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

In the matter of an Appeal from the order and the sentence of the High Court of Kalutara dated 05.08.2022 in HC 201/2010 made in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979.

Court of Appeal No:

CA/HCC/0148/0150/2022

High Court of Kalutara

Case No: HC/201/2010

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. K. A. D. Bandula Hemakumara
2. B. A. D. Nandarathna Abegunawardena
3. M. Vijith Ashoka *alias* Mahinda

ACCUSED

AND NOW BETWEEN

1. K. A. D. Bandula Hemakumara
2. B. A. D. Nandarathna Abegunawardena
3. M. Vijith Ashoka *alias* Mahinda

ACCUSED-APPELLANTS

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anuja Premaratne, P.C. with Ishan Madhawa and V. Ramayage for the Accused Appellant

: Wasantha Perera, DSG for the Respondent

Argued on : 11-07-2023

Written Submissions : 10-04-2023 (By the Accused-Appellants)

: 05-07-2023 (By the Respondent)

Decided on : 10-10-2023

Sampath B Abayakoon, J.

The three accused appellants (hereinafter sometimes referred to as the appellants) were indicted before the High Court of Kalutara for causing the death of one Kingsley Abegunawardena on 8th June 2007 at a place called Agalawaththa, and thereby committing an offence punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, the learned High Court Judge of Kalutara by his judgement dated 05-08-2022 found all three appellants guilty of the charge preferred against them, and they were sentenced to death accordingly.

Being aggrieved of their conviction and the sentence, the appellants preferred this appeal challenging both the said conviction and the sentence.

Facts in Brief

PW-01 Sriyani was the wife of the deceased Abeygunawardena. In her evidence before the trial Court, she has testified that, on the day of the incident, namely 07-06-2008, her husband came home around 09.00 p.m. after attending a party that was held at a house of a neighbour. At that time, her husband was accompanied by his brother Vijith Kumara and he was drunk. Vijith Kumara has informed her that the deceased had an altercation with one Bandula at the party and the deceased slapped the said Bandula as a result. The mentioned Bandula was also a neighbour and well known to the witness.

When her deceased husband came home, the witness and her two children were at sleep inside the room of the house. The deceased, without sleeping in the room, has gone to the living area and slept there on the floor. The house had no electricity, and at that time they had a kerosene lamp and a torch with them. The house had no doors or windows except for the door in the room where they used to sleep.

According to her evidence, while she was fast asleep, she heard a sound like somebody hitting a sack of flour towards the living area of the house. Although she was not sure of the time, she states that it was around 01.00 a.m. After hearing the sound, PW-01 has taken the torch she had with her and gone out of the room to the living area. She has seen Bandula, the person referred to by the brother of the deceased near the place where her husband was sleeping and when he saw her, he had an iron rod with him and left the place while uttering filth. She has observed her husband with a bleeding head injury, and he was unresponsive.

At the same time, she has seen two persons she identified as Podi Maama and Mahinda outside of the house near the window, who are also well known to her.

She has stated in her evidence that she saw a Manna knife with the person she identified as Podi Maama and a club with Mahinda.

In Court, she has identified the 1st accused appellant as Bandula, and the 2nd accused appellant who is also a relative of the deceased as the person whom she referred to as Podi Maama and has identified him as Nandana Abeywardena. She has identified the 3rd accused appellant as the person referred to as Mahinda. It has been her evidence that she saw the 2nd and the 3rd accused appellants from a distance about five-six feet away. After the appellants left the scene, the witness has raised her cries and the villagers who gathered have taken steps to take the deceased to the hospital where he was pronounced dead.

While she being subjected to cross-examination on behalf of the appellants, the defence has marked a contradiction as V-01 where the witness has stated when she gave evidence before the Magistrate's Court of Mathugama, that she could not see the place where the husband was sleeping from the room, whereas, she has stated in her evidence before the trial Court, that she could see the place where her husband was sleeping.

She has maintained the position that although there was a kerosene lamp in her house, when her husband went to sleep, it was lit off and the torch they had was with her. However, the defence has marked a contradiction in that regard in her evidence before the learned Magistrate of Mathugama in the non-summary inquiry where she has stated that her husband took the torch from her and went to sleep. This contradiction has been marked as V-02.

Before the trial Court, she has maintained the position that the torch was with her throughout and she identified the appellants with the aid of the torch she had with her.

The defence has brought to the notice of the Court that in her initial statement to the police, PW-01 has failed to mention that the 2nd accused appellant had a Manna knife and the 3rd accused appellant had a club with them when she saw them in that night as omissions in her statement.

In her evidence before the Magistrate Court, she has stated that the 2nd and 3rd accused appellants were seen in the garden, whereas, she has denied that she said so before the trial Court, and had stated that they were near the window but outside of the house. The contradictions marked V-03 and V-04 are in that regard.

In the police statement made by the witness, she has stated that the other two, referring to the 2nd and 3rd accused appellants, were bare-chested at that time but before the learned Magistrate, she has stated that the 3rd accused appellant was wearing some white dress. In the trial Court, she has stated that the 3rd accused appellant was wearing a white vest. The said contradiction has been marked as P-05.

The witness has maintained the position that her husband had no injuries when he returned home from the party. At the inquest held in that regard, the witness had stated that she observed a bleeding injury on the left side of her husband's head. However, at the trial, her evidence has been that the injuries she observed were on the right side of the head. The contradiction marked V-06 was in that regard.

The defence has taken up the position that the witness is giving evidence of something which she did not see and was lying, which the witness has denied stating that she is telling about what she saw at the time of the incident.

PW-02 Vijith Kumara Abeywardena is the brother of the deceased who has revealed what happened at the party where the deceased had an altercation with the 1st accused appellant. There had been several persons attending the party in relation to an attaining of age of a daughter of one of their relatives. While at the party, he has overheard the 1st accused appellant stating to Podi Maama who is the 2nd accused appellant "කතිර මල්ලි ගේමක් ඉල්ලනවා" referring to his deceased brother. Thereafter, he has seen his deceased brother pulling the 1st accused appellant from his collar and slapping him. The persons who were there had

separated the two, and the 2nd accused appellant had uttered the words "ඔබාල උදේට හොඳවෙයි".

After the incident, he has accompanied his brother to his house and informed his wife what happened and returned home which was nearby. Around midnight, he has heard the wife of his deceased brother screaming, and when he reached, his brother's house he had seen his brother in the living area with a bleeding head injury and he was unresponsive.

PW-05 and PW-06 are the police officers who had conducted the investigations into the incident, and according to their evidence, no productions had been recovered and the accused appellants have surrendered subsequently.

According to the evidence of the Judicial Medical Officer (JMO) who conducted the post mortem of the deceased, he has observed three injuries on his body. The 1st injury was a laceration towards the back right side of the head, which has caused a fracture in the base of the skull and middle cranial fossa. The 2nd injury had been stab wound to back of the mid chest and the 3rd was a linear abrasion below the 2nd injury.

He has opined that the 1st injury can be caused using an iron rod and the cause of death was the injuries caused to the skull and the brain. According to the Government Analyst Report marked P-02, alcohol has been identified in the blood samples sent by the JMO for analysis, which is indicative that the deceased was intoxicated at the time of his death.

At the conclusion of the prosecution evidence and having considered the evidence placed before the Court, the learned trial Judge has decided to call for a defence from the appellants.

All three of them had made brief statements from the dock and had denied any involvement in the incident claiming that they were unaware of the incident.

The learned trial Judge in his judgement has found that the evidence of the only eyewitness, namely, PW-01 was credible and trustworthy and had determined

that she has identified all three accused appellants at the time of the incident. It has been determined that the evidence has established that all three were acting with the common intention of killing the deceased at the time of the incident. The learned High Court Judge has found a clear connection between the words uttered by the 2nd accused appellant when the deceased slapped the 1st accused appellant, and the subsequent incident where the deceased was attacked, as indicative of the common intention.

It has been determined that the contradictions marked and the omissions stated do not go into the root of the matter and the said contradictions and the omissions had not caused a doubt in relation to the evidence of PW-01.

It was on that basis the accused appellants had been found guilty as charged.

The Grounds of Appeal

The following grounds of appeal were urged by the learned President's Counsel on behalf of the appellants.

1. Did the learned High Court Judge erred in not considering the limited time that PW-01 had to observe the incident.
2. Did the learned High Court Judge erred in not considering the light available for PW-01 to observe the incident said to have been seen by her.
3. Did the learned High Court Judge erred in not considering the state of mind of PW-01, especially as she states that she observed the incident upon being woken up from a deep sleep.
4. Did the learned High Court Judge erred in not considering in favour of the accused, the omissions and contradictions in the evidence of PW-01.
5. Did the learned High Court Judge erred in not considering that the evidence with regard to the 2nd and 3rd accused reveals a mere presence.

6. Did the learned High Court Judge err in considering the words uttered by the 2nd accused "බොල උදේට හොඳවෙයි" as being words indicating an animosity against the deceased.

It was the submission of the learned President's Counsel that there was a high improbability of PW-01 identifying the assailants as claimed by her under the given circumstances revealed in evidence. It was his position that after suddenly awakened from a deep sleep, she could not have identified the appellants properly by the use of a torch as claimed by her. It was his position that her identity of the 2nd and the 3rd accused is highly improbable given the distance she says she saw them and due to the darkness, that prevailed at that time.

He pointed out to the contradictions marked in that regard, and the omissions pointed out, as clear indications of the uncertainty of evidence as to the identity of the accused by the witness. He further pointed out that the contradiction whether she in fact had a torch with her at the time of the incident creates a sufficient doubt whether she was able to identify any of the accused appellants, and was of the view that these are matters that can be considered as contradictions and omissions that goes into the root of the matter, which should have been held in favour of the appellants.

It was his position that the words allegedly uttered by the 2nd accused appellant previously to the incident cannot be reasoned out as a motive and common intention as decided by the learned High Court Judge.

The learned President's Counsel also contended that although there was a stab injury on the deceased, PW-01 has only claimed that she saw an iron rod in the hands of the 1st accused appellant and the learned trial Judge has connected that injury to the alleged carrying of a manna knife by the 2nd accused without any basis.

It was his submission that the given deficiencies in the evidence should have been considered in favour of the accused appellants and urged the Court to

acquit them on the basis that the prosecution has failed to prove the charge against them beyond reasonable doubt.

The learned Deputy Solicitor General (DSG) on behalf of the respondents submitted that the learned High Court Judge has considered whether the only eyewitness had properly identified the accused appellants. It was his position that the mentioned contradictions and omissions do not go into the root of the matter as correctly considered by the learned High Court Judge. He contended that the evidence of PW-01, where she states that she had the torch was credible, given the totality of the evidence. It was his position that there exists no reason to doubt the eyewitness evidence under any circumstances.

He brought to the notice of the Court the behaviour of the appellants subsequent to the incident where they have fled the area and the fact that the 1st and the 2nd accused appellants surrendered to the Court 10 days after the incident, as a relevant matter that needs to be considered by the Court.

The learned DSG moved for the dismissal of the appeal and to affirm the conviction and the sentence.

Consideration of the Grounds of Appeal

As the 1st three grounds of appeal urged are interrelated and based on the premise that the PW-01 has failed to properly identify the persons who came to the house at the time of the incident, the said grounds of appeal will be considered together.

It is an admitted fact that this is an incident that happened during the night and PW-01 was the only eyewitness to the incident. As considered above, she was in deep sleep at the time when she heard a sound of something being beaten. She has gone out of the room as a result, and has seen the 1st accused appellant in front of her husband who was sleeping in the living area of the house. It has been her evidence that she was able to identify the 1st accused appellant and the 2nd and the 3rd accused appellants from the light emanating from the torch she

was carrying. The fact that all three appellants were well known to PW-01 was not a disputed fact and there was no other source of light at that time was also not disputed.

Identification of a person under such circumstances has been well considered in the case of **Regina Vs. Turnbull (1977) QB 224** often referred to as Turnbull guidelines.

The said 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 maybe wrong.*

Some of the circumstances a judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- *The length of time the accused was observed by the witnesses.*
- *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.*

The case of **Sigera Vs. The Attorney General (2011) 1 SLR 201** was a case where the question of the identity of the accused was considered. 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."

Having considered the above legal principles, it is my considered view that in a case of this nature, the trial Judge will have to consider not only the evidence of the witness who claims that he or she was able to identify the accused, but also the other attendant circumstances to conclude whether such evidence can be credible and trustworthy.

In the case of **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48**, it was held:

"While appreciating the evidence of a witness the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."

I am not in a position to accept the contention that the contradiction marked V-01 where there was a contradiction as to the fact whether PW-01 could see the place where her husband was sleeping from her room as a material contradiction. The evidence of the witness had been that, she did not see the husband being assaulted and only saw the 1st accused appellant in front of her husband who was sleeping on the floor of the house with an iron rod in his hand.

The contradiction marked V-02, which relates to the fact whether the torch was with her when she came out of the room was based on her evidence during the non-summary proceedings that her husband took the torch. However, when giving evidence in Court, she has given clear evidence that the torch was with her and the husband went to sleep in the living area after coming home drunk during that night. I find her evidence that it was she who had the torch very much acceptable as she was the one sleeping with the children and who may need it during the night

When it comes to the evidence presented before the trial Court in relation to the question of identity, it can be said that the PW-01 had a very brief moment to observe and identify the accused appellants.

This is a house where there was no electricity and no doors or windows except for the door of the room where PW-01 and children were sleeping. Under the circumstances, I do not find any reason to doubt her evidence that she had a torch with her although she must have stated otherwise during the non-summary inquiry. Her evidence taken in its totality clearly establishes the fact that it was from the aid of the torch she had identified the persons who came to the house. Although it was nighttime, I am of the view that for a person well adapted to living in such conditions, a light emanating from a torch would be a sufficient source for clear identification of a person. Her evidence was that when she saw the 1st accused appellant he was few feet away from her inside the house and near her husband. She has observed the husband with a head injury on the floor and the 1st accused appellant has left the place after uttering filth while carrying an iron rod.

I am of the view that even in relation to the 2nd and the 3rd accused appellants, her evidence had been that they were only about 5-6 feet away from her, but outside the house. Since the house had no doors or windows, her ability to identify a known person from such a distance using a torchlight cannot be doubted under any circumstance.

According to the evidence led in the trial, the brother of the deceased who accompanied him to the house has only told her that the deceased had an altercation with Bandula who is the 1st accused appellant. She has had no knowledge of what the 2nd accused appellant said or about the 3rd accused appellant at the time she saw them in front of her house.

It is clear from police evidence that she had given her statement to police few hours after the incident, and although she has not stated what weapons the 2nd and the 3rd accused appellant was carrying at that time, she has divulged the identity of them.

I do not find it a reason to doubt the PW-01's evidence as to her identifying the 2nd and the 3rd accused appellant outside of her house. The evidence of PW-01 had been that although she saw them outside of the house and saw them carrying weapons, she did see any act committed by them which caused any harm to her husband.

The evidence of the JMO establishes that the deceased had one fatal injury to his head apart from the stab wound to the back of the mid chest. Although PW-01 has not seen how such injuries inflicted on the deceased, it is clear from the evidence when taken in its totality, the head injury has been caused by a blunt weapon like the iron rod the 1st accused appellant had in his hand when PW-01 saw him.

For the reasons considered above, I find no basis to agree with the 1st three grounds of appeal urged by the learned President's Counsel that the identity of the three accused has not been established beyond reasonable doubt.

The 4th ground of appeal is that the learned High Court Judge failed to consider the contradictions and omissions that were in favour of the accused appellants.

I have already discussed the contradictions marked V-01 and V-02. The contradictions V-03 and V-04 relates to the fact whether the 2nd and the 3rd accused appellants were near the window of the house when PW-01 saw them

or they were in the garden. In her evidence at the non-summary inquiry, what she has stated had been that "නන්දරත්නයි මහින්දයි මිදුලේ හිටියා." I find no deficiency in her evidence where she says that they were outside of the house near the window which in my view refers to the same thing.

Contradiction marked V-05 relates to whether the 3rd accused appellant was wearing a vest or not when she saw him and the contradiction marked V-06 is whether the husband's head injuries were to his right side or left side of the head.

I find these contradictions are too trivial to consider as contradictions that go to the root of the case which creates a doubt as to the evidence of PW-01.

It is settled law that no one can be expected to have a photographic memory of an incident some period after the happening of it due to various factors relating to human nature, behaviour, and one's ability to remember and explain an incident.

The mentioned omissions are also of the similar nature for which PW-01 has provided clear answers. I find no reason to consider the said contradictions and omissions in order to come to a finding that PW-01 was not telling the truth about the incident, and that they should be considered in favour of the accused appellants.

The Indian Supreme Court held in the case of **Bhoginbhai Hirjibhai Vs. State of Gujarat AIR 1983 SC** 753 that;

> *"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen.*
>
> *Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attune to absorb the details.*

The power of observation differs from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas, it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on."

The 5th and the 6th grounds of appeal urged by the learned President's Counsel relate to the 2nd and the 3rd accused appellants on the basis that the common intention in terms of section 32 of the Penal Code cannot be attributed to them, given the evidence adduced before the trial Court.

The three accused appellants have been indicted on the basis that they acted with the common intention of causing the death of Kingsley Abegunawardana in terms of section 296 read with section 32 of the Penal Code.

The Section 32 of the Penal Code reads as follows;

32. When a criminal act is done by several persons in furtherance of a common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

In the case of **Mahabub Shah Vs. Emperor A.I.R. (1945) Privy Council 118**, it was held that;

"Common intention within the meaning of section 34 of the Indian Penal Code implies a pre-arranged plan. To convict of an offence applying section 34, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "there bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will

result in miscarriage of justice. The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case."

The essential ingredients of common intention under section 32 of the Penal Code were considered in the case of **The King Vs. Assappu 50 NLR 324**, where it was determined that;

(1) The case of each accused must be considered separately.
(2) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
(3) Common intention must not be confused with same or similar intention entertained independently to each other.
(4) There must be evidence, either direct or circumstantial of pre-arrangement or some other evidence of common intention.
(5) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

Basnayake, C.J. having considered several authorities in this regard, in the case of **The Queen Vs. J. Mahatun and Another 61NLR, 540 at 546** determined as follows;

"To establish the existence of a common intention.it is not essential to prove that the criminal act was done in concert pursuant to pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment. To hold that "common intention" within the meaning of the section necessarily implies a pre-arranged plan would unduly restrict the scope of the section and introduce an element which it has not."

With the above legal principles in mind, I will now proceed to consider whether the prosecution has established beyond reasonable doubt that the 2nd and the 3rd appellants had the same common intention along with the 1st appellant at the time of the causing the death of the deceased.

In the judgment, the learned High Court Judge had considered the evidence where it has been said that the 2nd appellant who was a relative of both the 1st accused as well as the deceased, uttered the words "බොල උදේට හොඳවෙයි" as an indication of the intention of the 2nd appellant to attack the deceased at a later stage. The learned High Court Judge has determined that there was unchallenged evidence to establish that because of the previous dispute that occurred at the party, the 2nd and the 3rd appellants were angry with the deceased. It has also been determined that PW-01 stated in her evidence that she saw the two appellants near the body of the deceased with a knife and a club, and that establishes the participation of the 2nd and the 3rd appellant in the crime.

As correctly pointed out by the learned President's Counsel on behalf of the appellants, I find that this was a misinterpretation of the evidence in that regard.

It was the PW-02, the bother of the deceased who has narrated what happened at the party held on that night at a house of a neighbour. According to him, it was his brother who attempted to assault the 1st appellant and it was he and the others who were present separated the two. He has seen the 3rd appellant being present at the house at that time among others, and he was not a party to the dispute. The 2nd appellant whom he referred to as Podi Mama is alleged to have uttered the words "බොල උදේට හොඳවෙයි" before leaving the place.

I am in no position to agree with the learned High Court Judges assumption the words uttered by him as indicative of the intention to attack the deceased under any circumstances. He was a relative of both the deceased and the 1st accused and had no connection to the dispute they had at that time. As all of them were drunk at that time, it may well be a reference to the fact that when they become sober in the morning thing will get right, or even it may even be some other reference. The 3rd appellant's mere presence at the party proves nothing as to a common intention as well. There was no evidence before the Court to suggest

that the 3rd accused appellant got involved in the altercation between the 1st accused appellant and the deceased at the party.

Although the learned High Court Judge has determined that the evidence of the PW-01 was that when she came out of the room all three accused appellants were near husband armed with weapons, I view that as a clear misdirection as to the evidence led at the trial. Her evidence had been that when she first saw her husband with bleeding head injuries, it was only the 1st accused appellant near him armed with an iron rod.

The 2nd and the 3rd accused appellants were outside of the house and clearly, they had not participated in the act where the deceased received his injuries. There cannot be any basis to conclude that all of them were together when the attack took place and ran away from the place where the deceased was sleeping as no such evidence has been given in this trial. The evidence of PW-01 only establishes the presence of the 2nd and 3rd accused appellants, a distance away from the scene of the crime, which only suggests that they may have come along with the 1st accused appellant.

There was no evidence before the Court to suggest that there had been a prearrangement among the three accused appellants to cause the death of the deceased. It was only with the 1st accused appellant the previous altercation has occurred, and the 2nd and the 3rd accused appellants had taken no part in the said altercation.

There cannot be any basis to think that this may be a result of an incident occurred where the common intention was formed on the spur of the moment as the evidence is clearly suggestive of the fact that this was a result of a previous incident happened between the 1st accused appellant and the deceased.

Although there is no doubt PW-01 has identified the 2nd and the 3rd accused appellants outside of the house, I find a basis for a clear doubt as to whether she clearly saw that the said accused appellants were armed with a knife and a club at that time.

This becomes so, as she has failed to mention that in her police statement made few hours after the incident and has failed even to state that at the inquest or at the non-summary proceedings held at the Magistrate Court.

Therefore, I find that the learned High Court Judge was not correct when it was determined that the evidence has established beyond reasonable doubt the 2nd and the 3rd accused appellants carried weapons and actively took part in the attack of the deceased.

Since the evidence led before the trial Court provides no direct evidence to connect the 2nd and the 3rd accused appellants for causing the death of the deceased, it becomes necessary for the prosecution to prove beyond reasonable doubt that the said two accused appellants participated in the crime with a common intention along with the 1st accused appellant to prove the charge against them. What has been established at the trial was only the presence of the 2nd and the 3rd accused appellants outside the house where the assault took place.

It is my considered view that alone would not suffice to conclude that the charge has been proved beyond reasonable doubt against them. I am of the view that the only conclusion which can be reached would be that their presence creates a grave suspicion of their involvement in the crime. However, it is settled law that suspicions alone would not prove a criminal case.

For the reasons set out above, I find merit in the appeal preferred by the 2nd and the 3rd accused appellants and find that the learned High Court Judge was misdirected when the 2nd and the 3rd accused appellants were convicted for the offence of murder based on common intention.

Accordingly, I set aside the conviction of the 2nd and the 3rd accused appellants and acquit them of the charge.

As I have considered before, the prosecution has proved beyond reasonable doubt that it was the 1st accused appellant who caused the death of the deceased as a result of the previous altercation he had with him.

Accordingly, I find no basis to interfere with the conviction of the 1st accused appellant for the charge preferred against him.

The appeal preferred by the 1st accused appellant is hereby dismissed for want of merit.

The conviction and the sentence of the 1st accused appellant affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal