1947 *Present :* **Canekeratne and Dias JJ.**

THE KING *v.* JAYAWARDENE.

S. C. 115—D. C. Criminal, Kandy, 315.

Insanity—Penal Code, Section 77—Quantum of proof—Affidavit of witness not called at trial—Admissibility in appeal.

In support of a plea of insanity evidence was led for the accused that his father, brother and sister had been insane ; that the accused in his childhood had suffered from epileptic fits and that when his detection and arrest became imminent his mental condition deteriorated and he attempted to commit suicide and was subsequently adjudicated to be of unsound mind. The evidence also proved that during the thirty years he had been a public servant he had displayed no signs of mental aberration.

Held, that the evidence was insufficient to discharge the burden which lay on the accused.

Quaere, whether the defence of insanity under section 77 of the Penal Code should be established beyond reasonable doubt or whether it would be sufficient if the accused established it by a preponderance of probability or on the balance of evidence.

Held, further, that a Court of Appeal will not ordinarily admit in evidence an affidavit of a witness who was not called at the trial.

Jamal v. Aponso (1924) 2 Times 215 and *Deachinahamy v. Romanis (1900) 1 Browne 188* followed.

APPEAL against a conviction from the District Court, Kandy.

F. A. Hayley, K.C. (with him *H. Wanigatunga*), for the accused, appellant.

D. Jansze, C.C., for the Attorney-General.

Cur. adv. vult.

September 9, 1947. DIAS J.—

The appellant, D. R. Jayawardene, was on the material dates the station master of the Matale Railway Station.

He was indicted under section 392 of the Penal Code in that he being entrusted as a public servant with dominion over property, to wit the cash collected at the Matale Railway Station, did between January 31, 1945, and February 22, 1945, commit criminal breach of trust of a sum of Rs. 4,200.

After trial the District Judge convicted the accused of this charge and sentenced him to undergo one year's rigorous imprisonment. He appeals from that conviction.

The case for the prosecution was not only proved beyond all reasonable doubt, but both in the Court of trial as well as in appeal it was conceded that the charge had been established against the appellant. His defence was that at the time he committed the offence he was by reason of unsoundness of mind either incapable of knowing the nature of his acts; or that he was doing what was either wrong or contrary to law in terms of the general exception to criminal liability formulated by section 77 of the Penal Code.

The learned District Judge in a carefully considered judgment examined this plea and has held that it had not been established. The question is whether his decision is right?

It is settled law that once the Crown has established its charge against the accused beyond reasonable doubt, the burden of proving the defence of insanity under section 77 of the Penal Code is placed on the defence. There appears to be some uncertainty as to whether that burden should be established by the accused beyond reasonable doubt, or whether it would be sufficient for the accused to discharge that onus by a preponderance of probability or on the balance of evidence. The former view was expressed in the case of *The King v. Abraham Appu* [1]. This was a decision before the Court of Criminal Appeal came into existence on a case stated to a Bench of three Judges. The latter view was expressed in the case of *The King v. Don Nikulas Buiya* [2]. This was a decision of the Court of Criminal Appeal. It is a question whether the later seven-Judge decision in *The King v. Chandrasekera* [3] has decided which of these views should be accepted as correct. It is, however, unnecessary in the present case to express an opinion on this point because the learned trial Judge based his decision on the case of *The King v. Don Nikulas Buiya* (*supra*) and considered whether the accused had discharged the lesser burden of proof by a preponderance of probability or on the balance of evidence.

It is clear law, however, that the burden of proof is on the accused to make it clear that he was at the time he did the criminal act labouring under such unsoundness of mind as made him incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. If the principle in *The King v. Don Nikulas Buiya* (*supra*) is applied, it was for the accused in this case to make it clear by a preponderance of probability or on a balance of the evidence that his case came within the four corners of section 77 of the Penal Code. If in attempting

[1] *(1939) 40 N. L. R. 505.* [2] *(1942) 43 N. L. R. 385.*

[3] *(1942) 44 N. L. R. 97.*

to establish this defence the prisoner only succeeds in involving the question of his unsoundness of mind in doubt, he has failed to discharge the burden incumbent on him, and his defence fails. In such a case there is no question of giving the prisoner the benefit of the doubt.

The law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the trial Judge or the jury, and it is for the defence to make it clear that, at the time the prisoner committed the offence charged, he was labouring under such unsoundness of mind as brings his case within the provisions of section 77. If the accused merely succeeds in involving those issues in doubt he fails to discharge his burden of proof, and the defence fails.

What was it that the accused in this case had to establish in order to claim a verdict, under section 373 of the Criminal Procedure Code, of an acquittal on the ground of insanity? He had to prove—(*a*) that at the time he committed the criminal act, (*b*) he was by reason of unsoundness of mind (c) incapable of knowing—

(i) either the nature of the act, or
(ii) that he was doing what was—
  (1) either wrong, or
  (2) contrary to law.

The accused could claim exemption by proving one of two alternatives, that is, either by reason of unsoundness of mind, he did not know the nature of the act, or, by reason of unsoundness of mind, he was doing what was wrong or contrary to law.

What are the facts? Undoubtedly the accused's family has the taint of insanity. His father was insane and died in the Asylum. His brother also was in the Asylum and died there. A sister of his is insane. When the acccused was a boy he had been liable to epileptic fits. But the evidence shows that the accused had been in the service of the Ceylon Government Railway for 30 years and that during that period there had been no signs of any mental aberration on his part until March 9, 1945, *i.e.*, after he committed this offence. The duties of a station master are responsible and important. The duty of observing the safety regulations to prevent danger to the travelling public is placed in his hands. In addition he has office work to do and he handles all moneys collected in his booking-office and the goods' shed. It is a significant fact that although his family has the taint of insanity, the accused himself since he joined the service of the Railway, and for 30 years thereafter, showed no signs or symptoms that he was mentally deranged.

The offence of which he has been convicted was committed in January and February, 1945. The evidence makes it quite clear that the accused had got himself into serious financial difficulties which caused him to misappropriate moneys which had been entrusted to him in the course

of his official duties. Matters came to such a pass that in March, 1945, it was almost certain that the misappropriations of the accused would be detected. He realised that although he had been immune up to then, nemesis, probably in the shape of an audit, would soon overtake him. Accordingly, on March 9, 1945, the accused stated that his children were ill and applied for and obtained leave. He never returned. His successor detected the fraud and investigations followed, leading to a police inquiry culminating in Magisterial proceedings against the accused.

On March 9, 1945, the accused, who was on leave, from the Victory Hotel, Kandy, wrote the significant letter P12 to Mr. Demmer his immediate superior officer. The relevant portions of this letter read as follows :—

"During February last I was compelled to appropriate a sum of money between Rs. 3,600 and Rs. 3,800 of Government cash meaning to replace same before the end of the month having sold some of my property or recovering debts due to me from my father-in-law and brother-in-law living at "River View", Pelena, Weligama.

"Both attempts failed. I therefore committed suicide in the hotel by shooting myself.

"As you know I was in bad circumstances about six months ago and that is why I was led to apply for a loan from the Fines Fund. That too failed and gradually by trying to gamble and make it up I fell deeper into the mire.

"Please order an audit clerk to go through the account and recover same from my Association Fund. The remainder please order payment to my children with the attorney power being given to Mr. P. P. J. Simon . . . . my brother-in-law. Also order my furniture and belongings be sent to when to above address on government account which is the only privilege I ask you for the whole of my career. This must be done before April next as I have had a dirty transaction with a Chettiar who might jump at my movable property also which he cannot do. I am yet sorry for him.

"You are, Sir, a good adviser to drinking officers under you but the only advice I give you is that you should at the same time sympathise with them for you lose your best staff gradually and make your department compact piece of inefficiency.

"Goodbye to you, yours and so on."

He then adds two postcripts to his letter. In one he admits that he owes the Railway Rs. 3,700.

Mr. Demmer, on receipt of this letter took prompt action and got the police to call on the accused at the Kandy hotel, where he was found with a gun.

It is submitted that the letter P12 shows that the accused was insane and was about to commit suicide. That may be so, but that does not prove that in January and February when he committed the offence he was of unsound mind. P12 is the unbalanced letter of a desperate

man who, finding that ruin and imprisonment were staring him in the face, was preparing to find an easy way out of his difficulties by putting an end to his life. The letter, far from showing that the accused was unsound in his mind in January and February, 1945, amply demonstrates that when he wrote P12 in March he was not labouring under such unsoundness of mind as prevented him from realising the nature of what he had done, or contemplated doing, or that it was morally wrong to embezzle Government money or that it was illegal to do so. P12 shows clearly he was fully conscious of his guilt, and that rather than face the exposure he was prepared to commit suicide.

It was pointed out that the accused's letter P13 of October, 1944, when compared with P12 of March 9, 1945, shows that the latter was written by an unbalanced person. P13 was written long before these incidents when the accused was quite normal. The letter P12 was written by a man who was labouring under a severe emotional strain and who intended to commit suicide. I am unable to draw the inference from P12 that the accused in January and February, 1945, was suffering from such unsoundness of mind that he did not know the nature of his acts, or that what he was doing was either wrong or contrary to law. After his detection became certain and when he was arrested it would seem that the accused's mental condition deteriorated in consequence of that strain.

We have the certificate A1 dated April 27, 1945, from Dr. H. O. Gunawardene, to the effect that the accused had told him that he was feeling faint for some months and that he had insommia and was generally nervous and unstable. Dr. H. O. Gunawardene, therefore, advised him to have one month's rest. It is to be noted that Dr. Gunawardene is merely stating what his patient told him. Then there is the medical certificate A3, given by the Medical Officer of Government Departments, stating that the accused had told him that he had headaches, sleeplessness, that he was unable to concentrate on his work, and that he was giddy and had palpitations. The doctor observed that the accused appeared to be dull and apathetic. He diagnosed the condition of the accused as being due to neurasthenia and recommended that he be given 30 days' leave. Then there is the document A5 of June 23, 1945, certifying that the accused was suffering from melancholia with occasional suicidal inclinations. In this doctor's opinion the accused was not fit to be employed in the Public Service and he recommended that he be sent before a Medical Board and granted leave until that board met. Dr. A. M. de Silva, who gave evidence at the trial, did not say on what grounds he formed his diagnosis. This doctor examined the accused for the first time on the day he issued that certificate, and it is a question whether a medical man could make this diagnosis at the first examination. He added "The 21 days during which the accused has written accounts and which accounts were shown to me must have been written during his lucid intervals". In my opinion the evidence of Dr. A. M. de Silva is quite valueless in assessing the important question as to the mental condition of this accused in January and February, 1945.

During this period the accused well knew that he was going to be charged, and that he would probably be convicted with the disgrace which usually attends a conviction for a crime involving moral turpitude. Therefore it is quite possible, in fact probable, that the conditions observed by these doctors were something which came on after March 9, 1945. The evidence does not assist the accused on the vital question as to whether he was labouring under such unsoundness of mind in January and February, 1945, as would entitle him to seek the protection of section 77 of the Penal Code. No doubt in March, 1947, the accused was sent to the mental home at Angoda and was adjudicated by the District Court to be of unsound mind, but in May, 1947, he was discharged on trial.

I cannot say that I am satisfied with the evidence either of Dr. C. O. Perera, the Medical Superintendent of the Mental Hospital, Angoda, or of his Assistant, Dr. A. L. Abeywardene. The conclusions reached by these two gentlemen are based on inadequate material, and do not justify a finding that in January and February, 1945, the accused had the symptoms which they say they observed in 1947. It is quite possible as stated by Dr. Abeywardene that in 1947 the accused was dull and apathetic, that his memory was poor and that there was a marked deficiency in all intellectual functions. But that evidence is valueless in deciding the question which the Court had to adjudicate upon. The following passage appears in Dr. C. O. Perera's evidence :—

"Shown letters P13 and P12. P12 is dated 9th March, 1945, P13 is dated 17th October, 1944. P13 is very well written. The man was very rational when he wrote it. The letter P13 is very well worded. I consider P12 written on 9th March, 1945, entirely a different type of document. In P12 there is a mass of ideas that the writer has jotted down as they came in. There is no attempt at qualification or any attempt at putting it in good language. Some of the statements in P12 appear to be irrelevant. For instance, his reference to his death. Reference in the letter to be remembered to his superior officers and the advice to his superior officers. All this appear to be irrational and incongruous statements to make taken together . . . . Judging from the past history, *as I have been told,* and the subsequent events *I do not think the accused was capable of knowing what he was doing when he took the money in February,* 1945. What I say is that the accused did not realise what he was doing in February, 1945, ... In the letter P12 the writer suggests that he has appropriated the money with the idea of replacing same. He shows confused thinking. He seems to think that this is a civil matter for adjustment with the Government. There is nothing in the letter P12 to indicate that the writer knew that he was doing something wrong. The letter indicates that he thought he was doing something not wrong".

Under cross-examination the witness said :

"From the first paragraph of letter P12 it is quite clear that the accused wanted to make good the money before the end of the month.

before he was caught . . . . From this letter it seems that the man was conscious that he was in financial difficulties and that he was trying to get out of his financial difficulties by gambling and that he was taking Government money with a view to replacing same".

I do not wish to be hard on a witness who has no opportunity of being heard, but I think the evidence given by Dr. C. O. Perera was given recklessly on totally inadequate material. How can any doctor on hearsay and on the construction of P12 commit himself to the statement that in his opinion the accused was of unsound mind in January and February, 1945, and was not capable of knowing what he was doing when he took the money during that time? I think the evidence of Dr. C. O. Perera is most unsatisfactory. The *modus operandi* of the accused, as detailed by the learned Judge at pages 51 and 52 of his judgment, clearly shows that the accused needed considerable skill and mental acumen in order to falsify the books and vouchers received by him during this period in order to deceive, not only his station staff, but also the head office at Colombo. A person who was of unsound mind and did not know the nature of his acts could not have perpetrated this somewhat intricate fraud in the manner in which the accused carried it out.

It was suggested that owing to attacks of malaria a Dr. Selvadurai had administered injections of atabrin to the accused between 1944 and 1945. It was contended that the effect of atabrin is to make a man lose his reason. On that ground Dr. Selvadurai had been summoned. After eight witnesses had been called for the defence, counsel for the accused stated he wanted to call Dr. Selvadurai. He was absent and there was no proof that summons had been served on him. I feel sure that had an application been made by learned counsel to the trial Judge for a short adjournment in order to secure the attendance of the witness that application would have been readily granted. Counsel however deliberately decided to proceed with the case. In appeal an application was made to read an affidavit from Dr. Selvadurai. This application was opposed by Crown Counsel who contended, in the first place, that the affidavit had not been sworn to before a person referred to in section 428 of the Criminal Procedure Code and, in the second place, that when once the pinch of a case was ascertained it would be improper to allow an affidavit to be filed on a material point by a person who could not be cross-examined by the opposite side. In the case of *Jamal v. Aponso*[1] Jayawardene J. said:—"I do not think that the record can be contradicted or impeached by affidavits". See *Deachinahamy v. Romanis*[2] In the latter case Bonser C.J. held that the Supreme Court would not accept an affidavit which purports to supply unrecorded statements made by a witness in the lower Court, there being no precedent for such a practice. We therefore decided not to receive the affidavit in evidence.

Having regard to the evidence as a whole I think the learned District Judge has come to a correct conclusion in holding that the accused had failed to establish, in terms of section 77 of the Penal Code, that at the

[1] *(1924) 2 Times Law Reports 215.* [2] *(1900) 1 Browne 183.*

time he committed the criminal act he was labouring under such unsoundness of mind as made him incapable of knowing the nature of his act, or that he was doing what was wrong or contrary to law.

If the appellant is at present "a person deemed to be of unsound mind" within the meaning of section 20 (*a*) of the Lunacy Ordinance (Chapter 177), sections 7 and 8 of that Ordinance indicate the procedure which the executive Government should follow.

The appeal is dismissed.

CANEKERATNE J.—I agree.

Appeal dismissed.