

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

In the matter of an Appeal preferred against  
the Judgment of the High Court at Bar sitting  
in Colombo made in terms of Section 451 (3)  
of the Code of Criminal Procedure Act No. 15  
of 1979.

The Democratic Socialist Republic of Sri Lanka

Complainant

**SC /Appeal No. TAB 001/2023****HC Colombo Case No. HC TAB 493/2019**

Vs,

1. Mosses Newamal Rangajewa
2. Lamahewage Emil Ranjan
3. Imaduwage Indika Sampath

Accused

And Now

Lamahewage Emil Ranjan

2<sup>nd</sup> Accused-Appellant

Vs,

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

Complainant –Respondent

**Before:** Justice Vijith K. Malalgoda PC,  
Justice Thurairaja, PC,  
Justice A.L. Shiran Gooneratne,  
Justice Achala Wengappuli,  
Justice Priyantha Fernando,

**Counsel:** Anil Silva, PC, Anuja Premaratna, PC with Nandana P. Perera, Nayana Dissanayake, Ishan Gampalage, Imasha Senadheera, Senal Matugama, Shonal de Silva, Bandula Dissanayaka, Vivendra Ratnayake, Avishka Jayawardana, Ramith Dunusingha and Achintha de Silva for the Accused-Appellant.

Dilan Ratnayake, SDSG, Madhawa Tennakoon, DSG, Keshani Wijesinghe, SC, and Shaine Weerasuriya, SC for the Respondents.

Argued on: 5<sup>th</sup> December 2023

**Judgment on: 08.08.2024**

### **Vijith K. Malalgoda PC J**

The 2<sup>nd</sup> Accused-Appellant Lamahewage Emli Ranjan (hereinafter referred to as the ‘Appellant’) was indicted before the High Court of Colombo along with two others (the 1<sup>st</sup> and the 3<sup>rd</sup> Accused) on 33 counts under the Penal Code. The Indictment served on the three Accused contained a count of conspiracy to commit murder, eight counts of murder based on unlawful assembly, another eight counts of murder based on common intent, a count of criminal trespass against the 1<sup>st</sup> Accused, a count for being members of an unlawful assembly, and 14 counts of abducting with intent to cause the death of 7 persons based on unlawful assembly and common intent.

Out of the 33 counts in the Indictment, the 25<sup>th</sup> count was based on unlawful assembly for the murder of Dewamullage Malith Sameera Perera alias ‘Konda Amila’ and the 33<sup>rd</sup> count was based on common intention for the murder of the same person. Even though there were 14 counts of

abduction with the intent of causing the death of 7 other deceased, there were no counts for the abduction of the deceased Malith Sameera Perera in the Indictment served on the three Accused.

The Indictment served on the three Accused were tried before a Trial at Bar and after the case for the Prosecution, on an application made by the Prosecution, the Court acquitted the 3<sup>rd</sup> Accused in the Indictment namely, Imaduwage Indika Sampath who was tried before the Trial at Bar in his absence.

After the trial, the Trial at Bar having acquitted the 1<sup>st</sup> Accused namely Moses Newamal Rangajeewa of all charges leveled against him, had convicted the 2<sup>nd</sup> Accused (Appellant before this Court) on the 33<sup>rd</sup> count of the Indictment for the murder of Malith Sameera Perera alias ‘Konda Amila’ and sentenced him to death. It is also important to note that the Trial at Bar had not found any accused guilty of the death of the other 07 prisoners referred to in the Indictment.

Being aggrieved by the said conviction and sentence the 2<sup>nd</sup> Accused had preferred the instant appeal to this Court on several grounds.

However, during the arguments before us, the learned President’s Counsel who represented the ‘Appellant’ had restricted his appeal to the following questions of law.

1. Has the prosecution proved charge 33 in the indictment beyond a reasonable doubt?
2. Have the learned Judges of the Trial at Bar failed to consider the matters favourable to the Appellant?
3. Have the learned Judges of the Trial at Bar drawn wrong inferences on the facts?
4. Did the learned Judges of the Trial at Bar misdirect themselves in considering the belatedness of the evidence of the main prosecution witnesses?
5. Did the learned Judges of the Trial at Bar misdirect themselves with regard to the admissibility of the evidence relating to motive?
6. Did the learned Judges of the Trial at Bar misdirect themselves on the facts pertaining to the subsequent conduct of the Appellant?
7. Did the learned Judges of the Trial at Bar misdirect themselves in analyzing the evidence relating to the 1<sup>st</sup> Accused and the Appellant?

As revealed before this Court, the incident that led to the death of 27 inmates including the 8 deceased persons referred to in the Indictment served on the three Accused including the

Appellant had taken place on 9<sup>th</sup> and 10<sup>th</sup> November 2012 at the Welikada Prison in Colombo. At the time of the incident, the Appellant was the Superintendent of the Magazine Prison which is located in close proximity to the Welikada Prison.

In establishing the background to the incident, the prosecution had heavily relied on the evidence of witness No. 2, Pallekumbura Walawwe Kuda Bandara who was the Acting Chief Jailor of Welikada Prison at the time of a series of incidents that were reported on the 9<sup>th</sup> and 10<sup>th</sup> which commenced on the 9<sup>th</sup> afternoon. On the 9<sup>th</sup> he was covering the duty of Chief Jailor Walisundara who was on leave that day. Around 1.30 p.m. when the witness went to his official residence for lunch, he received a call from the main gate, that nearly 700 troops from the Special Task Force (STF) had forcibly entered the prison premises, and wanted him to return immediately.

When he returned to Welikada prison, a search operation had already commenced by the STF personnel at the 'L ward'. At that time, he observed about 650-700 STF personnel armed with weapons engaged in the said operation and the Chief Jailor of the Prison Intelligence Indika Sampath (3<sup>rd</sup> Accused) and Jailor Pushpakumara were also present with the STF personnel. The witness immediately informed the Superintendent Welikada, Gamini Jayasinghe of the situation at Welikada.

When the STF personnel wanted to continue with their search operation at the 'Chapel Ward' the witness had requested them not to carry out any search operation in the 'Chapel Ward', but they continued with their search operations. Around 3.30 p.m. he heard a commotion from the said direction and observed a tense situation between the death row prisoners and the STF personnel and the prisoners throwing various items at them. STF personnel used tear gas to control the situation.

The situation became worse thereafter since the prisoners could not stay inside the wards due to the tear gas and he had seen about 15 prisoners climbing up to the roof with firearms. The witness later got to know that the prisoners had broken into the Hospital and Armory removed some drugs and weapons from the said locations, and ransacked the canteen, too. During this time, he heard the sound of some gunshots inside the prison premises. The situation continued till about 7.00 p.m. on the 9<sup>th</sup> and around that time the STF personnel being unable to arrest the situation had left the prison premises leaving the entire security at the hands of the few prison officials but continued to remain at the outer perimeter along with Police personnel.

According to witness Kuda Bandara, he had informed the situation inside Welikada Prison to his Superintendent Gamini Jayasinghe and the 2<sup>nd</sup> Accused who was the Superintendent at Magazine Prison, and sought their advice to control the situation and managed to collect a few weapons taken over by the prisoners during this time but the unrest continued even after the STF personnel left the prison premises.

Around midnight, Army personnel gained entry to the prison premises taking cover behind two armored cars and the fight continued even after the entry into the prison by the Army for a few hours and finally brought the situation under control by early morning on 10.11.2012. Several injured persons and 27 dead bodies were recovered in the morning hours of the 10<sup>th</sup>.

As submitted by the learned ASG, the Commissioner General of Prisons who visited the Welikada Prison during the early hours of the 10<sup>th</sup> had arranged a prison photographer to take photographs inside the prison premises and the prosecution had heavily relied on some of the photographs taken by Jailor Gunwardhena who took photographs on the direction of the Commissioner General.

The investigation into the riots and the deaths that occurred during the riots commenced immediately after the situation was brought under control by the Army and the Army personnel left the premises after handing over the control to prison officials. A Magisterial inquiry was held with regard to the deaths reported inside the prison premises and Post-mortem inquiries were also held to identify the cause of death of the deceased prisoners.

It was the position taken by the State that the investigations carried out by police, revealed several reasons for the deaths that occurred between the 9<sup>th</sup> and 10<sup>th</sup> of November inside Welikada Prison, and some deaths were identified as deaths due to crossfire, some when they attempted to escape and some by killing them after being abducted during the riots. It is not in dispute that several investigations were carried out by different agencies with regard to the incidents that occurred on the 9<sup>th</sup> and 10<sup>th</sup>, initially by Borella Police, and thereafter by Colombo Crimes Division (CCD) which was followed by the Criminal Investigation Department (CID). Apart from the said investigations a prison inquiry was carried out by the Wickramasinghe Committee and thereafter by the Bandula Atapattu Committee. During the investigations carried out by the Police and the commissions of inquiries, statements of several hundreds of witnesses were recorded but nothing significant was revealed from those statements. After the change of the

Government in 2015 another Commission of Inquiry was appointed by the Minister in Charge of the subject of Prison Administration namely the Nambuwasm Committee chaired by a retired High Court Judge and for the 1<sup>st</sup> time it was revealed that some of the deaths have taken place after they being abducted on the instigation either by the 1<sup>st</sup> Accused or by the 2<sup>nd</sup> Accused (Appellant in the instant appeal), by Army personnel who took control of the Welikada Prison after midnight on the 9<sup>th</sup> November 2012. However, it is also important to note that none of the Army personnel who were involved in those so-called abductions and/or killings were identified or indicted before the High Court at Bar by the Hon. Attorney General.

As revealed before us the star witness who revealed material concerning several of such abductions was Chief Jailor Kuda Bandara who was the acting Chief Jailor of Welikada Prison at the time of the incident.

Witness Kuda Bandara in his evidence before the High Court at Bar had said that when he went home after the series of incidents taken place on the 9<sup>th</sup> and the 10<sup>th</sup>, his wife had informed him of a telephone call she received from an unidentified caller, where the caller wanted her to inform the witness to be careful. In his evidence he further referred to an utterance made by the CID officer who recorded his statement for the 1<sup>st</sup> time, saying that they (Police Officers) had come to clear that sin of the others and the witness decided to cover up certain incidents that have taken place on the 9<sup>th</sup> and 10<sup>th</sup>. However as argued by the learned President's Counsel for the Appellant, the witness is not clear about the specific incidents that had not been revealed by him in his statement made to the CID officer immediately after the incident, to the prison tribunal headed by Mr. Wickremasinghe and Bandula Atapattu Committee appointed by the Hon. Minister. However, from the evidence of witness Kuda Bandara it is clear that he had not received any direct threats from the 1<sup>st</sup> and 2<sup>nd</sup> Accused to the Indictment.

Except for the questions of law raised concerning the belatedness in identifying the real culprits, the motive entertained by the Accused person, and the subsequent conduct of the Accused person, the rest of the questions raised in the instant appeal were mainly based on the evidence placed before the Trial at Bar and the evaluation of the said evidence by the said Court. In the said circumstances this Court must first consider and evaluate the evidence placed before the High Court at Bar as far as the case against the Appellant is concerned. During the trial before the Trial at Bar, the prosecution had led the evidence of several witnesses, which included the evidence of,

Pallekumbura Walawwe Kuda Bandara	PW2
Senerath Bandula Liyanarachchi	PW3
Indika Perera	PW4
Nandimal Silva	PW1
Samayakkarage Malani	PW9
Jayantha Arachchige Merlin	PW11
Tania Dulari Jayaweera	PW100
Nimal Shantha	PW20
Wasantha Nanayakkara	PW14,

several police witnesses who were involved in the investigation into the incidents that took place on the 9<sup>th</sup> and 10<sup>th</sup> of November at Welikada Prison and Judicial Medical Officers who performed the post-mortem examinations into the deaths that occurred during the aforementioned incident. In addition to the above, the prosecution relied on “call details” with regard to the telephone used by the 1<sup>st</sup> Accused at the time relevant to the incident and led evidence to that effect.

As I have already referred, the only conviction that is challenged before this Court is the conviction against the 2<sup>nd</sup> Accused before the Trial at Bar, and therefore is not necessary for this Court to consider the evidence led against the 1<sup>st</sup> and the 3<sup>rd</sup> Accused before the Trial at Bar unless the consideration of the said evidence is necessary to consider the case against the 2<sup>nd</sup> Accused-Appellant.

With regard to the death of Malith Sameera Perera alias ‘Konda Amila’ and the involvement of the Appellant to the incidents, that took place on the 9<sup>th</sup> and 10<sup>th</sup> of November the prosecution had relied on the evidence of the following witnesses.

1. PW2      Pallekumbura Walawwe Kuda Bandara
2. PW1      Nandimal Silva

3. PW11 Jayantha Arachchige Merlin
4. PW100 Tania Dulari Jayaweera
5. PW20 Nimal Shantha
6. PW14 Jailer Wasantha Nanayakkara

**Evidence of witness Kuda Bandara.**

Witness Kuda Bandara has referred to a series of events that took place before leaving the STF from Welikada and after the Army entering the Prison around midnight on the 10<sup>th</sup> of November. In his evidence, he referred to the breaking of a small armory around 4.00 p.m. on the 9<sup>th</sup> by the prisoners and a prisoner receiving a gunshot injury around that time. When the situation became worse, the STF personnel left the prison premises but remained in the outer perimeter. He had seen some prisoners on the roof of the canteen building and some of them were armed with weapons. Firing took place when the STF was in the Prison premises and also after the army entered the Prison premises.

Apart from the evidence he gave concerning several abductions by a person whom he identified as the 1<sup>st</sup> Accused along with Army personnel during the early hours of the 10<sup>th</sup>, somewhere around 6.00 a.m. on the 10<sup>th</sup> he had seen the Appellant taking away the deceased Malith Sameera alias 'Konda Amila'. An Army Major whom he identified as Major Alwis had accompanied the Appellant at that time and 'Konda Amila' was kneeling with several hundreds of prisoners at the time he was taken away by the Appellant. The body of 'Konda Amila' was later found near a *veralu* tree within the prison premises. According to the evidence of witness Kuda Bandara, the deceased 'Konda Amila' was last seen by him around 6.00 a.m. accompanied by the Appellant and Major Alwis.

After the breaking of the armory, several weapons went into the hands of the prisoners, and with the help of prison staff and the Army personnel, weapons were collected and handed over to Jailer Wasantha Nanayakkara to keep a record of weapons that were recovered. At one stage between 7.00 -7.30 a.m. witnesses Kuda Bandara had seen the Appellant asking Nanayakkara to give him 4 weapons. When Nanayakkara showed some reluctance to handover weapons to the Appellant, the Commissioner General of Prison Kodippili who was there at that time had told Nanayakkara to release weapons immediately, and the witness had seen Nanayakkara giving four

weapons to the Appellant. The witness states that he later saw these weapons placed near some dead bodies.

#### **Evidence of witness Senarath Bandula Liyanarachchi**

He was a prisoner who was detained at the special section of Welikada Prison on 09.11.2012. In his evidence, he speaks of abducting Nirmala Attapattu, Mala Susantha, Gundu, and Dolphin Chandana. These abductions had taken place after midnight by the 1<sup>st</sup> Accused accompanied by some army personnel. The following morning, he had seen the dead bodies of Gundu, Nirmala Atapattu, Susantha, and Kalu Thushara from a window of the ward where he was detained. He had seen the 3<sup>rd</sup> Accused placing weapons near the dead bodies. Even though he had not referred to any involvement by the Appellant in any of the incidents he referred to, the Appellant had threatened him with death and transferred to several places after the incidents on the 9<sup>th</sup> and 10<sup>th</sup> at Welikada Prison.

#### **Evidence of witness Nandimal Silva**

He too was a prisoner detained at Welikada Prison on the day in question. In his evidence before the High Court at Bar, he had referred to several incidents narrated by witness Kuda Bandara including the entry of the STF personnel followed by the Army in the midnight. According to him, he had witnessed some of the abductions after the 9<sup>th</sup> midnight by the 1<sup>st</sup> Accused including the abduction of 'Kalu Thushara'. In his evidence, he referred to the involvement of the Appellant by saying that he saw the Appellant taking away 'Konda Amila' around 6.00 a.m., and after the said abduction he heard a few gunshots. According to the witness, the 1<sup>st</sup> Accused was also present when 'Konda Amila' was taken away by the Appellant along with a few army officers.

However, several contradictions and omissions were marked in his evidence including the omission of his failure to implicate the Appellant about the abduction of 'Konda Amila'.

#### **Evidence of witness Wasantha Nanayakkara**

This witness was a Jailer attached to Welikada Prison on the days in question. Among the duties entrusted to him, he had to release weapons for the daily parade and to collect them after the parade. On the 9<sup>th</sup> he released the weapons for the parade but could not collect them officially due to several incidents that took place on that day.

According to the witness, it is he who informed witness Kuda Bandara of the arrival of STF in the afternoon hours of the 9<sup>th</sup>. Around 4.30 pm when he entered the prison premises with Chief Jailor Walisundara, he saw the daily armory had been broken and there were no weapons in the armory.

After the Army took control of the place, he was instructed by the Prison Superintendent Jayasinghe to take over the weapons recovered by the Army. This work had commenced around 6.00 a.m.

Since he could not find a proper register to take charge of the weapons, he made use of a register he found inside the Telephone Room which was damaged due to the incidents, and commenced attending to the task entrusted to him and the collection of arms had taken place at the Telephone Room. Two prison guards namely Wijerathne and Subasinghe assisted him at that time. When he commenced accepting weapons, witness Kuda Bandara too had handed over a few weapons taken charge by him during the night. Sgt. Tennakoon of the Army too had handed over some weapons to him.

While he was engaged in accepting and recording the details of the weapons taken charge by him, the Appellant had come to him and asked for 4 weapons from him. When he showed reluctance to hand over the weapons to the Appellant, the Commissioner General of Prisons, Kodippili who was there at that time had ordered him to hand over the weapons. According to him witness Kuda Bandara and the two guards who assisted him, Subasinghe and Wijerathne had been there at that time.

Thereafter the witness had given four weapons to some prison guards in the presence of the Appellant and witness Kodippili and recorded the identification numbers of the said weapons separately on the same page under the name of the Appellant.

Later, during the same day, after the arrival of the SOCO team, he got to know that the identification numbers of weapons given to the Appellant tallied with the numbers of the weapons recovered near some of the dead bodies.

Whilst giving evidence, a document which was marked as P-39 was produced by witness Nanayakkara. It is a photocopy of the document he prepared when receiving the weapons on the 10<sup>th</sup> morning. According to the witness he had handed over the original of the said document to the Superintendent of Welikada Prison, Jayasinghe after keeping a photo copy with him. However,

the original of this document was neither produced during the trial nor the handing over of the said document was admitted by witness Jayasinghe in his evidence.

P-39 carried the identification numbers of the four weapons in two places and according to the evidence of witness Nanayakkara, those four numbers were included in the list he prepared when he received those weapons and once again those four numbers were entered separately under the name 'Emil sir' when the weapons were handed over on the request of the Appellant.

Other than the evidence about the handing over of the four weapons at the request of the Appellant, witness Nanayakkara had not made any reference concerning the conduct of the Appellant during these two days.

#### **Evidence of witness Nimal Santha**

This witness was attached to Magazine Prison on 9<sup>th</sup> November 2012 and his Superintendent was the 2<sup>nd</sup> Accused. When they got to know of some incidents in Welikada Prison, the 2<sup>nd</sup> Accused informed him to be ready with some officers to assist the administration of Welikada Prison. The second Accused along with several Superintendents visited his official quarters at Magazine Prison in the evening and they discussed the measures to be taken to control the situation at Welikada Prison. Some Army officers and several others in civils had also joined the discussion. Commissioner General of Prison Mr. Kodippili too had joined the discussion. They contacted Kuda Bandara over the phone and the discussion continued till about 12.30 at midnight.

When the witness visited Welikada around 5.30 a.m. he had seen the 2<sup>nd</sup> Accused In front of the Superintendent's office and the situation at Welikada prison was controlled by that time. He had helped the officers to count the prisoners. He had seen the bodies of 'Kalu Thushara' and 'Konda Amila' in the prison premises. According to the witness both 'Kalu Thushara' and 'Konda Amila' were involved in the prison riots at Magazine Prison. He too had helped the Appellant along with another officer by the name of Gunathunga to take disciplinary action against them. When the witness was questioned whether 'Konda Amila' was affected with regard to the changes introduced by the Appellant to the administration of Magazine Prison, he took up the position that the changes were brought for administrative purposes.

### **Evidence of witness Jayantha Arachchige Merlin**

This witness is the mother of the deceased Malith Sameera Perera alias ‘Konda Amila’. According to the evidence of the witness, her son was arrested for a drug offence by a team of police officers including the 1<sup>st</sup> Accused. During the period her son was detained at Magazine Prison her son had a comfortable living inside the Prison. The meals were taken from home twice daily and her son used a touch phone to contact home during this period. On Sundays meals were not taken from home but her son used to get meals from hotels spending money for the prison officials.

However, with the arrival of the Appellant as the Superintendent, things were changed and her son complained that the Appellant was creating problems for him. She knew that her son was facing some charges inside Magazine Prison and thereafter transferred him to Welikada Prison a few days before the 9<sup>th</sup>. With regard to the conduct of the Appellant towards her son, complaints had been made to the Human Rights Commission and Borella Police Station, and the mistress of his son Tania made those complaints on her behalf. She knew that some inquiries were pending over those complaints.

On the 9<sup>th</sup> she had gone to Welikada to see her son but she could not see him due to the situation at the prison. Between 9.00 p.m. and 1.00 a.m., her son contacted her on a few occasions and informed her of some incidents taking place at prison but this position had not been investigated by police by calling telephone details.

### **Evidence of Tania Dulari Jayaweera**

She is the wife of a friend of the deceased Malith Sameera Perera alias ‘Konda Amila’ and was having an affair with him during the time in question. Due to this relationship, she visited him twice daily at the Magazine Prison with his meals. Due to an inquiry, the deceased was transferred to the Welikada Prison two days before the incident. On 10<sup>th</sup> November she contacted the deceased between 6.00 a.m. and 6.10 a.m. but she could not contact him thereafter. Later she got to know of the death of Malith Sameera Perera alias ‘Konda Amila’.

According to the evidence of Tania, only a single visit is permitted to see a remand prisoner, but on the orders of the Superintendent the deceased was given two visits but things were changed after the Appellant took charge of Magazine Prison as the Superintendent. The deceased was facing charges after the Appellant took over Magazine Prison and the deceased was transferred to

Welikada Prison to serve a sentence based on the findings of the inquiry proceeded against him. She had visited the deceased after he was transferred to Welikada and she could not recognize him at once when she saw him for the first time at Welikada since he had to cut his long hair as a serving prisoner.

When the deceased was at Magazine Prison he complained to the witness of some harassment and death threats made to him by the Appellant and the witness had first made a complaint to the Human Rights Commission and thereafter to the Borella Police against the Appellant. During the cross-examination on behalf of the Appellant, it was revealed that there was no mention of a death threat by the Appellant in the complaint made to the Human Rights Commission. However, there is a reference to the death threat in the police complaint.

As already referred to in this judgment the learned President's Counsel who represented the Appellant before this Court relied on several questions of law and I will now proceed to analyze the said questions in the light of the evidence placed before the trial Court.

To secure a conviction against the Appellant for the murder of Malith Sameera Perera alias 'Konda Amila' the prosecution heavily relied on the evidence of Kuda Bandara. However, one of the main challenges to the credibility of the said evidence was based on the fact that it was a belated statement. As already observed in this judgment, a statement of Kuda Bandara was recorded by a CID officer immediately after the incident. However, when questioning him, the said officer said to have informed him "අපි ආවේ අනුත්ගේ පටු හෝදන්ත. සර පරිස්සම් කටලුත්තරයක් දෙන්න" When he considered the above warning, along with a phone call said to have been received by his wife on the very same day the incident took place, he was frightened to make a truthful statement to the Authorities.

However, the above position taken up by witness Kuda Bandara was here say with regard to the warning he said to have received from his wife and uncorroborated with regard to the warning from the CID officer. None of these witnesses were called to give evidence. About the statement made to the CID, prejudice had been caused to the defence in the absence of the said statement to confront the witness Kuda Bandara with the statement, since it was the very first statement made by him to the investigative authorities. Since the prosecution has failed to make available the said statement to the defence, on behalf of the Appellant, W.C.I Nilmini Mendis from the CID was called as a defence witness and, in her evidence, while referring to the investigation conducted by CID

about the incidents happened on 9<sup>th</sup> and 10<sup>th</sup> November 2012 submitted that S.I Premathilake of CID had recorded a statement from the Kuda Bandara on 1<sup>st</sup> December 2012. The statement was handed over to the witness by S.I. Premathilake on the same day, but S.I. Premathilake had subsequently taken away the statement made by Kuda Bandara to him, informing her that he needed the said statement to make his notes. However, according to C. I Nilmini Mendis the statement made by Kuda Bandara is not available in the relevant notepad. In the absence of the 1<sup>st</sup> statement made by Kuda Bandara, no contradiction or omission could be marked on behalf of the Appellant.

According to witness Kuda Bandara, he refrained from telling the truth to the officials who conducted inquiries into the incident that took place on the 9<sup>th</sup> and 10<sup>th</sup> of November. As already observed by this Court, 1<sup>st</sup> statement implicating the Appellant was made only in 2015 at the Nambuwasm Committee although he was present as a witness at Wickremasinghe Committee and Bandula Atapattu Committee between 2012 and 2015.

The reason given by him for his sudden change of mind was another anonymous call said to have been received by him after 2015 informing him to come out with the truth. Thereafter he met the then Commissioner General of Prison Pallethenna and informed him of the true story. Commissioner General had first taken him before the then Secretary of Defence and thereafter to the Minister of Justice and Prison Reforms Wijedasa Rajapakse. The Minister had appointed Nambuwasm Committee and it was before the said committee that he had come out with the story against the Appellant for the 1<sup>st</sup> time. After making the statement before the Nambuwasm Committee witness Kuda Bandara made a statement to the CID implicating the 1<sup>st</sup> and the 2<sup>nd</sup> Accused but the investigators who investigated in to the fresh material had failed to ascertain the correctness of the statement made by Kuda Bandara three years after the incident. The investigators could have checked the telephone details since Kuda Bandara had changed his stance on both occasions after receiving anonymous calls. His wife who said to have received the 1<sup>st</sup> threatening call was not called as a witness to corroborate the evidence of Kuda Bandara.

It is trite law that belatedness in giving evidence is a factor that casts doubt on the credibility of a witness. If a witness delays making a statement that would leave room for him to implicate innocent persons for reasons best known to him. The Court would be reluctant to act on such belated evidence unless there is a plausible explanation given as to the cause of belatedness.

This was considered in the case of **Sumanasena V. Attorney General [1999] 3 Sri LR 137 at 140** as follows;

Just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and a Court must inquire into the reasons for the delay *and if reasons for the delay are plausible and justifiable* the Court could act on the evidence of a belated witness.

Witness Kuda Bandara made use of all the opportunities he got to make statements, and made statements to CID, Wickremasinghe Committee as well as Bandula Atapattu Committee but was not truthful until the change of the government in the year 2015 and received an anonymous call asking him to come out with the truth. To this extent, the evidence of witness Kuda Bandara will have to be treated as belated evidence, and a question will arise as to whether the explanation given by Kuda Bandara is plausible and justifiable for the Court to act on the said evidence.

The evidence given by witness Kuda Bandara before the Trial at the Bar was that, on the 10<sup>th</sup> morning between 5.55 and 6.15 a.m. he saw the Appellant along with Major Alwis taking away the deceased ‘Konda Amila’, who was kneeling at kovil section along with several hundreds of prisoners. The deceased was taken through the rear door of the main office by them. Even though the deceased was kneeling with several hundreds of prisoners at the time of his abduction, no prisoner has been called to testify about the so-called abduction except for witness Nandimal Silva whose evidence was rejected by the Trial at Bar. It was further revealed that witness Nandimal Silva had failed to inform police of the said abduction and it is for the first time that he implicated the Appellant for the abduction of the deceased ‘Konda Amila’ at the trial before the Trial at Bar. Several omissions were marked in his evidence concerning the said abduction.

In addition to the above evidence, witness Kuda Bandara in his evidence had referred to the conduct of the 1<sup>st</sup> Accused during that night. According to him, he had seen three persons in civil clothing entering the prison from the main entrance. Among them, one person was wearing a blue short and a yellow T-shirt. When inquired by a prison guard, as to the identity of the said person he was informed that the person in the blue short was “Rangajeewa from the Narcotic”. Witness had identified the 1<sup>st</sup> Accused as the person whom he saw at the prison on the day in question wearing a blue short and a yellow T-shirt. Witness in his evidence before the Trial at Bar had referred to the abduction of Malan, Kapila, Manju Sri, and Kalu Thushara by a group of 4-5 army personnel along with the 1<sup>st</sup> Accused but the Court was not prepared to act on the said evidence

of witness Kuda Bandara since the identity of the 1<sup>st</sup> Accused was only a dock identification. Similarly, when witness Kuda Bandara referred to Major Alwis for removing ‘Konda Amila’ along with the Appellant, the investigators could not find Major Alwis to frame charges against him.

Witness Kuda Bandara in his evidence before the Trial at Bar, had referred to his involvement in the prison inquiry against Konda Amila, but this fact was contrary to the material placed before the Trial at Bar since it was Jailer Saman Priyadarshana who had produced ‘Konda Amila’ before the Prison Tribunal.

Konda Amila was easily identified at the Magazine prison because of his long-grown hair, but when he was transferred to Welikada Prison a few days before the 9<sup>th</sup> of November to serve a sentence imposed by the prison tribunal, he had to cut his hair and even his mistress could not easily identify him as per her evidence before the Trial at Bar. In this context, doubt will arise about the identity made by witness Kuda Bandara concerning the deceased ‘Konda Amila’ who was transferred to Welikada Prison a few days before 9<sup>th</sup> November.

In his evidence, Kuda Bandara had also admitted to receiving promotions after 2015. When considering the above material, it appears that the evidence of witness Kuda Bandara consists of exaggerations, falsehood, and inadmissible material but the High Court at Bar was not cautious enough when acting on the evidence of witness Kuda Bandara, who made a belated revelation three years later. There is a duty cast upon the Trial at Bar to consider whether it is safe to act on the belated evidence of witness Kuda Bandara being the only witness who implicated the Appellant in the alleged abduction of the deceased Konda Amila.

When analyzing the case against the Appellant, the Trial at Bar had considered the evidence of the mother and the mistress of the deceased ‘Konda Amila’ and had come to a conclusion that the said evidence establishes the motive entertained by the Appellant to make use of the opportunity to commit harm to the deceased “Konda Amila”. It was elicited from the evidence of Jayantha Arachchige Merlin, mother of the deceased ‘Konda Amila’ and Tania Dulari Jayaweera, mistress of the deceased ‘Konda Amila’ that the deceased was not happy and complaining against the Appellant who was the Superintendent of the Magazine Prison.

As per the evidence of Tania Dulari, when she met the Appellant a few days before the incident, the Appellant had informed her that the deceased ‘Konda Amila’s behavior was unwarranted.

Based on the complaint made to her by the deceased, she had made complaints with the Borella Police and Human Rights Commission.

When analyzing the above evidence, the Trial at Bar reached several conclusions (pages 77 and 78 of the Judgment)

1. The fact that there were live proceedings against the Appellant for causing death threats to Konda Amila
2. The said proceedings were terminated due to the death of Konda Amila
3. The fact that the Appellant complained about the conduct of the deceased to his mistress shows an enmity between the two.
4. The fact that the Appellant had made use of an Army Major attached to the Army Unit deployed at the prisons to abduct Konda Amila, establishes the fact that the Appellant made use of the opportunity to harm the deceased
5. When the evidence clearly shows that 7 other abductions were committed by the Army troops which was summoned to control the situation inside Welikada Prison with the help of a civilian group, the abduction of Konda Amila was carried by an officer attached to the Army Unit deployed at the prisons and that clearly shows that the said killing was carried out to take revenge from him.

Based on the above conclusions the Trial at Bar had concluded that there is a strong motive entertained by the Appellant to murder 'Konda Amila'.

However, as observed by this Court witness Merlin as well as Tania Dulari had complained of losing the privileges enjoyed by 'Konda Amila' after the Appellant took over the administration of Magazine Prison as its Superintendent.

As revealed from the evidence of Merlin and Tania Dulari, the family members were permitted by the previous administration to provide two meals to 'Konda Amila' whereas the other prisoners were permitted to get down one meal per day. On Sundays 'Konda Amila' ordered meals from restaurants outside and that too was permitted by the authorities. Konda Amila was using a touch phone inside the prison. All these privileges were stopped after the Appellant took over Magazine Prison as the Superintendent. Protests were organized against the prison administration during

this period and the deceased ‘Konda Amila’ was identified as playing a major role in these protests.

Apart from the above, ‘Konda Amila’ was facing charges for his conduct against a co-prisoner. He was found guilty by the prison tribunal and was sentenced by imposing a jail term a few days before the 9<sup>th</sup>, and was transferred to Welikada Prison to serve his sentence.

It was not suggested by any of the above witnesses, the reason as to why the Appellant was so strict against the deceased. There was no material placed before the Trial at Bar to establish that the Appellant was against the deceased to favour another group of prisoners inside Magazine Prison or any other reason for the Appellant to be so strict on the deceased. When considering the above, it is clear that the deceased, ‘Konda Amila’, his mistress, and the mother did not like the Appellant since he was not prepared to favour the deceased and allow the old irregular practices to continue inside Magazine Prison.

In this regard, this Court is further mindful of the fact that witness Taniya Dulari is the mistress of the deceased, and witness Jayasingha Arachchige Merlin is the mother of the deceased. They are not eye witnesses to the alleged abduction. The prosecution has called these two witnesses to establish that the appellant had a motive to cause the death of the deceased. Can they be considered as interested witnesses?.

There exists no hard and fast rule stating that family members could never be true witnesses and that they would always give false evidence in Court in order to take revenge from an accused. It depends on the circumstances of each case. In the case of ***Jayabalan V. U.T. of Pandcherry 2010 1 SCC 199***, the Indian Supreme Court discussed the evidence of interested witnesses and as to whether they can be relied upon. The Court was of the view that their evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. In the case of ***Ram Bharosey V. State of U.P. AIR 2010 SC 917***, it was held that, a close relative of the deceased does not per-say become an interested witness, and that an interested witness is one who is interested in securing the conviction of a person out of vengeance, enmity or due to disputes among themselves and not with the intention to further the course of justice.

In the case of ***Motilal V. The State of M.P. AIR ONLINE 2018 MP 730*** it was stated that, “...it is important to analyse the jurisprudence on an interested witness. It is a settled principle that the

evidence of an interested witness needs to be scrutinized with utmost care. It can only be relied upon if the evidence has a ring of truth to it, is cogent, credible and trustworthy..."

Thilakawardane J. in the case of ***The Attorney General vs. Sandanam Pitchi Theresa SC Appeal No 79/2008*** SC minute dated 06.05.2010 stated that, "a key test of credibility is whether the witness is an interested or disinterested witness." Rajaratnam J in ***Tuder Perera vs. AG (SC 23/75D.C. Colombo Bribery 190/B minutes of SC dated 1/11/1975)*** observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (vide Halsbury Laws of England 4<sup>th</sup> Edition para 29). Therefore, the relative attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness. (Vide Hasker V. Summers (1884) 10 V.L.R.(Eq.)204- Australia; Leefunteum V. Beaudoin (1987)28 S.C.R.89 – Canada )

When examining an interested witness who has some enmity with the accused, Court should take greater care and caution than when examining the evidence of a disinterested and unrelated witness. In the instant case the two witnesses Tania Dulari and Merlin, are clearly interested witnesses as their interest is with regard to exacting revenge from the Appellant rather than having an interest in furthering the course of justice. Their grievance is that, the Appellant in following the administrative rules in the prison as the Superintendent of prisons, is not favouring the deceased. After the Appellant was appointed as the Superintendent, he had stopped all illegal favours that the deceased Amila, had enjoyed in the prison. Their vengeance is against maintaining the law and order of the prison to their disadvantage, therefore the evidence of these two witnesses will have to be considered with great caution.

In the said circumstances if anyone has a motive, it is 'Konda Amila's family that would entertain a motive to implicate the Appellant for the death of 'Konda Amila'. It is further observed that the prison inquiry which was pending against the deceased was also proceeding and certain inmates had testified during the inquiry. The inquiry panel had found the deceased guilty of the charges against him and sentenced him to a jail term. When considering the period in which these

incidents had taken place, it is clear that complaints made to the Human Rights Commission and Borella Police too had taken place during the same period.

In the absence of any material to establish a personal grudge against the deceased, it is clear that any disagreement between the Appellant and the deceased ‘Konda Amila’ was due to the proper implementation of administrative duties and responsibilities by the Appellant as the Prison Superintendent.

In the Judgment, the Trial at Bar had further observed the involvement of an Army Unit deployed inside Welikada Prison for the abduction of ‘Konda Amila’. Kuda Bandara in his evidence had referred to one Major Alwis of the Army Unit accompanying the Appellant when he went up to the Kovil section and picked up ‘Konda Amila’. According to Kuda Bandara, it is Major Alwis who took Amila Away. However, the Attorney General had not indicated Major Alwis for the abduction and the murder of ‘Konda Amila’. It was revealed that no person by the name of Major Alwis was attached to the Army Unit on the day in question. If the above position is considered true, Kuda Bandara’s evidence on the abduction of ‘Konda Amila’ will have to be rejected.

Kuda Bandara being an officer attached to Welikada Prison there wouldn’t have been any mistake about the identity of Major Alwis unless Kuda Bandara is lying about the identity of the Army personnel or he is lying concerning the so-called abduction of ‘Konda Amila’. If doubt is created whether witness Kuda Bandara is coming out with a true story or not when he referred to the involvement of Major Alwis the benefit of the said doubt should not be given to the prosecution but the Appellant is entitled to receive the benefit of such doubt.

However, the Trial at Bar is silent on the identity of the Army Major who said to have taken away the deceased at the instigation of the Appellant but, had concluded that the Appellant had made use of the officers of an Army unit deployed inside the prison to abduct the deceased ‘Konda Amila’ in the following manner. (Page 77, 78)

“..... කුඩා බණ්ඩාගේ සාක්ෂිය අනුව 2 වැනි විත්තිකරු කොන්ච් අමිල රගෙන යාම සිදු වන්නේ නොවැම්බර් 10 වනදා උදේ 6.පසුවේ ඇති අවස්ථාවක වේ. ඒ සඳහා 2 වැනි විත්තිකරු සහායට ගෙන ඇත්තේ එදින පිටතින් පැමිණී හමුදා නිලධාරීන් හෝ හටයන් නොව බන්ධනාගාරයට අනුයුත්ත හමුදා අනුබණ්ඩයේ මේජර්ටරයකු වේ. එම අයගේ නම විස්තර මෙම සාක්ෂිකරුගෙන් හෙලිවී තැත. මෙම සාක්ෂි පොදුවේ සලකා බැලීමේ දී ප්‍රබල ලෙස ගම්පවන අනුම්තියනක් වන්නේ බන්ධනාගාරය තුළ යම් ගැටුමක් ඇතිව් අවස්ථාවකදී එය ප්‍රයෝගනයට ගෙන 2 වැනි විත්තිකරු තමාට කරදරයක් හා අගතියක්

සිදුකරන පුද්ගලයෙක් වන කොන්ඩ අමිල යන අයට හානියක් සිදුකිරීමට අවස්ථාවෙන් ජ්‍යෝත්තන ගැනීමක් සිදුකළ බවය. ....

එසේ වුවද කොන්ඩ අමිලගේ මරණය පෙර විශ්ලේෂනය කළ ආකාරයට 2 වැනි විත්තිකරුගේ පුද්ගලික අවශ්‍යතාවයක් හෝ කොන්තරයක් සපුරා ගැනීම සඳහා අනුබණ්ඩ මේපර්වරයකු යැයි සඳහන් ඇයකුගේ සහාය ලබාගෙන සිදුකර ඇති බවට ඒකායන ලෙස ගම්‍යවන සාක්ෂි ඉදිරිපත් වී ඇත. ” .....

(Page 80 )

“..... මෙම නඩුවේ 2 වැනි විත්තිකරු පැමිණිල්ල තොදත් යුතු හමුදා මේපර්වරයකු සමඟ එක්ව කොන්ඩ අමිල තැමැත්තා ඔහු රඳවා සිටි ස්ථානයේ සිට ඉවත් කර තවත් ස්ථානයකට රැගෙන ගිය බවට සංශ්‍ය සාක්ෂි කුඩා බණ්ඩා මගින් හෙලිදරවු වී ඇත. ” .....

When considering the above conclusions of the Trial at Bar, it is clear, that the trial court was not concerned with the fact that witness Kuda Bandara could not properly identify the Army Major who was said to have been attached to an Army unit deployed inside the prison. As referred to above, the abduction had taken place not during the night but during the daylight after 6.00 a.m. This abduction was witnessed by several hundreds of prisoners too. Kuda Bandara makes a wrong identification concerning the Army Major and says that it is one Major Alwis who took away ‘Konda Amila’. However, when it was revealed, that no person by the name of Major Alwis was deployed to Welikada Prison on the day in question, it was not safe to act on the uncorroborated testimony of Kuda Bandara who made this revelation 3 years after the incident.

To circumvent the weakness of the evidence on the identification of the said Army Officer Major Alwis the judges of the Trial at Bar had said, “some officer attached to the army unit deployed at prison along with the Appellant has abducted the deceased”.

It is further observed that the Trial at Bar had simply acted on the above evidence ignoring the weaknesses in said evidence.

It is also important to consider the evidentiary value of the evidence of Jailor Nanayakkara and the extent to which the said evidence established the case against the Appellant.

As already observed in this judgment, the Trial at Bar had acquitted the 1<sup>st</sup> Accused in the Indictment of all charges leveled against him including count 33 where all three accused were indicted for the murder of Malith Sameera Perera alias ‘Konda Amila’. The charges were not proceeded against the 3<sup>rd</sup> Accused beyond the close of the prosecution and the 1<sup>st</sup> Accused was

acquitted at the end of the trial. The Appellant too was acquitted of all charges against him including the count No. 2 for conspiracy except for count No. 33 for the murder of 'Konda Amila'.

In his evidence, Jailor Nanayakkara referred to handing over four guns at the request of the Appellant after the Commissioner General of Prisons had intervened in expediting such release. He entered the identification numbers of the said four guns under the name of the Appellant but the original of the document said to have been prepared by Jailor Nanayakkara was not available and Superintendent Jayasinghe denied the receipt of the original document by him. Even if the oral evidence given by Jailor Nanayakkara is accepted the only inference that can be drawn by this Court is that 4 weapons had been taken into the Welikada Prison by the Appellant. There is no dispute concerning the recovery of four weapons near the dead bodies of four prisoners including Kalu Thushara and Nirmala Atapattu. Whilst connecting the numbers of the weapons entered by Jailor Nanayakkara with the four weapons recovered near the dead bodies the Trial at Bar, too had concluded that those weapons were introduced to indicate that those prisoners had died while they were engaged in fighting against the Army with the weapons they took charge by breaking the prison armory.

However as observed by this Court, the Appellant was neither convicted of the count of a conspiracy nor was convicted for the murder of any of the prisoners other than 'Konda Amila', but the 04 guns said to have been taken inside the prison by the Appellant was not found near the dead body of 'Konda Amila'. If the Appellant had entertained a motive to make use of this opportunity to harm the deceased, it is expected for the Appellant to keep one of those guns near the dead body of 'Konda Amila' to make sure his involvement with the riots that took place inside Welikada Prison.

In the said circumstances it is not correct to conclude that, the evidence given by witness Nanayakkara had helped to establish count 33 of the Indictment against the Appellant before this Court.

However, the Trial at Bar had considered the said evidence against the Appellant as follows; (page 78 and 79)

"..... මෙම කුවක්කු 4 හි අංක එදින උදෑසන නානායක්කාර විසින් 2 වන විත්තිකරුට ලබාදුන් කුවක්කුවල අංක සමග ගැලපේ. ඒ අනුව ඉන් ගම් වන්නේ 2 වැනි විත්තිකරු මැදිහත් වී ලබා ගත් කුවක්කු රට සුළු වේලාවකට පසු මාත දේහයන් තිබූ සමහර ස්ථානවලට ගෙන ගොස් දමා ඇති බවය.

මෙම ක්‍රියාවන් 2 වැනි විත්තිකරු උත්සාහ කර ඇත්තේ මෙම වෙච්චල් තුවාල සහිතව මියයන අවස්ථාවේ ගිනි අවවලින් සන්නද්ධව සිටි බව ඇගවීමට වේ..... ඒ අනුව 2 වැනි විත්තිකරු එම ක්‍රියාවට ක්‍රියාකාරීව සභාය වීමෙන් පෙනී යනුයේ මහුද මෙම මරණකරුවන් මියගිය සැබූ ආකාරය වහන් කිරීමේ වෙතනාවන් වේ. එය යම් ආකාරයට වරදකාරී මතසකින් යුතුව ක්‍රියාකර ඇති ආකාරයක් විදහා දක්වයි.”

As per the evidence of Kuda Bandara, he had not seen the Appellant inside Welikada Prison until 6.00 am on the 10<sup>th</sup>. According to him the abduction of the other prisoners had taken place at midnight and in the absence of any evidence against the Appellant for those abductions, the trial court is not entitled to observe that the Appellant had acted with guilty mind by taking 4 guns inside the prison.

When considering the above, the High Court at Bar had purposely ignored the evidence of witness Senarath Bandula Liyanarachchi whose evidence has not been rejected by the High Court at Bar, concerning the conduct of the 3<sup>rd</sup> Accused where he had seen the 3<sup>rd</sup> Accused placing guns near the dead bodies. In this regard, this Court is mindful of the fact that several prosecution witnesses including Kuda Bandara had seen the 3<sup>rd</sup> Accused inside the Welikada Prison during that night.

As already observed in this judgment, prosecution witness Senarath Bandula Liyanarachchi did not implicate the Appellant directly in the incidents that took place on the 9<sup>th</sup> and 10<sup>th</sup> of November. According to his evidence, he witnessed the abduction of Nirmala Atapattu, Mala Susantha, Gundu, and Dolphin Chaminda by some army personnel accompanied by the 1<sup>st</sup> Accused.

His evidence against the Appellant was limited to some death threats said to have been given to him by the Appellant after the incidents and after those threats he was transferred to different prisons, and this fact was considered by the Trial at Bar as follows;

“..... කමිටුව ඉදිරියෝදු සාක්ෂි දීමෙන් අනතුරුව තමාට විවිධ ආකාරයේ තර්ජන සහ බලපැංචි සිදු වූ බවත් එම්ල් රන්ජන් නමැති දෙවනි විත්තිකරු තමාට විවිධ ස්ථානවලට මාරු කළ අතර සාක්ෂි දුන්නොත් වෙඩිකන්න වන බවට තර්ජනය කළ බවද සාක්ෂිකරු සඳහන් කර ඇත.”

When making the above comment the trial court had taken into consideration the evidence given by witness Senarath Bandula Liyanarachchi against the Appellant but had completely ignored the evidence of the said witness concerning the conduct of the 3<sup>rd</sup> Accused as already referred to in this judgment.

The next matter that was raised before this Court by the learned President's Counsel for the Appellant was the failure of the Trial at Bar to give due consideration to the Medical Evidence placed before the Trial Court. A series of post-mortem inquiries were conducted by several Judicial Medical Officers about the deaths that occurred at Welikada Prison on the 9<sup>th</sup> and 10<sup>th</sup> of November 2012. The post-mortem inquiry into the death of Dewamullage Malith Sameera Perera alias 'Konda Amila' was performed by Dr. Prasanna Bandara Dissanayake. According to the report submitted as P-47 and the evidence of Dr. Dissanayake, the death had occurred due to gunshot injuries, and during the said examination the doctor had observed partly digested rice in the stomach of the deceased.

The Learned Senior DSG representing the Hon. Attorney General at the hearing submitted that the time of death cannot be ascertained by stomach contents and it is only a rough calculation. However, the JMO Dr. Dissanayake who conducted the autopsy on the body of 'Amila' in his evidence opined that under normal circumstances food will digest within six hours after its consumption.

There is no evidence of any circumstances which are not normal to show that the digesting process of the deceased 'Konda Amila' may have delayed.

As revealed before the trial court the last known meal that was served to the inmates of Welikada Prison was before noon of the 9<sup>th</sup> November 2012. As already observed by the Trial at Bar, the next two official meals were due to be served to the prisoners at 5.00 p.m. on the 9<sup>th</sup> of November and after 6.00 a.m. on the 10<sup>th</sup>. If the evidence of Kuda Bandara is believed, the death of 'Konda Amila' occurred after 6.30 a.m. on the 10<sup>th</sup> of November.

The evidence that was placed before the trial court revealed the situation prevailed inside the prisons from 1.45 p.m. on 9<sup>th</sup> November until the morning hours of the 10<sup>th</sup> November. There is evidence of prisoners breaking into the mini armory, kitchen, and pharmacy. These places were ransacked and there was a fight between the prisoners who were armed with weapons and the STF personnel. Gunshots were heard by several witnesses who testified before the Trial at Bar. The army gained access to the prison through the main gate with the cover of two armored cars.

According to the sketch of the Welikada Prison which was marked during the trial, the kitchen and the wards that were occupied by the prisoners were situated on either side of the armored cars

and therefore access was not possible for the inmates of the Welikada Prison to the kitchen area after the arrival of the Army at midnight even if there was a facility to cook meals inside the kitchen.

There is one more important factor that needs to be mindful of by this Court when analyzing the above evidence. According to the post-mortem reports of 7 other deceased persons, there was no stomach contents found in any one of those bodies which confirms the position that none of them had a meal at least 6 hours before their death. This position confirms the fact that no meal was served to the prisoners after the fights began inside the prison. In the said circumstances, a question arises as to how the deceased 'Konda Amila' had a meal after midnight for the doctor who performed the post-mortem examination to find partly digested rice in his stomach contents.

If the evidence of Kuda Bandara was believed with regard to the situation prevailed at Welikada Prison, there was no opportunity for the deceased 'Konda Amila' to prepare or get down a meal for him at the time of his so-called abduction when he was with several hundreds of prisoners kneeling in front of 'Kovil section' of the Welikada Prison. None of the prosecution witnesses who testified before the High Court at Bar had contradicted the above position and therefore it is not possible to conclude that the deceased 'Konda Amila' had an opportunity to have a meal after midnight. On the other hand, there was ample evidence placed before the trial Court, concerning the situation that prevailed inside Welikada Prison when STF personnel commenced their search operation a few hours after the lunch was served to the prisoners on the 9<sup>th</sup> November 2012. The prisoners gained access to the mini armory and took charge of several weapons. Witnesses Kuda Bandara as well as Nanayakkara confirm the position that they took charge of several weapons that were in the hands of the prisoners when STF left the prison premises but some of them refused to hand over the weapons and they too had heard gunshots when the fights commenced between the prisoners and the STF personal. In the above context when deciding the time of death of the deceased 'Konda Amila', the stomach contents found in the dead body play a major role and that will certainly become one of the main deciding factors as to how and when his death had occurred, in the absence of any material before trial court as to how 'Konda Amila' had the opportunity of having a meal after midnight, when the firing continued inside the prison between the prisoners and the Army or for him to have a meal after the situation was controlled by the army and the prisoners were brought before Kovil section and lined up with hundreds of

prisoners. Therefore, it is unsafe to conclude that there was an opportunity for him to have a meal during that time. If the Court were to decide this position, there was a duty cast upon the trial court to ascertain whether there was an opportunity to prepare a meal or to serve a meal on any of the prisoners when there was an ongoing fight between a group of prisoners and the Army troops. None of the witnesses who gave evidence on behalf of the prosecution had explained this to the Trial at Bar.

Apart from the above, there was strong evidence placed before the Trial at Bar by the prosecution as to how the incidents had commenced at Welikada Prison a few hours after the lunch was served to the prisoners on the 9<sup>th</sup> afternoon. This was the last official meal served to the prisoners and when the search operation was objected to by the prisoners, STF personnel used tear gas to control the situation. By this time the mini armory, hospital, and kitchen were attacked by the prisoners and there was firing inside the prison, and some of the prisoners were seen on the roof of the kitchen building armed with weapons. All these things took place within a few hours of serving the lunch to the inmates of Welikada Prison but the Trial at Bar had failed to give its mind to this aspect of the case when analyzing the case against the appellant. When STF could not control the situation, they left the prison premises by about 7.00 p.m. As per the evidence placed before the High Court at Bar, the unrest continued even after the STF left the premises and the situation was finally brought under control around 6.00 a.m. on the 10<sup>th</sup> after the army gained control of the situation.

It is thereafter only the prison officers could inspect the premises and find dead bodies inside the premises.

Among the prosecution witnesses it is only Kuda Bandara who speaks of the abduction of the deceased 'Konda Amila' around 6.00 a.m. on the 10<sup>th</sup> except for the evidence of Nandimal Silva whose evidence had been rejected by the Trial at Bar. Apart from the evidence of Kuda Bandara, the prosecution could not call any prisoner among the several hundreds of prisoners who were kept along with the deceased, to corroborate the evidence of Kuda Bandara, and therefore serious doubt will arise as to the truthfulness of the evidence of the uncorroborated evidence of Kuda Bandara for several reasons namely,

1. The medical evidence clearly contradicts the evidence of Kuda Bandara

2. Kuda Bandara has given evidence implicating the 2<sup>nd</sup> Accused and/or that he saw the abduction of Konda Amila, for the first time after 3 years of the so-called abduction.
3. According to Kuda Bandara Major Alwis of the army platoon attached to the prisons was also involved in the said abduction but no person by the said office and the name was attached to the prisons on that day.

However, the High Court at Bar had failed to give due consideration to the above when the Court considered the medical evidence in its judgment which reads as follows; (pages 63 and 64)

“එබැවින් 2012.11.09 දින සවස 5.00 ට මෙම සිරකරුවන් හට ආහාර ලබා ගැනීමට අවස්ථාවක් තිබේ නොමැති බව තවදුරටත් තහවුරු වේ. කළින් දින සවස 5.00 ට ලැබෙන ආහාර වේල නොලැබේ ඇති අවස්ථාවක ගැවුම්කාරී තත්ත්වය යම් දුරකට සමනය වූ පසු යම් ආහාරයක් සිරකරුවකු විසින් ලබා ගන්නට ඇති හැකියාව බැහැරකළ නොහැක. පැමිණිල්ලේ සාක්ෂි අනුව 2012.11.10 දින පෙ.ව. 6.00 ට පමණ වන විට කුරලිකාර තත්ත්වය බොහෝ දුරට පාලනය වී ඇත. එබැවින් මෙම කොන්ඩ් අමිල යන අයට ඒ අවස්ථාවේදී ආහාර ගැනීමට අවස්ථාවක් තිබේ ඇති බව සාධාරණව නිගමනය කළ හැක.

අධිකරණ වෙවදා නිලධාරී විසින් දුන් සාක්ෂිය සැලකීමේදී ආමාශ තුළ තිබූ ආහාර එම මරණය සිදුවූ වේලාවේ නිවැරදිව නිගමනය කිරීම කළ නොහැකි වුවද යමෙකු ගත් ආහාරය සාමාන්‍ය තත්ත්ව යටතේදී පැය 6 කට පසු සම්පූර්ණයෙන්ම බැහැර වන බව නිගමනය කළ හැක. එහිදී 2 වන විත්තිකරු වෙනුවෙන් ඉදිරිපත් කරන ලද වාචික සැලකිරීම් වලදී අවධාරණය කර ඇත්තේ, සවස 5.00 ට ආහාර ලැබුණා නම්, කොන්ඩ් අමිල යන අය පසුදා උදේ 6.00 ට පමණ රැගෙන ගොස් සාතනය කළේ යයි යන කරුණ මහුගේ ආමාශයෙහි බත් තිබීම මත විය නොහැකි බවයි. නමුත් කළින් සඳහන් කළ කරුණු අනුව 2012.11.09 දින සවස 5.00 ට සිරකරුවන්ට ආහාර දීමට අවස්ථාව තිබේ නොමැති හේතුව මත කොන්ඩ් අමිල යන අය සවස 5.00 ට ආහාර ගෙන ඇත යන්න නිගමනය කළ නොහැක. එබැවින්, කොන්ඩ් අමිල යන අයගේ ප්‍රේරණා මරණ පරික්ෂණය පවත්වන අවස්ථාවේදී මහුගේ ආමාශය තුළ ජීරණය නොවූ බත් තිබීම මත මහු සවස 5.00 ට ආහාර ගත් පසු පැය 6 ක් ගතවීමට පෙර මරණයට පත් වූ බවත්, නිගමනය කළ නොහැක. තවදුරටත් පැහැදිලි කරන්නේ නම්, කොන්ඩ් අමිලගේ ආමාශය තුළ බත් තිබීම මගින් කොන්ඩ් අමිල යන අයට උදේ 6.00 ට පමණ රැගෙන ගොස් සාතනය කළා යැයි යන සාක්ෂිය අස්ථිය සාක්ෂියක් බව තිසි විටෙක නිගමනය කළ නොහැක.”

When reaching the above conclusion, the High Court at Bar had once again ignored and/or failed to consider the fact that the deceased ‘Konda Amila’ was a prisoner who was serving a jail term at that time and had no access to food as his wish. The prosecution has not placed any evidence before the Court to establish whether a meal was served to the prisoners in the morning hours of the 9<sup>th</sup>, before the abduction of the deceased Konda Amila.

The Trial at Bar having ignored the above, had also concluded that..... (Page 96)

..... “එචන් පසුබිමකදී හමුදා මෙහෙයුමෙන් පසුව යම් ලිඛිල් අවස්ථාවක් ලද සැනින් පැය ගණනාවක් තිරාහාරව සිටි අයෙකු කැඩී තිබූ කුස්සියකින් හෝ ආහාර ලබාගැනීම විය හැකි අතර මෙම කොන්ච් අම්ල සිටි ස්ථානයට ආසන්නයේම හෝ ජාරියක් හා මෙම සිද්ධියෙන් අලාභ වූ ආහාර පිළියෙල කරන කුස්සියක් තිබූ බවට සාක්ෂි ඇත. 9 වනදා සවස ආහාර ලබා දීමට යම් ආකාරයකින් කටයුතු එදින දහවල් වන විට සිදුවෙමින් පැවති බවද සාක්ෂිවලින් හෙලිදරව් වී ඇත. එම ආහාර වේල ලබාදීමට නොහැකි වූයේ වි.කා.බ. නිලධාරීගේ පැමිණීම තිසාය. ඒ අනුව පිසු ආහාර එතැන් තිබීමේ ඉහළ ප්‍රවනතාවක් මෙම සාක්ෂිවලින් හෙලිදරව් වේ. ඒ අනුව විත්තියේ මෙම තරකය පදනම් විරහිත බවත් එමගින් කිසිදු සැකයක් පැමිණීල්ලේ නඩුව මත ඇති නොවේ. ”.....

