CHEONG TEIK KEON v. PP

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
AB KARIM AB JALIL JCA
RHODZARIAH BUJANG JCA
[CRIMINAL APPEAL NO: P-05(IM)-372-10-2016]
16 MAY 2018

CRIMINAL LAW: *Murder – Defence – Plea of insanity – Accused person wrote email few hours before murder – Whether motive implied from email – Whether there was act of premeditation to commit murder – Whether motive negated plea of insanity – Difference in expert opinions – Whether accused person coherent, logical and rational – Penal Code, ss. 84 & 302*

The appellant was charged under s. 302 of the Penal Code for the murder of his lover. At the conclusion of the trial, the High Court convicted and sentenced him to death. Aggrieved, the appellant appealed. The plea of the accused was one of insanity and two psychiatrists, DW1 and DW2, were called to testify. In his testimony, DW1 stated that at the time of the incident, the appellant was of unsound mind and incapable of knowing that his actions were wrong or against the law because of the major depressive disorder he was labouring under at that material time which impaired his cognitive function, affected his reasoning and reduced his mental capacity. DW2 noted that the appellant suffered from post-traumatic stress disorder. On the other hand, the prosecution called PW26 to rebut the evidence by DW1 and DW2. PW26 testified that although the appellant suffered from depressive disorder, his thought process was coherent and he was logical and rational. PW26 also stated that the appellant was partially sane and insane at that time and could have suffered a moment of temporary insanity which severely impaired his judgment and he might have thought that he was right to kill the victim. In his appeal, it was submitted that the Judicial Commissioner ('JC') was wrong in his findings and, in particular, referred to the evidence of DW1 which showed the mental incapacity of the appellant to know what he did was wrong or contrary to law as required by s. 84 of the Penal Code. The issue before the court was whether the appellant was legally insane or medically insane.

Held (dismissing appeal; affirming conviction and death sentence of appellant)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) Before the commencement of the trial, the appellant was sent to Hospital Bahagia by the court, on the application by the prosecution, to determine the appellant's state of mind as to whether he was fit to stand trial. The report by DW1 clearly stated that the appellant was fit to stand trial. Further, DW1, whom had been listed as prosecution witness, was offered by the prosecution to the defence at the close of the

prosecution's case. Therefore, there was no attempt to suppress evidence by the prosecution as alleged by the defence. Further, adverse inference under s. 114(g) of the Evidence Act 1950 could not be invoked against the prosecution as there was no suppression of material evidence. (para 7)

(2) The JC concluded, based on the email written by the appellant just a few hours before the killing, that the appellant had motive to kill the victim because of the perception that the victim wanted to be with the another man. Motive and lucidity of mind expressed just hours before the commission of the offence, negated the plea of insanity. The JC also considered the evidence that the murder weapon, the knife, was not that from the house where the incident took place. Hence, the inference was that the appellant brought the knife with him and this showed premeditation to commit the offence on his part. Further, there were differences in opinion amongst the experts on the mental incapacity of the appellant and given the contemporaneous examination of PW26 as compared to that of DW1 or DW2, it could not be gainsaid that his expert opinion on the appellant was definitely a more weighty evidence for the court to consider. (paras 15, 17 & 19)

Bahasa Malaysia *Headnotes*

Perayu dipertuduh bawah s. 302 Kanun Keseksaan kerana membunuh kekasihnya. Di akhir perbicaraan, Mahkamah Tinggi mensabitkan perayu dan menjatuhkan hukuman mati. Terkilan, perayu merayu. Rayuan perayu adalah bahawa dia tidak siuman dan dua pakar psikiatri, DW1 dan DW2, dipanggil memberi keterangan. Dalam keterangannya, DW1 menyatakan bahawa semasa insiden tersebut, perayu tidak waras dan tidak berupaya mengetahui tindakannya salah atau melanggar undang-undang disebabkan oleh kecelaruan episod kemurungan major yang dialaminya pada ketika itu yang mengganggu fungsi kognitifnya, menjejaskan pertimbangan dan mengurangkan kapasiti mentalnya. DW2 menyatakan bahawa perayu mengalami gangguan tekanan pasca trauma. Sebaliknya, pihak pendakwaan memanggil PW26 untuk mematahkan keterangan DW1 dan DW2. PW26 memberi keterangan, walaupun perayu mengalami kecelaruan episod kemurungan, proses pemikirannya koheren dan dia masih berfikiran lojik dan rasional. PW26 juga menyatakan bahawa perayu separa waras dan tidak waras pada ketika itu dan mungkin telah mengalami keadaan ketidakwarasan sementara yang menjejaskan pertimbangannya dengan teruk dan mungkin menganggap bahawa dia benar apabila membunuh mangsa. Dalam rayuannya, dihujahkan bahawa Pesuruhjaya Kehakiman ('PK') terkhilaf dalam dapatan beliau dan, khususnya, merujuk pada keterangan DW1 yang menunjukkan ketakupayaan mental perayu untuk mengetahui bahawa apa yang dilakukannya salah atau melanggar undang-undang seperti yang diperlukan bawah s. 84 Kanun Keseksaan. Isu yang diketengahkan di mahkamah adalah sama ada perayu tidak siuman dari segi undang-undang atau secara perubatan.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman mati perayu)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Sebelum perbicaraan bermula, perayu dihantar ke Hospital Bahagia oleh mahkamah, atas permohonan pendakwaan, untuk menentukan keadaan fikiran perayu sama ada dia layak dibicarakan. Laporan DW1 jelas menyatakan bahawa perayu layak dibicarakan. Selanjutnya, DW1, yang disenaraikan sebagai saksi pihak pendakwaan, ditawarkan oleh pihak pendakwaan kepada pembelaan di akhir kes pendakwaan. Oleh itu, tiada cubaan untuk menyekat keterangan oleh pihak pendakwaan seperti yang didakwa oleh pembelaan. Selanjutnya, inferens bertentangan bawah s. 114(g) Akta Keterangan 1950 tidak boleh dibangkitkan terhadap pihak pendakwaan kerana tiada sekatan keterangan penting.

(2) Pesuruhjaya Kehakiman memutuskan, berdasarkan emel yang ditulis oleh perayu hanya beberapa jam sebelum pembunuhan, bahawa perayu mempunyai motif untuk membunuh mangsa kerana tanggapan bahawa mangsa mahu bersama lelaki lain. Motif dan kewarasan fikiran yang ditunjukkan hanya beberapa jam sebelum melakukan kesalahan, menyangkal rayuan ketakwarasan. Pesuruhjaya Kehakiman juga mempertimbangkan keterangan senjata pembunuhan, pisau, bukan dari rumah di mana kejadian tersebut berlaku. Oleh itu, inferens yang dibuat adalah bahawa perayu membawa pisau tersebut bersama-samanya dan ini menunjukkan rancangan terlebih dahulu untuk melakukan kesalahan. Selanjutnya, terdapat perbezaan pendapat antara pakar-pakar tentang ketakupayaan mental perayu dan berikutan pemeriksaan semasa PW26 berbanding DW1 dan DW2, tidak boleh dinafikan bahawa pendapat pakar beliau mengenai perayu sememangnya keterangan yang nilainya lebih berat untuk dipertimbangkan mahkamah.

Case(s) referred to:
PP v. Jufri Nanti [2016] 1 LNS 53 CA ***(refd)***
PP v. Shalima Bi [2016] 2 CLJ 231 CA ***(dist)***
Saeng-Un Udon v. PP [2001] 3 SLR 1 ***(dist)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code, ss. 84, 302

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Dhiya Syazwani Izyan Mohd Akhir; DPP

[Editor's note: For the High Court judgment, please see PP v. Cheong Teik Keon [2016] 1 LNS 1421 (affirmed).]

Reported by S Barathi

A

JUDGMENT

Rhodzariah Bujang JCA:

Introduction

B **[1]** The appellant was charged with the offence of murder under s. 302 of the Penal Code ("PC"). The charge reads as follows:

> Bahawa kamu pada 14 Februari 2013, jam lebih kurang 8.40 pagi, di No. 2703 Taman Hwa Seng, Jalan Rozhan, Alma, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah membunuh Tan Ching Chin, No. Kad Pengenalan 890411-07-5080. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

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[2] At the conclusion of the trial, the appellant was convicted and sentenced to death by the High Court at Penang for the aforesaid offence. Aggrieved by the conviction and sentence, the appellant appealed to this court. We had unanimously dismissed the appeal and affirmed the decision and sentence meted out by the learned Judicial Commissioner. We now give detailed reasons for our decision.

D

Version Of The Prosecution

E **[3]** The appellant and the woman he was accused of murdering were lovers. He was in fact staying with her in her house when the killing took place. The gruesome discovery was made by her maid, Stros Leang (PW2) and her mother, Siew Geok Khim (PW24) who were both alerted by the victim's loud screams and it was even worse than just her dead body that they saw in the bathroom of the house for they both witnessed the accused, who was still in the bathroom with her, holding her leg and stabbing himself in the stomach right before their very eyes. And the offence was committed in no less a significant day for lovers than on Valentine's Day itself.

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[4] The clear and explicit evidence of the maid and the mother is corroborated by that of the victim's brother in law, Ng Heng Hing (PW5) who lived next door to the family who also saw the victim and the accused in the bathroom and also witnessed the accused stabbing himself in the stomach 3 to 4 times before summoning the police to the scene. Given the unequivocal evidence of these witnesses and the evidence of the police officer (PW4) who responded to PW5's emergency call and who saw both the victim and the accused still in the bathroom of the house, with the accused's intestines protruding from his stomach, the case for the prosecution that the accused caused the death of the victim was more than amply justified. The multiple injuries on the victim caused by stabbing and slashing of the knife were testified to by the pathologist (PW10) and he said death occurred in a few minutes due to loss of blood from the severed main arteries. The murder weapon was the very knife (exh. P9) found with the accused and recovered at the scene as a forensic examination of it shows a mixed DNA profile of both him and the victim on the said knife and the very one used by the

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accused to stab himself. The victim's house was installed with CCTV and the recording of it (exh. P71) before the incident shows footage of the victim going to the bathroom followed by the accused with an object in his hand. Based on the aforesaid evidence there was no denying that a *prima facie* case has been made out against the accused which justified the calling for his defence by the learned Judicial Commissioner.

Version Of The Defence

[5] It is obvious from the act of the accused that he was mentally unstable. He did not however give his version of why he did what he did for he remained silent after his defence was called but did call two psychiatrists to testify on his mental condition at the time of the offence.

[6] In other words, his plea was one of insanity. That was the upshot of his counsel's submission before us which sought to disparage the learned Judicial Commissioner's rejection of the said defence. His Lordship actually devoted a considerable time to analyse the accused's defence of insanity, more than half of the judgment in fact but in the end concluded that the appellant could not avail himself of that defence. Before delving into His Lordship's reasons for this, it would be best if we now make mention of the evidence of the two psychiatrists called by the defence. That would be Dato' Dr Suarn Singh s/o Jasmit Singh (DW1) and Dr Mohd Zulqisti bin Mohd Zulkifli (DW2).

Major Depressive Disorder

[7] That was the diagnosis of DW1 who was of the opinion that because of it the appellant was incapable of knowing that his actions were wrong and against the law. DW1's report was actually tendered by the defence at the close of prosecution's case for identification and marked as defence exhibit (exh. D18) when DW1 took the stand. For the record, DW1 was listed as a prosecution's witness but offered to the defence at the close of their case. The appellant was sent to Hospital Bahagia roughly one year six months after the incident, ie, on 9 August 2014 and he was there until 2 October 2014 under DW1's and his medical team's observation and treatment. The appellant was sent there by the court on application by the learned Deputy Public Prosecutor (DPP) before the trial commenced, which according to the learned DPP's submission before us, was to determine his state of mind, not at the time of commission of the offence but whether he was fit to stand trial. This was said by the learned DPP in answer to the defence's contention that the prosecution was consciously trying to suppress evidence favourable to the defence by not calling DW1 to testify. Straight away, we rejected the probability of such a motive because of two things:

(i) The report of DW1 clearly states that:

> (a) Encik Cheong Teik Keon mengidap penyakit mental iaitu kemurungan [Major Depressive Disorder];

(b) Saya juga berpendapat bahawa semasa kejadian, beliau dalam keadaan yang tidak waras;

(c) Buat **masa ini, beliau layak dihadapkan ke Mahkamah untuk membela diri dan dibicarakan**.

(emphasis added)

The highlighted words clearly demonstrate the truth of the contention advanced by the learned DPP that the appellant was indeed sent for psychiatric evaluation - to determine his fitness to stand trial. Learned counsel for the appellant also submitted before us that the learned Judicial Commissioner should have considered DW1's report at the close of the prosecution's case but that cannot be right because as stated earlier the report was only marked for identification as IDD118 at that stage and the legal burden to prove insanity lies with the defence - not the prosecution.

(ii) DW1 was offered to the defence. That gesture or act by itself shows no attempt to suppress evidence by the prosecution and would equally be an answer to the contention that an adverse inference under s. 114(g) of the Evidence Act 1950 be invoked against the prosecution for not calling DW1 as a prosecution's witness. It is of course trite law that the said section can only be invoked for the suppression of a material evidence and we have just stated that no such thing happened in this case.

Before we proceed to consider the learned Judicial Commissioner's assessment of DW1's evidence, it is worth a reminder that he only examined the appellant and took care of him that many months after the incident as stated earlier. DW1 noted that the appellant had a history of depression since his school days which worsened in early January 2013. Even whilst under his care he noted that the appellant attempted to hang himself in the ward. He concluded that at the time of the incident the appellant was of unsound mind and incapable of knowing that his actions were wrong or against the law because of the major depressive disorder he was labouring under at that material time which impaired his cognitive function, affected his reasoning and reduced his mental capacity.

[8] Dr Mohd Zulqisti (DW2) examined the appellant after his discharge from Hospital Bahagia. He noted that the appellant suffered from post-traumatic stress disorder.

[9] After these two doctors were called, the prosecution called one Dr Kelvin Lee (PW26) to rebut their evidence, in particular that of DW1. Learned counsel for the appellant submitted before us that the decision of the learned Judicial Commissioner in allowing the prosecution's application to call for rebuttal evidence was wrong but did not go into the details of either the law or the facts as to why this was so. The right to call rebuttal evidence is, to our understanding, one that is available to the prosecution for on it rests the burden, throughout the case to prove the case beyond a reasonable doubt.

[10] In this case, the evidence of PW26 was pertinent not only because the defence rests its case entirely on the medical evidence but because he, PW26 that is, saw the appellant barely four days after the incident, unlike DW1 and DW2. That was on 18 February 2016 and he testified that although the appellant suffered from the said depressive disorder his thought process was coherent and he was logical and rational. He admitted however that he did not assess the appellant for criminal liability but only medically for treatment and PW26 knew there was a difference between the two. The appellant, according to him, was partially sane and insane at that time and could have suffered a moment of temporary insanity which severely impaired his judgment and might have thought that he was right to kill the victim.

The Motive For Killing

[11] Against the backdrop of these medical evidence and what crucially influenced the mind of the learned Judicial Commissioner was the email written by the appellant just a few hours before the killing, that was at around 3.19am that very morning. The email was sent from a laptop computer (exh. P80) given by the company the appellant was working with and it was sent *via* his email account, cheongtk@camfilfarr.com.my. After his arrest, the company's Assistant Managing Director instructed his subordinate, Justin Tan Jyuan Li (PW6), to access the appellant's email to check on work-related matters. It was then that PW6 discovered under "sent email" that impugned email. Wong Lee Won (PW11), the Information Technology Manager of the said company, confirmed that PW6 was only able to access the emails of the appellant but not to edit the same. After a forensic examination of the laptop by Makmal Forensic Cheras, the contents of the computer were copied into a DVD and tendered at the trial as exh. P105. The importance of the contents of the computer was not just the impugned email but the fact that its search history revealed that searches were made by the appellant on the subject of suicide, including its methods, as late as three days before the incident that is on 11 February 2013 at 9.50pm. Reverting now to the impugned email, it was not disputed that it was sent to a friend of the appellant named Michelle and given the heading "Farewell My Beloved Sister Michelle M Tio" (*sic*) and as stated earlier it was sent at about 3.19am on the day of the incident. The email was printed and attached to the forensic examination report for the computer (exh. P103) and it appears at pp. 179 to 180 of vol. 3 of the appeal record. Given its importance, the content of the email is reproduced below:

(i) First of all, thanks for knowing you and also for the recently help to me.

(ii) Thanks with truth hearted. I'm proud of you to be my sister.

(iii) However, i rather choice to end of my life with Amanda to leave this world rather than just leave away from her.

(iv) After I leave I hope you can help me to follow up stuff of me after my life.

A (v) For your information, I have a set of medical card insurance policy and also a set of accident insurance policy, both under Great Eastern [GE] and also a set of life insurance policy under AIA.

(vi) My working Laptop password is "cv8zu2". And the password for my desktop in my room is "space" - 1 key only. [In my desktop I have
B print screen and Note down all the bank acc ID and password in D drive].

(vii) My both cars and working laptop, phone still in Butterworth her house: 2703, Jalan Rozhan, Taman Hwa Seng, Alma, 14000 Bukit Mertajam, Pulau Pinang.

C (viii) Please help to public this email to my family, My sister contact is 016-5411636.

(ix) Please help to claim the insurance for my death and also KWSP as well. I prefer to pass all my remaining money to my mum after my life. And tell her, I'm feel so sorry about never taking care well of
D mum and dad before. So sorry ... after some time ... please help me to apologise to Amanda's Mami [012-4828482] about the wrong I done ...

(x) May hope after get these all done, my sister will reward you with my remaining money RM10,000.00. I hope will have these amounts for you.
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(xi) All my ATM [or debit card] password is "362436". I disappointed with all the life I'm going thru now. All decision, all my life is sucks, especially working and love. I really hate the guy, Chris Lee who take away her heart and body, as you saw the picture.

F **[12]** It is obvious from the above that the appellant was at that time under the apprehension, true or otherwise, that the victim was being enticed by another man, Chris Lee but it is to be noted that Chris Lee (PW13) gave evidence and denied any romantic involvement with the victim. The learned Judicial Commissioner noted, rightly so that besides the apology to the victim's mother, the appellant had also detailed and gave explicit instructions
G to this Michelle with regards to the disposal of his personal items and effects after his demise.

[13] The learned Judicial Commissioner, after alluding to the content of the email, posed this question to himself:

H > Does the above point to the characters of someone who was incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law, or to someone who was so provoked and incensed by what he perceived to be the deceased bailing out on him and turning her attention instead towards someone else?

I **[14]** It was obvious that His Lordship was seriously grappling with this issue of insanity for he even recalled both DW1 and PW26 for clarifications of their evidence and in spite of the aforesaid, His Lordship proceeded to make the following deductions from the email and findings as to the mental state of the appellant:

[146] The accused was undoubtedly going to carry out this plan of his and he was prepared to leave this life along with the deceased. From the contents of the email and given the fact that it was written some 5 hours before the incident, this was not something carried out spontaneously or on the spur of the moment. Therefore I do not entirely agree with the evidence of SP26 when he said that something the deceased had said that morning had so provoked him to commit the act.

[147] The anger and rage of the accused with regard to the perceived relationship between the deceased and Chris Lee had already manifested itself and was evident in the contents of the email. The accused's intended reaction to that relationship was therefore already in evidence a few hours before the incident.

[148] In the said email, the accused had also tendered an advanced apology to the deceased's mother in anticipation of what he was about to do. He further expressed that his apology was with respect to **"the wrong I done [sic] … ". This would indicate that the accused knew that what he was about to do was wrong and therefore he felt the need to apologise to the deceased's mother**. SD1 had said that in his opinion the use of the word "wrong" indicated his regret and apology that he had failed to keep his promise to the deceased's mother that he would take care of the deceased and to marry her. SD1 based this upon his assessment of the accused in the ward over repeated sessions.

[149] I find however, that this does not accord with the overall tone from the content of the email and with the facts of the case as a whole. There is nothing in the email either preceding or after the use of the word "wrong" to indicate that the accused was apologising to the mother of the deceased for the reasons stated by SD1.

[150] I therefore find that the use of the expression "wrong" used by the accused in the email showed that he knew that what he was about to do that is, to kill the deceased, was both wrong and contrary to law.

[151] The nature of the injuries sustained by the deceased according to the evidence showed that the parts of the anatomy which were targeted were vulnerable and vital organs such as the chest and abdomen. SP8, who conducted the post mortem examination of the deceased testified to a diagonal stab wound in the lower region of the right medial chest area measuring 8cm by 4cm. A stab wound inflicted to the lower right chest area caused profuse bleeding due to the blood vessels to the aorta being severed. There was also a stab wound to the lower abdomen measuring 5cm by 1cm. There was also cut wounds on the fingers of the deceased consistent with her attempt to evade the cuttings and stabbings inflicted by the accused.

[152] The extent of such injuries sustained by the deceased due to the repeated stabbing showed that the accused was consumed with anger and rage when he carried out the killing. Although it was clear in the email that the main object of his hatred was the said Chris Lee, he was not too thrilled either, to put it very mildly, at the deceased's perceived affections for the said Chris Lee thus manifesting in his merciless stabbing of the

deceased. The evidence of SP26 that the accused was angry because of something the deceased had said to him just before the incident, if at all, had merely exacerbated the already enraged condition of the deceased.

[153] Even if this was carried out according to SP26, in the belief that the accused would end up with the deceased reunited in the next life, this of itself would not mean that he was of unsound mind. SP26 in his assessment of the accused had alluded to his Taoist or Buddhist belief in the afterlife. People of all religions believe in and aspire to attain paradise in the afterlife but this does not mean that they are all of unsound mind or incapable of knowing that if they kill to enter the afterlife, it is wrong or against the law.

[154] The evidence of SP26 that the accused did not care about the consequences of killing the deceased had a ring of familiarity to it in that the court of appeal in *Shalima Bi v. PP* (*supra*) had this to say:

> What that evidence shows is that the respondent's act of pouring hot coffee on the patient was motivated by anger and not due to unsoundness of mind. In any event, *what SD2 said was that the respondent did not even bother to think of the consequences of her act. Now, this is very different from saying that the respondent was incapable of knowing the nature of her act or that what she was doing was either wrong or contrary to law*.
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> (emphasis added)

[15] Then at paras. 155 and 158 of the grounds of judgment, His Lordship concluded that the email showed motive to kill the victim because of the perception that the victim wanted to be with Chris Lee and not him - in short, it was mere jealousy and this court's decision in *PP v. Shalima Bi* [2016] 2 CLJ 231 had held that the presence of motive negates the defence of insanity. His Lordship, further considered the evidence of PW2 that the murder weapon was not that from the house. The inference therefore was that the appellant [who was seen from the CCTV footage to be holding an object in his hand] brought the knife with him and this further shows, said His Lordship, premeditation to commit the offence on his part. Thus, although His Lordship accepted that the appellant was suffering from a major depressive disorder "it did not deprive him of his understanding and memory". Hence, the defence of insanity was rejected and the conviction for murder entered.

The Appeal

[16] Before us, learned counsel for the appellant submitted that the learned Judicial Commissioner was wrong in his findings above and meticulously laid down the pertinent evidence of DW1, in particular that which shows the mental incapacity of the appellant to know what he did was wrong or contrary to law as required by s. 84 of the Penal Code. He submitted, based on *inter alia*, this court's decision in *PP v. Jufri Nanti* [2016] 1 LNS 53 that

it is not for the court to determine whether a person is legally insane - it is the psychiatrist. This is what Abang Iskandar bin Abang Hashim JCA said at para. 35 of the judgment:

> [35] So it was clear to our mind, that in determining whether an act could be categorised as one that has amounted to an act of insanity under section 84 of the Penal Code, it would inevitably involve a two-tier exercise. First, there must be finding, based entirely on medical evaluation by a psychiatrist that the accused person was suffering from some kind of psychiatric condition that was affecting his cognitive faculties at the material time. This condition may take a variety of forms as medically described, such as he being delusional and so forth. That condition may qualify a person as being medically insane. But that finding *per se* is not sufficient to be determinate or conclusive of the fact that the accused person is legally insane, a condition with which section 84 of the Penal Code is concerned about as a general defence under the law. *To be legally insane, as opposed to being merely medically insane, the person must be determined by the psychiatrist to have lost his cognitive faculties to a degree such that he is incapable of knowing the nature of his act, or that what he is doing is wrong or contrary to law*. If the first tier test is a medical test, then this second tier test is a legal test. Learned Justice Ariffin Zakaria JCA [as he then was] described the defence on insanity under section 84 of the Penal Code in the following manner:
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> > It is settled law that the defence of insanity under section 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v. Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *PP v. Misbah* [1998] 1 CLJ 759; [1997] 3 MLJ 495. Indeed, the learned authors of *Ratanlal and Dhirajlal's Law of Crime*, 5th Edn. at page 289 had written when the Court is faced with a defence on insanity under section 84 of the Penal Code, it would have to consider two matters, namely: [i] whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and [ii] if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law.

[17] We have no cause to disagree with the statement made above but with respect to the appellant's counsel, the distinction drawn above makes scant difference to the overriding effect of the motive and lucidity of mind expressed just hours before the commission of the offence by the accused which to our minds negated the plea of insanity. It must also be borne in mind that the conviction for murder in *Jufri's* case (*supra*) was upheld by this court because the act of the appellant in surrendering himself after killing the deceased (because the latter had circulated a video recording of him having sex with his wife) shows that he knew that what he did was wrong in law. Similarly, the extreme jealousy nursed by Sharmila Bi, against the deceased who was her husband's first wife had so coloured her mind that she poured

A hot oil over her (the extensive 90% burns on her body was the cause of death) also negated the same defence. The fact that Sharmila Bi suffered a borderline personality disorder as testified by the forensic psychiatrist in that case did not make her medically insane and what more legally insane, held this court.

B **[18]** In order to convince us to depart from the conclusion of the learned Judicial Commissioner, the appellant's counsel submitted the Singapore's Court of Appeal case of *Saeng-Un Udon v. Public Prosecutor* [2001] 3 SLR 1 which held that:

> C [2] When a judge is confronted with expert evidence on a matter which is outside the learning of the court and such evidence is unopposed and is based on sound grounds and supported by basic facts, he is not entitled to reject it and substitute it with his own opinion on the matter (see paras 25-27)

[19] However, with respect, we have to stress here that the argument that confronted the court in this case was whether the appellant was legally insane D not whether he was medically so, whereas in the cited case the issue was on the murder weapon - the pathologist (the only expert who gave evidence) said it was a heavy instrument and not the one the appellant confessed to have used. This evidence according to the Court of Appeal, and contrary to the finding of the High Court Judge, was sufficient to raise a reasonable doubt E on the cause of the deceased's death. Furthermore, in this case before us, (unlike in the cited case), there were differences in opinion amongst the experts as alluded to earlier, on the mental incapacity of the appellant and given the contemporaneous examination of PW26 as compared to that of DW1 or DW2, it cannot be gainsaid that his expert opinion on the appellant F was definitely a more weighty evidence for the court to consider.

Conclusion

[20] For all the above reasons, we had dismissed the appeal and affirmed the conviction and death sentence passed on the appellant. The irony was not lost to us for by the aforesaid decision, the appellant, in a perverse way will G have his death wish fulfilled.

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