GAMINI
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
JAYASURIYA, J.,
KULATILAKA, J.
C.A. NO. 181/96
H.C. COLOMBO NO. 7474/95
OCTOBER 28, 1998

Criminal Law – Reckless and/or negligent having – Res ipsa loquitur – plea of epilepsy and defence of automatism – Burden of proof – S. 298, 328 Penal Code – S. 420 Criminal Procedure Code – S. 105 Evidence Ordinance.

The lorry driven by the accused halted at a signal post. Thereafter, the vehicle was driven very fast, went over to the opposite side of the road where it knocked a pedestrian, crashed on to a CEB transformer and then damaged a house on the edge of the roadside. The accused in his dock statement stated that from his early childhood he had been subject to epilepsy. On the day in question he had driven the lorry from Kurunegala. When he reached Colombo, he had felt faintish. He then washed his face and continued to drive. He halted the lorry at the signal light post at Armour street and on the Green light coming on, he commenced to drive on and as he was driving he felt faintish, his eyesight failed him and he became unconscious. He did not know what happened thereafter and he regained consciousness at the Armour Street Police Station. He was hospitalized for three days. An EEG examination done at the National Hospital and on the report and certificate admitted formally in terms of section 420 of the Code of Criminal Procedure Act without proof the plea that the accused was suffering from epilepsy at the time of the incident and the defence of automatism.

Held:

1. The use of the criterior of external physical factors and internal physical factors to distinguish between plea of automatism and insanity is wholly incongruous in the law of Sri Lanka.

   Our law is that in a plea of automatism the accused must lay a sufficient foundation for his plea by leading evidence that his mind was not controlling his limits at all at the time of the commission of the offence. It is not

sufficient for the accused to lay the foundation and discharge his evidential burden by establishing that his mind was acting imperfectly at that time, if he was still reacting to stimuli and controlling his limbs in a purposive way. In such an event he would fail to lay a sufficient foundation for the plea of automatism. He must establish that his acts were wholly conclusive and not purposive in any manner.

2. As the State Counsel has formally admitted the contents of the report and certificate of the doctor who issued the certificate in respect of the accused and taking in conjunction the evidence given by the accused in the Dock, the defence has placed a sufficient foundation for the plea of automatism and thereby rebutted the provisional presumption of mental capacity and once that provisional presumption of mental capacity was displaced, the legal burden lay on the prosecution discharge the ultimate burden of proving that the accused's act was voluntary. The evidence led by the accused in laying a sufficient foundation for the plea of epilepsy has thrown a reasonable doubt on the ingredient of the offence, ie the proof of a voluntary act against the accused on the part of the prosecution and he is entitled to be acquitted.

Cases relied on:

1. *Perera v. Amerasinghe, SI Police, Ratnapura* – 41 CLW 92.
2. *Halliwell v. Venabeles* – (1930) 99 Law Journal King's Bench 353.
3. *Kalansuriya v. Johoran* – 48 NLR 400.
4. *Bratty v. Attorney-General for North Ireland* – (1963) AC 386, 407, 408, 409, 413, 414.
5. *Rex v. Charlson* (1955) 1 WLR 317.
6. *Hill v. Baxter* (1958) 1 QB 277, 282 – (1958) 2 WLR 761.
7. *R. v. Lobell* – (1957) 1 QB 547.
8. *Director of Public Prosecutions v. Wolmington* – (1935) AC 462.
9. *King v. Chandrasekera* – 44 NLR 97.
10. *Queen v. Jayasena* – 72 NLR 313.
11. *Mancini v. D. P. P.* – (1942) AC 1.
12. *Regina v. Sullivan* – (1984) AC 156, 172.
13. *Regina v. Hennessy* – (1989) 2 All ER 9.
14. *R. v. T.* (1990) Criminal Law Review 256.
15. *Regina v. Quick* – (1973) QB 910, 922 (1973) 3 All ER 347.
16. *R. v. Bailey* – (1983) 1 WLR 780.
17. *Watmore v. Jenkins* – (1962) 3 WLR 463.
18. *Broome v. Perkins* – (1987) Criminal Law Review 271.
19. *Attorney-General's reference* No. 2 of 1992 – (1993) 97 Criminal Appeal Reports 429.
20. *Regina v. Douglas Lance Isitt* – (1978) 67 Criminal Appeal Reports 44.
21. *Roberts v. Ramsbottom* – (1980) 1 All ER 7.

APPEAL from judgment of the High Court of Colombo.

Dr. Ranjith Fernando with *Nihal Gunasinghe, Ms. Anoja Jayaratne* and *Ms. Subashini Godagama* for accused-appellant.

Vijith Malalgoda, SSC for the Attorney-General.

Cur. adv. vult.

October 28, 1998.

JAYASURIYA, J.

The accused-appellant, upon this prosecution, has been charged with driving lorry bearing No. 27 Sri 6696 recklessly and/or negligently and with having caused the death in count No. 1 of Suppiah Alageswaran and in count Nos. 2 and 3 with having caused hurt to Kirama Kankanamage Ariyadasa and Mariapillai Rengasamy, in terms of section 298 and section 328 of the Penal Code, respectively.

The evidence elicited by the prosecution disclosed that this particular lorry was halted at a signal light post in a stationary position and that, thereafter, the vehicle had been driven very fast and in the process that it went over to the opposite side of the road, knocked a pedestrian who was walking on the edge of the pavement on the opposite side and had crashed against a transformer belonging to the Ceylon Electricity Board and thereafter had proceeded again and caused damage to a house which was situated on the edge of the roadside. These facts which disclosed that the lorry in question was driven at a very fast speed right across the road in question gave rise to the presumption *Res ipsa loquitur.* Vide *Perera v. Amerasinghe*[1]; *Halliwell v. Venabeles*[2]; *Kalansuriya v. Johoran*[3] per Justice Wijewardena. Justice Wijewardena upheld the submissions of Crown counsel upon a charge of criminal negligence that a lorry going off the road raises a presumption arising from the application of the *maxim Res ipsa loquitur.* However, at the trial, the accused had produced a medical report and certificate to the effect that he was subjected to Electroencephalogram (EEG) which was held on the very day that this motor collision occurred and the medical expert who had issued

that report and certificate had stated in it that having regard to the test carried out by him on the day of the incident itself that the accused was prone to epilepsy and that the EEG confirmed that "he was suffering from temporal lobe epilepsy".

On the 11th of November, 1996, after the accused had made a statement from the Dock, learned counsel appearing for the accused at the trial moved to mark this medical report and medical certificate issued in respect of the accused-appellant – Mudunkotgedera Gamini on 19. 10. 92, which was the date of the incident, and which document was listed as item 12 in the list of documents attached to the indictment, without calling the medical expert, through the officiating Registrar of the Court. At this stage learned State counsel who appeared at the trial stated to Court that she was formally admitting the contents of the aforesaid report and its correctness and genuineness and moved that the contents of the aforesaid report and certificate be formally admitted without the necessity of proving its contents in terms of section 420 of the Code of Criminal Procedure Act. Thus, in view of this concession and representation on the part of the State Counsel, the contents of this document were *unfortunately* formally admitted and the medical expert who issued this report and certificate was not called as a witness. The accused in his Dock statement has stated that from his early childhood he had been subject to epilepsy and his mother had taken care of him. On the day in question he had proceeded from Kurunegala driving this lorry towards Colombo and when he reached Colombo that he had felt faintish and thereafter he had washed his face and continued to drive the lorry which had to be brought to a halt at the signal light post fixed at Armour street. Thereafter, on noticing the green light, he commenced to drive the lorry and as he was driving the lorry that he felt faintish and thereafter his eyesight failed him and that he was unconscious and he did not know what transpired thereafter and that he regained consciousness at the Armour Street Police Station. He has stated that thereafter he was admitted to the hospital and he was treated in the hospital for three days. The EEG examination had been carried out at the National Hospital. Thus, the accused in his Dock statement has related certain facts which taken in conjunction with the contents of the report and the certificate which were admitted formally in terms

of section 420 of the Code of Criminal Procedure Act without proof, had raised the plea of epilepsy, that the accused was suffering from epilepsy at the time of the incident and the defence of automatism.

Lord Denning in *Bratty v. Attorney-General for North Ireland*[4] dealt with the plea of automatism which is, in effect, a plea that the act in question was involuntary and proceeded to explain the plea in the following words : "An act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep walking". Thus, the plea is in effect that the act which is relied upon to prove the *actus reus,* was involuntary and not willed. In *Rex v. Charlson*[5] the accused was charged under the provisions of the offences against the Person Act with unlawfully and maliciously causing grievous bodily harm with intent to murder his ten-year old son whom he struck twice on his head with a wooden mallet and thereafter threw the boy out of the window into the river twenty-feet below. The boy suffered severe injuries to his leg and arm but succeeded in crawling out of the water. The accused admitted striking the boy but said he did not know why he had done so. Evidence was elicited at the trial that the accused was sane and had no disease of the mind whatsoever but there was evidence in regard to the clinical examination and the history of the accused which pointed to the possibility that the accused was suffering from cerebral tumour in which case he would be liable to motiveless outbursts of impulsive violence over which he would have no control at all. Justice Barry dealt with the necessity on the part of the prosecution of proving a conscious and voluntary act on the part of the accused. Justice Barry remarked : "That means that there must be a conscious act on the part of the accused. A person suffering from a disease may be deprived of the control of his actions . . . A man in the throes of an epileptic fit does not know what he is doing . . . The actions of an epileptic are automatic and unconscious and his will and consciousness will not apply to what he is doing . . . if he did not know what he was doing, if his actions were perfectly automatic and his mind had no control over the movement

of his limbs, if he was in the position as a person in an epileptic fit, then no responsibility rests upon him at all and the proper verdict is not guilty of all three charges".

However, the question arises whether a proper foundation has been laid in this case for a plea of automatism to be considered by the Court. In this particular prosecution the accused has pleaded thus : " I do not know what happened; I cannot remember a thing" as was asserted by the accused in *Hill v. Baxter* [6]. But learned State counsel has formally admitted the contents of the report and the certificate that the accused was suffering from temporal lobe epilepsy on the very date that the incident occurred. The accused has also referred in his Dock statement to his past history of the same illness and has stated that after the green light came on, he commenced driving the lorry but soon after that he had fainted and become unconscious and he did not know what happened thereafter till he regained consciousness much later at the Armour Street Police Station. He was admitted to hospital and received treatment at the hospital for three days. The EEG examination was carried out on him at the National Hospital, Colombo. Since the foundation for the plea of automatism had been sufficiently placed before the Court, the accused through the medium of this plea was, in effect, throwing doubt and negativing proof that he had committed a voluntary and self-willed *actus reus*. Vide Article by S. Prevezer – Automatism and Involuntary Conduct – 1958 Criminal Law Review 361 at 362. It is always open to an accused person through evidence or through suggestions or by cross-examination to cast a reasonable doubt as to any of the ingredients of the offence such as the voluntary *actus reus* which the prosecution is obliged to establish beyond reasonable doubt. Now, adverting to the submissions of learned senior State counsel state that in such circumstances there is no legal burden on the accused of proving any fact and neither is there any standard of proof to be achieved or discharged by him when he is engaged in the process of throwing doubt on the prosecution case. Hence, the issue before this Court is not whether the accused has discharged a legal onus or standard of proof but whether the accused has involved in doubt and thrown sufficient doubt

on the *actus reus* of the offence which is the commission of a voluntary and willed act on the part of the accused. The pleas of automatism and the pleas of epilepsy have been put forward by the accused in this case with that object in mind. The learned trial judge has failed altogether to view and consider this plea in its legal perspective. He has failed and omitted to give his mind to the issue whether the prosecution has proved a voluntary and conscious act as against the accused beyond reasonable doubt. But, on the contrary, he has held against the accused and arrived at the conclusion that the accused is guilty of the offence on the reasoning that even if the accused got into this state he ought not to have driven the vehicle any further and his act of driving the vehicle amounted to negligence. This reasoning discloses a failure to correctly comprehend, analyse and evaluate the contents of the Dock statement made by the accused. We further hold that it is a wholly unsatisfactory and illegal basis for a conviction on the charges.

In view of the submissions advanced by senior State counsel before the Court of Appeal, a restatement of the law on this point, with particular reference to the legal burden, standard of proof, and the evidential burden becomes necessary. The prosecution was under a duty to establish against the accused the doing of a voluntary, conscious and willed act. The prosecution could in this context rely on the presumption of mental capacity, which is a provisional presumption, to establish the voluntary nature of the act. Then, if the accused succeeds in placing a sufficient foundation for a plea of automatism that either the act was committed due to concussion, whilst sleep walking or due to epilepsy, the aforesaid provisional presumption is displaced and the prosecution is required to prove the legal burden and discharge the ultimate burden of proving that the act was voluntary. However, in order to displace the presumption of mental capacity, defence must place a sufficient foundation by evidence from which it may reasonably be inferred that the act was involuntary. Vide article Automatism as a Defence, 74 LQR 176. Once the defence discharges this evidential burden, the legal burden and the ultimate burden of proof, that the act was voluntary is on the prosecution. For the distinction between the Evidential Burden and the Legal Burden – Vide article by Lord Denning in 61 Law Quarterly Review, page 379. It must be emphasised that there is no legal burden on the accused to prove his act was involuntary. Vide *R. v. Lobell*[7] for, as laid down in the celebrated case of *DPP v. Wolmington*[8] it is for

the prosecution to prove the elements of its charge – *King v. Chandrasekera*[9]; *Queen v. Jayasena*[10]; *Mancini v. DPP*[11] One of these elements is that the accused's act is voluntary, conscious and willed. Thus, where the defence has discharged its evidential burden and ultimately the Court or jury left in doubt whether or not the accused acted in a state of automatism, *on principle* the accused ought to be acquitted on the footing that the *actus reus* has not been proved beyond reasonable doubt by the prosecution. Vide the decisions in *R. v. Charlson*[5] (*supra*) and the judgments delivered by Viscount Kilmuir, Lord Chancellor and by Lord Denning in *Bratty v. Attorney-General for North Ireland*[4] (*supra*). Thus, it is always open to the defence, after placing, by sufficient material, a proper foundation for a plea of automatism, to throw doubt on the ingredient of a voluntary and conscious act on his part and thereby secure an acquittal.

If the above statement of the law represents the correct position, it may be argued that the statement of the law is not sound since a defence of automatism is very near and close to the defence of insanity and it would be anomalous if there were to be any distinction between the one plea and the other [vide the observations of Lord Goddard in *Hill v. Baxter*[6] (*supra*). If the jury are to be directed to acquit the accused, if and only if they were satisfied on a balance of probability that the accused has acted in a state of automatism, in the same manner – as under the McNaughton Rules – that the accused must establish on a balance of probability that necessary requirements of the plea of insanity are satisfied. Such a proposition of law is not warranted because a plea of insanity is a general exception which falls within the ambit of chapter IV of the Penal Code – whereas, a plea of automatism does not. Dealing with general exceptions sections 105 of the Evidence Ordinance enables the Court to presume the absence of circumstances, bringing a case within the ambit of a general exception. It further postulates that the accused must prove those circumstances on a preponderance probability. It must be stressed that the plea of automatism does not constitute a general exception. It is a plea asserting that the prosecution has not proved an element of the offence – conscious and voluntary act on the part of the accused and, having regard to the principles laid down in Wolmington's Case, it is trite law that the prosecution must prove every element of the offence charged and the legal burden of proving ultimately the voluntary character of the act is on the prosecution.

In these circumstances, the doubt entertained by Lord Goddard in *Hill v. Baxter* (*supra*) is wholly misconceived and without foundation.

There have been developments taking place in English Law where views have been expressed dissenting from the reasoning of Lord Kilmuir and Lord Denning. The distinction which emerges from the subsequent development centers on classifying causes as being internal or *external.* In the case of *Regina v. Sullivan*[12] Lord Diplock implicitly accepted the distinction between *internal* and *external* causes. Lord Diplock in *R. v. Sullivan* (*supra*) at page 172 remarked :

> "If the effect of the disease is to impair [the facilities of reason, memory and understanding] so severely as to have either of the consequences referred to in the latter part of the rules, *it matters not* whether the aetiology of the impairment is organic, as in epilepsy or functional, or whether the impairment is permanent or is transient and intermittent – provided it subsisted at the time of the commission of the offence."

A verdict of not guilty on the basis of automatism would thus be acceptable in "Cases where temporary impairment . . . results from *some external physical factor* such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes, whereas, stress, anxiety or depression or epilepsy which lead to impaired consciousness are not classified *as external physical factors* and are treated as a plea of insanity and legal burden is cast on the accused. Further, the verdict is guilty but the offence has been committed due to a mental condition. Thus, only unconscious and involuntary conduct traceable to an *external physical factor* enables the plea of automatism to be put forward. But unconscious act caused by an *internal physical factor* does not permit the plea of automatism to be put forward and to be successful in obtaining an acquittal by involving in doubt the voluntary character of the act. (Vide *Regina v. Sullivan*[12] (*supra*); *Regina v. Hennessy*[13]; *R. v. T.*[14]; *Regina v. Quick*[15] per Lawton, LJ.

We would not follow this development of the law in England and we would lay down the law for Sri Lanka adopting the principles laid down by Viscount Kilmuir, Lord Chancellor and Lord Denning. This development of the English Law is inconsistent with the scheme and

symmetry of the Evidence Ordinance relating to burden of proof and of chapter IV of the Penal Code of Sri Lanka. Besides, the incongruity an untenability of this development is manifested on a consideration of two connected situations –

A. If a diabetic injects an excessive dose of insulin and commits a violent assault when suffering from hypoglycaemia in an unconscious state, it is said that as the malfunctioning of the mind of a transitory effect was caused by an EXTERNAL factor, the plea of automatism is available to him and there is no legal burden on him to discharge.

B. If a diabetic patient commits a violent assault when suffering from hypoglycaemic coma caused by over production of insulin by an overactive pancreas, it is ruled that it is an *internal cause,* and the plea of automatism is not available to him as it is classified as a disease and he is required to discharge a legal burden in setting up the defence of insanity. Vide for an interesting article – Defence of Automatism and Diabetes (Maher) 99 LQR 511; *R. v. Hennessy* (*supra*), *R. v. Bailey*[16]; *Watmore v. Jenkins*[17] accused all diabetics. Vide article – Epileptic's plea of Automatism – 99 LQR 506 – (Smith).

The use of the criterion of Internal/External causes to distinguish between pleas of Automatism and Insanity in this manner is wholly incongruous and fatuous and would not be adopted in the Law of Sri Lanka for the reasons already adumbrated. This distinction is "an affront to common sense".

However, we stress and emphasise that in a plea of automatism, the accused must lay a sufficient foundation for his plea by leading evidence that the accused's mind was not controlling his limbs at all at the time of the commission of the offence. It must be stressed that it is not sufficient for the accused to lay the foundation and discharge his evidential burden by establishing that his mind was acting imperfectly at that time, if he was still reacting to stimuli and controlling his limbs in a purposive way. In such an event he would fail to lay a sufficient foundation for the plea of automatism. He must

establish that his acts were wholly convulsive and not purposive in any manner. See article – Automatism whilst driving 78 LQR 476 at 476 end to 477. Vide *Broom v. Perkins*[18] *Attorney-General's Reference* [No. 2 of 1992][19]; *Regina v. I Sitt*[20]; *Roberts v. Ramsbottom*[21]. As the state counsel has formally admitted the contents of the report and certificate of the doctor who issued the certificate in respect of the accused and taking in conjunction the evidence given by the accused in the Dock, the defence has placed a sufficient foundation for the plea of automatism and thereby rebutted the provisional presumption of mental capacity and one that provisional presumption of mental capacity was displaced, the legal burden on the prosecution to discharge the ultimate burden of proving that the accused's act was voluntary. The evidence led by the accused in laying a sufficient foundation for the plea of epilepsy has thrown a reasonable doubt on the ingredient of the offence, ie the proof of a voluntary act against the accused on the part of the prosecution and, in the circumstances, we allow the appeal, set aside the finding, conviction and sentence imposed on the accused. However, we record and firmly lay down one finding that the accused has committed without consciousness and without volition the act or criminal negligence as defined in section 298 and section 328 of the Penal Code, respectively and in the circumstances we make order suspending his driving licence until he appears before three medical boards each held annually and till a determination that he is in a fit condition to drive motor vehicles is issued by the said three medical boards in a time-frame of three years. The accused in his present condition must not be permitted to be a source of danger to the community and to himself by driving motor vehicles until such a determination is reached by the aforesaid medical boards. He should not be kept at large to drive motor vehicles to the detriment of the community and himself. Subject to this direction and order, the appeal is allowed.

KULATILAKA, J. – I agree.

Appeal allowed subject to conditions.

Driving Licence suspended.