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

In the matter of Petitions of Appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

Vs.

1. Hewapathiranage Sugath Chandika alias Priyanga.
2. Wehalle Badalge Rumesh Wehalle.
3. Malawilage Amila Prasad alias Amila.

Accused

C.A.No.243-244/2014
H.C. Monaragala No.463/2008

AND NOW

1. Hewapathiranage Sugath Chandika alias Priyanga.
3. Malawilage Amila Prasad alias Amila.

Accused-Appellants

Vs.

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

Complainant-Respondent

****

BEFORE : **HON. DEEPALI WIJESUNDERA, J.**

HON. ACHALA WENGAPPULI, J.

COUNSEL : Tenney Fernando for the 1st Accused-Appellant.

Indica Mallawarachchi with Nigel Walter for the 3rd Accused- Appellant

Azard Navavi D.S.G. for the respondent

ARGUED ON : 16th October, 2019

DECIDED ON : 22nd November, 2019

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HON. ACHALA WENGAPPULI, J.

The 1st and 3rd accused-appellants (hereinafter referred to as the 1st appellant and the 2nd appellant respectively), by their individual petitions of appeal addressed to this Court, seek its intervention to have their convictions, for the counts of conspiracy to commit murder and committing murder of *Indragotabhaya Samarawickrama* on or about 19.06.2003 at 21 post – *Suriya-ara*, and the consequent imposition of sentences of death, set aside.

In the indictment presented to the High Court of *Monaragala* by the Hon. Attorney General, there were three persons accused of the two aforementioned offences. All the accused have elected to be tried without a

jury. At the conclusion of the ensuing trial, the trial Court had acquitted the 2nd accused and convicted only the 1st and 3rd accused to the indictment, who are referred above as the 1st and 2nd appellants.

The prosecution heavily relied on the only "eye witness's" account of the incident, led through witness *Ajith Kodagoda* (PW1), in support of the allegations of conspiracy and murder. In addition, it had led evidence to establish that the deceased had sustained two stab injuries penetrating into his chest cavity causing damage to blood vessels and lungs, leading to haemorrhagic shock resulting in his death.

In support of their respective appeals, learned Counsel for the 1st and 2nd appellants have made extensive submissions on the common ground of appeal that the trial Court had failed to properly evaluate the evidence of the solitary eye witness which they challenge as being "unreliable", and thereby the Court arrived at an erroneous conclusion as to their guilt.

It is the evidence of the sole eye witness that he spent the night at the 1st appellant's house (one of his distant relatives) after watching television till late night. The 2nd appellant, whom the witness knew from his childhood, was also there. He woke up in the early hours of the following morning at about 4.30 a.m. due to the sound of an alarm. The witness, having noted the front door of the house was left open, had looked for the appellants. He saw two of them were going in the direction where the body of the deceased was later discovered. The two appellants were dressed in an ordinary clothing at that time. His curiosity forced him to follow them. He avoided walking along the public road in following

them in order to prevent his discovery and had cautiously kept a distance of about 200 feet in between them.

At some point, the two appellants were met by another two persons who were waiting on the *Thanamalwila* main road. This was near a hut where the Army had set up a check point in the recent past. The 1st appellant, an army deserter, was clad in an army uniform by this time. The 1st appellant had thereafter stopped two motor cyclists who happened to go pass them and allowed the cyclists to proceed after checking them. The third motor cyclist who was stopped by the 1st appellant was the deceased. Having identified the motor cyclist by referring to him as "මෙන්න මූ තමයි", the gang of four had then surrounded the deceased and attacked him with clubs. He then fell off from the motor cycle. The witness then saw the deceased being stabbed by the 1st appellant about thrice on his chest, when he was appeared to be seated on the road. The witness claimed that he could not bear to witness this attack on the deceased any longer and had returned to the 1st appellant's home and slept. After the daybreak, they were told by a fellow villager that someone was lying by the road. All three went to see the place where the body of the deceased was. On their way the 1st appellant admitted that it was his work and warned the witness not to divulge about this to anyone. After their arrival at the scene, the witness saw his cap and the electric torch he had brought with him in the previous night, on his way to 1st appellant's house, were lying near the body of the deceased.

Then they returned to the 1st appellant's house and parted their ways. The witness had thereafter proceeded to a *chena* in *Pallebedde*. The Police came in search of him to *Pallebedde* having already "arrested" his

father. He was assaulted by the Police while questioning the whereabouts of the 1st appellant. The witness had divulged where the 1st appellant was hiding. He was arrested by the Police in the same day.

In his examination in chief itself the witness stated that he had identified two more persons, namely *"Rumesh"* and *"Chandu"*, as the two other persons who also assaulted the deceased with clubs. But he also stated before the High Court that he did so only upon instructions of the Police. He did not know them until their introduction to him by the Police. Only one of them was indicted before the High Court along with the two appellants, named therein as the 2nd accused.

The witness was cross-examined by all three accused and have suggested to him that he had accused the 1st and 2nd appellants to this murder after he was severely assaulted by the Police, forcing him to falsely implicate them. In addition, there were two inconsistencies marked off his statement to Police as 1V1 and 1V2. The witness admitted having making another inconsistent statement in of his testimony during the inquest proceedings, which ran contrary to the position he had taken up in the High Court. There were few omissions that were highlighted by the appellants over both important and some peripheral matters during the cross-examination of this witness.

It is the collective submissions of the learned Counsel for the two appellants that these inconsistencies and infirmities have made the testimony of the sole eye witness for the prosecution highly unreliable and it would be dangerous to act on such evidence without any corroboration. They submit there was none. It is also their contention that the trial Court

had dealt with the important inconsistencies that were highlighted by them only superficially and the failure of the trial Court in this aspect had tainted the validity of the conclusion it had eventually reached.

The 1st appellant, in support of his appeal strongly contended that the inconsistencies marked as 1V1 and 1V2 throws serious doubts about the alleged complicity of him in the murder since the witness was obviously inconsistent as to who was in army uniform at the time of the attack on the deceased.

It was the evidence of this witness before the High Court that it was the 1st appellant who was in army uniform, stopped the motor cyclists and then stabbed the third one. However, in his statement to Police, which was made after six days since the incident, he claimed that it was one of the two who were seen on the road awaiting the arrival of the two appellants that night. The inconsistency that was highlighted by the 1st appellant is in relation to his evidence before the trial Court and the position advanced by the witness during inquest proceedings. This inconsistency was admitted by the witness which excluded any mistake made by the witness on his claim.

It was also highlighted by the appellants that there was no motive for the appellants to mount such an attack on the deceased. In addressing the issue of lack of corroboration, it was emphasised that although the witness alleged that the deceased was clubbed by the gang of four, the post mortem report did not support such a claim as it was clear that the deceased had suffered only two stab injuries to the back of his chest. It was submitted by the appellant that the absence of contusions or

lacerations on the body of the deceased is not supportive of the fact that there were assaults by blunt weapons and therefore a doubt arises as to the reliability of the version of the events presented by prosecution.

The appellants also contended that the witness made a statement only after he was severely assaulted by the Police and the trial Court had failed to evaluate credibility of the evidence of this solitary eye witness from the angle of that very relevant consideration.

Learned Deputy Solicitor General, in his reply submissions stated that the trial Court had properly evaluated the evidence and particularly the two inconsistencies and found that it would not affect the credibility of the witness as it was not important. He also submitted that the subsequent conduct by the appellants clearly supports the allegation of the prosecution that it was they who committed the murder.

It would appear from the contention of both the appellants that their main thrust in challenging the conviction is based on the credibility of the sole eye witness *Ajith Kodagoda*. The trial Court, for the reasons stated in its judgment, concluded that the said witness is a truthful and reliable witness.

The challenge mounted by the appellants therefore concerns a determination of a question of fact by the trial Court. Credibility of a witness is undoubtedly a question of fact and the determination of that question of fact by the trial Court, which had the opportunity to note the demeanour and deportment of such a witness, is obviously is entitled to great weight; vide judgment of the Supreme Court in ***Attorney General v Mary Theresa*** (2011) 2 Sri L.R. 292.

In this particular instance, the trial Court, in accepting *Ajith Kodagoda* as a credible witness, had placed reliance of the demeanour of the said witness in coming to this conclusion. In such a situation this Court must then consider, even if it entertains a different view to the one held by the trial Court about the credibility of a witness, whether it should interfere upon such a determination.

In ***Sumanasena v Attorney General*** (1999) 3 Sri L.R. 137, the contention of the appellant before this Court was the credibility of the solitary witness who made an incriminating statement against him only after about a month since the incident. The appellant therefore contended the witness had ample opportunity to fabricate a version. This Court having noted the following, proceeded to dismiss the said appeal.

In relation to the claim that the conviction is based only on the evidence of a solitary witness this Court observed;

> *"In our law of evidence the salutary principle is enunciated that evidence must not be counted, but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law. Section 134 of the Evidence Ordinance sets out that "no particular number of witnesses shall in any case be required for the proof of any fact". In an Indian case the conviction for murder was affirmed on the mere circumstantial evidence given by a solitary witness and a pointed reference was made to the principle which we have adumbrated above vide* ***Mulluwa v. The State of Maddhya Pradesh****. Testimony must always be weighed and not counted and these principles have been*

followed by Justice G. P. A. De Silva in ***Walimunige John v. State; King v. N. A, Fernando.***"

Similar view was adopted by this Court in ***Sarathchandra & Others v Republic of Sri Lanka*** (2005) 2 Sri L.R. 267.

In the context of the acceptance of the evidence of a solitary witness by a trial Court, another related issue would be the consideration whether such evidence should be corroborated or not as a pre condition enabling the trial Court to place reliance on it thereafter if it is the case. Particularly the 2nd appellant contended that the evidence of the sole eye witness was not corroborated and therefore said evidence ought to be considered as unreliable. This too apparently is not an absolute requirement that would be applied universally and automatically. The evidence of a virtual complainant need not be corroborated by the evidence of a decoy as per the judgments of ***Gunasekera v The Attorney General*** 79(I) N.L.R. 348 and ***Sunil v Attorney General*** (1999) 3 Sri L.R. 191. However, ***Gunasekera v The Attorney General,*** the then Supreme Court recognized the principle that a trial Court could act on uncorroborated testimony of a complainant provided that the trial Court found it to be "cogent and convincing".

As already noted, in the instant appeal, the trial Court has decided to accept the evidence of the sole eye witness despite its proved inconsistencies in 1V1 and 1V2, coupled with other infirmities that were highlighted. The trial Court decided to accept his evidence attributing these infirmities to mere lapses in memory. The witness *Kodagoda* has given evidence before the learned trial Judge who delivered the judgment. Therefore, learned trial Judge has had the opportunity of observing

demeanour and deportment of the witness and had in fact stated so in the judgment in coming to the conclusion that the said witness is a truthful and reliable witness.

In ***Ariyadasa v Attorney General*** (2012) 1 Sri L.R. 84 it was re-emphasised in consideration of several judicial precedents on the point that;

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

This pronouncement reflects the general approach the Court of Appeal would adopt when presented with the challenge to a decision by the trial Court to accept a witness as a credible witness. The appellate Courts would not interfere, unless such a decision is "manifestly wrong". In delivering the judgment of ***Wijeratne v Attorney General*** (1998) 3 Sri L.R. 98, this Court has decided to allow the appeal before it, in following the judicial precedents laid down in the judgments of ***King v Gunaratne*** 14 C.L.R. 174 and ***Fernando v Inspector of Police, Minuwangoda*** 46 N.L.R. 210.

