

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 68 OF 2018**

Shri Suryakant J. Gawde, son of Mr. Jairam
Gawde, aged 40 years, Indian National, resident of
House No. 48, Karmale, Keri, Ponda, Goa. Appellant

Versus

State (Through Ponda Police Station), through
Public Prosecutor. Respondent

Ms. Gina Maria Almeida, Advocate under the Legal Aid Scheme for
the Appellant.

Mr. Gaurish Nagvenkar, Additional Public Prosecutor for the
Respondent.

Mr. Devidas J. Pangam, Advocate General for the State of Goa, on
notice.

Coram:- M.S. SONAK &
SMT. M.S. JAWALKAR, JJ.

RESERVED ON: 15th January, 2020

PRONOUNCED ON: 24th January, 2020

JUDGMENT: (Per Smt. M.S. Jawalkar, J.)

Heard learned Counsel, Ms. Gina Maria Almeida for the
appellant and Mr. Gaurish Nagvenkar, the learned Additional Public
Prosecutor for the State, respondent.

2. The present Appeal is filed being aggrieved by the judgment, order and sentence dated 04.11.2016 and 14.11.2016, by the learned Additional Sessions Judge, Panaji, sitting at Ponda, Goa, whereby the appellant is convicted for the offence punishable under Section 302 of the Indian Penal Code (IPC) and sentenced him to undergo life imprisonment.

3. The prosecution case in brief can be summarized as under:

That, the appellant herein is accused of having committed murder of his mother. The accused in between 13.03.2012 at 16:00 hours to 14.03.2012 at 13:00 hours at house no. 48, Karmale, Keri, Ponda, Goa, wrongfully confined his aged mother, Smt. Sita Jairam Gawde in the house and assaulted her with stone and caused injuries on her body, resulting in her death, thereby committing offences punishable under Section 342 and 302 of IPC. The charge is framed on 31.01.2013 accordingly.

4. Upon the accused pleading not guilty, the trial commenced, in which, the prosecution examined in all 13 witnesses. After recording of evidence, statement of the accused came to be recorded under Section 313 of the Criminal Procedure Code (Cr.P.C.). The accused/appellant neither examined himself nor any witness in his defence. The learned Additional Sessions Judge, vide impugned judgment and order dated 04.11.2016 and 14.11.2016, has convicted the appellant for the offence under Section 302 of IPC and sentenced him to life imprisonment, however, he was acquitted for having committed the offence under Section 342 of IPC of illegal confinement of the deceased/mother.

5. Ms. Almeida, the learned Counsel for the appellant, mainly challenged the judgment and order on the ground that the learned Sessions Judge failed to appreciate that the case was one of that of circumstantial evidence and there was no parallel investigation carried out by the Investigating Officer. Secondly, the accused was

suffering with unsoundness of mind, prior to and at the time of commission of the offence as well as after the said incident. It is further submitted that it is not established by the prosecution beyond reasonable doubt that the death is caused in the presence of the accused and the certain time of death. It is submitted that intention, knowledge or motive are not proved by the prosecution. The learned Sessions Judge ought to have extended the benefit of Section 84 of IPC to the accused, in the prevailing facts and circumstances. The conduct of the accused after the incident ought to have taken into consideration by the learned Sessions Judge.

6. As against this, Mr. Nagvenkar, the learned Additional Public Prosecutor for the respondent-State submitted that the accused was earlier also, convicted for the offence of committing murder of his father and now, he has caused death of his mother. There is nothing on record to show that at the time of incident, the accused was suffering with unsoundness of mind. It is submitted that the judgment and order, convicting the accused for the offence punishable under

Section 302 of IPC is principally justified under the facts, circumstances and evidence on record.

