

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 628 OF 2014

Ramesh s/o Dhondiram Najire
Age 30 years, Occ. Agriculture
R/o. Savkhed, Tq. Vaijapur
District Aurangabad

...Appellant
(Ori. Accused)

versus

The State of Maharashtra
Through Shivoor Police Station
Tq. Vaijapur, district Aurangabad

...Respondent

.....
Mr. V. S. Janephalkar, Advocate for the appellant
Mr. Shashibhushan P. Deshmukh, A.P.P. for respondent-State

.....

**CORAM : V. K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.
DATED : 13th OCTOBER, 2021**

JUDGMENT (PER V.K. JADHAV, J.) :-

1. This appeal is directed against the judgment and order of conviction dated 21.8.2014 passed by the Additional Sessions Judge, Vaijapur, in Sessions Case No.163 of 2012.

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

a) P.W.2 Dhondiram was residing alongwith his wife deceased Bhagubai and son appellant-accused Ramesh at Savkhed (Kd), Tq. Vaijapur, District Aurangabad. The appellant-accused Ramesh was not doing anything as he was jobless. The appellant-accused

Ramesh used to ask for money and if the money is not given to him, he used to abuse and assault both i.e. father and mother. On 21.3.2011 at about 9.00 a.m. P.W.2 Dhondiram had gone to Babhulgaon to attend the marriage of his relative. However, while going to Babhulgaon, he had directed his wife deceased Bhagubai to stay overnight in the house of neighbour viz. Walmik Jadhav. Thus, on the next day i.e. on 22.3.2011 at 8.00 a.m. deceased Bhagubai had returned to her farm house. At about 2.00 p.m. when P.W. Dhondiram had returned to his house from Babhulgaon, he did not find deceased Bhagubai and appellant-accused Ramesh in the house. He had thus made search in the agricultural land. During the search, near a heap of fodder, P.W.2 Dhondiram saw his wife in dead condition. She had injuries on her face and head. The appellant-accused Ramesh was not found. It is the prosecution case that as usual the appellant-accused had asked for money to deceased Bhagubai and since the money was not given to him, he assaulted her by weapon like axe.

b) On the basis of complaint Exh.16 filed by P.W.2 Dhondiram dated 22.3.2011, crime No. 16 of 2011 came to be registered for the offence punishable under Section 302 of I.P.C. at police station Shivoor. Meanwhile, before lodging complaint P.W.2 Dhondiram, when he found the dead body, given intimation to the village Police Patil. Thus, the Police Patil had telephonically intimated to the police station Shivoor and entry at Sr. No. 27 was taken to that effect in the

said police station.

c) P.W.11 Police Inspector, Bhapkar had visited the spot. He had prepared the spot panchanama and collected the sample of soil, soil mixed with blood. He had also prepared inquest panchanama and sent the dead body for post mortem examination. He had also attached the clothes of deceased Bhagubai by drawing pancahnama. P.W.11 Police Inspector, Bhapkar had also recorded the statements of witnesses. On 2.4.2011, the appellant-accused came to be arrested. His clothes were also seized. During the course of investigation, the appellant-accused had made disclosure statement and produced the weapon axe used in the commission of crime. It was seized by drawing memorandum pancahnama and recovery panchanama. On completion of investigation, P.W.11 P.I. Bhapkar had submitted charge sheet against the appellant-accused for the offence punishable under Section 302 of I.P.C.

d) The learned Additional Sessions Judge has framed the charge under section 302 of I.P.C. and explained the contents to the appellant-accused in vernacular. The appellant-accused pleaded not guilty to the charge and claimed to be tried. The prosecution, in order to substantiate the charge, has examined in all 12 witnesses. After examination of the prosecution witnesses is over, the statement of the appellant-accused under Section 313 of Cr.P.C. was recorded. The defence of the appellant is of total denial.

e) The learned Additional Sessions Judge, Vaijapur by impugned judgment and order dated 21.8.2014 in Sessions Case No. 163 of 2012 has convicted the appellant-accused for the offence punishable under Section 302 of I.P.C. and sentenced him in the following manner:-

“1. Accused Ramesh s/o Dhondiram Najire, Age 30 years, Occupation Agriculture, R/o. Savkhed, Tq. Vaijapur, District Aurangabad is found guilty and convicted for committing offence of murder punishable under section 302 I.P.C. and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/- in default to undergo further imprisonment for six months.

2) Accused is in jail. He be given benefit of set off as per Rules.

3) Muddemal property being worthless be destroyed after appeal period and relevant period is over.

4) Copy of judgment be given to accused free of costs immediately.”

3. Learned counsel for the appellant-accused, before entering into 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. Learned counsel submits that before committing the case to the Sessions Court, the Superintendent of Central Prison,

Aurangabad by communication dated 6.5.2011 has informed the learned Magistrate that the appellant-accused needs to be examined by the Psychiatrist, as his behaviour in jail is like a person of unsound mind. By letter dated 16.5.2011, the learned J.M.F.C. Vaijapur has informed to the Superintendent of Central Prison, Aurangabad that the permission as sought is granted and that appellant-accused be referred to Psychiatrist and after his examination, the relevant medical papers be submitted to the Court.

4. Learned counsel for the appellant-accused submits that after committal of the case to the Sessions Court, the appellant-accused has filed an application Exh.10 on 24.9.2012 bringing to the notice of learned Additional Sessions Judge that despite the communication from the Superintendent, Central Prison, Aurangabad dated 6.5.2011, and permission granted by the J.M.F.C. for referring the appellant-accused to the Psychiatrist/mental hospital, however, till date, the said order has not been implemented. It has been prayed in the said application Exh.10 that the appellant-accused may be sent to the mental hospital for his examination. On 24.09.2012, the learned Additional Sessions Judge has directed the jail authorities to refer the appellant-accused to mental hospital for examination and treatment and to submit a report on or before 6.10.2012.

5. The learned counsel for the appellant-accused submits that the Superintendent of Central Prison, Aurangabad, with covering letter

dated 3.10.2012, forwarded the communication received from the Superintendent of Psychiatrist Department, Government Medical College and Hospital, Aurangabad dated 1.10.2012 wherein it is informed to the Superintendent of Central Prison, Aurangabad that though the appellant-accused was examined, however, he needs detail evaluation and accordingly recommended the appellant-accused be sent to the Regional Mental Hospital, Yerwada, Pune. By report dated 27.12.2012, Exh.12 the Superintendent of Regional Mental Hospital, Yerwada, Pune has informed to the Additional Sessions Judge, Vaijapur that the appellant-accused is unfit for trial and unfit for discharge.

6. Learned counsel for the appellant accused submits that before this process began, the learned Additional Sessions Judge has already framed charge against the appellant accused vide Exh.3 on 21.9.2011 and the prosecution has also examined witness P.W.1 Rajendra Khute on 24.9.2012.

7. Learned counsel for the appellant-accused submits that the Superintendent of Regional Mental Hospital, Yerwada, Pune by communication dated 2.4.2013 Exh.13 (it was received by the Sessions Court, Vaijapur on 16.4.2013) that the appellant-accused after the treatment when presented before the committee, the committee on 28.3.2012 has taken decision that he is fit for discharge and trial.

8. Learned counsel for the appellant accused submits that the counsel representing the appellant-accused has filed an application Exh.19 on 16.7.2013 before the Sessions Court bringing to the notice of the learned Additional Sessions Judge that the concerned Superintendent of Regional Central Hospital, Yerwada, Pune has simply sent a letter and there is no detail report. It has been stated in the said application that the hospital ought to have informed the Court i.e. (1) Accused history Past and Present, (2) Physical and Neurological examination, (3) Psychological Testing, (4) Personality tests, (5) Intelligence Tests, (6) Psychomotor Tests, (7) Forensic Neurology – Role of neurologists, (8) Organic neurological Disorders, (9) Epileptic Insanity, (10) Epileptic Dementia, (11) Paroxysmal mental disorders, (12) Feigning insanity. These are the tests to find out mental disorders, if any. It has been further stated in the said application that there is nothing in the said letter Exh.13 to indicate that the appellant-accused has undergone the said tests. It has been prayed in the said application that necessary directions be given to the jail authority or the appropriate authority to file detail medical/mental condition report of the appellant-accused. The said application was opposed by the prosecution. Learned counsel submits that instead of passing any order on the said application Exh.19, the trial court has examined P.W.2 Dhondiram Najire. The learned Judge of the trial court has recorded his evidence from 2.7.2013 and completed his examination on 16.7.2013. Even the

prosecution has examined P.W.3 Balasaheb Pundlik Najire on 02.07.2013 and he was cross-examined on 16.7.2013.

9. Learned counsel for the appellant-accused submits that instead of complying with the provisions of Section 329 Chapter V of Cr.P.C., the learned Judge of the trial court has proceeded with the trial. Learned counsel submits that there was simple communication about the decision taken by the committee at Regional Mental Hospital, Yerwada, Pune certifying therein that the appellant-accused is fit for discharge and trial. No papers have been sent for perusal of the court. Learned counsel submits that in terms of the provisions of Section 329 of Cr.P.C., it is for the trial court to record specific finding to his satisfaction by examining medical expert as to whether the appellant-accused is capable to making his defence. However, the trial court has neither recorded its finding in compliance with the provisions Section 329 of Cr.P.C., nor carried out any examination of the appellant about the formal compliance of Section 329 of Cr.P.C.

10. Learned counsel for the appellant-accused submits that the appellant-accused thus deserves to be acquitted. In the alternate, learned counsel submits that if this Court comes to the conclusion for remanding the matter for de-novo trial for compliance of Section 329 of Cr.P.C., the appellant-accused has already undergone 10 years and 07 months imprisonment and as such, he may be directed to be

released on bail during the course of de-novo trial and further action as contemplated under Section 330 of Cr.P.C. thereafter.

11. Learned A.P.P. for the respondent State fairly accepts that there should have been compliance of Section 329 Chapter V of Cr.P.C. Learned A.P.P. submits that on the basis of report Exh.13 submitted by the Regional Mental Hospital, Yerwada, Pune informing to the court that the constituted committee has taken decision and accordingly certified that the appellant-accused is fit for discharge and trial, learned Additional Sessions Judge has rightly proceeded with the trial. Learned A.P.P. submits that there is enough evidence against the appellant-accused. Learned A.P.P. submits that the appellant-accused has already undergone the sentence of 10 years and 7 months and thus the aspect of non-compliance of provisions of Section 329 of Cr.P.C. would have no significance. Learned A.P.P. submits that the appellant-accused has not raised specific defence under Section 84 of I.P.C. and as such, mere non-compliance of Section 329 of Cr.P.C. is fatal for the prosecution case.

12. In the instant case, on careful perusal the record and proceedings, it appears that the Superintendent of Central Prison, Aurangabad had informed the J.M.F.C. Vaijapur, district Aurangabad, by letter dated 6.5.2011 that the behaviour of the appellant-accused in jail is abnormal. We have carefully perused the said letter. The Superintendent of Central Prison, Aurangabad has reported serious

instances, such as, (a) the appellant-accused, who was kept in Barrack No. 16, all of a sudden used to awake in the night, wake up the other inmates by demanding them the tobacco/Bidi and in case the said demand is not fulfilled, he used to assault them, (b) in the water tank of barrack No.16, he used to spit tobacco, (c) he used to remain sleepless for entire night and wonder in the barrack, (d) he used to look towards the wall continuously, (d) he used to drink his own urine.

13. On the basis of the said communication, the learned Magistrate by outward No.1707 dated 16.5.2011, informed to the Superintendent of Central Prison, Aurangabad to refer the appellant-accused to Mental Hospital for his treatment, examination and report and further directed the Superintendent of Central Prison, Aurangabad to submit the report in respect of examination of appellant-accused to the court.

14. It further appears from the order passed as per Section 209 of Cr.P.C. that the learned J.M.F.C. Vaijapur on 11.7.2011 committed the case to the Sessions Court without waiting for examination report of the appellant-accused from Mental Hospital. On 21.9.2011 the Additional Sessions Judge-3, Aurangabad has framed charge vide Exh.3 against the appellant-accused for the offence punishable under Section 302 of I.P.C. and also recorded his plea.

15. On 24.9.2012, the defence counsel has submitted an application Exh.10 before the Sessions Court at Vaijapur in Sessions Case No. 163 of 2012 pointing out therein that despite the communication dated 16.5.2011 to the Superintendent of Central Prison, Aurangabad by J.M.F.C. Vaijapur, granting permission for referring the appellant-accused to the Mental Hospital, the order is not implemented. In the said application Exh.10, it is prayed that the appellant-accused may be sent to Mental Hospital for his examination. By order dated 24.9.2012, the learned Additional Sessions Judge, Vaijapur has passed the following order:-

"1. Heard.

2. The jailer is directed to refer the accused to mental hospital for examination and treatment and to submit report on or before 6.10.2012."

16. It further appears from the record that by letter dated 3/4-10-2012 Exh.11, the Superintendent of Central Prison, Aurangabad has forwarded a report of Superintendent of Psychiatrist Department, Government Medical College and Hospital, Aurangabad dated 1.10.2012.

17. The Superintendent of Psychiatrist Department, Government Medical College and Hospital, Aurangabad vide communication dated 1.10.2012 has informed that the appellant accused needs to be referred to the Regional Mental Hospital, Yerwada, Pune. On

examination, the Regional Mental Hospital, Yerwada, Pune by communication dated 27.12.2012 Exh.12 has reported to the Additional Sessions Judge, Vaijapur that the appellant-accused is unfit for trial and unfit for discharge.

18. By communication dated 2.4.2013 Exh.13 the Superintendent of Regional Mental Hospital, Yerwada, Pune has informed to the Additional Sessions Judge, Vaijapur/Aurangabad that the committee in the hospital has taken decision on 28.3.2013 that the appellant-accused is fit for discharge and trial. The Sessions Court, Vaijapur has received the said communication on 16.4.2013. The report of the said committee is also annexed to the communication Exh.13. It has been simply stated in the said report of the committee that the committee has observed that the appellant-accused is of sound mind and fit for trial.

19. On 16.7.2013, the appellant-accused has filed an application Exh.19 through his advocate stating therein that the said committee has not sent detail report and by forwarding a letter simply indicating that the appellant-accused is not of unsound mind. It has been brought to the notice of the court through the said application that the following reports are necessary to come to certain conclusion;-

- (1) Past and present history of the accused,
- (2) Physical and Neurological examination,

- (3) Psychological Testing,
- (4) Personality tests,
- (5) Intelligence Tests,
- (6) Psychomotor Tests,
- (7) Forensic Neurology – Role of neurologists,
- (8) Organic neurological Disorders,
- (9) Epileptic Insanity,
- (10) Epileptic Dementia,
- (11) Paroxysmal mental disorders,
- (12) Feigning insanity.

Though the trial court has directed the A.P.P. to file the say and even the learned A.P.P. has filed say, the trial court has not passed any order on it. Accordingly, the trial was completed.

20. Learned counsel for the appellant has vehemently submitted that there is no compliance of Section 329 of Cr.P.C. and as such, entire trial is vitiated. Section 329 of 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."

21. It is clear from bare reading 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.

22. 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.

23. 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.

24. In our considered opinion, it is 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 committee has submitted report to the effect that the appellant-accused is fit to be discharged and fit for trial, it is for the trial court to record the reasons to his satisfaction as to the capacity of accused to make his defence during trial by examining the concerned doctor of said committee of Regional Mental Hospital, Yerwada, Pune. Even the learned Judge of the trial court has not bothered to pass any order on the application Exh.19 filed by the appellant-accused and proceeded with the trial merely on the basis of the communication Exh.13 of the committee of the Regional Mental Hospital, Yerwada, Pune. The said committee of Regional Mental Hospital, Yerwada, Pune has simply communicated to the Additional sessions Judge Vaijapur in two lines i.e. on physical verification the appellant-accused appears

to be a person of sound mind and fit for trial.

25. It is part of record that the trial court has not recorded the finding in terms of Section 329 (1) (a), (b), (2) read with Section - section (1-A) of Section 329 of the Cr.P.C. Even the learned Judge of the trial court has not bothered to pass any order below Exh.19 recording his satisfaction about the mental capacity of the appellant/accused to enter into his defence, before the commencement of trial. Thus, 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 committee on the record as the trial court has not made any observations in the judgment about the said aspect.

26. 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."*

27. 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."*

28. 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."

29. 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."

30. 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."

31. 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."

32. It is clear from the ratio laid down in the above cited cases that the provisions of Section 329 of Cr.P.C. are mandatory in nature. We also agree with the view taken by 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. 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 21.8.2014 passed by the Additional Sessions Judge, Vaijapur in Sessions Case No. 163 of 2012 (State Vs. Ramesh s/o Dhondiram Najire) 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.
 - (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 capable 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) 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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