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

In the matter of an application for appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

CA Case No. 149 / 2012

HC Panadura No. 1806 / 2004

The Honourable Attorney General,
Attorney General's Department,
Colombo 12.

-Vs-

Geoffrey Anthony Thilan Amarasekara
Accused

-AND-

Geoffrey Anthony Thilan Amarasekara
Accused - Appellant

-Vs-

The Honourable Attorney General,
Attorney General's Department,
Colombo 12.
Respondent

BEFORE	:	**A.H.M.D. Nawaz, J, and**
		K.K. Wickramasinghe, J.
COUNSEL	:	Saliya Pieris for the Accused-Appellant.
		Shavindra Fernando, PC, ASG for the Attorney-General
Argued on	:	15.09.2015
Decided on	:	17.09.2015

A.H.M.D.Nawaz J,

The Accused-Appellant was indicted in the High Court of Panadura for having committed the offence of murder in respect of one Thiruchelvam *alias* Terry on or about 15th March 1998 punishable under Section 296 of the Penal Code. The trial commenced before the Learned High Court Judge of Panadura on 13th May 2009 and the prosecution led the evidence of the mother of the Accused-Appellant, the investigating police officer and the judicial medical officer. On behalf of the Accused-Appellant, no evidence was led except a laconic dock statement made by the Accused-Appellant.

At the conclusion of the trial learned High Court judge of Panadura found the Accused-Appellant guilty of the offence of culpable homicide not amounting to murder contrary to Section 297 of the Penal Code. Having found the Accused-Appellant guilty of the lesser offence based on knowledge, the Learned High Court judge sentenced the Accused-Appellant to a term of 8 years' rigorous imprisonment

and imposed a fine of Rs. 15,000/- In default of which a term of 8 months' rigorous imprisonment (RI) was imposed.

Even though the learned High Court judge found the accused guilty in a judgment dated 22nd June 2012, the aforesaid sentence of 8 years' RI has been imposed by the Learned High Court judge on 10.08.2012. Though the sentence was imposed on a later date than the date of conviction, a careful reading of Sections 279 and 283 (2) of the Code of Criminal Procedure Act No. 15 of 1979 make it clear that the sentence forms part of the judgment and I construe that the sentence has been imposed as from 22nd June 2012 - the date of the conviction - vide the useful observations of M.W.H. de Silva J in ***Henricus v Wijesooriya***[1]**.** Interpreting sections 304 and 306 of the old Criminal Procedure Code which correspond to Sections 279 and 283 of the Code of Criminal Procedure Act No. 15 of 1979, M.W.H. de Silva J had the following to state in ***Henricus*** (supra)-

> *"Sections 304 and 306 quite clearly show that the judgment must be contemporaneous with the sentence and that the sentence forms, in fact, a part of the judgment."*

In fact Section 283 (2) of the Code of Criminal Procedure Act is indicative of the fact that the sentence is part of the judgment.

"It (the judgment) shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced."

When this instant appeal came up for argument before this court on 15th September 2015, the learned Counsel for the Accused-Appellant submitted that he would not canvass the conviction but would only confine the appeal to the question of

[1] 47 NLR 378 at 380-381

sentence. The Counsel for the Accused-Appellant would not gainsay that the deceased youth – an unfortunate domestic help of around 15 years as the 1st witness for the prosecution alleged, tragically came by his death at the hands of the Accused-Appellant. Be that as it may, his plea was an invocation of what he called mercy from court for an Accused-Appellant who labored under hallucinations and delusions which are persistent even during the pendency of this appeal.

The contention of the learned Counsel for the Accused-Appellant was that the case record speaks for itself as to the mental condition of the Accused-Appellant and upon being queried from Court the learned counsel outlined several instances of evidence demonstrating insanity on the part of the Accused-Appellant which he submitted should impel this court on compassionate grounds to reduce the term of 8 years' RI to what this Court would consider condign and render the reduced term effective from the date of conviction.

Though this court would not go into the propriety of the conviction of the Accused-Appellant for culpable homicide not amounting to murder based on knowledge, it is not irrelevant to consider the merits of the plea for a reduced term of imprisonment having regard to the constant state of sustained unsoundness of mind or derangement that has been urged before us. In point of fact it has been brought to the attention of court that the state of mental derangement of the Accused-Appellant persists even during the pendency of this appeal as on or around 13th March 2015 the Accused-Appellant is said to have attempted to commit suicide by hanging himself in his cell whilst in remand prison and the prison authorities had been able to abort the attempt and referred the Accused-Appellant later on to the psychiatrist at the Welikada prison, Dr. de Alwis. This court finds an affidavit from the

mother of the Accused-Appellant attesting to this fact of attempted suicide in the prison cell and the subsequent examination of the Accused-Appellant by a medical doctor on a number of occasions since the attempted suicide. The affidavit dated 21st April 2015 also deposes to the fact that the Accused-Appellant does not receive his medication and that relevant tests have not been carried out.

For purposes of satisfying myself with the presence or otherwise of a state of disease of mind on the part of the accused appellant, I have examined the record of proceedings which took place in the High Court of Panadura and the record is chock-full of items of evidence tending to show unsoundness of mind.

Our task of looking at that evidence is only for the purpose of ascertaining whether the plea in mitigation of the sentence is justified having regard to the material before us as the issue of sentence invariably engages the question of excessive punishment or a sentence which the State alleges to be lenient. Whether a sentence is excessive or lenient in light of the facts and circumstances of a particular case is a question of law which this Court is bound to consider in appeal and as I observed in ***Bandage Sumindra Jayanthi v Hon.Attorney-General*** CA 251-267/2012 (HC Vavuniya decided on 3.07.2015), the parties must be able to demonstrate to the appellate court the existence of both aggravating and mitigatory circumstances in the case for the reviewing court to assess the propriety of the sentence meted out. Such circumstances may be manifest in the evidence led, submissions made and the judgment pronounced containing the sentence. Submissions by both the prosecutor and defence counsel have to be considered by the sentencing judge and no judge can deny the right of parties to make submissions on sentence though no doubt sentencing belongs to the domain of the judicial mind. But parties do enjoy the right

of representing their respective positions on sentence to the judge and this right cannot be intruded upon by a sentencer as submissions on sentencing at times clarify and shed much light on the evidence led inclusive of both the aggravating and mitigatory circumstances. Even this Court is not denuded of jurisdiction to consider post conviction circumstances which are traceable to manifest items of evidence led in the High Court.

Viewed with these indicia, I observe upon a perusal of the evidence led in this case that even the prosecution has elicited evidence on unsoundness of mind from the mother of the Accused-Appellant who was summoned to testify for the prosecution (vide page 69 of the brief). Therefore submissions made by the learned counsel for the Accused-Appellant that the convict has continued to display tendencies bordering on insanity whilst in prison have to be borne in mind by this Court.

Mr. Saliya Pieris submitted that the Accused-Appellant has consistently displayed pathological behaviour which has resulted in his attempts to take his life twice in the past. The latest episode of the abortive attempt has taken place during incarceration *post* conviction. The Accused-Appellant who is an amputee had been shown to doctors for his disease of mind which, as spoken to by his mother, manifested itself in aberrant behaviour such as attempts to jump in front of an oncoming train, constant bathing and listening to music at full blast. A perusal of the proceedings at pages 69, 70, 75 and 77 demonstrates the above. The Accused-Appellant, when called upon to make his defence, has stated in his terse dock statement that as he had been suffering from a mental illness since 1998, he could not remember what had happened at that time *(sic)*. He had further stated that he was still suffering from a mental illness and the Court could do anything it wanted-vide page 159 of the

proceedings. Though the defence had moved for a date to call a medical doctor to testify as to the illness of the Accused-Appellant, no such witness was called in the end.

The learned High Court Judge has herself acknowledged the fact of the mental illness that was adduced before Court but found the Accused-Appellant guilty of culpable homicide not amounting murder based on knowledge.

Medical Condition at the commencement of the trial-Chapter XXXI of the Code of Criminal Procedure Act

It is relevant to advert to *Section 375 (1) of the Chapter XXXI of the Code of Criminal Procedure Act No 15 of 1979* which states as follows:-

> *"If any person committed for trial before the High Court appears to the court at his trial to be of unsound mind and consequently incapable of making his defence, the jury or (where the trial is without a jury) the Judge of the High Court shall in the first instance try the fact of such unsoundness and incapacity, and if satisfied of the fact shall find accordingly and thereupon the trial shall be postponed."*

This provision that deals with the competence and fitness of an accused person of unsound mind has been activated as the record shows that the Accused-Appellant was declared to be fit to face his trial subsequent to an examination and it was after such a finding that the trial got underway.

In fact Chapter XXXI of the Code of Criminal Procedure Act makes elaborate provisions for the initial investigation as to whether a particular accused is competent and fit to undergo his trial. The procedure *post* the acquittal of the

accused upon a successful defence of insanity is also provided for in section 380 of the Code which declares that:-

> *"Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence he was by reason of unsoundness of mind and incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law, the verdict shall state specifically whether he committed the act or not."*

Section 381 of the Code provides for a person acquitted on ground of unsoundness of mind to be kept in safe custody.

Section 381 (1) lays down:-

> *"Whenever the verdict states that the accused committed the act alleged, the court before which the trial has been held shall, if such act would but for the incapacity found have constituted an offence, order such person to be kept in safe custody in such place and manner the court thinks fit and shall report the case for the orders of the Minister."*

Section 381 (2) states as follows:-

> *"The Minister may by writing under the hand of the Secretary to the Ministry order such person to be confined in a mental hospital, prison, or other suitable place of custody until further orders."*

I think it appropriate to cite these provisions in order to show the anomaly that exists in regard to Accused-Appellants whose insanity is manifest on the record but evidence sufficient to establish its proof on a balance of probabilities has not been successful thus resulting in their incarceration. What does an appellate court do

when circumstances during the appeal clearly manifest that the convicted prisoner still labours under hallucinations and delusions such as the accused appellant in the instant case before us? The Code of Criminal Procedure Act does not appear to contain comparable provisions as it does in relation to pre-trial unsoundness of mind and this Court is of the view that a revision of the Code or any enactment which caters to post-conviction illnesses of mentally unsound convicts is a desideratum and certainly these Accused-Appellants whose lot could have been better but for the standard of proof to which their insanity could not be established at the trial, deserve to be provided for with ameliorative treatment and detention in a safe place or a mental hospital.

The Protection of the Rights of Persons with Disabilities Act 1996

In order to fortify itself with the order that this Court would ultimately make in the case, this court would now look at the other legal regimes that operate in this country in regard to the welfare of persons of unsound mind. The Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 which came into effect on 24th October 1996 principally provides for the establishment of a National Council for Persons with Disabilities charged with the promotion, advancement and protection of the rights of persons with disabilities in Sri Lanka. It has to be recalled that Sri Lanka enacted the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 long before the United Nations adopted the Convention on the Rights of Persons with disabilities on 13th December 2006. Until the UN Convention on the Rights of Persons with Disabilities (CRPD) is incorporated into domestic law, the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 establishes the legal definition of disability in Sri Lanka.

Section 37 of the Act reads thus:-

> *".... Person with disability means any person who, as a result of any deficiency any physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life."*

On a reading of this Act, this Court finds that although mental illness is incorporated within the legal definition of "disabled person" under Section 37 of the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996, the Act is severely lacking in the provision of a codified statement of rights to support this Court in the generation of a legal regime to deal with a convict such as the Accused-Appellant we find before us.

Mental Diseases Ordinance of 1873

In order to secure the best for the Accused-Appellant by way of a discount in sentence, Mr. Saliya Pieris drew our attention to the *Mental Diseases Ordinance* of 1873.

This Court has examined the antiquated Mental Disability Law and I find that this main legislation governing the mental health is based on British lunacy laws of yore. This Ordinance has yet not been repealed. The statute emphasizes institutionalisation through treatment and detention of those affected by mental illness.

Section 5 (1) provides for compulsory detention "until the Minister's pleasure shall be known" with the possibility that the person with mental illness be removed to a mental hospital by the District court when there is no relative or friend to care for them. The adjudication on the question whether the person is of unsound mind is

entrusted to the District Court. Under Section 6, a relative may petition for the admittance of a person of unsound mind and providing that a certificate is issued by two medical practitioners then the person named in the petition will be admitted to the hospital.

Section 9 (1) of the Ordinance comes closer in that if any person under imprisonment in any jail shall become of unsound mind and a report is made to the Minister in charge of the subject of Justice by the fiscal of the District Court within whose jurisdiction the said jail is situated, with a certificate of the medical officer thereof, that such person is of unsound mind, it shall be lawful for the Minister in charge of the subject of Justice to direct by warrant under his hand that such person shall be removed to the mental hospital named in such warrant, to be detained, until the expiration of the sentence under which such person may have been imprisoned.

Section 10 of the Ordinance deals with further proceeding at expiration of sentence if the person shall not have recovered.

In terms of this section, if the Superintendent of any mental hospital to which any person shall have been removed under the provisions of the preceding clause, and who shall not have recovered, shall, at least 14 days before the expiration of the sentence under which such person shall have been imprisoned, report the same to the District Court of the district in which such mental hospital shall be situated, and if the said District Court shall, upon inquiry, be satisfied that such person is still of unsound mind, and that it is necessary to continue to keep him under control, the said District Court may order such person to be detained in the mental hospital until discharged there from by order of the Minister.

From the foregoing it is apparent that the interposition of the District Court which enjoys the status of an upper guardian of disabled persons such as persons of unsound mind along with orders to be made by the Minister of Justice is necessitated by these statutory provisions and the Code of Criminal Procedure Act which alone empowers this Court to review sentences doesn't contain comparable provisions to clothe this court with jurisdiction to deal with a mentally unsound convict whose appeal on sentence is under adjudication by this Court. At this juncture this Court would recall that the Court of Appeal has been robust enough in the past to bear in mind the principle that ends of justice must be met by suitable orders and would borrow in the process the gladsome principles embodied in these enactments, even though archaic, to promote a rights based culture towards disabled persons if sufficient material is placed before this court, whilst at the same time recommending suitable amendments to the law on sentencing.

The *Mental Disease Act* No. 27 of 1956, which was an amendment to the 1873 Ordinance was brought in to vest the District Court with the jurisdiction to make an assessment of unsoundness of mind and this order by the District Court is open to an appeal to the Court of Appeal.

I think it fit to highlight these provisions in the hope that the Code of Criminal Procedure Act will be overhauled in the future to clothe the appellate court with sufficient statutory underpinnings to facilitate suitable orders to be made in cases of this nature. Or else it is the sanguine hope that the new Mental Health Act which is in the offing would cater to this aspect that requires to be dealt with in the interests of mentally unsound convicts. Or even an Act that deals with sentencing of mentally disordered accused could be enacted. It has to be mentioned that though the Sri

Lankan Law is still moored to British lunacy laws of olden times, Britain itself has moved on with times enacting in the process a slew of legislation to deal with these types of cases.

English Statutes

Section 37 (1A) (c) of *the Mental Health Act* 1983 and Section 305 (4) of *Criminal Justice Act* 2003 are two provisions that enable Hospital Orders and Guardianship Orders to be made when without the mental disorder the Court would be required to impose a life sentence or custody for life. There are provisions in *the Powers of Criminal Courts (Sentencing) Act* 2000 that enable a Magistrate's Court to conduct an inquiry into the physical or mental condition of the Accused-Appellant before the method of dealing with him is determined. The Act also provides for power to obtain medical reports.

The fact that Court must have a medical report is reiterated in section 157 (1) of the Criminal Justice Act which declares:-

> *Subject to subsection (2), in any case where the offender is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law.*
>
> *(2) subsection (1) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a medical report.*

In this Section "mentally disordered", in relation to any person, means suffering from a mental disorder within the meaning of the Mental Health Act 1983-Section 157 (5) of Criminal Justice Act 2003.

Court of Appeal to call for medical reports

Section 157 (4) of the *Criminal Justice Act* 2003 that mandates the Court of Appeal to obtain a medical report states:-

> *No custodial sentence which is passed in a case to which subsection (1) applies is invalidated by the failure of a court to comply with the subsection (requirement for medical reports), but* ***any court on an appeal*** *against such a sentence:*
>
> *a) must obtain a medical report if none was obtained by the court below, and*
> *b) must consider any such report obtained by it or by that court.*

The supplementary legislation, *Criminal Procedure Rules* 2011 2011/1709 supplement these procedural enactments.

In addition, *the Criminal Procedure (Insanity and Unfitness to Plead) Act* 1991 has introduced various sentencing options. The Court may make

- a Hospital Order (with or without a restriction order);
- a supervisions order;
- an order for absolute discharge.

A Court in England can only make a hospital order if there is medical evidence that justifies detention because of the defendant's mental state.

This Court is of the view that these legislative changes in England have to be studied and evaluated instead of our Courts being shackled by archaic provisions which England itself has discarded many moons ago and the time has come for us to move with the times and suitably amend our antediluvian lunacy laws that prevail in regard

procedures to be adopted by Courts including the appellate courts in respect of mentally disordered accused.

Before this Court proceeds to make an order in this case, we bear in mind the submissions of the Learned Additional Solicitor General Mr. Shavindra Fernando P.C who expressed the apprehension that the offender may be a continuing danger to the public upon his release. He contended that the Court must ensure safeguards before the offender is released and re-enters society when his determinate term has ended. If one were to summarize the submissions of the Learned Additional Solicitor General the tenor of his argument was that there must be a balancing of competing public interest vis-à-vis the interests of the Accused-Appellant.

After all I am reminded of what Lord Hailsham of St. Marylebone said n ***R v Howe***[2]-

> *"Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical and repeated offences like the so-called Moors murders to the almost venial, if objectively immoral, "mercy killing" of a beloved partner."*

With the kind of sustained derangement that the Accused-Appellant in this case has displayed we are the of view that it is a travesty to treat his case or even to actually treat it as if it were in the same degree of criminality as that of a professional assassin, or an armed robber who deliberately shoots a police officer or a security guard or a person who tortures, abuses and kills people for sadistic or sexual satisfaction.

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[2] (1997) AC 417 at 433

In my view, the contention that any murder, whatever the circumstances, should be regarded as uniquely heinous is also untenable legally.

However the key argument of the Additional Solicitor General is entitled to much weight even though he did not stand in the way of compassion being shown to the Accused-Appellant by way of a discounted term of sentence. He argued that it is necessary to protect the public from an otherwise potentially dangerous person. Certainly it carries within it the contention that the likelihood of the risk that an offender of this nature may pose, if released, to kill again. It is axiomatic that the public should, so far as reasonably practicable, be protected against the risk of violence and if constant supervision of this Accused-Appellant is undertaken during the period of incarceration I should regard it as a necessary initial safeguard towards the reduction of the potential risk.

Towards the end, this Court is of the view that the Accused-Appellant should be periodically examined by a medical doctor attached to the Mental hospital located in Angoda and if his detention at the said hospital is necessitated he should continue to receive such treatment under the supervision of the medical officers attached to both the prison and the Angoda Mental Hospital. In the process the Court makes the following orders.

In order to make these orders, this Court derives much strength from Section 7 of the Code of Criminal Procedure Act No. 15 of 1979.

> *As regards matters of Criminal procedure for which special provisions may not have been made by this Code or by any other law for the time being in force such procedure as the justice of the case may require and as is not inconsistent with this Code may be followed.*

Certainly from the foregoing analysis it would appear that the orders we would presently make in this case find resonance universally and I would not gainsay that they would promote the balancing of public interest vis-à-vis that of this Accused-Appellant. We would make the following orders on the Commissioner General of Prisons as the justice of the case requires the Court to make these orders as they are not inconsistent with the Code.

Orders on the Commissioner General of Prisons

1. The Commissioner-General of Prisons is directed to assign a Commissioner or a Superintendent of Prisons with the task of superintending the progress or regress of this particular Accused-Appellant under periodic treatment and to have necessary medical reports obtained.
2. The periodic treatment has to be undertaken by competent medical personnel at the Medical Hospital in Angoda.
3. If the detention of Accused-Appellant in the Mental Hospital is necessary for his betterment, the Commissioner-General of Prisons through the Commissioner or the Superintendent of Prisons in charge of the Accused-Appellant must convey the Accused-Appellant to and detain him in the Mental Hospital in Angoda for further treatment.
4. This process of continued treatment has to continue till the expiration of the term of imprisonment ordered by this Court on appeal and if treatment is still warranted before release, the Commissioner General has to ensure that the Accused-Appellant receives such treatment and depending upon medical reports he may either direct his further detention in the Mental Hospital or release him to the care and custody of his parent or guardian.

We make these orders in order to ensure that when the Accused-Appellant re-enters society, his release would not pose a potential threat to society.

The above orders have to be carried out by the Commissioner General of Prisons immediately upon receipt thereof.

Reduction of Sentence

Having considered the submissions of both the Counsel for the Accused-Appellant and the learned Additional Solicitor General, the Court sets aside the sentence of 8 years' RI and substitute in lieu thereof a term of 5 years' RI which is to run from the date of conviction namely 22nd June 2012. As I observed earlier, this Court backdates the sentence from the date of conviction on the basis of the holding in ***Henricus v Wijesooriya*** (supra) and section 283 (2) of the Code of Criminal Procedure Act.

Subject to the above variation of the sentence and the orders that this Court has imposed as to the medical treatment to be afforded to the Accused-Appellant, the appeal of the Accused-Appellant is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickramasinghe, J.

I agree

JUDGE OF THE COURT OF APPEAL