

GAHC010270692018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/111/2018

Sri Upen Basumatary,
S/o Santo Kumar Basumatary,
Village – godabari Gaon,
P.S. Dokmoka.

.....Appellant.

Versus

The State of Assam,
Represented by the Public Prosecutor,
Gauhati High Court, Guwahati,

.....Respondent.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

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| For the appellant | : Mr. D.K. Bhattacharyya, Mr. A. Gautam. Ms. D.R.A. Moumin | Advocates. |
| For the respondent | : Mr. B. Bhuyan Ms. P. Bora. | Addl. P.P. ... Advocate. |

Dates of hearing : 11.12.2023

Date of Judgment : 18.12.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. D.K. Bhattacharyya, learned counsel for the appellant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor assisted by Ms. P. Bora, learned counsel.

2. This appeal has been filed against the impugned judgment dated 04.06.2018 passed by the Court of Sessions Judge, Karbi Anglong, Diphu, Assam in Sessions Case No.35/2012, by which the appellant was convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.2,000/-, in default to undergo simple imprisonment for 6 (six) months.

3. The prosecution story in brief is that an FIR dated 10.03.2012 was submitted before the Officer-in-charge, Dokmoka Police Station by Prosecution Witness-2 (PW-2), stating that her husband Kamal Basumatary was murdered by the appellant with a spade, while the deceased was watching T.V in his house at about 4:30 p.m. Pursuant to the FIR dated 10.03.2012, Dokmoka P.S. Case No.11/2012 under Section 302 IPC was registered. The investigation of the case was initiated and after concluding the same, the I.O. submitted a charge-sheet, on finding a *prima facie* case against the appellant under Section 302 IPC.

4. The learned Trial Court framed charge under Section 302 IPC against the appellant, to which he pleaded not guilty and claimed to be tried.

5. The learned Trial Court thereafter examined 9 (nine) prosecution witnesses and after examining the appellant under Section 313 Cr.P.C, came to a finding that the appellant was guilty of killing his uncle. The appellant was accordingly convicted under Section 302 IPC and sentenced accordingly.

6. Mr. D.K. Bhattacharyya, learned counsel for the appellant submits that a perusal of the case records and the orders passed during the trial showed that the appellant appeared to be a person of unsound mind. As such, after the testimony of PW-1 & PW-2 had been recorded by the learned Trial Court, the learned Trial Court vide order dated 18.07.2016, had made an observation that the appellant seemed to be a person of unsound mind. The learned Trial Court, vide the said order dated 18.07.2016, directed that the appellant should be examined by medical experts in Diphu Civil Hospital, to ascertain as to whether the appellant was of unsound mind and to submit a report thereafter.

7. The learned counsel for the appellant submits that no report was made by the medical expert as had been directed by the learned Trial Court, vide order dated 18.07.2016. He submits that in view of the fact that no decision had been taken by the learned Trial Court with regard to it's apprehension/suspicion regarding the sanity of the appellant, the subsequent conviction of the appellant by the learned Trial Court could not be sustainable, keeping in view the provisions of Sections 328, 329, 334, 335 and 465 Cr.P.C. He accordingly

submits that the impugned judgment would have to be set aside, as no trial could have been concluded without the Trial Court having first taken a decision as to whether the appellant was a person of unsound mind. He also submits that though this Court is bound to set aside the impugned judgment, the appellant would have to be sent before a Mental Health Review Board constituted in terms of Section 74 of the Mental Healthcare Act, 2017 (hereinafter referred to as "the 2017 Act"), who would then be required to take a decision as to whether the appellant should be put in a mental hospital. With regard to his submission that the actions of a person of unsound mind and the explanation given by the said person under Section 313 Cr.P.C. should not be accepted as admissions of the true facts of the case, the learned counsel for the appellant has relied upon the Supreme Court judgment in ***I.V. Shivaswamy vs. The State of Mysore***, reported in **(1971) 3 SCC 220** and the Division Bench judgment of this Court in ***Bangla Bagti vs. The State of Assam***, reported in **(2012) 1 GLR 115**.

8. The learned counsel for the appellant submits that PW-1, who is the cousin of the appellant and daughter of the deceased, had stated that the appellant was of unsound mind as she used the words a "mentally disorder person" and keeping in view the suspicion/apprehension of the learned Trial Court in the order dated 18.07.2016 that the appellant appeared to be a person of unsound mind, there was a failure of justice in concluding the trial, without the learned Trial Court ascertaining whether the appellant was a person having an unsound mind, capable of defending himself. He accordingly prays that the impugned judgment and order should be set aside.

9. Ms. B. Bhuyan, learned Additional Public Prosecutor, on the other hand submits that the appellant in his confessional statement made under Section 164 Cr.P.C and during his examination under Section 313 Cr.P.C. has admitted to having killed his uncle. She also submits that the learned Trial Court, in the impugned judgment, has also gone into the issue of whether the appellant was a person of unsound mind at the time of the incident and had come to a finding that the act of the appellant in killing his uncle, was not due to unsoundness of mind in terms of Section 84 IPC, inasmuch as, no evidence had been led by the appellant, to show that the appellant suffered from unsoundness of mind. The learned Additional Public Prosecutor submits that the appellate Courts ought not to routinely re-appreciate evidence in a criminal case and the plea of unsoundness of mind under Section 84 IPC ought to be raised during the trial itself and not at the stage of appeal. In this regard she has relied upon the judgment of the Supreme Court in the case of ***Mohd. Anwar vs. State (NCT of Delhi)***, reported in ***(2020) 7 SCC 391***. She also submits that as there was no evidence given by any medical officer with regard to the appellant being of unsound mind, the learned Trial Court had rightly come to a finding that there was nothing to show that the appellant was of unsound mind. In this regard she has relied upon the judgment of the Supreme Court in the case of ***Prem Singh vs. State (NCT of Delhi)*** reported in ***(2023) 3 SCC 372*** and in the case of ***Prakash Nayi Alias Sen vs. State of Goa*** reported in ***(2023) 5 SCC 673***.

10. We have heard the learned counsels for the parties.

11. The question to be decided is whether the impugned judgment would be sustainable, keeping in view the fact that the learned Trial Court had not

decided the question whether the appellant was of unsound mind, despite having a suspicion/apprehension in that regard, as can be seen from the order dated 18.07.2016 passed by the learned Trial Court.

12. The evidence of PW-1 is to the effect that the occurrence of the incident took place on 09.03.2012 at about 4 p.m., when she was in her house. Her father was watching T.V and her mother was not at home. She had gone for a bath in the tubewell located near her house. Thereafter she heard sounds coming from her house. On hearing the sounds, she immediately went into the house and saw her father lying on a chair with blood around him. Out of fear she came out from the room and saw the deceased coming out from the room with a spade. While she was crying, the appellant fled kept the spade in the wood. Her father was thereafter taken to the Dokmoka PHC and was referred to Nagaon Civil Hospital. However, Nagaon Civil Hospital referred the case to GMCH. When the ambulance reached near Raha, the doctor declared her father dead. In her evidence PW-1 further stated that in the meantime the villagers had apprehended the appellant and tied him up. He was handed over to the police. The spade was also seized as was shown by the accused. PW-1 also identified the spade in the Court which was exhibited as material Exbt.1.

In her cross-examination, PW-1 stated that the appellant was her cousin brother and that it was a fact that the appellant was a mentally unsound person, as he used to sometime roam around with a knife and/or axe. PW-1 also stated that there was no quarrel before the occurrence of the incident with the elder father, i.e., the elder brother of the deceased and father of the appellant.

13. The evidence of all other prosecution witnesses are hearsay evidence.

14. The evidence of PW-7, who had conducted the Post Mortem examination of the deceased is to the following effect:

“General Appearance

Average built, height of 5ft 7" black hair, wearing yellow colored T-Shirt with light green vest and printed Gamosa, Mouth and Eyes are closed, Rigor Mortis is present. Injuries seen - clear cut incised wound on right eye brow size (2"x1"x1/2") and another clear cut injury on right side of the skull covering the right parietal area with a size 8"x1/2"x1", abrasion is seen in right forearm size is 2"x1".

Cranium and Spinal Canal

Clear cut incised wound size of 2"x1/2"x1 (1/2) on right eye brow. Another clear cut incised wound of 8x1/2x1(1/2) on right parietal area of the skull. Fracture of right frontal bone and right parietal bone. Membranes of the brain on right frontal and parietal is fractured. Right frontal and parietal area of the brain is cut.

Thorax

Walls of the ribs and cartilages healthy, No further findings. In my opinion the cause of the death is due to shock and hemorrhage following injury with sharp and heavy weapon. Ext-4 is the PM report Ext-4(1) is my signature Ext-4(2) is the signature of Joint Director of Health Services and Ext- 4(3) is the signature of the Superintendent of Diphu Civil Hospital.”

15. Interestingly the Investigating Officer of the case was not examined as he was not made a prosecution witness.

16. The appellant, during his examination under Section 313 Cr.P.C, admitted

to the lengthy evidence that had been recorded against him by giving answers to each question, starting from Question No.1 to 9, as "True". The remaining two questions and answers in regard to the examination of the appellant under Section 313 Cr.P.C. are reproduced here-in-below as follows :

“Q. No.10 Do you have anything to say?

Ans : Yes. At the time of occurrence I was a person of unsound mind. Now I am free from unsoundness.

Q. No.11 Do you intend to adduce defence evidence ?

Ans : No.”

17. The appellant, in his statement made under Section 164 Cr.P.C before the Magistrate on 15.03.2012, had stated that he had killed his uncle with a spade, as his uncle was not allowing him to stay on his land.

18. On perusing the records we find that the incident occurred on 10.03.2012 and the appellant was brought before the Senior Medical Health Officer (S.M & H.O), In-charge Dokmoka PHC on 11.03.2012, wherein the Doctor had given the following observation :

“Irrelevant talking”

However, in his remarks, the S.M & H.O had stated that the appellant was “fit otherwise” and was advised “psychiatry consultation”. The appellant was however not taken for psychiatry consultation by the Police nor was the same directed to be done by the Magistrate.

This doctor’s examination of the appellant on 11.03.2012 has however not been exhibited, though being a part of the Trial Court records.

19. As stated earlier, the learned Trial Court during the evidence stage, i.e. after recording the evidence of PW-1 & 2, in its order dated 18.07.2016, had made an observation that the accused seemed to be a person of unsound mind. It therefore ordered that the appellant should be examined by expert medical officers of Diphu Civil Hospital, to ascertain whether the appellant was of unsound mind. A report to this effect was to be submitted thereafter. However, the same was not done. The order dated 18.07.2016 passed by the learned Trial Court is reproduced herein below as follows :

“18.07.2016

Accused Shri Upen Basumatary is produced from custody. Shri P.N. Boro, Ld. S.D. Advocate is present. Shri U.N. Dutta, Ld. PP is also present. No PW is present. Issue summon to PWs namely Smti. Sushila Basumatary and Shri Prabit Basumatary.

Fix 22.09.2016 for evidence. Accused is as before.

Seen the guilty plea petition of the accused Shri Upen Basumatary receive through the Prosecuting Inspector, Diphu. On query, accused could not say anything about the contents of the petition. On further observation, accused Shri Upen Basumatary seems to be a person of unsound mind. Hence, in exercise of the powers conferred upon me U/S 328/329 Cr.PC, it is hereby ordered that the accused Shri Upen Basumatary be examined immediately by the expert Medical Officers of Diphu Civil Hospital to ascertain as to whether the accused person is of unsound mind or not and submit a report thereon to this court on or before the next date. Superintendent, District Jail, Diphu is directed to make necessary arrangements accordingly for medical examination of the accused person at Diphu Civil Hospital. Inform Superintendent, Civil Hospital, Diphu for compliance.

In view of the above, summon to PWs need not be issued till receipt of the medical examination report.

Copy of this order be sent to all concerned for compliance.

As dictated"

20. The learned Trial Court, in the impugned judgment and order, has also gone into the question of whether the appellant was of unsound mind, by devoting 7 paragraphs of the impugned judgment, to come to a finding that the act of the appellant did not attract Section 84 of IPC, thereby meaning that the appellant was of sound mind at the time of commission of the act of murder. As can be seen from the evidence of the appellant's cousin and daughter of the deceased, i.e. (PW-1) in her cross-examination, the unexhibited doctors examination report dated 11.03.2012, the learned Trial Court's order dated 18.07.2016 and the impugned judgment passed by the learned Trial Court, a common thread running at the time of enquiry of the case and during the trial, is the question regarding the soundness of mind of the appellant. The fact that the appellant was of unsound mind even prior to the incident has also been confirmed by PW-1 in her cross-examination.

21. This Court, vide order dated 08.08.2023, had held that a perusal of the records would reveal that right from the inception of the case, there was an indication that the appellant appeared to be mentally unsound at the time of the incident. This Court observed that the Deputy Commissioner, Karbi Anglong, Diphu, who conducted the proceedings of this case at the relevant point of time, when the Judiciary was not separate from the Executive, had made an observation in his order dated 18.07.2016 that the appellant seemed to be a person of unsound mind. Thus, by exercising powers under Sections 328 and 329 Cr.P.C, it directed that the accused be examined at the Civil Hospital, Diphu,

by expert Medical Officers and give a report of the same. Subsequent to the order dated 08.08.2023 passed by this Court, the Medical Board consisting of three doctors, i.e, Professor of Psychiatric, GMCH, Assistant Professor of Psychiatric, GMCH and Registrar of Psychiatric, GMCH have made a report dated 21.08.2023, stating that the appellant was examined on 19.08.2023 and that the Board opined that with available mental examination evidence, the appellant was suffering from Chronic paranoid schizophrenia and was having unsoundness of mind. The Board also stated that the appellant needed regular treatment and periodic follow up was advised, for optimum recovery of his illness.

22. The medical report of the appellant made by the Board on 21.08.2023 is reproduced herein below as follows :

“MEDICAL REPORT OF UPEN BASUMATARY

HOSPITAL NO.: 343639/23

OPD REGISTRATION NO.: DDC 1652/23

DATE OF EXAMINATION: 19/08/23

IDENTIFICATION MARKS: 1) One black mole under right eye

2) Scar mark on right cheek under eye

WITNESSES: 1) UBC 1425 Basudev Malakar

2) ABC 1124 Uttam Bora

Convict AC/5773 Shri Upen Basumatary, 43 years, male, C/O District Jail Diphu, Karbi Anglong was brought from Cental Jail, Guwahati to Gauhati Medical College and Hospital for mental state examination by a medical Board as formed by the Superintendent, GMCH (Ref. No. MCH/82/87/pt-29/203) and was examined on 19/08/2023 in the seminar room, Department of Psychiatry. The clinical history was taken from the patient himself and the legal documents that were available.

According to the patient, since 10 years prior to allegedly committing the murder of his paternal uncle, the patient had been hearing multiple voices of nearby villagers. The voices were also commanding him at times to do various things. He also believed that many people in his village were controlling him via a remote and phone and that they

were conspiring against him to take away his land and withhold his matriculation certificate in order to prevent him from studying further. He reported of remaining fearful and distressed most of the time during that period. He also reveals that the voices were commanding him to kill his uncle otherwise they were threatening to kill him.

On current mental state examination, patient is alert, conscious but guarded. Eye to eye contact is made but not maintained and rapport could not be established. His built is mesomorphic with normal psychomotor activity. His speech is coherent, relevant, reaction time is increased with decreased productivity. Mood is subjectively reported to be well but objectively apathetic with inappropriate affect. There is delusion of persecution along with auditory hallucination. Judgement and reasoning could not be ascertained due to inadequate speech output. He does not have any insight about his mental condition/state.

Opinion: With the available clinical history and mental state examination findings, the Board is of the opinion that, Shri Upen Basumatary has been suffering from chronic paranoid schizophrenia and is having unsoundness of mind at present. He needs regular treatment and periodic follow-up as advised for optimum recovery of his illness.

(Dr. Suresh Chakravarty)

(Dr. Utpal Bora)

(Dr. Sriparna Bhattacharyya)

Professor of Psychiatry, GMCH

Assistant Prof. of Psychiatry, GMCH

Registrar of Psychiatry, GMCH

cum

cum

cum

Chairman,

Member,

Member,

Medical Board

Medical Board

Medical Board"

23. Chapter XXV of the Cr.P.C, consisting of Sections 328 to 339, relates to provisions applicable to accused persons of unsound mind. Section 328 Cr.P.C. provides that when a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the

State Government may direct, and thereupon shall examine such surgeon or other officer as a witness and shall reduce the examination to writing. It further provides that if a Magistrate is informed that the persons against whom the inquiry is made is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate 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.

The proviso to Section 328(3) provides that if a Magistrate finds 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 proceeding for such period, as the opinion of the psychiatrist or clinical psychologist is required for the treatment of the accused and order the accused to be dealt with as provided under Section 330, which provides for grant of bail to persons of unsound mind. However, if the Magistrate/Court determines that the mental retardation of an accused makes him incapable of entering defence, the Magistrate/Court shall order the closure of the inquiry and deal with the accused in the manner provided under Section 330 Cr.P.C.

24. Section 329 Cr.P.C provides that if at the trial of any person, 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 is satisfied of the fact, the same shall be recorded and he

shall postpone further proceedings in the case. If the Magistrate or the Court is informed that the accused person is of unsound mind, the Magistrate 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.

Section 329(3) and the proviso to Section 329(2) provides that if the Magistrate/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 is required for the treatment of the accused. However, if the Magistrate/Court finds that a *prima facie* case is made out that the accused is incapable of entering defence by reason of mental retardation, he or she shall not hold the trial and order the accused to be dealt with in accordance with Section 330 Cr.P.C.

25. As can be seen from the records of the learned Trial Court, the appellant had been arrested on 10.03.2012 and the Doctor who examined him on the next date, i.e. 11.03.2012 made an observation "Irrelevant Talking". Further, the Doctor had advised "psychiatry consultation". Instead of the Police and the learned Magistrate/Court concerned making an attempt to follow up the medical advice, the police had forwarded the appellant before a Magistrate on 15.03.2012, for recording his statement under Section 164 Cr.P.C, wherein he admitted to killing his uncle with a spade, as his uncle allegedly did not allow him to stay on his land. However, there is nothing to show in the evidence of the witnesses that the appellant was staying in the land of his uncle in the first

place.

26. As can be seen from the order dated 18.07.2016 passed by the learned Trial Court, a reasonable doubt had arisen with regard to whether the appellant was of unsound mind and accordingly a report had been called for, in terms of Section 329 Cr.P.C. However, the order dated 18.07.2016 was not acted upon and as such, the learned Trial Court did not take any decision as to whether the appellant was of unsound mind, who was capable of defending himself.

27. As stated earlier, PW-1 had stated in her cross-examination that the appellant was having a mental disorder and that sometimes he roamed around with an axe and/or a knife. She also stated that there was no quarrel before the occurrence of the event with the elder father, i.e. the elder brother of the deceased and father of the appellant.

28. The Medical Board constituted in terms of the order of this Court, during the pendency of this appeal submitted its report on 21.08.2023, stating that the appellant was suffering from chronic paranoid schizophrenia and was of unsound mind at the time of examination of the appellant. The above facts now lead us to decide as to whether the appellant was fit to stand trial, capable of understanding what he had actually done and was capable of understanding the questions put to him during his examination under Section 313 Cr.P.C and the consequences thereof.

29. The Supreme Court has held that an accused who seeks exoneration from the liability of an act under Section 84 of IPC has to prove legal insanity and not

medical insanity. In the case of ***Surendra Misra vs. State of Jharkhand***, reported in **(2011) 11 SCC 495**, the Supreme Court has held that an accused who seeks exoneration from liability of an act under Section 84 IPC is to prove legal insanity and not medical insanity. The Supreme Court at paragraph 13 and 14 held as follows :

“13. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Indian Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him.

14. Reference in this connection can be made to a decision of this Court in the case of *T.N. Lakshmaiah v. State of Karnataka*, in which it has been held as follows:

“9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case

to the hilt but because the version given by him casts a doubt on the prosecution case.

10. In State of M.P. v. Ahmadulla, this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration (a)]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.

11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."

In the case of ***Hari Singh Gond vs. State of Madhya Pradesh***, reported in **(2008) 16 SCC 109**, it has been held that the expression "unsoundness of mind" has not been defined in the penal code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meanings in different context and describes varying degrees of mental disorder. Every person, who is suffering from mental disorder is not *ipso facto* exempted from criminal liability.

30. In the case of ***Bapu vs. State of Rajasthan***, reported in **(2007) 8 SCC 66**, the Supreme Court has held that Section 84 embodies the fundamental

maxim of criminal law i.e. *actus non reum facit nisi means sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur, but in the case of insane persons, no culpability is fastened on them as they have no free will. Thus, to invoke the benefit of Section 84 IPC, an accused would have to show that he was unable to apprehend what he was doing. In the case of ***Hari Singh Gond (supra)***, the Supreme Court has held that mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 IPC.

31. In the case of ***Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat***, reported in ***AIR 1964 SC 1563***, the Supreme Court has given the following propositions as the doctrine of burden of proof in the context of the plea of insanity which is as follows :-

“(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.

(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Penal Code, 1860: the accused may rebut it by placing before the court all the relevant evidence-oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.

(3) Even if the accused was not able to establish conclusively that he was, insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.”

32. Thus, in terms of the judgment of the Supreme Court in ***Dahyabhai Chhaganbhai Thakkar (supra)***, it is the requirement of the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea*. It has further held that the prosecution and the accused can rebut each others presumption as to whether the accused was of unsound mind or not when he committed the crime. It further held that even if the accused had not established conclusively he was insane at the time he committed the offence, the evidence placed by the parties, if it raises a reasonable doubt in the mind of the Court, the accused would be entitled to be acquitted.

33. In the case of ***Bapu (supra)***, the Supreme Court has held that the onus of proving unsoundness of mind is on the accused. However, when the previous history of insanity is revealed during investigation, it is the duty of the honest Investigator to subject the accused to a medical examination and place that evidence before the Court. If the same is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The Supreme Court further held that it is difficult to prove the precise state of the offender's mind at the time of commission of the offence, but some indication thereof is often furnished by the conduct of the offender, while committing it or immediately after the commission of the offence.

34. In the case of ***Devidas Loka Rathod vs. State of Maharashtra***, reported in ***(2018) 7 SCC 718***, the Supreme Court has held that in cases where benefit of Section 84 IPC is given, the onus on the accused under Section

105 of the Evidence Act is not stringent as on the prosecution to be established beyond all reasonable doubt. The accused has only to establish his defence on a preponderance of probability, after which the onus shifts to the prosecution to establish the inapplicability of the exception.

35. In the case of ***Prakash Nayi Alias Sen vs. State of Goa*** reported in ***(2023) 5 SCC 673***, the Supreme Court has held that as per Section 334 Cr.P.C, the judgment of the Court shall include a specific finding that the act was committed due to unsoundness of mind, though it was actually done. The reason being that there cannot be an acquittal on the ground of unsoundness of mind, unless the act is actually done. The Supreme Court also quoted some text written by experts regarding mental illness caused by schizophrenia and had come to the conclusion that schizophrenia was certainly a overpowering mental illness. In ***Prakash Nayi Alias Sen (supra)***, the Supreme Court had given the benefit of Section 84 IPC to the accused, by coming to a finding that the appellant therein was indeed suffering from schizophrenia and was unable to understand the act committed by him. The text/articles from various books written by experts on the subject of schizophrenia, has been enumerated in paragraph 19 of the judgment, which is reproduced herein below as follows :

“Schizophrenia

19. Now, we shall come to the mental illness caused by Schizophrenia. We do not wish to go into the said issue as it being one within the exclusive knowledge of the experts, except to quote the relevant text available:

19.1 Jaisingh P. Modi, a textbook on Medical Jurisprudence and Toxicology, 26th Edn. 2018, p. 922:

“(ii) Schizophrenia - Kraepelin (Emil Kraepelin, German psychiatrist.), in 1896, named this disease as dementia praecox. In 1911, Eugen

Bleuler (Paul Eugen Bleuler, Swiss psychiatrist and Eugenicist.) introduced the term 'schizophrenia' which literally means disintegration of mind. The term dementia praecox was changed because it implied that the disease always ended in dementia, which it did not. The term praecox meant that the disease developed at the time of puberty or adolescence, but in many cases developed outside that period. Since it was thought that the disease always ended in dementia, it meant a hopeless prognosis, which created a spirit of defeatism in the minds of people."

19.2 Elizabeth A. Martin (2007) "Oxford Concise Medical Dictionary (7th edition)" p. 642:

*“**Schizophrenia** n. a severe *mental illness characterised by a disintegration of the process of thinking, of contact with reality, and of emotional responsiveness. Positive symptoms, such as *delusions and *hallucinations (especially of voices), are common, and any *Schneiderian first-rank symptoms are particularly indicative of the illness. Negative symptoms include social withdrawal, impairment of ego boundaries, and loss of energy and initiative. Schizophrenia is diagnosed only if symptoms persist for at least one month. The illness can spontaneously remit, run a course with infrequent or frequent relapses, or become chronic. The prognosis has improved with *anti-psychotic drugs and with vigorous psychological and social management and rehabilitation. The many causes include genetic factors, environmental stress, and possibly illicit drug use.”*

19.3 American Psychiatric Association 2013, Diagnostic and Statistical Manual of Mental Disorders: DSM-5, 5th Edn. American Psychiatric Association, Washington DC. p. 87:

“Schizophrenia spectrum and other psychotic disorders include schizophrenia, other psychotic disorders, and schizotypal (personality) disorder. They are defined by abnormalities in one or more of the following five domains: delusions, hallucinations, disorganized thinking (speech), grossly disorganized or abnormal motor behavior (including catatonia) and negative symptoms.”

36. In the case of *Bangla Bagti vs. The State of Assam*, reported in **(2012) 1 GLR 115**, the Division Bench of this Court held that the accused therein was suffering from a mental disorder, i.e. schizophrenia and the examination of the accused under Section 313 Cr.P.C., which is a statutory obligation requiring the accused person to be mentally fit to properly understand the legal implications of the incriminating evidence/materials, brought against him and the question put to him. The Division Bench of this Court further held that as the Trial Court did not decide the question as to whether the accused therein was having an unsound mind, it was doubtful if the accused therein was capable of understanding the legal implications and the consequences of his answers during examination under Section 313 Cr.P.C, in view of the diametrically opposite stands taken at the time of framing of charge vis-a-vis at the time of examination under Section 313 Cr.P.C. The accused person therein was thus acquitted by this Court. The Division Bench quoted articles and texts in relation to schizophrenia in paragraph 38, 39 & 40 of the judgment, which are as follows :

“38. What is schizophrenia and what are its symptoms have been outlined by the National Center for Bio-Technology Information, U.S. National Library of Medicine 8600 Rockville Pike, Bethesda MD. 20894 USA as follows:-

"Schizophrenia.

Last reviewed: February 7,2010.

Schizophrenia is a mental disorder that makes it difficult to tell the difference between real and unreal experiences, to think logically, to have normal emotional responses, and to behave normally in social situations.

Causes, incidence, and risk factors.

Schizophrenia is a complex illness. Even experts in the field are not sure what causes it.

Genetic factors appear to play a role. People who have family members with schizophrenia may be more likely to get the illness themselves.

Some researchers believe that environmental events may trigger schizophrenia in people who are already genetically at risk for the disorder. For example, infection during development in the mother's womb or stressful psychological experiences may increase the risk for developing schizophrenia later in life. Social and family support appears to improve the illness.

Schizophrenia affects about 1 % of people worldwide. It occurs equally among men and women, but in women it tends to begin later and be milder. For this reason, males tend to account for more than half of patients in services with high numbers of young adults. Although schizophrenia usually begins in young adulthood, there are cases in which the disorder begins later (over age 45).

Childhood-onset schizophrenia begins after age 5 and, in most cases, after normal development. Childhood schizophrenia is rare and can be difficult to tell apart from other developmental disorders of childhood, such as autism.

Symptoms.

Schizophrenia may have a variety of symptoms. Usually the illness develops slowly over months or years. Like other chronic illness, schizophrenia cycles between periods of fewer symptoms and periods of more symptoms.

At first, you may feel tense, or have trouble sleeping or concentrating. You can become isolated and withdrawn, and have trouble making or keeping friends.

As the illness continues, psychotic symptoms develop:

- *Appearance or mood that shows no emotion (flat affect)*
- *Bizarre movements that show less of a reaction to the environment (catatonic behavior)*
- *False beliefs or thoughts that are not based in reality (delusions).*
- *Hearing, seeing, or feeling things that are not there (hallucinations)*
- *Problems with thinking often occur:*
- *Problems paying attention*
 - *Thoughts "jump" between unrelated topics (disordered thinking)*
 - *Symptoms can be different depending on the type of schizophrenia:*
 - *Paranoid types often feel anxious, are more often angry or argumentative, and falsely believe that others are trying to harm them or their loved ones.*
 - *Disorganized types have problems thinking and expressing their ideas clearly, often exhibit childlike behaviour, and frequently show little emotion.*
 - *Catatonic types may be in a constant state of unrest, or they may not move or be underactive. Their muscles and posture may be rigid. They may grimace or have other odd facial expressions, and they may be less responsive to others.*
 - *Undifferentiated types may have symptoms of more than one other type of schizophrenia.*
 - *Residual types experience some symptoms, but not as many as those who are in a full-blown episode of schizophrenia. People with any type of schizophrenia may have difficulty keeping friends and working. They may also have problems with anxiety, depression, and suicidal thoughts or behaviors."*

39. According to the Butterworth's Medical Dictionary the meaning of the term schizophrenia means :-

"Schizophrenia (ski.zo.fre.ne.ah). A mental disorder characterized by

a special type of disintegration of the personality: thought processes are directed by apparently random personal associations rather than logically to a goal, there is incongruity between the content of thought and the corresponding emotion, and an impaired relation to reality. Delusions, hallucinations and Catania may be predominant features. [Gk schizen to split, phren mind.]

40. *Schizophrenia, also sometimes called split personality disorder, is a chronic, severe, debilitating mental illness. It is one of the psychotic mental disorders and is characterized by symptoms of thought, behaviour, and social problems. The thought problems associated with schizophrenia are described as psychosis, in that the person's thinking is completely out of touch with reality at times. For example, the sufferer may hear voices or see people that are in no way present or feel like bugs are crawling on their skin when there are none. The individual with this disorder may also have disorganized speech, disorganized behaviour, physically rigid or lax behaviour (catania), significantly about themselves or feelings, as well as delusions, which ideas about themselves or others that have no basis in reality (for example, experience the paranoia of thinking others are plotting against them when they are not)."*

37. In the case of ***Ratan Lal vs. State of Madhya Pradesh*** reported in ***(1970) 3 SCC 533***, the Supreme Court has held that if from the materials placed on record, a reasonable doubt is created in the mind of the Court with regard to the mental condition of the accused at the time of occurrence, he shall be entitled to the benefit of the reasonable doubt and consequential acquittal.

38. In the present case, a perusal of the questions put to the appellant at the time of his examination under Section 313 Cr.P.C, leaves us wondering as to whether the appellant could have answered all the evidence adduced that had

been put into one question. The question no.1 put to the appellant is basically the entire evidence given by PW-1, except for the cross-examination. The only answer given by the appellant to the said question no.1 is "True".

39. On perusing the examination of the appellant under Section 313 Cr.P.C, we are of the view that the appellant has not been given a fair chance to comprehend the questions put to him and without understanding the true import of the questions put to him. The appellant has given a very simple answer by saying "True" to Question Nos.1 to 9, out of 11 questions put to him. To show the manner of questions put to the appellant, question no.1 and the answer given by the appellant under Section 313 Cr.P.C are reproduced herein below as follows :

“Q. No.1 PW-1 stated "She knows you and your name is Upen Basumatary who is her cousin. The complainant Susila Basumatary is her mother. The deceased Kamal Basumatary is her father and you killed him.They lived separately. Shanta Basumatary and B. Basumatary are brothers of her deceased father. At the time of occurrence they lived separately. The occurrence took place on 09-03-12 at about 4 pm and on that day she was at her house and her father was enjoying television and her mother was not at home. Her mother went to the house of one Gopal Paswan for inviting Holi festival whose house is situated about 1 km away from their house. Before the occurrence on the day she came to Diphu to attempt annual sports meet and thereafter she returned to Dokmoka High School. Her father came to Dokmoka to bring her. Accordingly she reached their house before the occurrence. On reaching home she slept for a while thereafter her father told her to go for bath. Accordingly she went for bath to tube well located near their house. Her father was enjoying TV. At that time she heard sound "dhum dhum" from their house. On hearing house she immediately came to their house and saw her father lying on the chair with blood stains. On fear she came out

from the home. Thereafter she saw the accused Upen Basumatary coming from the room with a spade. Then she cried. Her father was no more. Then the accused Upen Basumatary fled away keeping the spade in wood. On hearing her crying Shri Probit Basumatary and his wife Vandana Basumatary came to their house and they called an Ambulance popularly known as 108. After a few minutes Ambulance reached their house. One Lakhindar Basumatary brought her father to Dokmoka PHE. Thereafter Dokmoka PHE referred the case to Nagaon Civil Hospital. In the mean time information was given to her mother about the matter by the villagers. On getting information her mother immediately came back and on the way her mother met the Ambulance and accompanied her deceased father in taking him to Nagaon Civil Hospital. Nagaon Civil Hospital also referred the case to GMCH. While the Ambulance reached near Roha. Her deceased father was declared dead. Thereafter dead body was taken to their house. She was at their house. Due to night FIR was not lodged at Thana on the same day. Next day morning FIR was lodged at Doboka Thana by her mother. Thereafter Police came to their house. In the mean time the villagers apprehended you and tied you in the house. You were handed over to the Police. Police interrogated her and recorded her statement. Police also interrogated you. On interrogation you confessed the occurrence. Police seized a spade as shown by the accused. Ext-1 is the seizure list. Police also seized one red color plastic chair with arms. M-Ext-1 is the spade and M-Ext-2 is the plastic red color chair. Police arrested you. You sometimes used to make quarrel about the land.

"What is your saying?"

Ans: True"

How can the appellant know all the aspects/facts stated by PW-1 in her testimony, as he had left the house of the deceased, after killing him. It is very clear that the appellant has not been asked specific and separate questions. There is palpable irregularity in the manner questions have been put to him, which in our opinion amounts to a serious irregularity. We are of the view that

the manner in which the questions have been put to the appellant, keeping in mind the unanswered question of unsoundness of mind of the appellant by the learned Trial Court has caused prejudice to the appellant and as such, has vitiated the trial.

40. In the case of ***Rajkumar vs. State (NCT) of Delhi***, reported in **2023 SCC Online 609**, the Hon'ble Supreme Court has held that while examining the accused under Section 313 of the Code of Criminal Procedure, the accused should be drawn to every inculpatory material so as to enable him to explain it, as the same amounts to basic fairness of a criminal trial. Failure in this area may gravely imperil the validity of the trial itself. The Hon'ble Supreme Court further held that in the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. The Hon'ble Supreme Court in the above case at para 17 has summarized the law laid down in various cases and held as follows:-

“17. The law consistently laid down by this Court can be summarized as under:

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under [Section 313](#) is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under [Section 313](#) of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered."

41. As held by the Supreme Court in the case of ***Bapu (Supra)***, it was the duty of the police and the Magistrate to subject the appellant to a more strenuous/specific medical examination, as the Doctor who had examined the appellant on 11.03.2012 had advised "psychiatry consultation" of the appellant. As the same was not done and as the trial was concluded even though the learned Trial Court was also having serious doubt with regard to the sanity of the appellant, the same creates a serious infirmity not only in the prosecution case, but in the very conduct of the trial itself. As such, in line with the judgment of the Supreme Court in ***Bapu (Supra)***, the benefit of doubt would have to be given to the appellant, regarding the appellant's capability to understand the action and the consequences of him killing the deceased.

42. As held by the Supreme Court in the case of ***Prem Singh vs. State (NCT of Delhi)***, reported in ***(2023) 3 SCC 372***, Section 329 Cr.P.C provides that in a trial before the Court of Sessions, if the accused appears to be of

unsound mind and consequently incapable of making his defence, then the Court shall, in the first instance try the fact of such unsoundness and incapacity and if satisfied in this regard, shall record a finding to the effect and shall postpone further proceedings. In the present case, there is nothing to doubt the finding of the learned Trial Court that the appellant had caused the death of the deceased. Despite the learned Trial Court directing medical examination of the appellant, as there was a doubt with regard to his sanity, which implied that he was incapable of defending himself, no such examination was done.

43. Section 332 Cr.P.C provides that if the Court considers the accused is capable of making his defence, the inquiry or trial shall proceed. However, if it finds the accused to be incapable of making his defence, the Court shall act according to Section 328 and 329 Cr.P.C as the case may be and if he is incapable of making his defence, the Court shall deal with the accused in accordance with the provision of Section 330 Cr.P.C. Section 330 of Cr.P.C. provides for release of a person of unsound mind pending investigation or trial and Section 334 Cr.P.C provides for judgment of acquittal on ground of unsoundness of mind. In the present case, without first deciding as to whether the appellant was of sound mind, despite having reservations on the same, the trial had concluded with the appellant being found guilty of the crime under Section 302 IPC.

44. In view of the fact that there was a doubt on the mind of the learned Trial Judge that the appellant was of sound mind, coupled with the evidence of PW-1 in her cross-examination, the unexhibited Doctor's report made on 11.03.2012 and the Medical Board Report dated 21.08.2023 proving that the appellant was

an unsound mind, it cannot be said with certainty that the appellant was in a sound state of mind at the time he killed the deceased. The Medical Report dated 21.08.2023 states that the appellant's judgment and reasoning could not be ascertained due to inadequate speech output and he did not have any insight about his mental condition/state.

45. The records show that the Investigating Officer (IO) was not examined by the learned Trial Court as a prosecution witness. In the case of ***Behari Prasad vs. State of Bihar***, reported in ***(1996) 2 SCC 317***, the Supreme Court has held that non-examination of the IO is not fatal to the prosecution case, especially when no prejudice was likely to be suffered by the accused. In the present case, the Doctor who examined the appellant one day after the incident, i.e. on 11.03.2012, had advised that the appellant should be given "psychiatry consultation". However, the same was not done by the IO as was expected to be done, as in terms of the Supreme Court decision in ***Bapu (supra)***, it was the duty of an honest Investigator to subject the accused to a medical examination and place that evidence before the Court. As the same was not done by the IO and as the IO has not been examined to answer questions as to why the same was not done, we find the non-examination of the IO as a prosecution witness creates a serious infirmity in the prosecution case. Besides the I.O/Police not doing the same, the Magistrate before whom the appellant was first brought to, should have sent the appellant for examining whether he was having any psychiatry problem. However, the same appears to have not been done also. Accordingly, the learned Trial Court could not come to a finding under Section 328 Cr.P.C, with regard to whether the appellant was capable of defending himself during inquiry. Further, the IO could have given some

evidence, as to the mental condition and other relevant factors pertaining to the appellant at the time of the incident. We are aware that mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour affords no protection under Section 84 IPC. However, though it is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof could have been furnished by the IO. As the IO has not been examined as a prosecution witness, we are of the view that the same has created a serious infirmity in the prosecution case and has caused prejudice to the appellant.

46. With regard to the appellant not leading any evidence to prove that he was of unsound mind, we are of the view that if the appellant was of unsound mind, he would not be in a fit state of mind to defend himself. Further, as per the finding of the learned Trial Court in paragraph 22 of the impugned judgment, no relative of the appellant came forward for taking the accused out on bail, which implies that the appellant was left to his own devices by his family/ relatives. In the backdrop of the above facts and circumstances, it would have been nigh impossible for the appellant to defend himself, keeping in view his illness and the non-compliance of Section 329 Cr.P.C by the learned Trial Court. The facts of the case also show that the issue of the appellant being of unsound mind was a common thread running from the time prior to the incident till the impugned judgment was passed.

47. Section 330 Cr.P.C provides that if a person is found to be incapable of entering defence by reason of unsoundness of mind or mental retardation under Section 328 or Section 329 Cr.P.C, the Court shall release such person on bail.

Under Section 331 C.P.C, the inquiry or trial which has been postponed under Section 328 or Section 329 may be resumed after the person concerned has ceased to be of unsound mind. However in the present case, the inquiry and trial was completed without the Police, Magistrate or Court having come to any final decision with regard to whether the appellant was of unsound of mind under Section 328/329 Cr.P.C. Section 105 of the Evidence Act, 1872 deals with the burden of proving the existence of circumstances bringing the case within any of the exceptions specified in the Indian Penal Code and provides that the burden of proving the same is upon the accused. Section 84 IPC states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.

48. In the case of ***Dahyabhai Chhaganbhai Thakker vs State of Gujarat***, reported in ***AIR 1964 SC 1563***, the Supreme Court has held as under :

“the doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:

(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.

(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 IPC: the accused may rebut it by placing before the court all the relevant evidence-oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.

(3) Even if the accused was not able to establish conclusively that he was, insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the

mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged”.

The problem in this case is that though PW-1 had stated in her evidence that the appellant had a mental disorder prior to the incident and that there were signs of unsoundness of mind on the part of the appellant after the incident, as reflected by the Doctor's report and Trial Court order, the Magistrate/Court did not try to come to any definite finding whether the appellant was of unsound mind. As Section 328/329 Cr.P.C would only be relatable to an inquiry and trial, the appellant was to prove unsoundness of mind at the time of occurrence of the incident.

49. In the case of ***State of Madhya Pradesh vs. Ahmadullah***, reported in ***AIR 1961 SC 998***, the Supreme Court has held that to establish insanity, it must be clearly proved that at the time of committing the act, the party is labouring under such defect of reason, as not to know the nature and quality of the act which he is committing. However, in the present case, the appellant has been left all alone and no family or relatives of the appellant have come to help him, either by asking for his release on bail or coming forward with an explanation that the appellant was of unsound mind. As the appellant has not adduced any evidence to show that he was of unsound mind at the time the incident occurred and as plenty of water has gone under the bridge, keeping in view the inaction of the police and the Court under Section 328/329 Cr.P.C, it would be impossible at this stage to know the state of mind of the appellant at the relevant point of time. That the appellant has been having problems with his mental makeup prior to the incident and also after the incident is quite

apparent. Further, schizophrenia is a powerful disease which has an overpowering effect on a person's mental state of mind. There is no report from the jail Doctor or otherwise with regard to the appellant's mental condition during the time spent in the jail. In any event, , keeping in mind the testimony of PW-1, the Doctor's advice for "psychiatry consultation" and the Trial Court order dated 18.07.2016, the inquiry/trial should have been stopped until a decision had been taken under Section 328/329 Cr.P.C, as to whether the inquiry/trial should have been stopped. As the same has not been done, we are of the view that the appellant has not been given a fair opportunity to defend himself, as his capability to defend himself had not been decided. The same being a mandatory condition under Section 328/329 Cr.P.C, the failure to take a decision on the capability of the appellant to defend himself has caused prejudice to the appellant and in our view has occasioned a failure of justice.

50. On considering all the above facts and the various texts/articles written by the experts, we are of the view that the benefit of reasonable doubt would have to be given to the appellant, as it would be unsafe to come to a finding that the appellant was of sound mind at the time the incident occurred. Accordingly, we are of the view that though the appellant was the person who killed the deceased with a spade, we cannot say with certainty that the appellant was of sound mind at the time the incident occurred, i.e. it cannot be said that the appellant was capable of understanding the consequences of his action. Further, as held by the Supreme Court in the case of ***Prem Singh (supra)***, schizophrenia being a overpowering mental illness, there is a possibility that the appellant was unable to understand the act committed by him and as such, we are of the view that it cannot be said with certainty that the appellant was in a

fit state of mind to stand trial.

51. Section 334 of the Cr.P.C. provides that whenever any person is acquitted on the ground that at the time at which he is alleged to have committed an offence, he was by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

52. Section 335 of the Cr.P.C. provides that whenever a Magistrate or the Court finds that the accused person committed the act alleged, but for the incapacity found on the accused, it shall order such person safe custody or order such person to be delivered to any relative or friend of such person.

Section 335(2) provides that no order for the detention of the accused in a lunatic asylum shall be made under Section 335 (1)(a) Cr.P.C, otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912. It may be stated herein that the Indian Lunacy Act, 1912 had been repealed by the Mental Health Act, 1987 and the Mental Health Act, 1987 was subsequently also repealed by the Mental Healthcare Act, 2017.

Section 335(3) Cr.P.C provides that no order for the delivery of the accused to a relative or friend shall be made under clause (b) of Sub-Section (1) except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court, that the person delivered shall be properly taken care of and prevented from doing injury to himself or to any other person and he shall be produced for the inspection of such officer, and at

such times and places, as the State Government may direct.

Section 335(4) of the Cr.P.C. provides that the Magistrate or Court shall report to the State Government the action taken under Sub-Section (1).

53. Section 465(1) Cr.P.C provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or proceedings under the Code, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

Section 465(2) of Cr.P.C. provides that in determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

54. In view of the reasons stated above, there has been a failure of justice and as such, we are not in agreement with the conviction of the appellant by the learned Trial Court. We accordingly hold that as Sections 328 and 329 Cr.P.C have not been followed, the trial was vitiated. The benefit of doubt that the appellant was of unsound mind, incapable of defending himself, would have to be given to him, due to lapses on the part of the Police and the Magistrate/Court. Thus, the conviction of the appellant under Section 302 IPC is set aside. The appellant is accordingly acquitted of the charge under Section 302 IPC. Consequently, the impugned judgment dated 04.06.2018 passed by

the Court of Sessions Judge, Karbi Anglong, Diphu, Assam in Sessions Case No.35/2012 is hereby set aside.

55. The above being said, the question that remains to be answered is what is to be done to the appellant. The Medical Board Report dated 21.08.2023 has specifically found the appellant to be suffering from chronic paranoid schizophrenia. In this regard Section 103 of the 2017 Act states that an order made under Sections 330 and 335 Cr.P.C directing the admission of a prisoner with mental illness into any suitable mental health establishment, shall be sufficient authority for the admission of such person in such establishment, provided that transfer of a prisoner with mental illness to the psychiatric ward in the medical wing of the prison shall be sufficient to meet the requirements under Section 103 of the 2017 Act. However, where there is no provision for a psychiatric ward in the medical wing of a prison, the prisoner may be transferred to a mental health establishment with prior permission of the Board. In this regard, Section 103 of the 2017 Act is reproduced herein below as follows:

“103 Prisoners with mental illness .-(1) An order under section 30 of the Prisoners Act, 1900 (3 of 1900) or under section 144 of the Air Force Act, 1950 (45 of 1950), or under section 145 of the Army Act, 1950 (46 of 1950), or under section 143 or section 144 of the Navy Act, 1957 (62 of 1957), or under section 330 or section 335 of the Code of Criminal Procedure, 1973 (2 of 1974), directing the admission of a prisoner with mental illness into any suitable mental health establishment, shall be sufficient authority for the admission of such person in such establishment to which such person may be lawfully transferred for care and treatment therein:

Provided that transfer of a prisoner with mental illness to the

psychiatric ward in the medical wing of the prison shall be sufficient to meet the requirements under this section:

Provided further that where there is no provision for a psychiatric ward in the medical wing, the prisoner may be transferred to a mental health establishment with prior permission of the Board.

(2) The method, modalities and procedure by which the transfer of a prisoner under this section is to be effected shall be such as may be prescribed.

(3) The medical officer of a prison or jail shall send a quarterly report to the concerned Board certifying therein that there are no prisoners with mental illness in the prison or jail.

(4) The Board may visit the prison or jail and ask the medical officer as to why the prisoner with mental illness, if any, has been kept in the prison or jail and not transferred for treatment to a mental health establishment.

(5) The medical officer in-charge of a mental health establishment wherein any person referred to in sub-section (1) is detained, shall once in every six months, make a special report regarding the mental and physical condition of such person to the authority under whose order such person is detained.

(6) The appropriate Government shall setup mental health establishment in the medical wing of at least one prison in each State and Union territory and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment.

(7) The mental health establishment setup under sub-section (5) shall be registered under this Act with the Central or State Mental Health Authority, as the case may be, and shall conform to such standards and procedures as may be prescribed."

56. As the finding of the Medical Board dated 21.08.2023 is to the effect that the appellant suffers from chronic paranoid schizophrenia, the respondents are

directed to release the appellant from jail and produce the appellant before the Mental Health Review Board constituted under Chapter XI of the 2017 Act, who shall then examine the appellant and take a decision with regard to the future course of action to be taken in respect of the appellant in terms of the 2017 Act.

57. The appeal is accordingly disposed of.

58. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant