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 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant

Vs.

Meragalage Chandana Pushpa Kumara Perera

Accused

AND NOW BETWEEN

Meragalage Chandana Pushpa Kumara Perera

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Court of Appeal Case No:

CA / HCC / 0225 / 15

High Court of Polonnaruwa Case No:

HC 07 / 14

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Anil Silva P.C. and S. Neranga for the Accused – Appellant.

Rohantha Abeysuriya, ASG for the State.

Argued on: 20.06.2023

Decided on: 19.07.2023

Menaka Wijesundera J.

The instant appeal has been lodged to set aside the judgment dated 17.12.2015 of the High Court of Polonnaruwa.

The accused appellant (hereinafter referred to as the appellant) has been indicted for committing the murder of his infant child born out of wedlock.

The version of the prosecution is that the appellant who had been living next to the house of the deceased has been having an illicit affair with the deceased mother and on the day of the incident the appellant had come to the house of the deceased and had cut her to death. She also had been previously assaulted by the appellant and had been permanently disabled. Thereafter the appellant had run off and had been evading arrest.

The main ground of appeal by the appellant is that,

1) The appellant has a history of mental ill health and neither the High Court nor the Magistrates Court had acted under section 375 and 374 of the Code of Criminal Procedure Code (herein after referred to as the CPC) and as such he had not been given a fair a trial.

2) When the Magistrate had failed to consider his mental health, the appellant had not been properly committed to the High Court and thereby it vitiates his conviction in the High Court.

On perusal of the case record we find that initially when the appellant had been indicted the state counsel had made the application to the High Court to obtain a report with regard to the metal health of the appellant because in the Magistrates Court as per V1 the Polonnaruwa Consultant Psychiatrist the appellant had been diagnosed as being of "**unsound mind and is not fit to plead "and he had recommended treatment at the Angoda hospital.**

As such the High Court had obtained a report from Dr Neil Fernando who also had been the retired Consultant Psychiatrist at Angoda hospital and he has said that the appellant **"is fit to plead** "and that he "**may**" have been of good health at the time of the commission of the offence.

Hence the High Court Judge had not acted under section 375 of the CPC which is quoted below and had proceeded to trial and had convicted the appellant for the charge of murder. The trial judge had stated in his judgment that the report submitted in the Magistrate Court is not comprehensive enough but Dr Neil Fernando has gone in to a more detailed examination of the patient. But we find that the trial judge had failed to act under section 375 of the CPC which says that,

"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 defense, 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 find accordingly and thereupon the trial shall be postponed."

In view of the above section if the accused has a history of unsound mind the trial judge has to ascertain that the accused is of good health and is capable of understanding the charge against him and then act accordingly. But in the instant matter the trial judge had solely relied on the report of Dr Neil Fernando and has proceeded to trial without considering the contrary report filed of record at the non-summary. At this stage the learned Counsel for the respondents submitted that the report of Dr. Neil Fernando was very comprehensive and that a special inquiry need not have been held. But we are unable to agree with the same because the legislature had recommended that the trial judge should go in to the matter first before proceeding to trial is because it is fundamental in criminal law that an accused has to be able to understand the offence he is being charged with and especially when there is contrary view on the matter, the best would have been to lead evidence and give a chance for the accused to cross examine the expert who says that he is fit to plead. At this stage both Counsel were unable to assist court with regard to any decided authority except for an Indian judgement submitted by the learned counsel for appellant. In the said judgment the parallel section in the Indian Code of Criminal Procedure Code to section 375 and 374 of our CPC is section 328, and the cited judgment which is **the state of Maharastra vs Subasinghe on 20th July 1994 by the Bombay High Court had said as follows,**

"It can be seen that section 328 Cr.P.C. provides that if during an enquiry a Magistrate has a reason to believe that the accused is of unsound mind he has to first enquire into this aspect, and if he is convinced about the insanity, he has to stop the enquiry. Under section 329 Cr.P.C. a trial has to be mandatorily postponed on finding the accused to be insane. Section 330 Cr.P.C. suggests a course to be taken for the good care or safe custody of such accused. Section 331 to 333 Cr.P.C. provides that the inquiry or the trial as the case may be can

resumed only after the accused has fully recovered from insanity. Thus, the law takes care, and mandates that the accused must be of sane mind when he is tried. It is cardinal principal of criminal jurisprudence that the accused must understand the nature of the charge proceeding against him."

Therefore, we are unable to agree with the learned counsel for the respondents because the legislature had laid down the procedure to be adopted by courts for a purpose and the courts must follow the same because justice should not only be done but it should be seemed to be done as well.

The second point raised by the counsel for the appellant is that in the Magistrates Court the appellant had not been properly committed to stand trial in the High court as such the indictment filed by the Attorney General is not valid.

Chapter 15 of the CPC deals with inquiries to be held by the Magistrate, and under section 146 of the said chapter the charge has to be read over to the accused and the accused has to understand the charge. But for that purpose to be achieved the accused has to be of sound mind, but in the instant matter according to V1 submitted by Dr. Nallhewa the accused had not been of sound mind to plead. Hence the next step for the Magistrate would have been to act under section 374 of the CPC which reads as follows,

"374 (1) When a Magistrate's Court holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defense it shall inquire into the fact of such unsoundness and shall cause such person to be examined by the Government medical officer of the district or some other medical officer, and thereupon shall examine such officer as a witness and shall reduce the examination to writing. "

In the instant matter the Magistrate had been in possession of V1 and had taken steps to write to the Minister of Justice to take appropriate action and thereafter when the ministry has done so the Magistrate presiding had changed and the succeeding Magistrate had failed to consider all these steps and instead had proceeded to have non-summary and had concluded the same and had committed the accused as well which we consider as a clear violation of procedure and that type of erroneous procedure only vitiates the committal which denies the fundamental right of an accused to be able to understand the charge which is being read over to him by court.

Then the next question posed by the counsel for appellant is that in the light of not being committed properly whether it vitiates the indictment filed by the state. The Counsel appearing for the respondents cited sections 436 and 334 of the CPC which also says that any irregularity during trial or procedure can be corrected in appeal if it has not caused any miscarriage of justice to the accused. But in the instant matter we find that the accused had not been properly committed to the High Court for the reason that the accused had not been able to understand the charges against him as per medical evidence hence it has denied one of the basic rights of an accused which is enshrined in the Constitution of the country which we are all bound by.

At this stage we consider the judgments cited by the counsel for the appellant and we wish to draw our attention **to Piyadasa vs The Queen 66 NLR 242 in which it has been held that when the Attorney General has included new charges in addition to the charges for which the accused has been already committed that it vitiates the indictment for the reason that "the error strikes at the root of the jurisdiction of court ".**

In the instant matter we find that the accused had not been properly committed to the High Court and in such an event the Attorney General had no accused committed to the High Court to be indicted and as a result of which the trial judge had no accused before him who was indicted to be tried and convicted.

As such we allow the instant appeal and we set aside the conviction and the sentence entered by the trial judge but we order the Commissioner General of Prisons to take steps under section 381 of the CPC.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.