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.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No:

HCC 245-19

HC of Kegalle Case No:

HC 3283-2013

Vs.

Mohommed Farook Mohommed Mustafa

AND NOW BETWEEN

Mohommed Farook Mohommed Mustafa

Accused-Appellant

Vs.

The Hon. Attorney General, Attorney General's Department,

Colombo 12.

Complainant-Respondent

Before: Menaka Wijesundera, J.

B. Sasi Mahendran, J.

Counsel: A.S.M.Perera, PC with Mohamed Nazar and Chathurika Witharana for

the Appellants

Haripriya Jayasundara, ASG,PC, for the Respondent

Written

Submissions: 10.06.2020 and 02.06.2020 ((by the Appellant)

On 22.11.2023 (by the Respondent)

Argued On: 15.11.2023

Decided On: 14.12.2023

Sasi Mahendran, J.

The instance appeal has been lodged to set aside the Judgment dated 02.07.2019.

The Accused Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Kegalle for the following offences;

- 1. The alleged murder of Mohommed Mihilar Thahira Sirin (the Deceased) on or about 14.02.2012 and thereby committing an offense punishable under Section 296 read with Section 32 of the Penal Code.
- 2. In the course of the transaction for causing grievous hurt to Mohommed Naim Amardeen Begam Nausia by throwing acid and thereby committing an offence punishable under section 315 of the Penal Code.
- 3. In the course of the transaction for causing grievous hurt to Mohommed Mustafa Safni Mustafa by throwing acid and thereby committing an offence punishable under section 315 of the Penal Code.

4. In the course of the transaction for causing grievous hurt to Ahammed Munas Safni by throwing acid and thereby committing an offence punishable under section 315 of the Penal Code.

After the conclusion of the trial, the Learned Trial Judge convicted the Accused of all 4 counts and imposed the death penalty for the 1st count, and for 2nd, the 3rd, and 4th counts 3 years of Rigorous Imprisonment, and a fine of Rs.10,000/- with a default 6 months of Rigorous imprisonment for each count separately was imposed.

The above-said Accused is the husband of the deceased, the father of the victims in counts 3 and 4, and the victim in the 2nd Count is the Accused's mother-in-law

The only ground of appeal that was raised is that the Appellant suffered from mental illness at the time of committing these offences and the Learned High Court Judge has failed to consider it.

Before answering the above issue, it is pertinent to look into the relevant facts of the instant case.

The version of the Prosecution is that the Appellant's son Safni Mustafa who was 10 years old at the time of the incident gave evidence mentioning that the deceased, the Appellant, and his family members were watching television. Later on, while coming down from the stairs Accused threw some liquid at the parties who were watching Television. This liquid was suspected to be an acid. Then the deceased shouted "Burning", then she ran and fell into a drain. The little girl Maria and all the others presented were also burnt from said thrown liquid.

The deceased was taken to the Hemmatagama Hospital and was then transferred to Mawanella Hospital. The evidence was collaborated by Munas Safni the elder son of the deceased. Begam Nausia mother of the deceased collaborated with the narratives given by the eyewitnesses.

It was revealed that all three witnesses were unaware of whether the Appellant obtained any treatment for any mental illnesses.

After the conclusion of the Prosecution trial, In the Dock statement Accused declared that he had been taking medicine for a mental illness for over 30 years and stated that he was unaware as to what happened to him at the time of throwing acid.

The consultant Psychiatrist Sunil Pushpakumara Kandapola Arachchige who examined the Accused about two weeks after the commission of the offence of murder, informed that the Appellant was suffering from 'Schizophrenia' and he had examined him only twice. He further stated that from the information received from his family members, the Accused had previously taken medication from Kandy Hospital.

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පු : මේ තැනැත්තාට ඔබතුමා විසින් 2012 ජනවාරි මාසය වන කාලයේ දී පුතිකාර කර තිබෙනවා?

උ : එසේය ස්වාමිනි. ඔහු මට හමු වුනේ ජනවාරි මාසයේ 27 වෙනිදා පුථම වතාවට. එදා මම ඔහුව පරික්ෂාවට ලක්කළා උතුමාණනි.

පු :ඒ තැනැත්තාට ඔබතුමා ඉන් පසුව කොපමණ කාලයක් පුතිකාර ලබා දීලා තිබෙනවාද ?

උ :ඉන් පසුව මට තවත් එක වතාවක් පමණයි ඔහු පරික්ෂාවට ලැබුනේ. මට ස්ථාන මාරුවක් ලැබිලා ඉන්පසුව ගම්පහ රෝහලට මාරුවී ගිය නිසා.

When we perused the records the Learned High Court Judge has taken steps to call for a medical report.

On 2016.07.12

ගරු ස්වාමිනි, මෙම නඩුවේ මෙම සිද්ධිය වන වකවානුව වන විට මෙම වුදිත මානසික රෝගයකින් පෙළෙමින් පුතිකාර ලබා ගනිමින් සිටි බවත්, දැනටමත් කෑගල්ල මහා රෝහලේ මානසික වෛදා එම්. සුමනතිස්ස මහතාගෙන් පුතිකාර ලබන බවත්, ඒ සම්බන්ධයෙන් අධිකරණයෙන් නියෝගයක් ලැබෙන්නේ නම් ඔහු සම්බන්ධයෙන් වාර්.තාවක් අධිකරණයට ඉදිරිපත් කිරීමට හැකි බවත්, නැවත පුතිකාර ලබා ගැනීමට තිබෙන්නේ මෙම මස 18 වන දින මා ඉල්ලා සිටින්නේ මේ සම්බන්ධයෙන් මානසික වෛදා වාර්.තාවක් කැදවන ලෙස ඉල්ලා සිටිනවා.

විත්තියේ ඉල්ලීම සම්බන්යෙන් පැමිණිල්ල විරුද්ධ නොවේ.

විත්තියේ ඉල්ලීම සහ පැමිණිල්ලේ එකහතාවයෙන් සිද්ධිය වන කාලය වන විට විත්තිකරුගේ මානසික තත්ත්වය සම්බන්ධයෙන් වෛදාා වාර්.තාවක් ඉදිරිපත් කිරීමට හැකියාව ඇත්නම් ඒ සම්බන්ධයෙන් වෛදාා වාර්.තාවක් මීලග දිනට අධිකරණයට ඉදිරිපත් කරන ලෙසට කෑගල්ල මහා රෝහලේ විශේෂඥ මානසික වෛදාා එම්. සුමනතිස්ස මහතාට නියෝග කරමි. සාක්ෂි තාවකාලිකව මුදා හරින ලෙසත්, ඒ අනුව කැඳවීම් දිනයක් ලබා දෙන ලෙසත් පැමිණිල්ලෙන් අයැද සිටි.

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මෙම විත්තිකරු සම්බන්ධයෙන් වෛදා වාර්.තාවක් ඔහුට පුතිකාර කරනු ලබන මානසික වෛදා එම්. සුමනතිස්ස මහතා වෙතින් නිකුත් කරන ලෙස පසුගිය අවස්ථාවේදී නියෝග කරනු ලබා ඇත. කෙසේ වෙතත් දැනට එම වෛදාවරයා ගම්පොල දිසා රෝහලේ සේවය කරන බවත්, අදාළ වෛදා වාර්.තාව ලබා දෙන ලෙසට මෙම ලිපිය ඔහු වෙත ලැබුනේ අද දින උදෑසන බවත්, දුරකථන මාර්.ගයෙන් දන්වා සිටි බව රජයේ අධිනීතිඥ වරිය අධිකරණයට දන්වා සිටි. තවද අදාල වෛදා වාර්.තාව ලබා දීම සදහා වෙනත් දිනයක් ලබා දෙන ලෙසට ඉල්ලා සිටි බවට රජයේ අධි නීතිඥ වරිය දන්වා සිටි. එම කරුණු සලකා බලා මීලග දිනට වුදිත සම්බන්ධයෙන් සම්පූර්.ණ වෛදා වාර්.තාවක් අධිකරණයට ඉදිරිපත් කරන ලෙසට අදාළ වෛදාවරයාට නියෝග කරමි.

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2016.09.06.

විත්තිකරු සම්බන්ධයෙන් සම්පූර්.ණ වෛදා වාතර්ාවක් ලබා ගැනීම සඳහා පසුගිය අවස්ථාවේදී වෛදා සුමනතිස්ස මහතා වෙත නොතිසි නිකුත් කර ඇත. නමුත් ගම්පොල රෝහලේ මෙවැනි අයෙකු නොමැති බවට සඳහන් කර ලිපිය ආපසු ලැබී ඇත. මේ පිළිබඳව සොයා බලා වැඩිදුරටත් කරුණු දැක්වීම සඳහා කෙටි දිනයක් ලබා දෙන ලෙස පැමිණිල්ලෙන් ඉල්ලා සිටි. ඒ අනුව දින ලබා දෙමි.

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2016.09.13

වෛදා වාර්.හා ලැබී ඇත.

ගරු ස්වාමිනි, ඒ අනුව වෛදාා වාතර්ාවේ පිටපතක් පැමිණිල්ලට ලබා දෙන ලෙස ගෞරවයෙන් ඇයද සිටිනවා.

අදාළ වෛදා වාතර්ාවේ පිටපතක් පැමිණිල්ලට ලබා දීමට නියෝග කරමි, එසේම ස්වාමිනි, පැ .සා 1 සිට 3දක්වා සිතාසි නිකුත් කරන මෙන් ගෞරවයෙන් ඇයද සිටිනවා.

Thereafter the Learned High Court Judge simply proceeded to commence the trial. When we perused the entire record, we couldn't find the medical report. It is a cardinal principle of the criminal jurisprudence that the Accused must understand the nature of the charge proceeding against him and also be able to assist counsel in presenting his defence and that he was fit to plead and stand his trial.

The Learned High Court Judge himself called for the medical certificate from the psychiatrist but without any inquiry, he had allowed the Prosecution to lead evidence and thereafter found the Accused guilty of murder.

It will be convenient to refer at this stage to those provisions of the Criminal Procedure Code which have a bearing on the question of procedure arising for Medical Condition at the commencement of the trial Chapter XXXI of the Criminal Procedure Code.

Section 375(1) of the Code of Criminal Procedure Act No.15 of 1979 read as follows;

"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 this 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."

There's no evidence to establish that the Learned High Court Judge had a voir dire inquiry to find out whether the Accused is competent and fit to undergo his trial.

I hold that the failure to hold an inquiry as required in section 375 (1) is a violation of the fundamental principle of Criminal Procedure. There is evidence by Dr. Sunil Pushpakumara Kandapola Arachchige who examined the Accused twice and a complaint made by the deceased stating Accused had a long history of mental illness. The Learned High Court Judge could have acted under sections 376 to 379 and he would have proceeded as directed by Chapter XV. Instead of following the procedure the Learned High Court Judge proceeded the trial and convicted the Appellant for the Murder.

Since the Accused is convicted and sentenced, we set aside the conviction and sentence imposed by the High Court Judge. We hold that the Learned High Court Judge has failed to follow the procedure laid in the Criminal Procedure Code as the Accused has failed to understand the charges against him. Therefore, we set aside the conviction imposed on 02.07.2019.

Further, we direct the commissioner general of prison to take steps under Section 381 of the Criminal Procedure Code.

Appeal is allowed.

The Registrar is directed to send a certified copy of the Judgement to the Commissioner General of Prison.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL