

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.1846 of 2019**

- Sukhdev S/o Gambhir Sai Aged About 30 Years R/o Village Karri, Gawtiyan Para , Police Station- Odagi , Civil District Surajpur Chhattisgarh...(In Jail)..(Accused), District : Surajpur, Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through Police Station Odagi, District (Revenue Ande Civil) Surajpur Chhattisgarh...(Respondent), District : Surajpur, Chhattisgarh

---- Respondent/State

For Appellant	:	Shri Vineet Kumar Pandey, Advocate
For Respondent/State	:	Shri Lalit Jangde, Dy.GA

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board**Per Manindra Mohan Shrivastava, J.****22-07-2021**

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 30-04-2007 passed by the Second Additional Sessions Judge, F.T.C., Surajpur District Surguja (Ambikapur) in Sessions Trial No.238/2005, whereby and whereunder the appellant has been held guilty for commission of offence under Section 302 of IPC and sentenced him, as described below-

Section-302 IPC	Life Imprisonment and fine of Rs.100/-, in default of payment of fine, additional R.I. for five days.
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2. The prosecution story, as unfolded from the impugned judgment of conviction and order of sentence and records of the case is that the deceased

had entered cattle shed surrounded by wooden pillars, where the appellant was sleeping in the night. According to the prosecution case, the deceased had come in a drunken stage and he was abusing the appellant. The appellant asked him to leave the place, but the deceased kept on quarreling, abusing and did not leave the place. At this juncture, the appellant picked up an axe and assaulted on the head of the deceased, due to which, he fell down and died.

3. The prosecution came out with the circumstantial evidence that the dead body was found in the cattle shed in occupation of the appellant, the appellant ran away from the spot, extra judicial confession, presence of blood on the axe recovered on the memorandum statement of the appellant, from the possession of the appellant. The learned trial Court held that the motive on the part of the appellant was not very strong but as the evidence states, when the deceased entered the premises in occupation of the appellant in the midnight in a drunken stage and started abusing, assault was given with an intention to cause death.

4. Though, a defence of unsoundness of mind was taken, the learned trial Court disbelieved the same by holding that the appellant-accused failed to discharge this burden cast on him under Section 105 of the IPC that he suffered from legal insanity, though some minor aberration had affected the appellant. The finding eventually ended in conviction of the appellant under Section 302 of the IPC.

5. The argument of learned counsel for the appellant is three-fold. The first submission of learned counsel for the appellant is that the prosecution has failed to prove its case beyond reasonable doubt in as much as the conviction itself is founded on weak circumstantial evidence of extra judicial confession, coupled with doubtful evidence of recovery of axe on the memorandum statement of the appellant and there being no report of the group and origin of the blood on the axe and that of the deceased.

6. The other limb of argument of learned counsel for the appellant is that in

the present case, number of prosecution witnesses including Dr. M. K. Sahu, PW-12, who examined the accused, have led evidence that the appellant was not of sound mind and was suffering from psychosis of unspecified nature. Therefore, the overt act committed by the appellant cannot be said to be the offence in view of the provision contained under Section 84 of the IPC. Even though, the appellant being of unsound mind, was proved, the learned trial Court wrongly disbelieved the evidence in this regard by holding that the appellant failed to prove legal insanity.

7. Last submission of learned counsel for the appellant is that even if it is held that the appellant assaulted the deceased, the circumstances, in which, the incident happened, was as a result of sudden and grave provocation in exercise of right of private defence of person and property or in heat of passion of sudden fight without pre-meditation. The appellant having undergone 16 years of jail sentence by now, it is prayed that the conviction of the appellant may be altered to Section 304 Part-II of the IPC and he may be released. In support of his arguments, learned counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of ***Devidas Loka Rathod vs. State of Maharashtra***¹.

8. On the other hand, learned State counsel argued that the conviction of the appellant is founded on proof of not only extra-judicial confession given by the appellant before more than one witnesses, but also motive and recovery of bloodstained axe from the possession of the appellant. He would next submit that though, the evidence on record shows that the appellant had suffered from some mental problem, but it fell short of proof of legal insanity. He also submits that none of the exceptions as referred to by learned counsel for the appellant are made out. It was not a case of grave provocation nor an act in good faith in exercise of private defence of person or property not even a case of sudden fight between the appellant and the deceased.

1 (2018) 7 SCC 718

9. We have heard learned counsel for the parties, perused the records and judgment impugned before us.

10. In so far as assault given by the appellant on the deceased and cause of death is concerned, the learned trial Court has found the appellant guilty of commission of offence on proof of more than one circumstantial evidence. The place, where the dead body was found, was a place in occupation of the appellant, which is proved from the evidence of the prosecution witness Ramlal, PW-7, who states that when the dead body was found in the morning and enquiry was made, it was revealed that the spot (cattle shed) was the place where the appellant was residing. Thus, the dead body of the deceased was found in the cattle shed, which was in occupation of the appellant.

11. The other circumstantial evidence is of extra-judicial confession. Bir Singh, PW-2 has deposed that when the appellant was called after the incident of death, the appellant disclosed that the deceased was not allowing him to sleep, hurling abuses and was not prepared to leave, though, an attempt was made, so, he killed him. Though, a suggestion has been given to this witness that this statement has been given to falsely implicate the appellant-accused, nothing material has been elicited as to why this witness, being Sarpanch of the Village, would speak false against the appellant. The other prosecution witness, Samay Lal, PW-3 has also deposed that at the place of incident, the appellant was called and then he stated that he killed the deceased with the help of axe, but he did not state as to why he killed the deceased. Nothing could be elicited in the cross-examination to disbelieve the evidence of extra-judicial confession made by the appellant before this witness.

12. Ruplal, PW-6 is another witness, who has stated that when the appellant was called, he confessed that he killed Bal Say and there is no reason to disbelieve this part of the version of this witness.

13. Thus, from the evidence of not one, but, as many as three prosecution

witnesses, against whom, nothing could be elicited to falsely implicate the appellant, it is proved that the appellant had given extra-judicial confession before the villager that he having killed the deceased. Even one of the prosecution witnesses has stated that the motive for killing was that the deceased had come in the midnight at the place, hurling abuses and he was not prepared to leave the place, then the appellant gave assault.

14. The present is not a case, where only circumstantial evidence of extra-judicial confession was raised and no more evidence. The evidence of Investigating Officer, Kumar Say Thakur, PW-11, regarding obtaining appellant's memorandum statement in Ex.P-5 and then, recovery of axe vide Ex.P-6, has been duly proved from the evidence of independent witness, Bir Singh, PW-2, who has deposed that the police had enquired from the accused, statement was taken and then the axe on his memorandum, Ex.P-5 was recovered vide Seizure memo Ex.P-6 from the house of the accused. The axe was found stained with blood as per the Forensic Science Laboratory report Ex.P-14, though the group and origin of the blood could not be stated as the blood was disintegrated. Therefore, from the evidence of prosecution, it is proved that the dead body of the deceased was found in the cattle shed in possession and control of the appellant, the appellant had a motive, though simple one and not a very strong to kill him, extra-judicial confession and recovery of bloodstained axe from the house of the appellant on his memorandum. Therefore, the finding of the learned trial Court in that regard, does not warrant any interference that the assault was given by the appellant.

15. The next question, which arises for consideration is, whether in the present case, the appellant is entitled to acquittal, it being a case of act done by a person of unsound mind, who is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. For this purpose, it is apposite to refer the provision contained under Section 84 of the IPC, which is

reproduced, as below:-

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.

Section 105 of the IPC clearly stipulate that the burden is on the accused to prove facts constituting unsoundness of mind.

16. The appellant-accused has not led any evidence in this regard, but there is evidence on record of the prosecution witnesses, which indicates unsound mind of the appellant. But, then, the legal requirement is legal insanity and not merely some kind of insanity. This aspect was considered by the Supreme Court in more than one decisions. In the case of ***Sheralli Wali Mohammed vs. State of Maharashtra***², the Supreme Court, relying upon earlier decision, held:-

12. “To establish that the acts done are not offences under [Section 84](#) of the Indian Penal Code, it must be proved clearly that, at the time of the commission of the acts, the appellant, by reason of unsoundness of mind, was incapable of either knowing the nature of the act or that the acts were either morally wrong or contrary to law. The question to be asked is, is there evidence to show that, at the time of the commission of the offences, he was labouring under any such incapacity ? On this question, the state of his mind before or after the commission of the offence is relevant. The general burden of proof that an accused person is in a sound state of mind is upon the prosecution. [In Dahuabhai Chhaganbhai Thakkar v. The State of Gujarat](#) (1), Subba Rao, J., as he then was, speaking for the Court said :

(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by [Section 84](#) of the Indian Penal Code : the accused may rebut it by placing before the Court all the relevant evidence-oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence,

including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.”

17. In another decision in the case of ***Elavarasan vs. State represented by Inspector of Police***³ also, legal position in this regard was examined by Their Lordships in the Supreme Court, as below:-

27. “Let us now consider the material on record in the light of the above propositions to determine whether the appellant had discharged the burden of bringing his case under [Section 84](#) of the IPC. The appellant has led no evidence in defence to support the plea of legal insanity. That may be a significant aspect but by no means conclusive, for it is open to an accused to rely upon the material brought on record by the prosecution to claim the benefit of the exception. Evidence in defence may be a surplusage in cases where the defence can make out a case for the acquittal of the accused based on the evidence adduced by the prosecution.”

18. In the case of ***Devidas Loka Rathod*** (supra) also, the settled legal position was reiterated by the Supreme Court, as below:-

11. Section 84 of the IPC carves out an exception, that an act will not be an offence, if done by a person, who at the time of doing the same, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law. But this onus on the accused, under Section 105 of the Evidence Act is not as stringent as on the prosecution to be established beyond all reasonable doubts. The accused has only to establish his defence on a preponderance of probability, as observed in *Surendra Mishra vs. State of Jharkhand*, (2011) 11 SCC 495, after which the onus shall shift on the prosecution to establish the inapplicability of the exception. But, it is not every and any plea of unsoundness of mind that will suffice. The standard of test to be applied shall be of legal insanity and not medical insanity, as observed in *State of Rajasthan vs. Shera Ram*, (2012) 1 SCC 602, as follows :

“19.Once, a person is found to be suffering from mental disorder or mental deficiency, which takes within its ambit hallucinations, dementia, loss of memory and selfcontrol, at all relevant times by way of appropriate documentary and oral evidence, the person concerned would be entitled to seek resort to the general exceptions from criminal liability.”

12. The crucial point of time for considering the defence plea of

3 (2011) 7 SCC 110

unsoundness of mind has to be with regard to the mental state of the accused at the time the offence was committed, collated from evidence of conduct which preceded, attended and followed the crime as observed in *Ratan Lal vs. State of Madhya Pradesh*, (1970) 3 SCC 533, as follows:

“2. It is now wellsettled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the accused. In *D.G. Thakker v. State of Gujarat* it was laid down that “there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code, the accused may rebut it by placing before the Court all the relevant evidence – oral, documentary or circumstantial, but the burden of proof upon him is no higher than that which rests upon a party to civil proceedings.”

19. In view of the aforesaid settled legal position, it is clear that the benefit of Section 84 of the IPC cannot be extended to the accused, merely upon proof of some kind of mental disability, unless the evidence is sufficient to constitute legal insanity. That means, such a degree of unsoundness of mind, by reason of which, the accused is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.

20. Bir Singh, PW-2 has stated in para 7 of his cross-examination that the accused is mad one like half-minded. He has further deposed that the accused understand what he is speaking. This statement is quite loosely worded and does not by itself satisfy the legal requirement of legal insanity.

21. Samay Lal, PW-3 has stated in para 3 of his evidence that the accused is half-minded. Except this, he has not stated anything more.

22. Ruplal, PW-6 has stated in para 2 of his evidence that at the time when the accused was being enquired, he confessed that he had killed the deceased and behaving like a mad man. In his cross-examination, he has admitted suggestion that he is half-psychiatric and speaks hay way. He has also admitted suggestion that he does not recognize his own family members and in the stage of insanity, he sometimes assaults also.

23. Ramlal @ Ramdev, PW-7 younger brother of the appellant states that his

brother is mad and does not recognize members of the family and if he is pinched, he may assault anybody.

24. Mayalal, PW-8, who is the cousin of the accused, has stated in his cross-examination that his cousin is mad and remains in the condition of half-mindedness. The evidence of this witness definitely indicate that the appellant is not perfectly sound minded and suffers from mental disability. However, beyond that, nothing has been elicited.

25. Dr. M. K. Sahu, PW-12, who examined the accused-appellant has given elaborate statement with regard to nature and extent of the appellant's mental illness. He has stated that the appellant suffers from severe disease of psychosis and after treatment, he recovered. Having explained that there are different kinds of psychosis. Dr. Sahu has stated that the appellant suffered from unspecified psychosis, in which, the patient is not able to take proper care of himself, unnecessarily murmurs and does not live with cleanliness. He has further stated that he does not know as to whether on the date of incident, the appellant was suffering from psychosis disease, but he says that the disease is of the nature that he does not recognize anyone nor the disease was of the nature that he would suddenly get angry and assault someone. Further explaining, Dr. Sahu, PW-12 states that such behaviour found in the Paranoids Psychosis disease and not from one, which the accused is suffering from. In the cross-examination, it has been elicited that at the time, when the patient is in a stage of attack of the disease, he does know what is right or what is wrong. He further admits that a person suffering from psychosis may remain in proper condition for many months and he may remain sick for months together, but he admits that psychosis is very severe mental illness.

26. From the aforesaid evidence taken together, though, it is proved that the appellant had some mental problem and suffered from insanity, but, the evidence on record, particularly the evidence of doctor does not satisfy the legal

requirement of insanity in terms of provisions contained in Section 84 of the IPC.

27. There is yet another important aspect, which shows that at the time of commission of offence, the appellant did not actually suffer from legal insanity so as to be incapable of understanding consequences of his act in terms of Section 84 of the IPC. Bir Singh, PW-2 has clearly stated that when the appellant was asked, he not only confessed having assaulted the deceased, but he has also stated under what circumstances, he assaulted the deceased. This part of the evidence of Bir Singh, PW-2 is uncontroverted and this Court believed the evidence of Bir Singh, PW-2. That means, soon after the incident, when the appellant was asked, he has not only stated that he had killed the deceased, but also states as to why he had killed the deceased. It clearly rules out that the appellant, at the time of commission of offence, was actually suffering from attack of serious disease of psychosis and by such reason of unsoundness of mind, the appellant was incapable of knowing the nature of act which he was doing was either right or wrong or contrary to law.

28. Having held so, we take into consideration the third and last submission of learned counsel for the appellant that conviction of the appellant may be altered to that Section 304 Part-II of the IPC. This argument appeals to us, because, it is the case of prosecution and also the evidence of Bir Singh, PW-2, before whom, extra-judicial confession was recorded and which also finds some information in memorandum statement of the appellant that while the appellant was sleeping, the deceased came in a drunken stage and started abusing the appellant. The appellant asked him to leave the place, but the deceased did not leave the place. At this juncture, the appellant picked up an axe and gave assault on the head of the deceased. We, thus, find that the extreme reaction on the part of the appellant was in response to criminal trespass, attempt to quarrel and refusing to leave the place of the appellant. The appellant having

assaulted the deceased with the help of axe causing injuries on the head, proved intention to cause death.

29. Taking into consideration the totality of the case and the evidence, which has come, as discussed above, we are of the view that the appellant exceeded his right of private defence of person and property, though, it being not a case of sudden grave provocation and not a case of sudden fight. Therefore, conviction of the appellant would not be under Section 302 of the IPC, but under Section 304 Part-I of the IPC. In the circumstances, even though, we find that the case of the appellant is not covered under Section 84 of the IPC, that he had suffered legal insanity. Therefore, the circumstances, in which, the incident happened, we are inclined to hold the appellant guilty of commission of offence of culpable homicide not amounting to murder under Section 304 Part-I of the IPC and he is liable to be convicted and sentenced for 10 years. The appellant has undergone more than 10 years of jail sentence by now.

30. Resultantly, this appeal is partly allowed. Conviction of the appellant is altered from Section 302 of the IPC to that Section 304 Part-I of the IPC and he is sentenced for a period of 10 years. As the appellant has already undergone 16 years of jail sentence, the appellant be released forthwith.

**SD/-
(Manindra Mohan Shrivastava)
Judge**

**SD/-
(Vimla Singh Kapoor)
Judge**