



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 138 OF 2022

Madhukar s/o Radhaji Fugnar,
Age : 45 years, Occu. Agril,
R/o. Kotambwadi, Tq. Loha,
Dist. Nanded.

...Appellant

Versus

The State of Maharashtra

...Respondent

.....
Mr. Rizvi Syed Mubashir Ali – Advocate [appointed] for the Appellant
Mrs. S. N. Deshmukh – APP for the Respondent/State
.....

CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, JJ.

DATE : 09TH SEPTEMBER 2024

ORDER [Per R. G. Avachat, J.] : -

1. Appellant was convicted for committing murder of his wife and, therefore, sentenced to suffer imprisonment for life and pay fine of Rs.1,000/- with default stipulation, vide Judgment and Order dated 28.09.2018 passed by learned Additional Sessions Judge, Gangakhed, in Sessions Trial No. 27/2016. He is therefore in Appeal before us.

2. We have heard learned advocate for the Appellant and the learned APP for the State as well. The matter was reserved for Judgment. While going through the evidence on record and other papers, we came across an application at Exh. 22 moved by the learned

advocate representing the Appellant before the trial Court. The gist of the application was that the Appellant was not keeping well mentally and, therefore, unable to give him instructions to defend him. The trial Court, therefore, referred the Appellant to Civil Surgeon, Parbhani for his medical examination and report. The Civil Surgeon reported back that it would be better to refer the Appellant (then accused) to Mental Health Establishment, Yerwada. The Trial Court accordingly passed the order and referred him to the Mental Health Establishment at Yerwada. He was kept under observation for more than thirty (30) days (Exh.20/4). The Superintendent, Regional Mental Hospital, Yerwada, Pune vide his communication dated 11.10.2017 informed the trial Court that the Appellant was of unsound mind. The said communication was preceded by the report dated 07.10.2017 [Exh. 30] declaring the Appellant unfit for trial and discharge by Visitors Committee on 25.09.2017.

3. Then there is report at Exh. 32 issued by the very authority on 02.11.2017 i.e. within three weeks of the last report. The relevant portion of the said report reads thus: -

Diagnosis : *Mild Mental Retardation.*

Impression : *There is no evidence of Psychosis. Patient was admitted on 4/8/2017. IQ test was done at SGH Pune and as per report, patient having Mild Mental Retardation. Patient shown No Signs or Symptoms of Psychosis. Pt. was declared - "Discharge with escort with report from SGH" by Visitors Committee on 31.10.2017.*

4. On receipt of the said report, the trial Court resumed the trial and concluded the same holding the appellant guilty of the offence. Chapter XXV of the Code of Criminal Procedure speaks about the provisions as to accused persons of unsound mind. Section 329 is relevant in this matter and, therefore, reproduced below: -

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.

[(1-A) 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 the psychiatry in the nearest medical college.]*

- (2) *[If such Magistrate or Court is informed that the person referred to in sub-Section (1-A) 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.]*

5. While Section 330 of Cr.P.C. speaks of release of person of unsound mind pending investigation or trial. While scrutinizing the papers and evidence as well, we came across a statement under Section 161 of Cr.P.C. of the brother of the Appellant indicating he (Appellant) was not keeping well psychologically ten (10) years before the incident. We find averments in the FIR to the effect that the deceased (wife of the Appellant) had made a phone call to her father asking him to ensure the medicines of her husband (Appellant) are brought. The Appellant's son Ravi was taking education and therefore residing at the house of his

maternal grand parents. This reference is there in the FIR. He was major at the relevant time. On our inquiry, he told us that this medicine pertains to keeping the Appellant mentally stable. We are conscious of the fact that whether this could be read in evidence. The fact remains that these are the papers/material collected by prosecution during its investigation.

6. After receipt of the report dated 02.11.2017, the trial Court was expected to hold an inquiry in terms of Section 329 of Cr.P.C. Without undertaking the said exercise, the Trial Court resumed the trial and concluded the same. Section 329(2) of the Cr.P.C. was a subject for interpretation in the case of Balu Ganpat Koshire v. State of Maharashtra, 1983 CRI. L. J. 1769. For better appreciation, we reproduce paragraph 7 thereof as under : -

7. *Under Section 329, Cr.P.C., if at the trial of any person, it appears to the Court that such person is of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, "..... try the fact of such 'unsoundness and incapacity'. Record here does not indicate compliance with this mandatory provision. All that happened was that the trial Court did take a prima facie view in favour of the accused and did postpone the trial pending his medical examination. But after medical examination, the trial Court did not try the fact of the purported unsoundness and incapacity of the accused, did not record finding as to his mental condition and defending capacity and without fulfilling this initial obligation forthwith resumed and concluded the trial on the main charge itself. The resulting lacuna was not innocuous but vital. Under sub-section (2) of S. 329, Criminal P.C., the trial of the fact of unsoundness of*

mind and incapacity of the accused "..... shall be deemed to be a part of his trial before the Court". Sequitur follows that the requisite trial under S. 329, Cr.P.C. was in this case not held at all. All that happened, if one may say so, was mere collection or receipt of evidence or material. But pursuant thereto no trial took place on the basic fact of unsoundness and incapacity of the accused. This vital lacuna would vitiate the trial. The doubt regarding the unsoundness and incapacity of the accused to defend himself at the main trial must per force continue to linger on, in the process rendering the validity of the further proceedings in the trial also doubtful. Taking this to its logical conclusion, the instant trial would be no trial in the eyes of law or, putting it differently, a void trial. It is, however, not necessary to go to that extent in the instant appeal because even on the assumption that the trial was valid, the accused here, on merits, established his claim to protection under Section 84, Penal Code, and consequently to an order of acquittal.

7. In view of the aforesaid legal proposition, the trial conducted by the Additional Sessions Judge (Trial Court) stood vitiated.

8. Now the question is whether the matter needs to be sent back to the trial Court for *de novo* trial preceded by inquiry under Section 329(2) of the Cr.P.C. The Appellant has been in Jail since 24.05.2016 i.e. little over eight (8) years and three (3) months. It was informed by the son of the Appellant that since they were unaware of the provisions regarding parole or furlough, resort thereof has not been had. As such, the Appellant continued behind the bars and was not out of Jail for single day.

9. We have interacted with the Appellant online. We also

interacted with the Jail Guards and the Medical Officer of the Prison wherein the Appellant has been lodged. It was informed that, for the last seven years, the conduct of the Appellant is good (not abnormal). He did no wrong to himself or co-prisoners. Today, both the Appellant's son and daughter are present before us. They orally undertook to take him back home and take his care. In the peculiar facts and circumstances of the case, we do not propose to send the matter back to the trial Court first for inquiry under Section 329(2) of the Cr.P.C. and then *de novo* trial as well. In exercise of our powers as an Appellate Court, we propose to close the proceedings against the Appellant pending before the trial Court by discharging him of the offence for which he was proposed to be prosecuted. We are conscious of the fact that the charge was framed in the case. Before parting, we appreciate the pains taken by the learned APP, In-charge of this Appeal, to assist us in this matter. In view of the above, we pass the following order : -

ORDER

- [i] The Criminal Appeal is Allowed.
- [ii] The proceedings before the trial Court are vitiated.
- [iii] The Appellant is discharged from Sessions Case No. 27/2016.
- [iv] We direct the Jailer to release the Appellant today itself.
- [v] Parties to act upon the authenticated copy of this order.

[vi] The Registrar (Judicial) of this Court is requested to ensure compliance of this order today itself.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

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