In ***King v Gunaratne,*** it was held that the following three tests would apply in such circumstances;

> *"1. Was the verdict of the Judge unreasonably against the weight of the evidence ?*

2. *Was there a misdirection either on law or evidence ?*

3. *Has the Court of trial drawn the wrong inferences from matters in evidence ?"*

The judgment of ***Fernando v Inspector of Police, Minuwangoda*** adopted the view that;

> *"... an appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically although the decision of the Magistrate on question of fact based on demeanour and credibility of a witness carries great weight. Where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt."*

Similar approach was adopted by this Court as indicative in the judgments of ***Jagathsena and Others v Perera and Others*** (1982) 1 Sri L.R. 371 and ***Kumara de Silva and Others v Attorney General*** (2010) 2 Sri L.R. 169. In the Supreme Court judgment of ***Dharmadasa v Director General, Commission to Investigate Bribery or Corruption and Another*** (2003) 1 Sri L.R. 64.

Thus, in the light of these judgments, this Court should venture to consider the evidence of the solitary witness for its truthfulness and reliability by adopting the universally accepted tests in evaluation of the

testimonial trustworthiness of a witness, in order to satisfy itself as to the validity of the conclusion reached by the trial Court on this issue.

In relation to the test of spontaneity, it must be noted that the witness made his statement to Police only after six days from the date of incident. With the incident, he had relocated himself to a *chena* in *Pallebedde* area. The Police came in search of him after "arresting" his father who apparently led them to the said location. The witness's father had been assaulted by the Police probably to extract information to ascertain whereabouts of the witness. The witness too was assaulted by the Police while questioning him about the 1st appellant. The witness made his statement to the Police only on 25.06.2003 at 6.40 p.m. after his arrest and whilst being kept in the Police lockup. During cross examination of the 2nd appellant, the witness admitted that he was released soon after he made the said statement and he was allowed to go home.

Although, the prosecution led evidence as to the reason for the delay in making statement, it did not elicit material as to why the witness was reluctant to make a statement to the Police. The witness, in his evidence stated to trial Court that he had told what he saw that morning to his mother and also to one *Ukkun Mama* in detail before he left for *Pallebedda.* This shows that the witness had no fear of divulging the role played by the 1st appellant in the murder to others, even though he claims that he was threatened. But no explanation was forthcoming as to why he was reluctant to make a statement to Police. Similarly, there was no valid explanation by the witness as to why he had to find employment in a *chena* of *Pallebedda* at that particular point of time.

When the conduct of the witness is considered in the light of the evidence that had been led before the trial Court in relation to the recovery of the cap and an electric torch which belonged to him from the crime scene, it is reasonable to assume that he had to offer an acceptable explanation for that particular find to the Police. It appears that the witness opted to implicate the 1st appellant for the stabbing while naming the 2nd appellant and two other unknown participants and thereby distancing himself from the crime. He claims that he saw the attack on the deceased whilst hiding some unspecified distance away from the attackers, under the cover of the shrub jungle. But he offers no explanation as to how and why his cap and torch was found by the Police near the body of the deceased. The appellants have suggested that the appellants were falsely implicated by the witness due to duress, which the witness had simply denied.

This particular suggestion by the appellant could not be ignored since the witness himself admitted before the trial Court that he identified the 2nd accused and the 4th accused (who was not indicted) at the non-summery inquiry simply because the Police introduced the two persons as the other two who the witness had claimed to have seen that morning during the attack on the deceased. The 4th person was left out by the prosecution from the trial before the High Court.

It could be that the two appellants had some complicity in the murder of the deceased. But it was incumbent upon the prosecution to prove that fact by presenting legally relevant, admissible and reliable evidence before the trial Court. In the absence of any explanation as to the presence of the personal belongings of the witness *Kodagoda* at the crime

scene it is highly questionable as to the validity of the decision taken by the Police to treat him as the "sole eye witness" rather than an accomplice. The prosecution could have still utilised the statement of the witness by making a recommendation to the Hon. Attorney General for granting a pardon under Section 256(1) of the Code of Criminal Procedure Act, in order to secure conviction of the real perpetrators of the crime. It is clear that the Police already looking for the 1st appellant when they arrested the witness. The witness, who claims that he was severely assaulted by Police, was released from custody immediately after he made a statement incriminating the appellants. In these circumstances, it is reasonable to consider the proposition that the Police may have coerced the witness tried to implicate the 1st appellant, an army deserter, who was involved in the illegal cannabis trade in the area and by making *Kodagoda* a witness when it should have treated him as an accomplice?

In these circumstances, the testimony of the said witness becomes somewhat compromised when scrutinised under the test of spontaneity.

Then evaluating the testimony of the said witness by applying the test of consistency and inconsistency, the appellants have highlighted three significant inconsistencies. The 1V1 and 1V2 are the marked contradictions and in addition, the witness admitted giving evidence during the inquest proceedings contrary to his position taken at the trial Court.

It is the position of the witness that the 1st appellant, who was wearing a pair of shorts, when he initially saw him walking with the 2nd appellant that early morning, was clad in an army uniform soon after. He had not seen at which point of time the change of clothing took place. He

had witnessed them from a distance and the person in uniform also wearing a cap. It is also his testimony the 1st appellant, who was in uniform had repeatedly stabbed the deceased.

However, going by his statement that was made after six days from the incident and presumably his memory was still fresh, the witness was emphatic that the person in army uniform was one of the other two unknown assailants who were waiting for the appellants on the main road that morning. This reference could not be a mistake made by the witness because he had repeated that position once more in his statement. Then, after few days since making the statement and during inquest proceedings he had reiterated a similar position.

The contradiction that had been marked as 1V1 is as follows:

"එසේ යන විට මා දුටුවා තවත් පුද්ගලයන් දෙදෙනෙක් පාරේ ඉන්නවා. ඉන් එක් පුද්ගලයෙක් ආමි යුනිෆෝම් එකක්ද අනිත් පුද්ගලයා කලිසමක් සහ ටීෂර්ට් එකක් ඇඳ ගෙන සිටිනවා"

Similarly, the contradiction 1V2 reads thus:

"ඉන් පසු බාප්පාත්, අම්ල අයියාත් එම ස්ථානයේ සිටි හමුදා ඇඳුම් ඇඳ නොගත් පුද්ගලයා ඒ අසල පාර වම්පස ඇති නළ ළිඳ දෙස ගල් වලට මුවා වී සිටි අතර හමුදා ඇඳුම් ඇඳ ගත් පුද්ගලයා පාරට වී සිටියා."

The witness admitted he said in evidence at inquest proceedings that:

"ආමි යුනිෆෝම් එකක් ඇඳගෙන හිටියා කියලා මම දැක්කා. ඒ වෙලාවෙ සාමාන්‍යයෙන් හඳ එළිය තිබුනා. ඒ පුද්ගලයා මම හඳුනනවා. ඔහු ගරු අධිකරණයේ ඉන්නවා. ඔහු හමුදා ඇඳුම් ඇඳ ගත්ත පුද්ගලයා. හතරවැනියාට ඉන්න රුමේෂ්" කියලා තමුන් කිව්වාද?"

When the impugned judgment is perused it is clear that the trial Court had only considered the inconsistencies marked as 1V1 and 1V2.

Unfortunately, the other inconsistency that had been admitted by the witness, had escaped the attention of the trial Court. Due to that oversight the said vital inconsistency was excluded from the process of evaluation in applying the test of consistency.

It appears that the trial Court, having considered 1V1 and 1V2, was of the opinion that it does not affect to the "core" (හරය) of his evidence. This Court holds a different view and is of the opinion that the nature of the inconsistency could not be ignored in that way as it in fact affects a core issue that had to be decided by the trial Court.

Why this inconsistency is considered as important by this Court could be explained on several postulations. It is correct that the witnesses' implication of the 1st appellant as the person who stabbed the deceased is consistent. However, in describing the role played by the other two, the witness was making inconsistent statements. The inconsistency as to who was in the uniform and as such the determination of the issue whether it was the 1st appellant who stabbed the deceased in the way described by the witness becomes a questionable assertion.

The Prosecution need not prove a motive on the part of the appellants. However, the evidence indicates that whoever who committed the murder certainly had a strong motive against the deceased for it is clear that the assailants have consciously selected their victim after a proper identification. The prosecution did not elicit exact details from the witness as to the role played by the other appellant and two unknown persons. It appears from the evidence presented by the prosecution that it

was the 1st appellant who took the lead role in the entire episode while the other three were merely acted as his acolytes.

However, the position as revealed from the inconsistencies, indicate a different picture. The inconsistencies show that it was one of the two persons who were waiting for the appellants to arrive at the scene, took the initiative to stop the motor cycles and identifying the cyclists and thereby, shifting the act of identification of the victim from the 1st appellant. It is also the evidence that the 1st appellant had stabbed the deceased repeatedly (about thrice) on his own without waiting for anyone to issue instructions.

Other than causing his death, his assailants have not engaged in any other offence as his motor cycle and the personal belongings were left untouched until the Police arrived at the scene. Whoever who caused the death of the deceased therefore merely intended to cause the death of their victim without making a mistake in identifying him. This strongly suggestive of a pre-existing plan coupled with a strong motive but such evidence is not available.

The most important factor that affects the evidence of the witness in view of these inconsistencies, is his claim of identifying the persons who were involved in the incident. The witness stated in the trial Court that the 1st appellant was in army uniform and wore a cap. It is evident that he witnessed the incident from some unspecified distance away from the scene. The place where the motor cycle stopped was cleared of any vegetation owing to the check point manned by the army. It is therefore safe to assume that there was a considerable distance between the witness

and the 1st appellant who was dressed in a uniform wearing a cap. There was no light available except for the moon and the witness claimed he identified the 1st appellant thorough that light.

According to the witness, the 1st appellant was clad in a pair of shorts only a while ago. He then reappeared in a uniform with a cap and the witness saw this being some distance away. The identification of the 1st appellant was made by the witness only upon moon light. The only way he could identify the 1st appellant is facial identification. But it is doubtful whether there was sufficient light shone on his face due to the cap. Adding to this shaky identification of the 1st appellant is the inconsistency as to who was in the army uniform that night. This confusion, further exacerbated by the fact that an army uniform was recovered upon the information provided by the 2nd accused in a cluster of tall grass, which was located close to the house of the 1st appellant. The witness specifically claimed in evidence before the trial Court that he identified the 2nd accused upon being told to do so by the Police. However, the 2nd accused was later acquitted by the trial Court.

Clearly the witness was confused as to who was in the uniform that night. The contents of his statements marked as 1V1 and 1V2 cannot be considered by a Court as substantive evidence but the inconsistent position revealed therein ought to be given serious thought.

The confusion of the witness over the identity of the person in army uniform renders his evidence, which attributed several acts of violence to the said person in uniform, unreliable if not making it disqualified by due to falsity of his version.

Adding to the failure of the trial Court to consider this particular inconsistency it appears that the Court also overlooked to consider an important omission highlighted by the 1st appellant.

This was in relation to the witnesses' claim that when they set off to the place where the deceased was killed in the morning after its discovery by a fellow villager, the 1st appellant admitted that it was his work and threatened the witness not to divulge it to anyone. The 1st appellant had invited attention of the trial Court that the witness had failed to make any such reference in his statement to the Police. He had stated so only in the evidence before the trial Court for the first time after a lapse of 11 years. Unfortunately, the trial Court had considered this item of evidence in its judgment as an instance of admitting culpability by the 1st appellant and had thereafter proceeded to impute criminal liability on him relying upon the said "admission", not realising that it had escaped from its mind to consider the reliability of it in the light of the said omission. This is a significant error on the part of the trial Court in its evaluation of evidence.

Moving to consider the evidence of the witness under the test of probability, it must be noted that the evidence of the father of the deceased revealed that this was the first time the deceased had decided to travel to the institution where he studied, in newly acquired possession, the unregistered motor cycle. He left home that morning at about 4.30 and after about 5 hours the news reached him that the deceased was dead. The deceased had no known enemies.

This poses a question as to how could the appellants, who were not known to the family of the deceased, accurately predict that the deceased

would travel in a motor cycle that morning at that time in that particular direction. The fact that the two other motor cyclists who have arrived at the "check point" manned by the appellants were allowed to go indicate that they knew who there were looking for. This is clearly a mismatch in the prosecution version.

The deceased who was studying at the time of his death would not have anyway interacted with the 1st appellant or involved in his illegal trade in cannabis to earn his wrath, to be killed in this manner. The only other possible explanation of a mistaken identity is clearly negated by the witness's claim of clear identification of the rider by the 1st appellant.

Moving to consider another aspect of the witness's evidence on probability, it is noted that the two penetrating stab injuries observed on the back of the chest of the deceased was directed upwards. The witness claimed the deceased was in a seated position when he received them. The prosecution clarified the relative position of the attacker to the deceased only through the medical witness but did not clarify the manner in which these two injuries were inflicted through the solitary eye witness. When the witness claim that the deceased was stabbed whilst in a seated position, that claim seemed an improbable one due to its inherent improbability. If the witness is right, then the person who stabbed the deceased should inflict the injuries, whilst positioning himself to a lower elevation than to that of the deceased. But he was seated on the road after his fall from the motor cycle due to the clubbing by the gang of four. If the stabbing did not take place the way the witness had described then that might lead to a doubt whether the witness had really saw the attack and even if he did, whether he observed and recalled it correctly.

The lack of any telltale sign of blunt trauma on the body of the deceased when the witness claimed he was assaulted by clubs is also very significant. The Police found broken club at the scene.

When these infirmities are considered in the light of the considerations already stated in this judgment and especially the allegation that the appellants were implicated at the behest of the Police, it is the opinion of this Court that the evidence of the witness becomes highly unreliable owing to those infirmities. If he is an accomplice to the crime then it is equally probable that he would *"... cast his erstwhile association and friends to the wolves in order to save his own skin"* - per ***Illangatilaka & others v Republic of Sri Lanka*** (1984) 2 Sri. L.R. 38. This proposition is further fortified by the admission made by the witness that he identified the 2nd and 4th accused during the non-summery proceedings simply because he was instructed to do so by the Police. Then the question arises whether that admission is in line with the contention of the appellants that they too were falsely implicated upon the insistence of the Police. That consideration should have been considered by the trial Court with due regard to its effect on the evidence of this witness.

In view of these considerations, this Court concludes that the evidence of the sole eye witness is clearly tainted with definite disqualification of unreliability even if it is presumed that he was telling the truth. This Court is of the view that the prosecution has failed to prove its case beyond reasonable doubt.

The Supreme Court, in ***The Attorney General v Theresa*** (supra), stated that "*credibility is a question of fact, not law*". As such it was further stated:

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

In the instant appeal, the trial Court was certainly not faulted for any "*reckless glibness*" on its part but, in the opinion of this Court, had fallen into error in its failure to engage in a careful examination of certain vital infirmities, which in the opinion of this Court are sufficient to raise a reasonable doubt as to the guilt of the appellants, to which they should have been given the benefit of.

The contention that the subsequent conduct of the appellants is supportive of their guilt, as submitted by the learned Deputy Solicitor General, is a questionable one. The avoidance of law enforcement is common to the appellants and prosecution witness. Both parties have left their village and found refuge in distant locations. At most this conduct

raises suspicion as to complicity of the appellants to the murder but, that suspicion is inadequate to substantiate the evidence which clearly lacks the attributes of *"cogent and convincing evidence"* per ***Gunasekera v Attorney General*** (supra).

The convictions and the sentences of the appellants are therefore set aside. The appeals of the 1st accused-appellant and the 3rd accused-appellant are accordingly allowed.

JUDGE OF THE COURT OF APPEAL

HON.DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL