

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

CRIMINAL APPEAL NO. 206 OF 2014
WITH
CRIMINAL APPLICATION NO. 1098 OF 2021

Pandit s/o Haribhau Rathod,
Age 35 years, Occu. Agri.,
R/o Takalgavhan Tanda,
Taluka Pathri, District Parbhani ..Appellant

Versus

The State of Maharashtra ..Respondent

Mr Swapnil S. Rathi, Advocate for appellant
Mr Shashibhushan P. Deshmukh, A.P.P. for respondent

**CORAM : V.K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.**

DATE : 6th September 2021

ORAL JUDGMENT (Per V.K. Jadhav, J.) :

1. This appeal is directed against the judgment and order of conviction dated 23.1.2014 passed by the Additional Sessions Judge, Parbhani in Sessions Trial No. 56 of 2012.

2. The prosecution case in brief is as follows :

(a) The complainant is the uncle of the deceased. The appellant/accused was addicted to liquor since prior to the incident. He used to demand the money for drinking from his wife deceased Vijaymala. On 22.3.2012 at about 00.30 a.m., DW-1 Haribhau Rathod (father of the appellant/accused) came to the informant's house and told him that appellant/accused had beaten the deceased Vijaymala. Thereupon, the informant, his wife PW-6 Rukhmini, the mother of the deceased PW-3 Shashikala rushed to the house of the accused

and found that deceased Vijaymala was lying in her room and Dhamabai - the mother of the appellant/accused was giving water to the deceased Vijaymala. The deceased Vijaymala had bleeding injury on her abdomen. She was asked as to how the incident took place, the deceased Vijaymala disclosed to them that the accused had been demanding money for drinking liquor from 10.00 p.m. and since she did not have money, the accused under the hit of anger stabbed her by means of a sickle. She was allegedly shifted to the hospital at Pathri, however, during transit she breathed her last. It is also the prosecution case that the informant along with the persons stated above went to the house of appellant/accused and on seeing them, the accused ran away, however, he was caught by the villagers and brought before the Police. On the basis of F.I.R. lodged on 22.3.2012 at 10.30 a.m., Crime No.56 of 2012 came to be registered with the concerned Police Station.

(b) The Investigating Officer has drawn inquest panchnama (Exh.34), Spot Panchnama (Exh.36) and also recorded statement of the witnesses. Furthermore, during the course of investigation, at the instance of appellant/accused, knife was recovered from him. On completion of the investigation, the Investigating Officer has submitted the charge-sheet. In due course, the Additional Sessions Judge has framed the charge vide Exh.8. It was read over and explained to the accused in vernacular. The appellant/accused pleaded not guilty and claimed to be tried. The appellant/accused has raised defence that as on the date of incident, he was mentally ill and he used to wander here and there. On the day of incident, he was not at home and was slept in his field.

(c) In order to substantiate the charges levelled against the accused, the prosecution has examined ten witnesses. The appellant/accused examined his father DW-1 Haribhau Rathod as a defence witness to substantiate the plea of his mental illness.

(d) On completion of prosecution evidence and after recording statement of the accused under Section 313 of Cr.P.C. and after hearing both the sides, the learned Additional Sessions Judge, Parbhani, by impugned judgment and order dated 23.1.2014 in Sessions Trial No. 56 of 2012 has convicted the appellant/accused, for the offence punishable under Section 302 and sentenced him in the following manner :

" Accused Pandit s/o Haribhau Rathod is convicted of the offence punishable under Section 302 of the Indian Penal Code and he is sentenced to suffer rigorous imprisonment for life with fine of Rs.100/- (Rs.One hundred only). In default to suffer further simple imprisonment for one month."

3. The learned Counsel for the appellant/accused, before entering on the merits of the case submits that there is no compliance of Section 329 of Cr.P.C., which ultimately resulted into miscarriage of justice.

4. The learned Counsel for the appellant/accused submits that after framing of the charge, but before recording of the evidence, the defence Counsel, who was appointed Counsel from the Legal Aid Panel has submitted application Exh.13 stating therein that the accused is under treatment of Dr. Kelkar at Akola and Dr. Kale at Parbhani for psychiatric problems and all the relevant documents are in the custody of the Superintendent of District Prison, Parbhani. The learned Counsel has pointed out to the Court that the case is

posted for evidence without any medical papers and the Counsel is unable to conduct the matter. The learned Counsel defending the accused before the trial Court has thus prayed that the direction may be given to the Superintendent, District Prison, Parbhani to produce all the medical papers of accused before the Court. On 12.12.2012, the learned Judge of the trial Court has passed the order directing the Superintendent of District Prison, Parbhani to produce all the relevant papers as referred in the application Exh.13.

5. The learned Counsel for the appellant/accused submits the Superintendent of District Prison, Parbhani has submitted the medical treatment papers of the Psychiatrists about the examination and diagnosis of the appellant/accused available in the jail and those papers consisting of the reports of the Psychiatrists namely Dr. Bashir Khan and Dr. Kelkar. The said communication is dated 21.12.2012 marked at Exh.17 and there is an endorsement of the learned Judge of the trial Court on it as "Seen on 3.1.13". The learned Counsel submits that meanwhile on 7.2.2013, the learned Judge has passed the order on Exh.1 referring therein that the learned Counsel Shri Ghuge, appointed by the Legal Aid Committee states that the accused does not give any instructions and remains silent. The Court had put certain questions to him and observed that accused has some mental illness. Accused was therefore, referred to Civil Surgeon for examination and opinion. The learned Counsel submits that it further appears from the correspondence at Exh.20 that the Superintendent of District Prison, Parbhani, by communication dated 8.3.2013 has submitted the medical examination report of the Civil Surgeon, Parbhani before the learned Judge of the trial Court. The said report submitted by the Civil Surgeon is dated 7.3.2013, but the same is not exhibited by the trial

Court and it is only treated as part and parcel of the report of the Superintendent of District Prison, Parbhani (Exh.20). The learned Counsel submits that the Civil Surgeon in the said report has opined that at present, accused had no psychiatric symptoms and he may attend the Court trial. The learned Counsel for the appellant/accused submits that the medical examination report and the diagnosis of the two Psychiatrists namely Dr. Kelkar from Akola and Dr. Bashir Khan from Parbhani were also forwarded to the learned Judge of the trial Court by the Superintendent of District Prison, Parbhani. The learned Counsel submits that despite the same, instead of complying with the provisions of Section 329 (Chapter 25) of the Cr.P.C., the learned Judge of the trial Court has proceeded with the trial. The learned Counsel submits that the Civil Surgeon has merely given the opinion that at present, psychiatric symptoms are not active, however, it is for the learned Judge of the trial Court to record the specific finding to his satisfaction by examining the medical expert as to whether the accused is capable of making his defence. The learned Counsel submits that the trial Court has neither recorded its finding in compliance with the provisions of Section 329 of the Cr.P.C. nor carried out any exercise for his satisfaction about the formal compliance of Section 329 of the Cr.P.C. The learned Counsel submits that the appellant/accused thus deserves to be acquitted on this ground alone. The learned Counsel submits that in the alternate, if this Court comes to the conclusion for remanding the matter for de novo trial for compliance of the provisions of Section 329 of Cr.P.C., the appellant/accused has undergone the sentence of nine years so far and as such, he may be directed to be released on bail during the compliance of provisions of Section 329 of Cr.P.C. and if any action, as contemplated under Section 330 of Cr.P.C. thereupon.

6. The learned Counsel for the appellant/accused in order to substantiate his contention placed his reliance on the following judgments :

- (i) **Salim Abhu Juneja Vs. State of Gujarat**
reported in **2013 SCC OnLine Guj 4913**
- (ii) **Devidas Loka Rathod Vs. State of Maharashtra**
reported in **AIR 2018 SC 3093**
- (iii) **State of Maharashtra Vs. Govind Mhatarba Shinde**
reported in **2010 CRI.L.J. 3586**
- (iv) **Balu Ganpat Koshire Vs. State of Maharashtra**
reported in **1983 CRI.L.J. 1769**
- (v) **Prabhunath Singh, Son of Ash Narain Singh**
Vs. The State of Bihar reported in **2014 SCC OnLine Pat 5574**
- (vi) **Joga Ram s/o Shri Teja Ram Vs. The State of Rajasthan**, reported in **2017 SCC OnLine Raj 3171**
- (vii) **I.V. Shivaswamy Vs. The State of Mysore**,
reported in **AIR 1971 SC 1638**

7. The learned A.P.P. has fairly accepted the legal position that there should have been the compliance of Section 329 (Chapter 25) of the Cr.P.C. The learned A.P.P. submits that on the basis of the medical examination report submitted by the Civil Surgeon, Parbhani dated 7.3.2013, the learned Judge of the trial Court was satisfied about the capacity of the appellant/accused for making his defence and accordingly, proceeded with the trial. The learned A.P.P. submits that the appellant/accused has undergone

nine years of imprisonment and on merit, there is enough evidence against him. The learned A.P.P. submits that at this stage, after nine years of undergoing the sentence, the aspect of non-compliance of the provisions of Section 329 (Chapter 25) of Cr.P.C. would be losing its significance. The learned A.P.P. submits that the appellant/accused has not raised specific defence under Section 84 of the Indian Penal Code and as such, mere non-compliance of the provisions of Section 329 of Cr.P.C. would not be fatal for the prosecution case.

8. In the instant case, the learned Counsel for the appellant has brought to our notice the various documents and even, the order passed by the learned Judge of the trial Court on Exh.1. It appears that the defence Counsel before the trial Court was appointed Counsel from the Legal Aid Panel. The learned defence Counsel before the trial Court made two attempts. Firstly, he has brought to the notice of the trial Court that certain medical documents pertaining to the mental illness of the appellant/accused are available in the District Prison. The appellant/accused is a patient suffering mental illness and he has taken treatment of two Psychiatrists. Secondly, the learned defence Counsel before the trial Court has also pointed out to the Court that the accused does not give any instructions and remains silent. It further appears that the Superintendent of District Prison, Parbhani has forwarded twelve such medical examination papers along with six papers pertaining to medical examination of the appellant/accused through jail about his complaint in respect of the mental illness. Thus, the Superintendent of District Prison, Parbhani has forwarded in all eighteen papers in terms of the communication dated 21.12.2012 (Exh.17).

9. On the basis of the submissions made on behalf of the appellant/accused by his defence Counsel (appointed Counsel from the Legal Aid Panel), the learned Judge of the trial Court passed order on Exh.1 dated 7.3.2013, which reads as follows :

" The learned Counsel Shri Ghuge, appointed by the Legal Aid Committee states that the accused does not give any instructions and remains silent. I had put certain questions to him and from it, it appears that he has some mental illness. He is, therefore, referred to Civil Surgeon for examination and opinion."

Sd/-
7.2.13

10. It further appears that thereupon, the Civil Surgeon of Civil Hospital, Parbhani has carried out the medical examination of the appellant/accused and submitted the report to the District Prison, Parbhani. Thus, the Superintendent of District Prison, Parbhani has forwarded the said report under his covering letter dated 8.3.2020 (Exh.20). Unfortunately, the report submitted by the Civil Surgeon, Parbhani was not exhibited, probably for the reason that the trial Court was of the opinion that the author of the said certificate was not examined before the Court. However, for the ends of justice, we have carefully perused the said report dated 7.3.2013, which is part and parcel of the report sent by the Superintendent of District Prison, Parbhani (Exh.20). In paragraph 2 of the said medical certificate, it is mentioned that the patient had history of altered behaviour approximately since last one month and as per jail personnel, patient was remain aloof, not interacting with others, poor self-care (not taking daily bath & brush), occasional anger outbursts, for that patient was shown to

him on 11/09/2012. However, the Civil Surgeon was unable to record the detailed personal history for non availability of the family member. The Civil Surgeon, on the basis of certain findings and sequential mental status examinations, reached to the conclusion in the following manner :

" Pandit Haribhau Rathod, 35/yrs., male had nil active psychiatric symptoms at present, he may attend court trials."

11. Section 329 of the Cr.P.C. reads as follows :

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.

(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 :

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 (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."

12. In terms of sub-section (1) of Section 329 of the Cr.P.C., if during the course of the trial it appears to the 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.

13. In terms of sub-section (1A) of Section 329 of Cr.P.C., the Court of Sessions, if finds the accused 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.

14. Even in terms of sub-section (2) of Section 329 of Cr.P.C., it is incumbent upon the Magistrate or the Court to 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.

15. In case, if the prima facie case is made out against the accused in respect of whom a finding of unsound mind is arrived at, the Magistrate 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.

