1975 *Present :* **Sirimane, J., Perera, J. and Weeraratne, J.**

BARNES NIMALARATNE, Appellant, and THE REPULIC OF SRI LANKA, Respondent

C. C. A. No. 93/73 with Application No. 100/73

S. C. 808/72—M. C. Matale, 38178

Criminal Law—General exception—Defence of insanity—Burden and standard of proof—Penal Code Section 77. Question of an abnormal personality due to "irresistible impulse". The accused-appellant was unanimously found guilty by the jury of the murder of his wife and sentenced to death. He pleaded insanity.

Held, interpreting Section 77 of the Penal Code which embodies insanity, it is not sufficient for the defence to raise a doubt in the minds of the Jury. The defence has to establish that the accused did not know the nature of the act or, in the alternative, that it was contrary to law, on a preponderance of probability or on a balance of the evidence. The burden on the accused is no heavier than that resting on the plaintiff or the defendant in a civil case.

Held, further :— that it must be carefully borne in mind that, in order to succeed, the defence must establish on a preponderance of evidence that at the time the accused committed the criminal act he was in one or the other alternative states of mind set out in Section 77 of the Penal Code.

The question of an abnormal personality due to "irresistible impulse" discussed.

APPEAL against conviction.

E. R. S. R. Coomaraswamy with Prins Gunesekera, C. Chakradaran and V. B. D. Fernando, for the Accused-Appellant.

T. N. Wickremasinghe. Senior State Counsel for the State.

Cur. adv. vult.

June 2, 1975. WEERARATNE, J.—

The accused-appellant in this case, one Barnes Nimalaratne, was indicted for the murder of his wife Ariyawathie, an offence alleged to have been committed on 10th October, 1971. He was unanimously found guilty by the Jury of that offence and sentenced to death.

It would appear from the evidence that the accused and the deceased married when they were both working at the Badulla Hospital where the accused was a clerk and the deceased, a Nurse. The evidence discloses that the accused took to drink and within a few years of the marriage, which was contracted in August 1967, the deceased applied for maintenance and obtained an order in her favour on 5th November, 1970 on the ground that the accused neglected his family. The deceased Ariyawathie had then obtained a transfer to Matale where she lived with her parents and both husband and wife thereafter instructed their lawyers with a view to divorce.

According to the evidence, the accused went to Ariyawathie's parental home in Matale on the 9th October, 1971 as he was engaged in work relating to the Census which was due to be held. The accused lived in that house until the night of 11th October, 1971 when according to the evidence, there was some dispute between them both after they had retired for the night to Ariyawathie's room. Ariyawathie then appears to have left her room and gone to her sister's room and slept there within closed doors. The accused went up to her sister's room and insisted that Ariyawathie should return to their room and even went so far as to tell her that she should come back and if she did not do so, he would "do a fine thing otherwise". Thereafter the deceased returned to their room where the accused and she had slept earlier.

According to the evidence of the father of the deceased he was awake since 12 midnight due to his work as a baker. He was alerted to cries from Ariyawathie's room and rushed up there whereupon the accused unlocked the door and came out with the sleeve of his shirt on fire. The father thought that the accused was making an attempt on his life and rushed behind him, but, on hearing cries emanating from the direction of Ariyawathie's room, ran up there and found her on the bed in flames. They managed, with difficulty, to extricate Ariyawathie from her bed and then took her to the Hospital. She had severe third degree burns affecting almost 90 percent of her body. Her dying deposition was recorded at the Hospital and she passed

away by mid-day on 12th October, 1971. Dr. Ranarajah, who held the post-mortem, stated that death was the result of extensive burns which were necessarily fatal.

The accused, soon after he was seen by the father of the deceased leaving the room, had made a statement to Police Sergeant Ekanayake whom he had stopped on the road while he was travelling in his jeep on patrol duty. He told Ekanayake that whilst he was asleep in his wife's home he felt pain on his hand and found his wife by the side. The accused was taken by Ekanayake sometime later for treatment in Hospital and subsequently taken into custody.

Mr. E. R. S. R. Coomaraswamy, learned Counsel for the Appellant, conceded that he was not contesting that the accused did the act and submitted that the only question which arises is whether the accused was of unsound mind at the time of the alleged offence, having regard to the provisions of Section 77 of the Penal Code. Counsel prefaced his argument on the question of insanity by stating that in this case there was no motive to kill Ariyawathie which could be established by the prosecution.

There was, he submitted, an order for maintenance, an agreement between the husband and wife to obtain divorce and further, that the appellant had continued to pay maintenance. There was also the fact that the accused visited Ariyawathie from time to time. Counsel further conceded that the dying declaration, P10, was true. Counsel observed that the conversation the accused had with the Police Sergeant Ekanayake shortly after the alleged offence while he was walking along the road, was made a point against the accused to show sanity, but, submitted that it could also show insanity.

Every man is presumed in law to be sane and possess a sufficient degree of reason to be responsible for his crime until the contrary is proved to the satisfaction of the Jury. Section 77 of the Penal Code sets out that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he was doing what is either wrong or contrary to law.

In interpreting this provision our Courts have held that it is not sufficient for the defence to raise a doubt in the mind of the Jury. The defence has to establish that the accused did not know the nature of the act or in the alternative, that it was contrary to law, on a preponderance of probability or on a balance of the evidence. In short, as mentioned by Howard, C.J in the case of *King v. Don Nikulas Buiya* (reported in 43 N. L. R. at 385)

quoting from the judgment of Viscount Hailsham in the McNaughten case, " insanity must be proved to the Jury's satisfaction and it must be clearly proved ". This much is clear as stated by Howard, C.J.—the burden on the accused is no heavier that that which rests on the plaintiff or the defendant in a civil case. In other words, the burden is discharged by an accused person who shows on a preponderance or a balance of evidence in support of such a plea.

In support of the plea of insanity raised by the defence, the evidence of Rev. Buddhadatta Thero, a brother of the accused, was led to show that the accused's mother was mentally deranged for ten to twelve years prior to her death (she died at 73). His father's brother according to this witness, died of mental derangement. In this way it was suggested that there was a history of insanity in the family. It was further sought to be established by the same witness that the accused at times acted queerly in his youth, as for intance, he once ate a " Kaduru " fruit and on another occasion, had jumped into a well when punished by his father. The prosecution however commented that the well had only 3 feet of water. The accused had on one occasion suddenly disappeared and worked as a labourer. The accused was also, according to his evidence, subject to epileptic fits. On this point the prosecution submitted that there was only one occasion according to the evidence when the accused fell unconscious due to a fit and further, if it was an actual case of epilepsy, it would have been when the accused was only 15 years of age.

Background evidence of this nature may be of force when the defence seeks to establish insanity. However, it must be carefully borne in mind that in order to succeed the defence must establish on a preponderance of evidence that *at the time the accused committed the criminal act* he was in one or the other alternative states of mind set out in the provisions under which he has sought to bring himself. (Section 77 of the Penal Code).

It would be relevant to mention, however, that despite his family taint of insanity referred to by his brother and the single instance of alleged epilepsy, the accused did find service under the Government and continued to serve until he was taken into custody for this alleged offence, except for a very short period when he was examined by certain Doctors. In fact, in the course of his duties, sometime about 1960 he was the Diet and Stores Clerk of the Hospital where he was working, which allocation of work would undoubtedly have required a tidy organised mind, for otherwise the authorities would certainly have not continued him in that capacity.

The appellant's Counsel relied heavily on the evidence of the medical witnesses and it remains to be seen how far such evidence supported Counsel's contention that it helps to establish the defence raised under Section 77 of the Penal Code as analysed by me earlier.

Dr. Seneviratne was the Psychiatrist in-charge of the Mental Hospital, Pelawatte, from 1960, at which time the accused was the Diet and Stores Clerk of that Hospital. He stated that the accused behaved sometimes in a peculiar manner and was seen on an occasion somersaulting in the ward. The accused had also, on another occasion, tried to hang himself with a bed-sheet in the Hospital. Dr. Seneviratne did not see the actual attempt of the accused to hang himself but was brought to the room where the attempt to do so is alleged to have occurred.

I must say at once that on this point there is no specific evidence as to whether there was an actual attempt to hang himself, since the evidence that would constitute an attempt would have to be necessarily something to the effect that the accused tied that sheet round his neck with a view to hanging himself. There is no such evidence from anyone who had seen this incident, placed before Court, except for the fact that there was a sheet tied to a truss bar in the Ward.

It must be clearly borne in mind that when such evidence is sought to be given in order to bring an accused person under Section 77 of the Penal Code, the material on which any proposition is made in order to bring such person under the provision must be clearly established and not set out in vague or desultory fashion. The burden is fairly and squarely on the defence to prove insanity and as stated by Dias, J. in the case of *King vs Jayawardena* (48 N. L. R. at 487), the conclusions must not be based on inadequate material and must not be hearsay.

Dr. Seneviratne goes on to say that the accused was extremely annoying and stubborn. At certain times he was most meticulous in his work. He found him drinking " kassippu " and there were also occasions when he had drunk spirits of wine after ' burning ' it during working hours.

It seems to me that this last piece of evidence is indeed significant since there is no knowing as to whether his curious behaviour at times was due to spirits of wine or " Kassippu " rather than, mental illness.

Dr. Seneviratne then, from material such as this, deals with the the accused's state of ' epileptic behaviour disturbance ' which was his diagnosis, having regard to the accused's behaviour

referred to earlier. He went on to state that his 'epileptic behaviour disturbance' could take the shape of aggression to himself or others which can be triggered off at the time of sleep or during early hours of the morning and consequently he may not even be aware of what he was doing. The entire diagnosis of 'epileptic behaviour disturbance' was according to Dr. Seneviratne, based on a history of epilepsy. It must be emphasised that the Doctor relied upon this single instance of alleged epilepsy which is said to have happened when the accused was only 15 years of age on the evidence of the accused's brother, who was no medical man. When Dr. Seneviratne was asked what other information he had to arrive at this diagnosis, his answer was :—

> "I did not get any other social information because it was not relevant. I was more concerned with his past illness, specially *whether there was any previous history of epilepsy*".

This type of evidence seems to be quite unsatisfactory when we are aware that the only suggestion of epilepsy arises from the evidence of his brother as mentioned earlier.

When confronted by evidence such as this, it is not surprising to find Dias, J., in the case mentioned earlier, referring in no uncertain terms to reckless evidence given by medical men on inadequate material.

Dr. Seneviratne, on such material, states that the accused could well have been insane. This Doctor goes on to describe graphically that in a state of clouded consciousness, the accused could not be aware of what he was doing. He may not even be aware of the nature and the quality of the act that he is doing. In stating this Dr. Seneviratne says that he has relied on the instances of two alleged attempts of suicide, details of which have already been given, and a single instance of alleged epilepsy.

It seems to me that evidence of this nature, given by a non-medical witness in respect of an illness like epilepsy, should not be the basis for the diagnosis made and the consequential conclusions arrived at by the Doctor.

Be that as it may, Dr. Seneviratne does finally come to the finding that the condition from which the accused suffered could put him out of his mind at times whilst at other times, he could be quite lucid. One thing, however, is certain, namely, that we know that the accused continued to attend to the responsible work of a Diet and Stores Clerk without any criticism of his

work, which entailed, inter alia, maintaining of stores books and records which undoubtedly involved preciseness and a keen mind.

In the course of cross-examination by Senior State Counsel, Dr. Seneviratne was constrained to admit that he did not possess a single note on which he could base his detailed evidence given in Court. He further admitted that he did not send the accused before a Medical Board despite the serious implications of his alleged insanity. He did not even refer to this diagnosis in his Confidential Report which would savour of irresponsibility if he regarded the accused as insane to the extent he says he was, and also capable of doing injury to himself and even others at particular times. However, after giving some contradictory evidence on the question whether it was highly probable that the accused was insane on the night of the alleged murder, he ultimately was constrained to admit in cross-examination that he could not say whether the accused got an attack on the night in question at the time of the incident.

Three years later in 1964 the accused was sent before a Medical Board which examined the report of Dr. Sittampalam (D13). He was reported fit for service and described as of sound mind with no delusions or hallucinations. Then, five years later, in 1969 he faced a second Medical Board and was examined by Professor Rodrigo who reported (P15) *that though the accused was not suffering from mental illness, he nevertheless had abnormal personality* and developed stages of disorganisation of behaviour from time to time owing to that he was subject to " irresistible impulse ".

Professor Rodrigo, who is a Psychiatrist, being questioned as to what constituted " irresistible impulse " admitted that such persons " in a period of stress when confronted with a situation of mental stress are unable to control themselves and easily give vent to their feelings ". He said that such persons acting under " Irresistible impulses " would have an awareness of what they do. It is not possible definitely to exclude that possibility.

Q. " This category of persons will not escape responsibility on the basis of the McNaughten rules on which you were questioned ? "

A. " Under the McNaughten rules that is so."

Q. " Even though he is acting by reason of some uncontrollable impluse ? "

A. " Yes."

The question of an abnormal personality due to an "irresistible impulse" was considered in the Privy Council case of *Sodeman vs. R.* reported in 1936, 2 AER at 1139. The argument of Counsel for the Petitioner was that the rule in the McNaughten case (14 Digest 56) could no longer be treated as an exhaustive statement of law in regard to insanity and that there was to be grafted upon those rules another rule that where a man knows that he is doing what is wrong, nonetheless he may be held to be insane if he is caused to do the act by "irresistible impulse", produced by disease.

In this case, the petitioner, a labourer, took a girl for a ride on his bicycle, strangled her, tied her hands behind her back, stuffed some of his clothing into her mouth and left her for dead. He had committed three previous murders in similar ways and the defence taken was that two Government Prison Doctors in a Department in the Mental Division gave evidence in support of the defence whilst the Crown submitted no expert evidence. Viscount Hailsham, who was associated with Lord MacMillian and Sir Isac Isaacs, held that the law with regard to insanity was stated in the McNaughten case and that there was not to be added to that statement another rule that when a man knows that he was doing wrong but was forced to do the act by an "irresistible impulse" produced by disease, he could rely on insanity as a defence. The House of Lords in the case of *Attorney-General for the State of South Australia and Brown*, reported in 1960 Appeal Cases 432, re-affirmed the view of the law stated in the case of *Sodeman.*

Professor Rodrigo referred to report, D12, of Dr. Grilmayer, Viennese Specialist attached to the Mental Hospital, who had examined the accused and *did not make any suggestion that he was of unsound mind.*

The next Psychiatrist called as a witness was Dr. Manukulasooriya attached to the Prisons, who produced his docket P17. He treated the accused from 30.11.72 to 17.4.73. He says that he was *in a good mental condition* at the time. He stated that the accused had an acute state of anxiety which he considered would be because he was facing a capital charge. He expressed the opinion that the accused was of "abnormal personality", *which conclusion he arrived at on the material given by the accused's brother.* The material was, jumping into a well with only three feet of water, eating of the "kaduru" fruit (both of which he did when he was a boy) and the alleged attempt at suicide with a bedsheet in 1971. I have already made my observations in regard to this attempt.

It is relevant, perhaps, to mention that the accused's father-in-law stated in evidence that an alleged attempt at suicide by hanging occurred when the accused was drunk. (page 62 : Q. 998). It is important to note that this Doctor conceded that with a martinet as his father, the accused at the age of 15 may well have had the need for attracting the sympathy and affection of his parents, and consequently did these things. There were other facts that this Doctor took into consideration, such as the admission of a suspicion that he had about Ariyawathie having an affair with one of the boarders. The Doctor, however, was unable to say anything about the accused's likely condition at the time of the alleged incident.

Dr. Ranarajah, District Medical Officer, Matale, produced the Bed-Head Ticket of the accused dated 11.10.71 and the time given was 2.15 a.m. It is conceded that the date should read 12.10.71. He had superficial burns of the right upper arm and shoulder. He had noted that the patient was very boisterous and shouting. The accused said that he had got burnt without his knowledge.

As I have prefaced earlier, the question that arises in this case and which is relevant to the plea of insanity taken under Section 77 of the Penal Code is whether the accused was unsound within the meaning of that provision, at the time of the alleged act. Indeed, any background evidence in regard to the mental condition of the accused would be useful to ascertain his state of mind, but, it must be emphasised that such evidence may not be sufficient to support the defence of insanity since the crucial question is as to whether the accused was insane at the time that the alleged act was committed.

I have, earlier in this judgment, commented on the nature of this evidence and the observations of the medical witnesses who gave evidence, both for the prosecution and the defence. There appears to be some unanimity amongst the medical witnesses—some of whom are Psychiatrists—in regard to the fact that the accused could possibly have had episodic attacks from time to time. By this they mean that he had had lucid moments as well as abnormal personalities at other times. The crucial issue, however, is whether he was lucid or not at the time of the alleged act which was admittedly committed by him.

I have shown earlier that Dr. Seneviratne only relied on the evidence of the accused's brother to base his conclusions of "epileptic behaviour disturbance" upon which the suggestion of insanity of the accused is built. Even Professor Rodrigo says that he based his conclusion of abnormal behaviour by the accused,

who had his lucid moments at other times, on the material given by his brother upon whose evidence Dr. Seneviratne also relied. However, it is significant that despite all these pronouncements, the two Medical Boards did not find the accused insane and the accused continued to work in a responsible position in the Hospital.

None of the medical witnesses were able to give any definite opinion on the state of mind of the accused at the time of the alleged act. This would not be strange since, according to them, the accused has his lucid moments and abnormal moments. Hence it would be only the evidence of his state of mind sometime prior to the alleged offence and sometime shortly thereafter that would, to a large extent, assist Court in arriving at a proper conclusion as to whether he was insane when he committed the act, within the terms of Section 77 on a preponderance of the evidence as established by the defence.

It must be borne in mind that the accused was performing responsible duties for a considerable period of time prior to the alleged offience. He was neither removed from his duties nor found unsatisfactory. Dr. Seneviratne described him as extremely meticulous but at times stubborn and quarrelsome. He drank liquor in the form of " kassippu " and even spirits of wine during working hours and one cannot say whether his quarrelsome moments occurred at that time or not. One thing is clear- that both Medical Boards before which he went did not find him insane or unfit for duty. Even at the time he came to his wife's parental home on the 9th instant to attend to some work in connection with the General Census the accused did not display any signs of insanity nor did any incident occur to even suggest a trace of insanity right up to the time of the alleged incident in the early hours of the morning of the 12th. In fact the deceased's father, on being questioned as to why he did not object to the accused coming to his home, replied that his daughter had told him that she had no trouble with the accused, except when he was drunk.

Then, on the night of the incident, there was apparently some argument between Ariyawathie and the accused after they retired to bed in her room, details of which are not available, resulting in the deceased leaving her bedroom and sleeping in her sister's room. The accused, who was apparently incensed at her leaving him, continued to bang on the door saying " I have got to go to work tomorrow ; Ariyawathie come to sleep ". Learned Senior State Counsel submits that this is indeed quite a rational statement. When Ariyawathie still did not accede to his request the accused went so far as to threaten her by saying " I

will do a fine thing otherwise " unless she returned to their room. The deceased then went back to her room with the accused and if we are to accept what is contained in the dying declaration of the deceased, she describes how the accused locked the door of their room before they retired for the second time.

One could not find anything queer or what savours of insanity in the accused's conduct upto this point of time. It was later that night, at about 1 a.m. that the cries of the deceased were heard by her father. The dying deposition (P10) which Counsel for the Appellant conceded as " true " shows the relationship that existed between the accused and the deceased. The deceased states that there was displeasure between them. The Court had ordered the accused to pay Rs. 150 as maintenance for her and their two children. According to the deceased, on the night of the 11th instant, whilst she was asleep in the room shared by both of them, she " was awakened by something being poured on me. I got the smell of kerosene oil and it struck me that it was kerosene oil that was being poured on me. My husband was by my bedside. He lighted some paper and set fire to me ". It is significant that he ran out of the room when there was a knock on the door by the anxious inmates of the house.

Learned Senior Counsel for the State referred to certain other items of evidence, as for instance that there was a Haliborange bottle (p1) which smelt of kerosene oil on the bed; that the wick of a bottle lamp which was on a table, was found on the bed. Counsel for the State suggested that it may well be that the accused simulated an accident but unfortunately for him, the deceased got up. Learned Senior Counsel for the State submitted that the accused's conduct and the surrounding evidence do indicate that this was a premeditated murder. The sane behaviour of the accused, according to the prosecution, is advanced by the accused's conduct in signalling Police Sergeant Ekanayake to stop the jeep and his making what amounts to an exculpatory statement.

After the inquest on the 13th instant at 10 a.m., the accused pointed to Sergeant Ekanayake the place where he dropped the shirt which was about 15 yards from the deceased's home. Sergeant Ekanayake further stated that at the time he saw the accused on the road he was bare-bodied and holding a banian. This, according to the prosecution, supports their view that the shirt, which was aflame, according to the deceased's father's evidence, was discarded at the point where some ash was found by the Police Officer.

Learned Counsel for the Appellant further drew our attention to certain aspects of the summing-up of the trial Judge which, according to him, prejudiced the appellant. We are unable to accede to the submission of Counsel that the learned trial Judge had given weightage to the criticism of Dr. Seneviratne's evidence without reference to all the circumstances in favour of the defence. In this connection I find that the learned trial Judge has, at page 321 to 324 of his summing-up, given a detailed account of this Doctor's evidence on the mental condition of the accused. At page 326 the trial Judge has referred to the criticism of State Counsel who contested the Doctor's evidence on the basis that he had no proper material on which he (Doctor) could have concluded that the accused was epileptic. One cannot concede that the trial Judge has acted improperly by making reference to State Counsel's submissions in the way he did. I have earlier shown that this witness has built his entire theory of " epileptic behaviour disturbance " on the evidence of the accused's brother, who referred to a single instance in which the accused fell unconscious at the age of 15 years, which his brother had regarded as an ' epileptic fit '. In the same way, the learned trial Judge has, quite properly at page 326 of the summing-up, also referred to the fact that Dr. Seneviratne has not mentioned that the accused was suffering from any mental illness in his Confidential Reports, despite his opinion that the accused was suffering from abnormal personality.

Learned Counsel for the Appellant also submitted that the evidence of Dr. Ranarajah was not referred to in the summing-up. It must be remembered in this connection that Dr. Ranarajah, who is not a qualified Psychiatrist, merely describes (at pages 213 to 216 of his evidence) the treatment given to the accused after he was administered a sedative. According to this Doctor's evidence, the sedative was not as strong as morphia. It is not unlikely that the accused's boisterous condition could well have been because he was not under complete sedation and was suffering from obvious pain from his burns. I am quite satisfied that the absence of any reference to this Doctor's evidence was certainly not a material non-direction.

In regard to the argument of appellant's Counsel that the summing-up has no reference to the deceased's father's evidence of his suspicion that the accused had made an attempt on his life, I might state that there is no obligation cast upon the trial Judge in law to refer to each and every detail of the evidence in the case, whether for the prosecution or the defence, particularly when there is other evidence already on record in regard to an alleged attempt made by the accused upon his life which the trial Judge has commented on. The point indeed cannot therefore be regarded as of any significance.

We have carefully examined the manner in which the learned trial Judge has dealt with the defence of insanity. He has, with some particularity, set out the law and correctly referred to the legal implications of the burden which lies on the defence under Section 77 of the Penal Code. He has also adequately stated that the burden lies on the defence, once the prosecution has established its case beyond reasonable doubt, that the accused had set fire to the deceased with a murderous intention.

We have given the most anxious consideration to the evidence led in this case and to the submissions of Counsel for the Appellant and Senior Counsel for the State. We find that the defence has not established, on a balance of probability, that the accused was insane within the ambit of Section 77 of the Penal Code at the time that the alleged offence was committed as found by an unanimous verdict of the Jury. In arriving at this decision, we have, as shown in this judgment, considered the provisions of Section 350 (7) of the Administration of Justice Law No. 44 of 1973, which empowers the Supreme Court to examine the evidence with a view to decide " that although the appellant was guilty of the act or omission charged against him, he was at the time the act was done or omission made, incapable by reason of unsoundness of mind of knowing the nature of the act or that it was wrong or contrary to law ", in which event " the court may quash the sentence passed at the trial " and make a consequential order relating to the appellant being kept in safe custody as provided in the said provision.

The appeal of the accused-appellant is accordingly dismissed.

Sirimane, J.—I agree.

Malcolm Perera, J.—I agree.

Appeal dismissed.