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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRL.M.C. 744/2016**

% Decided on: 15th July, 2016

KAMAL BHARDWAJ THR. HIS
FATHER/PAROKAR SATISH KUMAR ..... Petitioner
Represented by: Mr. Mohd. Haneef and Mr. Puneet Dhawan, Advocates.

versus

THE STATE (NCT OF DELHI) AND ANOTHER..... Respondents
Represented by: Ms. Neelam Sharma, APP for the State with SI Naveen Kumar, PS Hauz Khas, Delhi.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The petitioner is undergoing trial in case FIR No. 606/2014 under Section 8 of the Protection of Children from Sexual Offences Act, 2002 (in short 'POCSO Act') registered at PS Hauz Khas, New Delhi. During the course of trial, the petitioner raised the plea that he is suffering from mental retardation thus he is unable to understand and comprehend his actions. In this regard, the petitioner was issued a disability certificate by Safdarjung Hospital certifying that he was a patient of mental retardation to the extent of 60%. The petitioner filed an application under Section 227 Cr.P.C. read with Sections 329/330 Cr.P.C seeking discharge however, the same was dismissed by the learned Sessions Judge vide impugned order dated 23rd November, 2015. Hence the present petition. The relevant portion of the impugned order is as under:

"As per Section 227 of the Code of Criminal Procedure, 1973, (Cr.P.C.) if, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

As per Section 329 of Cr.P.C., if at the trial of any person before a Court of Sessions, it appears to the Court that the such person is of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, try the facts of such unsoundness and incapacity, and if the Court, after considering such medical and other evidence as may be produced before it, is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.

In the present case the accused has been appearing before this court since his summoning. The court has minutely observed his actions and manners. From the acts and manners of the accused it do not appear that he is a person of unsound mind. In support of the application the accused has produced some documents prepared in the year 1998 and prior to that, while he was under treatment. The said documents do not indicate that the accused is a person of unsound mind. The said documents only indicate that the accused was under treatment for a long time, and at the time of the issuance of the certificate dated 28.4.1998 by the Medical Superintendent, Safdarjang Hospital, New Delhi, he was under moderate mental retardation.

The law is well settled that there is difference between legal unsoundness of mind and medical unsoundness of mind. In the case before the court it is for the accused to establish that at the time of the commission of the offence he was in fact suffering from unsoundness of mind. At this stage of the case, however, neither the court can presume

such unsoundness nor it has reasons to believe that the accused is a person of unsound mind.

Furthermore, by way of the application the accused is seeking his discharge under section 227 of Cr.P.C. The evidence collected by the police, however, do not indicate that no offence has been committed by the accused in this case. I am satisfied that there is no ground for discharging the accused as sought by him by way of the present application."

2. Notice in the present petition was issued to the State and as per the status report filed though treatment papers have been verified from the records however, it is stated that they are not valid for medico legal purpose and the patient with family is required for detailed assessment. Medical records from the Safdarjung Hospital and AIIMS could not be verified being old. Further regarding the status of the mental disability and assessment on mental retardation as per the report of AIIMS it was not possible to give any opinion and the patient was required to be examined in Psychiatry OPD for detailed psychological assessment after his initial evaluation.

3. Section 84 IPC provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. This Section exonerates the person from the liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (1) the nature of the act, or (2) that he is doing what is either wrong or contrary to law.

4. However, 'unsoundness of mind' has neither been defined in the Indian Penal Code nor in the Code of Criminal Procedure. The Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 treats "mental illness" and "mental retardation" as two different forms of disability. This is reflected from the definition of disability under Section 2(i). Disability means "mental illness" or "mental retardation". Section 2(q) defines "mental illness" which means any mental disorder other than mental retardation. As per Section 2(r), "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterized by sub normality of intelligence.

5. As per *Russell, 12th Edition, Vol. 1, p. 103*, mental incapacity arising from post-natal causes, such as illness (fever or palsy), or accident, injury, or shock to the brain, which makes the person suffering from it not criminally responsible for acts done by him while it continues, has been described by the older writers as *dementia accidentalis vel adventitia,* and is separately regarded as total or partial, or temporary or permanent.

6. The various levels of mental retardation are mild, moderate, severe and profound mental retardation. Even in cases of mild mental retardation it has been noted that the social adjustment of people with mild mental retardation often approximates that of adolescents, although they tend to lack normal adolescents' imagination, inventiveness, and judgment. Ordinarily, they do not show signs of brain pathology or other physical anomalies, but often they require some measure of supervision because of their limited abilities to foresee the consequences of their actions. With early diagnosis, parental assistance, and special educational programs, the great majority of borderline and individuals with mild mental retardation can adjust socially, master simple academic and occupational skills, and become self-supporting

citizens (Maclean, 1997). [*See: Abnormal Psychology by James N. Butcher, Susan Mineka and Jill M. Hooley*]

7. The Supreme Court in the decision reported as *(2009) 9 SCC 1 Suchita Srivastava & Anr. Vs. Chandigarh Administration* while dealing with the issue whether consent of a mental retarded woman who was a victim of sexual assault for termination of the pregnancy was essential or not, held that to form an opinion about the mental capacity of the person medical opinion was essential. It was noted:

> *"55. It is also pertinent to note that a condition of "mental retardation" or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities."*

8. Not only mental illness but mental retardation which is an infirmity of the mind by birth also falls within the definition of 'unsoundness of mind'. To invoke the defence of 'unsoundness of mind' it is for the accused to prove that he was laboring 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, if he did know it, that he did not know he was doing what was wrong. In a case where unsoundness of mind is periodical, it is for the accused to show that at the time of the offence he was laboring under the disease. However, the case would be different in case the person is suffering from mental retardation

because he is of unsound mind both at the time of commission of offence and at the time of trial because the situation does not improve.

9. Thus after the accused placed on record prima facie documents to show that he was mentally retarded, it was the bounden duty of the Court to conduct an inquiry under Section 329 Cr.P.C before proceeding with the trial. Section 329 Cr.P.C. provides 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.*
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> *[1A. 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:*
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> *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 –*
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> *(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 (1A) 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]"

10. Sections 328 and 329 Cr.P.C. carve out a distinction between a lunatic and a person of unsound mind. A person may not be mentally ill but still due to mental retardation and absence of necessary growth he may not be competent to withstand the trial. Section 329 Cr.P.C. not only uses the word "unsoundness" but also "incapacity". Thus to ascertain whether the

accused is a person of unsound mind or not, the learned Trial Court is required to seek an opinion of Psychiatrist / Psychologist and form a final opinion as to whether he can be proceeded with trial. In the present case the procedure required by law has not been followed by the learned Trial Court.

11. Consequently, the impugned order is set aside. The learned Trial Court is directed to conduct an inquiry as envisaged under Section 329 Cr.P.C. after getting the evaluation of the petitioner done from either Institute of Human Behaviour and Allied Sciences or AIIMS and upon report being received form an opinion whether the petitioner is in a position to face the trial or not. Once an opinion is formed by the Court on receipt of the medical report that the petitioner has the capacity to withstand trial and the prosecution has proved its case beyond reasonable doubt, the onus would then shift to the petitioner to prove that either he did not intend the act committed or did not understand the consequences of the act. Further action will be taken as envisaged under the Code on the receipt of the report. With these directions the petition is disposed of.

(MUKTA GUPTA)
JUDGE

JULY 15, 2016
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