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

In the matter of an application made in terms of Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General
Attorney Generals Department
Colombo 12

Complainant

Court of Appeal Case No:
CA-HCC-05-20
HC of Monaragala
Case No: HC 59/08

vs.

Rathnayake Mudiyanselage Muthubanda

Accused

AND NOW BETWEEN

Rathnayake Mudiyanselage Muthubanda

Accused

Vs.

Hon. Attorney General
Attorney Generals Department
Colombo 12

Complainant

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Chathura Amarathunga for the Accused-Appellant
Shanaka Wijesinghe ASG for the State

Written Submissions: 20.10.2022(by the Respondent)
On

Argued On: 26.06..2023

Decided On: 10.08.2023

Sasi Mahendran, J.

The Accused-Appellant abovenamed (hereinafter referred to as 'the Accused') was indicted before the High Court of Monaragala for having committed the following offence:
Count 1 – On or about the 20th of June 1993, the Accused committed the murder of one Nalin Priyadharshana, punishable under Section 296 of the Penal Code.

Count 2 – On the same day, at the same place, and in the course of the same transaction, the Accused voluntarily caused grievous hurt by a dangerous weapon, namely a pole, to one Gunathilaka Siriwardena Ramwalage Sudu Menike, punishable under Section 317 of the Penal Code.

Count 3 – On the same day, at the same place, and in the course of the same transaction, the Accused voluntarily caused hurt to one Weerasuriya Muhandiramlage Ramani, punishable under Section 317 of the Penal Code.

The Prosecution led the evidence of eleven witnesses and marked evidence as P1 to P7. The Accused made a dock statement. After the trial before a jury, the Accused was convicted on

all three counts on a unanimous verdict of the jury and thereafter sentenced by the Learned High Court Judge on the 19th of February 2020, which are as follows:
Count 1 - Death sentence. **Count 2** - Five years of rigorous imprisonment with a fine of 20,000 LKR. **Count 3** - One year of rigorous imprisonment with a fine of 1,000 LKR.

Being aggrieved by the said conviction and the sentence the Accused has appealed to this court.

The following grounds of appeal were set out in the written submission.

1. That a purported discussion between two juniors and the certain members of the court staff is alleged to have taken place near the office of the Registrar of the High Court after court proceedings had concluded on 13.02.2020, and the learned High Court Judge erred in failing to discharge the Jury on the grounds that the Jury has violated the oath taken at the conclusion of proceedings daily.

2. That the learned High Court Judge erred in law and misdirected the Jury on the evidentiary value of the evidence of Mutuma Duralage Geethani Manel (PW3).

3. That the learned High Court Judge failed to analyse and thereby misdirected the Jury on the evidentiary value of the evidence of weerasuriya Muhansiramlage Ramani (PW2), which was duly adopted under Section 33 of the Evidence Ordinance.

4. That the learned High Court Judge failed to direct the Jury on the importance of the documents marked on behalf of the Appellant in his defence case.

5. That the learned High court Judge failed to appreciate the weight of the contradictions and omissions marked and brought to the notice of court, and thereby misdirected the Jury on giving the Appellant the benefit of any doubt.

6. That the learned High Court Judge failed to direct the jury on the evidentiary value of the purported hearsay evidence of Weerasuriya Muhandiramlage Wimalawathi(PW4)

7. That the Learned High Court Judge failed to direct the Jury on the defence case and importance of the defence witnesses led on the Accused.

The Facts and circumstances are that;

It should be noted that the Accused was first indicted in 2008 for the same matter, and he was convicted on all three counts on the 18th of March 2014. Against the conviction, an appeal was preferred to the Court of Appeal, bearing case No. CA/146/2014. The matter was sent for retrial by order dated 14th June 2018, as it was observed that the jury option was not given to the Accused. Therefore, a retrial commenced on the 10th of February 2020, and the same witnesses who testified about 12 years ago gave evidence.

The evidence of the prosecution is as follows: On the fatal day of 20th June 1993, PW1 Sudu Menika (the mother of the Deceased and an eyewitness who had sustained injuries during the incident) was residing in her house with her two daughters, namely Weerasooriya Muhandiramlage Ramani (PW2, who was an eyewitness who had also suffered injuries), Weerasooriya Muhandiramlage Wimalawathie (PW4), and her son Nalin Priyadharshana (the Deceased).

The Accused, who was a relative, had whispered a proposition to PW2, who was 15 years of age at that time. Subsequently, PW2 rejected the Accused's proposition, who then left the premises and returned with a large pole hidden behind his back, which was witnessed by Geetha Manel (PW3), who was also present at that time. The Accused struck PW2 with the pole, flinging her to the ground. PW1 tried to intervene to save her daughter and was also struck on the head by the Accused. PW1's son, who witnessed this, jumped around his mother's neck in an attempt to protect her too, and was struck in the head by the Accused. Subsequently, the Deceased fell to the ground and was struck in the head repeatedly.

Thereafter, the Accused left the scene. The entire process was witnessed by PW3, who was hidden. PW1 and PW2 were taken to the hospital. PW1 had suffered grievous injuries to the head with a fractured skull, and PW2 suffered non-grievous injuries to her head, as per the medical report. Upon admission to the hospital, the Deceased was pronounced dead at 12:25 pm, approximately one hour after the incident. The cause of death was reported in the postmortem report to be brain damage with a fractured skull following the assault to the head with a blunt weapon.

During the trial, the defense marked six contradictions and highlighted two omissions. We are mindful that these lay witnesses are giving evidence after 18 years.

We are mindful of the observation made by His Lordship **Thakkar J**. in **Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753**;

"By and large a witness cannot be expected to possess a photo graphic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen."

The Learned High Court Judge considered this contradiction and indicated to the jury that none of the contradictions go to the root of the case.

The Accused takes up the defense of insanity, asserting that he committed the act by reason of unsoundness of mind and was incapable of knowing the nature or consequence of his action.

To prove that he was of unsound mind at the time of the act, on behalf of the Accused, one Doctor Deelip Kumara gave evidence. He had examined the Accused on the 24th of February 2001, nearly eight years after the incident. According to him, he made an observation based solely on information provided by the Accused's wife. He further testified that he did not examine the Accused during the time of the incident in 1993, and therefore, he cannot express any opinion on what his mental status would have been at the time of the incident.

He further testified that when he examined the Accused on 24th February 2001 the Accused had no signs of mental illness. We are mindful that the observation made by His Lordship in **Ranjith Silva J**, in the case of **Nandaseena v Attorney General 2007, 1 S.L.R 237** at page **239**, held that;

"When a defence of insanity is taken under section 77 of the Penal Code there must be evidence to prove that the accused was insane, and this fact had to be proved on a balance of probability like in a civil case. It is the burden of the accused to prove that he was incapable of (1) knowing the nature of the act,(2) that he is doing what is either wrong or contrary to law. In the book titled "Law of Crimes" by Ratnalal and Thakore it is stated thus, 'It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law'."

The Learned High Court Judge correctly considered the evidence of this witness and directed the jury that there was no evidence to establish that the Accused had any mental illness.

The Learned High Court Judge has made the following observation on this regard and directed the jury about this evidence.

On Pages 1318 to 1319 of the original record;

එසේම ඔබතුමාලාට මතක ඇති C යනුවෙන් එම විශේෂඥ වෛද්‍යවරයා ඉදිරිපත් කරන ලද වාතර්ාව ලකුණු කර ඇති අතර එම ලේඛනය සකස් කලේ චුදිතගේ එනම් තමා පරික්ෂා කරන ලද අයගේ බිරිඳගේ තොරතුරු මත බවටත්,

එම ලේඛනයේ අංගොඩ මානසික රෝහලෙන් නිකුත් කර ඇති රෝගය විනිශ්චය පතක මොහු බින්නොන්මාදය නමැති රෝගයෙන් පෙළී ඊට ප්‍රතිකාර ලබා ඇති බව සඳහන් වේ යනුවෙන් සඳහන් කර ඇත්තේ කුමන පදනමක් මතදැයි ප්‍රශ්න කර ඇති අවස්ථාවේදී එම වෛද්‍යවරයා පවසා ඇත්තේ තමන්ට ඒ ගැන හරියට මතක නැති බවටත්, යම් ලේඛනයක් තිබුනද කියලා තමන්ට මතකයක් නොමැති බවටත්. එසේම මෙම වාතර්ාව සකස් කරන අවස්ථාවේදී චිත්තිකරුගේ බිරිඳ විසින් යම් රෝග විනිශ්චය තුන්ඩුවක්,

නැත්නම් ප්‍රතිකාර සටහනක්, ඖෂධ වට්ටෝරුවක් ඉදිරිපත් කළා කියා මතකයක් නොමැති බවත්, එලෙස මොකකින් හරි බලලා ලිව්වා නම් තමාට යම් අනුක්‍රමික අංකයක් සටහන් කිරීමේ හැකියාවක් තිබෙන බවටත්, එවැනි අනුක්‍රමික අංකයක් හෝ ලේඛනයක් ඉදිරිපත් කල බවට විශේෂ සටහනක් යොදා නොමැති බවටත් පිළිගෙන තිබෙනවා.

එසේම 1993 දී මෙම තැනැත්තාගේ මානසික තත්ත්වය කුමක්දැයි තමා කිසිම අවස්තාවක පරීක්ෂාවට භාජනය නොකළ බවත්, එලෙස පරීක්ෂණයකට භාජනය කිරීමකින් තොරව 93 වසරේ ඔහුගේ මානසික තත්ත්වය පිළිබඳව නිශ්චිතව නිගමනයක් කිරීමට නොහැකි බවටත් ඔහු පවසා ඇත. 2021 වසරේ දී ඔහුව පරීක්ෂා කරන විට මානසික රෝගී තත්වයක් නිරීක්ෂණය කිරීමට නොතිබුන බවටත් ඔහු පවසා ඇත.

1993 වසරේ වූ සිදු වීමක් සම්බන්ධව අවරුදු 08 කට පසු පරීක්ෂා කරන විට ඔහු සම්පූර්ණ මානසික තත්වයක සිටි බවට ඔහු පවසා ඇත. මෙම සාක්ෂි වෛද්‍යවරයා අධිකරණයේ ලබා දෙන ලද සාක්ෂි පැවසූ සාක්ෂි, පැවසූ කරුණු, එතකොට මේ සාක්ෂිකරු පිළිබඳව, ඔහු විශේෂඥවරයෙකු වශයෙන් ඔහුගේ සාක්ෂි, සාක්ෂි ආඥා පනත ප්‍රකාරව අනුකූල කරුණක් වුවත් මේ සම්බන්ධයෙන් එම වෛද්‍යවරයා දරණ මතය, එම වෛද්‍යවරයාගේ සාක්ෂිය, ඒ සාක්ෂි වල සත්‍යතාවය පිළිබඳව අවබෝධ කරගෙන එම ඉදිරිපත්වී ඇති කරුණුද මෙම නඩුවේ සාධාරණ සැකයකින් තොරව ඔප්පු වීමට අදාළ කරුණුද යන්න පිළිබඳව ඔබලාට තීරණය කිරීමේ හැකියාවක් තිබෙනවා.

Therefore, we hold that the Learned High Court has correctly informed the jury about the law and the facts. On the other hand, witnesses for the prosecution have elicited in their evidence that the Accused left the house in which the incident occurred after the refusal of his proposition by PW2 and came back shortly with a pole hidden behind his back. This clearly shows that the Accused had the power of rational thought before he executed his pre-planned assault, which establishes him as capable of understanding the nature of his action.

I am of the view that the Accused has failed to prove, on a balance of probability, that he was of unsound mind at the time of the act, and that he was incapable of knowing the nature of the act.

We found that there is no misdirection or non-direction by the Learned High Court Judge causing any miscarriage of justice. We affirm the conviction by the unanimous verdict of the jury and the sentence imposed by the Learned High Court Judge dated 19th of February 2020, therefore we dismiss the appeal.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL