Section 32 of the same.
- Count 16: In the course of the same transaction, one or more Members of that unlawful assembly, committed the offence of attempted murder of Wastuhewa Nelson by shooting which is an offence punishable under Section 300 of the Penal Code read with Section 146 of the same.
- Count 17: In the course of the same transaction, the accused, committed the offence of attempted murder of Wastuhewa Nelson by shooting which is an offence punishable under Section 300 of the Penal Code read with Section 32 of the same and as the accused used a gun, a firearm to commit same, the accused committed an offence punishable under Section 44(a) of the Fire Arms Act No 33 of 1916.
- Count 18: In the course of the same transaction, one or more Members of that unlawful assembly, committed the offence of attempted murder of Abeysinghalage Dinesh by shooting which is an offence punishable under Section 300 of the Penal Code read with Section 146 of the same.
- Count 19: In the course of the same transaction, the accused, committed the offence of attempted murder of Abeysinghalage Dinesh by shooting

which is an offence punishable under Section 300 of the Penal Code read with Section 32 of the same and as the accused used a gun, a firearm to commit same, the accused committed an offence punishable under Section 44(a) of the Fire Arms Act No 33 of 1916.

When the trial commenced on 13.10.2009 all the accused persons pleaded not guilty and preferred a non-jury trial. After the trial, the learned High Court Judge acquitted all 06 accused persons from charge numbers 01 to 07 and charge numbers 14, 16 and 18.

The 01<sup>st</sup> to 04<sup>th</sup> accused persons were convicted for the charges numbers 08 to 13 in the indictment.

The 01<sup>st</sup> and the 04<sup>th</sup> accused persons were convicted for charge number 15 in the indictment.

The charges were based on liability under section 146 as well as section 32 of the Penal Code. There were two charges for attempting to cause the death of Abeysinghalage Chaminda under section 146 and section 32 of the Penal Code.

All the accused persons pleaded not guilty and preferred a non-jury trial. Thereafter the case proceeded to trial.

On behalf of the prosecution, 12 witnesses gave evidence. They are as follows;

- (i) Abeysinghalage Dinesh Sampath
- (ii) Abeysinghalage Chaminda
- (iii) Wathuhewa Nelson
- (iv) Malwaththage Padma Wijerathne
- (v) Hettiarachchige Sarath Indraratne
- (vi) Helaudamanannalage Gunawardena alia Abiththta
- (vii) Kuruppu Arachchilage Saman Priyantha
- (viii) Walakada Arachchige Nandadasa
- (ix) Dr. Shiromani Lakmal Muthukudaarachchi
- (x) Rathnapala Perera Siriwardena
- (xi) Samansiri Ariyadasa
- (xii) Jayasinghe Achchilage Manjula Prasad Jayasinghe

While the trial was proceeding the 01<sup>st</sup> and 03<sup>rd</sup> accused persons were absconding and evidence under section 241 was led and the trial proceeded in their absence.

The prosecution case was closed marking productions P1 to P11. The learned High Court Judge called for the defence and the 02<sup>nd</sup>, the 05<sup>th</sup> and the 06<sup>th</sup> accused persons made statements from the dock while the 04<sup>th</sup> accused gave evidence under Oath and subjected

himself for cross-examination. The accused persons called Grama Niladhari of Thambagamuwa East and Manchanayake Kapuralalage Chula Manchanayake to give evidence on their behalf. After the defence case was closed parties made submissions and the case was fixed for judgment.

On 01.03.2012 the learned High Court Judge delivered his judgement and acquitted the 05<sup>th</sup> and 06<sup>th</sup> accused persons of all the charges levelled against them. Consequently, all the accused were acquitted of counts 1 to 7 and 14, 16 and 18 of the indictment which was based on unlawful assembly. The 01<sup>st</sup>, 02<sup>nd</sup>, 03<sup>rd</sup> and 04<sup>th</sup> accused persons were convicted of counts 8 to 13 of the indictment. In respect of those charges, the 01<sup>st</sup> to 04<sup>th</sup> accused persons were sentenced to death.

The 01<sup>st</sup> and 04<sup>th</sup> accused were convicted of count 15 of the indictment and sentenced to 5 years rigorous imprisonment.

Being aggrieved by the said convictions and sentences the 01<sup>st</sup>, 02<sup>nd</sup> and 04<sup>th</sup> accused-appellants appealed to this Court.

The Grounds of appeal set forth on behalf of the accused-appellants are as follows;

- (i) The learned trial Judge failed to analyse the evidence led by the prosecution.
- (ii) The learned trial Judge failed to consider that the contradictions and omissions marked specially in the evidence of the two eyewitnesses, PW 2 and PW 3, create a reasonable doubt on the case.
- (iii) The learned trial Judge erred on facts that the identity of the accused-appellants by PW 2 and PW 3.
- (iv) The learned trial Judge failed to consider the fact that evidence lead on behalf of the accused-appellants also creates a reasonable doubt on the prosecution case.
- (v) The learned trial Judge applied two different criteria to evaluate the evidence against the accused-appellants.
- (vi) All the accused-appellants have denied any involvement in the murder incident. Therefore, the omissions and contradictions of the prosecution witnesses have to be scrutinized very carefully rather than simply disregarding them as immaterial. The trial Judge has failed to do it.
- (vii) The trial Judge has adopted 2 different inequitable bases in analysing the evidence for the prosecution witnesses and the defence witnesses. He was very lenient for the prosecution witnesses and the defence witnesses, he was very strict.
- (viii) This inequitable basis has deprived a fair trial to the accused-appellants.
- (ix) The trial Judge has not given valid reasons for rejecting the defence evidence.
- (x) The medical evidence revealed that the injured witness told the doctor that a gang has attacked them. But he did not disclose the names of the accused

persons. The doctor has to record the names of the attackers and if unknown, then it should be recorded. The trial Judge has failed to consider that aspect.

According to the prosecution witnesses, on 28.04.2001 the deceased's and prosecution witnesses Abeysinghalage Dinesh Sampath (PW 2) and Abeysinghalage Chaminda (PW 3) were staying at the house of Siriyawathie at Balawinna.

Dinesh Sampath (PW 2) had slept on the floor in the sitting room near the window with his elder brother Chaminda (PW 3). His brother Indunil had slept with his uncle Dayananda who had slept in the front room. His mother had slept in the second room. They had gone to sleep having switched off the lights.

Dinesh Sampath (PW 2) had woken up around 11.30 pm upon hearing a noise, the sound of gunshots being fired. The sound had come from the front side of the house. The sound had woken Chaminda (PW 3) as well. Dinesh Sampath (PW 2) had thereafter switched on the lights outside the house. Chaminda had requested Dinesh Sampath to go inside the house as there is a shooting. Dinesh Sampath accordingly had left Chaminda in the sitting room and had gone into the 02<sup>nd</sup> room.

Dinesh Sampath had thereafter heard his brother Chaminda saying "there is no sound anymore" and stepped out of the house from the rear door. His father had been standing near the rear door at that time. Immediately after his brother Chaminda stepped out of the house from the rear door, Dinesh Sampath had once again heard the sound of gunshots being fired. This time he had heard the sound coming from the rear side of the house.

Chaminda had thereafter returned to the house saying "the intruders are still there". Chaminda had closed the rear door. A short while later the lights had gone off. At that time Dinesh and the others had been staying in the dining room. All of them had been in a state of fear. Immediately after the lights had gone out, Dinesh had seen a torchlight via the vent holes located in the front and the rear side of the house. The lights had indicated that the intruders had surrounded the house by that time. This had been followed by someone hurling a bomb from the roof to the front room of the house. The sound of a loud explosion similar to that of a bomb explosion was heard thereafter.

Thereafter the intruders had entered the house had broken the rear door. Chaminda had requested Dinesh Sampath at that time to go into the room and hide. Dinesh Sampath had gone to the 03<sup>rd</sup> room and stayed behind the towel rack which had been loaded with clothes. His eldest sister had been in the 02<sup>nd</sup> room. Dinesh Sampath had thereafter heard the sound of the door to his mother's room being broken down. This had been followed by the screams of his mother. He had heard his mother saying "don't Jagath malli, don't".

He had thereafter heard his eldest sister shouting and his grandmother saying "I came to get medicine". His eldest brother Indunil had occupied the front room at that time. Thereafter he heard his deceased uncle screaming. The deceased uncle had occupied the room, which was in front of the room where Dinesh Sampath was hiding. He heard his mother being killed. Dinesh Sampath who was 10 years of age at that time, on hearing the same felt scared for his life as well.

Four of the intruders had thereafter come to the room in which Dinesh Sampath was hiding. One intruder had been armed with a fish cutting knife, whilst another had been armed with an axe. One other intruder had held a torch in his hand. The other intruder had been armed with a sword. Dinesh Sampath had identified the 4 persons to be Jagath the 01<sup>st</sup> accused, Chutta the 02<sup>nd</sup> accused, Mahasen the 03<sup>rd</sup> accused and Kaluwa the 04<sup>th</sup> accused, with the help of the torchlight.

Jagath's son, Salinda was Dinesh Sampath's classmate at Pallebedda School. Dinesh Sampath knew very well Jagath as he is the father of his classmate. The 02<sup>nd</sup> accused Chutta of being Jagath's Brother Dinesh Sampath very well-known even Chutta. The 03<sup>rd</sup> accused Mahasen is also a known person to Dinesh Sampath. He has gone to Mahasen's Lorry with his friend Salinda. The 04<sup>th</sup> accused Kaluwa is also a known person in the village as Kaluwa was frequently visiting Dinesh Sampath's friend Salinda's house. Dinesh Sampath has said that he has spoken to Jagath, Chutta, Mahasen and Kaluwa on several occasions.

Jagath the 01<sup>st</sup> accused had been armed with a sword. Kaluwa the 04<sup>th</sup> accused had been armed with a knife. They had having flashed the torch inside the room and the surrounding. Thereafter broke the ceiling using the sword. Having given a blow to the rack with the sword the 4 intruders had left the room saying "there is no one in the room". At that moment Dinesh Sampath was hiding inside the same rack. The 01<sup>st</sup> accused Jagath had uttered some words inside the room. The intruders had been shouting for 10 minutes. Dinesh had remained inside the room. He had thereafter heard his deceased brother Indunil shouting "Budu ammo" and he had remained inside the room behind the rack for 3 hours. When there had been no sound Dinesh Sampath came out from the house looking for some help.

After Dinesh Sampath had come out of the room, 3 hours later he had seen his father fallen on the ground with blood. Dinesh Sampath had thereafter stepped out of the house from the rear door and had gone to his loku thaththa's house and upon finding out that he was not there he had gone to several other houses. He had thereafter stated to the police.

The next eyewitness Abeysinghalage Chaminda (PW 3) testified and said that he was 21 years of age at the time of the incident. His younger brother Indunil had been 18 years of age at the time of the incident. His grandmother's name is H.A. Rosalyn Nona. Chaminda had been the last to go to sleep around 10.00 pm. on the date of the incident. Only the light which was near the statue of Lord Buddha had been switched on at the time they were sleeping. Chaminda had slept in the sitting room that night together with his younger brother Dinesh Sampath. His other younger brother Indunil had slept in the front room. His mother and father had slept in the rear rooms. His younger sister had slept in her room located within proximity to the sitting room.

Chaminda had woken up upon hearing a loud sound and feeling sand falling onto his body. He had heard the sound of gunshots being fired. Then he had switched the front sidelights on. Chaminda had thereafter looked outside to see what was happening. He had seen 2 persons standing in the front garden. They had been standing within a distance of 2 meters from the house. He had identified the two persons as Rohana Jagath the 01<sup>st</sup> accused and Mahasen the 03<sup>rd</sup> accused. Chaminda had known the 01<sup>st</sup> accused as he is from the same village and as he meets him frequently. He had known the 01<sup>st</sup> accused from his school-



going days. The 01<sup>st</sup> accused had come to his house as well. Chaminda had gone to school with the 03<sup>rd</sup> accused. He had known the 03<sup>rd</sup> accused from his childhood days as he had been from the adjoining village.

He had seen the 01<sup>st</sup> accused being armed with a 3 feet long gun. Chaminda had not seen the 03<sup>rd</sup> accused being armed with any weapon. The 01<sup>st</sup> accused had been aiming the gun at the house. Chaminda had managed to identify the 01<sup>st</sup> and the 03<sup>rd</sup> accused very well with the help of the front sidelights that he had switched on upon hearing the gunshots. He had asked everyone at home not to step out of the house and informed them that he would go and lodge a complaint to the police. Chaminda had stepped out of the house from the rear door. He had heard another gunshot being fired. The sound had come from the rear side of his house. Thereafter he had gone up to the front door and had informed everyone at home that he is not in a position to go out as the entire house is surrounded by the intruders. A short while later the lights had gone off. This had been followed by the sound of someone trying to remove the grills.

Chaminda had heard the sound of footsteps coming from the top of the roof. The intruder had in the said process broken a roof tile in one of the rooms. Then he had heard the intruder break the roof tile in another room thereafter. This had been followed by a loud noise. The house had been filled with smoke. His father had thereafter screamed saying "I got hit". This had happened in the rear room adjacent to the sitting room.

He had testified to the effect that he knew that a bomb had exploded and also that his father got injured. Chaminda had seen his father fall. This had been followed by the intruders pushing the rear door to open it. Chaminda had pushed the rear door to prevent it from being opened. However, he had found it difficult to continue to keep the door pushed and he had accordingly let go of it. Three persons had stepped into the house. There had been no lights in the kitchen at that time. The learned State Counsel had specifically queried from the witness as to how he recognized the intruders. The witness had in response replied by saying that he had managed to identify the intruders with the help of the torchlight. The intruders had possessed torches. They had lit the torches when they stepped into the house. There had been more than one torch in their possession.

Chaminda had identified the three persons to be Jagath the 01<sup>st</sup> accused, his younger brother Chutta the 02<sup>nd</sup> accused and Dayawansha the 05<sup>th</sup> accused. Jagath the 01<sup>st</sup> accused had stepped into the house first. Chaminda had known the 01<sup>st</sup> accused Jagath and the 02<sup>nd</sup> accused Chutta from his childhood days. He had known the 05<sup>th</sup> accused Dayawansha since 1995. The witness had received a blow to his head soon after he had seen the three accused. He had started to bleed as a result of a blow. The witness had thereafter gone to the sitting room. When he went to the sitting room, he had observed the trip switch having been removed. Thereafter he had gone to the front room and had leaned against the wall. This had been followed by some of the intruders walking into the room.

They had flashed the torchlight inside the house and the room. He had heard one person saying "there is no one here". Then another person had said, "there is one under the bed". Thereafter they pulled the person who had been hiding under the bed and that person had said: "don't aiye". This had been followed by one person saying "attack him". He had heard

another person saying "Sudha everyone is dead no". This had been followed by another person saying "everyone is dead". He had heard a voice saying thereafter "then shall we go". All the persons had thereafter stepped out of the house. When they were inside the house Chaminda could identify the 04<sup>th</sup> accused Kaluwa by his voice. Chaminda knew Kaluwa from his school days. He has a guttural voice. That was the reason how he had identified the 04<sup>th</sup> accused Kaluwa from his voice.

It was decided in Kirpal Singh vs the State Of U.P on 10 May, 1963 : 1965 AIR 712, 1964 SCR (3) 992;

"Rakkha Singh deposed that he had been able to recognise the appellant from his "voice and gait". Indeed, the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognising is not familiar with the person recognised may be somewhat risky in a criminal trial. In the examination, in-chief Rakkha Singh has deposed as if he had seen the actual assault by the appellant, but in cross-examination, he stated that he had not seen the face of the assailant of Karam Singh. He asserted however that he was able to recognize the appellant and his two brothers from their 'gait and voice'. It cannot be said that identification of the assailant by Rakkha Singh, from what he heard and observed was so improbable that we would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to his credibility and of the High Court which considered the evidence against the appellant and accepted the testimony. The assailant was intimately known to Rakkha Singh and the witness had heard the appellant's voice speaking about the dispute which was pending between him and the appellant. We do not think that the circumstance that Rakkha Singh had not seen the face of the appellant when the latter was running away is a ground for discarding his testimony. The conviction of the appellant must therefore be confirmed."

The said judgment in the case of Kirpal Singh Vs. The State Uttar Pradesh (supra) wherein the Indian Supreme Court decision about the voice identification, His Lordship justice Sisir de Abrew was having a similar view in the case of Hatangalage Ariyasena vs Attorney General CA 68/2011 decided on 21.02.2013 (unreported case) as follows;

"It is we that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognizing is not familiar with the person recognized may be somewhat risky in a criminal trial. But where the accused is intimately known to the witness and for more than a fortnight before the date of the offence he had met the accused on several occasions in connection with the dispute, it cannot be said that identification of the assailant by the witness from what he heard and observed was so improbable that the Supreme Court would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to his credibility and of the Nigh Com which considered the evidence against the appellant and accepted the testimony."

He had heard one person walking again into the house saying “wait a bit there is someone inside the house”. This had been followed by the noise of a piece of iron being thrown into the house. There had been no noise thereafter. After a while, he walked up to his father and had spoken to him. He had however not responded. He had stepped onto the road to complain to the police. **On his way to the police, he had bumped into a police jeep and inside the police, the jeep had seen his uncle Nelson. According to the witnesses, the entire incident had lasted for more than 2 hours.**

He had got into the police jeep and had gone home in the jeep. As he had a cut injury on his neck, he was admitted to the Godakawela hospital. It was revealed that the motive for the incident had been based on the fact that they had given refuge to the 01<sup>st</sup> accused's mother Rupa Ranjani. The 01<sup>st</sup> accused had chased off their mother Rupa Ranjini from home and Chaminda's parents had taken Rupa Ranjani to Gandara, where the ancestral home of his mother was and had kept her there. They were warned by the accused not to give refuge to their mother. Chaminda had very specifically testified to the effect that he has no animosity towards the accused persons. It was revealed that in 2001 there had been an incident between the 01<sup>st</sup> accused and his uncle Nelson and no one had got hurt from that incident.

Wastuhewa Nelson (PW 1) testified to the effect that Rosalyn Nona is his mother and also that she is not amongst the living. She had died on 28.04.2001. His mother had been living with his eldest sister Siriyawathi during that time. He had been at his eldest sister's house during that time. He had gone to his sister's house on the 12<sup>th</sup> of April and had stayed there until the date of the incident. Nelson had gone there to visit his mother. His eldest brother Dayananda had also come to his eldest sister's house during the avurudu time. He had also stayed over at his eldest sister's place. There had been death threats by the 01<sup>st</sup> accused Jagath levelled against his mother. The 01<sup>st</sup> accused person's and the 02<sup>nd</sup> accused person's eldest sister Siriyawathi had kept their mother at her home.

The 02<sup>nd</sup> accused K. K. Priyantha alias Chutta had given a blow using his hands to the witness PW 1 either on the 26<sup>th</sup> or the 27<sup>th</sup> of April for keeping his mother at his eldest sister's place. He was in a state of intoxication. The 02<sup>nd</sup> accused had made inquiries from Nelson as to why they are keeping his mother when her very own children do not want to keep her. The witness PW 1 had thereafter on the 28<sup>th</sup> of April given two blows, in return to the 02<sup>nd</sup> accused near his eldest sister's house during the morning hours on the same day. After the two blows, the 02<sup>nd</sup> accused person had run away. They must have decided to take revenge on the same night.

On the very same night of that incident, Nelson had gone to sleep after watching TV and having had his dinner around 8.00 pm - 9.00 pm. He had slept in the 3<sup>rd</sup> room on a table in that room. His eldest brother Dayananda and his sister's son Indunil had slept in the front room. His mother, eldest sister and brother-in-law had slept in the 02<sup>nd</sup> room, which was adjacent to the sitting room. His eldest sister's daughter had slept in the room on the rear side of the sitting room. Both Chaminda and Dinesh Sampath had slept on the floor in the sitting room.

Nelson had been woken up by Chaminda saying "someone had fired a gunshot". He had come out of the room. Everyone at home had been awake by that time. The lights had been

switched on when he stepped out of the house. Just as he came out of the room, he had seen Chaminda falling holding on to his body. Chaminda had requested him to bend down. He had whilst bending down looked around to see whether there was anyone. He had however not managed to see anyone. He had stood upon hearing a gunshot being fired. PW 1 Nelson, Chaminda and Chaminda's father had thereafter stepped out of the house from the rear side. This had been followed by another gunshot being fired. The shot had struck a barrel that had been there.

Nelson had walked back into the house. He had thereafter peeped from the windows to see who was outside. He had at that point seen 2-3 persons armed with weapons walking around the house. Out of three persons he had managed to identify the 02<sup>nd</sup> accused. The 02<sup>nd</sup> accused had been armed with a fish cutting knife in his hand. He had been seen to circulate the house with the fish cutting knife. Chaminda had thereafter informed him that someone is hiding behind the concrete stones. Chaminda had requested Nelson not to step out of the house. There had been lights in the house at that time. They had switched off the lights because of the intruders and had waited inside the rooms. The electricity had gone off a little later.

Nelson had seen torch lights flashed into the house from the outside. He had accordingly come to know that there were some persons outside. He had felt as if around 7-8 persons were running outside the house. There had been a ladder close to a room adjacent to the sitting room and one of the intruders had used it to climb onto the roof of the house. The intruder had thereafter broken a few of the roof tiles. Both his eldest sister's daughter and mother who had been inside the room with the door being closed had stepped out of the room on hearing the sound of the roof tiles being broken. This had been followed by the sound of a loud explosion coming from the dining room. Nelson and his son in law had been near the door at that time. Nelson's son in law had inquired as to whether Nelson had got injured. His son in law got injured thereafter.

Nelson had walked up to the rear door together with Chaminda and Chaminda's father. The 01<sup>st</sup> and the 02<sup>nd</sup> accused had broken into the house from the rear door flashing torch lights. The 01<sup>st</sup> accused Jagath Rohana had said "cut everyone without sparing a single person". Nelson had seen the 01<sup>st</sup> accused at his younger brother's house. He had known him for 5-6 years. The 02<sup>nd</sup> accused had entered the house first. The 01<sup>st</sup> accused had been armed with a long weapon like a gun at that time. Nelson had seen several others behind the 01<sup>st</sup> accused. He had not remained near the rear door thereafter and had seen his son in law falling near the door.

Nelson had gone to the Godakawela Police. It had been between 12.00 am and 01.00 am. He had narrated to the police as to what had happened and had gone home in the police jeep having remained in the police station for 45 minutes. He had bumped into Chaminda when he was on his way home in the police jeep. Chaminda had been bleeding from his head at that time. They had taken Chaminda into the jeep and had taken him to the hospital and had gone home thereafter.

When he returned home with the police, he had seen Indunil lying dead in the front room. He had seen Dayananda lying dead in the room located on the rear side of the sitting room.

He had seen the son in law lying dead in the room near the rear door. He had seen Pody Mahaththaya lying dead in the other room near the rear door. He had in addition seen his eldest sister, his eldest sister's daughter and his mother lying dead. They had all been seen with cut injuries and had identified the bodies of all six persons at the inquest. Nelson was 31 years of age at the time of the incident.

Malwattage Padma Wije Pieris (PW 4) testified to the effect that he is a three-wheel driver and before coming to know about the incident the 02<sup>nd</sup> accused Chutte had come to his house around 3.30 am and had asked him to take him to Miyanakoladeniya. Having said that the 02<sup>nd</sup> accused Chutte had got into the three-wheeler together with his elder brother and his wife and children. Chutte's wife and children also got into the Three-wheeler. Padma Wije Pieris (PW 4) had been asked to take them to the 01<sup>st</sup> accused person Jagath's house at Minakoladeniya.

Thereafter Padma Wije Pieris had gone to the 02<sup>nd</sup> accused Chutte's wife's house at Nawinna. After they were dropped the 01<sup>st</sup> accused Jagath and the 02<sup>nd</sup> accused Chutte thereafter went to Rakwana in the same three-wheeler. Padma Wije Pieris had been asked to take the two accused persons to a house belonging to one Kumara at Rakwana. He had received Rs. 1,000/- as cash for that hire and had been paid extra for the hire by Jagath and Chutte. Padma Wije Pieris had thereafter come to know that 6 persons had been killed by Jagath and Chutte.

Hettiarachchige Sarath Indrarathne (PW 6) had testified that he had lived in Rakwana in the year 2001, and also that he is called "Kumara". He had known the 01<sup>st</sup> accused Jagath. He had met him at funeral houses. He had borrowed the 01<sup>st</sup> accused's motorcycle and had met with an accident. This accident had brought him closer to the 01<sup>st</sup> accused.

They drink together whenever the 01<sup>st</sup> accused comes to Rakwana. He had later come to know that the 01<sup>st</sup> accused has a younger brother by the name of Priyantha. The 01<sup>st</sup> accused had stayed at his place on the 28<sup>th</sup> of April and had left the place in the night. The 01<sup>st</sup> accused had thereafter returned around 5.30 am on the 29<sup>th</sup> with two others in a red coloured three-wheeler driven by a person called "Wije aiyya". The 01<sup>st</sup> accused had come with one person called "Abiththaya" alias Gunawardena and the youngest brother of the 01<sup>st</sup> accused.

On seeing the 01<sup>st</sup> accused and the other two he had made inquiries from the 01<sup>st</sup> accused as to why they had come so early in the morning. In response, the 01<sup>st</sup> accused had informed him that there had been a fight to which the witness referred to as a commotion. The 01<sup>st</sup> accused had in addition informed him that he does not know whether 4-5 persons had died from that incident. The 01<sup>st</sup> accused Jagath had sought the assistance of the witness Sarath Indrarathne (PW 4). He had requested a different vehicle. The witness had gone to the road and had called another three-wheeler. The said three-wheeler had been driven by one Saman. The person known as Abiththaya had left in the three-wheeler belonging to Wije aiyya whilst the 01<sup>st</sup> and the 02<sup>nd</sup> accused had left in the three-wheeler driven by Saman.

The witness had later got to know from Saman that they had gone to Sooriyakanda. The witness had been arrested by the police in connection with the incident and he had been

released later. The witness had specifically testified to the effect that he has no animosity towards the 01<sup>st</sup> accused's brother the 02<sup>nd</sup> accused.

Helauda Manannalage Gunawardena (PW 5) had testified that his alias name is "abiththaya". He knows the 01<sup>st</sup> accused by playing cards during Avurudhu. He had known the 01<sup>st</sup> accused of a period of 3 years by the time of the incident and the younger brother of the 01<sup>st</sup> accused Chutte malli, the 02<sup>nd</sup> accused as well. He had known the 02<sup>nd</sup> accused also for three years by that time. The witness had also been arrested by the police. The 01<sup>st</sup> accused had come to his house around 4.30 am on the 29.04.2001. He had never come to his house previously around that time. The witness had been asleep with his family. The 01<sup>st</sup> accused had knocked at the door calling out his name. He had called him by his alias name.

Having knocked at the door, the 01<sup>st</sup> accused had said "this is Jagath please open the door". Upon recognizing the 01<sup>st</sup> accused's voice the witness had opened the door and on seeing the 01<sup>st</sup> accused the witness had made inquiries from the 01<sup>st</sup> accused as to why he had come. The 01<sup>st</sup> accused had requested the witness to wear a shirt and to join him to go to Rakwana for an emergency. The witness had accordingly joined the 01<sup>st</sup> accused. They had gone to Rakwana in a three-wheeler. The 01<sup>st</sup> accused had come to the witness's house with his younger brother, the 02<sup>nd</sup> accused. In addition to the 02<sup>nd</sup> accused the 02<sup>nd</sup> accused's wife and children had also been inside the three-wheeler. The three-wheeler had been driven by Wije aiyya of Pallebadde. On their way they had dropped the 02<sup>nd</sup> accused's wife and children at their native place.

They had gone to the house of one Kumara at Rakwana thereafter. It had been around 5.30 am by the time they reached Kumara's house. The 01<sup>st</sup> accused person Jagath had walked up to Kumara's house and had talked to him. The 01<sup>st</sup> accused had thereafter returned to the place where the three-wheeler was parked and said "එක ගෙදර භය හත් දෙනෙක් කොටලා දාලා ආවේ." Jagath said that in the presence of Kumara and the witness.

The witness had thereafter got into the three-wheeler and had gone to the 01<sup>st</sup> accused's house. The 01<sup>st</sup> accused had given a Rs. 1,000/- note to him and had requested the witness to give it to his wife. The 01<sup>st</sup> accused had further requested the witness to inform his wife that he will not come for 1 month and told her to go to the ancestral home. Leaving behind the 02<sup>nd</sup> accused and the 01<sup>st</sup> accused the witness came home. The witness accordingly had conveyed the message to the 01<sup>st</sup> accused's wife. When the witness returned home, he had come to know that 6-7 persons had been killed in a house at Balawinna. The witness had also been arrested by the police and released subsequently. He had specifically testified to the effect that he has no animosity towards the 02<sup>nd</sup> accused.

Kurupparachchilage Saman Priyantha (PW 11) had testified that he worked as a three-wheel driver in the year 2001. He knows Kumara. Kumara had come in a bicycle and had requested him to go on hire with two of his friends to Deniyaya. The two friends had been at Kumara's house. He had taken the two friends to Deniyaya and had dropped them at the Deniyaya bus stand. He had identified the 02<sup>nd</sup> accused person to be one of the friends of Kumara whom he had given a lift to Deniyaya.

Walakada Arachchige Nandadasa (PW 28) the Grama Niladhari of Balawinna had testified that he had served as the Grama Niladhari of Balawinna for 10 years. He had further

testified to the effect that there had been a six-person murder at Balawinna in the year 2001. He had in addition testified to the effect that before the said incident he had received a complaint from one Rupa Ranjani against his eldest son K.K. Jagath as he has assaulted her.

The Judicial Medical Officer (JMO) (PW 16) who examined Chaminda had testified to the effect that she had examined Chaminda on the 29.04.2001 whilst she was working at Godakawela Hospital at 03.00 am. Chaminda had given a short history to her and narrated the incident. He had informed her that he and his family were attacked by a group of persons armed with sharp weapons. There had been a loud explosion before the group of persons entered the house. The group had attacked Chaminda and everyone at home. Chaminda had 3 injuries.

The 01<sup>st</sup> injury had been a cut injury. It had been located on the rear side of the head. It was 12 cm long and 1 cm deep. She had identified the injury to be sufficient in the ordinary course of nature to cause death. The JMO opined to the effect that the 01<sup>st</sup> injury had been caused by a cutting weapon.

The 02<sup>nd</sup> injury had been located on the left side of the neck. It had been 3 cm long and 5 cm deep. It had been identified as a cut injury. The JMO had opined that the 02<sup>nd</sup> injury had been caused by a sharp weapon. The 02<sup>nd</sup> injury had been identified as being a non-grievous injury.

The 03<sup>rd</sup> injury had been a laceration on the index finger. The 03<sup>rd</sup> injury had also been identified as a non-grievous injury. Chaminda had been transferred to the Rathnapura hospital immediately.

The JMO (PW 15) who conducted the post mortem examinations of the 6 persons testified to the effect that he had conducted the post-mortem examinations of all six persons on 29.04.2001.

The body of Abeysinghalage Pody mahaththaya had 3 injuries. One injury had been located on the face. It had been a cut injury that had been 8.5 inches long and 2.5 inches wide. The second injury had been located on the head. The skull bone had been cut and damage was caused to the brain. The injury to the head had been identified as a fatal injury.

IP Siriwardena (PW 19) of the Godakawela police station testified to the effect that he had functioned as the OIC of the Godakawela police station in the year 2001. The IP had received information about the murder at 1.30 am on 29.04.2001 from a person by the name of Wastuhewa Nelson. He had been grieving over the demise of his family members. The OIC could not record the statement from him at that time. IP Siriwardena had left the station immediately upon the receipt of the information and had reached the scene of crime around 02.00 am. The house had been in darkness. The main electricity supply wires had been removed.

The OIC had taken with him a torch to conduct the investigations. Three chairs and a table at the entrance to the house had been seen to be in a toppled position. It had accordingly born out signs of a fight having taken place. He had seen three bodies in the front room and another body in the centre room whilst another body had been seen in the other room. He

had observed the rear door to the house broken. There had been a barrel located within proximity to the rear door and there had been 3 bullet holes in the barrel.

The jack tree located within 8 meters to the rear door, had also received a gunshot. He had observed two roof tiles removed. There had been a ladder leaning against the wall. There had been a crater on the ground. Pieces of a bomb had been recovered from the room. He had observed several bullet marks on the wall in front of the box in which the statue of Lord Buddha was. There had been a large number of bloodstains on the wall of the room in which Indunil's body was found.

There were 7 windows with grills fixed on them. Witness found blood flowing from all the rooms. He had got down PC 18399 to take photographs of the scene of the crime. On hearing that the accused were living within a distance of 2 1/2 km to the place of the incident IP Siriwardena had gone to the houses of the 01<sup>st</sup> accused Kapugedera Kankanamlage Rohana Jagath Nishshanka and the 02<sup>nd</sup> accused Kapugedera Kankanamlage Krishan Priyantha alias "Chutta".

IP Siriwardena had observed pellets and wadding lying in the sitting room. He had taken as productions the debris of a bomb, a soil sample, waddings, and pellets. He had taken into custody the 03<sup>rd</sup> accused Gamarachchilage Mahasen Bandara Samarasekera and Ranasinghe Mudiyansele Ananda Wasantha Kumara the 4<sup>th</sup> accused on the 01.05.2001. IP Siriwardena had in addition taken into custody Wickramaarachchi Mohomdiramlage Upul Ranasinghe the 6<sup>th</sup> accused on 03.05.2001. The statement of the 06<sup>th</sup> accused person had been recorded thereafter. On the pointing out of the 06<sup>th</sup> accused the witness had gone to the Chena cultivation of the 06<sup>th</sup> accused. He had pointed at a club concealed in the jungle and IP Siriwardena had taken it into custody. The club had been 34 inches long. Section 27 recovery statement had been marked during the trial as P 11.

The 05<sup>th</sup> accused had been subsequently arrested on 03.05.2001. The statement of the 05<sup>th</sup> accused had been recorded thereafter. On the pointing out of the 05<sup>th</sup> accused IP Siriwardena had gone to the Chena where the 05<sup>th</sup> accused had been in hiding. On the pointing out of the 05<sup>th</sup> accused the witness had managed to recover a sword concealed on top of a roof. There had been bloodstains on the blade of the sword which had been 22 1/2 inches long. The sword which had been marked as P 5 came to be identified by IP Siriwardena. Section 27 recovery statement was marked as P12.

The 01<sup>st</sup> and the 02<sup>nd</sup> accused had subsequently surrendered themselves to the Rathnapura police on 07.05.2001. Upon the receipt of the information on the same PC driver 34267 had gone to the Rathnapura police on the same day to take the two accused into custody. The statement of the 02<sup>nd</sup> accused had been recorded thereafter on 08.05.2001. On the pointing out of the 02<sup>nd</sup> accused IP Siriwardena had managed to recover another sword and a gun concealed under a coconut tree near the manam jungle along the Thambagamuwa to Badanamura road. The blade of the sword had been 20 inches long and the muzzleloading gun had been 25 inches long. The gun which had been marked as P2 identified by the witness IP Siriwardena. The sword which had been marked as P 4 further came to be identified by the same witness. Section 27 recovery statement was marked as P 13.



The statement of Wastuhewa Nelson (PW 01) had been recorded on 29.04.2001. The statement of Abeysinghalage Dinesh Sampath (PW 02) and Abeysinghalage Chaminda (PW 03) had also been recorded on the same date. PS 18329 Ariyadasa (PW 33) who took the photographs of the scene of crime testified to the effect that he functioned as the Rathnapura division photographer. This witness identified the photo album which comprised of the photos taken by him marked as P 1.

The learned counsel for the appellant's main argument was that whether any of the eyewitnesses saw the incident. As regards the evidence of the witness Dinesh Sampath (PW 2) contradictions were marked which creates a reasonable doubt as to whether the witness was present in the room and was hiding behind a clothes rack. The Learned trial Judge had brushed aside these inconsistent statements saying that those contradictions do not go to the root of the case. The learned counsel further says that when the evidence is analysed in the proper perspective these contradictions and omissions are material as far as the question of the identity of the accused is concerned. The failure to consider these in that way has occasioned a miscarriage of justice.

In the case of Jayathunga V A.G. and another 2002 (1) SLR 197 at 202, Hector Yapa J. stated as follows.

"The other submission that was made by Learned President's Counsel was the failure of the Learned High Court Judge to consider the defence evidence, especially the evidence was given by the accused-appellant before he decided to sustain the conviction of the accused-appellant. Counsel contended that there was a complete failure by the High Court Judge to consider the evidence given by the defence. In support of this submission, Learned Counsel cited the cases of The King V Tholis Silva 30 NLR 267, where it has been held that a Court must scrutinize the defence put forward in a case and if it is rejected, to give reasons, therefore. Counsel also referred to the case of Chandrasena and Others V. Munaweera 1998 (3) SLR 94, where the need for a Judge to analyse and evaluate the evidence of both the prosecution and the defence with reasons has been highlighted and commented upon".

In Wijerathna V Republic of Sri Lanka 78 NLR 49 Sirimanna J. stated as follows.

"When an accused is facing a capital charge every point in favour of the accused though it may seem trivial must be placed before the jury. It may well be that all such matters if so, placed before the jury may create a reasonable doubt the benefit of which the accused is entitled to."

"When, however, the circumstances against the accused are emphasized and the trial judge expresses his opinion as to the adverse inferences and fails to place the circumstances and inferences in favour of the accused before the Jury the accused is deprived of a substance of a fair trial."

Witness Nelson stated that the 02<sup>nd</sup> accused had assaulted him on a previous occasion. He says that the reason for the assault was the mother of the accused being kept at their house. This the prosecution tried to show as the motive for the incident.

As stated in Lionel Vs. AG 2004 (1) SLR 130 "motive is a double-edged weapon". Because of this reason, Nelson has falsely implicated the 02<sup>nd</sup> accused-appellant in connection with this murder.

The learned counsel for the appellants argued that at the time this incident took place the entire place and the surroundings were in darkness. Anyone could not have made a clear identification of any of the persons who had entered the house. Thus, the purported identification of the 02<sup>nd</sup> accused-appellant by the alleged eyewitnesses are open to very serious suspicion and a trier of facts should have considered this evidence very cautiously. In this instance, the learned trial judge had not done so. This has occasioned a failure of justice. When all these matters are taken into consideration there is serious doubt about the identity of the persons who came into the house and that benefit of the doubt should be given to the 02<sup>nd</sup> accused-appellant and he should be acquitted of the charges levelled against him.

The appellants argued that it was not possible to identify the perpetrators as there were no lights at the time of the crime. That is not true. Dinesh Sampath (PW 02) and Chaminda (PW 03) testified at the trial that the criminals who came into the house used torches and when they tried to find the whereabouts of the occupants of the house by lighting the torch, they were able to identify the culprits by the light of the torches. That it was possible. That evidence cannot be dismissed as improbable. This court believes that when a torch is lit in a dark house, it is possible to identify the person who came at any moment by the light emanating from the torch. Therefore, it can be concluded beyond a reasonable doubt that Dinesh Sampath (PW 02) and Chaminda (PW 03) identified the accused-appellants who had committed the crime by the torch lights which were lit even when the house was in darkness.

Dinesh Sampath (PW 02) and Chaminda (PW 03) testified firmly that they were able to identify the criminals when the lights were turned on outside the house while the criminals were in the yard before the lights were turned off. The argument of the accused-appellants never is accepted that those culprits could not be identified due to darkness. I, therefore, conclude that this argument of the accused-appellants is a very weak argument that has been put forward without any basis. I further conclude that it has been proved beyond a reasonable doubt that this crime was committed by the accused-appellants themselves.

The admissibility of a confession made by the 01<sup>st</sup> accused was also challenged by the learned counsel for the appellant. It is alleged that the 01<sup>st</sup> and 02<sup>nd</sup> accused left their respective houses on the same night in a Three-Wheeler with another person. Their family members have also left the place. These witnesses testify that the 01<sup>st</sup> accused uttered certain statements which may indicate that an offence was committed by him. Thereby the prosecution has sought to lead in evidence a purported confession in terms of Section 24 of the Evidence Ordinance. The Learned Trial Judge in his judgment had stated this confession is admissible against the 01<sup>st</sup> and 02<sup>nd</sup> accused. The Learned trial judge in his judgment on page 24 states as follows.

"ඒ අනුව මෙම සිද්ධියෙන් පසුව 1, 2 විත්තිකරුවන් ප්‍රදේශයෙන් පලා යාම නැතහොත් ඔවුන්ගේ පසු හැසිරීමද පැමිණිල්ලේ නඩුව ශක්තිමත් කරන ලද කරුණකි. එමෙන්ම 1 වන

වික්තිකරු සාක්ෂිකාර ගුණවර්ධනට කර ඇති පාපොච්චාරනයද වික්තිකරුවන්ට විරුද්ධව අදාළ කර ගනනැති සාක්ෂියකි."

The above passage in the judgment of the learned trial judge dealing with the admissibility of the confession made by the 01<sup>st</sup> accused against the 02<sup>nd</sup> accused is completely obnoxious to Section 30 of the evidence ordinance. It was argued by the learned counsel for the appellants that the learned trial Judge had misdirected himself completely on the law in this regard and that misdirection has affected his finding on the testimonial trustworthiness of the alleged eyewitnesses thereby resulting in a miscarriage of justice. The confession would be inadmissible against a co-accused.

Section 30 of the evidence ordinances reads as follows;

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court shall not take into consideration such confession as against such other person"

In Vivekanandan V. Selvaratnam 1979 (1) NLR 337 Malcolm Perera J. considering the applicability of Section 30 of the Evidence Ordinance states as follows:

"Now I come to the third point that an extra-judicial confession of an accused cannot be used in evidence against his co-accused under Section 30 of the Evidence Ordinance"

In the case of Joseph V. Peris 24 NLR. 485 the complainant charged the two accused with theft of certain articles. One of the circumstances on which the conviction of the 01<sup>st</sup> accused was based was that the 02<sup>nd</sup> accused made a statement to a person in authority, District Engineer implicating the 01<sup>st</sup> accused. It was held that the confession made by the 02<sup>nd</sup> accused outside Court to the District Engineer was inadmissible in Evidence against the 01<sup>st</sup> accused, in view of the provision of Section 30 of the Evidence Ordinance.

De Sampayo J. Said;

"I am bound to hold that, in view of that provision the confession made by the second accused to the District Engineer was inadmissible and does not furnish any evidence against the first accused."

"The Learned Magistrate did not consider this aspect of P 21. It is quite clear from his judgment when he came to consider the case against the second accused, he was influenced by P 21."

In the circumstances, it was argued by the learned President's Counsel for the appellant that for the above-mentioned reason this item of evidence should not be acted upon against the 02<sup>nd</sup> accused-appellant and the learned trial Judge misdirected himself in accepting this evidence.

When perusing the judgement of the learned High Court judge in the present case it is very clear that he has not violated section 30 of the Evidence Ordinance. There is no proof to say

that the confession of the 01<sup>st</sup> accused-appellant was used against his co-accused, the 02<sup>nd</sup> accused-appellant under Section 30 of the Evidence Ordinance.

The learned trial judge's misdirection was regarding the evidence of absconding. Regarding this argument court considered the following judgements;

King V Abeywikrama 44 NLR 254,

King V. Appuhami 46 NLR 128,

Krishantha De Silva V. AG 2003 (1) SLR 162

The learned trial judge in the passage above had drawn an adverse inference from the absconding of the 02<sup>nd</sup> accused from the passage above. This is an item of circumstantial evidence. Circumstantial evidence should not be acted upon to the detriment of the accused unless the inference that could be drawn from the evidence is consistent with the guilt of the accused and inconsistent with any other reasonable hypothesis.

Learned counsel for the appellants submitted that in this case there is an innocent explanation as to why the 01<sup>st</sup> and 02<sup>nd</sup> accused were not at home and why they left the place. The Learned Trial Judge has not considered this evidence. Therefore, his reliance on the evidence of absconding is also a misdirection of the facts.

It was argued for the appellants that there isn't sufficient reliable and admissible evidence led by the prosecution to convict the 02<sup>nd</sup> and the 03<sup>rd</sup> accused-appellants.

After the conclusion of the prosecution case and after the rights of the accused were explained the 02<sup>nd</sup> accused-appellant gave a dock statement. The 03<sup>rd</sup> accused-appellant gave evidence and proceeded to call defence-witness Ampawila Arachchilage Susilawathi (DW 01). The 05<sup>th</sup> and the 06<sup>th</sup> accused gave dock statements and proceeded to call Manchanayaka Kapuralalage Chula Manchanayake (DW 02).

The 02<sup>nd</sup> accused Kapugedera Kankanamge Krishan Priyantha alias Chutte in his dock statement took up the position that he had gone to watch an Avurudu Uthsawaya on the 14.04.2001. Wastuhewa Nelson (PW 01) had assaulted him there. On 28.04.2001 whilst he was on his way home Nelson had assaulted him again with 8 others. All of them had been armed with katties and clubs. Nelson had been armed with a pestle. He had rushed home out of fear and closed the door. Thereafter they had struck at the door with a sword saying "you will be killed".

He had managed to escape and he had complained to the Godakawela police station around 12noon. The Godakawela police had informed him that it will take about 3-4 days to inquire into the complaint. The police had requested him to mind his own business and wait. He had accordingly remained indoors. The incident had taken place on the following day. Upon hearing that the police were looking for him in respect of the incident he had gone to his wife's house with his children. He had thereafter surrendered himself to the Rathnapura police. He had been thereafter handed over to the Godakawela police on the following day. The Godakawela police OIC had assaulted him and had made inquiries from him as to why he had surrendered himself to the Rathnapura police without surrendering at the Godakawela police.

The police had asked for weapons from him. He took up the position that he had never used a sword or a gun in his lifetime. He had never seen them as well. He further took up the position that there had been an incident at one Soyza's house. It was his position that the weapons used in that incident had been introduced to the instant case. The Godakawela police had taken him to a paddy field. The police had thereafter thrown a sword to a mana plantation. He had been imprisoned thereafter. He denied all the allegations levelled against him.

The 03<sup>rd</sup> accused-appellant (04<sup>th</sup> accused) Ranasinghe Mudiyansele Ananda Wasantha Kumara alias Kaluwa testified to the effect that he is married and also that he lived with his wife at his mother's ancestral home in the year 2001. He had worked in a lorry which belonged to his mother. He had gone on hires in the said lorry by parking it at the Pallebadda town. He had got to know that some persons were killed at Balawinna on the 29.04.2001 when he was on his way on a hire. He had been taken into custody on the same day. Whilst he was in the police station the police had shown him a T56 and had told him that they had found it from his lorry.

On the 28<sup>th</sup> of April 2001, he had come to the park to go on hires. He had got a hire around 9.30 am. He had accordingly gone to galpaya to deliver some coconut branches. The 03<sup>rd</sup> accused-appellant (04<sup>th</sup> accused) Ranasinghe Mudiyansele Ananda Wasantha Kumara alias Kaluwa had denied the allegations levelled against him. He had mentioned as the motive to concoct the false allegation against him was that a fight that had been taken place between Nelson and Priyantha on New Year's Day. He had warned them not to fight. The allegations had been levelled against him owing to the animosity that existed with Priyantha.

The 04<sup>th</sup> accused's mother Ampawila Arachchilage Susilawathi testified to the effect that she had gotten to know through Lionel who brought her lorry home that, her son had been arrested. On the 28<sup>th</sup> of April, the 04<sup>th</sup> accused had come home around 8.30 pm and had stayed home overnight. He had thereafter left home around 7.30 am to go on hire on the 29<sup>th</sup> of April.

It was the contention of the Learned President's Counsel appearing on behalf of the 02<sup>nd</sup> accused-appellant that the main question that arises, in this case, is whether any of the purported eyewitnesses saw the incident. The learned counsel for the Respondent argued that the eyewitnesses saw the incident. It was proved by the following evidence.

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- ප්‍ර - ඔබ ඉන්නකොට කවුරුහරි කාමරේට ආවද ?
- උ - ඔව් ආවා දැක්කා. ඒගොල්ලන්ගේ අතේ ටෝච් එකක් තිබුණා. මාළු කපන පිහියක් තිබුණා පොරවක් තිබුණා.
- ප්‍ර - කී දෙනෙක් ආවා දැක්කාද ?
- උ - මම ඉන්න කාමරේට 4 දෙනෙක් ආවා
- ප්‍ර - ඒ අය අතේ ටෝච් තිබුණා කියලා කීව්වා. ?

- උ - ඒක මතක නැහැ.
- ප්‍ර - එම ටෝව් පත්තුවෙලා තිබුණද ?
- උ - ඔව්.
- ප්‍ර - මොන වගේ දේවල්ද අතේ තිබුණේ?
- උ - එක් කෙනෙක් අතේ කඩුවක් තිබුණා. පිහියක් තිබුණා. තව පොරවක් තිබුණා.

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- ප්‍ර - ඔබ කිව්වා පැමිණි අය අතේ ටෝව් එකක් තිබුණා කියලා ?
- උ - ඔව්
- ප්‍ර - ඒ එළිය තමුන් දැක්කද ?
- උ - ඔව්
- ප්‍ර - ඒ පැමිණි අය ඒ අවස්ථාවේදී හඳුනාගත්තද?
- උ - ඔව්.
- ප්‍ර - කවද ඒ 4 දෙනා කියලා දැක්කද ?
- උ - ජගත්, වුට්ටා, මහසෙන්, කලුවා

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- ප්‍ර - ඔබ කිව්වා රැක් එක පිටිපස්සේ ඔබ හිටියා කියලා ?
- උ - ඔව්.
- ප්‍ර - ඒ වෙලාවේදී රැක් එකේ ඇඳුම් එහෙම දාලා තිබුණද?
- උ - ඇඳුම්වලින් පිටිපස්සට ගිහිල්ලා හිටියේ.
- ප්‍ර - ටෝව් එළියක් එල්ල කලා කියලා කිව්වා?
- උ - ඔව්
- ප්‍ර - ඔබ ඒකෙන් දැක්කද?
- උ - ඔව්
- ප්‍ර - කොහොමද දැක්කේ?
- උ - රැක් එකට කඩුවෙන් ගැහුවා. ඊට පස්සේ කාමරයේ කවුරුන් නැහැ කියලා ගියා.

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- ජර - තමන් ඒ ආපු අය කීදෙනෙක් හඳුනා ගත්තද?
- උ - 4 දෙනෙක්

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ප්‍ර - තමුන් කිවුවා තමුන් ඔය හඳුනා ගත්ත පුද්ගලයන් හතර දෙනා හඳුනා ගත්තේ කාමරය ඇතුළෙදී කියලා?

උ - ඔව්

ප්‍ර - හඳුනා ගත් පුද්ගලයින් හතරදෙනා කවුද?

උ - ජගත්, වුට්ටා, කළවා, මහසෙන්

ප්‍ර - ඒ අය හඳුනා ගත්තේ කාමරයේදී?

උ - ඔව්

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ප්‍ර - රාත්‍රි කාලයේ ලයිට් නිවපු වෙලාවේ තමුන්ට ඔය ගේ ඇතුළට ආව අය කිසිම කෙනෙක් හඳුනාගන්න බැරිවුණා කියලා කියන්නේ?

උ - පුළුවන් වුණා.

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ප්‍ර - මම තමාට යෝජනා කරනවා තමා නින්දෙන් ඇහැරී රණ්ඩුවක් වෙන කොට හැංගුණා එහෙම නැතිව කිසිම දෙයක් දැක්කේ නැහැ කියා?

උ - සියළු දේ දැක්කා.

ප්‍ර - දැකපු දෙයක් තියෙනවානම් මීට වඩා පැහැදිලිව සාක්ෂි දෙන්න පුළුවන් කියා යෝජනා කරනවා.

උ - පැහැදිලිවම මම දැක්කා.

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ප්‍ර - අවසාන වශයෙන් තමුන්ට කියා සිටින්නේ තමුන් මේ අධිකරණයට ඇවිල්ලා කිවුවේ තමුන් අහපු දේවල් මිසක් දැක්ක දේ නොවේ කියා?

උ - දැක්ක දේ තමයි කිවුවේ

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ප්‍ර - රාත්‍රියේ සිද්ධියක් වුණා කියන්නේ රාත්‍රියේ තමුන්ගේ නිවසේ කිසිම ආලෝක තත්වයක් නැති අවස්ථාවේදී සිද්ධිය වුණා කියලා කියන්නේ.

උ - ලයිට් තිබුණා. ඊට පස්සේ වෙඩි තියලා ටික වෙලාවකට පස්සේ තමයි ලයිට් නැති වුණේ.

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ප්‍ර - ඔබ ගරු අධිකරණයට පැහැදිලිව කිව්වා විත්තිකරුවන් හතරක් ඔබ පැහැදිලිව හඳුනා ගන්නා කාමරයේදී කියලා.

උ - ඔව්.

ප්‍ර - ඉතා පැහැදිලිව දැක්කද?

උ - ඔව්

ප්‍ර - තිබ්බ ආලෝක තත්වය ප්‍රමාණවත්ද?

උ - ඔව්

ප්‍ර - ටෝච් එළිය ඔවුන්ගේ මුහුණට පත්තු වුණා.

උ - ඔව්

ප්‍ර - එක අවස්ථාවක ටෝච් එක උඩට අල්වාගෙන ඉටි කොළ කැපුවා?

උ - ඒ කට්ටිය එක එක්කෙනා හඳුනා ගත්තා. මුල්ලේ ඉන්නවද බලනවා විතරයි. කිසිවෙක් හමු උණේ නැහැ. මම ඒ කට්ටිය කවුරුද කියලා දැක්කා.

ප්‍ර - ඔක්කොම පැහැදිලිව හඳුනා ගත්තද?

උ - ඔව්

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ප්‍ර - ඔබෙන් ප්‍රශ්න කළා 2, 3 විත්තිකරුවන් වෙනුවෙන් ඔබ සාක්ෂි දෙන්නේ පරණ කෝන්තරයක් පිරිමහන්න කියලා?

උ - නැහැ.

ප්‍ර - ඇස් දෙකෙන් දැකපු දේද කියන්නේ?

උ - ඔව්.

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ප්‍ර - ඔබට කිසිම අවශ්‍යතාවයක් තිබෙනවාද මේ විත්තිකාරයන්ට විරුද්ධව බොරු කියන්න.

උ - නැහැ.

ප්‍ර - ඔබ දුටු සත්‍ය දේද ගරු අධිකරණයට ඇවිල්ලා කියන්නේ.

උ - ඔව්.

ප්‍ර - ඇස් දෙකට දැකපු දේද?

උ - ඔව්.

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ප්‍ර - ඊට පස්සේ මොකද වුණේ?

උ - මම දොර තල්ලු කරගෙන හිටියා. ඔවුන් දොර අරින්න හැදුවා. මම බැරිම තැන දොර අත ඇරියා. තුන්දෙනෙක් ගෙට ආවා.

ප්‍ර - ඔය වෙලාවේ කුස්සිය ඇතුළේ එළියක් තිබුණද?



උ - නැහැ.

ප්‍ර - තමුන් කොහොමද ගේ ඇතුළට ආව කට්ටිය හඳුනා ගත්තේ?

උ - ඔවුන් අතේ ටෝච් තිබුණා.

ප්‍ර - ආපු පුද්ගලයන් අතේ තිබීම ටෝච් දල්වාගෙන ද හිටියේ.

උ - ඔව්.

ප්‍ර - ටෝච් එකක් හෝ ඊට වැඩි ගණනක් තිබුණද?

උ - එකකට වැඩි ගණනක් තිබුණා.

Page 254 of the brief;

ප්‍ර - ඒ ආපු පුද්ගලයන්ගෙන් එක් කෙනෙක් හෝ ඊට වැඩි ගණනක් අදුර ගත්තද?

උ - ඔව්.

ප්‍ර - කී දෙනෙක් හඳුනා ගන්නද?

උ - ජගත් සහ ඔහුගේ මල්ලිව වුවටා කියලා හඳුන්වන්නේ, ඔහු හඳුනා ගත්තා.

ප්‍ර - තුන්වෙනියා කවුද?

උ - දයාවංශ කියන අය.

Page 296 of the brief;

ප්‍ර - දොර තල්ලු කරගෙන තුන් දෙනෙක් ඇතුළට ආවා කියලා කිව්වා?

උ - ඔව්.

ප්‍ර - තමුන් කිව්ව විදිහට ජගත් සහ වුවටා දයාවංශ ඇතුළට ආවා කියලා කිව්වා.

උ - ඔව්.

Page 317 of the brief;

ප්‍ර - කාමරයෙන් එළියට එනකොට විදුලි බල්බ දල්වලාද තිබුණේ?

උ - බල්බ දල්වලා තිබුණේ වටේම.

ප්‍ර - තමුන් කොහේද ආවේ කාමරයෙන්?

උ - සාලයට.

ප්‍ර - ඊට පස්සේ මොකක්ද සිද්ධ වුණේ?

උ - කාමරයෙන් එළියට ආවම වමින්ද අල්ලගෙන බිමට වැටුණා. එයා කිව්වා පහත් වෙන්න කියලා.

ප්‍ර - තමුන් බැලුවද වටපිටාව මොකද්ද වෙන්නේ කියලා.

උ - මම හිමින් නැගිටලා බැලුවා. කවුරුවත් පේන්න හිටියේ නැහැ. ඉස්සෙල්ලා වෙඩිල්ලක් තියලා මම නැගිටින්න ඉස්සර වෙලා.

ප්‍ර - දිගටම විමසීමක්ව හිටියද?

උ - ඔව්.

ප්‍ර - නිවසේ කවුරු හරි එළියට යන්න හැඳුවද යම් අවස්ථාවක?

උ - ඔව්.

Page 319 of the brief;

ප්‍ර - එච් දැකපු අය එක්කෙනෙක් හෝ වැඩි දෙනෙක් දන්න හඳුනන අයද?

උ - ඔව්

ප්‍ර - කවුද ඒ?

උ - දෙවන විත්තිකරු දැක්කා. එයාගේ අතේ තිබුණා මාළු කපනවා වගේ ලොකු පිහියක්.

ප්‍ර - ඔහු පමණක් ද දැක්කේ?

උ - ගේ වට්ටම ඇවිදගෙන යනවා දැක්කේ එයා විතරයි.

Page 320 of the brief;

ප්‍ර - එළියේ හිටිය වෙලාවේ දෙවන විත්තිකරු ප්‍රියන්ත එහෙම නැත්නම් වුට්ටා හඳුනා ගත්තාද?

උ - ඔව්.

Page 321 of the brief;

ප්‍ර - ඊට පස්සේ මොකද වුණේ?

උ - ඊට පස්සේ කට්ටිය ඉන්න නිසා ගේ ඇතුළේ ලයිට් ඕෆ් කර කාමර වලට වෙලා හිටියා.

ප්‍ර - කාමරවලට වෙලා ඉන්නකොට මොකද උණේ?

උ - විදුලිය නැති වුණා.

ප්‍ර - විදුලිය නැති වුණාට පස්සේ මොකද වෙන්තෙ කියල විමසීමක්ව සිටියාද?

උ - ඔව්.

Page 324 of the brief;

ප්‍ර - කී දෙනෙක් විතර ගේ ඇතුළට ආවාද?

උ - 1 සහ 2 වන විත්තිකරු ඉස්සරහා හිටිය 1 වන විත්තිකරු ඇතුළේ වුණ තැනදී කිවුවා එකෙක් නැර ඔක්කොම කපාපල්ලා කිව්වා.

Page 326 of the brief;

ප්‍ර - තමන් කිවුවා පිටුපස දොර කඩාගෙන ආව පිරිසෙන් 1 සහ 2 විත්තිකරුවන් හඳුනා ගත්තා කිවුවා?

උ - ඔව්.

ප්‍ර - ඔය දකින අවස්ථාවේදී 1 වන විත්තිකරු අතේ මොනවාහරි තිබුණාද?

- උ - ඉස්සර වෙලා ඇතුල් වුණේ 2 වන විත්තිකරු. 1 වන විත්තිකරු මොකක් හෝ දිග ආයුධයක් අරගෙන ආවේ. සමහර විට තුවක්කුවක් වෙන්ත පුළුවන්. අපි නිරායුධව සිටියේ. ඉස්සරහට යන්න බැරි නිසා.

The learned President's Counsel contended that as regards the evidence of the 01<sup>st</sup> witness Dinesh Sampath is concerned vital contradictions marked which accordingly created a reasonable doubt as to whether the witness was present in the room and was hiding behind a clothes rack. The learned trial judge.

According to the learned President Counsel he had brushed aside these inconsistent statements stating that the said contradictions do not go into the roots of the case. The learned President's Counsel contended that when the evidence is analysed in the proper perspective the said contradictions and omissions are material as far as the question of the identity of the accused is concerned. The said failure on the part of the learned trial judge occasioned a miscarriage of justice to the 02<sup>nd</sup> accused-appellant.

As far as the evidence of Abeysinghalage Dinesh Sampath is concerned not a single contradiction or an omission came to be marked or pointed out on behalf of the 02<sup>nd</sup> accused-appellant. A single omission on page 143 of the brief came to be pointed out on behalf of the 01<sup>st</sup> accused-appellant. A further omission came to be pointed out on behalf of the 04<sup>th</sup> accused (the 03<sup>rd</sup> accused-appellant) on page 165 of the brief. Another omission came to be pointed out on page 166 of the brief on behalf of the 04<sup>th</sup> accused. Another omission came to be pointed out on page 169 of the brief. Not a single contradiction was marked on behalf of either of the accused persons.

Page 143 of the brief;

- ප්‍ර - මම යෝජනා කරන්නේ මේ ගොඩකවෙල පොලිසියට දුන් ප්‍රකාශයේදී කිසිම විටක කියලා නැහැ එදා තමන් රෙදි දමන රැක් එක යට ගිහින් මුවා වෙලා හිටියා කියල .
- උ - පිළිතුරක් නැත.

Page 164 of the brief;

- ප්‍ර - මම තමුන්ට යෝජනා කරන්නේ තමුන් පොලිස් ස්ථානයට කටුල්තර දෙන වෙලාවේ පැය 3 ක් තිස්සේ රැක් එක යට හිටියා කියලා නැහැ නේද?
- උ - පැය තුනක් කියලා නැහැ. රැක් එක යට හිටියා කිවුවා.

Page 165 of the brief;

- ප්‍ර - තමුන්ට යෝජනා කරන්නේ තමුන්ගේ දෙවන ප්‍රකාශය දෙන අවස්ථාවේදීද පැය තුනක් තිස්සේ තමුන්ගේ නිවසේ කාමරයේ රෙදි රැක් එක යට හැංගිලා හිටියා කියලා නැහැ නේද?
- උ - කියලා නිබුණා.

Page 169 of the brief;

- ප්‍ර - මම අහන ප්‍රශ්නය තමයි තමුන් කාමරයේ රැක් එක යට ඉන්න වෙලාවේ හතර දෙනෙක් හරියට හඳුනා ගත්තා කියලා කිවුවද පොලිසියට?

උ - ඔව්.

ආ - මම නමුත්ට යෝජනා කරන්නේ පොලීස් ස්ථානයට කට උත්තර දෙන වෙලාවේ එහෙම කියලා නැහැ කියලා.

උ - හඳුනා ගන්නා කියලා කිවුවා.

The position of the respondent is that the learned High Court judge had given due consideration to the omissions. The respondent in this context deems it pertinent to draw this Court's attention to the dicta in Banda and others v AG 1999(3) SLR168, where it was held that omissions do not stand in the same position as contradictions and discrepancies. The said omissions cease to be vital omissions that go into the root of the case or to the identity of the accused persons.

Quoting the dicta in Jayathunga v AG and another 2002(1) SLR197 at 202 and Wijerathne v Republic of Sri Lanka 78 NLR 49 the learned President's Counsel said that there had been a failure on the part of the learned trial judge to consider the defence evidence especially the evidence given by the accused-appellant before the learned Trial Judge decided to sustain the conviction of the accused-appellant. When an accused is facing a capital charge it is essential that every point in favour of the accused though trivial should be placed before the jury. As such, matters if placed before the jury it may create a reasonable doubt about the benefit to which the accused is entitled. If, however, the circumstances against the accused are emphasized and the trial judge expresses his opinion as to the adverse inferences and fails to place the circumstances and inferences in favour of the accused before the jury, the accused is then deprived of a substance of a fair trial.

The respondent submits that the 02<sup>nd</sup> accused-appellant did not give evidence, he only made a dock statement. The learned high court judge had evaluated the dock statement made by the 02<sup>nd</sup> accused-appellant.

The dicta in Jayathunga v AG and another 2002 (1) SLR 197 and Wijerathne v Republic of Sri Lanka 78 NLR 49 ceases to hear any relevancy whatsoever as the instant matter was not tried by a jury but by a single judge. When a case is tried by a judge who has a trained legal mind, it is not necessary to state every point in favour of the accused though trivial. As held by His Lordship Justice Sisira de Abrew in Abeysekera Wannaku Arachchige Percy Bernard vs AG - CA/119/2003, HC Negombo 233/2001 decided on 11.11.2008 reported on page 132 of Appellate Court Judgments (Unreported) 2008 (Volume II).

The contention of the learned President's Counsel for the 02<sup>nd</sup> accused-appellant that Nelson had falsely implicated the 02<sup>nd</sup> accused-appellant in connection with this murder, as the 02<sup>nd</sup> accused-appellant had assaulted Nelson previously. The reason for the assault was that the mother of the 02<sup>nd</sup> accused-appellant was kept at Nelson's house. The basis for the learned President's Counsel to state that was because at the time this incident took place the entire place and surroundings were in darkness. Anyone could not have made a clear identification of any of the persons who entered the house. The purported identification of the 02<sup>nd</sup> accused-appellant by the alleged eyewitnesses are according to the learned President's Counsel, open to very serious suspicion.

The learned President's Counsel contended that a trier of facts should have considered this evidence very cautiously. Which had not been the case in the instant matter. This according to the learned appellant's counsel occasioned a failure of justice to the 02<sup>nd</sup> accused-appellant. When all these matters are taken into consideration there is a serious doubt about the identity of the persons who came into the house and that this benefit of the doubt should be given to the 02<sup>nd</sup> accused-appellant which should ultimately result in the acquittal of the 02<sup>nd</sup> accused-appellant.

Wastuhewa Nelson (PW 01) testified as follows;

Page 317 of the brief;

ප්‍ර- කාමරයෙන් එළියට එනකොට විදුලි බල්බ දල්වලාද තිබුණේ?

උ- බල්බ දල්වලා තිබුණේ වටේම.

ප්‍ර- තමුත් කොහේටද ආවේ කාමරයෙන්?

උ- සාලයට.

ප්‍ර- ඊට පස්සේ මොකක්ද සිද්ධ වුණේ?

උ- කාමරයෙන් එළියට ආවම වමින්ද අල්ලගෙන බිමට වැටුණා. එයා කිව්වා පහත් වෙන්න කියලා.

ප්‍ර- තමුත් බැලුවද වටපිටාව මොකද්ද වෙන්නේ කියලා.

උ- මම හිමින් නැගිටලා බැලුවා. කවුරුවත් ජේන්ත හිටියේ නැහැ. ඉස්සෙල්ලා වෙඩිල්ලක් තියලා මම නැගිටින්න ඉස්සර වෙලා.

ප්‍ර- දිගටම විමසිලිමත්ව හිටියද?

උ- ඔව්.

ප්‍ර- නිවසේ කවුරු හරි එළියට යන්න හැදුවද යම් අවස්ථාවක?

උ- ඔව්.

Page 319 of the brief;

ප්‍ර - එච් දැකපු අය එක්කෙනෙක් හෝ වැඩි දෙනෙක් දන්න හඳුනන අයද?

උ - ඔව්

ප්‍ර - කවුද ඒ?

උ - දෙවන විත්තිකරු දැක්කා. එයාගේ අතේ තිබුණා මාළු කපනවා වගේ ලොකු පිහියක්.

ප්‍ර - ඔහු පමණක් ද දැක්කේ?

උ - ගේ වටේටම ඇවිදගෙන යනවා දැක්කේ එයා විතරයි.

Page 320 of the brief;

ප්‍ර - එළියේ හිටිය වෙලාවේ දෙවන විත්තිකරු ප්‍රියන්ත එහෙම නැත්නම් වුවටා හඳුනා ගත්තාද?

උ - ඔව්.

Page 321 of the brief;

ප්‍ර - ඊට පස්සේ මොකද වුණේ?

උ - ඊට පස්සේ කට්ටිය ඉන්න නිසා ගේ ඇතුළේ ලයිට් ඕෆ් කර කාමර වලට වෙලා හිටියා.

ප්‍ර - කාමරවලට වෙලා ඉන්නකොට මොකද උණේ?

උ - විදුලිය නැති වුණා.

ප්‍ර - විදුලිය නැති වුණාට පස්සේ මොකද වෙන්නෙ කියල විමසිල්ලෙන් සිටියාද?

උ - ඔව්.

There was ample electricity available right around the house and that electricity enabled Nelson (PW 1) to identify the 02<sup>nd</sup> accused-appellant being armed with a fish cutting knife circulating the house. He had further identified the second accused entering into the house having broken open the door. Accordingly, there was ample light available for Nelson to identify the 02<sup>nd</sup> accused-appellant. The position of the Respondent is that there is no necessity for the learned trial judge to consider the identification evidence very cautiously. No failure of justice accordingly accrued to the 02<sup>nd</sup> accused-appellant.

There is no merit in the contention of the learned President's Counsel that when all these matters are taken into consideration there is a serious doubt about the identity of the persons who came into the house and that this benefit of the doubt should be given to the 02<sup>nd</sup> accused-appellant which should ultimately result in the acquittal of the 02<sup>nd</sup> accused-appellant. It is quite clear that the electricity which was amply available at that time enabled Nelson to identify the 02<sup>nd</sup> accused-appellant. Nelson had testified to the effect that he did not harbour any animosity towards the 01<sup>st</sup> and the 02<sup>nd</sup> accused-appellants. He had testified what he had seen.

It was the contention of the Learned President's Counsel that the learned trial judge had made a finding completely obnoxious to section 30 of the Evidence Ordinance on page 24 of the judgment. The Learned Trial Judge had misdirected himself completely on the law in this regard and that misdirection had affected his findings on the testimonial trustworthiness of the alleged eye witness which had occasioned a miscarriage of justice. The learned High Court judge had stated "එමෙන්ම පළවන විත්තිකරු සාක්ෂිකාර ඉඹවර්ධනට කර ඇති පාපොච්චාරණය ද, විත්තිකරුවන්ට විරුද්ධව අදාළ කර ගත හැකි සාක්ෂියකි." The rest of the judgment clearly and amply demonstrates the fact that the learned High Court Judge did not use the confession made by the 01<sup>st</sup> accused-appellant in respect of the other accused persons.

The learned President's Counsel argued that the learned trial judge had drawn an adverse inference from the absconding of the 02<sup>nd</sup> accused-appellant and also that the learned Trial

Judge had failed to take into consideration the innocent explanation given by the 02<sup>nd</sup> accused-appellant about the reason which resulted in the 02<sup>nd</sup> accused-appellant to leave the place. The learned President's Counsel contended that the reliance placed by the learned trial judge on the absconding evidence is a misdirection of the facts. As it is an item of circumstantial evidence and circumstantial evidence should not be acted upon to the detriment of the accused unless the inference that could be drawn from the evidence is consistent with the guilt of the accused and inconsistent with any other reasonable hypothesis. There is insufficient reliable and admissible evidence led by the prosecution to convict the 02<sup>nd</sup> accused-appellant and therefore, he should be acquitted from the charges levelled against him. I am unable to agree with the argument of the learned President's Counsel who appeared for the 02<sup>nd</sup> accused-appellant. The reason is at page 548 of the appeal brief reveals that the learned High Court Judge took into consideration the excuse given by the 02<sup>nd</sup> accused-appellant to abscond.

Page 548 of the brief;

“දෙවන විත්තිකරු විත්ති කුඩුවේ සිට ප්‍රකාශයක් කරමින් මෙම අපරාධය සම්බන්ධයෙන් සොයන බව දැන ගත් නිසා දරුවා සමග බේරිදගේ නිවසට ගොස් නීතීඥ මහත්මයෙකුගේ මාර්ගයෙන් රත්නපුර පොලීසියට භාර වූ බවත්, තමා මෙම අපරාධය සිදු නොකළ බවත්, ඔහුගේ මග පෙන්වීම යටතේ කිසිදු ආයුධයක් සොයා නොගත් බවත් පවසා ඇත. විත්තිකරු විසින් විත්ති කුඩුවේ සිට කරන ලද ප්‍රකාශයෙන් පැමිණිල්ලේ නඩුව සම්බන්ධයෙන් කිසිදු සාධාරණ සැකයක් උද්ගත වන්නේ නැත. විත්තිකරුද මෙම සිද්ධිය වූ දින උදෑසන සාක්ෂිකාර නෙල්සන් සමග ආරවුලක් ඇති වූ බව පිළිගෙන ඇත.”

“කෙසේ වුවද මෙම විත්තිකරුවන් මෙම අපරාධයට පටලවා අසත්‍ය සාක්ෂියක් දීමට පැමිණිල්ලේ සාක්ෂි කරුවන්ට කිසිදා හේතුවක් නොමැත. මෙම 1 සහ 2 විත්තිකරුවන්ගේ මව මියගිය අයවලුන්ගේ නිවසේ රඳවා තබා ගැනීම සම්බන්ධයෙන් 1, 2 විත්තිකරුවන් අමනාපයෙන් සිට ඇති බව සාක්ෂි මත අනාවරණය වී ඇත. මෙම සිද්ධිය මුල් කරගෙන දෙවන විත්තිකරු සාක්ෂිකාර නෙල්සන්ට පහර දීම ද, සිද්ධිය වූ දින උදෑසන නෙල්සන් මෙම අදාළ නිවස අසලදී 5 වන විත්තිකරුට පහර දීමක් ද සිදු වී ඇත. ඒ අනුව එදින රාත්‍රියේ ඒ ආකාරයේ අපරාධයක් සිදු කිරීමට 1 සහ 2 විත්තිකරුවන්ට පෙළඹවීමේ හේතුවක් තිබූ බව පැහැදිලි ලෙසම අනාවරණය වී ඇත.”

There is no merit whatsoever in the aforementioned ground of appeal of the learned President's Counsel who appeared for the 02<sup>nd</sup> accused-appellant.

The learned President's Counsel argued that the learned Trial Judge had failed to follow the guidelines set out in Aruna Jayananda Jayasinghe Vs AG (CA 133/2000 decided on the 25.09.2008 reported in Appellate Court Judgments 2008 Volume II) when taking into consideration the defence of alibi taken up by the 02<sup>nd</sup> accused-appellant in his evidence. The learned President's Counsel contended that the learned Trial Judge proceeded to reject the defence evidence on untenable grounds and that this had accordingly deprived the 02<sup>nd</sup> accused-appellant of having a fair trial.

As far as the defence of alibi is concerned it is my view that though the trial commenced on 13.10.2009 no notice of alibi was given by the 02<sup>nd</sup> accused-appellant as required by section 126A of the Code of Criminal Procedure Act No 15 of 1979, which came in to being by the Amending Act No 14 of 2005.

Section 126A of the Code of Criminal Procedure Amending Act No 15 of 1979 is as follows;

"Notice of alibi. 126A.

(1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has -

(a) stated such fact to the police at the time of his making his statement during the investigation; or

(b) stated such fact at any time during the preliminary inquiry or

(c) raised such defence, after the indictment has been served, with notice to the Attorney-General at any time before fourteen days of the date of commencement of the trial:

Provided, however, the Court may, if it is of opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but before the conclusion of the case for the prosecution, to raise the defence of alibi.

(2) The original statement should contain all such information as to the time and place at which such person claims he was and details as to the persons if any, who may furnish evidence in support of his alibi.

(3) For this section "evidence in support of an alibi" means evidence tending to show that because of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was not likely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission."

A schematic examination of the cross-examination carried out on behalf of the 02<sup>nd</sup> accused-appellant makes it apparent that not a single question, not a single suggestion had been asked or posted to any of the prosecution witnesses about the defence of the alibi. It is the firm position of the learned counsel for the respondent that the defence of alibi was merely an afterthought, a last-minute escape, a ruse concocted to escape from liability upon the closure of the prosecution case.

The dicta in Bobby Mathew Vs State of Karnataka 2004 CriLJ 3003, 2004 (5) KarLJ 415, it was held;

....." the failure to put his case in cross-examination indicates that the position taken by the accused is untrue and that makes way for the rejection by the Court of Appeal of a submission made on behalf of the accused-appellant on his case on the said point the accused declined to avail himself of the opportunity to put that point his case in cross-examination."

This Court rejects the defence of alibi taken by the 02<sup>nd</sup> accused-appellant in his Dock Statement considering section 126A of the Code of Criminal Procedure Amending Act No 15



of 1979. There is no merit in the submissions made by the learned President's Counsel for the 02<sup>nd</sup> accused-appellant, on the defence of alibi.

Now I consider the grounds of appeal of Ranasinghe Mudiyanseelage Ananda Wasantha Kumara alias Jayapala alias Sepala Kaluwa the 04<sup>th</sup> accused who is now the 03<sup>rd</sup> accused-appellant of this appeal. It was argued by the learned counsel for the 03<sup>rd</sup> accused-appellant that the trial judge failed to analyse the evidence led by the prosecution specifically regarding the 03<sup>rd</sup> accused-appellant (04<sup>th</sup> accused person).

The learned High Court Judge had analysed the evidence led by the prosecution specifically regarding the 03<sup>rd</sup> accused-appellant on pages 542,547,552,553,556,557 and 558 of the Appeal Brief. It was further argued for the 03<sup>rd</sup> accused-appellant that the learned trial judge failed to consider the contradictions and omissions marked specially in the evidence of PW 02 and PW 03, the two eyewitnesses, creates a reasonable doubt on the case against the 03<sup>rd</sup> accused-appellant. As far as PW 02 is concerned 3 omissions came to be pointed out on pages 165, 166, 169 on behalf of the 03<sup>rd</sup> accused-appellant. As far as PW3 is concerned a further 3 omissions came to be pointed out on pages 293, 294, and 295. But it is important to note that not a single contradiction is marked on behalf of the 03<sup>rd</sup> accused-appellant.

Page 292 of the brief;

- ප්‍ර - ඔබ 2001.05.03 වන දින දෙවන ප්‍රකාශය කරන අවස්ථාවේ කළවා කියන පුද්ගලයා කට හඬින් හඳුනා ගත්තේ කියලා සඳහන් කරලා නැහැ කියලා යෝජනා කරනවා.
- උ - උත්තරයක් නැත.

Page 293 of the brief;

- ප්‍ර - මම තමුන්ට යෝජනා කරනවා පොඩ්ඩක් ඉන්න මම ගෙට ගිහිල්ලා එන්නම් කියලා කළවා කියන කථාව කිසිදු අවස්ථාවක පොලීසියට කියලා නැහැ.
- උ - උත්තරයක් නැත.

Page 294 of the brief;

- ප්‍ර - මම තමුන්ට යෝජනා කරනවා දෙවන ප්‍රකාශය ලබා දෙන අවස්ථාවේ පොඩ්ඩක් ඉන්න මම ගෙට ගිහිල්ලා එන්නම් කියලා කළවා කියන කතාව පොලීසියට ප්‍රකාශ කරලා නැහැ?
- උ - උත්තරයක් නැත.

Page 295 of the brief;

- ප්‍ර - මම තමුන්ට යෝජනා කරනවා පහළ අධිකරණයේ සාක්ෂි දෙන අවස්ථාවේදීවත් පොඩ්ඩක් ඉන්න මම ගෙට ගිහිල්ලා එන්නම් කියන කථාව කළවා කිව්වා කියලා ගරු මහේස්ත්‍රාත් අධිකරණයෙහි සාක්ෂි දීලා කියලා නැහැ.
- උ - උත්තරයක් නැත.

The dicta in Banda and others v AG 1999(3) SLR 168 where it was held;

Omissions do not stand in the same position as contradictions and discrepancies. The learned High Court judge did take into consideration the said omissions on pages 534,535, 540, 541. The said omissions cease to be vital omissions that go into the root of the case.

The learned counsel for the 03<sup>rd</sup> accused-appellant submits that the learned trial judge erred on facts that the identity of the 03<sup>rd</sup> accused-appellant by PW 02 and PW 03 has been properly established by the prosecution.

There is no merit in the said argument and the said ground of appeal. The identity of the 03<sup>rd</sup> accused-appellant had been established by the evidence of PW 02 and PW 03. PW 02 testifying before the trial judge on pages 106, 138, 139, 174, 178, 180 confirmed the presence of the 03<sup>rd</sup> accused-appellant at the crime scene. Not only that PW 03 gave evidence at the High Court trial and confirmed on page 259 of the trial brief that the active participation of the 03<sup>rd</sup> accused-appellant during this unfortunate incident.

Another argument put forward by the accused-appellants was that Chaminda (PW 03), an eyewitness and injured in the incident, was admitted to the Godakawela Hospital on 29.04.2001 at 02.35 am. He was unable to reveal the names of the culprits to the Doctor who examined him on that day. He has stated that assaulted by a gang of persons using sharp weapons. But he has not disclosed the names of those attackers and it was argued by the accused-appellants that he was unable to identify who they were. It has been stated that if they had been identified at that time, the victim would have been able to reveal the names. But not doing so would raise serious doubts as to whether these accused-appellants were involved in the crime.

The Medico-Legal Report marked as P 2 confirms that the injured Chaminda was admitted to the hospital with serious cut injuries. Given the seriousness of the crime, we need to understand how traumatic, painful, and excruciating it must have been for one of the two eyewitnesses to be seriously injured when six people were hacked to death in the same house. This court should consider very carefully whether Chaminda had the courage to tell the doctor the names of the perpetrators when he gave the brief history at the time of his admission to the hospital. It should not be considered a shortcoming or a mistake for a victim to be able to bear the pain of his or her trauma and reflect on that ordeal. It is not surprising that someone who has had to deal with such a shock will forget how or by whom the crime was committed for the same reason. Therefore, a person suffering from an injury cannot be accused of being a liar simply because there was a gap or omission in what he initially told the doctor on admission to the hospital.

Another argument raised by the learned counsel for the 03<sup>rd</sup> accused-appellant was that the learned trial judge failed to consider the fact that evidence lead on behalf of the 03<sup>rd</sup> accused-appellant also creates a reasonable doubt on the prosecution case.

There is no merit in the said ground of appeal as pages 554, 555 and 556 of the appeal brief demonstrate the fact that the learned High Court Judge did take into consideration the evidence leads on behalf of the 03<sup>rd</sup> accused-appellant. However, having considered the

same the learned High Court Judge was of the view that the evidence failed to create a reasonable doubt in the prosecution case. I too agree with the view of the learned High Court Judge after going through the evidence led before the High Court on behalf of the 03<sup>rd</sup> accused-appellant.

Finally, the learned counsel for the 03<sup>rd</sup> accused-appellant submitted his last ground of appeal that the learned trial Judge applied two different criteria to evaluate the evidence against the 03<sup>rd</sup> accused-appellant and evidence lead on behalf of the 03<sup>rd</sup> accused-appellant as a defence witness. I am of the view that there is no foundation or there is no proof regarding the said ground of appeal as the learned High Court Judge did not apply two different criteria to evaluate the evidence against the 03<sup>rd</sup> accused-appellant and evidence lead on behalf of the 03<sup>rd</sup> accused-appellant. If it is argued on behalf of the 03<sup>rd</sup> accused-appellant that the learned trial Judge applied two different criteria to evaluate the evidence against the 03<sup>rd</sup> accused-appellant and evidence lead on behalf of the 03<sup>rd</sup> accused-appellant, it should be specifically indicated that in which places the different criteria had been used. There is no merit in the said argument.

In the above circumstances, it is evident that there is strong and cogent evidence that established the fact that the Prosecution has proved its case beyond reasonable doubt. It is proper for the learned Trial Judge to decide that the accused-appellants did commit the offence of murder of Abeysinghalage Pody Mahaththaya, Hettiarachchige Rosalyn, Wastuhewa Siriyawathi, Wastuhewa Dayananda, Abeysinghalage Indunil and Abeysinghalage Madhuka Sureni and also that the accused-appellants did commit the offence of attempted murder of Abeysinghalage Chaminda by assaulting him.

There is no reason to interfere with the findings of the learned trial Judge of the High Court of Ambilipitiya.

We affirm the conviction and the sentence dated 01.03.2012.

The appeal is dismissed.

**Judge of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**