But as already observed in this judgment, there was no material before the Trial at Bar to come to the above conclusion. In this regard, this Court is mindful of the following facts,

- a) The STF officers had entered Welikada a few hours after the lunch was served to the prisoners on the 9<sup>th</sup>
- b) The kitchen was attacked and ransacked during the 1<sup>st</sup> few hours of the unrest situation inside the Prison
- c) The kitchen and the Kovil section were situated at either side of the main gate where the armored cars were parked during the operation
- d) At the time the deceased ‘Konda Amila’ was abducted, he was among several hundreds of prisoners kneeling in front of Kovil section

The learned Judges of the Trial at Bar has erred when they considered the inferences that they should have drawn in favour of the appellants, were drawn in favour of the prosecution.

Whilst raising concerns with regard to the photographic evidence and some of the documents produced on behalf of the prosecution the learned President’s Counsel for the Appellant questioned the evidentiary value of some of the documents produced on behalf of the prosecution. When an objection was raised for the marking of the photocopy of the document said to have been prepared by Jailer Gunawardena during the morning hours of the 10<sup>th</sup> November 2012, marking was permitted subject to certain restrictions.

However, during the trial before the Trial at Bar, the prosecution had failed to produce the original of the document marked P-39. According to the evidence of Jailer Nanayakkara the original of P-

39 was handed over to Prison Superintendent Gamini Jayasinghe by him, but witness Jayasinghe denied receiving the original list by him.

As already observed in this judgment, Jailor Nanayakkara heavily relied on the document prepared by him for the reason that he made a separate note on that document with regard to handing over four weapons to the Appellant when witness Kodippili pulled him up to do so.

The learned President's Counsel for the Appellant took up the position that the Trial at Bar was prejudiced by relying upon a document which was produced before the Court for the first time even without producing the original document and/or without proving the existence of the said document. The fact that the Trial at Bar relied on P-39 about the conduct of the Appellant and witness Kodippili is established from the following passage of the Judgment, (Page 48)

“මෙසේ එම සාක්ෂිකරු විසින් උදෑසන හාරගත් අව් ලේඛනගත කර ඇති අතර ඒ අවස්ථාවේ එම්ල් රන්ජන් නැමැති මෙම නඩුවේ දෙවැනි විත්තිකරු පැමිණ ගිනි අව් 4ක් ඉල්ලා ඇත. 2 වෙනි විත්තිකරු එසේ ඉල්ලා සිටියේ වූවද මෙම සාක්ෂිකරු එය දීමට මැලිබවක් දක්වා ඇත. මේ අවස්ථාවේ කොමසාරිස් ජනරාල් කොච්පිලිද එම ස්ථානයේ සිට ඇත. 2 වෙනි විත්තිකරු එම්ල් රන්ජන් “වෙපන් 4ක් ඉක්මනින් දෙනවා” යනුවෙන් අව් ඉල්ලු බවත් පෙරද කි පරිදි එසේ දීමට අදිමදි කිරීමත් සමග කොච්පිලි මහතා විසින් “අයිසේ වෙපන් වික ඉක්මනින් දෙනවා” යනුවෙන් ප්‍රකාශ කිරීම හෝතුවෙන් සාක්ෂිකරු විසින් අව් 4ක් දෙවැනි විත්තිකරු වෙත හාරදී ඇත. මේ අවස්ථාවේදී කුඩා බණ්ඩාර නියාමක විශේරත්න හා සුබසිංහ යන අයද එහි අවට සිට ඇත. කුඩා බණ්ඩාර විසින් අතින් සංයුතවක් ඒ අවස්ථාවේ කර ඇත. 2 වැනි විත්තිකරු එම අවශ්‍ය එතැනි එතැනි පැමිණී තිලධාරියෙකුට හාරදී ඇති අතර එම අය එකිනී අව් 4 යෙනා ගොජේ ඇත. පැ 39 ලේඛනයේ ඒ අව් ආසන්නයේ සටහනක් යොදා ඇත. ඒ ආසන්නයේ එම්ල් රන්ජන් යනුවෙන් ලියා ඇත.....”

The above position is once again re-produced in the judgment by the Trial at Bar as follows;

“මිට අමතරව ඉදිරිපත් වන අතිකුත් පරිවේෂනිය සාක්ෂි වන්නේ 10 වනදා උදෑසන මෙම දෙවැනි විත්තිකරු අව් ලබාගෙන විවිධ මරණකරුවන් වැට් සිටි ස්ථානවල දමා තිබීම වේ. එනම් කුඩා බණ්ඩාර සහ නානායක්කාර යන සාක්ෂිකරුවන්ගෙන් හෙලිදරවු වන්නේ 2 වැනි විත්තිකරු විසින් නානායක්කාර හාරයේ තිබූ තුවක්කු 4ක් ලබාගත් බවය. පසුව එම තුවක්කු මෙම වෝද්‍යාවන්හි තම් සඳහන් මරණකරුවන් අසල තිබූ හමු වී ඇත. මෙම මරණකරුවන් වැට් සිටි ස්ථාන ගුණවර්ධන නැමැති බන්ධනාගාර නියාමක විසින් ණායාරුපගත කර ඇති අතර එම ණායාරුපගත කිරීම උදෑසන 7.30 ත් 8.00 ත් අතර සිදුකර ඇත. මූලින් ගිනි අව් කිසිවක් මෙම දේහ අසල තිබූ නැති නමුත් ර්ව සුඟ වේලාවකට පසුව ගත් ණායාරුපවල තුවක්කු 4ක් වෙන් වෙන්ව දිස් වේ. ඉදිරිපත් වූ සාක්ෂි අනුව මෙම තුවක්කු 4 හි අංක එදින උදෑසන නානායක්කාර විසින් 2 වැනි විත්තිකරුට ලබා දුන් තුවක්කු වල අංක සමග ගැලීමේ.

ඒ අනුව ඉත් ගමා වන්නේ 2 වැනි විත්තිකරු මැදීහත් වී ලබා ගත් තුවක්කු ර්ට සුලු වේලාවකට පසුව මඟ දේහයන් තිබූ සමහර සේවානවලට ගෙන ගොස් දමා ඇති බවය. මෙම ක්‍රියාවෙන් 2 වැනි විත්තිකරු තුළාග කර ඇත්තේ මෙම වෙඩි වැදි තුවාල සහිතව මිය ගොස් සිටි අය මිය යන අවස්ථාවේ ගිනි අවශ්‍ය වලින් සහ්නද්ධව සිටි බවට ඇගැනීමට මේ. ඒ හැර අන් කිසිදු සාධාරණ අනුමතයක් ඉත් මතුවන්නේ තැනු.”

As further revealed before us the prosecution had produced a photograph said to have been captured by Jailor Gunawardena marked P-40 which is a photograph of the document marked P-39. The main purpose of producing P-40 was to establish the existence of the document P-39. When producing P-40, the prosecution took up the position that the said photograph was captured by Jailor Gunawardena around 06.16 a.m. before the 4 weapons were handed over to the Appellant and therefore P-40 does not contain the separate entry made by Jailor Nanayakkara giving the numbers of the four weapons under the name of “Emli Sir” as appeared in the P-39.

However, it was later revealed that P-40 was captured by a Nikon Camera, but the camera used by Jailor Gunawardena was a Canon Camera and his first photograph inside the prison premises had been taken at 07.07 a.m. As further revealed before the trial court, SOCO officers who visited the prison premises after 08.30 a.m. used a Nikon Camera to take photographs and therefore P-40 was a photograph taken by the SOCO team during their investigation most probably after 08.30 a.m. If this position is admitted, even at 08.30 a.m. or thereafter the controversial entry concerning handing over 4 weapons to the Appellant was not found in P-39, contradicting the evidence given by Jailor Nanayakkara.

If there is a doubt created by the fact that there was no entry made by witness Nanayakkara even at 08.30 a.m., which contradicts his evidence to the effect that he handed over 4 weapons to the Appellant on the 10<sup>th</sup> morning on the request of the Appellant with the interference of witness Kodippili, the benefit of the said doubt should be given the Appellant but, there is no material before this Court to that effect.

The extent to which the Trial at Bar acted on the evidence of witness Kodippili is also a matter that needs to be considered in this Judgment.

There is no doubt that the incidents that took place on the 9<sup>th</sup> and 10<sup>th</sup> of November 2012 were commenced due to the operation carried out inside Welikada Prison by STF personnel. There was no evidence led before the trial court to implicate the involvement of officers from the Prisons Department in the said operation except for the presence of the 3<sup>rd</sup> Accused at the inception of

the operation. The law and order could not be maintained within the prison premises until the Army troops walked into the premises and controlled the situation.

Witness Kuda Bandara had witnessed several incidents that took place in the prison premises after midnight. It is the evidence of witness Nimal Santha that several high-ranking officers met at his official residence within the Magazine Prison and discussed the situation at Welikada Prison. Commissioner General of Prisons Kodippili, Prison Superintendent Magazine Prison (the Appellant), and several others joined these meetings and during the said meeting several matters such as providing assistance to the officers at Welikada Prison and preparing meals for the prisoners at Welikada Prison were discussed and Jailer Kuda Bandara was contacted during that time to ascertain the ground situation at Welikada Prison. One will have to be mindful of this situation when analyzing the evidence of witness Kodippili who was listed as a witness in the back of the indictment but was called by the defence as a witness. Jailer Gunawardena on whose evidence the prosecution heavily relied on, was directed to photograph the prison premises by Kodippli, and the photographs taken by Jailer Gunawardena, resolved several doubts in the prosecution case.

Witness Kodippli's evidence should be looked into, in the above context, and in his evidence he had denied interfering with the work of Jailer Nanayakkara by directing him to hand over 4 weapons to the Appellant, which were already collected from the prisoners but the Trial at Bar had neither accepted nor rejected the said evidence. However as submitted by the learned President's Counsel for the Appellant, the Court had given an interpretation contrary to its true meaning. In this regard, our attention was drawn to the following passage of the judgment by the learned Counsel, (Page 94 of the Judgment)

“.....මෙම විත්තිකරු වෙනුවෙන් කැඳුව කොචිප්පිලි තැමැති සාක්ෂිකරුගේ ස්ථාවරය වන්නේ නානායක්කාර යන අය මෙවැනි අව්‍යාපිත 2 වැනි විත්තිකරුට හාරදුන් අවස්ථාවේ කොචිප්පිලි එසේ හාර දෙන ලෙස බලපැමක් කළ බවට ප්‍රකාශ කරන්නේ එම කළ ක්‍රියාවේ වගකීම යම් ජේජ්ස් නිලධාරියකුට පැවරීමේ අදහසින් බවය. එනම් කෙටියෙන් සඳහන් කළහොත් නානායක්කාර අව්‍යාපිත හාර දීම සිදු කර ඇති නමුත් එම ක්‍රියාවේ වගකීමෙන් බේරිමට කොචිප්පිලිගේ කීම මත එම අව්‍යාපිත 2 වැනි විත්තිකරුට හාරදුන් බවට නිදහසට කරුණක් දක්වන බවය.

ඒ අනුව විත්තිකරුගේ ප්‍රකාශය කොචිප්පිලිගේ සාක්ෂිය සමග එක්ව සලකා බැලීමේ දී පරස්පර හා නොගැලුපෙන තත්ත්වයකට පත්වේ. එනම් 2 වැනි විත්තිකරු අව්‍යාපිත හාර ගැනීමක් හෝ නානායක්කාරගෙන්

ලඛ ගැනීමක් සම්පූර්ණයෙන්ම ප්‍රතිකෙෂ්ප කරන අතර කොචිජ්පිලිගේ ස්ථාවරය වන්නේ නානායක්කාර අව් දැමෙන් පසුව වගකීම කොචිජ්පිලිට පැවරීමට උත්සාහ දරන බවය.”

As submitted before this Court, the evidence of witness Kodippili was never challenged, and as already referred to above he has denied directing Jailor Nanayakkara to hand over 4 weapons to the Appellant. But when the Court specifically questioned the witness about the reason for Jailor Nanayakkara to implicate him, Kodippli answered that Nanayakkara may have said so to get away from his responsibility. Does this mean that witness Kodippli had admitted to giving such instruction? The clear answer to the above is ‘No’ when considering the totality of the evidence of Kodippli.,

It is also observed that the Trial at Bar had completely ignored the fact that witness Kodippili was a witness for the prosecution whose name was found in the list of witnesses. The evidence given by Kodippili was not challenged and contradicted by the prosecution when the prosecution decided to cross-examine him when he was called as a witness for the Defence. In the above context, serious doubt will be created on the evidence of witness Nanayakkara when he said that witness Kodippili directed him to hand over 4 weapons to the Appellant but the Trial at Bar in its’ judgment had not given any reason as to why the Court decided to act on the evidence of witness Nanayakkara as against the evidence of witness Kodippili.

Even though it is not relevant to consider the evidence led before the Trial at Bar, about the involvement of the 1<sup>st</sup> Accused, there is no dispute between the parties that the prosecution had relied on the evidence of several witnesses to establish the charges against all three Accused. In this regard, the prosecution had heavily relied on the evidence of PW2 Kuda Bandara, PW3 Senerath Bandula Liyanarachchi, PW4 Indika Perera, and PW1 Nandimal Perera to establish charges against the 1<sup>st</sup> Accused. Except for witness Kuda Bndara, all the other witnesses were prisoners serving jail terms in the Welikada Prison and the 1<sup>st</sup> Accused was very well known to the said witnesses and some of them were arrested for Narcotic offences by the 1<sup>st</sup> Accused. In their evidence before the Trial at Bar, they identified the 1<sup>st</sup> Accused as the person who abducted some of the deceased persons in their presence.

As per the evidence of Kuda Bandara, he had observed three persons dressed in civil clothing entering the Welikada Prison when the premises were heavily guarded by its outside by several hundreds of STF and Police personnel including a Senior DIG. At the time they entered the Prison

premises, the Army platoons were actively engaged in controlling the riots inside the prison and there was gun firing within the prison premises. The fact that three persons entered the prison premises cannot be ignored in the above context and when inquired from two prison officials in uniform as to who they were, Kuda Bandara was informed by them that one of them was Rangajeewa from Narcotic (1<sup>st</sup> Accused). Thereafter Kuda Bandara had witnessed several abductions with the involvement of the said person who was said to have identified as “නාකොටික් එක් රුගලීව”

The above evidence too had surfaced only after 2015 but no steps were taken by the CID officers who conducted the investigation to hold an identification parade concerning the 1<sup>st</sup> Accused.

As observed by this Court, the Trial at Bar was not prepared to act on the identity of the 1<sup>st</sup> Accused by several witnesses for several reasons such as, dock identity only, identified in difficult circumstances and there was reason to falsely implicate the 1<sup>st</sup> Accused, but decided to act on the evidence of them against the Appellant (except for the evidence of Nandimal Silva as already referred to in this Judgment).

As already observed in this judgment the High Court at Bar had made use of the evidence of witness Senerath Bandula Liyanarachchi against the Appellant by finding evidence to establish the subsequent conduct of the Appellant but rejected the identity made by him with regard to the 1<sup>st</sup> and the 3<sup>rd</sup> Accused. When the Court rejected the evidence given by witness Senerath Bandula Liyanarachchi as against the 1<sup>st</sup> and 3<sup>rd</sup> Accused, the Court failed to explain the reasons for its decision to reject only a part of his evidence and act on the balance.

The Trial at Bar had failed to explain, why they decided to act on the evidence of several witnesses, as indicated above only against the Appellant but rejected and/or was reluctant to act on their evidence with regard to the involvement of the 1<sup>st</sup> and the 3<sup>rd</sup> Accused. In this regard this Court is reminded of the maxim *falsus in uno falsus in omnibus* which is treated as a common law legal principle, that a witness who falsely testifies about one matter is not credible to testify about any matter which was not totally rejected by common law jurisdiction, but applied with restrictions. In the case of **Balaka Singh vs. State of Panjab AIR 1975 SC 162** Indian Supreme Court observed that it is the responsibility of the Court to make an attempt to separate the falsehood in a testimony from the truth in the same way as grain is separated from the chaff. In the case of **Ughor Ahir & Ors vs. State of Bihar AIR 1965 SC 277**, Even though the Court was not prepared to

accept the said maxim as a sound rule, it was observed that the Court has a duty to scrutinize the evidence given by the witness and very carefully separate the falsehood from the truth.

Even though our courts have not totally rejected the application of the above maxim, in the case of ***The Queen vs. V.P. Julis and two others (1963) 65 NLR 505***, Basnayake CJ and Weerasooriya J in two separate judgments acknowledge the acceptance of the above maxim as follows;

As per Basnayake CJ,

“In the instant case there are no circumstances which exclude the application of the maxim and as the sole testimony against the accused is that of these two witnesses, the learned Commissioner’s direction that it was open to them to act on the evidence of Thomis and Windsor against the 4<sup>th</sup> and 5<sup>th</sup> accused in contrary to the maxim. There is nothing that distinguishes their testimony against the 4<sup>th</sup> and the 5<sup>th</sup> accused from their perjured testimony against the 1<sup>st</sup> accused. When the only evidence on which the jury was told they may act is the evidence of admitted perjurers whose testimony even the prosecution does not hold out as true against one accused, it would be wrong for them to convict the other accused on the testimony of the perjurers **unless there is something positive which distinguishes the case of the others**. In the case such as the one before us the proper direction is that it is not open to them to convict on the testimony of the witnesses whom the prosecution itself had admitted were witnesses who had falsely implicated the 1<sup>st</sup> accused.”

(Emphasis added)

As per Weerasooriya J

*“The maxim falsus in uno, falsus in omnibus*, is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. But when such evidence is given by a witness the question whether other portions of his evidence can be accepted as true should not be resolved in his favour **unless there is some compelling reason for doing so.**”

(Emphasis added)

As already observed in this judgment the prosecution had heavily relied on the evidence of witness Kuda Bandara against both the 1<sup>st</sup> and the 2<sup>nd</sup> Accused before the High Court Trial, but when accepting the said evidence, the Trial at Bar was not in favour of accepting the said evidence against the 1<sup>st</sup> Accused. Similarly when analyzing the evidence of witnesses Senerath Bandula

Liyanarachchi and Indika Perera, the Court was not prepared to act on the said evidence against the 1<sup>st</sup> Accused but analyzed favourably the portion of evidence given by them against the Appellant, but as already observed, the Court had failed to consider whether there is any compelling reason to apply the divisible rule and accept their evidence only against the Appellant, when the impugned statement had been given almost three years later giving ample opportunity for them to falsely implicate the accused.

The illegalities already discussed in this judgment are fatal in nature which permits me to answer the questions of law that were raised before this Court in favour of the Appellant, and to set aside the conviction imposed on the Appellant (2<sup>nd</sup> Accused –Appellant) by the Trial at Bar.

Accordingly, the Appeal before us is allowed and the 2<sup>nd</sup> Accused-Appellant is acquitted.

**Judge of the Supreme Court**

**Justice Thurairaja, PC,**

I agree,

**Judge of the Supreme Court**

**Justice A.L. Shiran Gooneratne,**

I agree,

**Judge of the Supreme Court**

**Justice Achala Wengappuli,**

I agree,

**Judge of the Supreme Court**

**Justice Priyantha Fernando,**

I agree,

**Judge of the Supreme Court**