16. In view of the above provisions, in our considered opinion, it was mandatory to record the finding as to the capacity of the accused of making or entering into his defence during the trial. Even though the Civil

Surgeon of the concerned District Civil Hospital, Parbhani has submitted medical examination report, the trial Court has not examined the Civil Surgeon to satisfy himself as to the capacity of the accused of making his defence during trial. In the instant case, it was necessary since the defending Counsel, who was appointed Counsel from the Legal Aid Panel, has pointed out to the Court that the appellant is not giving any instructions and remains silent. Even, the Superintendent of District Prison, Parbhani has also recorded the symptoms of the appellant/accused and communicated the same to the Civil Surgeon. The same is also reflected from the medical certificate issued by the Civil Surgeon about suffering of the appellant/accused from mental illness.

17. It is necessary to refer though we have not considered the case on merit, that the defence has examined father of the appellant/accused namely D.W.1 - Haribhau Rathod, who has deposed that the accused became mentally ill owing to which he did not use to be in his senses and used to roam around anywhere. The accused is mentally ill about one to one and half years since before the incident and he had taken the accused to Dr. Kelkar at Akola and also to Dr. Bashir Khan of Parbhani.

18. In the backdrop of these factual aspects and considering the legal position, we find that the trial Court has not recorded finding in terms of the provisions of Section 329 (1), 329 (2) read with sub-section (1-A) of Section 329 of the Cr.P.C. Moreover, the learned Judge of the trial Court has not passed any order below Exh.1 observing his satisfaction about the mental capacity of the appellant/accused to enter into his defence, before the commencement of trial. On the other hand, in para no.31, the learned Judge of the trial Court has made the following observations :

" 31 - Shri Ghuge also contended that the accused is mentally ill. After drinking liquor, he did not use to be in his senses. He used to wander here and there. On the day of the incident also, he was not present and it is supported by the record brought from the jail. So far as the record from jail is concerned, it merely shows that the accused was referred to the psychiatrist. Those documents were not proved. Therefore, it cannot be said as to whether the accused was suffering from mental illness of such a degree that he did not use to be in his senses and used to wander aimlessly. Moreover, the witnesses had seen him at the time of incident. In this view of the matter, it cannot be said that the accused was not present at the scene of the offence."

19. In our considered opinion, the approach of the trial Court is not proper, correct and legal. The trial Court has not even gone through the medical certificate submitted by the Civil Surgeon on record. Even in para 31 of the judgment, there are no observations that the learned Judge of the trial Court was satisfied that the appellant/accused was capable in entering into his defence.

20. In a case of **Rajendra Singh Vs. State of Rajasthan**, reported in **2006 SCC OnLine Raj 754**, relied upon by the learned Counsel for the appellant/accused, the Rajasthan High Court in paragraphs no.7 and 8 has made the following observations :

"7. It is mandatory that where the court decides that the accused is of unsound mind and consequently incapable of making his defence the trial should be postponed. Flouting the mandate of section 329 will vitiate the trial. In the case of hand learned trial Judge completely overlooked the mandate of Section 329. Despite the fact that the appellant was of unsound mind and was under treatment, the learned trial

Judge proceeded with the trial. There is no material on record, which could establish that the appellant was cured. Learned trial Judge was required to follow the provisions contained in Section 329 Cr.P.C. Non compliance of the mandatory provisions has vitiated the trial and the impugned judgment rendered by the learned trial Judge is liable to be set aside on this ground alone.

8. For the reasons aforementioned, the appeal is allowed. The judgment dated 12.5.2006 passed by the learned Special Judge, SC/ST (Prevention of Atrocities) Cases, Jhunjhunu is set-aside and the case is remanded back to the court of learned Special Judge, SC/ST (Prevention of Atrocities) Cases, Jhunjhunu for de novo trial in accordance with law. Record of the case be remitted forthwith."

21. In a case of **Sawai Singh Vs. State of Rajasthan**, reported in **2020 (3) RLW 2655 (Raj.)**, the Rajasthan High Court in paragraph nos.17 and 18 has made the following observations :

"17. From an over all appreciation of the evidence available on record, we are duly satisfied that the accused was undoubtedly suffering from acute/aggravated psychiatric ailment from the year 2005 onwards and well before the incident. The trial court was apprised of the mental ailment of the accused by way of an application in writing with supporting prescriptions etc., but no enquiry was made under Section 329 CrPC. The trial was continued without any pause and the finding of guilt was recorded against the accused. Section 84 of the IPC provides that nothing is an offence, which is done by a person, who at the time of doing it, by the 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. Therefore, if an offence is committed by a person in the state of unsoundness of

mind, by effect whereof, he is not capable of understanding the nature or implication of the act or the consequence thereof, such act would not tantamount to be an offence. When trial of such a person, who is suffering from unsoundness of mind, is proposed and the procedure of Section 329 CrPC is not applied, it would have to be held that the accused has not been provided opportunity to put up his defence as per law. The situation presented in the case at hand is squarely covered by the mandate of Section 84 of the IPC. Undoubtedly and unquestionably the accused was suffering from unsoundness of mind right from the year 2005. The symptoms aggravated over the years and as such, it was imperative for the trial court to have stopped the trial by applying the mandate of Section 329 CrPC. However, this mandatory procedure was not adopted. The crucial fact to be examined by this court would be whether the accused was suffering from unsoundness of mind at the time of doing the act. As we have discussed above that from 22.10.2005 onwards till 24.06.2008, when the prescription slip Ex.D/10 was prepared, the accused was suffering from maniac disorder. His symptoms had aggravated over the course of time. Just after being lodged into the jail, the accused displayed marked symptoms of uncontrollable activity, on which, he was taken to the Government Hospital on 09.09.2008 and was opined to be a patient of acute psychosis. Therefore, it is firmly established that the accused was undoubtedly suffering from unsoundness of mind on the date of the incident. The defence evidence in the form of the statements of the concerned doctors, which we have discussed above, duly establishes that the accused was suffering from unsoundness of mind when the offence was committed. Therefore, and in the circumstances noticed above, we are of the firm opinion that the accused is entitled to the defence of plea of insanity provided by Section 84 of IPC. Our view is fortified by this court's judgment in the case of Geeg Singh (supra) and Rajendra Singh (supra).

18. In view of the above discussion, we are of the firm opinion that the learned trial court committed grave error in facts as well as in law while convicting the accused appellant by not adopting the procedure provided under Section 329 CrPC and not extending him the benefit of defence of insanity by virtue of Section 84 IPC.

22. In a case of **State of Karnataka (Kanakagiri P.S.) Vs. Doragal Kanakappa**, reported in **MANU/KA/0132/1995**, the Karnataka High Court in paragraph 5 has made following observations :

" 5. The Trial Court has acquitted the respondent-accused mainly on the ground that the evidence of P.W.1 cannot be accepted without corroboration by independent witnesses and as P.Ws 2 and 3 turned hostile there is no corroboration to the said evidence. We have gone through the judgment of the Trial Court. The approach of the Trial Court to the law and evidence of the case appears to be perverse. Even the learned Judge has not framed proper points for consideration. The points which has been raised by him for consideration are as follows:

- "(1) Whether the death of a human being attempted?
- (2) That such death was attempted to be caused by or in consequence of the act of the accused?
- (3) That such an act was done with the intention of causing bodily injury and accused knew that such an injury is likely to cause the death of P.W 1?"

Instead of framing the points for consideration on the basis of the facts of the prosecution case, the Judge seems to have culled out some words and phrases from Section 307, I.P.C and framed the points for consideration. Another basic and very

serious mistake committed by the Judge is in not following the mandatory provisions of Section 329 of Cr. P.C. The evidence of C.Ws 1 and 2 recorded by the Trial Court goes to show that the respondent-accused was suffering from mental disorder. Even C.W.1, examined on 15-12-1989 deposes that the accused was examined by him on 13-2-1989 and he appeared to be mentally unsound. Section 329 of Cr. P.C. lays down that at the Trial of any person before a Magistrate or Court of Session, if 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. The said Section lays down the fact of unsoundness of the mind or incapacity of the accused shall be part of the trial before the Court or the Magistrate. Section 329 provides for three stages. That the first stage is, it must appear to the Court that whether the accused was of an unsound mind and incapable of making his defence. It is only after this first stage, the Judge is required to make the inquiry about the unsoundness of mind and incapacity and record a finding on this point. Where in case it did not appear to the Trial Judge that the accused was of an unsound mind or that he was incapable of making his defence it is not necessary to adopt the procedure provided by the second part of Section 329, Cr. P.C. In view of the three Court witnesses examined in this case, it was apparent that the accused was not of sound mind. In view of this material the Judge was required to try the question of unsoundness of the mind of the accused and his incapacity to defend himself before commencing other prosecution evidence. P.W.13 is examined in this case during the course of the trial. He refers to a letter Ex. P-18 issued by

him on 22-4-1993 wherein he has stated that the accused will understand the evidence given in the Court. But mere production of Ex. P-18 and its proof through P.W.13 cannot be held to be the compliance with the requirements of Section 329 Cr. P.C. What is required is that the Court should record a finding as to whether the accused is of sound mind or unsound mind and as to whether he is capable of or not capable of defending himself. Though Ex. P-18 is on record, the Trial Judge has not recorded any such finding. The provisions of Section 329, Cr. P.C. are mandatory provisions. This Court in **(1990) 3 Kant. LJ 213 (Pujappa v .State of Karnataka)** has held that the provisions of Section 329, Cr. P.C. are mandatory and it is mandatory on the part of the Court to first consider the fact of unsoundness of mind and incapacity of the accused to make defence after taking such evidence including medical evidence that may be necessary for the purpose. Failure to comply with such mandatory requirements will vitiate the trial. In this case also the order-sheet dated 11-6-1993 mentions only receipt of the letter from the Superintendent of the Hospital, Dharwar on 30-4-1993 to the effect that the accused is capable of understanding evidence. We have seen that order-sheet. The Judge does not seem to have written the portion relating to that letter in his handwriting but he has signed the order-sheet. We do not find anything in the record whether the Judge has considered and given the finding about the mental condition of the accused and his capacity to defend himself. Mere receiving of Ex.P-18 by the Court is not the compliance with the mandatory requirements of Section 329, Cr. P.C. After Ex.P-18 was received and exhibited through the evidence of P.W.13, the Court was required to consider all the material including Ex.P-18 and record a finding about the mental condition and the capability of the accused to defend the case. The non-compliance of the mandatory provisions of Section 329, Cr.P.C. by the Additional Sessions Judge who

tried the accused in this case has vitiated the trial and the judgment rendered by him is liable to be set aside. Since we have to order for de novo trial, we do not want to comment on the merits of the contentions raised by both sides in this appeal.

23. In a case of **Chittmalla Krishna Murthy Vs. State of A.P.**, reported in **MANU/AP/1543/2001**, the Andhra Pradesh High Court in paragraphs no.11 and 12 has made the following observations :

"11. Section 329 the Code of Criminal Procedure, which is a mandatory provision, 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.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Magistrate or Court.

12. We are satisfied that the procedure contemplated under Section 329 the Code of Criminal Procedure has been overlooked by the learned Sessions Judge. The entire trial is vitiated on account of the illegality committed in not complying with the mandatory provisions of Section 329 the Code of

Criminal Procedure. Therefore we set aside the order of conviction and sentence and remand the Sessions Case No. 552/1994 to the file of the learned Sessions Judge, Warangal with a direction to follow the procedure contained in Section 329 the Code of Criminal Procedure and then proceed with the case in accordance with law.

The appeal is accordingly allowed in part."

24. In a case of **Gurjit Singh Vs. State of Punjab**, reported in **1986 CRI.L.J. 1505**, the Punjab High Court in paragraphs no.8 and 10 has made the following observations :

"8. The mandate of Section 329 of the Code is that when the plea of insanity is raised before a Court it shall try the fact of unsoundness of mind and incapacity of the accused in the first instance. Sub-section (2) of this section makes, the preliminary trial, of this fact, a part of the trial before the Court. Although Section 465 of the old Code contained the same provision of the fact of the unsoundness of the mind of the accused and his incapacity to make defence at first, the Law Commission at the time of amendment of the Code re-emphasised this. At the time the Code was amended in the year 1973, in the Objects and Reasons for bringing legislation, the report of the Law Commission was referred as:

" Clause 329 (original Clause 337)- The clause has been so amended as to make it clear that in a trial before a Magistrate or Court of Session if the accused appears to be 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 of mind and incapacity; and if the Magistrate or Court is satisfied as to the unsoundness of mind or incapacity of the accused, he or it shall record a finding to that effect and shall postpone further proceedings in the case."

10. When the Court is at the second stage, above-referred, to enquire into the fact of unsoundness of mind and consequent incapacity to make his defence, it is to ask for evidence. When the accused raised the plea of unsoundness of mind, the onus is on him to prove it. He is to lead evidence. If the opinion of the medical expert examining the accused does not favour him, he can lead other permissible evidence to prove his mental condition. The prosecution has a right to rebut the evidence led by the accused. The procedure for the trial of the fact of unsoundness of mind and consequent incapacity to make a defence by the accused postulates recording of evidence in support and in rebuttal of it. The statement of the doctor, who examines the accused and certifies the accused to be of unsound mind should be recorded as a witness. The accused cannot be permitted to get away from punishment by malingering unsoundness of mind. The party contesting such a plea has an inherent right to rebut it by evidence. After such evidence as may be examined by the court Section 329 of the Code again provides for performing three essential functions by it. The first is that such evidence has to be considered. The consideration is to be demonstrated by its appraisal on the record. The second essential is that the Court has to be satisfied of the fact, that is, the fact which is being tried first. After this satisfaction, the third element comes that a finding has to be recorded demonstrating the consideration of evidence and satisfaction about this fact. The three elements cannot be judicially dealt with unless the evidence as may be led by the person raising the plea referred in Section 329 of the Code is dealt in the manner indicated. Such a provision is clearly in consonance with the principle of fair administration of justice. Any violation by a Court in not examining proper evidence for recording a finding as directed by Section 329 of the Code is to vitiate the trial, as a lunatic, insane or mentally unsound accused cannot understand the trial and appreciate

the evidence against him and answer the charge because of his mental incapacity. Any trial of an unsound person is void."

25. In case of **Salim Abhu Juneja Vs. State of Gujarat**, reported in **2013 SCC OnLine Guj 4913**, in paragraphs no.7, 8, 11, 12 and 18, the Gujarat High Court has made following observations :

"7. From the above sequence of events, it emerges that even before the case was committed for sessions trial, the fact of accused being highly mentally disturbed and suffering from psychiatric problems had come on record. Before the learned Magistrate, Mundra, as early as on 29.12.2008, it had already come on record that as per the medical opinion the accused was unable to defend himself. In fact it was the Magistrate who authorized the jail authority to shift the accused to the mental hospital. On 09.03.2009, the learned Magistrate committed the case for sessions trial. The record reflects that by that time the accused was discharged from the hospital. However, whether he had recovered from his mental imbalance and was thus able to defend himself of the charges was never ascertained. Though as noted above, the order dated 09.03.2009 refers to the medical case papers of the accused, no such papers are found on the record.

8. We may not disturb the order of committal. The important question is whether the trial could be commenced and continued under such circumstances. Our answer has to be clearly in the negative. To recapitulate the factual aspects, on 29.12.2008, the Psychiatrist of Mental Health Hospital, Bhuj had indicated several disturbing features of the mental condition of the accused. Most significantly he opined that he was unable to defend himself. These documents were very much before the trial Court, when the sessions trial commenced. Ignoring such documents, virtually the entire trial was completed when once again the accused had to be admitted in the mental hospital.

This happened towards the end of the year 2009. After about a month or so he recovered sufficiently to be discharged from the hospital. In our opinion, it was the duty of the trial Court to ascertain the condition of the accused and to verify whether he was fit enough to defend himself. Between 9 March 2009 after the case was committed for sessions trial and on 9 November 2009 when the statement of the accused under Section 313 of the Cr.P.C was recorded, all important stages of the trial except the hearing oral arguments were completed. During this time, charge was framed, oral evidence was recorded and documents were exhibited. The trial Court carried the complete trial without verifying of the accused was able to defend himself.

11. From the above, it can be seen that in terms of Sub-section (1) of Section 329 of Cr.P.C, 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. Sub-section (1) of section 329 thus would apply when it appears to the Magistrate or Court that a person is of unsound mind and is consequently incapable of making his defence. Under such circumstances, the duty of the Court is to try such fact of unsoundness of mind and incapacity of the accused to defend himself. If on the basis of materials brought on record the Court is so satisfied, it should record the finding accordingly and in such case the trial shall have to be postponed.

12. The provisions contained in Section 329 serve an important purpose of not proceeding a trial against a person,

who on account of his unsoundness of mind, is unable to defend himself. It is not difficult to appreciate that such requirement would be mandatory in nature. Proceeding against a person of unsound mind and holding him guilty of criminal offence would be clearly violative of the guarantee contained under Article 21 of the Constitution that no person shall be deprived of his life or liberty without following the procedure established by law.

18. From the above judgments, it clearly emerges that the requirements of Section 329 of Code of Criminal Procedure are mandatory in nature. It pertains to unsoundness of mind and resultant incapacity of the accused to defend himself at any stage of the trial. It is quite distinct from the defence of insanity which can be raised under Section 84 of IPC, which must have relevance to the point of insanity when the offence is committed. Provisions of Section 329 would apply irrespective of whether such a plea has been raised or not. The Legislature has advisedly used the expression, 'it appears to the Magistrate or the Court'. Thus, even though no such plea is raised, but it appears to the Court that a person is of unsound mind and consequently incapable of making his defence, the further procedure in this regard must be followed. In the present case, even before the trial commenced before the Sessions Court, the material came on record to suggest that the accused was suffering from serious mental instability. He had to be shifted to hospital when the treatment given to him in jail did not result in any improvement. We may record that the accused was too poor to defend himself and therefore was represented by the legal aid counsel. If he was as seriously mentally ill as the medical opinion of 29th December 2008 suggested, the whole trial was a sham. Almost all stages of the trial were conducted without verifying whether the accused was capable of understanding what was going on and thus capable of defending himself. If a person of unsound mind is proceeded against in a criminal trial for a serious charge of murder, it is at least

expected that the system ascertains that he is able to comprehend what he is charged with and the nature of evidence which is adverse to him, which is brought on record. If a person is unable to comprehend any of these aspects, we fail to see how he could instruct his advocate about his defence."

26. It is thus clear from the ratio laid down in the above cited cases, the provisions of Section 329 of the Cr.P.C. are mandatory.

27. We agree with the observations made by the Gujarat High Court in a case of **Salim Abhu Juneja Vs. State of Gujarat** (supra), that the compliance under Section 329 of Cr.P.C. is quite distinct from the defence of insanity which can be raised under Section 84 of IPC, which must have relevance to the point of insanity when the offence is committed. Provisions of Section 329 of Cr.P.C. would apply irrespective of whether such a plea has been raised or not.

28. In the instant case, since it was brought to the notice of the learned Judge of the trial Court about the mental illness of the appellant/accused, the trial Court should have, on its own complied with the provisions of Section 329 of Cr.P.C. The trial Court has received the report from the Civil Surgeon certifying therein that the appellant/accused can attend the trial. However, mere certifying that the appellant/accused can attend the trial before the Court, is not sufficient compliance of Section 329 of the Cr.P.C. In our considered opinion, it is for the trial Court to record the finding in compliance with the provisions of Section 329 of Cr.P.C. that as to whether the appellant/accused was capable of making his defence. Even assuming for the sake of discussion that the trial Court has gone through the medical certificate issued by the Civil Surgeon, however, the trial Court has not passed the order below Exh.1 observing therein about his satisfaction in compliance with the

provisions of Section 329 of Cr.P.C. Consequently, we left with the no other alternative but to remand the matter for de novo trial. Hence, we proceed to pass the following order :

ORDER

- (I) Criminal Appeal is hereby partly allowed;
- (II) The impugned judgment and order dated 23.1.2014 passed by the Additional Sessions Judge, Parbhani in Sessions Trial No.56 of 2012 (State Vs. Pandit Haribhau Rathod) is hereby quashed and set aside.
- (III) The case is remanded to the trial Court for de novo trial on the following conditions :
 - (A) The trial Court, before commencement of the de novo trial, shall comply with the provisions of Section 329 of the Cr.P.C. within two months from the date of receipt of record and proceedings and may also refer the appellant/accused for his medical examination afresh, if so required, within the said period of two months before passing the order in compliance with the provisions of Section 329 of the Cr.P.C.
 - (B) The trial Court, depending upon the findings recorded in compliance with the provisions of Section 329 of Cr.P.C., may :
 - (i) Proceed in accordance with the provisions of Section 330 of Cr.P.C. in case, if the finding is recorded in the affirmative [to the effect that the accused is incapable of making his defence].
 - (ii) If the finding is recorded in the negative [to the effect that the appellant/accused is incapable of raising his defence], the trial Court shall proceed with the trial forthwith and dispose of the same within three months by day-to-day hearing, if possible.

(IV) In the event, if the trial Court proceeds with the de novo trial in terms of the finding recorded in the negative in compliance of provisions of Section 329 of Cr.P.C., it is open for the appellant/accused to raise the defence as contemplated under Section 84 of Indian Penal Code.

(V) The appellant/accused, in the event if the finding is recorded in negative in compliance with the provisions of Section 329 of Cr.P.C., is at liberty to file an application for bail and it is for the trial Court to decide the said application on its own merits.

(VI) Criminal Appeal is accordingly disposed of.

(VII) Criminal Application no.1098 of 2021 also stands disposed of.

(VIII) Record and Proceedings be sent to the trial Court with the special messenger forthwith.

(SHRIKANT D. KULKARNI, J.)

(V.K. JADHAV, J.)

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