7. The learned Counsel for the appellant pointed out from the evidence of PW-10, Suresh Gaonkar, retired Police Inspector (who was the Investigating Officer, who has carried out the investigations) that in cross, he has admitted that he has not carried out any parallel investigations. Learned Advocate Ms. Almeida, referred us to the evidence of PW-5, PW-6, PW-7 and PW-8 and pointed out that PW-5, Vaishali Gaude, wife of complainant is not only interested witness, but, she also deposed falsely that the accused was not going to do any work and in the cross she has deposed that the accused was working with Mayur Traders. She also deposed that at the time of incident, her husband did not go to work in the evening session. PW-6, daughter of complainant deposed that the accused (her uncle) used to fight with her parents. PW-7, wife of the accused deposed that they are having property at Karmale, having coconut trees and arecanuts plantation. She has deposed that sometimes, there used to be quarrel between the

accused and his brother Vasu (complainant) on account of the property. That his brother has built unilaterally a wall, partitioning the house and said Vasu used to threaten them and give bad words and even used to try to beat them. She also deposed that said Vasu assaulted her mother-in-law on at least three occasions and that the wife of Vasu also used to say that she is related to the family of Vasu and no property should be given to the accused and his family. She deposed that presently, the property is with Vasu, brother of the accused. She and accused were not allowed to enter the property. She deposed that there are other houses belonging to the family of the accused, near their house. She also deposed that in 2012, there was quarrel between Vasu (complainant), his wife Vaishali Gawde (PW-5) with deceased Sita and Vaishali Gawde had lodged police complaint as against the deceased.

8. The learned Counsel for the appellant also referred us to the evidence of PW-8, Vasu Gawde (complainant), who is the brother of the accused. He admitted that he divided the house himself and one

portion of the house was occupied by the accused and the other portion of the house was occupied by him. He admitted that the deceased mother was voluntarily residing with the accused and during this 4 to 5 years, there was no incident of assault, fight or quarrel between the accused and his deceased mother. This witness has deposed that there was no quarrel or fight between himself and the accused or any family members of the accused and his wife. He used to look after their property and used to retain all the produce for him when the accused was in jail. The learned Counsel for the appellant submitted that the police has recorded the statement of witnesses, which reveals that the complainant and his wife are the persons, who are having strong motive to grab the property. As such, the Investigating Officer ought to have conducted the investigation in the direction with regard to involvement of complainant himself in the offence.

9. The record shows that substantial investigation was carried out by PW-10. Though, he admitted that no parallel investigation was

carried out, he has explained the reason for not doing so. On the basis of statement recorded and circumstances existing on the spot, it was confirmed that the act is committed by none other than the accused. There is sufficient evidence on record to show that the mother of the accused was residing with accused along with the wife of the accused and their daughter. The complainant along with his wife and their children are residing in the adjacent block. There is a wall in between the two blocks of the accused and complainant, having no door or windows. The dead body was found in the block where the accused was residing and the accused was in the house since the evening of 13.03.2012 till the next day upto 1:00 p.m. The wife and daughter of the accused had left the house a day before the incident on account of some quarrel. The clothes of accused seized also shows presence of blood stains. There is no explanation whatsoever from the accused. There is no dispute that the death is homicidal. It has also come on record that accused was present till arrival of police and then fled from the spot, but was found in Kulagar (garden surrounding premises). Considering the oral as well as other evidence on record, it is clearly

established that accused is the only author of the crime. In such circumstances, the reason for not carrying out any parallel investigation is justified.

Intention, knowledge and motive of the accused and plea of unsoundness of mind:

10. Though the fact of committing the act of killing the mother by the accused is duly established, the case arises for our consideration whether there was any motive, intention or knowledge, attributable on the part of the accused. It is also the ground of objection to the judgment and order that the accused was suffering from unsoundness of mind and in view of that, there is no question of any knowledge or intention on the part of the accused to kill his mother.

11. In this regard, the evidence of PW-5, Vaishali Gawde, wife of the complainant, PW-6, Ishwari Gawde, daughter of complainant and the complainant, Vasu Gawde himself is important.

Pw-5, Vaishali Gawde, wife of the complainant in chief, itself has deposed that the accused and his mother were having cordial relations. In her cross, she admits that the accused was looking after his mother.

12. PW-8, Vasu Gawde, who is the complainant deposed in his cross that his mother was voluntarily residing with the accused. He deposed that the mother must have been staying with the accused for about 4 to 5 years prior to her death and during this 4 to 5 years, there was no incident of quarrel, fight or assault between the accused and his deceased mother. The learned Sessions Judge relying on the evidence of PW-6, Ishwari Gawde, daughter of complainant, who deposed about one incident which took place two days prior to the date of incident that the accused had quarrel with his own wife and she had ran away from the house along with the child. On that day, grandmother Sita had come to call her and asked as to what had happened. Upon which, her uncle (accused) got angry on her grandmother (deceased) and started beating the deceased and took her

inside his room. Except this, there is nothing on record to show any motive on the part of the accused for committing the murder. This incident also took place two days prior to the date of the incident as per PW-6. As such, it can be said that there is no motive at all or a weak motive.

13. Insofar as the plea of unsoundness of mind is concerned, it has come on record that the Court examined Dr. Shilpa Waikar for the opinion of accused fitness to face the trial. It is a matter of record that after the arrest, the accused was produced before the JMFC, Ponda and vide reception order of the Court dated 16.03.2012, the accused was admitted to Institute of Psychiatry and Human Behaviour (IPHB) at Bambolim. The learned Counsel for the appellant vehemently argued that if, the accused was of sound mind, he would have ran away immediately after the incident. It is submitted that as per the medical opinion, the death occurred at around 9:30 p.m. of 13.03.2012 and if, that would be the case, the accused was inside the house on 13.03.2012 since 9:30 a.m. till next day 1:00 p.m. It is submitted that

there is no case of any other persons involvement in the offence and during that period, there is no attempt by the accused to flee from the spot. It is submitted that the prosecution miserably failed to establish any motive, attributable to the accused to cause the death of his mother. In such circumstances, only a person, not in his senses or of unsound mind, can commit such an act. She has pointed out that there is history of mental illness in the family and the witnesses also deposed to that effect.

14. PW-5, Vaishali Gawde, wife of the complainant deposed that the sister of the accused by name Gune Gawde is also suffering from mental sickness. PW-7, Suchita Gawde, wife of the accused deposed that the younger sister of the accused by name, Shali was not mentally sound. PW-8, Vasu Gawde, complainant, deposed that his sister, Gune was mentally retarded. Dr. Shilpa Waikar deposed that the case paper of 1996 mentions that patient's (accused) sister was admitted in IPHB. However, there were no further details of the said sister. As such, there is family history.

15. From this evidence it appears that unsoundness of mind is hereditary genetic. It also appears from the record that initially after arrest, the accused was admitted for ten days in the hospital and the said period was extended from time to time for around a month. The accused was admitted on 17.03.2012 and discharged on 16.04.2012. It has come in the evidence of Dr. Shilpa Waikar that the accused was taking treatment and that the case of the accused is registered in IPHB since the year 1996. As per the report of the psychologist, given by Dr. Meeta Mazumdar, the accused was having some residual features of psychosis and if the treatment is stopped, the patient may relapse into some psychotic stage. She also deposed that aggressive behaviour is not the criteria for diagnosis of psychotic disorders, however, based on the contents of hallucination, the patient may behave in an aggressive manner. She deposed that as per the record of the hospital, the accused was not regular in taking treatment and that at the time, when she examined the accused, he was in the stage of hallucination. She further deposed that she have been examining the accused since the year 2010 and as per her record, at least on three occasions, the accused was

admitted under her treatment in the stage of hallucination. She deposed that such disorder may be acquired through genetic disorder.

16. The learned Counsel for the appellant relied on citation **2003 SCC (Cri) 144** in the case of **Shrikant Anandrao Bhosale Vs. State of Maharashtra**, wherein the Hon'ble Apex Court held that to get the benefit of Section 84 of IPC, state of mind of the accused, at the time of commission of the offence is required to be proved. It is held that mere fact that the appellant did not make any attempt to run away or that he committed the crime in daylight and did not try to hide it or that the motive to kill his wife was very weak, would not indicate that at the time of the commission of the act, the appellant was suffering from unsoundness of mind and he was not having requisite mens rea for commissioning the offence. It is held that appellant's unsoundness of mind before and after the incident, for which, he underwent treatment in the hospital was a relevant fact. It is held that the nature of burden of proof on the accused is not higher than that which rests upon a party in civil proceedings, which means

preponderance of probability.

17. The learned Counsel for the appellant further submitted that the facts in the case before the Hon'ble Supreme Court are similar to the facts involved in the present matter. It is submitted that there was family history in the appellant's family and the appellant was treated for unsoundness of mind since 1992 and within a short span soon after the incident, he had to be taken for treatment for mental illness. In the said matter, the appellant was under regular treatment for mental illness. There was weak motive of killing of the wife as the wife of the appellant was opposing the idea of the appellant of resigning the job of police constable. There are no attempts of the appellant for hiding or for running away.

18. The learned Counsel for the appellant also relied on **2006 Criminal Law Journal 998** in the case of **Kamala Bhuniya Vs. State of West Bengal**, wherein the Calcutta High Court held that where the plea of insanity has been in connection with a murder of a close

relation of the accused, the motive always assumes much importance and if there is no evidence indicating the motive of murder, a conclusion will certainly follow in favour of the plea of insanity.

19. The learned Counsel for the appellant also relied on Textbook Medical Jurisprudence, 25th Edition, by Modi, who is renowned Author on Medical Jurisprudence. In chapter 35 of Mental Ill-Health and its Medico-Legal Aspects, he elaborately explained what is delusion, what is psychosis and neurosis and psychotic murderer as under:

Psychosis and neurosis.- The terms 'psychosis' and 'neurosis' have been used for many years to separate mental illnesses into two groups, corresponding generally to those disorders in which the patient is regarded as being out of mind', 'insane' or 'mad' - the psychosis - and the remaining milder 'nervous' illness - neurosis.

Psychotic Murderer.- The psychotic murderer is the one who kills either because his awareness of reality is impaired to the extent that he is unaware of the nature

of his action or because his judgment as to the justification for his act is faulty. The former situation is very rare and usually implies some disorder of consciousness and it is almost exclusively related to the cases of organic brain disorder. The latter situation may arise as a result of any action, in which delusional ideas or hallucinatory experiences occur. The most common illness, giving rise to murder is depression. In this, a person develops delusions of hopelessness and decides that his family must be spared from the horrors of life and kills them prior to committing suicide.

20. On the point of criminal responsibility, Modi comments that:

In law, responsibility means liability to punishment. In criminal cases, where mental ill-health is raised as a plea of irresponsibility, the burden of proving it lies on the defence. Mental ill-health may be proved from facts alleged or proved by the prosecution or independently by the defence. When a person accused of murder is alleged to be mentally ill, the presiding officer of the court generally asks the medical officer to keep the accused under observation and to verify whether he is mentally

ill or not.

The medical officer must consider the following points before deciding whether the murder was a result of mental ill-health.

(1) Personal History of the Murderer.

(2) Absence of Motive – Not only does a mentally ill person commit murder without any motive, but also often kills his nearest and dearest relations, for eg, his wife and children. It must, however, be difficult to trace a motive though there may be one.

(3) Absence of Secrecy – The murderer, if he happens to be mentally ill, does not try to conceal the body of his victim, nor does he attempt to evade law by destroying evidence of his crime or by running away from the scene of the murder.

(4) Multiple Murders – A sane person usually murders only one person with whom he has a grievance. On the other hand, a mentally ill person may kill several persons, mostly his friends and relatives, for whom he has great regard and affection.

(5) Want of Preparedness or Pre-Arrangement – A mentally ill person does not make any pre-arranged plan.

(6) Want of Accomplices – A mentally ill person has no accomplice in the criminal act.

21. In the present matter, as already discussed above, the accused committed murder of his mother. The mental disorder is genetic as established from the evidence on record. Absolutely, there was no motive, specifically when the prosecution witnesses deposed that the accused was having good relation with his mother and there was no incident of quarrel or fight during the last preceding four to five years of the incident. The accused was with the dead body in the house itself since the night of 13.03.2012 till next day 1:00 p.m. and the accused had not made any attempt to run away from the scene of murder. It has come in the evidence that the accused was in the house till the police arrived and the police arrested the accused from the kulagar (orchard) of the house. It is also a matter of record that the accused was earlier convicted and sentenced for four years for assaulting his father. In the said incident, the father of the accused died. No preparedness or pre-arrangement on the part of the accused is established. It is also a matter of record that there is no alleged accomplice in the act of the accused.

22. The learned Additional Public Prosecutor relied on citation **AIR 1992 SC 1175** in the case of **Mulakh Raj Vs. Satish Kumar & Others**, in support of his contention that the failure to discover the motive of the offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. The proof of motive is never indispensable for conviction. When facts are clear, it is immaterial that no motives are proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances, connecting the accused with the crime, nor militates against the prosecution case.

23. The learned Additional Public Prosecutor also relied on the decision dated 26.08.2014 of this Court passed in Criminal Appeal No. 9/2013 in the case of **State of Goa Vs. Sameer Shetye**, wherein this Court has held that the exemption is restricted to cases where the cognitive features are completely impaired and not to cases where the insanity affects only the emotion and the will and lastly and most importantly, the crucial point of time under Section 84, at which the

insanity of the accused in the sense of the section must have existed, is the time when the alleged offence was committed by the accused. The absence of motive is not by itself proof of insanity on the part of the accused. However, the same may be taken along with other circumstances as a relevant factor in determining the question of sanity or insanity of the accused, for the purpose of Section 84 of IPC.

24. The learned Additional Public Prosecutor relied on the decision of the Hon'ble Supreme Court in the case of **Gali Venkataiah Vs. State of Andhra Pradesh, (2007) 14 SCC 475**. However, the facts involved in the matter are totally different then the facts involved in the present matter. There was clear threat given to the deceased that the accused would kill him and on the date of the occurrence, the appellant armed with knife went to the deceased with an intent to kill and caused vital stab injury. There is no such threat in this matter.

25. The learned Additional Public Prosecutor has relied on citation (2007) 8 SCC 66 in the case of **Bapu alias Gujraj Singh Vs.**

State of Rajasthan in support of his contention that Section 84 of IPC lays down a legal test in the case of alleged unsoundness of mind and every act cannot be said to be unsoundness of mind. Section 84 of IPC lays down the legal test of responsibility in cases of alleged unsoundness of mind. There, is no definition of “unsoundness of mind” in the IPC. The Courts have, however, mainly treated this expression as equivalent to insanity. But the term insanity itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. However, in the said citation, it is held that burden on the accused is not higher than that resting upon the plaintiff or the defendant in the civil proceedings.

26. Section 84 of IPC carves out the exception, which runs 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. Section 84 of IPC thus contemplates only unsoundness of mind, which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal liability, therefore, for reason of unsoundness of mind, which intakes a person from doing the nature of the act or that he is doing what is either wrong or contrary to law. There is no definition of unsoundness of mind in the Indian Penal Code.

28. Therefore, as held in the case of **Shrikant Anandrao Bhosale** (supra), the above referred facts are not sufficient to conclude that at the time of incident, the accused was suffering from unsoundness of mind or he did not have requisite mens rea for the commission of the offence. However, it is not only the aforesaid facts, but, it is the totality of the circumstances seen in the light of the evidence on record i.e. the treatment of accused since 1995 and family history to prove that the appellant was suffering from psychotic

disorder. The unsoundness of mind before and after the incident is a relevant fact.

29. From the total circumstances of the case, clearly an inference can be reasonably drawn that the appellant was under hallucination at the relevant time. He was under an attack of the ailment and was under medical treatment since 1995. Even after the incident when the accused was produced before the JMFC, he was required to be sent to IPHB for treatment. Thus, the other facts along with the medical record reveal that prior to and after the incident, the accused was undergoing treatment for mental disorder and there is family history also. Having regard to the nature of existence of these circumstances, it can safely be held that the appellant was incapable of knowing the nature of the act by reason of unsoundness of mind and thus, he is entitled to get benefit of Section 84 of IPC. The conviction and sentence of the appellant cannot be sustained. The accused person does not have to prove the case beyond reasonable doubt and it is sufficient that the plea of accused rests on preponderance of probability

as in a civil case.

30. Though, we have come to the conclusion that the appellant, in the present case, has committed the act of killing his mother in the night intervening 13.03.2012 and 14.03.2012, we are also satisfied that at the time when he committed this offence, he was, by reason of unsoundness of mind incapable of knowing the nature of the same or that such act was wrong or contrary to law. Therefore, we proceed to record an acquittal by extending the benefit of Section 84 of IPC to the appellant. However in doing so, we cannot overlook the fact that the appellant, in the past, in fact, had assaulted his father, which led to demise of his father. On this occasion, the appellant, assaulted his mother, which led to the death of his mother. The appellant is married and has a daughter. The appellant's relationship with his brother and his brother's family, who are residing adjacent to his house, is also not cordial. In such circumstances, if we are to set the appellant at large forthwith, consequent upon his acquittal, it is possible that the appellant might prove to be a serious risk to his family

members or even the society. Some precautionary measures are necessary in such a situation, so that the appellant is prevented from committing any further offence or even harming himself.

31. Precisely, in order to deal with such a situation, the legislature has enacted Section 335 in the Code of Criminal Procedure, 1973, which reads as follows:

335. Person acquitted on such ground to be detained in safe custody -

(1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence,-

(a) order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit; or

(b) order such person to be delivered to any relative or friend of such person.

(2) No order for the detention of the accused in a lunatic asylum shall be made under clause (a) of sub-section (1) otherwise than in accordance with such rules as the State

Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

(3) No order for the delivery of the accused to a relative or friend shall be made under clause (b) of sub- section (1), except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the person delivered shall-

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct.

(4) The Magistrate or Court shall report to the State Government the action taken under sub- section (1).

32. According to us, interest of justice will be met, if the appellant is ordered to be released from the prison, where he is presently lodged and placed at the Institute of Psychiatry and Human Behaviour at Panaji, Goa, where, we are informed that there are facilities to examine, treat and keep such persons. However, we note that Section 335(2) of Cr.P.C. provides that no order for detention of the accused in a lunatic asylum shall be made under clause (a) of sub-

section (1) of Section 335 of Cr.P.C., otherwise than in accordance with such Rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

33. Accordingly, we requested Mr. D. Pangam, the learned Advocate General to assist us in this matter, since, we found that Goa, Daman and Diu Lunacy Rules, 1974 and said Mental Health Rules, 1990 did not make any specific provision in this regard. Besides, we find that the Indian Lunacy Act, 1912 was since repealed by Mental Health Act of 1987 and Mental Health Act of 1987 has since been repealed by the Mental Healthcare Act, 2017.

34. Mr. D. Pangam, the learned Advocate General admitted that there is nothing in the Goa, Daman and Diu Lunacy Rules, 1974 and said Mental Health Rules, 1990, to deal with such a situation. He, however, referred to certain definitions under the Mental Healthcare Act, 2017 as also provisions of Section 19 and Section 103 of the Mental Healthcare Act, 2017. He admitted that as yet, there are

neither any Rules framed under the Mental Healthcare Act of 2017 nor the State Government, as yet, established the State Mental Health Authority in terms of Section 45 of the Mental Healthcare Act of 2017. He, however, submitted that the State Mental Health Authority will be established within a reasonable period and thereafter, the State Mental Health Authority will be apprised of the requirements of constituting the Mental Health Review Board, as required by Section 73 of the Mental Healthcare Act, 2017. He admitted that as of now, there is some vacuum, though, the State, intends to take expeditious steps to ensure that the provisions of the Mental Healthcare Act, 2017 are made operational and effective at the earliest.

35. The learned Advocate General submitted that Section 19(3) of the Mental Healthcare Act of 2017 requires the appropriate Government to provide for or support the establishment of less restrictive community based establishments including Half Way Homes, group homes and the like for persons who no longer required treatment in more restrictive mental health establishments such as long

stay mental hospitals. He submitted that there are some Establishments in the State of Goa, which would answer the requirement of Half Way Homes. The learned Advocate General also referred to the decision in the case of **Gaurav Kumar Bansal Vs. Mr. Dinesh Kumar & Others, MANU/SCOR/07095/2019**, wherein the Hon'ble Apex Court elaborately discussed Half Way Homes for psycho social rehabilitation of treated and controlled mentally ill persons' scheme. The Hon'ble Apex Court held that besides the State Governments setting up their own Homes, specifically The Hon'ble Apex Court held that besides the State Governments setting up their own Homes, their efforts can be supplemented by ensuring that accredited NGOs with a proven track record are encouraged to take the benefit of the Centrally Sponsored Scheme by seeking financial assistance, as envisaged.

36. The learned Advocate General submitted that since, there are no provisions in the Goa, Daman and Diu Lunacy Rules, 1974 and said Mental Health Rules, 1990 dealing with the situation of the

present nature and since, even the provisions of the Mental Healthcare Act, 2017 are not yet made clearly effective for want of establishment of State Mental Health Authority and Mental Health Review Boards, reference can be made to the guidelines framed by the Human Rights Commission and suitable orders made on the basis of the same in the interregnum.

37. As noted earlier, Section 335 of Cr.P.C. provides that whenever the finding states that the accused person committed the act as alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit or order such person to be delivered to any relation or friend of such person. This means that the Magistrate or the Court, as the case may be, is obliged to take cognizance of the provisions of Section 335 of Cr.P.C. and make appropriate order in terms of the same. This is in fact held by the learned Single Judge of this Court (V.S. Sirpurkar, J. as

His Lordship was) in the case of **The State of Maharashtra Vs. Subhashsing s/o Shalikramsingh Raghuwanshi**, 1996(1) Bom.C.R. 102.

38. In **Subhashsing** (supra), this is what was observed at para 6 in relation to Chapter XXV of Cr.P.C., comprising *inter alia* Section 328 of Cr.P.C. and Section 329 of Cr.P.C.:

It can be seen that section 328 Cr.P.C. provides that if during an enquiry a Magistrate has a reason to believe that the accused is of unsound mind he has to first enquire into this aspect, and if he is convinced about the insanity he has to stop the enquiry. Under section 329 Cr.P.C. a trial has to be mandatorily postponed on finding the accused to be insane. Section 330 Cr.P.C. suggests a course to be taken for the good care or safe custody of such accused. Section 331 to 333 Cr.P.C. provides that the inquiry or the trial as the case may be can be resumed only after the accused has fully recovered from his insanity. Thus the law takes care, nay, mandates that the accused must be of sane mind when he is tried. It is cardinal principle of criminal jurisprudence that the accused must understand the nature of charge and proceeding against

him. Under section 84 I.P.C. insanity or lunacy is a complete defence to any criminal liability. While all these provisions offer protection to the interests of the accused, section 335 has its thrust mainly towards the interests of the society in which such "once upon a time lunatic" may live. The section at the same time seeks to protect such accused from harming himself. Surely the interests of society in general could not be allowed to be scarified at the alter of law. After all even if there is no criminal liability the accused has committed the act amounting to offence. It may be marked that where there is an acquittal solely on the ground of defence under section 84 I.P.C. the Court has to record a finding whether the act amounting to offence has been committed by the accused or not as provided by section 334 Cr.P.C. It would, therefore, be hazardous to let such person live in the society unconditionally as any recurrence of lunacy in case of such person may put to the society in which he lives to a serious jeopardy. There would be no guarantee that such person in fit of his lunacy would not repeat acts amounting to offences or would not harm himself. Provisions in section 335, therefore, aim at providing a safety valve so that both society at large and the accused himself are safeguarded from ghastly effects of a possible

future recurrence of lunacy on the part of such accused. Therefore, considering the language of section 335, the purpose behind it and also its utility to the society in general and to the accused in particular there is no escape from the conclusion that it is a mandatory provision of law. The contention of Shri Mardikar that the provision is directory is clearly incorrect.

39. The difficulty, however, arises because the Rules framed by the State Government under the Indian Lunacy Act of 1912 or Rules framed by the State Government under the Mental Healthcare Act, 1987, really make no provisions in order to deal with the situation of the present nature. The difficulty posed by the repeal, the Indian Lunacy Act, 1912 or the Mental Health Act, 1987 can perhaps be surmounted by reference to the provisions of Section 8 of the General Clauses Act. In terms of Section 8 of the General Clauses Act, 1897, where the said Act or any Central Act or Regulation made after commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed

shall, unless a different intention appears, be construed as references to the provision so re-enacted. Accordingly, by applying the provision of Section 8 of the General Clauses Act, it is possible to refer to the provisions of the Mental Healthcare Act, 2017 in place of Indian Lunacy Act, 1912. Under Section 335(2) of Cr.P.C, however, since, as of date, no Rules have been framed under the Mental Healthcare Act of 2017, the difficulty persists.

40. In such a situation, reference will have to be made to the provisions of Section 103 of the Mental Healthcare Act, 2017, which *inter alia* provides that an order under Section 335 of Cr.P.C., directing the admission of a prisoner with mental illness into any suitable mental health establishment, shall be sufficient authority for the admission of such person in such establishment to which such person may be lawfully transferred for care and treatment therein. Again, Section 103(2) of the Mental Healthcare Act, 2017 provides with the method, modalities and procedure by which the transfer of a prisoner under under this section is to be effected shall be such as may be prescribed.

Section 2(v) of the Mental Healthcare Act, 2017 defines “prescribed” to mean to be prescribed by the Rules made under this Act. Again, there are no Rules made in this Act, which contributes to the vacuum admitted by the learned Advocate General.

41. Faced with the aforesaid difficulties, we are making an order under Section 335 of Cr.P.C., directing that the appellant, consequent upon his acquittal by extending him the benefit of Section 84 of IPC, shall, in the first instance, be transferred by the Jail Superintendent, in which, he is presently lodged to the IPHB at Panaji, Goa, which is a Government Institution. Since, as yet, neither the said Mental Health Authority, as contemplated by Section 45 of the Mental Healthcare Act of 2017 is constituted, nor the Mental Health Review Board for the State of Goa is in place, we direct that for this case, an Ad-hoc Board, comprising of the Chief of IPHB (by whatever name or designation called); one Psychiatrist; one Medical Practitioner; one District Judge (either serving or retired) and if possible, one person representing the organization of person with mental illness or action

giver or NGOs working in the field of Mental Health, to be constituted as expeditiously as possible and in any case, within 30 days from today.

42. This Ad-hoc Board, based upon such medical opinion, as it may wish to obtain, shall take a decision on the continuation of the appellant at the IPHB or any other suitable Mental Health Establishment as it may deem fit and proper, having regard to the condition of the appellant. The Board is at liberty to take such decision as the condition of the appellant may warrant including decision for the continuance at IPHB or discharge. However, if the appellant is to continue at IPHB or any other Mental Health Establishment beyond a period of six months from today, necessary report is to be made to the Principal Sessions Judge at Panaji, who shall, if necessary, seek further directions from this Court.

43. Since, the learned Advocate General has assured us that expeditious steps will be taken to constitute the said Mental Health

Authority and thereafter, this Authority, will also take expeditious steps to constitute the Mental Health Review Board in terms of Section 73 and Section 74 of the Mental Healthcare Act, 2017, we clarify that once such Board is constituted, it will be the duty of such Board to immediately review the condition of the appellant and thereafter, to take such decision as they deem fit, no doubt, in consistent with the provisions of the Mental Healthcare Act, 2017 or any other legal provisions as may be found to be applicable in the matter.

44. This Appeal is accordingly disposed off by making the following order:

O R D E R

- (i) This Appeal is allowed and the judgment and order dated 14.11.2016 and the conviction recorded therein against the appellant is hereby quashed and set aside by extending the benefit of Section 84 of IPC to the appellant.
- (ii) In consonance with the provisions of Section 335 of Cr.P.C., we, however, direct the Jail

Superintendent to transfer the appellant to IPHB at Panaji, which shall, receive the appellant and thereafter, deal with the appellant in accordance with directions issued by us in paras 41, 42 and 43 of this judgment and order.

(iii) The statement made by the learned Advocate General regards constitution of the State Mental Health Authority and the Mental Health Review Board is accepted.

(iv) There shall be no order as to costs.

45. We record our appreciation at the fair manner in which, both, Ms. Almeida, the learned Counsel appearing for the appellant under Legal Aid Scheme and Mr. Nagvenkar, the learned Additional Public Prosecutor for the respondent, presented their respective versions before this Court. We make a special note that both the learned Counsel argued this matter with research and industry. We also express our gratitude to Mr. Pangam, the learned Advocate General for the assistance rendered by him in the matter.

46. Registry to take the necessary steps in the matter.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.

EV