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

In the matter of an Appeal under and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

CA HCC 0128/2019
High Court of Anuradhapura
HC 189 /2010

Vs.

Ratnayaka Mudiyanselage Nandana Ratnayake,
No. 23,
Maha Idhigollagama,
Galkiriyagama.

Accused

AND NOW BETWEEN

Ratnayaka Mudiyanselage Nandana Ratnayake,
No. 23,
Maha Idhigollagama,
Galkiriyagama.

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **Sampath B. Abayakoon, J.**
Amal Ranaraja, J.

Counsel: Mithula Skandarajah (Assigned Counsel) for the Accused-Appellant.

Shanil Kularathne, A.S.G., for the Respondent.

Argued on: 12.11.2024

Decided on: 18.12.2024

JUDGMENT

AMAL RANARAJA, J.

1. The accused-appellant (hereinafter referred to as the '*appellant*') has been indicted in the *High Court of Anuradhapura* in **Case No.189/2010**.

2. The charges in the indictment are as follows;

    i. That on or about 11.05.2006, at *Idhigollagama*, in the *District of Anuradhapura* within the jurisdiction

of this Court you did commit murder by causing the death of *Kahatapitiya Kangkanamlage Somasena Perera;* and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

ii. That on or about 11.05.2006, at *Idhigollagama*, in the *District of Anuradhapura* within the jurisdiction of this Court you did commit murder by causing the death of *Jayasinghe Arachchige Somawathie;* and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

3. Upon the indictment being received the Learned High Court Judge has caused the appellant to appear before Court, served a copy of the indictment with its annexures on the appellant and enlarged the latter on bail.

4. On the date set for the appellant to furnish bail, the Counsel of the appellant has made an application to Court stating his inability to defend his client in the future. In those circumstances, the Learned High Court Judge has assigned a Counsel to the appellant.

5. On 24.03.2015, the Learned High Court Judge has attempted to read and explain the charges in the indictment and asked the appellant as to whether he is guilty or not guilty to the offences stated in the charges in the indictment. The appellant at that instance had made several utterances which lacked substance.

The unusual behaviour of the appellant has prompted the Learned High Court Judge to order the prison officials to produce the appellant before the national institute of mental health and forward to Court a report on the mental health of the appellant. Thereafter, the appellant has been admitted to such institute on 29.10.2017. The appellant has received treatment as an indoor patient and a report has been forwarded to Court dated 21.04.2017. The report on the mental health of the appellant has been prepared by *Dr. T. S. S. Mendis* (Acting Consultant, Forensic Psychiatrist, Forensic Psychiatry Unit National Institute of Health, Angoda).

6. Subsequent to treatment and the appellant being deemed fit to plead and stand trial, the appellant has been brought before *High Court of Anuradhapura* and the trial commenced without a jury. At the conclusion of the trial, the Learned High Court Judge has convicted the appellant for both offences stated in the charges in the indictment and sentenced him to death.

7. Aggrieved by the judgment and the sentencing order, the appellant has preferred the instant appeal to this Court.

8. The grounds of appeal formulated by the Counsel for the appellant are as follows;

    i. Has the Learned High Court Judge failed to properly evaluate the facts and the circumstances of the case when arriving at the finding of guilt of the appellant?

ii. Has the Learned High Court Judge erred in law by concluding that the alleged statements made by the deceased-female to **PW-03** and **PW-15** are dying declarations in terms of Section 32 (1) of the Evidence Ordinance?

9. The deceased, the male (hereinafter referred to as the "*deceased-male"*) and the female (hereinafter referred to as the "*deceased-female"*) have been living in a hut built on a land belonging to the appellants' father, i.e. **PW-03**, and had been engaged in farming. **PW-02** has cultivated a plot of land which was situated across the hut in which the deceased lived in. On **11.05.2006**, **PW-02** has been engaged in the process of preparing his land for cultivation. **PW-02** has used a tractor for such purpose and also a person by the name of *Padma Kumara* has assisted him in such endeavour. **PW-02** has gone to the hut occupied by the deceased-male and the deceased-female on two occasions that morning, for the purpose of quenching his thirst; once at about 09.30 hrs and the next at about 11.30 hrs. On his first visit, only the deceased-female had been in the hut. When he visited the hut for the second time, **PW-02** has observed that the deceased-male, the deceased-female and the appellant were inside the hut. The appellant had had in his possession an axe.

10. **PW-02** upon quenching his thirst for the second time has returned to the plot of land, he was preparing for cultivation purposes and has continued to engage in such process. After some time, the appellant has come running towards **PW-02** and stated that he had cut with heavy blows a person ('*කෙටුවා*) but not stated as to who the victim was.

11. **PW-02** has informed **PW-03** (the father of the appellant, as he was the owner of the land on which the hut the deceased lived in was built) about the alleged incident stated to him by the appellant. **PW-03** thereafter had gone into the hut occupied by the deceased. **PW-03** had observed the deceased-male and the deceased-female lying injured in the hut. He has also observed that the deceased-male had passed away by that time. The deceased-female on being questioned by **PW-03** as to who was responsible for the injuries inflicted on the deceased-female, the latter has stated (කිරිඵුනා). Subsequently, the deceased-female has been hospitalised for treatment. The deceased-female has passed away on **18.05.2006**, while receiving treatment in the hospital as an indoor patient.

12. While the deceased-female was receiving treatment at the *Colombo National Hospital,* PS37576 *Epa*, while investigating the incident has visited the deceased-female in hospital and has inquired from the latter as to who inflicted the injuries on her. **PW-11** [PS8522, *Ashoka*], who was in the ward with "PS37576 *Epa"*, has overheard the deceased-female state to PS37576 *Epa* that it was "*Nandana Rathnayake*" who inflicted the injuries on her.

13. **PW-15,** *Dr. Nigamani Allagiyawanna* has examined the deceased-female when she was hospitalised and obtained a short history from the deceased-female, who was an indoor patient at that time. The deceased-female giving such history has stated that she was, "*assaulted using an axe by Nandana"*.

14. **PW-13**, *Dr. Ajith Jayasena* has conducted the post-mortem examination on the deceased-male and prepared a post-mortem report. Such report has been marked as '**ඇ2-2'**. **PW-14** *Dr. P.H.R.S.Senathilaka,* has conducted the post-mortem examination on the deceased-female and prepared a post-mortem report; such report has been marked **'ඇ2-3'**.

15. **PW-13** has observed four cut injuries on the deceased-male, three of those injuries had been on the head and neck area. The other on the right upper limb. The injury to the neck had been on the right side of the neck. Corresponding to such injury, underlying soft tissues, muscles on the posterolateral aspect of the neck, nerves, also the fifth and sixth vertebral bodies have been cut. **PW-13** has opined that the deep cut injury to the neck has caused the death of the deceased-male.

16. **PW-14** has observed the following injuries on the body of the deceased-female;

    i. Scabbed abrasion on the left cheek.
    ii. Surgically altered healing sutured cut injury on the left side of the face.
    iii. Surgically altered healing sutured cut injury on the back of the head and correspondingly a cut fracture of the scalp, a sutured cut injury of the dura-matter of the brain and a laceration of the brain.
    iv. Healing sutured cut injury on the back of the left shoulder.

PW-14 has opined that the cut injury to the head as well as the corresponding injury to the skull and the brain had caused the death of the deceased-female.

17. The approximate time and the date of the death of the deceased-male has been confirmed by **PW-13**. Accordingly, **PW-13** has recorded the time of death as 10.30 hrs on **11.05.2006**.

18. At about 11.30 hrs on 11.05.2006, the deceased-male, the deceased-female and the appellant have been together in the hut occupied by both deceased. The appellant at that time had had in his possession an axe. A little after 11.30 hrs, the appellant has confessed to **PW-02** that he "*hit and cut someone in a rough manner*", "කෙටුවා". Probing such confession has culminated in the recovery of the deceased-male and the deceased-female with serious injuries inflicted on them in the hut they lived in. The deceased-male had passed away at the scene while the deceased-female who was in a serious condition had been admitted to the hospital for treatment. The testimony is that the injuries to both the deceased had been caused by using a sharp weapon which was heavy, one similar to an 'axe'. The female-deceased has made 'verbal statements' naming the person who inflicted the injuries on her.

19. **Section 32** of the **Evidence Ordinance No.15 of 1895** provides,

> **"***Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the*

case, appears to the court unreasonable, are themselves relevant facts in the following cases: -

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question…"

20. Furthermore, **Illustration '(a)'** to **Section 32** of the **Evidence Ordinance** provides,

"*The question is, whether A was murdered by B, or whether A died of injuries received in a transaction in the course of which she was ravished.*

The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts".

21. The verbal statements made by the deceased-female to **PW-03**, **PW-15** and **PS37576** *Epa* which was overheard by **PW-11** being in reference the transaction which resulted in the death of the deceased-female, though hearsay could be admitted as evidence as they are in the nature of dying declarations as per the

provisions in Section 32(1) of the Evidence Ordinance No.15 of 1895.

22. The narrations of **PW-03**, **PW-11** and **PW-15** have established that the person referred to in the statements of the deceased-female as the person who inflicted the injuries on the latter to be the appellant. Though the appellant has been referred to as "කිරිඳුතා" and "*Nandana"* in those verbal statements, there is no testimony to suggest that there were multiple people with the same name in the village the appellant lived in. It has also been established that the appellant was referred to as "කිරිඳුතා" and "*Nandana"* therefore there is no ambiguity that the person referred to in those statements is none other but the appellant. Further, the deceased-female have made one such verbal statement to **PW-15** *Dr. R. Allagiyawanna* when she examined the former as an indoor patient in the hospital. Though such verbal statement has been in the Sinhala language, **PW-15** has translated the same to the english language. No evidence has been elicited to establish the fact that such translation was done incorrectly. **PW-11** also had perceived such a statement when the deceased-female made such statement, while receiving treatment as an indoor patient in the hospital. No evidence has been elicited to reveal that the deceased-female's condition so was serious that she was unable to speak while receiving treatment as an indoor patient. The matters referred to above establish the fact that the deceased-female had been able to speak soon after the injuries were inflicted on her and also after she had been hospitalised for treatment.

23. In ***Sigera vs. Attorney General [2011] 1 SLR 201*****,** Ranjith Silva J, has held,

> "*- Under our law a dying declaration can be admitted in evidence under Section 32 of the Evidence Ordinance. One of the salient features discernible in this section is that the declaration may be written or oral. Even a sign made by a person who is unable to speak is caught up in this phrase.*
>
> *- First and foremost a judge must apply in his mind and decide whether the dying declaration is a true and accepted statement – in doing so he must be mindful of the fact that the statement was not made under oath, that the statement of the deceased person has not been tested in cross examination and that the person who, made the dying declaration is not a witness at the trial.*
>
> *- An accused can be convicted for murder based mainly and solely on a dying declaration made by a deceased, - without corroborating under certain circumstances. It would not be repugnant or obnoxious to the law to convict an accused based solely on a dying declaration."*

24. It is also pertinent to take into consideration the testimony that the appellant was seen with an axe in his possession in the hut occupied by the deceased, just prior to the confession made by the appellant to **PW-02**. Further, the deceased-male and the deceased-female were found in the hut they were living in with injuries soon after the appellant made such confession to **PW-02**. Such a scenario also re-inforce the contents of the verbal

statements of the deceased-female to be true and accurate. Also, the credibility of **PW-03**, **PW-11** and **PW-15** has not been called in question. Hence, there is no hindrance to relying on the testimony of those witnesses regarding 'the dying declarations' made to **PW-03** and **PW-15** or perceived by **PW-11**.

Additionally, even though the Learned High Court Judge has mistakenly referred to the testimony of **PW-02** to be that of **PW-03** and also concluded that the testimony of **PW-01** who had been made adverse by the prosecution, corroborates the prosecution's case, such misdirection (error) in my view has not occasioned in a failure of justice.

25. The prosecution accordingly has led strong and incriminating evidence which caused the appellant to appear guilty of the offences stated in the charges in the indictment. In other words' a prima facie case has been made out by the prosecution, therefore, the appellant is required in law to offer an explanation of the incriminating evidence established against him.

26. In ***Sumanasena vs. Attorney General [1993] 3 SLR page 137 at page 142,*** **Jayasuriya, J, has stated,**

> "*When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him".*

His Lordship has also stated,

> *"...the learned trial Judge was entitled to draw certain inferences which he deemed proper from the failure of the accused to give evidence in explanation of such circumstances".*

27. **E. R. S. R. Coomaraswamy** in his book, *The Law of Evidence, Volume 1* at page 21, has referred to ***R. vs. Lord Cochrane and Others [1814] Gurney's Report*****,** where Lord Ellenborough has stated,

> *"No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which is attached to him; but nevertheless if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence if such exist, in explanation of such suspicious appearances which would show him to be fallacious and explicable consistently with his innocence, it is reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest."*

28. The appellant has proceeded to give the following dock statement, "මම දන්න තරමින් මිනිහෙක් මරල නෑ", which in my mind does not create a doubt in the prosecutions' case.

29. Though the matters referred to are as such, I now draw my attention to the mental health report of the appellant dated **29.10.2017**. Some of the contents in the mental health report is as follows,

> "*The reconstruction of the mental state at the time of the alleged offence revealed the followings;*
>
> - *The accused was mentally ill at the time of the offense.*
> - *He **had features of schizophrenia at the time of the alleged offence**, according to the mother.*
> - *The accused had been having distortions of thought in the form of delusions, in which he believed that there is another person who has the same identity as him, as a result of his psychiatric illness.*
>
> *36. Therefore he would have been of **unsound mind** at the time of the alleged offence."*
>
> ***Fitness to plead and stand trial***
>
> *37.At present, he is able to*
>
> *i. Understand the difference between pleading guilty and not guilty.*
> *ii. Instruct counsel*
> *iii. Follow court proceedings*
>
> *38. Therefore in my opinion, he is **fit to plead and stand trial**.*
>
> ***Summary***
>
> *39. The accused is suffering from a major mental illness diagnosed as Schizophrenia.*
>
> *40. In my opinion he was of unsound mind at the time of the alleged incident.*
>
> *41.The accused is fit to plead and stand trial.*

42.He needs to continue treatment as an out-patient for his mental illness at psychiatry clinic, District General Hospital Matale."

30. The summary of such report being as reproduced above, it is clear that the appellant had been of unsound mind/ mentally ill at the time of the alleged incident, i.e. when he inflicted injuries on the deceased-male and the deceased-female. The appellant being of unsound mind would have been incapable of knowing the nature of his actions or that he was doing something wrong or contrary to law.

31. Accordingly, set aside the conviction and the sentence imposed on the appellant by the Learned High Court Judge of Anuradhapura and acquit him due to the reasons set out above.

32. Taking into consideration the matters discussed in the previous paragraphs, I now draw my attention to the provisions in **Section 380** of the **Code of Criminal Procedure Act, No.15 of 1979**.

Section 380 provides,

"*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 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*".

33. On that account I also conclude that the prosecution through the testimony of the witnesses led on its behalf at the trial has established beyond reasonable doubt that the appellant did commit the acts of inflicting the injuries which were necessarily fatal and sufficient in the ordinary course of nature on the two deceased even though I have proceeded to acquit the appellant in respect of both charges in the indictment in consideration of the provisions set out in Section 380 of the Code of Criminal Procedure Code Act. Further, acting in terms of Section 381 of the Code of Criminal Procedure Act, I direct the Learned High Court Judge of Anuradhapura to order the prison authorities to keep the appellant in detention until further directions by the Minister of Justice.

34. I also direct the Learned High Court Judge of Anuradhapura to report this matter to the Minister of Justice in terms of Section 381 of the Code of Criminal Procedure Act together with this judgment, and the medical records available in relation to the appellant to enable him to make a suitable decision as regards to the confinement of the appellant.

35. The Registrar of this Court is directed to communicate this judgment to the *High Court* of *Anuradhapura* for compliance.

Judge of the Court of Appeal

SAMPATH B. ABAYAKOON, J.

I agree.

Judge of the Court of Appeal