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

In the matter of an appeal in terms of Section 331 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.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0061-0062/2019
High Court of Embilipitiya
Case No. HCE 36/2017

Complainant

Vs.

1. Kukul Korala Gamage Gamini Premakumara.
2. Senanayakage Sarath Kumara.

Accused

AND NOW BETWEEN

1. Kukul Korala Gamage Gamini Premakumara.
2. Senanayakage Sarath Kumara.

Accused-Appellants

Vs.

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

Complainant-Respondent

BEFORE : P. KUMARARATNAM, J.
K.M.G.H. KULATUNGA, J.

COUNSEL : I.B.S. Harshana, assigned Counsel for the 1st accused-appellant.
Chamara Nanayakkarawasam with Dimuthu Fernando for the 2nd accused-appellant.
Disna Warnakula, DSG for the Respondent.

ARGUED ON : 05.02.2025

DECIDED ON : 11.03.2025

K.M.G.H. KULATUNGA, J.

JUDGEMENT

Introduction

1. The 1st and 2nd accused-appellants have preferred separate appeals but both were listed and taken up for argument together with the consent and agreement of all Counsel. This judgement will thus determine and bind both the appeals bearing No. CA-HCC 0061/2019 and No. CA-HCC 0062/2019.

2. The 1st and 2nd accused-appellants were indicted in the High Court of Ratnapura for the murder of Aparakke Keerthiwansha punishable under section 296 of the Penal Code and for causing hurt to Nalani De Silva PW-01 the wife of the Deceased punishable under Section 314 Penal Code both read with Section 32 of the Penal Code. The trial has commenced without a jury before the judge in the High Court of Ratnapura. Then with the establishment of the High Court of Embilipitiya, this matter had been transferred to that Court and upon further trial, both the accused-appellants were convicted on count No. 1

for murder and sentenced to death but acquitted of count No. 2 that of hurt.

Facts

3. The facts of this offending may be summarized as follows. The deceased, worked as a Supervisor in an Indian company and resided in quarters of the company with his wife, Nalani De Silva (PW-01). On the evening of the day of the incident the 1st accused visited the deceased person's quarters on three occasions. On the last visit the 1st accused, Kukul Koralagamage Gamini Premakumara was accompanied by the 2nd accused, Senanayakage Sarath Kumara. The 1st accused having said that the vehicle of their boss had stalled due to a diesel block a short distance away had requested the deceased for assistance.

4. The deceased, accompanied by his wife (PW-01), had then proceeded on foot to the purported place but found no vehicle there. Being suspicious, the deceased and his wife have set off to return home. PW-01 who was walking ahead, upon hearing her husband shout had turned back and seen him being held by the 1st accused and being jabbed with a closed fist. Just then the 2nd accused had pulled PW-01 from her hair and pushed her to the ground. She had resisted and kicked him when the 2nd accused has then taken to his heels. The 1st accused too had fled the scene. Then PW-02 Dilshan Amarasinghe happened to come by and then assisted PW-01 to take the deceased to the hospital. The deceased appear to have been pronounced dead upon admission to the hospital. According to PW-01 the possible motive for the attack is that the 1st accused who was a security guard had been demoted to the position of a labourer by the deceased.

Grounds of Appeal

5. As per the written submissions the accused-appellants, the grounds of appeal are as follows:

The 1st appellant's grounds of appeal are,

1. *that the learned trial judge was misdirected by failing to comply with Section 48 of the Judicature Act No. 02 of 1978 (when the case was transferred from Ratnapura to Embilipitiya);*
2. *that the learned trial judge failed to consider the credibility of the evidence of the PW-01;*
3. *that the learned trial judge failed to appreciate the relevant considerations that ought to be taken into account in analysing circumstantial evidence; and*
4. *that the learned trial Judge came to an erroneous finding based on speculations and surmises.*

The 2nd accused-appellant's grounds of appeal are,

5. *that the accused was denied of a fair trial;*
6. *that the learned trial judge erred in law in failing to properly evaluate identification of the 2nd accused at the identification parade; and*
7. *that the learned trial judge erred in appreciating the Section 27 discovery.*

In the course of the argument, the Counsel raised the following ground;

8. *The trial judge failed to properly evaluate and determine the existence of the common murderous intention.*

Grounds of Appeal 1 and 5: *Failure to comply with Section 48 of Judicature Act No. 02 of 1978*

6. During the course of the argument, both learned counsel for the respective appellants abandoned the grounds of appeal No. 1 and 5 based on Section 48 of the Judicature Act on the adoption of evidence.

Grounds of Appeal 2, 3, and 4: *Failure to consider the credibility of the evidence of the PW-01; findings based on speculations and surmise; failure to consider the principles in analysing circumstantial evidence.*

7. Grounds of appeal 2, 3, and 4 will be considered together, as they are interconnected. The sole eye witness is PW-01 and according to her

evidence she had seen the 1st accused holding on to the deceased and jabbing with a closed fist. She had not seen any weapon and it appears that she herself was pulled and thrown on to the ground by the 2nd accused. Therefore, she had been able to observe the initial assault on the deceased. Then she had seen the two accused run away and the deceased fallen on the ground. It is subsequently that she had observed blood on the deceased. She had been approximately 2 – 3 feet away from the place of the assault. PW-01 has seen this from the light that emanated from a nearby building and she admits that the surrounding was not very well lit but there was sufficient light. There had also been a torch.

8. After the two accused took to their heels, PW-01 had got up and gone to the deceased who was standing unsteadily and then fallen. She claims to have been in a state of agitation and fear believing that the assailants may return, and had switched off the torch. It is then that she heard a motor bicycle, who happened to be PW-02, Dilshan.

9. Though PW-01 is referred to as an eyewitness, she had not seen the weapon used to inflict the injuries. According to the medical evidence, the deceased had nine stab injuries; four on the upper back of the body, one on the left side of the lower neck, another on the right side close to the collarbone, and two others towards the left lower chest. As PW-01 had not seen a weapon or a knife at that moment, proof of certain aspects of the prosecution case is thus based on circumstantial evidence. That would be the use of the weapon, and as to exactly how the stab injuries were inflicted, as well as the entertaining and sharing of the common murderous intention. To that extent, the prosecution relies on circumstantial evidence *inter alia* to prove the actual infliction of the fatal injuries (stab) and sharing of the common murderous intention. The learned trial judge appears to have not directly adverted to this in that sense. However, he had come to the finding that the prosecution had proved beyond reasonable doubt that the death of the

deceased was committed by the two accused and no other (*"ඒ අනුව මියගිය අපරාක්කේ කීර්තිවංශ යන අයගේ මරණය සිදුකරන ලද්දේ මෙම නඩුවේ විත්තිකරුවන් දෙදෙනාම විසින් බව පැමිණිල්ල විසින් සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කර ඇති බව තීරණය කරමි"*). Then the learned trial judge goes on to conclude that the 1st accused attacked the deceased, but the 2nd accused did not attack, but acted on a pre-conceived plan and with a common murderous intention to cause the death of the deceased. The trial judge comes to the finding that the Prosecution has proved, beyond reasonable doubt, that the injuries were inflicted by no other but the 1st accused. Therefore, though it is not expressly so articulated, the necessary inference is that the learned trial judge has inferentially concluded that the stab injuries were inflicted by the 1st accused and was sharing the common intention with the 2nd accused.

Evaluating circumstantial evidence by the trial judge

10. It is correct to say that the trial judge has not considered expressly or engaged in the analysis of the effect, import and the relevance of circumstantial evidence *vis-à-vis* the relevant principles. However, the trial judge has, in fact expressly declared that the "*conclusions and findings are based both direct evidence and circumstantial evidence"* (at page 18 of the judgement and page 352 of the brief). Thus, in effect, the conclusion and the findings are based on direct evidence as well as the inferences drawn on circumstantial evidence, and the trial judge had been mindful of this.

11. One of the complaints of the 1st appellant is that the trial judge had not expressly adverted to the principles governing the evaluation of circumstantial evidence and also failed to properly evaluate the circumstantial evidence. True, on the perusal of the judgement, apart from the references that the findings are based on circumstantial evidence, there is no express advertence to the principles governing and applicable to the evaluation of circumstantial evidence.

12. The following decisions do advert to the said principles:

In **King vs. Abeywickrama** 44 NLR 254, it was held by Soertsz, S.P.J., that, "*In order to base a conviction on circumstantial evidence, the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypotheses of his innocence.*"

Similarly in the case of **King vs. Gunaratne** 47 NLR 145, it was held that, "*In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion. The Jury are entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt.*"

Then in the case of **Krishantha de Silva vs. Attorney General** (2003) 1 SLR 162, Edirisuriya, J. held that, "*It is admitted that this is a case of circumstantial evidence. In such a case, circumstances relied upon should be consistent with the guilt of the accused and inconsistent with his innocence. If the circumstantial evidence relied upon can be accounted for on the supposition of innocence, then the circumstantial evidence fails. Circumstantial evidence can be acted upon only if, from the circumstances relied upon the only reasonable inference to be drawn is the inference of guilt. If the circumstances are consistent both with guilt and with innocence then the case is not proved on circumstantial evidence. The hypothesis of innocence must be excluded by the circumstances relied upon and the circumstances must point to one conclusion alone, i.e. the guilt of the accused. The learned trial Judge has not discussed in detail these principles to be followed in appreciating circumstantial evidence in the instant case.*"

These are some of the salient principles the trial judge ought to have appraised himself of.

13. It's true that such principles of evaluating circumstantial evidence should have been considered by the trial judge. If the matter was before a jury, this specific direction would have been necessary and the failure would certainly amount to a misdirection or a non-direction. However, this trial was before a judge, who for all purposes is deemed to be learned and a trained judicial mind, who can reasonably be considered to have been aware and mindful of the principles of law relating to circumstantial evidence.

14. When the trier of fact is a judge with a trained judicial mind, the mere absence of express advertence or appraisal of such principles may be viewed differently. This is for the simple reason that trial judges are presumed to know the law (**R. v. Burns**, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656 at pp. 664-65, 89 C.C.C. (3d) 193 at pp. 199-200]). That presumption must apply with particular force to basic legal principles governing and applicable to the evaluation of circumstantial evidence as well. I find the learned trial judge has in fact made some reference to and been mindful to these principles in formulating and crafting the judgment.

Items of proved circumstances

15. I will now consider the available items of circumstantial evidence in this case and consider if it is sufficient to reasonably have drawn the inferences and come to the findings as found by the learned trial judge. According to the medical evidence, the death was caused due to multiple stab injuries. The learned trial judge had concluded that it was the 1st accused who caused the death by inflicting these injuries. However, there is no direct evidence of the accused *using a knife* or inflicting the injuries *with a knife*. PW-01 has only seen the 1st accused jabbing the deceased with *a closed fist*. If so, how did the trial judge come to the conclusion that it was the 1st accused who inflicted these fatal stab

injuries? Of course, it is upon the consideration of direct and circumstantial evidence.

16. The trial judge did clearly advert to the fact that PW-01 did not say that the 1st accused *was armed* when he attacked/assaulted the deceased (*"එනමුත් 1වන චූදිත ආයුධ සන්නද්ධව මරණකරුට පහර දුන් බවට වන සාක්ශියක් ඇය ඉදිරිපත් කර නොමැත"* at page 15 of the judgement and page 349 of the brief). Having so observed, then the learned trial judge then expressly stated that the *conclusions and findings are based on the evaluation of both direct evidence and of circumstantial evidence* (*"පැමිණිල්ල විසින් මෙහෙයවන ලද එකී ඇසදුටු හා පරිවේශනීය සාක්ෂි මත එළඹිය හැකි එකම අනුමිතිය වන්නේ ඉහත කී අපරාක්කේ කීර් තිවංශගේ මරණය සිදුකරන ලද්දේ මෙම නඩුවේ විත්තිකරුවන් දෙදෙනා විසින් වන නමුත් වෙන අන් කිසිවෙකු හෝ විසින් නොවන බවයි"* at page 18 of the judgement and page 352 of the brief).

17. The said items of circumstantial evidence are 1st accused attacking and jabbing with a closed fist; the medical evidence confirming the existence of stab injuries and the observation that they are caused by a sharp-cutting weapon; the recovery of a pointed knife P-08 about 10 feet away from the scene; the pathologist's opinion that the injuries could be inflicted by this or a similar knife to P-08.

18. When considering the evidence that it was the 1st accused and him alone who attacked and was grappling with the deceased along with the other items of circumstantial evidence narrated above, they simply lead only to one inference, that it was the 1st accused who caused the stab injuries that caused the death of the deceased. Apart from this inference, there is absolutely no other reasonable hypothesis possible that is inconsistent with the guilt of the accused. That being so, even if there is technically a non-direction, in view of the overwhelming evidence, even if a reasonable jury or judge correctly directed would certainly have arrived at the same conclusion. Therefore, there is no miscarriage of justice that has actually occurred. In such circumstances, even though

the points raised for the appellant might be decided in their favour, this appeal may be dismissed (**Lurdu Nelson Fernando and Others v. The Attorney-General** (1998) 2 Sri LR. 329).

Failure to consider the credibility of PW-01

19. The next ground of appeal common to both appellants is that the learned trial judge failed to consider the credibility of the evidence of the PW-01. It was submitted that due to poor light, PW-01 could not possibly have seen the alleged stabbing, and could not have identified the 2nd accused who was not a person known prior to this day. The argument advanced is that the trial judge has failed to properly and adequately consider the testimonial trustworthiness. Testimonial trustworthiness in this context, especially when it involves identification, encompasses both the *credibility* and the *reliability*.

20. Considering and evaluating the testimonial trustworthiness of a witness, more often than not, ***credibility*** and ***reliability*** are referred to, but is often misconceived. Sometimes *credibility* and *reliability* are used interchangeably or as synonyms, which is a serious misconception and is erroneous. There is a subtle but significant and a very relevant difference and distinction between credibility and reliability which every trial judge should be mindful of. *Credibility* or *veracity* relates to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. *Reliability*, on the other hand, concerns and relates to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves consideration of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony.

    Obviously, a witness who is not credible, cannot give reliable evidence on that same point. The evidence of a credible or an honest witness,

may, however, still be unreliable. [vide; **R. v. Morrissey** (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII).

This distinction and difference between credibility and reliability was adverted to in the Canadian case of **R. v. H.C.**, [2009 ONCA 56, 244 O.A.C. 288 at para. 41,] where Watt J.A. expounded and explained it in the following lines: "*Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately, i. observe; ii. recall; and iii. recount events in issue.*"

21. If I may put this in a simpler form, the credibility relates to the witness's willingness to speak the truth sincerely, as the witness believes it to be. On the other hand, reliability relates to the actual accuracy of the witness's testimony. The reliability or accuracy of the testimony will depend on the witness's ability and opportunity to accurately ***observe, recall, and recount*** the events in issue which such witness claims to have perceived.

22. There is, however, an interrelation between ***credibility*** and ***reliability***. The threshold issue to be determined is the credibility. This is so, as a witness whose testimony is not credible is not a believable witness whose testimony will not be accepted or acted upon. As such, the next issue of considering reliability will not arise. If the testimony satisfies the test of credibility, it will necessarily be that the witness is found to be an honest witness. However, the mere finding that witness to be credible or honest will not *ipso facto* determine the question of reliability of his/her testimony. Reliability depends on the witness's ability to accurately, observe, recall, and recount events in issue so witnessed. The rationale is that the witness may be honest and would testify as to what the witness may truly believe that he/she perceived. But even a truthful and honest witness may be mistaken, or the power of observation and the capacity to recall may be impaired or weak. It is more of an honest

mistake. So, the reliability of the witness' observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation and also witnesses ability to observe, recall and recount. The failure of a trial judge to consider the reliability of the evidence may be a factor which an appellate court may consider.

23. Thus, the trial judge should have considered both the credibility and the reliability of evidence. It is common ground that the 1st accused was a person known to the witness. The only dispute is the sufficiency of light. As for the 2nd accused, he was not known to the witness prior to this day. Prosecution seeks to prove and establish the presence of the both the accused persons by the testimony of PW-01. As the 1st accused was a *previously known* person it is a **recognition**, and as the 2nd accused was *previously unknown* to PW-01, it is an **identification** that is made by the witness.

24. There is a subtle but an important difference and a vital distinction between ***identification*** and ***recognition***. The United Nations International Criminal Tribunal for the former Yugoslavia in its judgement in ***Prosecutor v. Lukić & Lukić*** (IT-98-32/1-A) expounded this distinction as follows:

"*118. The Trial Chamber noted that there was a difference between "identification" witnesses, to whom the accused was "previously unknown by sight" and "recognition" witnesses who had prior knowledge of the accused enabling them to recognise the accused at the time of the alleged crime. A witness's prior knowledge of, or level of familiarity with, an accused is a relevant factor in the assessment of identification evidence.*"

Did the trial judge correctly evaluate of the evidence of PW-01?

25. Now, let's consider if the trial judge has evaluated the evidence of PW-01 in accordance with the aforesaid principles. Whilst summarising the

evidence, the trial judge has considered contradictions V1 and V2 and come to the finding that the said contradictions do not go to the root of the evidence and are insignificant. At page 21 of the judgement (page 355 of the brief), the evidence of this witness had been considered along with the totality of the evidence and found that the said evidence is consistent and is supported by other evidence. During cross examination, the defence had not seriously assailed the evidence of PW-01 and had not suggested or made an allegation of fabrication. The position suggested appears to be that the witness could not have seen this incident due to there not being sufficient light. As for the 2nd accused, the challenge was on the identification of the 2nd accused, however, had not made any suggestion of fabricating or giving false evidence. If at all the basis is that of a mistaken identity. Considering the totality of the evidence, the learned trial judge had clearly come to a correct conclusion on the credibility of these witnesses.

26. As for reliability, the main challenge on behalf of both the accused is based on poor light. The fact that there was light emanating from a nearby building is testified to by this witness as well as confirmed by the other witnesses, including the Police observations of the scene. Therefore, though not the best, a sufficient degree of illumination had been available for the witness to see and observe the incident. It is her testimony that the two accused were seen at her house and all of them walked for approximately an hour until they reached the place of incident. The 1st accused was a person who was previously known and seen by the witness well before the incident. However, the 2nd accused was seen for the first time, when he came to her house that evening.

27. The 1st accused being a known person, it was a **recognition** that she had made of him. However, as the 2nd accused was seen for the first time, it is more an **identification** she had made.

Identity of the 1st accused

28. Did the trial judge err in the evaluation of the reliability as far as the identity of the 1st accused is concerned? As stated above, the 1st accused clearly being a person who was familiar and known, PW-01 had no difficulty in recognizing him. As at the point of incident, PW-01 had been 2-3 feet away when she saw the 1st accused grappling with the deceased. She clearly claims to have recognised that it was no one but the 1st accused who attacked the deceased with 'a closed fist.' The issue raised in this appeal on behalf of the first accused is that PW-01 had not observed a knife. If there was sufficient light, she ought to have seen the weapon and identified the same, which she had not been able to do. The submission is that due to lack of sufficient light, she could not have seen and recognised the assailant. The learned trial judge had concluded otherwise.

29. This court is now required to consider if this finding is reasonable and correct. The 1st accused was no stranger. He was approximately 2-3 feet away from the witness. Even under poor conditions of light, it is very possible that you could recognize a known person. Especially when that person was there with the witness and the deceased during the immediate hour preceding the incident. However, in poor conditions of light, it is quite possible that you may not be able to see a knife which was concealed in the hand, partly due to the poor light, and partly due to the circumstances. The circumstance so contemplated is that the witness was able to see basically the initial attack or the commencement, as the 2nd accused had soon thereafter pulled the witness down by her hair. This may have deprived the witness of the opportunity and occasion of observing the weapon in the hand. However, as to the assailant and the act he was engaged in could easily have been observed even under these conditions. It is exactly this, that appears to have happened. The fact that the witness had testified so, establishes that she had deposed to only what she had actually seen and observed.

This clearly demonstrates that PW-01 is a truthful witness and that she is also a reliable witness. The learned trial judge has come to this conclusion though not in that direct form. Thus, the finding on the testimonial trustworthiness of PW-01's evidence is correct and lawful which there is no basis to interfere with.

Ground of Appeal No. 6: ***That the learned trial judge erred in law in failing to properly evaluate identification of the 2nd accused at the identification parade.***

30. As for the 2nd accused, he was not a person known to the witness prior to the day of the incident. It is for the first time that the witness had happened to see the 2nd accused. Therefore, this is a question as to the identification and not a question of recognition.

31. In this circumstance, the main issue is whether PW-01 had the opportunity and the occasion to sufficiently observe and see the 2nd accused. According to her evidence, the 2nd accused had accompanied the 1st accused that evening and there was sufficient light at their house to see and observe the 2nd accused. Further, the witness along with the deceased had spent a considerable amount of time (approximately an hour) walking up to the place of the incident. It is in evidence that line rooms, a food outlet and factory buildings were found along the road. Thus, there is light emanating from the illumination of these placed. At the place of the incident too, there is evidence that light emanating from a building was sufficient to observe and identify a person. In this backdrop, the opportunity the witness had was certainly not a fleeting glance so to say. The evidence certainly establishes that PW-01 did have sufficient time, space, and opportunity to observe and to familiarise with the identifying features of the 2nd accused. To that extent, though the witness had made an identification, it may be considered to be a recognition which the witness made at the point of the attack.

32. An identification parade has also been held on 06.12.1996 where the 2nd accused had been positively identified by PW-01. However, at the identification parade, an objection had been raised on behalf of the 2nd accused that she was shown to the witness whilst being held at the Police Station. During the trial, the defence had attempted to mark a contradiction on this issue from the evidence given by PW-01 at the non-summary inquiry. It appears that the witness had admitted having seen the 2nd accused at the Police Station in her evidence given at the non-summary inquiry, but denied this at the trial. The learned trial judge has proceeded to consider this contradiction marked 2V1. However, on a perusal of the evidence and as conceded by the counsel, it is apparent that the above contradiction had not been proved. During the course of the argument, the learned counsel for the 2nd appellant proceeded to submit that as the trial judge had considered the merits of the purported contradiction the absence of proof is not relevant.

33. Raising and marking of contradictions is provided for by Section 145 of the Evidence Ordinance. Unless a contradiction raised is admitted, the same requires to be proved for it to become admissible. It is then that it can be considered by the trial judge. When a contradiction is raised and the relevant portion is put to the witness, the witness may admit the same. If so, further proof is not required as the contradictory portion is thus admitted. It is then an admitted contradiction. Similarly, the witness may either deny making the previous statement or claim forgetfulness, then it is incumbent upon the cross-examining party to prove the existence of the said previous contradicting statement. If the same emanates from a statement to the Police, then the Officer who recorded the statement requires to be summoned and the existence of the contradictory statement be proved. Similarly, when such contradiction is found in the non-summary evidence the same may be proved by calling the Registrar or an Officer of the High Court who has the custody of the original Magistrate's Court record. In the absence of such proof, for all purposes, the trial judge cannot take cognizance of such contradiction which remains not proved. This

applies both to the prosecution as well as the defence without any distinction. That being so, the trial judge has proceeded on the mistaken premise that contradiction 2V1 was proved. However, notwithstanding the same, I see no error or unreasonableness in the manner the learned trial judge had considered and disregarded the said contradiction.

34. As evaluated herein above, PW-01 had the opportunity to sufficiently perceive and familiarise herself as to the identifying features. Strictly speaking, an identification parade may not have been necessary as it was not a momentary fleeting glance or a mere opportunity to see during the assault and no more, if so, an identification parade may have been necessary and important. In the circumstances of this case and in the sequence of events, the importance of the identification parade would be marginal. Therefore, this issue raised does not affect the reliability of the identity of the 2nd accused. Accordingly, ground of appeal No. 06 is misconceived and is devoid of merit.

Ground of Appeal No. 7: *That the learned trial judge erred in appreciating the Section 27 discovery.*

35. The 2nd appellant also takes up the ground that a recovery based on Section 27 of the Evidence Ordinance has been erroneously considered against the 2nd accused, when in fact, there is no evidence to link or connect the said items recovered (pair of socks) to this offending or incident.

36. The recording of a statement and a recovery made under Section 27 of the Evidence Ordinance is a fact. However, the recovered item (a pair of socks) is not proved to be, in any way, connected to this incident. However, the learned trial judge has in the passing, commented that the said recovery is an item of evidence against both the accused. In the first instance, this recovery was made on a statement made by the 2nd accused. As such, it has no relevance to the 1st accused. On a consideration of the totality of the judgement, apart from the mere

comment, the learned trial judge has not in any way utilised or considered the said recovery as a relevant item of circumstantial evidence in arriving at the conclusion. To that extent, there is no prejudice that has been caused to the appellants by the reference to this recovery.

Ground of Appeal No. 8: ***That the trial judge failed to properly evaluate and determine the existence of common murderous intention***.

37. During the course of the argument, the learned counsel for the 2nd accused-appellant did, in the passing, submit that the trial judge had not considered the principles governing common intention and the evidence does not establish beyond reasonable doubt that the 2nd accused did in fact share a common murderous intention with the 1st accused. At pages 18 and 19 of the judgement, the trial judge has come to the finding that both the accused were actuated by a common murderous intention when they committed the death of the deceased. The trial judge found that the 1st accused had in fact inflicted the fatal injuries but there is no evidence that the 2nd accused did in any way assault or attack the deceased directly. Therefore, in view of the arguments advanced, it is necessary to consider if there is sufficient evidence to draw the inference of the 2nd accused entertaining a common murderous intention.

38. The pith and substance of the submission was that, even if the Court was to accept the prosecution's case in its totality, still for all, available evidence does not disclose the criminal culpability of entertaining the common murderous intention to commit the murder on the part of the 2nd accused. It was argued that the proved circumstances do not give rise to the sole, irresistible, and inescapable inference that the 2nd accused did entertain a common intention together with the 1st accused, to commit the murder of the deceased. In the circumstances it was submitted that no reasonable conclusion could be even inferentially

drawn that the 2nd accused together with the 1st accused entertained a common intention to cause the death as alleged.

39. The principal offender is the 1st accused who acted with the murderous intention. Thus, it is necessary to establish that the 2nd accused was sharing the said intention to commit the death of the deceased and of active participation.

40. As for the law, Section 32 of the Penal Code reads as follows:

"When a criminal act is done by several persons in furtherance of the 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."

Section 32 lays down only a principle of criminal liability and such conduct must be in furtherance of the common intention shared with the principal perpetrator. (**Attorney-General vs. Munasinghe and Others** 70 NLR 241). In **The King vs. Assappu** 50 NLR 324, Dias, J. held that if common intention is required to be considered in a trial the jury be directed as following vital and fundamental principles:

> *"(a) the case of each prisoner must be considered separately;*
>
> *(b) that the Jury must be satisfied beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed;*
>
> *(c) they must be told that the benefit of any reasonable doubt on this matter must be given to the prisoner concerned— 47 N. L. R. at p 375;*
>
> *(d) the Jury must be warned to be careful not to confuse "Same or similar intention entertained independently of each other" with "Common intention";*
>
> *(e) that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case—A. I. R. 1945 P. C. 118;*

(f) the Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other— 47 N. L. R. at p. 375, 48 N. L. R. 2 95;

(g) the Jury should also be directed that if there is no evidence of any common intention actuating the co-accused, or any particular co-accused, or if there is any reasonable doubt on that point, then the charge cannot lie against anyone other than the actual doer of the criminal act—44 N. L. R. 370, 46 N. L. R. 135, 473, 475;

(h) in such a case such co-accused would be liable only for such criminal acts which they themselves committed;

(i) the Jury should also be directed that the mere fact that the co-accused were-present when the doer did the criminal act does not per se constitute common intention, unless there is other evidence which justifies them in so holding— 45 N. L. R. 510 ; and

(j) the Judge should endeavour to assist the Jury by examining the case against each of the co-accused in the light of these principles."

These principles will equally be relevant to a judge in a non-jury trial.

41. In **Kalanchidewage Suresh Nandana vs. Attorney General** (SC Appeal 130/2014 - SCM 14.14/2019, Supreme Court Minutes, 9th February 2024), Justice Achala Wengappuli opined that in a case based on common intention, the court must consider the existence of evidence which confirm a 'participatory presence' by each of the accused who are alleged to have ***entertained the common intention***. In this instance it is the common intention to commit the murder of the deceased.

42. To prove the sharing of the common murderous intention of the 2nd accused, the prosecution relies on circumstantial evidence. There is no express assertion or utterance by the 2nd accused indicating so or from which an inference to that effect may be drawn. Taking at its best, the items of evidence available to establish the sharing of the common intention are as follows: the fact that the 2nd accused came along with the 1st accused; the fact that, when the first accused attacked the deceased the 2nd accused did simultaneously pull the witness to the ground by her hair; and after the attack, the 2nd accused did run away with the 1st accused.

43. These are the circumstances which have been proved by the prosecution. Is it possible to draw the inference of the 2nd accused entertaining and sharing the common intention to commit murder? When these circumstances are considered in its totality, the inference that there was an understanding between the two accused and that they were acting together can be drawn. This inference strongly emanates from the fact that when the deceased was attacked by the 1st accused, the 2nd accused did himself spontaneously get activated and simultaneously attacked PW-01, preventing her from going to the assistance of the deceased. This, without a doubt, indicates that the 2nd accused did know beforehand and was anticipating some attack or assault on the deceased. If not, in the normal course, it is not possible for the 2nd accused to act swiftly and spontaneously in that manner.

44. By so preventing PW-01 from approaching the deceased the 2nd accused has clearly facilitated the 1st accused to attack the deceased without any hindrance or interruption. Then the 2nd accused had also gone along with the plan of the 1st accused to lure the deceased on a false pretext of a vehicle breakdown. Finally, they runaway and escape together.

45. As stated above, there is no evidence of any direct utterance of whatever nature by the 2nd accused. It is the 1st accused who had the motive to harm the deceased, which was his demotion attributed to the deceased.

In the absence of any other evidence, it is possible to infer that the 2nd accused knew that the 1st accused would cause some serious harm, but as to whether that was the murder is not the only irresistible inference that can be drawn from these proved circumstances. Though the learned trial judge had considered and adverted his mind to circumstantial evidence, he has failed and consider if the only irresistible inference was one consistent with entertaining common murderous intention. In the **Ariyaratne v. Attorney-General**. (S.C. 31/92-SCM 15.11.93) G.P.S.de Silva, C.J. reiterated that, "*the inference of common intention must be not merely a possible inference, but an inference from which there is no escape.*"

There may be very suspicious circumstances but that cannot amount to legal proof. Then on the evidence if there be two possibilities the one which is in favour accused should be preferred as the accused is entitled to the benefit of any reasonable doubt. This is specially so and relevant where the guilt of the accused is sought to be established by circumstantial evidence.

46. Having considered the evidence against the 2nd accused, I am of the view that evidence is insufficient to sustain the conviction of murder based on common intention as against the 2nd accused-appellant. In these circumstances, it is apparent that the prosecution has failed to prove beyond reasonable doubt of the 2nd accused entertaining the common murderous intention. To that extent, the learned trial judge has erred, and accordingly the conviction against the 2nd accused for murder cannot be sustained.

47. However, the proved circumstances certainly give rise to a very strong and irresistible inference of entertaining and sharing between the accused persons, a common intention to assault and cause grievous hurt to the deceased. Thus, it is now necessary to consider if the 2nd accused can be convicted for the lesser offence of causing grievous hurt

on the basis of common intention when the 1st accused is found guilty of murder.

48. I find that in **Kripal v. State of Uttar Pradesh**, AIR 1954 SC 706, the Indian Supreme Court has considered a similar matter, which I will now advert to. In this case, the Court considered an appeal filed by three Appellants named Sheoraj, Kripal, and Bhopal, all of whom were convicted for murder on the basis of common intention. This appeal was in respect of two murders but the immediate issue considered was in respect of the murder of one of the deceased named Jiraj.

The facts of the incident have been summarised in the judgment as follows: *"The three appellants were working the well (Milakwala well) that morning. When they saw Man Singh and Sher Singh going past the well they asked them where they were going. On being told that they were going to harvest Jiraj's sugarcane field they abused them and told them not to go there but to work for them. Man Singh and Sher Singh did not listen to them and walked on. When they had gone 30-40 paces, the three appellants rushed at them and began to beat them with the handles of spears which were in the hands of Bhopal and Kripal and with a lathi* (Lathi is a long heavy wooden stick used as a weapon in India) *which was in Sheoraj's hand. Jiraj (*the deceased) *arrived at the spot and asked the appellants why they were beating his labourers and stopped them from beating them. Sheoraj hit him on the legs with his lathi and he fell down. Kripal stabbed him with his spear near the ear. Bhopal then stabbed him with his spear on the left jaw, put his legs on his chest and extracted the spear blade from his jaw. Just as the blade came off, Jiraj died."*

It was found that only simple hurt was caused to the deceased by the blows inflicted by Sheoraj and Kripal, and that it was Bhopal who inflicted the injury that caused the death. The High Court of Uttar Pradesh, convicted all three accused for murder on the basis of common

intention. In appeal, the Respondents argued that the common intention of the three accused was to kill the deceased Jiraj, which the supreme Court did not accept and held that:

"We are, therefore, unable to upheld the view taken by the High Court that any common intention to kill the deceased can be attributed to the three appellants. Therefore, the only common intention that can be attributed to all the three appellants in so far as the assault on Jiraj is concerned is the common intention to beat Jiraj with the weapons in their hands, which were likely to produce grievous injuries. In this view, therefore all the three would be guilty in respect of their assault on Jiraj for an offence under Section 326 I.P.C. while Bhopal alone would be guilty in respect of the offence under S. 302 I.P.C. It follows from that the conviction of both Kripal and Sheoraj under Section 302. I.P.C. must be set aside but that of Bhopal has to be maintained." (Section 326 is grievous hurt and Section 302 is murder under the Indian Penal Code.)

The Supreme Court upheld and affirmed the conviction of Bhopal under Section 302 I.P.C., but set aside the conviction of Kripal and Sheoraj under S. 302 I.P.C. but convicted them under Section 326 I.P.C on the basis of common intention under Section 34 of the Indian Penal Code.

49. Now in the present appeal, the evidence proves beyond reasonable doubt that the 1st accused did cause the death of the deceased with the requisite murderous intention. Hence the 1st accused is guilty and convicted for murder. However, as there is a reasonable doubt if the 2nd accused entertained a common intention to commit murder, the 2nd accused cannot be convicted for the offence of murder punishable under Section 296 read with Section 32 of the Penal Code. However, there is clear and cogent evidence to inferentially conclude beyond reasonable doubt that the two accused were actuated and acted with a common intention to cause grievous hurt to the deceased.

50. Both of them, having decided to cause grievous hurt to the deceased, acting together with that common intention, did in fact cause grievous injuries. The medical evidence of the pathologist proves this. The 1st and 2nd accused embark upon the joint enterprise with the common intention to cause grievous hurt but the 1st accused exceeds the shared common intention and inflicts multiple stab injuries with the intention of causing death and the death is caused as a result of the injuries. The proof in this case being so, the 1st accused is clearly guilty of murder under Section 296.

51. In these premises, the offence proved and the actual liability of the by the 2nd accused is for causing grievous hurt under Section 316 read with Section 32 of the Penal Code. As proved, this is the intention which was common to both the accused. No doubt, the 1st accused's unilateral intention of causing the death exceeded the initial common intention of causing grievous hurt. However, the 1st accused's act of inflicting fatal stab injuries was in furtherance of the common intention to cause grievous hurt which was exceeded by the 1st accused.

52. The offence of murder committed by the 1st accused certainly includes and encompasses the offence of causing grievous hurt which is a lesser offence. Thus, to my mind, it is quite legitimate and lawful to separately convict the first accused individually under Section 296 for murder. Similarly, it is also lawfully possible to convict both the 1st and 2nd accused for committing grievous hurt punishable under Section 316 read with Section 32 of the Penal Code, as it is a lesser offence of murder. It is relevant to note that the 1st accused could lawfully have been charged and charges under Section 296 and 316 may have been included in the same indictment vide Section 179 (3) of the Code of Criminal Procedure Act. That being so, as the 1st accused stands convicted for murder punishable under Section 296, a conviction under Section 316 read with Section 32 would be superfluous and redundant.

53. It would, therefore, be proper to convict the 2nd accused under Section 316 read with Section 32 of the Penal Code. Accordingly, the conviction against the 2nd accused for the offence of murder, punishable under Section 296 read with Section 32 is hereby substituted with a finding of guilt and is convicted for the lesser offence of voluntarily causing grievous hurt to Aparakke Keerthiwansha, punishable under Section 316 read with Section 32 of the Penal Code.

54. The Counsel for the 1st accused did concede that the 1st accused had taken up a completely different position in his dock statement from what was suggested to PW-01. Though this was so conceded, for completeness, I would also consider the same.

55. The 1st accused in his dock statement, tries to make out that the wife of the deceased, PW-01, was having an adulterous relationship with another and that was seen by the 1st accused which he had then conveyed to the deceased. He denies being present at the scene on that day and takes up a total denial. The learned trial judge has rejected and disregarded the dock statement on the basis that it creates no doubt on the prosecution's witness' version. As stated above, the 1st accused has taken up a completely new position at the end of the trial. He had not suggested any aspect of the positions taken in the course of the dock statement to PW-01. A dock statement requires to be considered in the same plane as any other evidence and should be subjected to the normal tests in evaluating the credibility and reliability. In the normal course of events, a person ought to suggest his position to the witness, especially, when the narration of the witness is completely different to the position of the accused. Failure to cross-examine and suggest is a tacit acceptance of the version as narrated by the witness. As held in the case of *Gunasiri and 2 Others vs. Republic of Sri Lanka 7* [2009] 1 SLR 39,

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-*

examination, it must follow that the evidence tendered on that issue ought to be accepted."

56. Therefore, when the accused takes up a completely new position at the end of the trial without suggesting that position to the witnesses, the said dock statement fails the test of consistency. It does not end there, but when an extreme position, totally contrary to what transpired in evidence, is so taken there is a strong inference that this is a false position taken up at the end of the trial to save himself. The dock statement of the first Accused is clearly one which is inconsistent and unreliable. Therefore, the learned trial judge is justified in rejecting the same and concluding that the dock statement has not been able to create any doubt in the prosecution's evidence.

Conclusion

57. In the above premises we see no merit in the grounds of appeal raised on behalf of the 1st accused-appellant. There is overwhelming evidence to prove beyond reasonable doubt that the 1st accused did cause the death of the deceased with the requisite murderous intention. Hence, we see no reason to interfere with the finding of guilt and conviction for murder as entered against the 1st accused and the sentence. Accordingly, the appeal of the 1st accused-appellant is dismissed, and the conviction and sentence imposed on the 1st accused-appellant are affirmed.

58. As for the grounds of appeal raised on behalf of the 2nd accused-appellant, we see no merit except ground No.8, which we uphold. Accordingly, the conviction and sentence against the 2nd accused for the offence of murder punishable under Section 296 read with Section 32 are varied and substituted. Accordingly, for the reasons as given above, the 2nd accused is found guilty and is convicted for the lesser offence of voluntarily causing grievous hurt punishable under Section 316 read with Section 32 of the Penal Code.

59. Considering the age, the gravity of the offence, and the fact that he is a first offender, a sentence of 6 years' rigorous imprisonment with a fine of Rs. 1500/= and in default a sentence of 6 months is ordered in substitution for the sentence.

60. Upon the conviction and sentence on 25.04.2019, the 2nd accused has been in remand since preferring this appeal on 03.05.2019. That would be 5 years and 10 months. By virtue of the proviso to Section 333 (5) of the Code of Criminal Procedure Act, as amended by Act No. 25 of 2024, the time so spent in remand pending the determination of this appeal is ordered to be considered as a part of his sentence. Accordingly, the said period is deemed to be a part of the sentence served.

61. The appeal of the 1st accused-appellant is accordingly dismissed and the conviction and the sentence against the 1st accused-appellant are affirmed.

62. The conviction and the sentence against the 2nd accused-appellant are varied and substituted and the appeal of the 2nd accused-appellant is partially allowed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL