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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act.

Court of Appeal Case No:
HCC 230-235/2013

The Democratic Socialist Republic of Sri Lanka.

Complainant

High Court Of Katutara
Case No: HC 874/2007

VS.

1. Mohomad Faizer Mohomad Liyakahth
2. Mohomad Manzoor Mohomad Ramaz
3. Mohomad Manzoor Mohomad Hariz
4. Mohomad Manzoor Mohomad Rizwan
5. Mohomad Sali Mohomad Mohomad Manzoor (deceased)
6. Mohomad Faizer Mohomad Nizer Hussain
7. Mohomad Manzoor Mohomad Irfan

Accused

AND NOW BETWEEN

1. Mohomad Faizer Mohomad Liyakahth
2. Mohomad Manzoor Mohomad Ramaz
3. Mohomad Manzoor Mohomad Hariz
4. Mohomad Manzoor Mohomad Rizwan
5. Mohomad Sali Mohomad Mohomad Manzoor (deceased)
6. Mohomad Faizer Mohomad Nizer Hussain

7. Mohomad Manzoor Mohomad Irfan

Accused-Appellants

VS

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

Respondent

Before : **Devika Abeyratne,J**
P.Kumararatnam,J

Counsel : Shanaka Ranasinghe, PC with Anushika Ranasinghe for the 1st and 6th Accused-Appellant

Nalin Ladduwahetty,PC with Keerthi Gunawardhana for the 2nd,3rd ,4th and 7th Accused-Appellant

Shanil Kularatna, DSG for the State

Argued On : 28.04.2021 and 05.05.2021

Decided On : 02.08.2021

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Devika Abeyratne,J

The seven accused in this case were indicted on the following counts. The 5th accused had died at the conclusion of the trial before delivery of the judgment.

a) On or about the 16th of November 2003 at *Beruwala*, being a member of an unlawful assembly with the common object of causing injuries to *Mohamad Jabeer Mohamad Rizmi* and thereby committing an offence punishable in terms of section 140 of the Penal Code.

b) In the course of the same transaction being a member of the said unlawful assembly causing death of *Mohamad Jabeer Mohamad Rizmi* and thereby committing an offence in terms of section 296 read together with section 146 of the Penal Code.

c) In the course of the same transaction being a member of the said unlawful assembly committing the offence of attempted murder of *Abusali Mohamad Nazir* and thereby committing an offence punishable in terms of section 300 read together with section 146 of the Penal code.

d) In the course of the same transaction causing death of *Mohamad Jabeer Mohamad Rizmi* and thereby committing an offence punishable in terms of section 296 read together with section 32 of the Penal Code.

e) In the course of the same transaction committing the offence of attempted murder of *Abusali Mohamad Nazir* and thereby committing an offence punishable in terms of section 300 read together with section 32 of the Penal Code.

The learned trial judge convicted and sentenced all the accused except the 5th accused on all 5 counts. For counts 4 and 5 as they were alternative charges no sentence was imposed. For the convicted accused, the following sentences were imposed. On count No 1, 6 months rigorous imprisonment, on the second count which is for causing the murder of *Mohamed Ramiz* the death sentence was imposed and on count no 3 for the attempted murder charge, a term of 18 years rigorous imprisonment was imposed.

Being aggrieved with the conviction and the sentence, the 1st to 4th and 6th and the 7th accused have preferred their appeal to this Court. By judgment dated 16.06.2017, the judgment of the High Court was affirmed.

Aggrieved by the decision of this Court, an appeal has been preferred to the Supreme Court where leave was granted on the Questions of Law submitted for consideration. By order dated 4.3.2020 the Supreme Court has set aside the judgment of this Court dated 16.6.2017 and referred the matter back to this Court to hear and determine the appeals of the convicted accused expeditiously.

On 8.4.2021 and 5.5.2021 the appeals were argued before this Court. President's Counsel Mr. *Nalin Laduwahetty* appeared for 2nd to the 4th and the 7th Appellants and President's Counsel Mr. *Shanaka Ranasinghe* appeared for the 1st and the 6th accused appellants.

Written submissions have been submitted on behalf of all the appellants. It is noted that there is no written submissions submitted by the Respondent on the main appeal, however, written submissions by the respondent filed of record pertains to a preliminary objection taken by the appellants that they were not given a jury option, which preliminary objection has been overruled by order

dated 29.09.2015 by *Justice H. N. J Perera* (as he then was) with *Justice K.K.Wickremasinghe*.

The grounds of appeal of all the appellants can be summarized as follows;

That the learned trial judge failed to assess properly that the evidence of the prosecution witnesses specially, witnesses PW 1 and PW 2 lack credibility, given the fact their evidence is contradictory and inconsistent; the failure to consider that the short history given to the doctor by PW 2 totally contradicts the evidence given at the trial; failure to consider that the dock identification is bad in law as there is no proper identification in this case; that the learned trial judge has erred in law by convicting the appellants under the charge of Unlawful Assembly.

The facts of the case, albeit briefly is as follows;

According to the evidence of PW 1, on 16.11.2013, around 3 am, during the *Ramadan* period, she had heard some cries from outside when she was waiting for her step brother PW 2 who she has sent to bring some fruits from a nearby boutique.

She had run out of the house and tripped on some object she identified as the injured *Rizmi*, now deceased. Her query as to who assaulted him was unanswered and his mouth had been filled with blood and he had made only a gurgling sound. After shouting for help, she had run to his house which was close by and informed the inmates in the house. It was her evidence that she saw about 5 people near the mosque which was about 200 meters from where *Rizmi* was fallen, but had not recognized any of them.

People had gathered to the place where *Rizmi* was fallen when she returned after informing about *Rizmi* . She has seen PW 2 walking towards the gathered crowd bleeding from his head. She had inquired from him what happened but he has not answered. Thereafter, she has taken him by a three wheeler first to the Police Station then to the hospital. On the way to the Police Station, near the petrol shed PW 2 had answered her question as to who assaulted him stating it was *Hariz, Rizmi, Razeek, Rizwan, and Liyakath* .Thereafter, he had fainted. These names she has stated in her police statement.(Page 106 of the brief). It is noted that although she had said that her brother said 4 names, in her answer five names have been mentioned.

ප්‍ර : කාගේ නම් ද කිව්වේ?

උ : හාරිස්,රිස්මි, රාසෙධ , රිස්වාන්, ලියාක්වත්.

It is to be stated that throughout the proceedings, the names of the accused have been written in different ways by the stenographers and as practical as possible the names will be referred to in Sinhala with reference to the pages in the brief for easy reference.

Further, although the witnesses have given evidence in Sinhala, it is to be noted that they are not fluent in Sinhala language and therefore, the evidence should be carefully assessed and understood giving consideration to the limitation of the knowledge of the language. In pages 126 and 137 of the brief, PW 2 has stated about his not being fluent in the Sinhala language.

PW 1 has not seen the actual attack but, when cross examined,she had stated that the names of the 4 assailants as stated by her brother on their way to the Police Station she had informed the Police. (page 122 of the brief)

ප්‍ර : මොකක්ද කිව්වේ?

උ : එයා කිව්වා හරි, රිස්වාන්, රාම්ස්, ලියකාන් ඒ අය ඔක්කොම ගහගත්තා. මම බේරන්න ගිහිල්ලා මාව ලියාකාන් කැපුවා කිව්වා. කියලා එහෙමම සිහිය නැති උනා නසීටර්.

PW 1 has further stated that she was unaware of any existing animosity among the deceased, injured and the accused, but they live in close proximity to each other. However, she has mentioned that there had been a recent incident where one of her nieces had been struck by the motorcycle ridden by the nephew of the person called *Liyakath* ,who is the 1st accused, and they had stopped communicating with each other. However, after the matter was resolved by the police, they were on talking terms once again.

In cross examination she had denied knowledge of any incident the previous night or about any disputes between people from *Mahagoda* and *Maradana*. (Page 118 of the brief). However, it appears that these suggestions by the defence counsel appeared to be without any logical basis or solid evidence.

PW 1 has identified the accused appellants mentioned by PW 2 at the trial. This identification can be accepted as she has testified that all the accused were known to her as they were living close to her residence. However, her identification is limited to what was conveyed by PW 2 and not as the persons who attacked the deceased or PW 2.

The only eye witness PW 2 has testified that when he was returning from the boutique he saw about seven people assaulting *Ramiz.* When he had questioned why they were attacking him, the 1st accused is alleged to have answered that as the deceased attacked him he was going to kill him and not to interfere or else he too would be killed.

Further, when PW 2 asked them not to assault so severely, the 1st accused appellant has attacked him with a "*Manne* knife" saying he (PW 2) was warned not to interfere. PW 2 has clearly testified that the 1st accused *Liyakan* and 3rd accused *Hariz* were carrying knives and the others were possessed with clubs at that time.

In Page 128 of brief;

ප්‍ර : මොකද්ද දැක්කේ ?

උ : රිස්මි තම්බිට ලියාකාන්, මන්සුර්, රිස්වාන්, ලියාකාන්, ලියාකාන්ගේ මල්ලී මන්සුර් ඒ ගොල්ලෝ ගහ ගහ සිටියා. ලියාකාන්ගේ හා හරාරීස්ගෙ අතේ මාළු කපන මන්නයක් තිබුනා. එකෙන් මෙයාව කපල තිබුණා. මම ගිහින් ඇහුවා මොකටද මෙහෙම යාළුවාට ගහන්නේ කියා. ලියාකාන්ගෙන්. එයා කිවුවා තමාට මේකෙන් වැඩක් නැහැ, මට ගැහුව නිසා මම මෙයාව මෙතනම මරනවා, තමාට වැඩක් නැහැ ඔයා කාටහරි කිවුවොත් ඔයාවත් මරනවා කිව්වා. තමාගේ වැඩක් බලාගන්න කියා මට කිවුවා.

ප්‍ර : කොයි හරියේදී ද ?

උ : මහගොඩ පල්ලියේ අඹ ගහක් තිබෙනවා. අඹ ගහ යට. එහෙම ගහන්න එපා, මැරෙන්න ගහන්න එපා කිවුවා, ඔයාට එක පාරක් කිව්වනේ, තමාට වැඩක් නැහැ කියා. මට ලියාකාන්ගේ අතේ තිබුන මන්නෙන් ගැහුවා, ඔයාට තව පාරක් කියන්න ඕන නැහැ කියා.

PW 2 has testified about the place of incident as under the mango tree near the mosque and there was sufficient light to identify from the lamp post that was there. This evidence about the lamp post at the scene of the incident was corroborated by a police witness.

In page 107 of the brief, PW 2 has identified *Liyakath* as the 1st accused, *Ramaz* as the second accused, *Hariz.* as the 3rd accused, *Rizwan* as the 4th accused who live in close proximity to each other. Names of the other accused had been disclosed later as per the evidence in pages 162 and 163 of the brief where in cross examination PW 2 has stated that after he left the hospital, in a statement to

the Police, he has given the names of *Liyakath, Hariz, Ramaz, Rizwan, Naizer, Manzoor* as the assailants who were involved in the fight as follows.

In page 162 and 163 of the brief;

ප්‍ර : මේ සිද්ධියේදී ලියාකාත් කියන අයගේ නම විතරයි කිව්වා.?

උ : ඔව්. ඊටපස්සේ ඉස්පිරිතාලෙන් බෙහෙත් අරගෙන ආවට පස්සේ කටඋත්තර ගන්න කොට කිව්වා මෙහෙම රණ්ඩු වුනා කියා. ලියාකාත්, හාරිස්, රාම්ස්, රිස්වාන්, නයිසර්, මත්සුර්, ඔක්කොම රණ්ඩු කර කර සිටියා. මම බේරන්න ගියාම තමා මට මන්න පාර වැදුනේ.

The suggestion by the defence Counsel that the names of 5 to 7 accused were not given in the statement to the hospital police was denied by PW 2, and that fact has been highlighted as an omission.

According to his evidence PW 2 has given a statement to the Police on 18.11. 2003. In page 162, PW 2 had testified to a subsequent statement made by him to the police. Therefore, the defence cannot be now allowed to say that they were unaware of a second statement by PW 2. In page 163 PW 2 has given the names of seven people who were involved in the incident which has not been challenged in cross examination.

PW 2 has clearly testified that when he saw *Rizmi* being attacked by several persons who he identified in page 128 as ලියාකාන්, මන්සුර්, රිස්වාන්, ලියාකාන්, ලියාකාන්ගේ මල්ලී මන්සුර් that he intervened and he was threatened by *Liyakath* not to interfere. *Liyakath* and *Hariz* had been carrying knives with them. This evidence he has further expanded in page 163 to include ලියාකාත්, හාරිස්, රාම්ස්, රිස්වාන්, නයිසර්, මන්සුර්.

In *Wannaku Arachchilage Gunapala vs Attorney General* 2007 SLR, Volume 1, page 273, it was held " *Absence of cross examination of a prosecution witness of certain facts leads to the inference of admission of that fact."*

In *Sarwan Singh vs State of Punjab* 220 AIC SC (111)3652 at 3655, 3656 it was stated ' *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."*

The learned trial judge has clearly stated in his judgment, that the evidence of PW 2 has not been challenged by the defence. In the light of the above authorities, when the evidence of PW 2 is not challenged in cross examination, it has to be concluded that such evidence is not disputed and thus accepted.

It has been established by medical evidence that PW 2 suffered injury to his forehead area and that there was a compound depressed fracture of the left frontal bone and that the CT Scan showed , *Skull fracture, Brain Contusion, and Pneumocephalus*. It is fair and just to consider this injury when his evidence is considered . PW 1 saw him walking, bleeding from head and initially he could not answer her question as to who injured him, but later, after mentioning the 4 names of some appellants he had fainted. It is also important to consider his evidence that although he has recovered from his head injury, sometimes he has loss of memory and he could not continue with his visits to the medical clinic because of financial difficulties. Nonetheless, he had revealed the names of the other assailants to the police. These facts have to be considered in the background of his head injuries.

Another important issue taken up by the appellants is where both Presidents Counsel emphasising on the fact that in the short history given to *Dr Jayasena* a person called ***YAKAR*** had been mentioned as the person who assaulted PW 2, and that as such a person has not transpired in evidence, the evidence pertaining to the identification is contradictory. Further, that the evidence did not elicit a use of a sword in the incident as PW 2 has only testified about a *Manne knife*.

The medical officers evidence relating to "*Yakar"* is hearsay evidence. The following Indian Supreme Court authorities have explained what is expected of a medical personnel who examines a patient or an accused person in a criminal case very succinctly.

In *Pattipati Venkaiah v State of Andra Pradesh AIR 1985 SC 1715 (Supreme Court of India)*

> At Para 16: *"A doctor is not at all concerned as to who committed the offence or whether the person brought to him is a criminal or an ordinary person, his primary effort is to save the life of the person brought to him and inform the police in medico legal cases."*

Bhargavan v State of Kerala AIR 2004 SC 1058 (Supreme Court of India)

> At para 20*: So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly noted by the Courts below, his primary duty is to treat the patient and not to find out by whom the injury was caused.*

In Dolawatte vs Attorney General 1986 (1) SLR 371 it was held that the rules pertaining to hearsay evidence would apply if the person who gives the history of the patient (if it is not the patient) is not called as a witness. It went on to state, "*.....Medical Report of the doctor was admissible under section 414(1) of the Criminal Procedure Code. The doctor being obliged in the course of his professional duty to make the entry under the relevant cage specifying case history the provisions of section 32(2) of the Evidence Ordinance are applicable to the admission of such an entry."*

In the instant case, the doctor who made the entry was called as a witness, and had admitted in page 200 of the brief that the patient informed him that he was assaulted by "*Yakar"*. That evidence has not been elaborated.

It is trite law that Court cannot presume certain issues. However, the doctor being a Sinhalese, who was speaking to a person whose mother tongue is different, should have been questioned more closely by the Counsel. PW2 is alleged to have been assaulted by ***"Liyakath"***. In the doctors notes the person is **"*Yakar"*** which has some similarity, and for a person not familiar with the names of that community, the name may have sounded as it was written by him. (emphasis added)

Be that as it may, PW 2 has specifically testified how and where he was assaulted by *Liyakath* in page 128,129 of the brief as follows;

ප්‍ර : කොයි හරියේදී ද ?

උ : මහගොඩ පල්ලියේ අඹ ගහක් තිබෙනවා. අඹ ගහ යට. එහෙම ගහන්න එපා, මැරෙන්න ගහන්න එපා කිවුවා, ඔයාට එක පාරක් කිව්වනේ, තමාට වැඩක් නැහැ කියා. මට ලියාකාන්ගේ අතේ තිබුන මන්නෙන් ගැහුවා, ඔයාට තව පාරක් කියන්න ඕන නැහැ කියා.

ප්‍ර : ගහපු පාර තමාට වැදුනාද?

උ: ඔව්.

ප්‍ර : කොහෙටද?

උ: (සාක්ෂිකරු මුහුණේ නළලේ වම් පැත්ත පෙන්වා සිටී.)

ප්‍ර : තමා මොකද කලේ ?

උ: මට යන්නත් බෑ, මම හෙමින් ගෙදරට ගිහින් අක්කට කිව්වා මෙහෙම රණ්ඩුවක් වෙලා තිබෙනවා, මම බේරන්න ගිහින් මාවත් කැපුවා කියා.

ප්‍ර: තමාට යන්න පුළුවන් වුනාද?
උ : ගෙදර දොරට තට්ටු කරලා ගෙට ගියා. මාව වැටුනා.

Considering all of the above it is my view that the learned trial judge has very correctly concluded that it has been established beyond reasonable doubt that it was the accused appellants who are responsible for the injuries caused to PW 2.

One of the main grounds of appeal is that the learned trial judge failed to consider the contradictory evidence given by PW 1 and PW 2. The learned Counsel for the appellants submitted that the contradictory and inconsistent evidence of PW 1 and PW 2 which go to the root of the case has not been considered by the trial judge and as PW 2 contradicted himself on vital and decisive points, his evidence is unreliable and unworthy of any credence.

One such contradiction is that in the evidence of PW 1 she has stated that the names of the people who assaulted PW 2 was told to her in the three wheeler. Whereas, PW 2 in his evidence has testified that after getting injured he walked to her house, knocked on her door and after mentioning the names of the people who assaulted him he fainted. In another instance he had testified that he told PW 1 about his injuries when she came out of the house in to the compound.

Another discrepancy that was highlighted by the Counsel for the appellants was PW 1 stating she saw PW 2 walking towards where *Rizmi* was fallen and from there she took him to the police station . However, contradicting it, PW 2 in his evidence had stated that after being assaulted, he slowly walked to his sister's house where eventually he fainted.

The vital issue to be considered is how the incident occurred and the persons involved in it, more than the place where she met the witness and at what point it was conveyed to PW 1. As stated above , it has been elicited that PW 2 was bleeding from the head after being assaulted with a cutting weapon and rational thinking or a photographic memory of the sequence of events cannot be anticipated or expected in such circumstances. Thus, at which place or at what point the names of the assailants was mentioned is not a material point in this case.

In *Bhoginbhai vs State of Gujarat* (1983) AIR SC 753 the Indian Supreme Court held thus" *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident .It is not if as a video tape is replayed on the mental screen. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time plan. A witness is liable to get or mixed-up when interrogated later on."*

In *H.K.K. Habakkala vs Attorney General* 2010 BLR at page 102 it was held '*if contradiction is to be material it should be sufficient to create a reasonable doubt in the evidence of the witness concerned.'*

Another omission that was highlighted (in page 164) is that PW 2 has failed to mention the names of 5,6, and 7 accused in the police statement. In page 162 in cross examination PW 2 has stated that after being released from the hospital he has given a statement to the police regarding the incident and mentioned the names of *Liyakanth, Hariz, Ramiz , Rizwan, Naiser* and *Mansoor.*

The contradictory positions referred to by the learned Presidents Counsel do not affect the root of the case and no doubt has arisen regarding the credit worthiness of the prosecution witnesses by these contradictions and discrepancies which cannot be considered as material contradictions in the given circumstances.

Thus, the learned trial judge's conclusion that the contradictions were not material and that the omission did not affect the root of the case or create a reasonable doubt in the case can be upheld in our considered view.

Another ground of appeal contended by the Learned Presidents Counsel for the appellants is that the Dock Identification is bad in law.

It was submitted by President's Counsel *Mr.Laduwahetty* that although PW 2 testified about 7 people assaulting the deceased , the evidence does not elicit that position. It is apparent that the names of the accused have been mentioned on two separate occasions. Initially only 4 names have been mentioned by PW 2 to his sister while travelling in the three wheeler.

From the police evidence it has been established that those 4 persons have been taken in to custody on 17.11.2003 when they surrendered themselves to the Police. (page 210), The 5th and the 6th accused have been taken into custody on

31.1.2004 (page 210) and the 7th accused has been taken into custody on 19.03.2004. (page 226)

At one point PW 2 has testified mentioning six names and what he stated was 'about' seven people were assaulting the deceased when he intervened. One cannot expect him to be counting the number of people who were around the person being assaulted, in the given circumstances. Nonetheless, these 7 accused have been identified in the evidence of PW 2 particularly in pages 132, 133 and 163.

This is a criminal action. It is a trite fact that consequent to investigations of any incident, persons involved are identified and arrested. Likewise in the instant case it appears that the accused appellants have been taken in to custody at various stages. Thereafter, it is the burden of the prosecution to prove its case beyond reasonable doubt.

PW 2 has testified about the presence of the accused at the scene of the crime armed with clubs and two *manna* knives. It has been established by medical evidence that the deceased had cut injuries as well as injuries from blunt trauma. It has been established that PW 2 has cut injuries. Therefore, the learned trial judge's conclusion that on evidence, the accused had been instrumental in causing bodily injuries to the deceased is well founded and the trial judge has sufficiently analysed and evaluated the evidence of the complicity of each accused appellant.

On perusal of evidence it is apparent that on behalf of the accused, several contradictory suggestions have been put to the prosecution witnesses, specially when the time frame mentioned is considered. In page 138 it had been suggested that PW 2 was involved in an incident the previous night with *Rizwi* and *Iqbal* attacking *Liyakath* in his house. Another suggestion was that PW 2 and *Rizwi*

had tried to cause injury with a knife to the mother and sister of *Liyakath* .that morning and they were chased away by *Liyakath* and subsequently, some people from the area had injured *Rizwi* and PW 2 .(Page 146 of the brief)

Another suggestion was that *Rizwi* had tried to assault a person called *Thushara.* It has also been suggested that PW 2 and *Rizwi* were always having disputes with the 1st to 4th accused appellants. These have been merely suggestions without any corroborating evidence. It is apparent that these contradictory positions had been suggested by the defence Counsel to PW 2 without any logical or solid basis. This shows that various defences have been put forward on behalf of the appellants and that the defence was not consistent.

In page 166 the following contradictory position had been suggested by the defence counsel.

ප්‍ර : සිද්ධිය වූ දිනයේ උදේ තමයි රිස්මියි තවත් ඉක්බාල් කියන පුද්ගලයන් 3 දෙනාම ගියා 1 විත්තිකරුගේ නිවසට ගොස් ඔහුගේ මවගේ උරහිසට පිහියෙන් ඇනලා අක්කටයි, නංගිටයි මරණ තජර්නය කරලා මංකොල්ලකෑමක් සිදු කරන්න ගියා කියා?

උ : නැහැ.

ප්‍ර : එහෙම ගිහින් එනකොට තමා වටේම ඉන්න අය පහර දීමක් කලේ කියා?

උ : නැහැ.

On perusal of the evidence it is abundantly clear that neither with the contradictory stances that was suggested to the accused nor with the evidence, the creditworthiness of the witnesses was impaired.

The dock statements of the appellants have been considered by the trial judge and the conclusion that the Dock Statements have not cast any doubt in the evidence of the prosecution evidence can be upheld.

It has been clearly established by evidence that the accused were well known to the witnesses PW 1 and PW 2 as they were from the same area. In such circumstances there was no need to hold an identification parade and no prejudice has been caused to the appellants, by not holding an Identification Parade.

It was also contended on behalf of the appellants that as the charge was to be under unlawful assembly, in order to fulfill that requirement the names of 7 people have been submitted and that the learned trial judge should have considered whether the legal requirement to maintain a charge under unlawful assembly could be maintained.

PW 2 has testified naming the seven accused who were at the place of incident. *Hariz* and *Liyakath* were armed with *manne* knives and the others with clubs. This material evidence was not challenged when it was opportune and possible to challenge. Neither the plea of alibi of 2, 4, 6 and 7 appellants nor the defence of any of the appellants have created a doubt in PW 2's evidence. The medical evidence corroborates the evidence of PW2 in as much as it was established that there were blunt trauma injuries on the deceased that could be caused by being assaulted with clubs.

The common object of unlawful assembly alleged in count one and two are, causing the death of *Rizmi* and the attempted murder of PW 2 respectively. It is up to the prosecution to prove that these offences were committed in furtherance of the common object.

In *Ajith Samarakoon s The State 2994 2 SLR page 208 at page 230 Ninian Jayasuriya J held, that evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused.*

On a consideration of the evidence of PW 2, it can be accepted that the prosecution has proved that each accused was a member of the unlawful assembly, at the time the offences were committed. The common object of the unlawful assembly was the infliction of serious bodily injury on the deceased and PW2. It is in evidence that *Liyakath* had stated that he is going to kill *Rizmi* and if PW 2 interferes he too would be killed. The other appellants have been present at the place of incident.

In *King vs Abeywickrama* 44 NLR 254, *Soertz* J stated '*once they were found to be members of an unlawful assembly, the extent of their participation is immaterial when we are considering their liability in law. In regard to their liability they also serve who only stand and wait.'*

Therefore, the argument of the Counsel for the appellants does not arise for consideration as the learned trial judge has sufficiently evaluated and analysed the evidence to come to his conclusion on that legal issue.

The trial judge had the benefit of observing the language, expression, the manner of giving evidence in the examination in chief and cross examination of the witnesses. The demeanour and the deportment of the evidence of these witnesses would have assisted him in his conclusions.

In *Sigera* Vs *Attorney General* 2011 1 SLR 201, it was held that an Appeal Court will not interfere with the findings of facts of a trial judge who has the

privilege and the advantage of hearing and observing the demeanour and department of witnesses as and when they gave evidence in court.

In the dock statements of the 2nd, 4th, 6th and 7th appellants they have referred to a plea of alibi which has not seriously impugned the evidence of the prosecution witnesses.

It is apparent that the learned judge has drawn proper inferences from the evidence that has been elicited and proved.

For the reasons given above in the judgment, it is my considered opinion that there is no merit in any of the grounds of appeal urged by the defence and there is no justification in interfering with the verdict, findings or the sentence imposed by the learned trial judge.

Accordingly, the conviction and sentence is affirmed of all the appellants. The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL