

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.192 OF 2012

Yosef s/o Bhanudas Athawale,
Age 34 years, Occ. Nil,
R/o Bajar Wahegaon, Tq. Badnapur,
District Jalna ... APPELLANT

VERSUS

The State of Maharashtra
through Police Station, Badnapur,
District Jalna ... RESPONDENT

.....
Shri D.S. Ladda, Advocate holding for
Shri S.G. Ladda, Advocate for appellant
Shri S.D. Kaldate, A.P.P. for respondent / State
.....

CORAM: S.S. SHINDE AND
 A.I.S. CHEEMA, JJ.

DATED: 14th August, 2015.

Date of reserving judgment : 14/07/2015
Date of pronouncing judgment : 14/08/2015

JUDGMENT (Per A.I.S. Cheema, J.):

The Appellant – original accused (hereinafter referred as “accused”) has filed this appeal against his conviction in Sessions Case No.76/2009, by judgment dated 30.7.2010, passed by Additional Sessions Judge-2, Jalna. The

accused has been convicted under Section 302 of the Indian Penal Code, 1860 and sentenced to suffer imprisonment for life and fine of Rs.1000/-, and in default to suffer rigorous imprisonment for 15 days.

2. The case of prosecution in brief is as follows :

(a) According to the charge sheet which was filed in the trial Court, the accused on 15.2.2009, between 6.30 p.m. to 7.00 p.m., at village Bazar Wahegaon, Taluka Badnapur, District Jalna, murdered his grandmother Samindrabai Onkar Ghorpade, aged about 85 years, as the old lady had troubled his parents and his aunt and was also troubling him and he was tired of looking after her. The parents and aunt had died, but the grandmother was not dying and because of her, he had to go to jail and thus, the accused picked her up from the Ota and dropped her on the road in front and also put stone in her head near the ear. Because of the grievous injuries, Samindrabai (hereafter referred as 'victim') expired and thus the offence took place.

(b) P.W.1 Petrus Yosef Arsul filed F.I.R. in the morning

of 16.2.2009 at Badnapur Police Station and Crime No.26/2009 was registered at 7.15 a.m. of 16.2.2009. The offence was registered by P.W.5 Ashok Jadhav (P.S.I.) vide F.I.R./ Exh.20. A.P.I. Sharad Ingale (P.W.6) rushed to the spot with photographer and photographs were taken. Spot panchanama (Exh.22) was drawn. From the spot, two stones of different sizes, simple earth, earth mixed with blood were seized. Inquest panchanama (Exh.16) was drawn. Body was sent for autopsy. A.P.I. searched for the accused and arrested him on the same day. Clothes of the accused were seized (vide panchanama Exh.18). Similarly, the clothes of the victim were also seized (Exh.25). Blood sample of the accused was collected (Exh.26). Statements of witnesses came to be recorded. While in custody, memorandum of the accused was recorded (vide Exh.23) on 20.2.2009 and the accused gave discovery of the stick used at the time of incident from his house (vide panchanama Exh.24). The articles were deposited with the Head Moharir of the police station. They were sent to Chemical Analyser on 27.2.2009 (vide letter Exh.32). C.A. reports were

received (Exh.33–34). Completing the investigation, charge sheet came to be filed.

- (c) The offence being Sessions triable, matter was committed to the Court of Sessions. Charge was framed on 9.7.2009 under Section 302 of the Indian Penal Code. The accused pleaded not guilty. The defence of the accused is of denial. According to him, in order to grab his land the offence has been brought against him. Samindrabai died due to fall from Ota. Defence is that, accused did not throw her from the Ota or assault her. In the statement under Section 313 of the Code of Criminal Procedure, 1973, the accused claimed that his shirt got blood stains when he lifted the victim.

3. Prosecution brought on record evidence of seven witnesses in the trial Court. The trial Court considered the material brought before it, and relying on the eye witnesses and other evidence, the accused was convicted.

4. The appeal memo raises various grounds claiming that the impugned judgment of the trial Court is illegal and injudicious; the material on record has not been properly

appreciated; illegal assumptions and presumptions were resorted to and on surmises matter is decided; unproved documents and inadmissible material was relied on. Evidence of P.Ws.1, 3 and 4 was not of any use for prosecution. It was not established that the accused was author of the crime. The investigation was not impartial and it should have been done from the stand of prosecution and also defence. The appellant claimed that he should have been acquitted.

5. The learned counsel for the appellant submitted that the evidence of P.W.1 Petrus as well as P.Ws.3 and 4 was unreliable. The act alleged was not premeditated. There was delay in filing of F.I.R. The incident does not show that there was any motive or intention to kill. According to the counsel, in sudden heat of anger the incident occurred if the case of prosecution is perused. According to the counsel, the case would at the most fall under Section 304 Part II of the Indian Penal Code. It was submitted that, the accused has been falsely involved in order to grab his land by the witnesses.

6. The learned counsel for the appellant – accused further submitted that the accused was suffering from insanity. He submitted that, in the trial Court, report was called from the Mental Hospital, Yerwada, which was received

vide Exh.12. According to the counsel, keeping in view provisions of Sections 328 and 329 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short), the trial Court should have examined the concerned Doctor before going ahead with the trial. It has been argued that, the trial was vitiated because of this. The counsel placed reliance on the following cases which were under earlier sections 464, 465 of the Code of Criminal Procedure, 1898 (hereafter referred as Old Cr.P.C.) :

- (i) AIR 1955 Travancore -Cochin 32 (Vol.42, C.N. 18)
(Travancore-Cochin State Vs. Madhavan)
- (ii) 1990(1) Crimes 144
(Dhani Ram Vs. State of H.P.)
- (iii) AIR 1954 Travancore-Cochin 435 (Vol.41, C.N. 150)
(State Vs. Kochan Chellayan, Counter-Petitioner)

According to the counsel, the conviction needs to be set aside and matter needs to be remanded with directions to the trial Court to first decide whether the accused was able to defend or not due to insanity.

7. Against this, the learned A.P.P. submitted that there were eye witnesses of the incident. According to him, the accused had expressed that the victim needs to be finished of and he carried out his intentions. The accused

knew that the 85 year old lady would die if dropped from the Ota, on to the road and he carried out his intention as the accused had anger against the grandmother, whom he was holding responsible for the accused going to jail in another earlier complaint. The accused was angry as he was required to go on taking care of the old lady. According to the learned A.P.P., when there is direct evidence of the incident, the motive is not really material. There is evidence of P.W.1 Petrus as well as P.W.3 Kisan Arsul and P.W.4 Sudhir Gaikwad. P.Ws.3 and 4 were residents nearby. The incident had occurred on the Ota and road in front of the house of Sadanand, the grandson-in-law of the victim as the victim was residing with her grandson-in-law Sadanand. The learned A.P.P. submitted that, under Section 465 of the Old Cr.P.C., it was not necessary for the Sessions Judge to enquire if the accused did not appear to the Sessions Court to be insane. The learned A.P.P. relied on the case of **I.V. Shivaswamy Vs. The State of Mysore**, reported in **AIR 1971 SC 168**. Reliance was also placed on the case of **Shankaran Vs. The State** reported in **1994 Cri.L.J. 1173** to submit that, even if the Psychiatrist was not examined, compliance of Section 329 of the Cr.P.C. could be achieved.

8. We will consider the question regarding insanity

subsequently. First we proceed to look into the evidence to see if the offence is established and initial burden which is on the prosecution to prove the offence beyond reasonable doubt is discharged.

9. In this regard, firstly there is F.I.R. Exh.20 recorded in the early morning on 16.2.2009 at the police station. P.W.1 Petrus had filed the said F.I.R. Exh.20 and informed the police that on 15.2.2009 his sister-in-law Indubai had expired at some place mentioned as Bharadkheda and for the last rites they had engaged one tempo on rent and he along with his two wives Avantika and Sindhubai along with sister-in-law Shantabai as well as accused Yogesh and one Abadas Keshavrao, Yakub Waman, Eknath Pandurang, Petrus Baburao, Kisan Umaji Arsul (P.W.3) and other 2 persons mentioned in the F.I.R. had gone to Bharadkheda for the last rites. After the last rites they were returning to Bazar Wahegaon. At that time, the accused was saying that his parents and aunt had died but the grandmother Samindrabai is not dying. He was saying that the grandmother had troubled his parents and aunt and now was troubling him and he was tired of cleaning her urination and passing of stools. He was expressing that he will finish her. He was also saying that because of her, he was required to go to jail. The F.I.R.

mentions that, they reached back to Bazar Wahegaon around 6.30 to 7.00 p.m. and all of them got down on the road and started going towards their houses. Some of them proceeded in other lane and the complainant along with his two wives and accused Yosef Bhanudas proceeded from another lane towards their own houses. Even at that time the accused was expressing that he will finish of his grandmother. The F.I.R. says that, the complainant along with his wives reached near their house. At that time, the accused went near the victim who was on the Ota of house and picking her up, he dropped her on the road. The complainant mentioned that, seeing this, he had given two slaps to the accused as to why he was beating the old lady. He asked her to place her on the Ota. At that time, the accused picked up the victim and then dropped her on the Ota and picked up a stone and also put it on her head, causing grievous injury. Blood started coming out. The complainant mentions in the F.I.R. that he and his wives separated accused from the victim. The accused went on saying that because of the victim he had to go to jail and he was being required to look after her. The F.I.R. informed that the accused had killed his grandmother Samindrabai.

10. In support of such F.I.R., the complainant P.W.1 Petrus gave his evidence also. In the evidence, the

complainant has deposed as to how they had gone to Bharadkheda for the funeral and the accused was with them. P.W.1 deposed that the accused got down from the tempo on the road near their house and he had expressed that the victim should be killed saying as to how many days he will look after her. P.W.1 deposed that the victim was on the Ota of the house of Sadanand and the accused went there and lifted her and dropped her on the road, and he picked up a stone and had thrown it on the victim. The accused picked her up and kept her on the Ota, but again took one stone and threw it on the person of the victim. In evidence, the complainant deposed that the accused took stick of the victim and assaulted her by stick also. Because of such heating, the victim died. The evidence of complainant is that, at the time of incident he tried to save the victim but still the accused assaulted her. The complainant proved the contents of Exh.20.

11. The evidence of complainant is corroborated by P.W.3 Kisan Arsul. He deposed that, on the concerned day, they had returned from village Bharadkheda after funeral of Indubai. He claimed that he was at home and heard commotion and rushed to the spot. He saw the accused assaulting his grandmother by fists and blows. The witness

claims that, he asked the accused not to assault the said lady.

12. Then there is evidence of P.W.4 Sudhir Gaikwad. He has also deposed that the incident took place on 15.2.2009. He has deposed that the incident took place on 15.2.2009 at 7.00 p.m. He was present at his house and heard commotion. He also reached to the house of Sadanand. It appears, his house is at a distance of 1000 ft. The witness claims that he saw the accused assaulting the victim by means of stick and stone on the Ota. The witness claims that he tried to rescue the victim.

13. P.Ws.1, 3 and 4 have been cross-examined by the accused. In the cross-examination of the complainant P.W.1 Petrus, he deposed that, on the day of incident itself he lodged the report to police station and it was lodged after 1 ½ hour of the incident. The witness accepted that the relatives discussed and decided to lodge report to the police station. In the further cross-examination, P.W.1 deposed that, on the concerned day the police patil was not at his house and, therefore, he could not disclose the incident to the police patil. The evidence of P.W.6 A.P.I. Sharad shows that, Bazar Wahegaon is about 10 Kms. from the Police Station, Badnapur. Accused suggested to him that it is 17 Kms. away.

P.W.1 admitted that, vehicles are available at their village to go to Badnapur. However, his further evidence shows that he had gone to Badnapur Police Station at 5.00 a.m. on the next day morning by vehicle and thereafter police had come to Wahegaon at about 6.00 a.m. The cross-examination reveals the witness to be rustic villager who does not appear to be much literate if one sees his signature on the F.I.R. and thus can be confused in cross-examination. In the cross-examination, the counsel for accused skillfully brought on record admissions that on the day of incident itself the matter was reported and police came on the spot. The record shows that, the F.I.R. Exh.20 was registered at 7.15 a.m. of 16.2.2009. Reading the evidence as a whole, we ignore the evidence brought on record by the cross-examiner that within 1 ½ hour of the incident the report was lodged. The reading of evidence as a whole of P.W.1 shows that early morning he had gone to the police station and by 7.15 a.m. F.I.R. had been lodged.

14. It has been argued that, to grab the property of the accused the prosecution witnesses discussed and filed report against the accused. Only because P.W.1 accepted that relatives have discussed the matter does not mean that they had discussed to conspire to file false F.I.R. The discussion

can be regarding the incident that has taken place and by such admission, falsity cannot be assumed. It has been argued that, there was delay in filing of the F.I.R. The trial Court discussed this aspect and observed (in para 14 of the judgment) that the police patil of the village was not at home and the complainant had gone at 5.00 a.m. on the next day morning to the police station. The trial Court observed that, the complainant was an old aged person of about 65 years and discussing the evidence of P.W.1 the trial Court did not give much value to the delay and found the evidence of P.W.1 reliable. It held (in para 15) that there was no inordinate delay considering the facts and circumstances of the case. The delay was not found to be fatal to the prosecution case. Considering the apathy many times people have and the facts of the present matter, which shows that the victim was a helpless old lady of about 85 years, depending on her grandson-in-law Sadanand and unfortunately also on the accused, it is likely that P.W.1 may not have rushed in the night itself from the village they lived. Had the Police Patil been there in the village, may be he would have persuaded P.W.1 to proceed in the night itself. Evidence shows that, on concerned day there was no electric light in the village. This may have added reason for P.W.1 who had spent the day in attending a funeral and on return facing incident like the

present one, to go early morning instead of the night. Looking to the material and reasons recorded by the trial Court, we also find that the delay cannot be said to be fatal in the circumstances of the matter.

15. The suggestion to P.W.1 that the victim Samindrabai fell down from Ota and thus she got injured, has been denied by P.W.1. The suggestion that to grab land of the accused he has been falsely involved, is also denied. The defence that the accused did not assault, is also denied by P.W.1. The accused brought on record in the cross-examination of P.W.1 that the P.W.1 had not stated in his F.I.R. that the accused threw stone on the head of Samindrabai when she was lying on the road. The F.I.R. shows that the accused did throw stone towards the head of victim which hit her near the ear. However, stone was thrown when she lay on the road was of course not stated. The material is that the F.I.R. mentions that in the course of incident accused had thrown stone on the head of the victim. That has been stated. The cross-examiner further brought on record the fact in the F.I.R. that the complainant has not stated that accused assaulted Samindrabai by means of stick. This omission is proved. However, even this is not material because the accused at the time of incident hit victim also by stick, has been deposed to by P.W.4 Sudhir Gaikwad also. In the cross-

examination of Sudhir Gaikwad no such omission has been proved.

16. The omission proved in the cross-examination of P.W.3 Kisan is that he had not stated to police in his statement that he had asked accused not to assault his grandmother. The cross-examination of P.W.3 brought on record that his house is 5-6 houses away from the spot. He claimed that within 5-10 minutes he had reached the spot after hearing commotion. Although P.W.3 admitted that there was no electric supply in the village, he denied that it was not possible to see. Similarly, P.W.4 admitted that, hearing commotion that someone is beating somebody, he had reached the spot in 5 minutes. Even P.W.4 denied that he could not have seen the incident due to darkness. This witness claimed that he had even intervened in the incident to rescue the victim. This evidence of the witness was denied in the cross-examination, but the witness could not be shattered. No omission or contradiction was proved. The trial Court has accepted the evidence of P.Ws.1, 3 and 4 as reliable. We do not find any reason to disagree with the trial Court.

17. The evidence of P.W.2 Devanand and P.W.6 A.P.I. Sharad shows that police prepared spot panchanama Exh.22 and seized simple earth, earth mixed with blood and two stones from

the spot on 16.2.2009.

18. Then there is evidence of P.W.6 who prepared inquest panchanama Exh.16, which was admitted by the defence. The seizure panchanama of the clothes of accused on 16.2.2009 was also admitted by the accused at Exh.18. The seizure panchanama mentions that the shirt of the accused had blood stains. We have already mentioned that in the statement under Section 313 of the Cr.P.C. the accused stated that he received blood stains when he picked up his grandmother. Of course, the defence is that the grandmother fell from Ota and got injured and when accused picked her up, the blood stains were received by him.

19. P.W.6 further deposed that he had seized the clothes of victim vide panchanama Exh.25 and blood samples of the accused were collected and seized vide panchanama Exh.26. Exhs.25 and 26 were also admitted by the accused before the trial Court. C.A. Reports Exhs.33 and 34 show that the clothes of the victim and the clothes of the accused had blood group "O" stains.

20. P.W.2 Devanand deposed that on 20.2.2009 the accused agreed to show where the stick was. As per the witness,

the accused stated that, the stick was at the house of Sadanand and accordingly, memorandum Exh.23 was recorded and the accused took them to the house of Sadanand, from where the stick was seized. This is contrary to the documents Exhs.23 and 24 proved by P.W.6 A.P.I. Sharad Ingale which show that the accused had volunteered to give discovery of the stick from his house and taken the panchas and police to his house and gave discovery of the stick from his house. In the cross-examination of P.W.2, he denied that the panchanama was done at the police station. Looking to the cross-examination of P.W.2 as well as P.W.3 brought on record by the accused and the documents Exhs.23 and 24, we would ignore the discovery of stick said to be at the instance of the accused. However, even if it is held that discovery of the stick is not established, there is sufficient direct evidence of the witnesses available to show that accused was responsible for the incident of assault causing grievous injuries to the victim, because of which she died.

21. Prosecution examined P.W.7 Dr. Rajesh Agrawal, who deposed that the dead body of the victim was received on 16.2.2009 at the Primary Health Centre, Wakulli and he had conducted the post mortem. He found the following injuries :

1. (1) Penetrating wound, present on the face, left

side, between left eye and the ear. Five in number 0.2 – 0.3 cm. Apart from each other, rounded in shape, 0.2 – 0.3 in breadth and 2-3 cm. Deep, margins are abraded and bruised, directed medially and downwards, reddish in colour, due to hard and sharp object and are within 24 hours.

(2) Contused lacerated wound present on left arm near elbows joint, posterior side, 4 x 0.5 x 0.2 cm. reddish in colour, due to hard and sharp object, within 24 hours.

(3) Contused lacerated wound present on wrist joint, left, on posterior aspect, 2 x 0.3 x 0.2 cm. reddish in colour, straight, margins are lacerated, due to hard and sharp object, within 24 hours.

(4) Contused lacerated wound, present on right arm below elbow joint, posteriorly, 4 x 0.5 x 0.3 cm. reddish in colour, straight margins are lacerated, due to hard and sharp object, within 24 hours.

(5) Contused lacerated wound, present on chin right side, straight, 2 x 0.8 x 0.2 cm. reddish in colour, margins are lacerated, due to hard and sharp object within 24 hours.

(6) Contused lacerated wound, present on face, below left eye, straight, 2.5 x 0.2 x 0.2 cm, reddish in colour, margins are sharp, due to hard and sharp object, within 24 hours.

2. Fracture on femure, fracture of thigh left side is noted, on lower one-third part, compound fracture, swelling present, transverse in nature.

Fracture of humerus, left side noted on palpation, in middle one-third of part, compound fracture, irregular swelling noted, transverse in nature.

Fracture of mandible of body was noted on right side, compound fracture, irregular swelling present.

Fracture of Zygomatic bone, multiple fracture of zygomatic bone left side is noted, blood clots are present on the surface due to penetrating wound.

Fracture of distal phalanx of ring finger right side is

noted. The distal phalanx is totally separated from middle phalanx. Blood clot is present.”

22. The doctor gave opinion that the injuries were ante mortem and the cause of death was haemorrhagic shock due to multiple fractures. He issued report Exh.36. His evidence was that the injuries were sufficient in ordinary course of nature to cause death.

The cross-examiner brought on record admission from the doctor that the victim could have survived if immediately medical treatment was given to her. He admitted that, none of the injuries shown in column No.17 were on vital part of the body. The doctor admitted that he had not mentioned approximate time of death before post mortem. It was suggested, but the doctor denied that if such old person falls from Ota of stone, such type of fractures were possible. The further suggestion was also denied that the injuries mentioned in Col.No.17 of the post mortem report were possible by simple fall from Ota on stone.

23. Thus, although the doctor was fully cross-examined, the accused could not bring on record that due to singale fall from Ota such fractures could be sustained. The evidence of

P.W.7 Dr. Rajesh has proved that the victim suffered culpable homicide.

24. It has been argued on behalf of the accused by the learned counsel that in the heat of anger the incident appears to have taken place and thus the accused should be given benefit and if at all conviction is to be maintained, it should be under Section 304 Part II of the IPC. We are not convinced. It has been argued that the incident suddenly occurred and it was not premeditated. We find that none of the exceptions under Section 300 of the IPC are attracted. It is not a case of sudden fight without premeditation in the heat of passion upon a sudden quarrel. In the present matter, there is evidence to show that the accused returned from funeral; that he had the grudge that although others have passed away, the victim continues to live even at the age of 85 years and was cause of his troubles and thus, coming home, he gave vent to his anger. The victim was helpless old lady of 85 years of age and keeping in view Illustration (b) below Section 300 of IPC, the accused must be attributed knowledge that if he throws down such lady from the Ota on to the road, she would suffer injuries which could cause her death. The evidence of P.Ws.1, 3 and 4 shows that accused threw down the victim and also assaulted her with such intention. Looking to the number of injuries noted in the post mortem

report, it is not possible that by single fall from Ota on the road such injuries were possible. There would be difference between an accidental fall and when a person is picked up and thrown from the Ota to the road. The spot panchanama Exh.22 shows that the road in front of the Ota was of cement concrete. Even if a person was to stand on such road and picked up an old lady of 85 years like the victim and drop, even that could be fatal. We thus find that the prosecution has established that accused committed culpable homicide amounting to murder.

25. We have gone through the reasons recorded by the trial Court for coming to the conclusion that the offence against the accused is established. We do not find any reason to disagree from the trial Court that accused committed culpable homicide amounting to murder.

26. Coming to the plea of insanity, the learned counsel for the appellant – accused relied on the case of **State of Maharashtra Vs. Govind Mhatarba Shinde**, reported in **2010 Cri.L.J. 3586** to submit that the accused can raise plea of exception under Section 84 of IPC by relying on probabilities and circumstances as appearing from the case. Section 84 of the Indian Penal Code reads as under :

"84. Act of a person of unsound mind :- 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 is doing what is either wrong or contrary to law."

27. With reference to Section 84, this Court had, in the matter of **State of Maharashtra Vs. Sindhi alias Raman s/o Dalwai alias Raghav**, reported in **1987(3) BCR 570**, observed in para 1 as under :

"There is a clear distinction between legal insanity and medical insanity. The medical insanity may be of various types, kinds and degrees. To what extent the medical insanity affects the cognitive faculties of a person will naturally depend upon the nature of that insanity. A person may be suffering from some form of insanity recognised by the doctors as such, but that form of insanity may not necessarily be the unsoundness of mind contemplated by section 84 of the I.P.C. If despite the insanity, which the doctor may find in a particular person, that person is able to recognise the nature and the quality of the act for which he is tried or if he is capable of knowing that what he was doing was either wrong or was contrary to law, then the benefit of Section 84 of the I.P.C. naturally would not be available to him. It is not every form of insanity, loosely so called that is recognised by law as sufficient excuse (so) as to come within the protection of Section 84 of the I.P.C. If, despite the state of mind of the accused which Dr. Patkar found on the day on which he

examined him and assuming that this state of mind had set in by the day on which the incident took place, the accused was capable of knowing the nature of his act and after knowing the nature of his act he was capable of knowing that what he was doing was either wrong or contrary to law, then naturally the accused would not get the benefit of Section 84 of the I.P.C.”

(emphasis supplied)

28. Thus, it is clear that, what is relevant and material is “legal insanity” to attract Section 84 of the IPC. The above judgment was discussed by this Court in the matter of **State of Maharashtra & anr. Vs. Santosh Maruti Mane & anr.** reported in **2014(4) Bom.C.R. (Cri.) 22.** Discussing further relevant judgments, the principles deduced in para 44 were as under :

“44. If one analyses the aforesaid judgments the following principles emerge :-

- (1) Burden of bringing the case under general exception is on the accused.
- (2) Test of preponderance of probability has to be applied.
- (3) Burden on the accused is no higher than resting upon the plaintiff or defendant in civil proceedings.
- (4) Initial burden on the prosecution to establish that the act/ omission is committed by the accused.
- (5) Mere prior incidence of treatment taken is not sufficient. It has to be established that at the time of

commission of an offence, the accused was of unsound mind and was incapable of understanding consequences of his action.

(6) The Court is concerned with legal insanity and not with medical insanity.

(7) Burden rests on the accused to prove his insanity by virtue of section 105 of the Evidence Act.

(8) In order to get benefit of section 84, it has to be shown that the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then only this section can be applied.

(9) Mere fact that motive has not been proved would not indicate that he was insane or that he did not have necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of psychopath affords no protection under section 84."

29. In the matter of **Dharmendrasinh alias Mansing Ratansingh Vs. State of Gujarat** reported in **AIR 2002 SC 1937**, in para 15, Hon'ble Supreme Court, with reference to that matter, observed as under :

"15. We may next consider the argument made on behalf of the appellant that he was suffering from mental ailment and had received medical treatment for the same. First of all reference has been made to the statement of P.W.7 Danpatsinh who is neighbour of the appellant. He has stated that the appellant had been suffering from mental disease and had been admitted in the hospital of Dr. Navin Modi. He further stated that the appellant was like a mad person and did not have any sense.

It was also stated by him that the husband and wife were not on good terms and quarrel used to take place between them. Whenever he got ill, his father used to take him to the hospital. So far the nature of illness of the appellant is concerned, P.W.3 denied the suggestion that he was suffering from any mental illness. She stated that he had been taking liquor. She further goes on to say that he was admitted in Himmatnagar Hospital but did not know if it was hospital of Dr. Navin Modi or some other hospital. We do not think that on the basis of the statement of these witnesses, any conclusion can be drawn that the appellant was suffering from any mental illness or he used to become mad. We find no infirmity in the finding of the High Court that in case it was so, evidence should have been led on behalf of the defence to prove the fact of mental illness. The prescription of the treatment given to the appellant in the hospital should have been brought in the record or the Doctor who may have treated him could be produced to show that the appellant suffered from any mental illness. Obviously these facts if at all, would be in the special knowledge of the defence and in case the defence wanted to take advantage of any such ground of mental illness, this plea should have been substantiated by adducing relevant and cogent evidence. No circumstance has been indicated on the basis of which any such inference could be drawn. We therefore, find no force in this argument as advanced on behalf of the appellant."

(emphasis supplied)

30. It is clear from the above that, to raise such plea there would be necessity of some material regarding mental illness which would be in the special knowledge of the defence in case the defence wanted to take advantage of the ground of

mental illness.

31. Section 105 of the Evidence Act and relevant Illustration (a) reads as under :

"105. Burden of proving that case of accused comes within exceptions :-

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General exceptions in the Indian Penal Code (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations :

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A."

32. Regarding burden of proof, keeping in view Section 105 of the Indian Evidence Act, in this regard, reference can be made to the judgment of **Vijayee Singh and others Vs. State of U.P.**, reported in **AIR 1990 SC 1459**, in para 25, Hon'ble Supreme Court discussed the law as under :

"25. The maxim that the prosecution must

prove its case beyond reasonable doubt is a rule of caution laid down by the Courts of Law in respect of assessing the evidence in criminal cases. Section 105 places 'burden of proof' on the accused in the first part and in the second part we find a presumption which the Court can draw regarding the absence of the circumstances which presumption is always rebuttable. Therefore, taking the Section as a whole the 'burden of proof' and the presumption have to be considered together. It is axiomatic when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence and then it would amount to a case where prosecution failed to prove its own case beyond reasonable doubt. The initial obligatory presumption that the Court shall presume the absence of such circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record (gathered from the prosecution evidence, chief and cross examinations, probabilities and circumstances, if any, introduced by the accused, either by adducing evidence or otherwise) creating a reasonable doubt about the existence of the ingredients of the offence. In case of such a reasonable doubt, the Court has to give the benefit of the same to the accused. The accused may also show on the basis of the material a preponderance of probability in favour of his plea. If there are absolutely no circumstances at all in favour of the existence of such an exception then the rest of the enquiry does not arise in spite of a mere plea being raised. But if the accused succeeds in creating a reasonable doubt or shows preponderance of probability in favour of his plea, the obligation on his part under Section 105

gets discharged and he would be entitled to an acquittal.”

(emphasis supplied)

33. Keeping in view the position of law as appearing from the above judgments, when the present matter is examined, what appears is as follows :

In the evidence of P.Ws.1 to 4, who are from the concerned village, nothing is brought on record by way of earlier or subsequent conduct of the accused to show that the accused was suffering from any mental illness. No other incident is referred to show abnormal conduct. It would be dangerous to presume mental illness merely on the basis of the incident in dispute. Even if one was to say that it is unnatural for a person to kill his grandmother only because she was quite old and he was required to take care of her, it is not something which is not possible for some person to think or do. In the cross-examination of P.W.1, the counsel of accused asked the witness and he stated (in para 2) that he does not know whether the accused is mentally ill. However, in the further cross-examination, when specific suggestion was made to P.W.1, he denied the suggestion that the accused was mentally ill. No enquiries were made from P.Ws.2 to 4 regarding the mental condition of the accused. P.W.6 A.P.I. Sharad Ingale, who

investigated the matter, was asked in the cross-examination and he deposed that he was not able to tell at whose house accused was found. He deposed that, at about 10.00 – 10.30 a.m. he started searching for the accused and could find the accused at about 1.00 p.m. Thus, it would show that the accused tried to avoid, but was found by this witness. As per procedure, P.W.6 deposed that he had sent the accused for medical examination. When enquired, the witness stated in the cross-examination that the accused was mentally fit and, therefore, he did not request Medical Officer to examine the accused whether he is mentally fit. In the further cross-examination, P.W.6 stated that, before filing charge sheet the accused was mentally fit and stated that he had no idea whether the accused was mentally ill. Looking to Section 105 of the Evidence act, the assumption is that the person is sane. It would be for the accused to at least bring on record some probabilities of unsoundness of mind. Looking to the material, no such probability is brought on record. It needs to be recalled that, for attracting Section 84 of the IPC, what would be relevant is legal insanity.

Facts proved in this matter show accused had various grievances against the victim which he expressed and which is proved by P.W.1 Petrus. Accused had expressed his intention to do away with victim and knew that for the old lady

even to drop her on hard surface of road would be sufficient. He did so and added assault to it. He knew what he was doing. There is no good reason to disbelieve P.Ws.1, 3 and 4. There is no good reason why they should depose against accused, and not in his favour. We find Section 84 of I.P.C. does not aid accused.

34. The counsel for the appellant – accused then referred to the case of Govind Mhatarba (supra) to further state that Sections 328 and 329 of Cr.P.C. were required to be followed. The counsel relied on the further judgments referred earlier to say that, after the report was received from the doctor, the doctor should have been examined to confirm that the accused was in a fit condition to defend the case. Section 329 of the Cr.P.C. is relevant for the present matter. The same reads as under :

"329. Procedure in case of person of unsound mind tried before Court:

(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before

him or it is satisfied of **the** fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

(1-A) If during trial, the Magistrate or court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be, shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind.

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of ---

- (a) head of psychiatry unit in the nearest Government hospital; and
- (b) a faculty member in psychiatry in the nearest medical college.

(2) If such Magistrate or Court is informed that the person referred to in sub-section (1-A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall instead of postponing the trial, discharge the accused and deal with him in the manner provided under section 330:

Provided that if the Magistrate or

Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

(3) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with section 330.

(emphasis supplied)

Careful reading of the Section shows that, sub-section (1) gets attracted when "it appears" at the trial that the person is of unsound mind to the Magistrate or Court of Session. It is a matter of satisfaction of the Magistrate or Court concerned. Further questions arise only thereafter. It should further appear that the unsoundness of mind is such that it leads to the consequence of the person becoming incapable of making his defence. The section does not appear to be providing that even if it "does not appear" to the Magistrate or Court that the person is of unsound mind, still for the asking the person should be referred or that even when report is received that the person is able and fit to face trial, still the Magistrate and Court should continue to probe and postpone trial. Proviso below sub-section (1-A) rather provides for remedy of appeal for the person, if he

so desires.

35. The counsel submitted that, Section 328 of Cr.P.C. requires that the Magistrate, at the time of enquiry, should call for report of Civil Surgeon and then also examine the Civil Surgeon. However, as the heading of the Section would show, Section 328 deals with procedure in case of accused being lunatic and enquiry in that regard. Like Section 328, Section 329 does not provide for examining the Civil Surgeon. Under Section 329, concern is whether due to unsoundness of mind the person is incapable of making defence at the trial. As mentioned, in order to attract Section 329, it is necessary that "it appears" to the court that the person is of unsound mind and consequently, incapable of making his defence. In the present matter, we have gone through the record of the Sessions Court and committal proceedings, which is available. It appears that, the accused was arrested on 16.2.2009. He was produced before the concerned Judicial Magistrate, First Class on 17.2.2009 and he was sent in police custody till 20.2.2009 and subsequently on 20.2.2009 the concerned Magistrate sent him to magisterial custody till 5.3.2009. These Magistrates, before whom the appellant – accused was produced and to whom the accused had stated that he did not have any complaint about illtreatment, do not appear to have recorded anything regarding

mental condition of the accused. Had it appeared that he was not mentally alright, it would have reflected in their orders. Magistrate before whom committal proceedings took place also interacted with accused. He also does not appear to have noted any such symptoms of unsoundness of mind. Thus, no question arose of attracting Section 329 of Cr.P.C. Trial Court framed charge on 9.7.2009 vide Exh.4. At that time also Trial Court questioned accused. Then also no abnormality was noticed.

36. It appears that, the accused, while in custody, at the jail, consumed phenol mixed water because of which the jail authorities referred him for medical treatment and was admitted to the Medical College, Aurangabad, at which time he banged his head on the floor and again tried to commit suicide by drinking phenol mixed water, and the doctor recorded that the accused was suffering from severe personality disorder. The jail authorities wrote letter dated 15.9.2009 to the Additional Sessions Judge seeking permission to get the accused examined from Psychiatrist. It appears, Dr. P.P. Deshpande, Lecturer, Department of Psychiatry treated accused for some time and later, on 18.9.2009, wrote letter to the Additional Sessions Judge which was forwarded by the jail authorities, informing as under :

"I have examined above referred case for purpose of psychiatric report.

He suffers from severe personality disorder (severe character pathology) with psychopathic conduct (alleged harm to relative with revengeful intent) with manipulative suicidality with suspected epilepsy requiring detention under forensic psychiatry circumstances (ward in regional mental Hospital for alleged criminal minded sick persons) in anticipation of repetition of abnormal conduct.

Physicians independent view regarding epilepsy and relation to crime may be sought. So far mental capacity is concerned, its unlikely he's suffering from mental disorder affecting reasoning and judgment capacity (No delusions and hallucinations of nature impairing judgment noticeable)."

(emphasis supplied)

37. Vide letter Exh.10, jail authorities submitted short case record of the accused with diagnosis :

"Diagnosis :

Severe personality disorder (severe character pathology) with psychopathic conduct with manipulative suicidality with need to be detained under forensic psychiatry circumstances with suspected epilepsy."

38. The same report had endorsement in handwriting that the judgment of the accused still did not appear to be affected. It appears from the record of the trial Court that the

Additional Sessions Judge, on receiving such report, on 22.1.2010 asked few questions to the accused and noticed that he had given irrelevant answers and due to the report received, sent the accused to Regional Mental Hospital for observation. Report was received on 22.3.2010 vide Exh.12 from the Mental Hospital, Yerwada and the Board reported that the accused was "of sound mind and fit for trial". One of the signatories to Exh.12 was Chief Judicial Magistrate, Pune. On receipt of such report, the trial appears to have proceeded after the Additional Sessions Judge took on record on Exh.12.

39. The above discussion shows that, basically it was the behaviour at the jail due to which the jail authorities found abnormal conduct and got the accused examined medically. The case record Exh.10 recorded that the accused was suffering from suspected epilepsy and severe personality disorder, but the judgment was not affected. Although there appear to be some mental illness, it was not a case of unsound mind as can be seen from the record which has to be what could be said to be "legal insanity". From the judgment of "Santosh Maruti Mane" (paras 6 to 10) (supra), it appears that, at the stage of passing of sentence, the accused invoked Section 329. The Court obtained the necessary report and proceeded further with the matter once it was informed that the accused was not having any Psychotic

features so as to make him incapable of making statement as required under Section 235(2) of the Cr.P.C. In the present matter, as our discussion of the evidence would show, the accused did instruct his counsel so as to raise necessary defences and the whole trial has been duly and ably conducted. The accused, at the stage of remand, did not show any signs regarding mental illness. Even at the time of committal proceedings, the concerned Magistrate interrogated the accused and the accused had expressed that he wanted free legal assistance, which was provided in the Court of Sessions. Nothing was noticed at the time of framing of charge also. Even when the statement of accused under Section 313 of Cr.P.C. is perused, in answer to Question No.2, if the original recording is seen, in Marathi as well as English, the accused, in answer to question regarding they going to the funeral, initially said "Yes" and then immediately corrected himself to claim that the evidence on that count was false. He further explained in question No.15 as to how his clothes sustained blood marks. In answer to question No.21, he claimed that he had 3 sisters and that a false case had been filed in order to grab his property. All this shows that the accused did understand the proceedings which were going on against him. Thus, there was no reason to attract or invoke Section 329 of Cr.P.C. as the conduct in the Court did not reflect that the accused was incapable of making

his defence. Even this appeal filed by accused through his counsel, the accused has prosecuted very ably; rather more ably than even those who, due to poverty seek legal aid.

40. In the matter of I.V. Shivaswamy (supra), High Court had held that, "the mere circumstance that the counsel appearing for the accused made a submission that the accused did not answer him coherently is no ground to hold enquiry under Section 465 Criminal P.C." Hon'ble Supreme Court considered Section 465 of old Cr.P.C. And observed in para 24 :

"24. Coming to the second point, no question was raised before the Committing Magistrate that the appellant was insane at the time of the occurrence or trial and his statement before the Magistrate under S. 364 Cr.P.C. clearly shows that he was sane in mind and able to stand trial. It seems that the statement of the Standing Counsel before the Sessions Judge made him look into the matter, and quite rightly, but on questioning the accused the learned Sessions Judge was satisfied that it did not appear to him that the appellant was insane. Section 465, Cr.P.C., requires that there should be an enquiry within the second limb of the section if it appears to the Sessions Judge that the accused was insane, but if it does not appear to him so it is not necessary that he should conduct a regular enquiry under the second limb of the section. It is true that the word "appears" in S.465 imports a lesser degree of probability than "proof", but this does not mean that whenever a counsel raises a point before a Sessions Judge he has to straightway hold

an elaborate enquiry into the matter. If on examining the accused it does not appear to him that the accused is insane it is not necessary that he should go further and send for and examine medical witnesses and other relevant evidence. Of course, if he has any serious doubt in the matter the Sessions Judge should hold a proper enquiry."

(emphasis supplied)

In present matter, due to behaviour of accused in jail the authorities got accused examined seeking directions. Mere incoherent answers in Court would not attract or invoke Section 329 of Cr.P.C. A.P.P. has rightly relied on the case of "Sankaran" (supra) also in this regard.

41. Even otherwise, there has been considerable change in the provisions which earlier existed under Chapter XXXIV of Old Cr.P.C. dealing with lunatics and the present Chapter XXV of Cr.P.C. dealing with accused persons of unsound mind. The present provisions show that if the accused is aggrieved by information given by the Psychiatrist or Chemical Pathologist, accused is given right of appeal and the matter could be referred to the Medical Board. In the present matter, the accused did not resort to any such appeal. Still, after receiving short case record vide Exh.10, the accused was further got examined from the Medical Hospital, Yerwada and on receipt of the concerned report that the accused was in sound mind and fit for trial, the trial has

taken place. As such, there is no reason to quash the proceedings looking to the facts, circumstances and the evidence.

42. For the above reasons, we do not find any substance in the appeal. The appeal is dismissed.

(A.I.S. CHEEMA, J.)

(S.S. SHINDE, J.)