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

In the matter of an appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 220/2016

High Court of Badulla
Case No. HC 103/2005

Vs.

1) Rathnayake Mudiyanselage Jayantha Rathnayake

Accused

And Now Between

1) Rathnayake Mudiyanselage Jayantha Rathnayake

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Nayantha Wijesundara

For the Accused-Appellant

Wasantha Perera, DSG

for the Respondent

ARGUED ON : 16/06/2022

DECIDED ON : 14/09/2022

R. Gurusinghe, J.

The Accused Appellant (the appellant) was indicted in the High Court of Badulla for having committed the murder of one Nihal Sisira Kumara, an offence punishable in terms of Section 296 of the Penal Code.

After trial, the appellant was convicted as charged and sentenced to death.

Being aggrieved by the aforesaid conviction and the sentence, the appellant preferred this appeal to this court.

Prosecution Case

The deceased was a bus driver attached to the Keppetipola, Sri Lanka Transport Board depot. On the 12th of December 2003, the deceased and PW1 Wijeratne had gone to Welimada town. PW1 bought some fertilizer from a shop, and he went to find a three-wheeler to transport the fertilizer. The

deceased stayed back. He was standing on the pavement outside the shop until PW1 returned. When PW1 was coming back to the shop, he saw the appellant coming behind the deceased, and stabbed him at the back. The appellant stabbed the deceased twice on the shoulder. PW1 was about 7 to 8 meters away from the place where the appellant stabbed the deceased.

PW2, a sales assistant at the shop, had also seen the stabbing. PW1 and PW2 both knew the appellant before the incident, as he is a conductor of a private bus, which regularly takes the route from Welimada to Nuwara-Eliya. PW1 immediately took the deceased to the Welimada hospital. The deceased was then transferred from the Welimada hospital to the Badulla hospital. While he was being taken to the Badulla hospital, he succumbed to his injuries, and the ambulance returned to the Welimada hospital.

The Defence case

The appellant making a dock statement stated that on the day of the incident, the deceased and four others assaulted him and the deceased came towards him with a knife and the deceased fell on his body when they grappled with each other. He did not say that he stabbed the deceased, but he said that during the struggle, the deceased suffered stab injuries accidentally. He did not explain how the deceased had sustained two wounds on the back of his chest. He also stated that somehow the handle of the knife was in his hand, and he went to the police station and handed over the handle of the knife to the police. The defence called no other witness.

When this matter came up for hearing, Counsel for the appellant relied on two grounds of appeal against the conviction.

1. The appellant was not mentally fit to stand trial at the time of the trial.

2. The cause of death of the deceased was not established beyond reasonable doubt.

It was submitted for the appellant that, as per the proceedings dated 16th December 2008, the learned High Court Judge observed that the appellant had been taking treatment for a mental illness. Then the learned Trial Judge directed the authorities at the Ragama hospital to evaluate whether the appellant was mentally fit to stand trial. However, no report from the psychiatrist was filed of record.

The case came up before the same High Court Judge on the 30th of April 2009, and nothing has been mentioned about the mental condition of the appellant. It is to be noted that there was no application from Counsel for the appellant at the trial, to the effect that the appellant was not fit to stand trial. Counsel for the appellant at that time submitted to court that, as the appellant was at the hospital the previous day, he was unable to appear before the court. He mentioned this fact only as an excuse for the absence of the appellant on the last date. A photocopy of the diagnostic ticket was produced. It did not bear a seal or a signature of a doctor. The trial started on the 6th of January 2011, that is more than a year later. The appellant was represented by a Senior Counsel right throughout the trial. The issue of the fitness of the appellant to stand trial was never raised at the trial.

Section 375 of the Code of Criminal Procedure Act reads as follows:

375. (1) 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.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the court.

It would appear that before the Trial Judge tries the fact of unsoundness and incapacity, it must appear to him that the accused was of unsound mind and consequently incapable of defending himself. This is the first stage, and only when the first stage is complete, the Trial Judge must try the fact of such unsoundness and incapacity before the judge proceeds with the trial.

The issue of whether the accused was mentally fit to stand trial may be raised by the accused, the prosecution, or by the judge himself. If an accused raises the defence of an unsound mind, the burden of proof is on the accused. (Section 105 of the evidence ordinance). Similarly, I am of the view that if the accused is not fit to stand trial, it is for the accused to prove that fact.

The appellant did not raise the issue of mental fitness at the beginning or during the trial. It seems that the learned Judge had not observed anything to the effect that the appellant was not fit to stand trial.

The appellant had retained a Senior Counsel to defend him, and he was defended by the Counsel throughout the trial. Therefore, it is manifested that the appellant had the ability to aid his Counsel in his defence. If there were any deficiency, the learned Counsel would have noticed and brought them to the notice of the learned Trial Judge.

In the case of *King vs Pindorrisa 29 NLR 385,Lyall Grant J.* stated regarding the capacity as follows:

"I charge the jury that they should in the first place consider the question whether the accused was capable of making his defence, whether he sufficiently understand the proceedings what is alleged against him, what he was entitled to do and say his power to bring forward witnesses in his defence."

In the case of *Dusky vs United States 362 US402 [1960],* the U.S.Supreme Court held that; to be competent to stand trial the accused must have a *"sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him*."

In the instant case, the appellant was defended by the counsel throughout the trial and the appellant made along dock statement as his defence. The appellant absconded the trial for two years and he said that because of this case, he lost his income and he had to go abroad to do a job. Therefore, it is clear that he had understood the charge against him and given proper instruction to his counsel. After considering the above-mentioned case laws, the provisions of law and the circumstances, I see no deficiency in making his defence by the appellant at the trial court. Therefore, this ground of appeal has no merit and I reject the same.

The second ground of appeal is that the prosecution did not establish the cause of death of the deceased. Counsel for the appellant submitted that the doctor who conducted the post-mortem inquiry was not called as a witness. The doctor who performed the post-mortem was unavailable to give evidence before the court as he was seriously ill and not competent to testify in court.

There were two eyewitnesses, namely PW1 and PW2, who saw the appellant stabbing the deceased from the back. There was no serious challenge against the testimony of these two eyewitnesses.

The Judicial Medical Officer gave evidence using the post-mortem report (PMR) prepared by Dr. Dissanayake. As per the PMR and the evidence, there were two deep stab injuries on the back of the chest of the deceased. As per the evidence of the doctor, the stab injuries penetrated the lungs of the deceased and damaged the arteries of the lung. The doctor described that such injuries would cause the death of a person in the ordinary course of nature.

The evidence of the Judicial Medical Officer who gave evidence before the court was not challenged by the defence at all. Only two questions were put to the doctor by the defence, to the effect that the doctor gave evidence based on the PMR prepared by Dr. Dissanayake and he himself did not conduct the post-mortem examination. In the above circumstances, the evidence of the doctors stands unchallenged.

The evidence of the two eyewitnesses also stands uncontradicted.

The appellant in his dock statement took up the position that the deceased along with four others attacked him. There was a struggle but he did not say how the deceased sustained two stab injuries on the back of the chest. None of the witnesses has seen any kind of commotion or struggle. This position is not put to the prosecution witnesses. The appellant stated that he had the handle of the knife in his hand, and he went to the police station with the handle of the knife. The appellant did not say how the handle of the knife came into his possession.

The evidence clearly establishes the fact that the deceased died of stab injuries, caused by the appellant.

For the reasons set out above, I see no reason to interfere with the judgment of the learned Trial Judge. The judgment and the sentence imposed on the appellant is affirmed.

The appeal of the appellant is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal