

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

*In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.*

**Court of Appeal No:**

CA/HCC/102/104/18

**High Court of Colombo**

**Case No:** HC/1832/04

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

1. Abdul Hamid Mohamad Aslam
2. Nuwan Rangana Gunasekara
3. Pushpakaran Jeyachandran *alias*  
Achcha *alias* Achchaman

**ACCUSED**

**AND NOW BETWEEN**

1. Abdul Hamid Mohamad Aslam
2. Nuwan Rangana Gunasekara
3. Pushpakaran Jeyachandran *alias*  
Achcha *alias* Achchaman

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General

Attorney General's Department

Colombo 12

**RESPONDENT**

Before : Sampath B. Abayakoon, J.  
: P. Kumararatnam, J.

Counsel : Asela Muthumudalige, Assigned Counsel for the 1<sup>st</sup>  
Accused Appellant  
: Neranjan Jayasinghe for the 2<sup>nd</sup> Accused Appellant  
: Palitha Fernando, P.C. with Ruwan Udawela, Geeth  
Jayasinghe, Kishan Perera and Trimali Kaveesha for  
the 3<sup>rd</sup> Accused Appellant  
: Maheshika Silva, DSG for the Respondent

Argued on : 06-02-2023

Written Submissions : 08-02-2019 (By the 1<sup>st</sup> Accused-Appellant)  
: 30-01-2019 (By the 2<sup>nd</sup> Accused-Appellant)  
: 30-01-2019 (By the 3<sup>rd</sup> Accused-Appellant)  
: 13-05-2019 (By the Respondent)

Decided on : 24-03-2023

**Sampath B Abayakoon, J.**

This is an appeal by the accused appellants (hereinafter sometimes collectively referred to as the appellants) on being aggrieved of their conviction and the sentence by the learned High Court Judge of Colombo.

The appellants were indicted before the High Court of Colombo for causing the death of one Sumith Janaka Fernando on 5<sup>th</sup> November 2001, and thereby committing the offence of murder, punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, the appellants were found guilty as charged by the learned High Court Judge of Colombo of his judgement dated 18<sup>th</sup> May 2018, and accordingly, they were sentenced to death.

**Facts in brief**

PW-02 Anura Lasantha had been the only eyewitness who has given evidence at the trial. He was a fishmonger by trade, and had been walking along a narrow road near a playground in the Nawagampura area when the incident relevant to the charge occurred. He has gone to the area in order to collect some debts and also to pay some money owed by him to another. It was after 9.30 p.m. in the night. He has seen a person being held by two others and another person, whom he has identified as the 1<sup>st</sup> accused appellant, stabbing the person held by the other two. He has then seen the person being stabbed for a second time by one of the other persons who held him.

After the stabbing, all three of them have fled the scene of the crime. He has identified the second accused appellant as the person who stabbed the deceased for the 2<sup>nd</sup> time, while identifying the 3<sup>rd</sup> accused appellant as one of the persons who held the deceased along with the 2<sup>nd</sup> appellant.

According to his evidence, the incident had taken place in front of a boutique near the playground, but the occupants of the boutique had closed it while this

was going on. He has stated that there was adequate light from the streetlights in the vicinity. Initially, he has seen the deceased person leaned against a lamppost just before he was attacked. He has stated that the deceased and his father who came to the scene after the incident, were unknown to him. It has also been his evidence that the police came to the scene of the crime soon after it happened and he pointed out the direction the assailants went to the police. Subsequently, he has seen the 1<sup>st</sup> appellant being apprehended by the police.

At an identification parade held before the Magistrate of Colombo, the witness has identified all three appellants as the persons involved in the crime. He has also identified the two knives produced in the Court as the knives used by the 1<sup>st</sup> and the 2<sup>nd</sup> appellants.

Under cross-examination, the witness has admitted that he was a long time Heroin addict, but has denied the defence suggestion that he is giving false evidence because of the friendship he has with the father of the deceased. It had been his position that he came to know the father of the deceased only after the incident. It was also his position that he did not observe a funeral at a house near the place of the incident. He has denied that the appellants were shown to him at the police station, stating that he saw them only at the identification parade. However, he has admitted that when the police apprehended the 1<sup>st</sup> appellant soon after the incident, he was brought to the scene of the crime by the police.

The next witness of importance in this matter is PW-04 Chief Inspector of Police, Anuradha Mahindasiri. He has been on crime prevention duty along with some other police officers in the Nawagampura area around 21.35 hours on 5<sup>th</sup> November 2001. While on patrol, he has been informed that there is a commotion near a funeral house in the area, and a person had been stabbed.

He had reached the place of the incident soon thereafter, and had found a person with serious stab wounds in front of a shop belonging to one Lalitha.

The place where he found the injured person had been about 50 meters away from a funeral house. He had observed a streetlight about 6 meters away from the shop. One Bernard Fernando has identified the injured as his son, and PW-04 has instructed him to take the injured to the hospital. At the same time, another person called Anura Lasantha (PW-02) has informed him that one of the persons who stabbed the injured person ran away towards a nearby statue. Upon receiving this information, PW-04, along with another police officer, has got into a three-wheeler and gone in pursuit of the attacker.

Although he was not informed of any details of the attacker, when he reached the statue, PW-04 has observed a person attempting to switch on a three-wheeler, which was parked nearby. With the aid of the nearby streetlights, he has observed that the person is covered with blood in his hands and the body. When he pointed the torch he was carrying towards the person, he has observed blood stains in his left foot as well. Further, upon searching the person, he has seen a cut injury in his left-hand index finger. He has also observed him in a panicked state. Accordingly, PW-04 has arrested the person as a suspect of the incident.

The earlier-mentioned Anura Lasantha has informed PW-04 that the arrested person was one of the assailants of the injured. He has identified him in the trial Court as the first appellant.

The prosecution has called the other relevant police witnesses who conducted investigations into the matter and recovered the two knives as part of the investigation.

The Judicial Medical Officer (JMO) who conducted the postmortem has marked the said report as P-06. She has observed thirty cut and stab wounds on the body of the deceased. The defence has admitted the fact that the JMO has observed such injuries on the body in terms of section 420 of the Code of Criminal Procedure Act.

It needs to be noted that the prosecuting State Counsel, at the very commencement of the trial has informed the trial Court that PW-01, who was the father of the deceased had passed away, and had sought the permission of the Court to mark the deposition the said witness has made on 12<sup>th</sup> June 2002 at the Magistrate Court non-summary inquiry in terms of section 33 of the Evidence Ordinance. Accordingly, the Court has allowed the application.

However, after leading the relevant witnesses at the trial, the prosecuting State Counsel has concluded that it was not necessary for him to produce the deposition of PW-01 in terms of section 33 of the Evidence Ordinance and has closed the case for the prosecution.

When called for a defence, the 1<sup>st</sup> appellant has made a statement from the dock and has stated that he is a three-wheeler driver by profession. He has admitted that he was near the funeral house around 9.00 p.m. on the day of the incident. It had been his opposition that while he was there, an altercation commenced amongst the people who were at the funeral house and he was also chased away from that place as a result. He has taken up the position that when he was starting his three-wheeler to go home, the police came and apprehended him and there were no bloodstains on his body or clothes and the police are fabricating evidence against him.

He has claimed that PW-02 was a friend of the deceased's father. It was his contention that he had no connection whatsoever to the incident and was innocent of the charges.

The 2<sup>nd</sup> appellant has given evidence in the Court under oath. It had been his position that the house he and his family members lived was a very small house, therefore, he was in the habit of sleeping for the night in a nearby abandoned house. It was his position that when he was arrested by police, as pointed out by the 1<sup>st</sup> appellant, the 3<sup>rd</sup> appellant who was a friend of him was

also sleeping in the mentioned house. He has denied any involvement to the crime.

The 3<sup>rd</sup> appellant had also given evidence under oath and has maintained the same position as that of the 2<sup>nd</sup> appellant. He has admitted that he was taken to another house where a knife was recovered. However, it was his position that the said knife recovered from that house was a knife used for household work, and it had nothing to do with the alleged incident.

In this matter, as the prosecution has decided not to lead the deposition of PW-01, the defence has taken steps to produce and mark the deposition made by PW-01 at the non-summary inquiry held before the Magistrate Court as 'Y'. What is relevant of this deposition is the fact that the deceased has made a dying declaration to his father at the scene of the crime, before he was taken to the hospital. When questioned as to what happened, the deceased has informed his father that it was Aslam, referring to the 1<sup>st</sup> appellant, who did this to him. The PW-01 has been specific in his deposition that his son did not inform him about any involvement of other persons. In his deposition he has stated that, if it has been recorded as his son informed him that Aslam and two others stabbed in the statement he made to the police, it was wrong.

### **The Grounds of Appeal**

At the hearing of this appeal, the learned Assigned Counsel for the 1<sup>st</sup> accused appellant formulated the following grounds of appeal for consideration of the Court.

1. The conviction of the 1<sup>st</sup> appellant was contrary to the law and against the weight of the evidence led before the trial Court.
2. The learned High Court Judge has failed to take into consideration, the unrealistic and improbable evidence of prosecution witnesses.

3. The learned High Court Judge has failed to apply his judicial mind to the fact that the prosecution has failed to prove the charge beyond reasonable doubt.
4. The learned High Court Judge has failed to properly analyze the defence evidence.
5. The 1<sup>st</sup> accused appellant has been denied of a fair trial since the learned High Court Judge has been prejudiced even before the evaluation of the defence evidence.

The learned Counsel for the 2<sup>nd</sup> accused appellant formulated the following grounds of appeal.

6. The evidence of the sole eyewitness is not safe to be relied upon, as there were several material contradictions in his evidence.
7. The evidence regarding the section 27 statement is suspicious and was unsafe to rely upon.
8. The learned High Court Judge has failed to take into consideration, the evidence that has been given by the father of the deceased (PW-01) in his deposition which favours the appellant.
9. The defence evidence has been wrongfully rejected.

On behalf of the 3<sup>rd</sup> appellant, the learned President's Counsel urged the following grounds of appeal.

10. The learned trial Judge failed to carefully analyze the evidence of the only eyewitness in the light of the infirmities and improbabilities of his evidence.
11. The learned High Court Judge has failed to consider the strong conflicting evidence between the father of the deceased and the only eyewitness for the prosecution.



12. The learned Trial Judge did not carefully consider the medical evidence and has held that the medical evidence corroborated the eyewitness due to a wrong analysis.
13. The learned High Court Judge has failed to consider the fact that the investigating officers had acted in a biased manner and had fabricated evidence against the 3<sup>rd</sup> appellant.
14. The learned High Court Judge has failed to consider that the mode of identification of the 3<sup>rd</sup> appellant by the eyewitness was doubtful, in its correct perspective.

It was the position of the learned Counsel for the 1<sup>st</sup> appellant that PW-02 who was supposed to be the only eyewitness is not a credible witness for several reasons. It was pointed out that, admittedly, he was a Heroin addict and may have had the tendency to fabricate a story with the intention of receiving favours from the law enforcement authorities. Pointing to several instances of his evidence, which he termed as contradictory to each other, it was his position that PW-02 has stated that the deceased person and his father were unknown to him. However, at a later stage of his evidence, he has stated that he speaks to the father when he meets him. It was also shown that at the postmortem, PW-02 was one of the persons who have identified the body of the deceased as a neighbour of him.

Furthermore, it was stated that PW-02 has given evidence to say that he did not see a funeral house near the place of the incident, however PW-04, the police officer who reached the place soon after the incident has clearly stated that there was a funeral house about 50 meters away. It was the position of the learned Counsel that even as to the time where he has made his statement to the police, he has been contradictory. At one stage of his evidence, he has stated that he made the statement on the same night, but later he has stated

that it was in the morning of the following day, and yet again, later in his evidence has stated that it was in the afternoon at 3.30 p.m.

Referring to the prosecution's failure to mark the deposition made by PW-01 at the non-summary inquiry even after informing the Court that it would be so marked, it was the position of the learned Counsel that it was not done because, if marked, it would have further established that PW-02's evidence was not reliable. The learned Counsel contended further, that the learned High Court Judge has believed the evidence of PW-02 at the very commencement of his judgement and even before he considered the evidence led on behalf of the defence. It was his view that this approach of the learned High Court Judge has denied a fair trial towards his client.

It was the submission of the learned Counsel for the 2<sup>nd</sup> appellant, that the 2<sup>nd</sup> appellant was arrested by the police while he was sleeping in a house where the 3<sup>rd</sup> appellant was also sleeping. It was his position that although the police witnesses say a weapon was recovered upon his statement, the appellant never gave such a statement nor was he allowed to read the statement before he was asked to sign. It was also his position that the 2<sup>nd</sup> appellant was shown to PW-02 and that was the reason why he identified him at the identification parade. The stand taken up by the learned Counsel to argue that the evidence of PW-02 was not credible, was that he was never an eyewitness to the incident, but because he was a friend of the father of the deceased, he volunteered to give evidence, and he has been coaxed by the police to implicate the 2<sup>nd</sup> appellant.

He pointed to the evidence where PW-02 who has stated that when the stabbing took place, the deceased was leaning against a lamppost, and to the place where the deceased was found injured in front of a shop nearby. It was his position that this discrepancy shows that the witness has not seen the incident and there exist a serious doubt in that regard. He contended that this discrepancy has not drawn the attention of the learned High Court Judge.

It was also the position of the learned Counsel that although the witness PW-02 has claimed that he did not know the deceased's father, the evidence points otherwise, and it was his contention that they were well known to each other. It was also contended that the witness PW-02 has admitted that he went to the police station around 10.30 a.m. on the following day and by that time, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were in police custody. It was his position that they were shown to the witness at the police station enabling him to identify them at the identification parade. It was also his position that police evidence had been contradictory in this regard.

It was the position of the learned Counsel that in the evidence, it has been stated that the 2<sup>nd</sup> appellant was taken to the place of the incident around the same time where the inquest was also held by the Magistrate. Hence, there was a strong possibility of PW-02 seeing the 2<sup>nd</sup> appellant before the identification parade. It was his position that since PW-02 was not a cogent witness, his evidence should not have been accepted without sufficient corroboration.

It was pointed out to the dying declaration made to PW-01 where the deceased has mentioned only the name of the 1<sup>st</sup> appellant as the person who stabbed him. It was his position that given the contradictory nature of the evidence, it would be unsafe to allow the conviction of the 2<sup>nd</sup> appellant to stand.

It was pointed out further that the learned High Court Judge in his judgement has considered the contents of the statement made by the accused to the police as substantive evidence and thereby had misdirected as to the relevant law.

Agreeing with the submissions of the learned Counsel representing the 1<sup>st</sup> and the 2<sup>nd</sup> appellant, it was the position of the learned President's Counsel on behalf of the 3<sup>rd</sup> appellant that, since the learned High Court Judge has rejected the dying deposition of PW-01, the case has been determined solely relying on the evidence of the supposed only eyewitness. It was his position

that although evidence of a solitary witness can be relied upon to a prove a case, it can be done only if that witness was cogent and trustworthy.

The learned President's Counsel contended that the learned trial Judge has failed to give adequate reasons as to why he is accepting the evidence of PW-02, given the discrepancies in his evidence. It was his position that PW-02 was a witness planted by the police to establish their case, and it was highly doubtful whether any witness could identify the knife or knives used to commit the crime under the light conditions that existed, and given the facts and the circumstances.

He too pointed out the possible reasons as to why the prosecution who initially wanted to produce the deposition made by PW-01 at the non-summary inquiry as evidence, later decided not to do so, because, if produced, it would have been detrimental to the prosecution case.

The learned Deputy Solicitor General (DSG) representing the Hon. Attorney General submitted that a witness being a Heroin addict is not a reason by itself to doubt his evidence. She cited what was stated by **Anil Gooneratne, J.** in the case of **C. A. Sisira Bandula alias Mahathun Vs. The Attorney General CA 122/2006 decided on 09-10-2014** to support her contention.

It was her position that PW-02 was a credible and trustworthy witness, and there had been no acceptable issues raised as to the credibility of his evidence at the trial. It was her position that PW-02 has been consistent in saying that he did not know the deceased and his father before the incident, and later in his evidence saying he speaks to the father, cannot be interpreted to say that the witness had not been truthful in that regard.

Referring to the identification of the deceased at the postmortem, it was her position that PW-02 has identified the body as the person who was stabbed at the incident.

It was submitted by the learned DSG that the rejection of the PW-01's deposition to Magistrate Court led in terms of section 33 of the Evidence Ordinance was correct, although the approach that led to the conclusion to reject such evidence by the learned trial Judge may be wrong.

It was contended that the postmortem report has indicated that there had been 16 stab wounds as well as 12 cut injuries on the body of the deceased, which supports the evidence of PW-02 that several persons were involved in this attack. It was her position that the evidence led to establish the recovery of the murder weapons had not been properly challenged by the appellants at the trial. It was her argument that there can be no basis to the argument that PW-02 has not seen the incident, given the distance from the lamppost to the place where the deceased was found injured.

The learned DSG took up the position that the evidence adduced against all three appellants at the trial Court has been strong and cogent, and the evidence against the 1<sup>st</sup> appellant had been much stronger, given the fact that the evidence of PW-02 had been well corroborated by the other evidence adduced before the trial Court.

### **Consideration of the Grounds of Appeal**

Although 14 grounds of appeal were raised by the learned Counsel on behalf of the three appellants, I would now proceed to consider them taken as a whole, since most of the grounds urged are similar, and interrelated.

At the very outset, it needs to be mentioned that I am in no position to agree with the contention that PW-02 was an unreliable witness because he was a Heroin addict, and he may have come forward as a witness expecting favour from the authorities.

As appointed out correctly by the learned DSG, even a Heroin addict or any other witness who may have a bad record, need not necessarily be treated with

suspicion unless there is material to conclude that such a witness was not credible and trustworthy.

As pointed out correctly, in the case of **Sisira Bandula alias Mahathun Vs. The Attorney General (Supra)**, where a drug peddler's evidence given on behalf of an accused had been rejected by the learned trial Judge, it was held at page 21 of the judgement,

**Per Anil Gooneratne, J.**

*“I find a total misdirection of the Trial Judge at folios 420-419 where Tarzan’s testimonial trustworthiness had been analyzed and rejected. The basis of rejection has been summarized by the Trial Judge as regards Tarzan. It is stated that witness Tarzan is a drug peddler. He has consumed drugs for over 15 years. He daily consumes drugs. (Twice a day) Tarzan has been convicted by a Court of law for possession and trafficking, etc. These are items of evidence admitted into the evidence of Tarzan. It is a misdirection of law to conclude that he is an untruthful witness on account of above. There is no denial by Tarzan of above. Trial judge states that a person in the caliber of Tarzan, who is a drug addict and such evidence is untrustworthy of credit when he is called upon to give evidence on behalf of another drug trafficker or drug peddler. Trial Judge’s view is that Tarzan has a distorted mind is on one hand unsupported by medical evidence. TC has failed to analyze Tarzan’s evidence in an unbiased manner and without importing personal knowledge of the witness and as such it cannot be a good ground to reject his testimony in Court. A witness can be rich, poor, disabled, person convicted of an offence, suffer mental disability during lucid periods, person of young age etc. what is important is not the character- position but the evidence that transpires in Court is trustworthy or has credence or not. Whatever the person is, can the Court rely on the evidence led in Court and not based on his position in life.”*

It was the submission of the learned Counsel that PW-02 cannot be considered a credible witness because of several contradictory positions taken up by him while giving evidence. It was pointed out that in his evidence, PW-02 has claimed that the deceased person was unknown to him as well as his father. It has been the position of the appellants that they were well known to PW-02 and since the deceased's father was a close friend, and it was at the instigation of the father, the PW-02 is giving evidence to claim that he saw the incident.

It is clear from the evidence of PW-02 when taken as a whole, he has been consistent in saying that the deceased and his father were unknown to him. Although he has been cross-examined at length on this, he has maintained his position right throughout. Nearing the conclusion of his cross-examination, while answering a question, he has stated that when he goes to sell fish, he speaks to the father when seen.

The relevant question and answer read as follows:

පර : තමන් රාත්‍රී කාලයෙන් ඉන්නේ මේ බරනාඩ් එක්ක නේද ?

උ : නැහැ. මාළු විකුණන්න යන ගමන් දැක්කම කතා කරනවා.

The witness has given evidence some eight years after the incident. It is clear from his evidence what he has stated was that the deceased and the father was unknown to him at the time of the incident. The line of cross-examination which led to the answer reproduced above shows that the questioning has been as to the status of the relationship between him and the father of the deceased at present, that means during the time he faced the cross-examination. It is clear that the witness has built up a relationship with the father of the deceased as a result of this incident, and him being involved as a witness. That may be the reason why he has stated that when he meets the father of the deceased, he used to talk with him. I do not find anything contradictory in the stand taken up by PW-02 in that regard.

When it comes to the fact that it was the PW-02 who has identified the body of the deceased along with the father before the postmortem, I find no reason to consider it as a fact that leads to a conclusion that the deceased, his father and PW-02 were known to each other. If one looks at the relevant evidence in its correct perspective, it can be seen that the witness has been present from the time of the incident and even at the postmortem. It is clear from his evidence that before the JMO, he has come forward to identify the body as the person who was injured during the incident. Although the JMO has stated that he was a neighbour, there is no material before the Court to conclude under what circumstances the JMO has stated so.

I do not find it as a reason to lower the credibility of the evidence of PW-02. Further, saying in his evidence that he did not see a funeral house is also not a reason to doubt the credibility of the witness. It may well be he was telling the truth when he stated so in his evidence. According to his evidence, what he had seen first was the incident where the stabbing took place. Obviously, as a result, there had been a commotion where several others have gathered. The police too have come to the scene soon thereafter. It may well be that the incident has overwhelmed the witness. Under the circumstances, his failure to observe a funeral house some 50 meters away is quite understandable in my view.

Giving evidence in Court, while stating that the deceased was standing near a lamppost when the attack took place, he has also stated that this happened in front of Lalitha's boutique, and as soon as this incident took place, the boutique was closed. According to the police evidence, the distance between the lamppost and the place where the deceased was found fallen with bleeding injuries was six meters. I am unable to agree that this was a material contradiction under these circumstances.



The learned High Court Judge has well considered this fact in his judgement and has come to a finding that this do not create a doubt as to the evidence of PW-02, for which I have no reason to disagree.

The learned Counsel in the submission before this Court contended that the appellant has given various times, as to when he gave his statement to police. He has stated that he went to the police station after the incident around 10.30 in the night and made a statement. However, it is clear from the police evidence that his statement has been recorded at 3.30 a.m. on the following day. I do not find any discrepancy in that, because it may well be that when the witness went to the police station, he has narrated what happened, but his statement may have been recorded only at 3.30 in the morning.

In this matter, although I find no credibility issues in the evidence of PW-02, I find, the Turnbull guidelines enunciated in the case of **Regina Vs. Turnbull (1977) QB 224** should have also been considered in the analysis of PW-02's evidence, since a person who is convinced that he saw and identified the persons, may still be wrong given the facts and the circumstances.

The said Turnbull guidelines require a trial Judge to be mindful that;

- *Caution is required to avoid the risk of injustice.*
- *A witness who is honest may be wrong even if they are convinced, they are right.*
- *A witness who is convincing may still be wrong.*
- *More than one witness may be wrong.*
- *A witness who recognizes the defendant even when the witness knows the defendant well may be wrong.*

A judge should also examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include;

- The length of time the accused was observed by the witness.
- The distance the witness was from the accused.
- The state of the light.
- The length of time elapsed between the original observation and the subsequent identification to the police.

The case of **Sigera Vs. The Attorney General (2011) 1 SLR 201** was a case the question of the identity of the accused had been discussed. It was held:

*“The identification was not in a difficult circumstance or in a multitude of persons in a crowd or in a fleeting moment. To apply the Turnbull principles, the identification had to be made under difficult circumstances. In this case, although the incident took place during night, there was ample light shed by the bulb of the lamppost that was burning. There was no congregation of multitude of persons in a crowd but only the accused appellant and the deceased. In order to inflict the injuries on the deceased, the assailant had to come very close to the deceased.”*

In the incident where the PW-02 has seen the stabbing, the evidence establishes that it has happened within a very short period of time and the PW-02 has had a very little time to observe.

Under the circumstances, it is my considered view that it was necessary for the trial Court to look for some kind of corroboration of the evidence of PW-02.

The evidence led in this action shows that the police have arrived at the scene of the crime soon after the incident and it was the PW-02 who has shown the direction where the assailants had fled. Police officers have been able to apprehend the 1<sup>st</sup> appellant while he was attempting to switch on a three-wheeler parked nearby, presumably to flee the area. When he was stopped by the police, he was having blood on his body as stated in the evidence, and even

had a cut injury in his index finger. This establishes a strong corroboration of the evidence of PW-02 as to the involvement of the 1<sup>st</sup> accused of the crime.

When a defence was called, the 1<sup>st</sup> appellant has made a dock statement and has claimed that he was at the funeral house nearby, where there was a clash between some parties, and when he was attempting to leave the place of the clash, he was arrested.

I find that the 1<sup>st</sup> appellant has failed to put this position to PW-02 when he gave evidence. The police officer who reached the place of the incident soon after the stabbing and arrested the 1<sup>st</sup> appellant, he has stated in his evidence that the first information they received was about a clash at a funeral house in the area. However, the police evidence is clear that there had been no clash at the funeral house, but the information relates to the place where the deceased was attacked.

It appears that the claim of a clash at the funeral house was an afterthought by the 1<sup>st</sup> appellant in order to match his defence with the police evidence. However, he has failed to explain the blood found on his body and even the cut injury received by him. In view of the fact that there had been no clash other than the incident where the deceased received injuries, the only irrefutable conclusion would be that the 1<sup>st</sup> appellant was one of the persons who caused injuries to the deceased.

I am of the view that these established facts have provided sufficient corroboration of the evidence of PW-02 in relation to the 1<sup>st</sup> appellant's involvement in the crime.

Although the learned High Court Judge has decided to not to act on the deposition by PW-01 who was the father of the deceased made at the non-summary proceedings before the Magistrate Court for a different reason, I am in no position to agree with the conclusion reached in that regard. In this matter, at the very commencement of the trial, the prosecution has sought the

permission of the Court to lead the deposition made by PW-01 before the Magistrate Court in the non-summary proceedings since PW-01 was dead at that time, which the Court has allowed. However, the prosecution has later decided not to produce the relevant evidence. The defence has decided to produce that piece of evidence when the appellants were called upon for a defence.

In his deposition before the Magistrate Court, PW-01 has spoken about a dying declaration made to him by the deceased at the scene of the crime. According to police evidence, when the police arrived soon after the incident, the deceased was alive and in pain. Hence, I find that when the father says he spoke to his son, and asked what happened, that evidence needs to be taken as credible, since any natural reaction of a parent who sees his or her son with serious cut injuries would be to ask what happened.

According to the father's deposition, the deceased has stated it was Aslam who attacked him, which amounts to a dying declaration made by the deceased as to the cause of his injuries which led to his ultimate death. I am of the view that when the evidence against the 1<sup>st</sup> appellant taken as a whole, this also has provided sufficient corroboration of what the PW-02 says as to what he saw, in relation to the involvement of the 1<sup>st</sup> appellant to the crime.

However, I am unable to say the same with regard to the evidence against the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants. The only evidence against them is the evidence of PW-02 who says that they were also involved in the attack on the deceased. As I have already decided that although the evidence of PW-02 can be considered credible, there should be corroboration of his evidence in relation to the involvement of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants as well, for the Court to act on the evidence.

In his deposition before the Magistrate Court non-summary inquiry, PW-01 has been clear that what his son told him was only about the 1<sup>st</sup> appellant and

nothing about the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. It appears from the judgement that the learned High Court Judge has decided not to act on his deposition because of the discrepancy that has been brought to the notice of the Court. When PW-01 was examined in the Magistrate Court in relation to the statement he made to the police, where he has referred to Aslam and two others as what was stated by his son to him. The father has categorically denied that he has stated to the police about two others. If taken as it is, the evidence of the PW-02 in relation to the involvement of the 2<sup>nd</sup> and the 3<sup>rd</sup> appellant would create a doubt as to whether he was correct in involving the 2<sup>nd</sup> and the 3<sup>rd</sup> appellant as well, to the incident.

Considering the guidance provided by the Turnbull principles, I am of the view, if taken in the correct perspective, although PW-02 may be correct to think what he saw was the involvement of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, the dying declaration of the deceased to his father would not provide supportive evidence in that regard.

When there is evidence that can be interpreted in different ways, the interpretation that favours the accused person should be preferred.

In the case of **Alim Vs. Wijesinghe, S.I. Police Batticaloa, 38 CLW 95**, it was held that; where the same facts are capable of inference in favour of the accused and also of an inference against him, the inference consistent with his innocence should be preferred.

I am of the view that there had been no corroboration of the evidence against the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and in view of the dying declaration which had been admitted in terms of section 33 of the Evidence Ordinance, it was not safe for the learned High Court Judge to conclude that the charges against the 2<sup>nd</sup> and 3<sup>rd</sup> appellants had been proved beyond reasonable doubt.

For the reasons as adduced above, I find merit in the grounds of appeal urged on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

Accordingly, I set aside the conviction and the sentence imposed against them and acquit them of the charge preferred against them.

For the reasons as stated above, I find no merit in the grounds of appeal urged on behalf of the 1<sup>st</sup> appellant, hence, his appeal against the conviction and the sentence is hereby dismissed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal